

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

## Meeting Materials

September 19 & 20, 2023

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

**September 19 & 20, 2023  
Public Meeting Materials**

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

**September 19-20, 2023**

**Location: General Gordon R. Sullivan Conference & Event Center  
2425 Wilson Blvd, Arlington, VA 22201**

**Public Meeting Virtual Link**

Dates/Times:

September 19, 2023: 12:30 p.m. – 4:50 p.m.

September 20, 2023: 8:25 a.m. – 4:15 p.m.

<https://www.zoomgov.com/j/1613272379?pwd=ZHILSU5maS9ZV3ZSREZOdllMVmdkdz09>

Meeting ID: 161 327 2379

Passcode: 615243

Dial by your location

- +1 669 254 5252 US (San Jose)
- +1 646 828 7666 US (New York)

Meeting ID: 161 327 2379

Passcode: 615243

<b>Tuesday, September 19, 2023</b>	<b>Day 1</b>
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**9:00 a.m. – 12:00 p.m.**

**Subcommittee Meeting: Policy (Closed)**

*BGen(R) James Schwenk (Chair)*

*MG(Ret) Marcia Anderson*

*Ms. Suzanne Goldberg*

*HON Jennifer O'Connor*

*Judge Karla Smith (Committee Chair)*

*DFO: Mr. Dwight Sullivan*

**9:00 a.m. – 12:00 p.m.**

**Subcommittee Meeting: Special Projects (Closed)**

*Ms. Meghan Tokash (Chair)*

*Judge Paul Grimm*

*Mr. A.J. Kramer*

*Dr. Jenifer Markowitz*

*Dr. Cassia Spohn*

*Judge Reggie Walton*

*DFO: Mr. Dave Gruber*

**12:00 p.m. – 12:30 p.m.**

**Break**

*(30 minutes)*

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

<b>12:30 p.m. – 12:35 p.m.</b>	<b>Welcome and Introduction to Public Meeting</b>
<b>12:35 p.m. – 1:05 p.m.</b>	<b>JSC Briefing on the 2023 Military Justice Executive Order</b> <i>(30 minutes)</i>  <i>CAPT Anita Scott, U.S. Coast Guard</i> <i>COL Christopher Kennebeck, U.S. Army</i>
<b>1:05 p.m. – 2:35 p.m.</b>	<b>Panel – Military Service OSTC Representatives</b> <i>(90 minutes)</i>  <i>BG Warren Wells, U.S. Army, Lead Special Trial Counsel</i> <i>RDML Jonathan Stephens, U.S. Navy, Lead Special Trial Counsel</i> <i>BGen Kevin Woodard, U.S. Marine Corps, Lead Special Trial Counsel</i> <i>Brig Gen Christopher A. Brown, U.S. Air Force, Lead Special Trial Counsel</i> <i>CDR Ben Gullo, U.S. Coast Guard, Deputy Chief Prosecutor</i>
<b>2:35 p.m. – 2:50 p.m.</b>	<b>Break</b> <i>(15 minutes)</i>
<b>2:50 p.m. – 4:50 p.m.</b>	<b>Panel – Former General Court-Martial Convening Authorities</b> <i>(120 Minutes)</i>  <i>MG David M. Hodne, U.S. Army</i> <i>MajGen Leonard F. Anderson IV, U.S. Marine Corps</i> <i>Maj Gen Kenneth T. Bibb, U.S. Air Force</i> <i>RDML (Ret) Charles Rock, U.S. Navy</i> <i>RDML Bryan Penoyer, U.S. Coast Guard</i>
<b>4:50 p.m.</b>	<b>Day 1: Public Meeting Adjourned</b>

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

<b>Wednesday, September 20, 2023    Day 2</b>
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<b>8:25 a.m. – 8:30 a.m.</b>	<b>Welcome and Overview of Day 2</b> <i>(5 minutes)</i>
<b>8:30 a.m. – 9:30 a.m.</b>	<b>DAC-IPAD Court-Martial Observations Presentation and Committee Discussion</b> <i>(60 Minutes)</i>
<b>9:30 a.m. – 9:45 a.m.</b>	<b>Sexual Assault Case Adjudication Case Data Collection for FY 2021 and FY 2022</b> <i>(15 minutes)</i>
<b>9:45 a.m. – 10:00 a.m.</b>	<b>Break</b> <i>(15 minutes)</i>
<b>10:00 a.m. – 11:30 a.m.</b>	<b>Policy Subcommittee Presentation and Committee Deliberations on Article 25, UCMJ, Panel Selection</b> <i>(90 minutes)</i>
<b>11:30 a.m. – 12:30 p.m.</b>	<b>Lunch</b> <i>(60 minutes)</i>
<b>12:30 p.m. – 2:00 p.m.</b>	<b>Special Projects Subcommittee Presentation and Committee Deliberations on Victim Access to Information (Sec 549B)</b> <i>(90 minutes)</i>
<b>2:00 p.m. – 2:15 p.m.</b>	<b>Break</b> <i>(15 minutes)</i>
<b>2:15 p.m. – 2:30 p.m.</b>	<b>Case Review Subcommittee Project Update</b> <i>(15 minutes)</i>
<b>2:30 p.m. – 3:30 p.m.</b>	<b>Collateral Misconduct Report Presentation and Committee Deliberations</b> <i>(60 minutes)</i>
<b>3:30 p.m. – 4:00 p.m.</b>	<b>Public Comment</b> <i>(30 Minutes)</i>
<b>4:00 p.m. – 4:15 p.m.</b>	<b>Meeting Wrap-Up &amp; Preview of Next Meeting</b> <i>(15 minutes)</i>
<b>4:15 p.m.</b>	<b>Public Meeting Adjourned</b>



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

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**MINUTES OF JUNE 13 - 14, 2023, PUBLIC MEETING**

**AUTHORIZATION**

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee” or “DACIPAD”) is a federal advisory committee established by the Secretary of Defense in February 2016 in accordance with section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 537 of the NDAA for FY 2016. The Committee is tasked to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of such cases on an ongoing basis.

**EVENT**

The Committee held its thirtieth public meeting on June 13 - 14, 2023.

**LOCATION**

The meeting was held at the Renaissance Arlington Capital View, located at 2800 Potomac Avenue, Arlington, Virginia. Location details were provided to the public in the Federal Register and on the DAC-IPAD’s website.

**MATERIALS**

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

## PARTICIPANTS

### Participating Committee Members

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

Ms. Jennifer Gentile Long\*  
The Honorable Jennifer M. O'Connor\*  
Brigadier General James R. Schwenk,  
U.S. Marine Corps, Retired  
Dr. Cassia C. Spohn  
Ms. Meghan A. Tokash  
The Honorable Reggie B. Walton

### Committee Staff

Colonel Jeff A. Bovarnick, U.S. Army,  
Executive Director  
Mr. Dale Traxler, Chief of Staff  
Ms. Stacy Boggess, Senior Paralegal\*  
Ms. Alice Falk, Technical Writer-Editor  
Ms. Theresa Gallagher, Attorney-Advisor  
Ms. Nalini Gupta, Attorney-Advisor\*  
Ms. Amanda Hagy, Senior Paralegal

Mr. Chuck Mason, Attorney-Advisor  
Ms. Marguerite McKinney, Management &  
Program Analyst  
Ms. Meghan Peters, Attorney-Advisor  
Ms. Stayce Rozell, Senior Paralegal  
Ms. Terri Saunders, Attorney-Advisor  
Ms. Kate Tagert, Attorney-Advisor  
Ms. Eleanor Magers Vuono, Attorney-Advisor

### Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)  
Ms. Evie Ankele, Intern  
Mr. Yonah Berenson, Intern  
Mr. James Van Drie, Intern

\*Via video-teleconference

## MEETING MINUTES

### Day One – June 13, 2023

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 12:30 p.m. Mr. Sullivan introduced the Honorable Karla N. Smith, DAC-IPAD Chair, who provided opening remarks welcoming those in attendance; explained the purpose of the meeting; outlined the agenda; and introduced Colonel Jeff Bovarnick, DAC-IPAD Executive Director, who provided a brief overview of the meeting. Ms. Meghan Peters, Attorney-Advisor, introduced the first session.

### Military Criminal Investigative Organizations (MCIO)

This panel included the following presenters:

Ms. T.L. Williams, U.S. Army Criminal Investigative Division (CID)  
Special Agent Ashlee Wega, U.S. Air Force Office of Special Investigations (OSI)  
Special Agent Erin Hansen, U.S. Naval Criminal Investigative Service (NCIS)  
Special Agent Kathleen ‘Katie’ Flynn, U.S. Coast Guard Criminal Investigative Service (CGCIS)

After Ms. Meghan Peters introduced the presenters to the full Committee, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members covering the following topics:

1. What is the current practice by Military Criminal Investigative Organizations (MCIOs) regarding the release of statements of victims, forensic examination information and medical records to victim’s counsel?

The Army CID refers requests for information to the trial counsel and also releases information through the Freedom of Information Act (FOIA) process because CID currently has no means to release to special victim’s counsel.

The Air Force OSI has a two-fold process. If the investigation is closed, the information is released to the base trial counsel for consideration of distribution to victim’s counsel. However, if the investigation is still ongoing when a request is made, OSI has policies and procedures to receive the request and review the request for information. OSI then consults with the base staff judge advocate’s office to determine what information could or should be released to victim’s counsel.

The Navy and Marine Corps’ NCIS has a specific policy that allows a victim’s recorded statement to be shared directly with the victim or the victim’s legal counsel. Regarding medical records or SAFE forensic examination reports, NCIS works with the local chain of command and prosecution office to determine what information should be released. Special Agent Wega’s conveyed that once the investigative file is closed and provided to the trial counsel’s office, they have specific policies for what information can be released and what information the victim has the right to access.



The Coast Guard Investigative Service (CGIS) has a similar policy to the Army's CID. The investigative case file is provided to the base trial counsel or staff judge advocate to determine what information should be provided to the victim or to victim's legal counsel.

2. Dr. Markowitz asked the panelists whether sensitive photographs, taken as part of the sexual assault medical forensic examination, are handled in the same manner as external body photographs, and whether all photographs are treated as part of the SAFE record.

SA Flynn said all sensitive photographs remain the possession of the custodian, which would be MEDCOM, DHA, or AFME. External body photographs would be released through the same process as other investigative documents.

SA Hansen said NCIS maintains the sensitive photographs as part of the SAFE exam medical record. If release is required, they use other ways to protect a person's privacy as much as possible i.e., cover pages or edited photographs.

OSI treats the sensitive photos much the same as NCIS and released to only those with a need to know.

SA Flynn said sensitive photographs for SAFE exams are treated the same as other sensitive photographs such as child pornography. However, the CGCIS downloads the photos to an external media storage and is maintained with the agent's file. A summary report, excluding the sensitive photographs, are then released to the command and legal office.

3. Mr. Cassara asked if there had ever been a case when the victim's counsel requested the victim's information, but asked that it not be shared with the trial counsel?

SA Flynn was the only presenter that answered in the negative and that if a request was ever made, it would be handled on a case-by-case bases.

4. Hon Walton asked if there should be a uniform policy regarding the release of information? If so, what should that look like? He also asked the panelists for their perspective if they believed there should be a uniform policy?

None of the panelists had an unfavorable response to a uniform policy. All only asked that a uniform policy not be too restrictive and would allow for ample flexibility for each MCIO to work within their Services' current policies. If a uniform policy were enacted, SA Wega asked that sufficient time be given to the MCIOs to respond.

5. Dr. Markowitz asked if requests for SANE exams are handled differently if the exams was taken at a civilian medical facility rather than a military medical facility?

All the panelists responded that all requests are handled the same.

6. Ms. Goldberg asked if any panelist had seen patterns of misuse of the investigative record?

No panelist had seen widespread misuse of the investigative records, but appropriate action was taken in the few instances that it had happened.

SA Wega added that sometimes the victim is the one who "leaks" the information, whether it's through innocent disclosure or not.

7. Ms. Goldberg asked what is communicated to victims to try to mitigate against disclosures by the victim.

Ms. Williams said that victims are asked, for the integrity of the investigation, to not disclose what was said in the interview.

8. Hon. Walton asked whether redaction authority should be granted at the investigative level.

Both SA Flynn and SA Wega said that if it were, MCIOs would need additional training and resources.

9. Ms. Goldberg started by noting that in conversations with some victim's counsel in different settings, some of them mentioned the importance of having the information, so that they can advise their client. Ms. Goldberg then asked the investigators whether anyone was aware of the issue of uneven or inconsistent access to case file information by victim's counsel?

SA Flynn said that the special victim's counsel is provided everything from the investigation for official use. Although there is no standard as to the timing when the SVC gets the information, it's usually at preferral or when the investigation is completed.

SA Hansen, SA Wega and Ms. Williams didn't know of any concerns from the SVC/VLC communities.

10. Ms. Bashford asked if there was any difference in the amount of information released to a victim's counsel verses a victim without counsel?

All panelists said there was no difference in disclosure of information between victims with counsel and those without.

11. Ms. Tokash: Do you see any safety issues with respect to the three points of release?

All responded in the negative. However, SA Flynn highlighted that the victim may put themselves at risk of retaliation by disclosing certain information.

12. Ms. Tokash followed up by asking if disclosure issues would be easier on MCIOs and trial counsels if decisions were made at the judicial level, by a judge?

SA Flynn, SA Hansen and SA Wega said it would be easier because the MCIOs and TCs would not have to make that decision. Ms. Williams said it would add another administrative task if the MCIOs had to prepare the court order for a judge to authorize.

13. Ms. Bashford asked if any of the Services are turning over the entire investigative case file to the victim or victim's counsel?

The Army and Air Force have policy to release a draft ROI on a case-by-case bases if the investigation is ongoing. Once the investigation is closed, the legal office makes that decision.

SA Wega said she's not aware of any direct release to the victim or victim's counsel. Once the investigation is closed, the request for release goes through the FOIA process.

In a case with multiple victims, Mr. Cassera asked if there would ever be an instance when victim A's statement would be provided to victim B or vice versa?

Both SA Flynn and SA Hansen response in the negative.

Ms. Goldberg raised the issue of investigator consistency in sexual misconduct investigations and asked if anyone concurred with this as a reality. If so, how does this impact the investigation?

SA Flynn said that the CGCID are in the middle of a transformation to have agents stay on station longer and they are working to become more of a civilian agency than a military agency.

OSI and NCIS are also extending time on station for the civilian and active-duty agents. Both agencies plan to add additional billets to build consistency for their special victim crimes. Ms. Williams said CJIS typically has agents on location for four years, but there is no mandatory time they must be there. If a subject does relocate, the agent acts as a secondary agent to the new case agent.

#### Prosecutors Working with Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC)

This panel included the following presenters:

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

After Ms. Meghan Peters introduced the presenters to the full Committee, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members focused on the sharing of information with victim's counsel and victim pursuant to their statutory task.

1. What's your current practice for providing victim and victim's counsel their statements, examinations, photographs, etc.?

The Army TJAG Policy 22-07 covers the release of recorded statements and documentary evidence to the victim. Copies are provided to the victim at preferal without request. The DD Form 2911, Sexual Assault Forensic Examination Report is provided upon the request by the victim through the military medical facility. Any record in the government's possession can be release through FOIA.

Navy Legal Service Command Instruction 5810.1 covers the release of information to the victim. Upon request by the victim or victim's counsel, the following may be released: victim's statement, evidence produced by the victim, images of the victim, victim's SAFE exam, any court filing in which the victim has an interest, plus the plea agreement and stipulation of fact. Additionally, any sua sponte material such as subpoenas, search warrants, requests for records in which the victim has a privacy interest, appointing order, scheduling matters, etc. The Marine Corps follows this same policy.

The Air Force processes requests for information in accordance with TJAG Policy 51-201 on the administration of military justice. A victim's counsel will file official use requests that we do not process under FOIA.

The Coast Guard's current policy is to provide, without request, the victim's recorded statement through victim's counsel prior to preferral of charges during the investigative phase. The trial counsel or SJA can authorize this release if CGIS has not already done so. If the victim is not represented by counsel, CGIS turns it over through the FOIA process.

2. Mr. Kramer asked for clarification as to why some Service's release information as a routine practice, while others use the FOIA process.

Col Dennis clarified the Air Force's policy by saying the victim's statement is released without a request. The remaining contents of the ROI is generally processed through an official use request by the victim's counsel. The victim's counsel would submit a request outlining the purpose for which they would use that information.

The Navy and Marine Corps have consistent policies that the recorded statements, SANE exams, and medical records are provided upon the victim's request.

The Army's policy is to provide the victim's statement to the SVC without a request. The victim then can decide if he or she wants it. The victim can also request his or her SANE exams and medical records through the MTF. If by chance the government came into possession of the victim's medical records through some other means, the request is processed through FOIA.

3. Dr. Spohn: Do you ever redact sensitive information when you release records or statements? How do you protect the privacy interests of the victims, the witnesses, and anyone else who might be affected by the release of information?

All Service's reported that they do not redact the victim's statement when requested by the victim. However, all other material not provided directly by the victim is redacted in accordance with FOIA through the proper custodian of the record.

4. Chair Smith wanted to know whether and how the Services protect sensitive information such as photographs contained in the SANE exam, e.g., through a protective order.

Again, all Services report that the entire SANE exam, including any photographs, are turned over to defense counsel. However, protective orders are a common practice to protect against further dissemination.

5. Ms. Goldberg asked if the panelists have seen any misuse of information or record? If so, would a uniform policy help to address this?

None of the Service's are aware of trends of misuse of information by either trial or defense counsel.

6. Mr. Cassara asked how the Services deal with the dissemination of information involving child victim when one parent wishes to cooperate, but the other parent doesn't.

All the Services have similar policies. The dissemination of information would go to the Article 6b representative. If the Article 6b is the cooperating parent, then that is who it would be released to. If the Article 6b is the non-cooperating parent, then we could ask the court to appoint somebody outside of the non-cooperating parent as the 6b representative, and that's who it would be released to.

7. Ms. Tokash addressed the military's lack of a traditional public docket. She asked the panelists if they could address some concerns regarding this issue.

Under the Army TJAG's policy 22-07, in addition to the disclosure of information previously discuss the following information is also releasable: date, time, and location of any pretrial confinement review pursuant to R.C.M. 305, victim's summarized Article 32 transcript, an excerpt of the charges relating to the requesting victim, docketing, scheduling orders, deadlines for filing motions, etc. It also includes motions and responsive pleading that may limit the victim's ability to participate in court-martial, affect the victim's possessory rights to property, victim's privileged communication or medical information, or victim's right to be heard.

The Navy and Marine Corps have a similar process as the Army. They are currently moving to a new case management system that will be used to file motions electronically.

8. Ms. Tokash asked if their system serves almost as a "PACER-esque" function?

CAPT Tang confirmed that the Navy's defense counsels have the initial duty to furnish and serve all legal filing to the victim's legal counsel. The Marine Corps practice is the same as the Navy's. They even codified it in their manual, and it will be codified in the OSTC SOP as well. The Marine Corps also have access to the Navy's new case management system when it come online.

The Air Force's defense counsel customarily ensures victim's counsel gets filings pertaining to M.R.E. 412 and 513 issues, and any other issues that directly involve the victim. The trial counsel is responsible for doing the same in accordance with Article 6b. The Air Force does face some of the same constraints as our sister services, but we continue to work closely with victim's counsel in discussing access to information, to make sure Article 6b is fulfilled.

For the Coast Guard, the responsibility falls on the trial counsel with the caveats previously mentioned on defense counsel's responsibility. The Coast Guard will also have access to the Navy and Marine Corps new case management system (NCORS). CAPT Scott said she's been allowed to use the new system and described it as such: depending on your position as TC, DC, judge, etc., you can utilize specific areas within the case management system.

9. Ms. Tokash informed the panelists that the Committee will hear from SVCs/VLCs who will express concerns about not receiving information, like court-martial filings, consistently. She asked if this is because of their current practices as described or if they had other experiences?

LTC Tregle said she hasn't heard any complaints from the SVC community about this being an issue. E-mail is used as the primary means for notification.

CAPT Tang said it is incumbent upon the person filing the motions to know to whom to distribute the notice. Until NCORS stands up, email is used. If mistakes are made, they are typically caught early and addressed. In the rare occasion that VLC never received notice of a filing until trial, she will delay any proceedings until the VLC has had adequate time to respond.

Col Hines agreed. It's essential that the counsels follow the circuit rules. If that fails, the presiding judge should address, possibly in the form of sanctions, and grant a delay. Although it's not codified, it's certainly anecdotal, that judges will grant a delay to give counsel time to respond.

The Air Force also uses e-mail for filings, but she has not seen any issues where SVCs are not being served motions that they need to represent their client. She expects this process will better under the OSTC construct.

CAPT Scott agreed that when she's seen instances of lack of SVC/VLC notification, it's usually operator error and not deliberate.

LTC Tregle added that the Army clerk of court usually receive and accept the filings. The filing is rejected if it does not conform with the rules.

10. Hon Walton: Are there any particular stage of the process in which disclosure will not be made? For example, not disclosing the information before a decision to file charges have been made, such as the victim's statement?

Col Dennis said that when it comes to the victim's statement, it's probably less likely that it would be impacted by the timing as it would be for other information contained in the ROI.

The Army generally doesn't disclose information prior to preferral of charges. However, the Navy will disclose, upon request, prior to preferral. CAPT Tang said it would be extremely rare that the Navy would refuse to disclose information prior to preferral. Col Hines agreed.

11. Ms. Bashford asked if there were any concerns with providing the victim's statement prior to trial counsel interviews the victim?

All panelists saw no concern because trial counsel has the victim review his or her statements or recording prior to sitting down for an interview. It's done more to have the victim's memory refreshed, rather than produce inconsistent statements.

12. Mr. Kramer: Why would the victim's medical records be encompassed in a policy concerning the disclosure of information since the victim has access to their own medical records?

Several of the panelists identified cases in which the victim's medical records are provided to the government as routine practice or over sharing by the MTF, by the investigators, or even by nefarious purposes not by the government.

#### Prosecutors (Military and Civilian Experience)

This panel included the following presenters:

Brigadier General Bobby Christine, District Attorney, Columbia Judicial Circuit, Georgia

Lieutenant Colonel Joshua Bearden, Office of the Chief Prosecutor, Office of Military

Commissions, Assistant U.S. Attorney, Southern District of Georgia

Ms. Kathleen Muldoon, Litigation Attorney Advisor, U.S. Marine Corps, Eastern Regional Trial Counsel Office, Camp Lejeune, North Carolina

Ms. Magdalena Acevedo, Assistant U.S. Attorney, Washington, DC

After providing an overview of their experience with the venire processes for both military courts-martial panel members and civilian criminal juries, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members covering the following topics:

1. Should the military move to a randomized process that would achieve a more diverse population of potential panel members?

The panelists agreed that not all Article 25 criteria are compatible with randomization, but there is room for consideration of the need for a more diverse panel. Specifically, it was pointed out that “judicial temperament” is a subjective term that wouldn’t fit in an algorithm.

The panelists expressed their concerns regarding the impact a randomized process would have on readiness, deployability of the justice system, and a commander’s requirement to maintain good order and discipline.

BG Christine expressed concern of what impact a completely randomized selection process would have on deployability. He stated that moving in the direction of randomization is appropriate but expressed concern about whether such a system could be compatible with a system of justice in a deployed environment.

Ms. Muldoon stated that a purely randomized jury selection process would need to be balanced with military readiness.

Dr. Spohn asked the panelists to provide their perspectives on diversity in the jury selection process. The panelists agreed that expanding the population of potential panel members would achieve a more diverse venire.

Ms. Acevedo stated that diversification would make courts-martial fairer and increase the perception of fairness in the system. LTC Bearden added that a broader scope of potential members is essential to increasing diversity.

Ms. Muldoon stated that there would need to be more peremptory challenges and more focus on Batson challenges.

2. MG Anderson asked the panelists if they had any experience where the convening authority delegated their role to the staff judge advocate, legal officer, or other principal assistant.

All of the panelists responded that they had not seen this.

3. Mr. Cassara asked the panelists their thoughts on a minimum panel size of 12 and/or more peremptory challenges for both sides.

BG Christine responded that if the military moves to a randomized panel selection system in which many of the potential grounds for excusal would be left to the voir dire system, that it would be appropriate to provide each side more peremptory challenges. The panelists agreed that increasing the number of panel members to adequately reflect the defendant and plaintiff, and also provide a greater number of challenges to get there, would provide fairness in the justice system.

Ms. Muldoon provided that a randomized panel selection process would make it less necessary for the current liberal grant mandate for defense challenges for cause. If that were the case, more peremptory challenges would be appropriate.

Judge Walton asked if the military system could realistically operate if the number of peremptory challenges were the same as in civilian systems.

Yes, if the venire is increased.

4. Chair Smith asked whether eliminating some of the Article 25 criteria to make panel selection less subjective would change the perception of the fairness of the military justice system.

LTC Bearden agreed that it would and stated that except for judicial temperament, Article 25 factors are a baseline and are already established in terms of age, training, and education of the military force. He also agreed that judicial temperament is subjective and not clearly defined. If subjectivity is removed, and there is an increased number of potential panel members in the venire, there is a greater opportunity for diversity.

### Senior Enlisted Leaders

This panel included the following presenters:

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

After providing an overview of their experience with the venire process, the panel engaged in an in-depth dialogue (through a Q&A format) with Committee members covering the following topics:

1. Mr. Cassara asked the panel to share their perspectives on whether enlisted panels should be required to have more than one-third enlisted representation?

The panelists were not opposed to an increase in the number of enlisted panel members, but noted that having officers and enlisted members with more time in service, provides balance and experience to the panel.

2. Ms. Goldberg asked the panel their thoughts on either the benefits or the costs of keeping Article 25 in its current version.

The panel agreed that Article 25 does not need to be changed. CMSgt Puza stated that Article 25 has been effective in identifying the best qualified panel members by reason of age, education, training, experience, and length of service. However, all panel members agreed that the term “judicial temperament” should be defined or eliminated as it’s a subjective term.

3. Chair Smith asked the panel if they had suggestions for any additional Article 25 panel member qualifications.

MC George suggested considering the positions held, previous and current stations, and job assignments. Additionally, MGySgt Pere agreed with including a potential member’s background and added that culture be taken into consideration. He clarified that the culture of the command and the service, when reflected in the panel, provides for a fair trial.

4. BG Schwenk asked if the composition of a panel should reflect the composition of the force, noting that the Court of Appeals of the Armed Forces concluded that convening authorities could take race, ethnicity, gender, and sex into account for panel selection. Chair Smith added to the question, asking how diversity of panels is viewed among enlisted members of the Services.



MGySgt Pere suggested that similar to the enlisted panel option, the accused be allowed to elect to have members of their race or gender. BG Schwenk stated that the administrative separation process allows for a minority to request minority representation on the board, and that the idea had been suggested to the Committee in the past as a way to deal with this issue.

The panel all agreed that diversity is important in the composition of panels. They expressed concern on how to accomplish diversity in panel composition through a randomized process.

5. Ms. Goldberg asked the panel to provide other suggestions for improving the perception and reality of fairness in the process.

The panel agreed that depending on what side you are on, the perception and reality of fairness is different. They agreed that there is room for minor changes to Article 25, but that in its current form, it works well for selecting panel members.

6. Chair Smith asked the panel to provide their perspective on Congress requesting the Services to consider randomization of the panel selection process.

MC George stated that there are a number of concerns regarding what system will be used to randomize the panel, when the randomization will occur, will there be enough resources to support, will the questionnaire be retained, and other second and third order effects.

CSM Bostic agreed and expressed concerns regarding the impact on staffing to support additional duties that will be required to support a randomized process. He stated that there would need to be time allowed to assess and execute.

MGySgt Pere stated that the Marine Corps is made up of younger Service members and a randomized process will produce a list of young and inexperienced members.

7. Judge Walton asked the panel their recommendations to improve the military justice system.

MGySgt Pere reiterated his previous suggestion of allowing the accused the option to select race and gender representation on the panel.

Ms. Tokash followed up and asked what the difference is between trusting young enlisted service members with their military occupational specialty competency and their ability to sit, listen to the receipt of facts in evidence, follow a judge's instructions, deliberate, and arrive at findings, or the difference between civilian juries and courts-martial panels.

MGySgt Pere stated that the difference in the military is that in a court-martial, someone's career is at stake, where in a civilian trial that may not be the case. He agreed that there is a consideration to be made on the importance of career and livelihood and it takes a level of maturity to understand that importance.

CMSgt Puza added that there are crimes in the military that are not crimes in the civilian sector and that the junior service members could potentially not have a complete appreciation for those differences. CSM Bostic stated that junior enlisted panel member's voice might not be heard in the deliberation room with higher ranking members.

## Day Two – June 14, 2023

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 8:29 a.m. Ms. Martha Bashford made a few comments about the untimely death of former DAC-IPAD Committee member, Jim Markey. Ms. Meghan Peters, Attorney-Advisor, introduced the first session.

### Special Victims' Counsel Organizations (SVC/VLC)

This panel included the following presenters:

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

After Ms. Meghan Peters introduced the presenters to the full Committee, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members focused on the sharing of information with victim's counsel and victim pursuant to their statutory task.

1. Hon Smith began by asking the panelists to describe the current practice for obtaining victim's information?

In general, during the investigative process the Army provides material as they become available. At preferral, it's required that all statements made by the victim or evidence given by the victim is provided. Then throughout the trial prep process, additional material may be provided to the victim or victim's counsel. More information can be shared to allow the victim to understand why the government could not proceed to trial.

In practice, the Air Force releases a redacted copy of the ROI pursuant to a request by the victim or victim's counsel. The Navy and Marine Corps have similar practices that trial counsel, upon request, disclose most all document to victim's counsel; this includes medical records and SAFE exams in the government's possession.

At the investigative and preferral of charges stage, the Coast Guard discloses victim's statements, documentary evidence adopted, produced or provided by the victim, victim's recorded statements, and excerpts from the charge sheet to VLC.

2. In the case in which there are multiple victims, Mr. Cassera asked if each victim gets a copy of all victims' statements or just their own statement? At what point would an alleged victim get copies of witness statements, either those that may be exculpatory or those that may be inculpatory to the accused?

Col Park said that if the case is sexual assault SVCs may see more information on the other victim in the ROI.

The Army provided each victim with their own statement. This is done deliberately to not open the victim up to cross-examination about the impact of having witness statements available to them prior to their testimony.

As discussed by NCIS, both Navy and Marine Corps VLCs receive victim's statement, and anything directly related to the victim. As always, there may be exceptions to the rule. If a VLC can articulate an exception the trial counsel might give a summary of the content, but nothing is ever turned over.

Coast Guard VLCs do not get to review the ROI or any statement made by other witnesses.

Col Park clarified her statement by saying that the ROI is disclosed to the SVC as part of an official use request. The SVC is not authorized to release the ROI to their client; it's only used to advise their client.

3. Ms. Tokash: We've heard, at least anecdotally, that some victims are not getting access to pleadings as their civilian counterparts do through the public-facing PACER system. Is this your experience or are you hearing this from your workforce? And if so, what are you hearing?

Air Force SVCs have a Sharepoint docketing site that we can access to motions and filings. We also get them from the legal office. In the event SVCs are mistakenly left off, we do reach out to them to get the problem resolved. COL Brewer and CAPT Cimmino echoed Col Park's remarks and added that generally everyone is satisfied.

Col Pedden highlighted that although the current practice is workable, the process should be automated, so that VLCs receive all pleadings on the same terms the TCs and DCs do.

4. Ms. Tokash wanted to know if SVC/VLCs were already having conversations with the lead special trial counsel?

All acknowledged they had frequent communication with the OSTC.

5. Mr. Kramer asked the percentage of people who asks for victim's counsel as opposed to those who don't?

Col Brewer recalled roughly 23 – 30% decline SVC services.

6. Ms. Goldberg: What processes do you think the DAC-IPAD should be thinking about in terms of policy and/or research?

Bring consistency to the process. Uniform process for accessing victim's information.

7. What remedies are there for either not getting information or someone else getting information you would have made a motion to redact?

Reach out to SJAs for assistance, training, petition the court, have specific and enforceable remedies under Article 6b.

### Civilian Advocacy Organizations

This panel included the following presenters:

Mr. Ryan Guilds, Survivors United  
Ms. Kylisha Boyd, Survivors United  
Ms. Jennifer Elmore, Protect Our Defenders (POD)

After Ms. Meghan Peters introduced the presenters to the full Committee, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members focused on the sharing of information with victim's counsel and victim pursuant to their statutory task.

Mr. Guilds discussed the importance of victims having timely and complete access to information, including their statement, charge sheet, Article 32 Preliminary Hearing transcripts, and non-privileged filings without having to request them.

Ms. Boyd spoke about her experience as a victim of sexual assault and as a victim advocate.

Ms. Elmore discussed the experience of victims relating to their access to information and her personal challenges she faced going through the investigative and court-martial process.

1. Do you think there is an imbalance in the military justice system, in which it's more in favor of the victim and less of the accused?

Mr. Guilds does not see this as an issue in the military judicial system because he observes the relative unfairness of the civilian justice system.

2. Should a victim preclude the government from entering into a plea agreement that the victim does not agree with?

Mr. Guild was not in favor of this option for victims.

3. How would a victim notification system in the military serve victims and civilian victim advocate organizations?

Mr. Guilds has not studied such a system closely but is aware of the D.C. system. Ms. Boyd said the military could have an automated notification system, but follow-up with the victims are still needed.

4. Do you think judges are not respecting victims' rights at sentencing?

Mr. Guilds spoke for the group by saying that judges are not consistent, and he continues to see judges limiting victims' statements at sentencing.

5. Do you think allowing victims to have automatic access to everything may put the victim at risk if the accused finds out he or she has that information?

Mr. Guild advocated that a good safety plan is recommended.

Ms. Goldberg noted for the record that although Ms. Boyd believes the military's victim notification system was comparatively better than the civilians' system, the Committee continues to hear about the challenges victims have with the system. Mr. Guild agreed.

6. Do you think victims getting their statement is a problem for only unrepresented victims?

Mr. Guild responded by saying that he thinks both represented and unrepresented victims have problems getting a copy of their own statements before referral.

Based on a prior question, Mr. Guild said that he's seen multiple reasons victims don't ask for SVC/VLCs. Some of the common reasons he identified are that they don't trust those in uniform and the lack of SVC/VLC availability.

7. MG Anderson was curious to know the panelists' thoughts on the adequacy of the current Article 25 criteria, diversity of the panel members, and if there should be any changes.

Mr. Guilds thinks putting more minorities and women may increase trust in the process. He would eliminate the liberal grant mandate and would reaffirm the value to both the accused and survivors to have representative member panels.

8. Ms. Goldberg asked if Mr. Guilds thinks the liberal grant mandate disproportionately excludes women and sexual assault survivors, and if so, what was it based on.

He said it was based on his experience hearing voir dire questions like, "Were you a uniform victim advocate?" "Were you a sexual assault survivor?" "Do you know a sexual assault survivor?" "Do you have a connection with the process?" "Do you have some SAPR training beyond the ordinary SAPR training?" Women are more likely to answer yes to those questions, which frequently results in them being excluded from the panel, not for cause but for implied bias, based on liberal grant mandate.

9. POD released a statement encouraging the DAC-IPAD to investigate the use of military magistrates and judges for the Article 32 preliminary hearing process and recommend establishing standing courts with judges and magistrates. Ms. Tokash asked for the panelists' perspectives.

Mr. Guilds opined that having a magistrate or judge as the Article 32 preliminary hearing officer would increase truth in the process.

He was asked issues that caused him trouble or concern. His response was that Article 6b appellate rights don't give victim's counsel immediate access and therefore do not allow for effective advocacy. He noted that there are some limitations in some branches on the Article 6b right to be heard with respect to privacy. His number-one concern at the moment was the erosion of M.R.E. 513 protections [psychotherapist-patient privilege]. The *Mellette* decision [by CAAF] curtailed his ability to assure his client's psychotherapy records are protected.

#### Civilian Advocacy Organization (Diversity)

This panel included the following presenters:

Lorry Fenner, Colonel, USAF Retired, Service Women's Advocacy Network (SWAN)

Ms. Elisa Cardnell, SWAN

Ms. Rafaela Schwan, Chief Operating Officer, League of United Latin American Citizens (LULAC)

After providing an overview of their respective organizations, the presenters engaged in an in-depth dialogue (through a Q&A format) with the Committee members covering such topics as:

1. How panels are composed; and how the composition of the panels impacts the perception of fairness and legitimacy of the military Justice. Specifically, how Article 25 criterion and panel selection process influence the perception of fairness and legitimacy.

Diversity matters in the selection of panels and ultimately a realistic representation of the Service and the accused. Randomization of panels is important, and it might be a difficult task, but the Military is able to difficult things.

2. What does diversity mean?

SWAN overall agrees with the DoD definitions of diversity and inclusion with the addition of consideration of overall experience of the service members and their unique paths through the military.

LULAC concurs with the views of DoD and SWAN, but includes the concept of equity. Hispanics are over-represented in the military, but under-represented in all other areas of society. Equity is as important as diversity. When you have someone a panel that looks like you, has had experiences like you, it can increase confidence in the system as an accused.

3. DEI – diversity, equity, and inclusions – is being attacked in the U.S. across many domains. Do you see any evidence of this kind of backlash in the military? Do you have any strategies on how to respond to this phenomenon?

LULAC does not see the changes in approach to DEI negatively impacting Hispanics because the military needs Hispanics to meet their numbers. However, when that need doesn't exist it, there are concerns of how DEI will be modified or minimized.

SWAN has generally the same perspective that the military needs women to meet their numbers. There is concern about the current attacks, as evidenced by various riders added to the appropriations bills in Congress that limit how funds can be sent to support DEI initiatives.

Generally, DEI supports retention and recruiting. If you bring individuals into the Services and don't support them, they will leave.

4. How does diversity impact the investigation, prosecution, or defense of sexual assault?

Creating a diverse Force encourages belief in and trust of the system. If the system fails to ensure trust, individuals will leave the Service and as Veterans not encourage others to service. Lack of inclusion and trust hurts the system long-term.

5. What successful initiatives or best practices have been identified concerning diversity and inclusion issues.

Actions versus words. The military needs to be able to actually support the policies, rather than allowing things to continue as is. Have a Black History Monday, have a Gay Pride Week, but without actual changes in day-to-day operations it is for naught. A move towards truly blind promotion boards – no pictures, no names, no identifying demographics – would increase confidence in the system. Commanders should be held responsible for actions within their commands, just as they are for accidents or operational failures.

Presenter: Dr. Lisa Arfaa, Director, DoD Office of Diversity, Equity, and Inclusion

After providing brief background on her qualifications, Dr. Arfaa engaged in an in-depth dialogue (through a Q&A format) with the Committee members covering such topics as:

- Department of Defense's diversity, equity, and inclusion environment and accessibility, (DEIA environment).
- The DoD Office of Diversity, Equity, and Inclusion (DoD ODEI) and its strategic priorities and activities.
- 2040 Task Force (D2T) for production and implementation of near, mid, and long-term DEIA strategies for DoD.

In order to ensure the Department is the most intelligent, the most capable, and the most effective fighting force we must leverage all of the talents of our nation. Everything from how we recruit people to how we promote is representative of the country we serve.

The ODEI maintains policy development and oversight responsibilities and works with the Diversity Management Operations Center (DMOC) for their operational capability to jointly advance diversity, equity, inclusion, and accessibility across all of DoD.

ODEI has four primary focus areas: Military Equal Opportunity, Equal Opportunity and Civil Rights, Disability, and Diversity and Inclusion.

1. How does ODEI capture racial and ethnic data and can it be used to support the DAC-IPAD projects?

The ODEI is capturing some, not all, demographic breakdown of our forces to include career progression. Will provide additional information to the Committee on the ability to export the data in a format usable by the DAC-IPAD. Unaware if ODEI has any military justice data within their system at this point. ODEI is utilizing the ADVANA platform with OSD.

2. What initiatives have been created using analytics to determine the effectiveness and initiatives and ensure compliance?

IRT on racial disparities and the investigative and military justice systems. Current findings have not been released at this point. Researching examining barriers and opportunities to promotion and retention for enlisted and officer corps members across the services. Attempting to seek barriers to diversity and why/how people are succeeding.

Center for Naval Analysis report exploring racial, ethnic, and gender disparities in the military justice system and how to use administrative data to measure and interpret has not been released at this point.

3. The new DoD instruction related to harassment – what is different about the new instruction compared to the previous version.

The policy is dated 2018 and updated in 2022. Primary change in the instruction is the inclusion of standardization in training. The instruction streamlines anti-harassment and focuses on sexual harassment within the Services.

4. How does ODEI utilize the information identified in the data being collected?

Through collaboration with multiple partnerships and relationships within DoD and external organizations. Determine who is responsible for the area identified and explore joint projects to study and address the topics.

5. The IRC identified sexual harassment, specifically investigating incidents, as an issue that needed to be addressed, has that been resolved?

The information is pre-decisional and due to Congress in December of 2023. After it is provided to Congress, ODEI will be able to discuss start collaborating with stakeholders to implement.

6. What does “policy achievement” and successful implementation of anti-harassment prevention strategy 2.0 entail?

100% of components are compliant – have policies. Does not mean that every component concurs with specific language, but the policies are completed jointly and published jointly. Success of the policies will be assessed as part of the annual force survey in cooperation with the Office of People Analytics.

7. Future of studies on root causes and solutions to military justice disparities.

ODEI is in the planning process of the future studies. The proposal and parameters have not been finalized, but will be shared when available

8. Who owns command climate surveys and develops research parameters, specifically trust of junior enlisted in non-commissioned officers and senior commanders.

Office of People Analytics – working with DoD ODEI, P&R DHR entities like SAPRO and Defense Suicide Prevention Office (DSPO).



## **CERTIFICATION**

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

The Honorable Karla N. Smith, Chair

## **MATERIALS**

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

1. Agenda for June 13 – 14, 2023 Meeting
2. Section 549B FY23 NDAA (Victim Access to Information)
3. Service Policies on Victim and SVC Access to Information

### Military Criminal Investigative Organizations

4. Presenter Biographies
5. Panel Questions

### Prosecutors (work with SVC/VLC)

6. Presenter Biographies
7. Panel Questions

### Article 25, UCMJ Materials

8. Article 25, UCMJ
9. DAC-IPAD Request for Information
10. Summary of Combined Services' Responses to RFIs
11. Complete Combined Services' Responses to RFIs

### Responses to Policy Subcommittee

12. Services Women's Action Network
13. Survivors United
14. Academics (Professor Eugene Fidell, Professor Lisa Schenk, and Professor David Schlueter)

### Prosecutors (military and civilian experience)

15. Presenter Biographies
16. Panel Questions

### Senior Enlisted Leaders

17. Presenter Biographies

18. Panel Questions

Public Comment

19. Mr. Erik Burris

20. Master Sergeant Lisa Silva, USAF (Ret.)

21. Mr. Bill Santucci & Mrs. Donna Santucci

22. Additional materials from Mr. & Mrs. Santucci can be found at [dacipad.whs.mil](http://dacipad.whs.mil)

**JSC Briefing on the 2023 Military Justice Executive Order**  
**Presenter Biographies**

**Captain Anita Scott, U.S. Coast Guard, Chair, Joint Service Committee**

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.

**Colonel Christopher Kennebeck, U.S. Army, Chief, Criminal Law Department, Office of The Judge Advocate General**

Colonel Chris Kennebeck is the Chief of the Criminal Law Division in the Office of the Judge Advocate General in the Pentagon. Together with a small team of military and civilian attorneys and paralegals, he advises The Judge Advocate General on criminal law policy and programs, as well as military justice operations in the field. COL Kennebeck's previous assignments include Staff Judge Advocate, I Corps and Joint Base Lewis-McCord; Staff Judge Advocate, 2d Infantry Combined Division; Chair of the Criminal Law Department, The Judge Advocate General's Legal Center and School; Deputy Staff Judge Advocate, I Corps and Joint Base Lewis-McCord; Chief of Criminal Law Policy at the Office of the Judge Advocate General; Chief of Military Justice at 7th JMTC in Grafenwoehr, Germany; Senior Defense Counsel in Bagram, Afghanistan; Instructor at the US Army Military Police School in Fort Leonard Wood, MO; Observer/Controller at the National Training Center in Fort Irwin, CA; and Legal Assistance, Trial Counsel, and Special Assistant US Attorney at Fort Riley, KS. COL Kennebeck graduated from the US Army War College in Carlisle, PA, in 2020. He graduated from the Command and General Staff College in Fort Leavenworth, KS, 2011 and received a Masters of Law degree in military law from TJAG Legal Center and School in 2007. He earned his Juris Doctor from the University of South Dakota and was accepted as a member of the South Dakota Bar in 1998. He received his Bachelor of Science in English and Linguistics from the University of South Dakota in 1995. COL Kennebeck is admitted to practice before the Supreme Court of the United States, the Court of Appeals for the Armed Forces, and the Army Court of Criminal Appeals.

**Questions: Reference the Military Justice Executive Order 14103**

- Q1:** Please highlight those changes in the rules that you believe are most significant relating to the DACIPAD's work. What changes might benefit from the DACIPAD's expertise and evaluation if we were to monitor and assess the implementation of this new EO?
- Q2:** Please explain the purpose behind the national security exception in the new RCM 306A that allows a commander to withdraw jurisdiction from OSTC and prevent prosecution if the trial would harm national security. Doesn't this new rule allow a senior official to override a STC's decision to prosecute a covered offense case?
- Q3:** In June, the DACIPAD recommended that the Secretary of Defense establish uniform prosecution standards as part of Appendix 2.1 of the Manual for Courts-Martial. Can you update us if there are any plans underway with respect to that recommendation?
- Q4:** Under the new R.C.M. 705, prosecutors and convening authorities can negotiate a specific sentence in a plea agreement. Did the JSC consider how victims may react to that scenario, where the military judge is no longer the sentencing authority, and victims no longer have an opportunity to tell the military judge about the impact of the crime for purposes of imposing an appropriate sentence?

**Summary of Executive Order 14103**  
**Amending the Manual for Courts-Martial**  
**Signed 28 July 2023**  
**(DAC-IPAD staff-prepared document)**

Executive Order (EO) 14103 includes extensive amendments to the Manual for Courts-Martial (MCM). The link to the EO and its three annexes is available at <https://www.govinfo.gov/content/pkg/FR-2023-08-02/pdf/2023-16570.pdf>.

This staff-prepared chart highlights key changes to the MCM but does not include clerical or conforming amendments. Many of the amendments in the EO address the new role of the special trial counsel (STC) and update terminology. For example, the term “referral authority” replaces the term “convening authority” where appropriate. Many amendments address the new judge-alone sentencing requirements but will not take effect until December 27, 2023. Practitioners using this chart are reminded to reference the actual language of the EO when citing to the new rules.

Significantly, the EO establishes different effective dates for the changes reflected in Annexes 1-3. The amendments listed in Annex 1 of the EO took effect immediately; amendments in Annex 2 and Annex 3 have effective dates aligned with the accompanying statutory changes. The JSC issued a new 2023 MCM that includes the Annex 1 amendments now in effect. This new 2023 MCM can be found at [https://jsc.defense.gov/Portals/99/Documents/MCM%20editions/2023%20MCM%20\(2023\\_08\\_30\).pdf?ver=ungvu5HSVgl\\_o20I0XEHwQ%3d%3d](https://jsc.defense.gov/Portals/99/Documents/MCM%20editions/2023%20MCM%20(2023_08_30).pdf?ver=ungvu5HSVgl_o20I0XEHwQ%3d%3d)

In January 2024, the MCM will be reissued to include the Annex 2 and Annex 3 amendments.

Highlighted below are two changes that relate to DAC-IPAD recommendations:

- **RCM 601** (page 50653) includes a new statement regarding the standard for referral. The new language reads as follows: “R.C.M. 601(d)(2). Consideration. Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction.”

This new RCM 601 language is in Annex 2 of the EO and does not take effect until December 27, 2023. Once effective, the rule will **require** that the referral authority consider sufficiency of the evidence (i.e., “shall consider”). This new statement is like the language in Appendix 2.1, MCM, except that the Appendix 2.1 disposition guidance only encourages the convening authority to consider whether the admissible evidence will likely be sufficient to obtain and sustain a conviction (i.e., “should consider”). Notably, Appendix 2.1 is not part of the EO, so additional changes to the Secretary of Defense’s Disposition Guidance still may be forthcoming.

- **R.C.M. 1001(c)** (page 50705) addresses victim impact statements at presentencing proceedings. These amendments will take effect December 27, 2023.

DAC-IPAD recommendation 43 recommended changing the definition of victim impact to “directly or indirectly relating to or arising from.” The amended R.C.M. 1001(c)(2)(B) removes the word “directly” before the words “relating to or arising from.” The new rule reads: “For purposes of R.C.M. 1001(c), victim impact includes any financial, social, psychological, or medical impact on the crime victim relating to or arising from the offense of which the accused has been found guilty.”

The new R.C.M. 1001(c)(3) allows victims to recommend a specific sentence during their impact statements in noncapital cases. This change aligns with DAC-IPAD recommendation 44.

The new R.C.M. 1001(c)(5) removes the requirement to show “good cause” for the victim’s counsel to read the victim impact statement. This change aligns with DAC-IPAD recommendation 46.

The new R.C.M. 1001(c)(5) removes the requirement that a victim provide a written proffer of the matters addressed in their victim impact statement to the trial counsel and defense counsel after the announcement of findings. This change aligns with DAC-IPAD recommendation 47.

**Summary of Executive Order 14103**  
**Amending the Manual for Courts-Martial**  
**Signed 28 July 2023**  
**(DAC-IPAD staff-prepared document)**

<b>Part I – Preamble</b>	
<b>Amends the Preamble and adds a new paragraph 4 “The Evolving Military Justice System”</b>	adds two new purposes of military law: “to deter misconduct” and “to facilitate appropriate accountability.” New paragraph 4 explains the historical evolution of military justice from the adoption of the UCMJ in 1950 through the creation of independent prosecution offices to try “covered” offenses.
<b>Part II – Rules for Courts-Martial</b>	
<b>RCM 103 – Definitions and rules of construction</b>	creates new definitions for the following terms: “Deferral”; “Exercise authority over”; “Lead Special Trial Counsel”; “Preferral”; “Referral”; “Referral authority”; and “Special trial counsel”
<b>RCM 104 – Command influence</b>	adds language prohibiting coercion or influence over court-martial members, preliminary hearing officers (PHOs); adds language addressing performance evaluations, assignments, and retention decisions for those serving as court-martial members, defense counsel, or special victims’ counsel
<b>RCM105 – Direct communications: convening authorities and staff judge advocates; among staff judge advocates; with special trial counsel</b>	amends rule to ensure that all communications with STC are non-binding and free from unlawful influence or coercion with respect to cases involving covered, known, and related offenses
<b>RCM 201– Jurisdiction in general</b>	(f)(2)(C) amends the rule to include STC authority over a capital offense
<b>RCM 301 – Report of offense</b>	(c) adds a requirement to promptly forward allegations of covered offenses to STC and gives STC the authority to determine whether a reported offense is a covered, known, or related offense
<b>RCM 303 – Preliminary inquiry into reported offenses</b>	requires commanders to promptly forward a report of a covered offense to STC
<b>RCM 303A – Determination by special trial counsel to exercise authority</b>	new rule gives STC exclusive authority to determine if a reported offense is a covered offense and to exercise authority over covered, related, and known offenses alleged to have been committed by the suspect
<b>RCM 305 – Pretrial confinement</b>	(f) requires notification of STC if a person alleged to have committed a covered offense is ordered into or released from pretrial confinement (j) updates the review procedures by the military judge
<b>RCM 306 – Initial disposition of offenses over which special trial counsel does not exercise authority</b>	new title clarifies that RCM 306 addresses non-covered offenses. Commanders have discretion to dispose of offenses within their command, except for offenses over which a STC has exercised authority and has not deferred. Commanders retain authority to dispose of sex-related offenses occurring on or before December 27, 2023

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<b>RCM 306A – Initial disposition of offenses over which a special trial counsel exercises authority</b>	new rule addresses how STC may dispose of offenses, including preferring charges or deferring the offense by forwarding it to a commander for disposition. It gives victims of sex-related offenses the opportunity to express views on jurisdiction. Secretary decides cases where a commander believes trial would harm national security or war
<b>RCM 307 – Preferral of charges</b>	(b)(3) permits administration of the oath by remote means
<b>RCM 308 – Notification to accused of charges and required disclosures</b>	expands upon the list of information that must be provided to the defense after notification of preferred charges; clarifies what is not subject to disclosure, including information protected by Military Rules of Evidence, work product of counsel, contraband, and information that is privileged, classified, or under protective order
<b>RCM 309 – Proceedings conducted before referral</b>	(a) clarifies the authority of a military judge to issue pre-referral orders and rulings pursuant to Article 30a (b) lists new matters over which a military judge may issue pre-referral orders: a named victim's petition for relief from subpoena or other process; matters remanded by appellate courts including matters under subsection (e) of Art. 6b; appointment of a suitable person to assume the rights of a victim under subsection (c) of Art. 6b; pretrial confinement of the accused; inquiries into the mental capacity of the accused; requests for individual military counsel; a victim's petition regarding preliminary hearing issues; pre-referral depositions
<b>RCM 401 – Forwarding and disposition of charges in general</b>	clarifies how STC may dispose of charges over which they exercise authority and which they have not deferred
<b>RCM 401A – Disposition of charges over which a special trial counsel exercises authority and has not deferred</b>	new rule describes the methods by which STC may dispose of charges including referral, dismissal, and deferral
<b>RCM 403 – Action by commander exercising summary court-martial jurisdiction</b>	in cases where STC has exercised authority and not deferred, requires returning charge sheet to STC after recording receipt of charges
<b>RCM 404 – Action by commander exercising special court-martial jurisdiction</b>	clarifies authorities of commander who exercises special court-martial jurisdiction; clarifies new rule for covered offenses and other charges over which a STC has exercised authority and not deferred
<b>RCM 405 – Preliminary hearing</b>	(c) STC are responsible for requesting a PHO from a convening authority, who will direct a preliminary hearing in such cases (d) new paragraph directs the items that must be disclosed to the defense (f)(3) new paragraph requires notice to STC if evidence of uncharged covered offense is raised (and STC hadn't requested the hearing) (h) notice to victim may include notice to victim's counsel; clarifies procedures for producing evidence requested by the defense (j) updates references to evidence defined in MRE 412 (k) clarifies hearings should remain open to the public even if conducted remotely; lists conditions to allow remote presence of the accused

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<b>RCM 406 – Pretrial advice and special trial counsel determinations</b>	(a)(2) now requires the staff judge advocate to provide advice before a convening authority refers charges to a special court-martial (SPCM) (b) explains the written determination STC must make before referring offenses to a GCM or SPCM (c) requires a copy of SJA written advice or STC written determination be given to defense if charges referred to a court-martial
<b>RCM 407 – Action by commander exercising general court-martial jurisdiction</b>	new rule for cases over which STC has exercised authority and not deferred, but a commander believes trial would be detrimental to the prosecution of a war or harmful to national security, the matter must be sent to the Secretary concerned.
<b>RCM 502 – Qualifications and duties of personnel of courts-martial</b>	new provision addresses qualifications of STC and allows STC to prefer or refer charges without disqualification as “accuser”
<b>RCM 503 – Detailing members, military judge, and counsel, and designating military magistrates</b>	new provision directs the convening authority to give the military judge a list of detailed members to be randomized in accordance with RCM 911
<b>RCM 504 – Convening courts-martial</b>	explains how commanders may convene courts-martial in cases where the STC refers the charges
<b>RCM 601 - Referral</b>	explains how convening authorities and STC “refer” i.e., order prosecution of a case at a court-martial; sets the preconditions for referral (d)(2) requires referral authorities to “consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction”
<b>RCM 603 – Changes to charges and specifications</b>	new provision for STC to make major and minor changes to charges or specifications over which the STC exercises authority and has not deferred
<b>RCM 604 – Withdrawal of charges</b>	new provision for STC to withdraw a charge or specification from the court-martial any time before findings are announced
<b>RCM 701 – Discovery</b>	updates trial counsel’s disclosure requirements to the defense, including written determinations made by STC relating to referral and written determinations by commanders regarding disposition
<b>RCM 703 – Production of witnesses and evidence</b>	(d) new procedures for funding and providing notice of expert witnesses and consultants for the prosecution and defense; after referral, allows the defense to file an <i>ex parte</i> motion before the military judge for an expert (g) allows a named victim to request relief from a subpoena for personal or confidential information
<b>RCM 703A – Warrant or order for wire or electronic communications</b>	(a) eliminates 180-day time limit for warrants for wire or electronic communications stored in a communications system (b) allows a military judge to quash or modify the warrant (c) clarifies procedures for military judge to issue orders (d) clarifies non-disclosure order procedures



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<b>RCM 704 - Immunity</b>	gives STC authority to grant immunity for offenses over which they exercise jurisdiction
<b>RCM 705 – Plea agreement</b>	(a) gives STC authority to enter into a plea agreement with the accused that is binding on convening authorities (d) allows plea agreement to contain a specified sentence that “shall be imposed by the court-martial” (e) includes requirement for STC to consult with victim
<b>RCM 706 – Inquiry into the mental capacity or mental responsibility of the accused</b>	(b) allows military judge to order pre-referral inquiry into the mental capacity or mental responsibility of the accused (c) clarifies that the board’s ultimate conclusions shall be submitted to government and defense counsel and, after referral, to military judge
<b>RCM 707 – Speedy trial</b>	(c) clarifies that, pre-referral, the convening authority may resolve requests for pretrial delay, but after referral, requests for pretrial delay are submitted to the military judge (e) changes “forfeiture” to “waiver” and explains that a plea of guilty waives speedy trial issues
<b>RCM 804 – Presence of the accused at trial proceedings</b>	(b) in exceptional circumstances only, allows remote presentencing proceedings, including for a plea inquiry, with the consent of the accused
<b>RCM 813 – Announcing personnel of the court-martial and the accused</b>	(d) requires that, when announcing the convening order during the opening session of the court-martial, the name, grade, and position of the convening authority shall be omitted from announcement (except when it is the Service Secretary, Sec Def,s or President)
<b>RCM 908 – Appeal by the United States</b>	(b)(7) gives the Lead Special Trial Counsel authority to decide to file an appeal in cases over which a STC exercises authority
<b>RCM 909 – Capacity of the accused to stand trial by court-martial</b>	(c) upon request by the government or accused, military judge may conduct a pre-referral hearing into an accused’s mental capacity; incorporates STC authorities in the rule
<b>RCM 910 – Pleas</b>	(f) establishes reasons a military judge may reject a plea agreement (j) clarifies that a guilty plea waives any objection to factual issue guilt and non-jurisdictional defects
<b>RCM 911 – Randomization and assembly of the court-martial panel</b>	establishes new procedures for the military judge to randomly assign numbers to the members detailed by the convening authority
<b>RCM 912 – Challenge of selection of members; examination and challenges of members</b>	(g) includes a new sentence: “No member may be impaneled without being subject to peremptory challenge.”
<b>RCM 912A – Impaneling members and alternate members</b>	(d) rewrites the process for impaneling members following the exercise of all challenges; authorizes convening authority to instruct the military judge to prioritize impaneling a specific number of alternate enlisted members before impaneling alternate officer members in cases in which accused elects one-third enlisted panel

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<b>RCM 912B – Excusal and replacement of members after impanelment</b>	clarifies procedures for replacing excused members with alternate members; after court has closed for deliberations, trial may not proceed and a mistrial must be declared if the number of members is reduced below the Article 29 requirement
<b>RCM 914 – Production of statements of witnesses</b>	(e) adds a good faith exception to the application of the exclusionary rule when a party cannot disclose a statement because it is lost
<b>RCM 916 – Defenses</b>	(e)(2) new terminology for “aggravated offer-type assault cases” and the elements of the defense
<b>RCM 918 – Finding</b>	deletes the word “named” from (a)(1)(B) to read “not guilty of an offense as charged, but guilty of a lesser included offense”
<b>RCM 920 – Instructions on findings</b>	(g) new provision clarifies that instructions on lesser included offense (LIO) shall not be given when both parties waive the instruction
<b>RCM 925 – Application of sentencing rules</b>	creates procedures for sentencing in accordance with the rules in effect at the time the offense was committed; conforms sentencing to the statutory changes in the FY22 NDAA
<b>RCM 1001 – Presentencing procedure</b>	(c) as part of victim’s right to be heard, amends meaning of “impact” by deleting the word “directly” from the phrase “relating to or arising from the offense”; allows the victim to make a recommendation for a specific sentence, except in a capital case
<b>RCM 1002 – Sentencing determination</b>	includes rules for the military judge when sentencing in accordance with sentencing parameters and criteria; limits acceptance of a plea agreement if the MJ determines the proposed sentence is “plainly unreasonable”
<b>RCM 1003 – Punishments</b>	(b) clarifies that forfeitures of greater than 2/3 pay per month may be imposed only during periods of confinement (c) removes prohibition on a sentence to confinement for a commissioned officer or cadet at a SPCM
<b>RCM 1101 – Statement of trial results</b>	(e) new provision allows modification of the Statement of Trial Results in certain contexts
<b>RCM 1102 – Execution and effective date of sentences</b>	(b)(1) clarifies effective date for forfeitures (b)(6) new provision allows the Secretary to prescribe regulations addressing circumstances that permit automatic reduction of an enlisted accused whose sentences includes a DD, BCD, or hard labor without confinement
<b>RCM 1104 – Post trial motions and proceedings</b>	(e) new provision requires notice to victims of post-trial motions, filings, or hearings

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<b>RCMs 1106 – Matters submitted by the accused</b>	(a) now accused may submit matters to the convening authority after sentencing in a summary court-martial
<b>RCM 1106A – Matters submitted by crime victim</b>	(a) now victim may submit matters to the convening authority after sentencing in a summary court-martial
<b>RCM 1107 – Suspension of execution of sentence; remission</b>	(b) clarifies which convening authorities may, after entry of judgment, suspend an unexecuted part of any sentence, except death, DD, BCD, dismissal or confinement more than 6 months
<b>RCM 1109 – Reduction of sentence, general and special courts-martial</b>	(e) clarifies when and how convening authorities may act on a trial counsel's recommendation to reduce a sentence when an accused has provided substantial assistance in the criminal investigation or prosecution of another person (g) requires convening authority action on sentence to be in writing, with statement of explanation
<b>RCM 1111 – Entry of judgment</b>	(c) clarifies process for military judge to modify the judgment to correct any errors prior to certification of the record
<b>RCM 1112 – Certification of record of trial; general and special courts-martial</b>	(b) the content of the ROT must include the election, if any, for application of post-Jan 1, 2019 sentencing rules
<b>RCM 1113 – Sealed exhibits, proceedings, and other materials</b>	(b) appellate counsel cannot disclose sealed materials without prior authorization from TJAG or the appellate court where the case is pending review; expands list of "reviewing and appellate authorities" to include "officers and attorneys designated by TJAG"
<b>RCMs 1115 – Waiver or withdrawal of appellate review</b>	(a) allows waiver of right to appeal after conviction at a SPCM, regardless of sentence imposed
<b>RCM 1116 – Transmittal of records of trial for general and special courts- martial</b>	(c) clarifies that GCMs and SPCMs not reviewed by an appellate court must be reviewed by a judge advocate under Art. 65(d)
<b>RCM 1201 – Review by the Judge Advocate General</b>	(h) clarifies process for accused to apply for relief to TJAG after final review and expands timeline for consideration
<b>RCM 1202 – Appellate counsel</b>	(b) requires detail of appellate defense counsel to review every SPCM and GCM with a finding of guilty unless accused waives right or declines representation
<b>RCM 1203 – Review by a Court of Criminal Appeals</b>	(e) new provisions for TJAG action when the Court of Criminal Appeals sets aside the findings
<b>RCM 1208 – Restoration</b>	(c) new provision establishing the effective date of new sentences after a previous sentence has been set aside or disapproved

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<b>Part III – Military Rules of Evidence</b>	
<b>MRE 311 – Evidence obtained from unlawful searches and seizures</b>	(c)(3) expands the good faith exception for a warrant or search authorization (d)(4)(B) for motions to suppress and objections, expands “false statements” to include omitting “a material fact”
<b>MRE 315 – Probable cause searches</b>	(b)(2) expands definition of “search warrant” to include RCM 703A (b)(3) lists authorities by which a military judge may issue a “warrant for wire or electronic communications” (d) expands who may issue a search authorization
<b>MRE 404 – Character evidence crimes or other acts</b>	(b) amends the rule to align with the Federal Rules of Evidence, requiring trial counsel to provide written notice of evidence intended to be offered at trial
<b>MRE 503 – Communications to clergy</b>	rule now uses gender-neutral language for clergy
<b>MRE 611 – Mode and order of examining witnesses and presenting evidence</b>	(d)(1) clarifies use of remote testimony for child victims and child witnesses in cases of domestic violence or child abuse (d)(2)(E) defines “domestic violence” as an offense under Article 128b, UCMJ
<b>MRE 803 – Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness</b>	(16) defines “Statements in Ancient Documents” as those prepared before January 1, 1998
<b>MRE 807 – Residual exception</b>	amends the rule to align with the Federal Rules of Evidence, requiring a consideration of the “totality of the circumstances” and “evidence, if any, corroborating the statement”; removes the requirements that the hearsay is offered as evidence of a material fact and “serves “the interests of justice;” and adds a written notice requirement
<b>MRE 902 – Evidence that is self-authenticating</b>	(13) adds a new provision to the list of self-authenticating evidence to include “Certified Records Generated by an Electronic Process or System” (14) adds a new provision to the list of self-authenticating evidence to include “Certified Data Copied from an Electronic Device, Storage Medium, or File”

<b>Part IV – Punitive Articles</b>	
<b>Art. 79 – Conviction of offense charged, Lesser included offenses, and attempts</b>	Para.3.b.(4) clarifies the military judge’s duty to instruct on LIOs, except when waived by both parties under RCM 920(g)
<b>Art. 93 – Cruelty and maltreatment</b>	Para. 19.c.(2) clarifies that assault, improper punishment, and sexual harassment may constitute “cruelty and maltreatment” if the conduct meets the elements
<b>Art. 93a – Prohibited activities with military recruit or trainee by person in position of special trust</b>	Paras. 20.b., c., and e. change the knowledge requirement to “knew” (removing “or reasonably should have known”); amend the explanations of “prohibited activity” and “knowledge”

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<b>Art. 120 – Rape and sexual assault generally</b>	Paras. 60.e.(3) and (4) add “[ <i>(directly) (through the clothing)</i> ]” for sample specifications for “Aggravated sexual contact” and “Abusive sexual contact”
<b>Art. 120c – Other sexual misconduct</b>	Paras. 63.b. and e. add the phrase “ <i>without legal justification or lawful authorization</i> ” to the elements for the offenses of “Indecent viewing,” “Indecent recording,” “Broadcast of an indecent recording,” and “Distribution of an indecent recording” and amends the corresponding sample specifications
<b>Art. 123 – Offenses concerning Government computers</b>	Para. 69.c.(1) expands definition of “Access” to include “computer system or computer network”
<b>Art. 128 – Assault</b>	Para 77.b.(4)(d)(ii) amends the element “that the accused did so by strangulation or suffocation; and” for the offense of Aggravated Assault by strangulation or suffocation Para. 77.d.(1)(b) reduces the maximum punishment for simple assault with an unloaded firearm from three years to two years Para. 77.d.(5) adds “sexual assault, or sexual assault of a child” to the listed offenses
<b>Art. 132 – Retaliation</b>	Para. 89.c.(2) expands the explanation of “Personnel action” to include action taken on a civilian employee
<b>Art. 133 – Conduct unbecoming an Officer</b>	deletes “and a gentleman” from the title of the offense, from the text of the statute, and from the elements of the offense. Para. 90.c. – clarifies the explanation paragraphs

<b>Part V – Nonjudicial Punishment Procedure</b>	
<b>Applicable standards</b>	Para. 1.h. – creates a uniform rule to require the more rigorous “preponderance of the evidence” standard as the burden of proof used by commanders
<b>Decision</b>	Para. 4.c.(4) – clarifies “preponderance of the evidence” as the standard for the decision

NEW Appendix 12B provides a chart for sentencing parameters. The chart lists 6 categories with different ranges of confinement.

NEW Appendix 12C provides a chart listing every offense in the MCM with an accompanying offense category that corresponds with the 6 categories listed in Appendix 12B.

NEW Appendix 12D lists each of the offenses subject to sentencing criteria (instead of sentence parameters) and provides the criteria for each offense.

<p style="text-align: center;"><b>Military Service OSTC Representatives</b> <b>Presenter Biographies</b></p>
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**Brigadier General Warren L. Wells, U.S. Army, Lead Special Trial Counsel**

Brigadier General (BG) Warren L. Wells, as the Lead Special Trial Counsel, in charge of the Army's Office of Special Trial Counsel, a statutorily mandated organization Congress directed to independently evaluate and prosecute cases of sexual assault, murder, domestic violence, child pornography, and other serious offenses. Prior to assuming those duties in December of 2022, BG Wells served as the Chief of the Personnel, Plans, & Training Office (PPTO), Office of The Judge Advocate General, which oversees recruitment, management, and retention of the 9,500 active duty, reserve, and civilian attorneys and paralegals comprising the US Army Judge Advocate General's Corps.

Over the course of his 26-year career, BG Wells has personally participated in or overseen the administration of more than 460 courts-martial as either a Trial Counsel, Defense Counsel, or Staff Judge Advocate. BG Wells began his career practicing military justice while deployed with the 2d Armored Cavalry Regiment, out of Fort Polk, Louisiana, as a Trial Counsel and Operational Law Attorney in Bosnia-Herzegovina from 1997-1998. From 1999-2001, he served as the Trial Counsel for 2d Brigade, 1st Armored Division in Baumholder, Germany, where he prosecuted numerous drug and sexual assault cases. From 2001-2003, BG Wells served as the Senior Defense Counsel at Fort Leonard Wood, Missouri, leading a team that defended Soldiers at courts-martial and adverse administrative hearings. Recognized for his military justice expertise, BG Wells joined the faculty at the Air Force JAG School at Maxwell Air Force Base, Alabama, in 2004, where he taught military criminal law. He became the first Army instructor to ever serve as Chief of the Criminal Law Department at the Air Force JAG School. From 2008-2010, BG Wells served as the Deputy SJA of 1st Armored Division in Wiesbaden, Germany. He twice deployed to Iraq with the division, where the legal team provided a full range of legal support to the command. From 2012-2014, BG Wells served again in a key military justice position as the Regional Defense Counsel (RDC), Great Plains Region, U.S. Army Trial Defense Service. From 2015-2017, BG Wells served as the SJA of 1st Infantry Division and Fort Riley, Kansas. While assigned to 1st Infantry Division, he deployed to Iraq, where he served as the SJA for the Combined Joint Land Component Command – Operation Inherent Resolve. From 2017-2019, he served as the PPTO Chief of Plans, overseeing force structure planning and personnel policies within the JAG Corps. BG Wells has served in several organizational leadership positions over his Army career, to include assignment as the Staff Judge Advocate (SJA), XVIII Airborne Corps & Fort Bragg from 2019-2021.

BG Wells graduated cum laude from the University of Mississippi in 1993, receiving his commission through ROTC. He earned his Juris Doctorate, cum laude, Order of the Coif, from Brigham Young University in 1996. His military education includes Command and General Staff College, an LL.M. with a criminal law specialty from The Judge Advocate General's School, and a Master of Strategic Studies from the U.S. Army War College. His awards and decorations include the Legion of Merit with Oak Leaf Cluster, Bronze Star, Defense Meritorious Service Medal with Oak Leaf Cluster, and the Meritorious Service Medal with four Oak Leaf Clusters.

## **Rear Admiral Lower Half Jonathan Thomas Stephens, U.S. Navy, Lead Special Trial Counsel**

RDML Stephens graduated from the University of Michigan (UM) with a Bachelor of Science in Civil and Environmental Engineering in December of 1996 and earned his commission as an Ensign upon completion of the Naval Reserve Officer Training Corps (NROTC) program. After graduation, he remained with the UM ROTC unit in Ann Arbor until May 1997, when he detached to report to the Surface Warfare Officer School Division Officer Course in Newport, Rhode Island.

RDML Stephens reported to USS INGERSOLL (DD 990), homeported in Pearl Harbor, as the Communications Officer in November 1997. He made the ship's final Western Pacific (WESTPAC) deployment prior to its decommissioning in July 1998. He then reported to USS KINKAID (DD 965), homeported in San Diego, and served as the First Lieutenant, Combat Information Center Officer, and Assistant Operations Officer, completing his second WESTPAC deployment before detaching in 2000. He transferred to the Office of Legislative Affairs in Washington, DC, where he served until 2002 when he was awarded a Law Education Program Scholarship.

RDML Stephens began his legal studies in 2002 at George Washington University School of Law, earning his J.D. (With High Honors) in 2005. During his two summer assignments, he interned with the Office of the Judge Advocate General (Criminal Law Division)(Code 20) and the Vice Chief of Naval Operations legal office. RDML Stephens began his first JAG duty assignment as a defense counsel at Naval Legal Service Office Southwest (NLSO SW) in October 2005. He assumed the Senior Defense Counsel billet at NLSO SW in March 2007.

Selected as a Military Justice Specialist in May 2008, RDML Stephens returned to Code 20 in August 2008, and served as an action officer for the next two years. RDML Stephens returned to George Washington in the fall of 2010 and graduated with his LL.M. in Litigation and Dispute Resolution (With Highest Honors) in 2011.

## **Brigadier General Kevin S. Woodard, U.S. Marine Corps, Lead Special Trial Counsel**

Brigadier General Woodard grew up in Minden, Louisiana. He is a graduate of Louisiana Tech University, earning his B.A. degree in 1991. He achieved his J.D. degree from the University of Arkansas School of Law (Fayetteville) in 1995 and was admitted into the Arkansas Bar that same year. Brigadier General Woodard and his wife, Cathy, were married in May 1992 and have been blessed with two children, Ryne, who is a Doctor of Physical Therapy, and Jakob, a senior working towards his degree in Cyber Security at North Carolina State University.

Brigadier General Woodard enlisted in the Marine Corps Reserves in October 1991 and upon completion of bootcamp, Marine Combat Training, and School of Infantry, he was designated as an 0341 (Mortarman). In August 1992, he was commissioned as a 2nd Lieutenant through the Platoon Leader's Class-Law program. After completion of The Basic School and Naval Justice School Basic Lawyer's Course in 1996, he was designated a Marine Corps judge advocate. As a judge advocate, Brigadier General Woodard has served as the command staff judge advocate for Battalion, Installation, Group, Division, and Expeditionary Force commands; as the Executive Officer of a deployment Combat Logistics Regiment; as the officer-in-charge of a Joint Law Center and Regional Legal Services Support Section; in numerous litigation billets such as trial counsel, defense counsel, senior trial counsel, senior defense counsel, regional trial counsel, and regional defense counsel; as an Associate Judge and Chief Appellate Judge for the Navy-Marine

Corps Court of Military Appeals; as a Circuit Military Judge; and as the Deputy Director Military Justice, Judge Advocate Division. He has also served as an instructor, evidence division head, and military justice department head at the Naval Justice School; adjunct professor for military justice studies at the Naval War College and the Defense Institute of International Legal Studies; and as a CMC Fellow at the Department of Justice, National Security Division, Counterterrorism Section. Brigadier General Woodard most recently served as the Deputy Director Military Justice at Judge Advocate Division, Headquarters Marine Corps, where he advised the Staff Judge Advocate to the Commandant of the Marine Corps on all matters involving military justice policy and procedure and served as the Marine Corps' representative to the Joint Services Committee on Military Justice.

Brigadier General Woodard was promoted to his current rank and appointed as the Marine Corps' first Lead Special Trial Counsel on 5 January 2023. As Lead Special Trial Counsel, Brigadier General Woodard will lead the Marine Corps Office of Special Trial Counsel, exercising both operational and administrative control over the personnel and activities of that office.

Brigadier General Woodard's assignments have included tours at Marine Corps Logistics Base, Albany, Georgia; Camp Pendleton, California; Naval Base, Newport, Rhode Island; Marine Corps Air Station, Cherry Point, North Carolina; multiple tours at Camp Lejeune, North Carolina; and multiple tours in the National Capital Region (Headquarters Department of Justice, Washington Navy Yard, and the Pentagon). He has twice deployed to Iraq in support of combat operations: Operations ENDURING FREEDOM and IRAQI FREEDOM.

### **Brigadier General Christopher A. Brown, U. S. Air Force, Lead Special Trial Counsel**

Brig. Gen. Christopher A. Brown is the Lead Special Trial Counsel, Office of Special Trial Counsel, Department of the Air Force, Arlington, Virginia. In this capacity, he oversees the department's legal representation in the investigation and trial-level litigation of covered offenses, pursuant to the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the office exercises authority. The DAF's Office of Special Trial Counsel operates independently of the military chains of command of both the victims of alleged covered offenses and those accused of covered offenses. Brig. Gen. Brown reports directly to the Secretary of the Air Force with no intervening authority.

Brig. Gen. Brown graduated Army Basic Training in 1985 and served in the Army National Guard as an enlisted Army Military Policeman while attending law school. During his second year of law school, he was activated for operations Desert Shield and Desert Storm. He commissioned into the Air Force through Officer Training School in 1995 and served five years as a Security Police Officer prior to completing an intra-service transfer to the JAG Corps. Brig. Gen. Brown has deployed to Guantanamo Bay, Cuba in support of Detainee Operations, and to Qatar in support of Operation Enduring Freedom.

Brig. Gen. Brown has served in a variety of legal positions at the base, the field operating agency, and the major command level including as a Staff Judge Advocate twice, as an Instructor and Commandant of The Air Force Judge Advocate General's School. His experience covers virtually all facets of the military justice system including Area Defense Counsel, Appellate Military Judge and Chief of the Military Justice Division at the headquarters level. He is admitted to practice law before the Supreme Court of the United States, the Supreme Court of Massachusetts, and the United States Court of Appeals for the Armed Forces.



## **Commander Benedict S. Gullo, U.S. Coast Guard, Deputy Chief Prosecutor for the Office of Chief Prosecutor**

Commander Ben Gullo currently serves as the Deputy Chief Prosecutor for the Office of the Chief Prosecutor in Charleston, South Carolina. While overseeing the prosecution of courts-martial throughout the Coast Guard, he proudly supports a team of legal professionals charged with the swift and fair application of military justice. A native of Huntington, New York and a former Senior Assistant District Attorney in Brooklyn, New York, CDR Gullo began his military career in the U.S. Army Reserve Judge Advocate General's Corps in 2003. He mobilized in support of Operation Noble Eagle and attained the rank of Captain before recommissioning into the Coast Guard in 2006. In his first assignment, CDR Gullo prosecuted courts-martial and served as a Fifth District Command Advice and Operational Law Attorney. CDR Gullo's follow-on active duty and reserve assignments include Operational Law Fellow at the U.S. Army's Center for Law & Military Operations; Deputy Staff Judge Advocate for the Ninth District; Contingency Planner for Sector Buffalo; Senior Reserve Officer for Marine Safety Unit Toledo; Program Reviewer for the Office of Budget & Programs (CG-821); and Executive Officer for the Maritime Law Enforcement Academy.

CDR Gullo has also served as a collateral duty military judge, and from 2015–2017, he temporarily separated from active duty to serve as an Assistant U.S. Attorney for the Department of Justice. CDR Gullo holds a Juris Doctor from Hofstra University's School of Law, a Master of Laws in Military Law from The U.S. Army's Legal Center & School (Distinguished Graduate), and a Master of Science in National Resource Strategy from the Eisenhower School for National Security and Resource Strategy (Distinguished Graduate). CDR Gullo maintains licenses to practice law in a number of federal, state, and military courts. CDR Gullo's personal awards include the Meritorious Service Medal (5), Coast Guard Commendation Medal (2), an Army Commendation Medal, the Basic Parachutist Badge, the 2014 DHS Outstanding Lawyer of the Year, and the Coast Guard's 2009 American Bar Association Young Lawyer of the Year. He is married to the former Miss Summer Jerue of Westfield, Massachusetts. They have a son Matthew and three daughters, Natalie, Alex, and Jaime.

**Questions I: Structure and Operations**

**Q1:** We understand that the new Special Trial Counsel (STC) prosecution authority does not take effect until December, pending any changes in the FY24 NDAA. Please explain how your designated counsel are operating in the meantime. Are all STCs designated, in place, and beginning to advise on covered offense cases?

**Q2:** Please explain how cases will be staffed between the Offices of Special Trial Counsel (OSTC) and the SJA or installation's trial counsel. Will investigations and prosecutions involve a mix of STCs and traditional trial counsel? For example, at large installations with big caseloads, such as Fort Cavazos, will the SJA provide staffing support for covered cases?

**Q3:** Will there be a mentor/ mentee relationship between the OSTC counsel and the traditional counsel in order to prepare the less experienced counsel to "fleet up" to OSTC during subsequent assignments?

**Q4:** Please explain the purpose behind the national security exception in the new RCM 306A that allows a commander to withdraw jurisdiction from OSTC and prevent prosecution if the trial would harm national security. Does this rule allow a senior official to override a STC's decision to prosecute a covered offense case?

**Q5:** Will STCs be responsible for all Art 32 hearings for covered offenses?

**Questions II: Uniformity among the Services**

**Q1:** How often do you plan to coordinate with the other Services moving forward?

**Q2:** What other efforts are you planning to achieve uniformity?

### **Questions III: Advising commanders**

- Q1:** What level of supervisory OSTC lawyer will have primary responsibility advising commanders regarding covered offense disposition and deferral decisions? For example, who will counsel company commanders on sexual harassment investigations? Will these counsel be local, regional or centralized?
- Q2:** How will the SJA, brigade judge advocate, and STC coordinate substantive case discussion? Will the STC be meeting directly with commanders or only in conjunction with the SJA?
- Q3:** How will non-STC judge advocates be involved in the investigation and prosecution of covered-offense cases that are not deferred?
- Q4:** The new Manual for Courts-Martial gives commanders for the accused the opportunity to provide non-binding input to the STC on case disposition. How do you propose that STCs build relationships with these commanders for purposes of those conversations?

### **Questions IV: Deferral Process**

- Q1:** Please explain how deferral decisions will be made at various stages of a case.
- Q2:** What standards/factors will be used or considered when deferring prosecution?
- Q3:** What happens if the STC defers a covered offense to the command and recommends non-judicial punishment, but the accused turns down the Article 15? Who tries the case?

### **Questions V: Preferral and charging process**

- Q1:** The 2023 amendments to the Manual for Courts-Martial retain the ability for anyone subject to the UCMJ to prefer charges, including charges involving covered offenses. Can you explain how cases will be handled in those situations where a non-STC prefers the charges?
- Q2:** The Navy SOP (page 21) requires: “Before charging an offense requiring Sex Offender notification, the prosecutor must be confident that the offense was sufficiently severe that a civilian jurisdiction would likely pursue such an offense.” How is a military prosecutor informed about the likelihood of civilian jurisdiction decision to pursue the offense?
- Q3:** How will the OSTC coordinate/ discuss charging decisions of witnesses that may have committed collateral misconduct for which the Commander retains disposition authority?

### **Questions VI: Referral process**

- Q1:** What evidentiary standard will STCs use as a threshold for referral decisions? Will STCs refer cases only if there will probably be sufficient evidence to obtain and sustain a conviction?
- Q2:** What is the process if an Article 32 preliminary hearing officer finds no probable cause for a particular offense and recommends dismissal? What if the STC or Deputy believes it is appropriate for referral? Who decides and using what criteria?

### **Questions VII: Sentencing and plea agreements**

- Q1:** Under the new R.C.M. 705, STCs can negotiate a specific sentence in a plea agreement. What effect do you think this will have on pre-sentencing proceedings?
- Q2:** In this plea agreement scenario, the military judge’s role has been eliminated and the prosecutor becomes the sentencing authority. How will you address complaints from victims who will not have the opportunity to tell the military judge about the impact of the crime for purposes of imposing a sentence?

### **Questions VIII: Discovery**

- Q1:** Will each Service adopt an “open file” discovery policy? For the accused? For the victim(s) and their counsel?
- Q2:** Do you have established timelines on when certain discovery is to be disclosed to the defense/victims?

### **Questions IX: Motions practice**

- Q1:** Do you have policies for who receives motions and responses filed by the OSTC? Will OSTC provide victims or their counsel all pleadings? Corresponding evidence?
- Q2:** Will you require counsel to omit PII from all filings, pleadings, and court records, or do any of the Services allow filings to include PII?
- Q3:** Does your service use technology or AI to assist with the trial and appellate court redaction rules?

### **Questions X: Annual Training**

- Q1:** Have you considered using OVC TTAC for training for new offices? If not, what kind of training are you deploying, i.e., bringing outside/civilian trainers?

<p style="text-align: center;"><b>Former General Court-Martial Convening Authorities</b> <b>Presenter Biographies</b></p>
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**Major General David M. Hodne, U.S. Army**

Major General David Hodne is the Director, Chief of Staff of the Army Transition Team, Office of the Chief of Staff of the Army, Washington, DC. His recent previous assignments include Commanding General, 4<sup>th</sup> Infantry Division and Fort Carson, Fort Carson, Colorado; Commandant, United States Army Infantry School, United States Army Maneuver Center of Excellence/Director, Soldier Lethality Cross Functional Team, Army Futures Command, Fort Benning, Georgia; and, Deputy Commanding General (Maneuver), 4<sup>th</sup> Infantry Division, Fort Carson, Colorado. He has deployed to both OPERATION ENDURING FREEDOM AND OPERATION IRAQI FREEDOM. In addition, he has held several joint assignments.

He is a graduate of the Officer Infantry Basic Course, Command & General Staff College, and was a Senior Service College Fellow at Georgetown University. His awards and badges include the Army Distinguished Service Medal; Defense Superior Service Medal; Legion of Merit (with 3 Bronze Oak Leaf Clusters); Purple Heart; Meritorious Service Medal (with 3 Bronze Oak Leaf Clusters); Joint Service Commendation Medal; Combat Infantry badge; Master Parachutist Badge; Air Assault Badge; and Ranger Tab.

**Major General Len “Loni” Anderson IV, U.S. Marine Corps**

Major General Anderson is the Assistant Deputy Commandant Plans, Policies, and Operations Department. He was commissioned in 1993 upon graduation from the Illinois Institute of Technology. He was designated a naval aviator in October of 1995 and selected to fly the F/A-18 Hornet.

Major General Anderson's previous assignments as a General Officer include Commanding General, 4th Marine Aircraft Wing, Deputy Commanding General, Marine Corps Forces Cyberspace Command and Deputy Commander, Joint Task Force-ARES.

Assignments in the Operating Forces include Schedules Officer, Assistant Operations Officer, Air Wing Landing Signal Officer, and Weapons and Tactics Instructor with the “Fabulous Checkerboards” of VMFA-312 while deployed on USS Enterprise and USS Truman during Operations SOUTHERN WATCH, DESERT FOX and DELIBERATE FORGE; and Training Officer, MAG-31. In 2006, he transferred to the Marine Forces Reserve where he has served as the Assistant Operations Officer, Marine Aviation Training Support Group-42; Operations Officer, VMFA-112; and Commanding Officer, MALS-41.

Assignments in the Supporting Establishment include Demonstration Pilot, Navy Flight Demonstration Squadron; Flight Instructor, VT-86; Operations Officer, Marine Aviation Training Support Group-41.

Headquarters and Staff Assignments: Senior Reserve Advisor, MAG-41; Reserve Branch Head, HQMC Aviation; Assistant Wing Commander, 4th Marine Aircraft Wing.

Joint assignments include two deployments in support of Operation INHERENT RESOLVE as the Deputy Director, Combined Joint Operations Center-Baghdad, Iraq, and Battle Director, 609<sup>th</sup> Combined Air Operations Center, Qatar.

Major General Anderson is a graduate of the Weapons and Tactics Instructor Course, the Navy Fighter Weapons School (TOPGUN), Command and Staff College (DEP), Air War College

(DEP), Advanced Joint PME, Senior Joint Information Operations Application Course, Harvard Kennedy School's Cybersecurity: The Intersection of Policy and Technology, and the Combined Force Air Component Commander Course.

### **Major General Kenneth T. Bibb, U. S. Air Force**

Major General Kenneth T. Bibb, Jr., is the Deputy Inspector General of the Department of the Air Force, Office of the Secretary of the Air Force, Headquarters U.S. Air Force, the Pentagon, Arlington, Virginia. The Inspector General reports to the Secretary of the Air Force, Air Force Chief of Staff, and Chief of Space Operations on the readiness, efficiency, and military discipline of all components of the Department of the Air Force: active duty, Air Force Reserve and Air National Guard. The Inspector General provides inspection policy and oversees the inspection and evaluation system for all Air Force nuclear and conventional forces; oversees counterintelligence operations; investigates fraud, waste, and abuse; oversees criminal investigations; and provides oversight of complaints resolution programs. The Inspector General is also responsible for three field operating agencies: the Air Force Inspection Agency, the Office of Special Investigations, and the Department of Defense Cyber Crime Center.

Maj. Gen. Bibb received his commission from the United States Air Force Academy in 1991. He holds a master's degree in Aeronautical Engineering from the Air Force Institute of Technology and is a command pilot with more than 5,000 hours in the C-5, C-12, C-17, C-21, T-37, T-38 and KC-135.

He has served on the Joint Staff, Air Staff and Air Force Materiel Command Staff. He has also served in multiple command assignments, including Commander, 100th Air Refueling Wing, Commander, 618th Air Operations Center (Tanker Airlift Control Center) and most recently, Commander, 18th Air Force.

### **Rear Admiral (Retired) Charles Rock, U.S. Navy**

Rear Admiral (Retired) Charles "Chip" Rock is a native of upstate New York. He was commissioned through the Naval Reserve Officer Training Corps Program at Texas A&M University, where he received a Bachelor of Science in Ocean Engineering. Rock holds a master's degree in national security strategy from the National War College.

He retired from the Navy in 2022 after 35 years, serving much of his career at sea and overseas. His last assignment was as Commander of Navy Region Mid-Atlantic, providing direct support to the Navy's operational forces and their families. His specialties include budget development, public-private partnerships, community and public relations, climate resiliency, environmental conservation, energy, and defense policy. He has a passion for supporting non-profit organizations that focus on helping the under-served.

## **Rear Admiral Bryan Penoyer, U.S. Coast Guard**

Rear Admiral Brian K. Penoyer serves as Assistant Commandant for Human Resources (CG-1) where he oversees all aspects of military and civil service personnel management, including recruitment, assignments and hiring, workforce policies, and pay and benefits.

Previous flag assignments include Commander of the Eleventh Coast Guard District, responsible for the safety, security, law enforcement and environmental stewardship operations from the California-Oregon border to Peru including Arizona, Utah, and Nevada; Commander, Coast Guard Force Readiness Command; and Commander, Fourteenth Coast Guard District.

Rear Admiral Penoyer has extensive operational experience with a specialty in coastal operations. During his career, he served as the Commander of Coast Guard Sector Houston-Galveston and Deputy Commander at Coast Guard Sector Maryland/National Capitol Region and Sector Jacksonville, Florida. He was the liaison in the office of the Deputy Secretary of Homeland Security during the Deepwater Horizon incident, deployed during Hurricane Katrina to Louisiana, and again during the Hurricane Sandy to New York. In his first assignment for the Coast Guard, he deployed throughout Europe and the Middle East during the 1991 Gulf War.

Rear Admiral Penoyer's staff assignments include serving as the Chief of Staff at the Fourteenth Coast Guard District, Deputy Chief of Coast Guard Congressional Affairs, Military Fellow at the Center for Strategic and International Studies, and Department of Homeland Security's Chief of Contingency Planning. He also served as the Coast Guard's liaison to the U.S. Department of the Interior and Coast Guard representative on the National Response Team. Rear Admiral Penoyer holds a Master of Public Policy degree from the University of Maryland and a Master of Arts in national security and strategic studies from the Naval War College. He is a 2015 recipient of the Coast Guard's Type I Incident Commander qualification.

Rear Admiral Penoyer is a native of the Chicago area, and a proud University of Chicago graduate. He is married to Hildi Baker of Madison, Wisconsin, a nurse and equally proud University of Chicago graduate. Together they have two daughters, Scotia and Teslin.



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

**Background:** Article 25(e)(2), UCMJ, requires convening authorities to detail members to a court-martial that are, in their opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. Although not statutorily provided for, military caselaw has determined it is permissible for convening authorities to consider race, ethnicity, and gender in selecting courts-martial panel members for purposes of inclusion.

Article 25(e) also provides several additional qualification criteria; court-martial members must be senior to the accused by rank and grade, and must not be an accuser, a witness, a preliminary hearing officer, or counsel for any party as to any offense charged.

At the time that the Article 25(e) “best qualified” criteria were established in the UCMJ in 1950, panel members presided over courts-martial and served as the sentencing authority—there was no military judge. Changes in the law have resulted in the establishment of a trial judiciary with military judges presiding at every court-martial. Additionally, military judges will soon serve as sentencing authority in all but capital cases, reducing the panel’s role to determining guilt or innocence of the accused, as is the case in federal and most state courts. Finally, 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.

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.

The DAC-IPAD is reviewing and assessing the qualifications required for court-martial members to perform their duties, the best method for selecting court-martial members, what criteria a randomized selection system should incorporate to produce a list of court-martial members qualified to perform their duties, and whether convening authorities should have a role in the selection of court-martial members.

**Questions:** From your perspective as a former general court-martial convening authority, please consider the following:

- Q1:** How important are the following qualifications to be able to perform the duties of a court-martial member? If the qualification is important, please explain what the specific requirement should be and why. For example, the DAC-IPAD is considering a two-year minimum length of service requirement in order to ensure initial military training is completed and to give Service members a greater understanding of military culture.
1. An age requirement.
  2. An education requirement.
  3. A training requirement.
  4. An experience requirement.
  5. A length of service requirement.
  6. A judicial temperament requirement.
- Q2:** Should there be any other required qualifications for court-martial members? For example, if court-martial members are randomly selected from personnel rosters, what criteria would need to be factored into the random selection program to produce a list of members qualified to sit as court-martial members?
- Q3:** Do you have any concerns about the ability of young Service members, officers and enlisted, to follow and understand the military judge's instructions?
- Q4:** If there were a system of modified random panel member selection, should inclusion of race, ethnicity, and/or gender as randomization factors be required to provide panels representative of Service demographics or reflecting a fair cross-section of the military community? Civilian juries rely primarily on voter registration and motor vehicle registration lists for inclusion of race, ethnicity, and gender on juries. In light of Service demographics and unit compositions, where junior enlisted white males often form a significant majority of the Service members, does the military community need to specifically provide for inclusion of members diverse by race, ethnicity, and gender to be fair in appearance and reality? Why or why not?
- Q5:** How important is it to have court-martial panels that reflect a fair cross-section of the military community by grade? For example, many stakeholders have concerns about panels composed primarily of senior military members, but also about panels composed of predominately junior military members. What is the right balance and how can it be achieved?
- Q6:** The DAC-IPAD is considering whether to recommend removing the Article 25(e) requirement for convening authorities to detail members who "in his opinion, are best qualified" based on "age, education, training, experience, length of service, and judicial temperament." What concerns, if any, do you have about removing the subjective "best qualified" criteria?
- Q7:** The DAC-IPAD is also considering whether to recommend convening authorities be removed from the court-martial member selection process and replaced by an administrative randomized selection system. What concerns, if any, do you have about removing the convening authority from the process of selecting court-martial members?

- Q8:** Availability determinations. Should convening authorities, or lower-level commanders, have authority to determine whether randomly selected members are unavailable, for professional or personal reasons, to be detailed as court-martial members? Why or why not? What is the appropriate level of command to make this determination? Do you have any recommendations on how to improve transparency in availability determinations, without affecting mission or Service member privacy considerations?
- Q9:** Excusal Determinations. Should convening authorities continue to have authority to excuse detailed court-martial members prior to assembly of the court-martial? Do you have any recommendations on how to improve transparency in excusal determinations, without affecting mission or Service member privacy considerations?
- Q10:** A randomly selected panel is likely to require detailing more court-martial members to appear at the court-martial for questioning by the parties to ensure an adequate number of members after challenges. What impact will detailing additional members have on the mission and what recommendations do you have for reducing the impact on the mission?
- Q11:** Please share any other issues this Committee should consider when making recommendations to change the selection criteria or to randomize the selection process.
- Q12:** What, if any, issues with the military justice system would you like to see this Committee explore in future studies?

## Court-Martial Observation Discussion Guide

Background: The list of items below address comments from members based on their court-martial visits. All observations are anecdotal due to the limited number of courts-martial observed. The purpose of this discussion is to identify whether any of the items listed below warrant further review to determine whether there is a systemic or structural issue.

### 1. Court-Martial Members

#### A. Voir Dire

- Counsel use leading questions that do not effectively develop information on bias
- Counsel effectively exposed potential bias
- The military judge tends to ask most of the group voir dire questions, clarifies confusing questions, and elicits the basis for challenge or rehabilitation
- The military judge limited counsel's ability to question members

#### B. Military/Civilian Jury Differences

- No unanimous verdict, only 6 of 8 members required for verdict
- Voir dire seems more cursory than in civilian courts
- Voir dire was more thorough than in civilian courts
- A very different jury pool demographic
- Military jurors can ask questions – helps to keep the jury engaged

### 2. Trial Preparation

#### A. Motions

- Motions were raised at trial that should have been resolved pre-trial
- Too much relitigation of pre-trial motions

#### B. Victims/Witnesses/Experts

- Government witnesses were not as prepared as they should have been. For example, victims and witnesses were not familiar with their prior statements or investigators did not recall the investigation.
- Victims provided testimony that surprised the government
- SANE testimony was good, however the evidentiary value was not always clear

#### C. Evidence

- Limited digital evidence, phones not searched, social media not searched

#### D. SVC/VLC/VA

- Present, participated, and seemed to have a good relationship with client

### 3. Counsel and Military Judge Training and Experience

A. Questioning victims/witnesses

- Government counsel ask too many leading questions of victims, without objection by the defense. Allowed to shape the testimony, sometimes inaccurately.
- Counsel did not elicit enough detail about the incident (“we were kissing,” “he was on top of me,” “my clothes came off”)

B. Photos/Diagrams/Demonstrative Evidence

- Counsel should introduce more pictures or diagrams to help the fact-finder understand the testimony
- Establishing inconsistencies in statements can be improved by introducing relevant portions of an interview and by using demonstrative evidence to show the discrepancies

C. Experience

- Prosecutors should be more experienced
- Improvement needed on understanding of law and rules of evidence
- Military judges had good control of the proceedings and judicial decorum
- Rulings by military judges could be improved by providing a nuanced decision with analysis based on the evidence rather than simply restating the rule

#### **4. Court-Martial Processes**

A. Efficiencies

- Keeping witnesses subject to recall unnecessarily
- 39a sessions where members have to leave the courtroom each time
- Courtroom microphones only record and do not amplify sound making it difficult for spectators to hear the trial participants

B. Military/Civilian Differences

- Substantive argument on objections occur in front of witness (no sidebars)
- Victims allowed to remain in courtroom to hear each other’s testimony in a multiple victim case

# Panel Member Selection Criteria

*A Timeline Outlining Statutory Amendments and Case Law Affecting Panel Composition*

Statutory Criteria

*Best qualified by reason of age, training, experience, and judicial temperament.*

*Officers having less than 2 years of service shall not be appointed if can be avoided w/out manifest injury to the service.<sup>1</sup>*

Articles of War, art. 4

1920

*Art. 4: Amended to allow enlisted members to select a panel composed of at least one-third enlisted members.<sup>2</sup>*

*Art. 88: Prohibited CA from admonishing, coercing, or unlawfully influencing panel members.<sup>3</sup>*

Articles of War, arts. 4, 88

1948

*Qualifications to be considered: Age, education, training, experience, length of service, and judicial temperament.*

*Prohibited investigating officers and counsel from serving as members.*

*Made any member of the armed forces eligible to sit on a CM of another armed service.<sup>4</sup>*

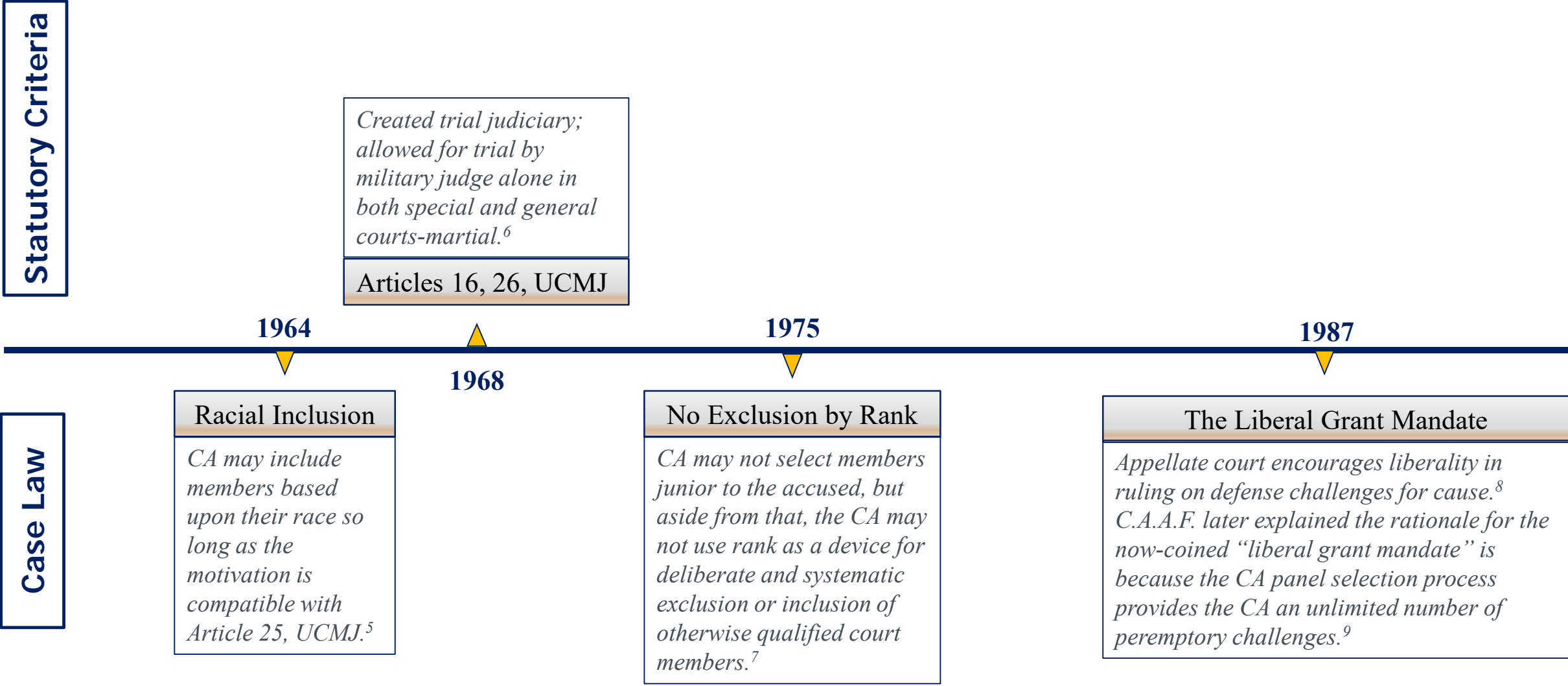
Article 25, UCMJ

1950

Case Law

# Panel Member Selection Criteria

*A Timeline Outlining Statutory Amendments and Case Law Affecting Panel Composition*



# Panel Member Selection Criteria

*A Timeline Outlining Statutory Amendments and Case Law Affecting Panel Composition*

Statutory Criteria

Case Law

1988

## No 6<sup>th</sup> Amendment Right to Representative Panel

*No Sixth Amendment right that panel membership reflect a representative cross-section of the military population.<sup>10</sup>*

## CA May Seek Representativeness of Minorities

*The CA is free to require representativeness in his panels and insist no important segment of the military community—such as blacks, Hispanics, or women— be excluded from service on CM panels.<sup>11</sup>*

## Batson-equivalent Applying to All Minorities

*Though the Supreme Court has never specifically applied Batson to the military, military case law applied and expanded Batson to peremptory challenges through the Fifth Amendment. Under this case law, counsel cannot exercise a peremptory challenge based on any minority group—race, gender, or ethnicity. The government’s use of a peremptory challenge on a minority raises a prima facie showing of discrimination requiring the government to proffer a race-neutral reason for the challenge.<sup>12</sup>*



# Panel Member Selection Criteria

*A Timeline Outlining Statutory Amendments and Case Law Affecting Panel Composition*

Statutory Criteria

*Requires judge alone sentencing in general and special courts-martial.*

*Effective 27 Dec 2023*

FY22 NDAA Amendment to Art. 53: Judge Sentencing

*“When convening a court-martial, the CA 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.”*

*Effective 23 Dec 2024*

FY23 NDAA Amendment to Art. 25(e): Randomization

2023

2024

Case Law

# References

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1. The Articles of War of 1920, art. 4, *reprinted in* MANUAL FOR COURTS-MARTIAL, United States, app. 1, at 494 (1921).
2. The Articles of War of 1948, art. 4, *reprinted in* MANUAL FOR COURTS-MARTIAL, United States, app. 1, at 273 (1949).
3. *Id.* at art. 88.
4. Article 25, Uniform Code of Military Justice, 18 U.S.C. § 825 (1950).
5. *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964).
6. Articles 16, 26, Uniform Code of Military Justice, 18 U.S.C. § § 16, 26 (1968).
7. *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975). *See also United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000), *pet. for clarification denied*, 54 M.J. 211 (C.A.A.F. 2000); *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993).
8. *United States v. Moyer*, 24 M.J. 635, 638–89 (1987) (A.C.M.R. 1987).
9. *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005).
10. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988).
11. *United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988). *Cf. United States v. Riesebeck*, 77 M.J. 154 (C.A.A.F. 2018) (holding selection of a large number of women raised the appearance of court-martial stacking in a sexual assault case; once the issue was raised, the government failed to rebut it because it could not not introduce any evidence of a benign motive).
12. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

## Section 1: Article 25, UCMJ, and the Selection of Court-Martial Panel Members

*A member of the armed forces facing . . . criminal punishment in the military justice system does not have the right to trial by jury. A military accused is tried before a panel composed of his or her superiors, not a jury of his or her peers. The panel is not randomly selected, nor does it constitute a representative cross-section of the community. Each member of the panel is selected personally by the commander who convenes the court-martial. The convening authority, who is not a judicial official, exercises command authority and responsibility over the accused, over the members of the panel, and over the discretionary prosecutorial decision to refer the charges to a court-martial.<sup>1</sup>*

### I. Convening a Court-Martial

When charges are referred to a general or special court-martial, whether by a commander serving as convening authority or by a special trial counsel, the commander serving as convening authority creates the court-martial to hear the case by issuing a convening order.<sup>2</sup> Because the Armed Services do not have a standing court-martial system, commanders must individually convene each court-martial and refer each case individually to the court-martial.

When convening the court-martial, the convening authority must also simultaneously detail members of the armed forces to serve as panel members.<sup>3</sup> While there is variation among and within the Military Services in the process for detailing members, typically lower-level commanders provide a list of nominees to the convening authority's staff judge advocate who prepares a packet to present to the convening authority containing the list of nominees, questionnaires completed by the nominees, and a roster of all command members. The convening authority uses the material provided to select and detail the court-martial members.

### II. Article 25, Uniform Code of Military Justice (UCMJ), Selection Criteria

Article 25, UCMJ,<sup>4</sup> outlines the criteria by which a convening authority must select panel members. The statute directs the convening authority to personally select members who "in his opinion, are best qualified" based on six criteria: "age, education, training, experience, length of service, and judicial temperament."<sup>5</sup>

The statute does not further define these criteria or provide the method by which the convening authority makes this selection.

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<sup>1</sup> *United States v. Benedict*, 55 M.J. 451, 456 (2001) (Effron, J., dissenting) (citations omitted).

<sup>2</sup> 10 U.S.C. § 825 (2021) (Art. 25); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) [2019 MCM], Rule for Courts-Martial [R.C.M.] 504(a).

<sup>3</sup> Art. 25(e)(2); R.C.M. 503(a) and R.C.M. 504(d)(1)(A)(ii).

<sup>4</sup> Art. 25, UCMJ, *supra* note xx.

<sup>5</sup> Art. 25(e)(2), UCMJ.

## A. Historical Background

Accused Service members do not have a Sixth Amendment right to a trial by jury in military courts-martial.<sup>6</sup> The Military Justice Review Group provided a summary of the history of Article 25 in their 2015 report, noting that Congress first set forth criteria for service on courts-martial panels in the 1920 Articles of War, which were then incorporated into the UCMJ as Article 25 upon its enactment in 1950.<sup>7</sup>

Article 4 of the 1920 Articles of War—applicable to the Army, but not the Navy—established criteria for selection of court members: “When appointing courts-martial, the appointing authority shall detail as members thereof, those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament. . . .”<sup>8</sup> Article 4 also included a clause stating that officer with less than two years of service should not sit as panel members “if it can be avoided without manifest injury to the service.”<sup>9</sup> With the enactment of the UCMJ in 1950, Article 25 adopted the selection criteria from Article 4, adding education and length of service as additional criteria and eliminating the baseline requirement of two years of service.<sup>10</sup>

These criteria have remained the same since 1950, though the military justice system and the composition and functions of courts-martial panels have changed significantly. Enlisted members were not permitted to sit as panel members until the passage of the Elston Act in 1948, which allowed an enlisted member to select a panel comprised of at least one-third enlisted members.<sup>11</sup> The DAC-IPAD staff’s review of a random sample of cases closed in fiscal year 2021 show that the majority of courts-martial in which a panel sits in judgment of an enlisted accused include enlisted members as part of the panel.

For many years courts-martial operated with no military judges and with the senior officer of the panel—who was not an attorney—serving as the President of the panel. The President of the panel presided during hearings and made procedural and other rulings necessary to manage the court-martial process.<sup>12</sup> Even with the enactment of the UCMJ in 1950, courts-martial procedures remained primarily panel-based until 1968, when Congress amended the UCMJ to

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<sup>6</sup> *United States v. Anderson*, No. 22-0193 (C.A.A.F. June 29, 2023), citing *Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); and *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950).

<sup>7</sup> REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I 252 (Dec. 22, 2015).

<sup>8</sup> The Articles of War of 1920, art. 4 (June 4, 1920) reprinted in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1921 ed.) app. 1, at 494, available at <https://www.loc.gov/item/2011525334/>

<sup>9</sup> *Id.*

<sup>10</sup> Art. 25, UCMJ (1950).

<sup>11</sup> The Articles of War of 1948, art. 4 (June 24, 1948) reprinted in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1949 ed.) app. 1, at 273, available at <https://www.loc.gov/item/2011525325/>

<sup>12</sup> Rodrigo M. Caruco, *The Court-Martial Panel of the Founding Era, Echoes of Adolphus – An Explanation of Military Justice* (April 6, 2021), found at: <https://echoesofadolphus.com/2021/04/06/the-court-martial-panel-of-the-founding-era/>

provide for military trial judges to preside over all general and special courts-martial. This law gave trial judges authority to direct all procedural aspects of trial and allowed an accused to elect to have findings and sentencing conducted by panel members or by the presiding military trial judge.<sup>13</sup> A special court-martial without a military judge presiding was statutorily authorized until Article 16, UCMJ, was amended, effective January 2019, to eliminate this option and require all special courts-martial to have a military judge presiding.<sup>14</sup>

Unlike the federal system and most state systems, an accused military member may elect to be sentenced by a panel of members. This will soon change as a provision in the National Defense Authorization Act for Fiscal Year 2022 requires military judges to serve as the sentencing authority in all special and general courts-martial, with the exception of capital cases, effective for cases in which the charged offenses are committed after December 27, 2023.<sup>15</sup>

For fiscal year 2021 (FY21) and FY22, less than a third of general and special courts-martial were tried before panel members. In FY21, the Services tried a total of 752 general courts-martial, of which 231 (31%) were tried by members. They tried a total of 454 special courts-martial, of which 68 (15%) were tried by members. In FY22, the Services tried a total of 667 general courts-martial, of which 207 (31%) were tried by members, and a total of 429 special courts-martial, of which 76 (18%) were tried by members.<sup>16</sup> The majority of these cases involved plea agreements in which the accused waived the right to a trial by members.

## B. Enlisted Representation

Article 25(c)(2) provides that prior to the assembly of a court-martial, an enlisted accused may request that the court-martial panel be comprised entirely of officers or that enlisted members comprise at least one-third of the panel's membership.<sup>17</sup>

The Military Justice Act of 2016 (MJA16) amended Article 25 to allow convening authorities to appoint enlisted members to panels in the initial convening order, subject to the accused's ability to specifically elect an officer-only panel.<sup>18</sup> Prior to this change, convening authorities could only detail officer members in the initial convening order.

Prior to the MJA16 amendments to Article 25, the convening authority would convene a court-martial, appointing only officer members. If an enlisted accused subsequently requested enlisted representation on the court-martial panel, the convening authority would issue an amendment to

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<sup>13</sup> Wayne L. Friesner, *Military Justice and the Military Justice Act of 1968: How Far We've Come*, 23 Southwestern Law Journal 554, 568 (1969).

<sup>14</sup> REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I 221 (Dec. 22, 2015) (conforming to the long-standing military practice requiring a military judge to preside over all special courts-martial).

<sup>15</sup> National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, [FY22 NDAA], §539E, 135 Stat. 1541 (2021).

<sup>16</sup> Article 146a.

<sup>17</sup> Art. 25(c)(2), *supra* note xx.

<sup>18</sup> Art. 25(c)(1), *supra* note xx.

the initial convening order adding enlisted members. With the change to Article 25, enlisted members may now be added to the initial convening order. A review of a sampling FY 21 courts-martial records of trial shows that adding enlisted members to the initial convening order is now the norm.

MJA16 also amended Article 25 to allow enlisted members to serve on a panel even if serving in the same unit as the accused. Prior to the change, officers, but not enlisted personnel, from the same unit as the accused could serve on a panel.<sup>19</sup>

The staff reviewed case documents from a sampling of FY21 courts-martial and found that in the overwhelming number of cases, enlisted accused elected to be tried by a military judge alone—often as part of the terms of a plea agreement—or by a panel consisting of at least one-third enlisted members.

### C. Diversity of Panel Membership

It is permissible for convening authorities to consider race, ethnicity, and gender in selecting courts-martial panel members for purposes of inclusion.

#### 1. *Inclusion by Race*

In 1964, the Court of Military Appeals [now the Court of Appeals for the Armed Forces] first recognized the permissibility of including a panel member based on race.<sup>20</sup> *United States v. Crawford* held a convening authority may include a member based on race so long as the motivation remained compatible with the criteria in Article 25, UCMJ.<sup>21</sup> Article 25 does not, however, require affirmative inclusion of members based on race.<sup>22</sup>

Subsequent appellate court decisions relied on this holding for decades,<sup>23</sup> but the Court of Appeals for the Armed Forces (CAAF) recently specified and requested additional briefing on whether *Crawford* should be overruled.<sup>24</sup> That decision is pending.

#### 2. *Gender Inclusion*

The convening authority may take gender into account in selecting panel members if seeking in good faith to select a panel representative of the military population.<sup>25</sup> However, the convening

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

<sup>20</sup> *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964).

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *United States v. Bess*, 80 M.J. 1, 11 (C.A.A.F. 2020).

<sup>23</sup> See, e.g., *United States v. Cunningham*, 21 M.J. 585, 586 (C.M.R. 1985).

<sup>24</sup> *United States v. Jeter*, 2022 CAAF LEXIS 750\* (Oct. 24, 2022).

<sup>25</sup> *United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988).

authority may not intentionally “stack” a panel with an over representative number of female members for the purpose of having a large number of women on a sexual assault case.<sup>26</sup>

### 3. Cross-Representation

Neither the Constitution nor the UCMJ provide an accused Service member the right to a cross-sectional representation of the community on their court-martial panel.<sup>27</sup> Case law provides only that significant and identifiable groups may not be systematically excluded from the selection process.<sup>28</sup> “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)).

While cross-representation is not required, the convening authority may seek to have the panel’s membership reflect the military community.<sup>29</sup>

### 4. Research on the value of diverse juries

A study of diversity in civilian juries found that diverse juries increase trust in the public that the court system is fair and impartial.<sup>30</sup> A former federal judge for the Northern District of Illinois observed “You want, especially at the outset, [for] this thing to not only be fair but look fair. This court system depends on people believing that you get a fair shake.”<sup>31</sup> Studies have also found that “diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements,”<sup>32</sup> and that they bring a variety of backgrounds and perspectives to juries and may consider evidence in different ways and reach different conclusions.<sup>33</sup>

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<sup>26</sup> *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018). See also *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988).

<sup>27</sup> *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988).

<sup>28</sup> E.g., *United States v. Bess*, 80 M.J. 1, 8 (2020); *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988).

<sup>29</sup> *United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988).

<sup>30</sup> Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 (3) Chi.-Kent L. Rev. 1033, 1033 (2003).

<sup>31</sup> Ashish S. Joshi and Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA J. (2015), citing Annie Sweeney and Cynthia Dizikes, *The balancing act of jury selection*, Chicago Tribune (Mar. 27, 2013).

<sup>32</sup> Chopra, *Preserving Jury Diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/Wheeler Motion at Trial (and Why You Should)*, The Trial Lawyer, Summer 2014; citing Samuel Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 (4) J. Personality & Soc. Psychol. 597 (2006).

<sup>33</sup> Hong Tran, *Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries*, Defense, May 2013.



#### D. Limitations on Selection Criteria

In addition to race and gender, other aspects of the court-martial panel selection process have been the subject of litigation, which has led to judicially-interpreted limitations on selection criteria.

##### 1. Rank

The convening authority may not select members junior to the accused.<sup>34</sup> Aside from that statutory prohibition, the convening authority may not use rank as a device for deliberate and systematic exclusion or inclusion of otherwise qualified court members.<sup>35</sup>

##### 2. Position and Occupation

The convening authority may select members based upon duty position (e.g., commanders) in a good faith effort to comply with Article 25 criteria. The C.A.A.F. noted, “Officers selected for highly competitive command positions . . . have been chosen on the ‘best qualified basis,’ and . . . the qualities required for exercising command ‘are totally compatible’ with the statutory requirements for selection as a court member.”<sup>36</sup>

Occupation is not a permissible basis to exclude members. *United States v. Bartlett* invalidated an Army regulation that prohibited certain occupational specialties from being detailed as panel members.<sup>37</sup> The convening authority possesses “broad power to detail any officer to a panel as long as the requirements of Article 25, UCMJ, are met.”<sup>38</sup>

#### E. Liberal Grant Mandate

The Court of Appeals for the Armed Forces has held that “military judges must liberally grant challenges for cause” brought by the defense counsel to protect the “perception or appearance of fairness of the military justice system.”<sup>39</sup> This “liberal grant mandate” is provided to the defense because of the unique nature of the military court member selection process in which the convening authority chooses the members who will sit on the panel to hear the case and yet the defense is limited to one peremptory challenge.<sup>40</sup> The Court also noted that the staff judge

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<sup>34</sup> Article 25(e)(1).

<sup>35</sup> *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975). *See also United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

<sup>36</sup> *United States v. White*, 48 M.J. 251, 255 (C.A.A.F. 1998) (citing *United States v. Carman*, 19 M.J. 932, 936 (A.C.M.R. 1985)).

<sup>37</sup> *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008).

<sup>38</sup> *Id.* at 429.

<sup>39</sup> *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987); *see also United States v. Dale*, 42 M.J. 384, 386 (1995).

<sup>40</sup> *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005).



advocate may have the authority to excuse members prior to the court-martial being assembled, further providing the government opportunity to affect the makeup of the panel, in addition to the trial counsel's peremptory challenge.<sup>41</sup>

### III. Randomization of the Selection Process

Congress amended Article 25(e), UCMJ, in the FY23 NDAA to require the convening authority to detail members "under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable."<sup>42</sup> The President must prescribe implementing regulations by December 23, 2024.<sup>43</sup> However, Congress did not eliminate the Article 25(e) requirement for convening authorities to detail members best qualified for duty.

#### A. Fort Riley, Kansas, Study (1973)

Randomization of the court-martial member selection process is not a new concept. Rather, it has been the subject of studies,<sup>44</sup> reports,<sup>45</sup> and scholarly articles<sup>46</sup> since the inception of the UCMJ. In 1973, the Army conducted a 13-month test of a randomized selection process at Fort Riley,

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<sup>41</sup> *Id.*

<sup>42</sup> National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, [FY23 NDAA], §xxxx, xxx Stat. xxx (2022).

<sup>43</sup> *Id.*

<sup>44</sup> Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol II (Nov 30, 1972) [hereinafter 1972 Laird Task Force Report] (Secretary of Defense commissioned study recommending court-martial members be randomly selected without convening authority involvement in the selection process); United States General Accounting Office, Military Jury System Needs Safeguards Found in Civilian Federal Courts (June 6, 1977) [hereinafter 1977 GAO Military Jury Report]; DoD Joint Service Committee on Military Justice, Report on the Method of Selection of Members of the Armed Forces to Service on Courts-Martial (1999) [hereinafter JSC Member Selection Report].

<sup>45</sup> Independent Review Commission on Sexual Assault in the Military, *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY* (July 2021) [IRC Report], available at <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>; Honorable Walter T. Cox III et. Al., Report of the Commission on the 50<sup>th</sup> Anniversary of the Uniform Code of Military Justice (May 2001) (In May 2002 the Cox Commission, a privately-funded study, held hearings and received written submissions on improving the military justice system, and issued a report identifying the "far-reaching role of commanding officers in the court-martial process" as the "greatest barrier to operating a fair system of criminal justice within the armed forces." The Cox Commission recommended that the convening authority be removed from the court-martial member selection process immediately, finding "no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates.")

<sup>46</sup> Major S.A. Lamb, *The Court-Martial Panel Member Selection Process: A Critical Analysis*, 40<sup>th</sup> Judge Advocate Officer Graduate Course, April 1992, available at <https://apps.dtic.mil/sti/citations/ADA456700>; Lindsay Nicole Alleman, *Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, Duke Journal of Comparative and International Law, Vol 16 at 169, 2006.

Kansas.<sup>47</sup> Using selection criteria established by the general court-martial convening authority,<sup>48</sup> the command personnel office,<sup>49</sup> and the deputy staff judge advocate,<sup>50</sup> developed a randomized list of qualified Service members for the convening authority to use in detailing court-martial members. Qualified members were notified and remained eligible for court-martial member duty for three-months. When a convening order was needed, the personnel officer randomly selected the required number of names from the qualified members and provided the list to the convening authority for approval. The convening authority could approve or disapprove the entire list. If the list was disapproved, another was randomly generated.<sup>51</sup> Six general courts-martial and 23 special courts-martial were tried before mixed officer and enlisted panels and one special court-martial was tried before an officer panel using the random selection method.<sup>52</sup> The percentage of warrant officers and lower and middle grade enlisted members (E-3 to E-6) serving as court-martial members increased substantially, as did the number of requests to be tried by an enlisted member panel.<sup>53</sup>

Following the test period, opinions on the random selection process were obtained from affected community members.<sup>54</sup> Fort Riley Service members favored randomization, noting an increase

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<sup>47</sup> JSC Member Selection Report, *supra* note xx, Appendix J – Past Experimentation and Studies (summarizing the Fort Riley random member selection test program).

<sup>48</sup> 1977 GAO Military Jury Report, *supra* note xx at 26 (The Fort Riley GCMCA established the following qualification criteria: U.S. citizen, over the age of 21 years old, minimum 1 year active duty, stationed at Fort Riley for at least 3 months, English proficiency, no mental or physical defects that hinder ability as juror, no nonjudicial punishment during present enlistment or preceding 3 years, no felony convictions, no misdemeanor convictions during present enlistment or preceding 3 years E-3 or higher, not assigned or attached to a confinement facility, not an officer assigned to medical corps, Judge Advocate General's Corps, chaplain corps, military police corps, or a detailed Inspector General, not on orders for permanent change of station or temporary duty, and had not already served as a juror during the preceding year. The GCMCA also exempted the following personnel from court-martial member duty: persons with pre-approved leave for the period of leave and those scheduled for an annual training test or major field exercise during the period of training or exercise.); *see also*, JSC Member Selection Report, *supra* note xx, Appendix J, at 3 (the GCMCA subsequently added the following requirements: all special courts-martial had to include a minimum of three officers on the panel, all GCMs had to include a minimum of four officers on the panel, a minimum of two randomly selected field grade officers had to be appointed to all courts, and all members be of the rank of E-3 or higher).

<sup>49</sup> JSC Member Selection Report, *supra* note xx, Appendix J at 2-3 (The command personnel office used the installation personnel system to produce a list of 1,000 computer generated names. The computer was programmed to ensure 10-25% of those selected were field grade officers and to eliminate names from consideration based on some of the selection criteria.).

<sup>50</sup> *Id.* at 3 (Eligibility questionnaires were provided to the 1,000 Service members on the list, failure to return the questionnaire resulted in disqualification. The Chief of Military Justice reviewed the returned questionnaires to determine eligibility based on the established selection criteria.); *see also*, *id.* at 3, note 7 (Receipt of NJP was the factor causing the most disqualifications – in the first quarter 30% of those providing questionnaires were at least partially disqualified for recent receipt of NJP).

<sup>51</sup> *Id.* at 3-4.

<sup>52</sup> *Id.* at Appendix J at 4-5.

<sup>53</sup> 1977 GAO Military Jury Report, *supra* note xx, at 26-29.

<sup>54</sup> *Id.* at 29 (800 questionnaires were distributed and 456 responses received; 86% of the responses were from field grade officers).

in both the appearance of fairness and actual fairness of the process to the accused.<sup>55</sup> Trial counsel voiced concern about member intelligence levels overall and the lack of experience and maturity demonstrated by the lower grade enlisted members,<sup>56</sup> a concern shared by the military judge who observed that some juries understood the proceeding well but many “appeared not to understand the evidence, the issues, the instruction or the arguments.”<sup>57</sup> Defense counsel found random selection to be a major improvement; random selection created a greater appearance of fairness and would be fairer as “jurors would be drawn from a broader range of grades and experience.”<sup>58</sup> The results of the Fort Riley test were publicized across the Services. The Chief Counsel of the Coast Guard publicly commended the process, noting commanders and defendants generally like the system, younger enlisted members spread the word that the defendant “really does get a full, fair, and impartial trial from start to finish....,” and requests for enlisted panels increased with the knowledge the members would not be all very senior enlisted.<sup>59</sup>

Acknowledging the small number of courts tried by members during the test period, the project officer recommended similar random selection tests be conducted on a broader scale, but further testing efforts were stopped due to an ongoing General Accounting Office (GAO) review of random member selection.<sup>60</sup> In 1977 the GAO concluded a 2-year study of civilian and military jury selection processes, including the Fort Riley test. The GAO recommended “that the Congress require random selection of jurors—selecting from a pool made up of qualified jurors representing a cross section of the military community. Essential personnel, such as those needed for combat during war, would be excluded from eligibility.”<sup>61</sup>

## B. Joint Service Committee Study (1999)

In the FY99 NDAA, Congress directed the Secretary of Defense to submit a report on the processes for selection of court-martial members along with alternative methods, including

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<sup>55</sup> *Id.* at 29; *see also* JSC Member Selection Report, *supra* note xx, Appendix J, Fort Riley Material, Memorandum to HQDA, Subject: Implementation of the Random Juror Selection Pilot Program, dated 10 Mar 1975 at 6 (containing the statistical breakdown on the number of questionnaires sent and received by grade).

<sup>56</sup> JSC Member Selection Report, *supra* note xx, Appendix J, Fort Riley Material, Memorandum For: Deputy Staff Judge Advocate, Subject: Remarks Concerning Random Juries, dated 20 Feb 1975 from Trial Counsel (specifying the lower ranking enlisted Soldiers lacked sufficient knowledge of the military community and the “way of the world to sit in judgment on their fellow soldiers.”).

<sup>57</sup> *Id.* at Appendix J, Fort Riley Material, Letter to Deputy Staff Judge Advocate, dated 13 December 1974 from the Military Judge at 5-9 (also determining the test resulted in insufficient data to reach any conclusions and suggesting military judges and counsel need to have a higher level of experience before reducing the level of experience and education of members).

<sup>58</sup> *Id.* at Appendix J, Fort Riley Material, Memorandum For: Deputy Staff Judge Advocate, Subject: Comments of Chief Defense counsel Regarding the Random Jury Selection Pilot Program, undated, at 1-3 (recommending several eligibility restrictions: 1-year active duty service, E-3 or above, no prior court-martial convictions, and recommending against exclusion based on nonjudicial punishment).

<sup>59</sup> *Id.* at Appendix J at 31.

<sup>60</sup> *Id.* at Appendix J at 4.

<sup>61</sup> 1977 GAO Military Jury Report, *supra* note xx, at *i* and 44.

random selection.<sup>62</sup> A limitation on the study was a requirement that the alternatives had to be consistent with the existing requirements for court-martial service specified in Article 25(e).<sup>63</sup>

The report, drafted by the Joint Service Committee on Military Justice (JSC), identified two significant features of the military society that warrant special consideration; the significantly younger military population and the need for the selection system to “produce panel members who are available without unduly restricting the conduct of the military mission or national security.”<sup>64</sup>

Additionally, the report emphasized the need for court-martial members to have a high level of competence in partial reliance on two military-unique reasons that are no longer applicable to panel member duties.<sup>65</sup> First, unlike civilian juries, court-martial members were responsible for adjudging a sentence which required them to “understand the seriousness of an offense and how it affects military operations, morale, and discipline. Court-martial members must have the judicial temperament, experience, and training necessary to adjudge punishments commensurate with the offense and the need to maintain military discipline.”<sup>66</sup> Secondly, since special courts-martial without a military judge were statutorily authorized, the President of such a panel had to “comprehend and intelligently resolve procedural and evidentiary issues.”<sup>67</sup>

The JSC considered several methods of randomizing court-martial member selection while still adhering to the convening authority best qualified mandate in Article 25(e) and concluded the current selection practice best applies the criteria in Article 25(e), UCMJ, in a fair and efficient manner.<sup>68</sup>

### C. Independent Review Commission on Sexual Assault in the Military Study (2021)

In 2021, the Independent Review Commission on Sexual Assault in the Military (IRC) issued a report recommending, in part, random selection of court-martial members.<sup>69</sup> In light of the broad discretion the convening authority has in selecting members, the IRC found random selection

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<sup>62</sup> FY99 NDAA.

<sup>63</sup> JSC Member Selection Report, *supra* note xx, note 11 at 6 (noting alternatives that were determined to be beyond the scope of the study). The criteria identified as Article 25(d) in the report, are now located in Article 25(e)(2), UCMJ.

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 8, notes 21 and 22 (also linking competence to expeditious resolution of cases). Effective December 2023, sentencing at all non-capital cases will be determined by military judges. Effective Jan 2019, military judges are required to preside at all SPCM, MJA16.

<sup>66</sup> *Id.* at 8, n. 22.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 21 (the JSC noted that many of the models could include methods to ensure the pool included Service members from all grades or ranges of grades senior to the accused).

<sup>69</sup> IRC Report, *supra* note xx, App. B-54, Recommendation 1.7 d: Random Selection of Panel Members. Appendix B, “Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System,” contains the IRC discussion and recommendations on accountability.

necessary to “enhance the perception and reality of a fair and impartial panel,” while acknowledging the process should account for “practical realities of location and availability.”<sup>70</sup>

#### D. FY23 NDAA Randomization Requirement

The JSC has been tasked to develop the proposed amendments to the Manual for Courts-Martial to implement the Congressional requirement for the convening authority to detail qualified members randomly selected.<sup>71</sup>

Currently, each of the Services have the capability to use their personnel and pay systems as the basis for generating a randomized pool of Service members for court-martial duty.<sup>72</sup> Each system maintains information on Service members’ age, rank, time in service, education, location, unit, job, training, gender, race, ethnicity, and availability. Information added to these mission-critical systems is generally updated within 24 hours and the systems are accessible everywhere there is an internet connection. The Services have the capability to build or use existing analytical tools with a user interface to quickly and easily produce a computer generated randomized list of panel members based on programmed requirements. Lists can be generated based on units and/or locations. While some availability criteria would be in the systems (permanent change-of-station orders), follow-up with the commands and/or the Service members would be required to reliably determine future availability due to leave, TDY, and other mission requirements. The depth of information available on each criteria vary by Service. Several Personnel Systems do not collect military experience or assignment history – such information would have to be accessed through different systems.

#### IV. Detailing Court-Martial Panel Members and Trial Delays

Article 25(e)(2) requires the convening authority to detail court-martial panel members at the time the court-martial is convened, when charges are referred.<sup>73</sup> It is not uncommon for months to elapse between convening the court-martial and the beginning of the trial. Members that were available to serve on the panel when the court-martial was convened may no longer be available six months or more later, due to military deployment, training, or other reasons, when the court-martial begins. For this reason, the Military Services, with the exception of the Air Force, create “standing” convening orders, often on a yearly basis, to which all courts-martial of that type (special or general) are initially convened. With no trial date and understanding that the trial may

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<sup>70</sup> *Id.*

<sup>71</sup> See *Transcript of DAC-IPAD public meeting 13* (February 21, 2023) (testimony of Captain Anita Scott). Transcripts of all DAC-IPAD public meetings can be found on the DAC-IPAD website at <https://dacipad.whs.mil/>.

<sup>72</sup> As part of this study, the Policy Subcommittee staff interviewed experts on the Services Personnel and Pay Systems [hereinafter Personnel Systems] to determine what information relevant to court-martial member selections was collected in those systems and could be reliably accessed to generate randomized lists of Service members based on programmed requirements. The Services use the following Personnel Systems: Navy Standard Integrated Personnel System, Marine Corps Total Force System, Army Integrated Personnel and Pay System, the Air Force Military Personnel Data System and the Coast Guard Direct Access System. Service Alpha rosters are generated from these Personnel Systems.

<sup>73</sup> Art. 25(e)(2); R.C.M. 503(a) and R.C.M. 504(d)(1)(A)(ii).

not be scheduled for several months, these “standing” convening orders often have “straw panels” detailed—essentially members included on the convening order without expectation that many or most will actually sit as members on a court-martial panel.

As the trial date for a particular court-martial draws near, the convening authority amends the initial convening order, detailing members to the particular court-martial who are available for the scheduled dates of the trial. If the court-martial is delayed, the convening authority may have to issue additional amendments to the convening order as detailed panel members become unavailable and have to be replaced.

The Air Force uses a similar process, but rather than creating a “standing” convening order for all courts-martial convened in the command for that year, Air Force convening authorities maintain a pool of available members on a quarterly or similar basis and refer each case to a separate court-martial with a new convening order. The process for amending convening orders to replace unavailable members is the same.

By executive order, signed July 28, 2023, the President amended Rule for Courts-Martial (R.C.M.) 911 to require the military judge in a court-martial to randomly assign numbers to the panel members detailed to the court by the convening authority.<sup>74</sup> The general process under the amended Rules requires the convening authority to detail an appropriate number of qualified members and provide a list of all detailed members to the military judge for randomization under R.C.M. 911. The military judge then controls the process. The military judge randomly assigns numbers to all detailed members in an open court session and determines how many of the detailed members appear at court for the initial session.<sup>75</sup> At assembly (swearing in of the members), the military judge will account for the members present and those the military judge temporarily excused. The military judge then uses the list to require additional members to appear in the randomly assigned order, as needed.<sup>76</sup>

The Joint Service Committee draft revisions to Appendix 15 of the Manual for Courts-Martial, the analysis of the R.C.M.s, provides the following explanation:

“R.C.M. 503(a)(1) is amended to reference Article 25, UCMJ, and to require the convening authority to provide a list of detailed members to the military judge to randomize in accordance with R.C.M. 911. The Discussion accompanying R.C.M. 503(a)(1) is amended to require the convening authority to detail a sufficient number of qualified persons. In order to determine a sufficient number of qualified persons to detail to a court-martial, the convening authority, as advised by the staff judge advocate, should consider the following non-exclusive list of factors to ensure an adequate number of members remain after challenges: operational necessity; forum of the court-martial; availability of Article 25, UCMJ, qualified servicemembers available to the

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<sup>74</sup> Executive Order 14103, Annex 2, para. jjjj (July 28, 2023), *available at* <https://jsc.defense.gov/Military-Law/Executive-Orders/>

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



convening authority; anticipated awareness of, and knowledge regarding, the parties or facts of the case; and the capability to detail additional members to the convening order.”<sup>77</sup>

This list of factors would be better suited to court-martial panel members being detailed closer in time to the court-martial.

## V. Stakeholder Perspectives

The Policy Subcommittee sent a request for information (RFI) to each of the Military Services’ Criminal Law/Military Justice organizations, Office of Special Trial Counsel (OSTC), Trial Defense organizations, and Victims’ Counsel organizations, requesting their responses to a series of questions on Article 25 criteria and panel selection. The Army, Navy, and Coast Guard victims’ counsel program managers deferred to their respective criminal law department responses to these questions. Each of these organizations also spoke at DAC-IPAD public meetings or Policy Subcommittee meetings, answering members’ questions on these topics. The DAC-IPAD also heard the perspectives on these issues of several prosecutors with both military and civilian experience and senior enlisted members from each Service.

The Policy Subcommittee also invited responses to questions on these issues from several victim advocacy organizations and members of academia who have written on the military justice system. The Subcommittee received written responses from Survivors United and Service Women’s Action Network (SWAN) and representatives of Survivors United and Protect Our Defenders (POD) appeared at the DAC-IPAD’s June 2023 public meeting to provide their perspectives on Article 25 criteria and the panel selection process. In addition, the Subcommittee received written responses from the following members of academia: Professor Eugene Fidell<sup>78</sup>, Dean Lisa Schenk<sup>79</sup> and Professor David Schlueter<sup>80</sup>, and Professor Richard Rosen<sup>81</sup>.

### A. Requirement that panel members be senior in rank and grade to the accused

All Service trial organizations, academics, and victim advocacy organizations who responded unanimously agreed that the requirement that panel members be senior in rank or grade to the accused be maintained.<sup>82</sup>

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<sup>77</sup> Joint Service Committee on Military Justice draft Annex to the draft Executive Order, Discussion section to R.C.M. 503(a)(1), published in the Federal Register and *available at* <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>.

<sup>78</sup> 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.

<sup>79</sup> Dean Lisa Schenk, Associate Dean for National Security, Cybersecurity, and Foreign Relations Law, and Distinguished Professorial Lecturer in Law, the George Washington University Law School.

<sup>80</sup> Professor David Schlueter, Professor of Law Emeritus, St. Mary’s University School of Law.

<sup>81</sup> Professor Richard Rosen, Glenn D. West Endowed Research Professor of Law, Texas Tech University School of Law, and Colonel (retired), U.S. Army.

<sup>82</sup> See Request for Information (RFI) responses from Service criminal law organizations, Office of Special Trial Counsel, trial defense organizations, and victims’ counsel organizations; Professor Eugene Fidell, Dean Lisa

The Service trial organizations and members of academia stated that having junior panel members decide the guilt or innocence of a senior-ranking accused would be inconsistent with the hierarchical structure of the military.<sup>83</sup> Members of the SWAN and Survivors United also pointed out that this could lead to pressure on the panel members from the accused and possible retribution following the trial.<sup>84</sup>

## B. Article 25, UCMJ, criteria

### 1. Service Criminal Law Organizations and OSTC Prosecutors

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 in selecting panel members the convening authority deems best qualified for the duty based on the existing Article 25 criteria.<sup>85</sup> The Air Force OSTC does, however, support aligning the minimum age with the federal minimum age of 18.<sup>86</sup>

Regarding whether additional criteria should be added, the OSTC prosecutors agreed Service members who are flagged for investigation, pending disciplinary actions, or who 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.<sup>87</sup>

### 2. Service Defense Organizations

The military trial defense organizations support amending the Article 25 criteria to eliminate the experience, training, and judicial temperament criteria.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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Schenk, Professor David Schlueter, and Professor Richard Rosen; and Service Women's Action Network (SWAN) and Survivors United, *available at* <https://dacipad.whs.mil/>

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See RFI responses from Service criminal law organizations and OSTC prosecutors.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See RFI responses from Service trial defense organizations.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*



Regarding whether additional criteria should be added, the trial defense organizations agreed Service members who 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.<sup>91</sup> 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, as those issues can be addressed in the voir dire process.<sup>92</sup> Additionally, the Army recommended adding a requirement that court-martial members be U.S. citizens.<sup>93</sup>

### 3. Service Victims' Counsel Organizations

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.<sup>94</sup> 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.<sup>95</sup>

Neither program manager believe other criteria should be required. Instead they support using the voir dire process to address mental and physical conditions and disciplinary status, unless disqualification is already permitted under the existing provisions of Article 25.<sup>96</sup>

### 4. Military Services' Senior Enlisted Panel

The DAC-IPAD heard from a panel of senior enlisted leaders at the June 13-14, 2023, public meeting. The panelists provided that the current Article 25 criteria are working well and should remain intact, except for judicial temperament which is too subjective and insufficiently defined. They also agreed that the minimum age to serve on a court-martial panel should be older than 18.

### 5. Prosecutors with Military and Civilian Experience

Members of this panel did not see a continued military necessity for the current Article 25 criteria.<sup>97</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See RFI responses from Service victims' counsel organizations.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See *Transcript of DAC-IPAD public meeting* (June 13, 2023) (testimony of BG Bobby Christine, LTC (P) Joshua Bearden, Ms. Magdalena Acevedo, and Ms. Kathleen Muldoon). Transcripts of all DAC-IPAD public meetings can be found on the DAC-IPAD website at <https://dacipad.whs.mil/>.

## 6. Members of Academia and Victim Advocacy Organizations

Professor Fidell suggested that the current Article 25 criteria should be revised to more closely reflect the requirements of the Federal system.<sup>98</sup> He suggested the minimum age to serve on a panel should be 18, but opposes any education, experience, training, or judicial temperament requirements to serve on a panel. Dean Schenk and Professor Schlueter do not believe minimum requirements are necessary, instead the convening authority should continue to select members based on age, training, experience, and judicial temperament.<sup>99</sup>

The representative from SWAN suggested that court-martial panel members should be at least 18 years old and be proficient in English.<sup>100</sup> They also suggested a one-year length of service requirement for panel service to allow members to complete basic training requirements and to obtain a better understanding of the military justice system.<sup>101</sup>

### C. Randomization of the selection process

#### 1. Service Criminal Law Organizations and OSTC Prosecutors

The Services recommend the DAC-IPAD defer the study on randomization until after regulations to implement the statutory requirement for randomization are completed and implemented. They expressed concerns about decreased efficiency, loss of the established Article 25 factors, and the ability of commanders to retain control over determinations of availability.

#### 2. Service Trial Defense Organizations

The Service trial defense organizations all support randomizing the member selection process. Some support a fully randomized process, while others support a modified process that includes using geographic locations rather than units or commands to expand the pool of potential members.

#### 3. Service Victims' Counsel Organizations

The Marine Corps and Air Force victims' counsel program managers<sup>102</sup> support using personnel systems to randomly select the initial pool of members, prior to the convening authority detailing members in accordance with current Article 25 requirements.

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<sup>98</sup> See RFI response from Professor Fidell.

<sup>99</sup> See RFI responses from Professor Fidell, Dean Schenk, and Professor Schlueter.

<sup>100</sup> See RFI response from SWAN.

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

<sup>102</sup> The remaining Services deferred to their criminal law organizations.

#### 4. Military Services' Senior Enlisted Panel

Acknowledging that some form of random selection is required, the Services' senior enlisted members want this Committee to ensure the system is flexible enough for each Service to execute differently depending on the needs of their Service and to ensure the system is appropriately resourced. Most are concerned about the maturity and competency of randomly selected junior enlisted and officer members. One expressed concern about the extent a junior enlisted member's voice will be heard in deliberations.

#### 5. Prosecutors with Military and Civilian Experience

The presenters all support modifying the selection process, while retaining the deployability of the system.<sup>103</sup> All presenters also agreed that a selection process that enhances both actual fairness in the system and the perception of fairness is extremely important.<sup>104</sup> Additionally, all of the presenters support measures to ensure the selection system captures a broad pool of Service members that fairly represent the diversity of the military population.<sup>105</sup> Ms. Acevedo supports removing the convening authority from the selection process and developing a modified random selection system that provides for a fair cross section, cautioning that every person who has a role in determining who is qualified adds their own biases, regardless of good intentions.<sup>106</sup> Without adopting a position, BGen Christine stated a choice has to be made between keeping the Article 25(d) criteria selection process and establishing a random selection process – the two are not compatible, if the commander determines a criteria, it is not random.<sup>107</sup> LTC Bearden and Ms. Muldoon are open to a randomized system that eliminates the current selection criteria and provides a diverse pool of Service members, but allows the convening authority to have a role in order to ensure military readiness is not affected.<sup>108</sup>

#### 6. Members of Academia and Victim Advocacy Organizations

Dean Schenk and Professor Schlueter oppose a wholly random military panel selection process due to difficulty in implementation, increased processing time, and the potential for adversely impacting military readiness and national security. Professor Fidell believes a truly random system should produce diverse venires reflective of the military community, but also supports a

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<sup>103</sup> See *Transcript of DAC-IPAD public meeting* (June 13, 2023); see also, *id.* at 107, 125-128 (BGen Christine expressed that the current system and a randomized system are equally capable of achieving justice. He also believes great modifications can be made to the way a panel is selected).

<sup>104</sup> *Id.* at 135-143.

<sup>105</sup> *Id.* at 137-144.

<sup>106</sup> *Id.* at 121, 135 (Ms. Acevedo stated, "Right now you have a system where the same person who is pre-qualifying the jurors is also bringing the charges.")

<sup>107</sup> *Id.* at 161-162 (BG Christine clarified that "We're going to leave it to the commander to determine temperament, or we're truly going to randomize it.")

<sup>108</sup> *Id.* at pgs 122-124; 129-130; 133-135; 140-144.

modified selection system that is “focused, transparent, and defensible” to foster a diverse venire, regardless of whether the resulting panel is diverse. SWAN and Survivors United support a modified random selection process that expands the pool of potential members to a geographical area and provides for diversity in race, ethnicity, and gender. Additionally, SWAN supports diversity in age and grade.

#### D. Diversity in Courts-Martial Panels

##### 1. Service Criminal Law Organizations and OSTC Prosecutors

The Service criminal law organizations 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.”<sup>109</sup> 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.<sup>110</sup>

##### 2. Service Trial Defense Organizations

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.

##### 3. Service Victims’ Counsel Organizations

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

##### 4. Military Services’ Senior Enlisted Panel

Several members support consideration of these factors for a more diverse panel, but point out that diversity in background, experience, and socio-economic status may be just as important. Some support letting the accused request minority representation.

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<sup>109</sup> 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>.

<sup>110</sup> *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.

## 5. Prosecutors with Military and Civilian Experience

All presenters agreed that diversity is important. Ms. Acevedo believes the Article 25 criteria limit the ability to select a fair cross-section of the community, diversified by socioeconomic status and life experiences in addition to gender, racial, and ethnic diversity.<sup>111</sup>

## 6. Members of Academia and Victim Advocacy Organizations

Professor Fidell warned that efforts to achieve balance or diversity often vests too much discretion in the individual who selects panels, even if that person is well-intentioned and desires a diverse panel. He recommends the military justice system closely follow the constitutional jurisprudence in *Batson v. Kentucky*, and its progeny. Dean Schenk and Professor Schlueter agree that the purpose of random selection is to remove discretion in the process and to avoid the appearance of “stacking the panel.” They recommend the Committee review the need to add race, ethnicity, and gender as criteria for the convening authority to consider.

## E. Enlisted Panels

### 1. Service Criminal Law Organizations and OSTC Prosecutors

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.<sup>112</sup> 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.<sup>113</sup>

### 2. Service Trial Defense Organizations

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.<sup>114</sup> 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.<sup>115</sup>

### 3. Victims’ Counsel Organizations

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<sup>111</sup> See *Transcript of DAC-IPAD public meeting* (June 13, 2023) at 117.

<sup>112</sup> See RFI responses from Service criminal law organizations or OSTC prosecutors.

<sup>113</sup> *Id.*

<sup>114</sup> See RFI responses from Service trial defense organizations.

<sup>115</sup> *Id.*

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.<sup>116</sup> The Air Force victims' counsel program manager does not oppose an all enlisted panel.<sup>117</sup>

#### 4. Military Services' Senior Enlisted Panel

Most panel members oppose an all enlisted panel as officers bring different experiences to the table. Some noted that there is nothing in the current rules to prevent an all enlisted panel. Half of the panel members support increasing the percentage of enlisted representation, noting enlisted members serving today are highly educated and add an important perspective.

#### 5. Prosecutors with Military and Civilian Experience

Several panel members determined enlisted members could fulfill panel member duties.

#### 6. Members of Academia and Victim Advocacy Organizations

Professor Fidell doesn't recommend changing Article 25 to provide for an all enlisted panel, but has no objection if an all enlisted panel is randomly chosen. Dean Schenk and Professor Schlueter support an option for an all enlisted panel for enlisted accused.

### VI. Concerns Regarding Article 25 Criteria and the Convening Order Process

1. IRC: trust in the military justice system
2. Lack of diversity.
  - a. There is a perception that panels are primarily composed of senior officers and enlisted Service members.
  - b. There is a perception that panels are not sufficiently diverse by race and ethnicity.
  - c. There is a perception that panels are not diverse by gender.
3. Too much power in the convening authority, who decides whether there is a court-martial, what the charges are at the court-martial, and who the members are at the court-martial, and can affect the post-trial results through clemency actions and ordering rehearings. Abuse is difficult to prove.<sup>118</sup> Broad discretion allows for differing perspectives on what best qualified based on the criteria means.
4. Given the demographics of the military today, whether the purely random selection of court-martial members would result in many panels of young, all white males. See 1, above.
5. Lack of transparency in the member selection process contributes to the perception that the member selection process is unfair and provides the potential for abuse.
6. Inherent (implicit) bias throughout the nomination and selection process.

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<sup>116</sup> See RFI responses from Service victims' counsel organizations.

<sup>117</sup> *Id.*

<sup>118</sup> 1977 GAO report.

## Section 2: Article 25 Issues Deliberation Guide

### 1. Should the current requirement that convening authorities select members who the convening authority considers best qualified by reason of age, education, training, experience, length of service, and judicial temperament be ended or modified?

- Article 25(e)(2) provides: 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.

**Draft Recommendation 1:** Amend Article 25(e) to remove the requirement for the convening authority to detail members who “in his opinion, are best qualified” based on “age, education, training, experience, length of service, and judicial temperament.”

Draft Finding 1: At the time that the Article 25(e) “best qualified” criteria were established in the UCMJ in 1950, military judges did not preside over courts-martial and panel members also served as the sentencing authority. Changes in the law have resulted in the establishment of a trial judiciary with military judges presiding at every court-martial. Additionally, military judges will soon serve as sentencing authority in all but capital cases, reducing the panel’s role to determining guilt or innocence of the accused, as is the case in federal and most state courts. This reduced role of the panel eliminates the necessity of the “best qualified” criteria in Article 25(e).

Draft Finding 2: The Article 25(e) criteria and “best qualified” mandate result in courts-martial panels primarily comprised of officers and senior enlisted Service members. There is not a military requirement to support this composition, which ensures most accused will not be tried by a panel of their peers or a panel fairly reflective of the Service composition.

Draft Finding 3: Elimination of the subjective “best qualified” criteria, along with implementation of a process to randomize member selection, will help eliminate the perception that the convening authority is selecting members most likely to convict the accused and increase trust and confidence in the military justice system.

Draft Finding 4: Officers and enlisted members of all ranks are sufficiently qualified to serve on courts-martial panels.



**2a. How should randomized court-martial panel member selection be implemented?**

**2b. In a modified randomized court-martial panel member selection process, should diversity of members based on rank be a factor for consideration?**

**2c. In a modified randomized court-martial panel member selection process, should diversity of members based on race, ethnicity, and gender be a factor for consideration?**

- Section 543 of the FY23 NDAA, provides:

#### RANDOMIZATION OF COURT-MARTIAL PANELS

(a) IN GENERAL.—Section 825(e) of title 10, United States Code (article 25(e) of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph:

“(4) When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.”

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date that is two years after the date of the enactment of this Act and shall apply with respect to courts- martial convened on or after that effective date.

(c) REGULATIONS.—Not later than the effective date specified in subsection (b), the President shall prescribe regulations implementing the requirement under paragraph (4) of section 825(e) of title 10, United States Code (article 25(e) of the Uniform Code of Military Justice), as added by subsection (a) of this section.

**Draft Recommendation 2:** Amend the Rules for Courts-Martial to provide for a modified randomized court-martial panel member selection process utilizing the Military Services’ personnel and pay systems to select the members. This system should preclude the convening authority or other members of command or the judge advocate office from hand-selecting members. The convening authority should retain the authority to detail the panel members. In addition to the required eligibility criteria, the randomized selection should be modified to include the following factors:

1. Diversity of members based on rank
2. Diversity of members based on race, ethnicity, and gender

**Draft Recommendation 3:** The Secretary of Defense direct initiation of a pilot project to create a court administrator position to be responsible for the panel member selection process – rather than the staff judge advocate or command.

Draft Finding 1: Randomization of the court-martial member selection process is not compatible with the Article 25(d) requirement for the convening authority to select members “best qualified” on existing criteria.



Draft Article 25, UCMJ, Deliberation Guide provided for the September 19-20, 2023 DAC-IPAD public meeting

Draft Finding 2: A purely random court-martial member selection process would not reflect a fair cross-section of the military community due to the predominately junior military population.

Draft Finding 3: A randomized panel selection process that removes the ability for the convening authority or others in the chain of command or judge advocate office from selecting members will provide a more transparent process and increase Service member trust in the court-martial process.

**3. Should the authority to excuse members (prior to and after the court is assembled) from serving on a court-martial remain with the convening authority?**

- Article 25(f) provides: 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.

**Draft Recommendation 4:** Amend Article 25 to explicitly permit convening authorities the authority to determine whether randomly selected Service members are available prior to being detailed to a court-martial panel and retain the authority in Article 25 to exempt or excuse individuals after being detailed for operational requirements or personal reasons.

**Draft Recommendation 5:** Amend the Rules for Courts-Martial to provide a transparent method for convening authorities to document availability and excusal determinations.

Draft Finding 1: Convening authorities must retain availability and excusal determination authority in the interest of military readiness.

Draft Finding 2: Documentation of the bases for excusal and availability determinations increases transparency, preserves the perception of fairness, and prevents abuse.

#### 4. What eligibility requirements should be prerequisites for serving on a court-martial panel?

##### A. Senior in rank or grade to the accused.

- Art 25(e)(1) provides: 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.

**Draft Recommendation 6:** The requirement in Article 25(e)(1) that, when it can be avoided, no accused Service member may be tried by a court-martial in which any member is junior to the accused in rank or grade should be retained.

Draft Finding: The Article 25 requirement that court-martial members be senior by rank and grade to the accused serves a specific military purpose to ensure the hierarchical rank structure of the military is maintained.

##### B. Length of Service.

**Draft Recommendation 7:** Amend Article 25 to add a two-year time in service requirement for court-martial panel member eligibility.

Draft Finding 1: A minimum length of service requirement is supported by a specific military purpose – to ensure initial military training is completed and to give Service members a greater understanding of military culture.

Draft Finding 2: A minimum length of service requirement of two years eliminates the need to require a minimum age requirement for service as a panel member.

##### C. Age, Education, Experience, Training, and Judicial Temperament

Draft Finding: There is no military necessity for having minimum requirements for service as a panel member based on age, education, experience, training, or judicial temperament.

**5. Should race, ethnicity, and gender be explicitly made permissible criteria for consideration in panel selection, for purposes of inclusion?**

**Draft Recommendation 8:** Amend Article 25 to provide that rank or grade, race, ethnicity, and gender are permissible criteria for consideration in panel member selection, for purposes of inclusion to better obtain a representative cross-section of the military community and for the perception and reality of a fair and impartial military justice process.

Draft Finding 1: This recommendation would put in statute what has already been recognized as permissible in case law. [Note: This is dependent on the forthcoming decision in *U.S. v. Jeter*.]

Draft Finding 2: Panels comprised of individuals with different backgrounds and experiences view evidence at trial through the lens of those backgrounds and experiences, which may lead to more robust deliberation and outcomes that are not only fair, but perceived as fair.

**6. Should the ineligibility criteria include other categories than the accuser, witness for the prosecution, preliminary hearing officer, and counsel in the same case?**

- Article 25(e)(2) provides: 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.
- The discussion section to Rule for Courts-Martial (R.C.M.) 503(a)(1)(c) provides: The following persons are subject to challenge under R.C.M. 912(f) and should not be detailed as members: any person who is, in the same case, an accuser, witness, preliminary hearing officer, or counsel for any party or witness; any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused, unless this is unavoidable; or any person who is in arrest or confinement.

**Draft Recommendation 9:** The President should establish a uniform rule establishing eligibility requirements for service on a court-martial panel relating to whether the potential members have been convicted of an offense, are under investigation, have received nonjudicial punishment, or other potentially disqualifying criteria. At the discretion of the Secretary of Defense, the Military Services may also establish additional eligibility criteria through regulation. Any additional eligibility criteria established by the Military Services should be published to the public through the Federal Register and other appropriate means for maximum transparency.

Draft Finding: Federal courts require jury members to be proficient in English, have no disqualifying mental or physical condition, and not be subject to felony charges or convicted of a felony.

## 7. When should panel members be detailed to a court-martial?

- Article 25(e)(2) and R.C.M. 504(d)(2)(A)(ii) require the convening authority to detail panel members when convening the court-martial (at referral of charges).

**Draft Recommendation 10:** Amend Article 25(e)(2) and (3) to remove the requirement that the convening authority detail panel members at the time the court-martial is convened. Instead, provide that the convening authority must detail panel members within a reasonable time prior to commencement of trial.

Draft Finding 1: The requirement to detail members at the time of referring a case to court-martial often results in excusal and replacement of a significant number of the originally detailed members, creates an administrative burden, and does not serve a military purpose based on the length of time from referral to empanelment and the low percentage of courts-martial in which the accused elected to be tried by members.

Draft Finding 2: Providing the flexibility to detail members at a later date will allow the convening authority to determine the appropriate number of qualified members to detail to a specific court-martial, using the criteria outlined in the discussion section accompanying Rule for Courts-Martial 503(a)(1).

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

## **Request for Information**

**1 March 2023**

## **Victim Access to Information**

### **I. Purpose**

In Section 549B of the National Defense Authorization Act for Fiscal Year 2023, Congress directed the DAC-IPAD to 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 information 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).

The information requested will inform the DAC-IPAD's review and assessment of this topic.

### **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. Suspense**

<b>Suspense</b>	<b>RFI</b>	<b>Proponent – Military Services</b>
<b>31 May 2023</b>	Narrative Responses	Service TJAGs and SJA to the Commandant of the Marine Corps provide narrative responses to the questions in Section IV, Paragraph A, of this RFI.
<b>Suspense</b>	<b>RFI</b>	<b>Proponent – Military Services</b>
<b>31 May 2023</b>	Narrative Responses	Services—The identified group provide narrative responses to the identified questions in Section IV, Paragraphs B and C of this RFI.

## **DAC-IPAD Request for Information**

### **Victim Access to Information**

#### **IV. Information Requested**

##### **A. Questions for the Offices of The Judge Advocates General and the SJA to the Commandant of the Marine Corps (Questions 1 – 5)**

1. Please identify the release authority and the stages of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral—at which the information described in (1) – (3) below should be provided to counsel representing the 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.

2. Please describe your Service's current practice for sharing the information described in (1) – (3) above with counsel representing a victim.

3. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing the information described in (1) – (3) above with counsel representing a victim on the privacy of individuals, the criminal investigative process, and the military justice system generally?

4. Please provide your Service's position on the feasibility and advisability of establishing a uniform policy across all the Military Services for the sharing of the following information with 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.



## **DAC-IPAD Request for Information**

### **Victim Access to Information**

5. Please identify:

a. Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.

b. Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.

### **B. Questions for the Services' Special Victim's Counsel Program Managers** **(Questions 1 – 4)**

1. How, in practice, do counsel representing a victim as defined in Article 6b, UCMJ, obtain the information described in (1) – (3) below and at what stage of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral?

(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.

2. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing of information described in (1) – (3) above with a victim, or counsel representing a victim, on the privacy of individuals, the criminal investigative process, and the military justice system generally?

3. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information identified above with counsel representing a victim? With a victim? Why or why not?

4. Please identify:

a. Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.

b. Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.

## **DAC-IPAD Request for Information**

### **Victim Access to Information**

#### **C. Questions for the Service Chiefs of the Trial Defense Services Organizations** **(Questions 1 – 3)**

1. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing the information described in (1) – (3) below with counsel representing a victim as defined in Article 6b, on the representation of the accused in the investigative process and in military judicial proceedings?

(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.

2. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information identified above with counsel representing a victim? Why or why not?

3. Please identify and explain any recurring issues in your discovery practice regarding the sharing of information not listed above with counsel representing a victim.

**Sec. IV. A. Narrative Questions for the Offices of The Judge Advocates General and the SJA to the Commandant of the Marine Corps (Questions 1 – 5)**

	<p><b>1. Please identify the release authority and the stages of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral—at which the information described in (1) – (3) below should be provided to counsel representing the victim.</b></p> <p><b>(1) Any recorded statements of the victim to investigators.</b></p> <p><b>(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.</b></p> <p><b>(3) Any medical record of the victim that is in the possession of investigators or the Government</b></p>
<p><b>USA</b></p>	<p>(1) TJAG Policy 22-07 provides that the prosecution will provide the victim/Special Victims' Counsel (SVC) a copy of all statements and documentary evidence produced or provided by the victim upon preferral. Upon receipt by the government, the prosecution will provide to the victim/SVC a summarized transcript of the victim's testimony at the preliminary hearing.</p> <p>(2) DoDI 6495.02, Enclosure 7, para. a.(12)(b) states, "Upon completion of the SAFE, the sexual assault victim shall be provided with a hard copy of the completed DD Form 2911." The DD Form 2911, is the SAFE report. If a FOIA request was received by CID for medical records included in the investigative file, the FOIA would be referred to the custodian of those records, Defense Health Agency. If a FOIA was received for forensic testing performed on the property of the victim, such as a phone, CID would be the custodian of the record and redact in compliance with FOIA and the Privacy Act.</p> <p>(3) Servicemember victims may always request a copy of their own medical records from the medical treatment facility. There is no policy addressing release of victim medical records in the possession of investigators. If a FOIA request was received by CID for medical records included in the investigative file, the FOIA would be referred to the custodian, the Defense Health Agency.</p>
<p><b>USMC</b></p>	<p>(1) Upon request by the victim or the victim's counsel, counsel for the government shall provide to the victim or the victim's counsel a copy of the victim's statements, including the victim's video statements. These may be requested and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding.</p> <p>(2) Upon request by the victim or the victim's counsel, counsel for the government shall provide a copy of any reports arising from a sexual assault evidence collection kit, including a deoxyribonucleic acid (DNA) profile match, toxicology report, or other information collected as part of a medical forensic examination, unless doing so would impede or compromise an ongoing investigation. These may be requested</p>

	<p>and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding. Additionally, Department of Defense Instruction 6495.02 and Secretary of the Navy Instruction 1752.4C require that upon completion of a sexual assault forensic examination, the victim shall be provided with a hard copy of the completed Department of Defense Sexual Assault Forensic Examination Report.</p> <p>(3) Upon request by the victim or the victim's counsel, counsel for the government shall provide documentary evidence derived directly from and pertaining directly to the victim that are in the possession of the government, including medical records of the victim. These may be requested and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding.</p>
<b>USAF</b>	<p>DAFI 51-201, <i>Administration of Military Justice</i>, 14 April 2022, Chapter 8, Section 8B, governs the provision of information to victim's counsel (VC). This chapter does not distinguish release procedures based on stages of the military justice process. Instead, regardless of the stage of the military justice process, a uniformed victim's counsel may request statements of the victim to investigators, the record of any forensic examination of the person or property of the victim, or any medical record of the victim that is in the possession of investigators or the government by making an "official use" request under the Privacy Act and FOIA. <i>See</i> 5 U.S.C. §552a(b)(1); DoD 5400.11-R, <i>Department of Defense Privacy Program</i>, paragraph C4.2.1. Civilian victims' counsel may request information pursuant to the "routine use" provision of the SORN "Military Justice and Civilian Criminal Case Records," DOD 0006.</p> <p>Upon receiving such a request, the release authority depends on which agency is in possession of the requested records. Pursuant to DAFI 51-201, paragraph 8.5.1, the Staff Judge Advocate is the release authority for "information generated and maintained by the servicing legal office in accordance with law and policy." Consequently, should the legal office maintain the above referenced items, the Staff Judge Advocate would be the release authority. This provision makes it likely that the release authority for such records post-preferral, Article 32 preliminary hearing, or post referral would be the Staff Judge Advocate as the legal office likely to be in possession of any recorded statements, record of forensic examinations, or any medical records of the victim at those stages of the military justice process. There may be situations where the VC makes the request for such items pre-preferral, prior to the legal office being in possession of these records. In those situations, the release authority will likely be the OPR for the investigative agency, whether it be Air Force Office of Special Investigations or Security Forces Office of Investigations. <i>See</i> DoDM 5400.7-R_AFMAN 33-302, <i>Freedom of Information Act Program</i>. The victim or their representative is also entitled to get copies of their own records maintained in their own DAF Privacy Act record at any time, such as copies of their own DAF medical records. <i>See</i> DoD 5400.11-R, <i>DoD Privacy Program</i>.</p>
<b>USN</b>	<p>For subsections (a) – (c) below, the release authority is government counsel after consultation with other agencies, as appropriate. The stage of release is determined</p>

	<p>by the timing of the request or as provided by applicable instruction. These matters may be requested and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding.</p> <p>(1) Commander Naval Legal Service Command Instruction 5810.1 calls for any statement of the victim, including a copy of any recording and transcript, be provided to victims, or Victim Legal Counsel (VLC) when applicable, upon request when in the physical possession of the government counsel. As the recorded statement of the victim to investigators can be a critical factor in a VLC's advice to their client regarding a victim's decision to participate in a prospective court-martial and testify at any preliminary hearing, these statements are provided to the VLC upon request.</p> <p>(2) Commander Naval Legal Service Command Instruction 5810.1 calls for any images or videos of the victim collected in the course of the investigation, including photographs taken during a sexual assault forensic examination, be provided to the victim, or VLC when applicable, upon request. Other portions of a forensic examination are provided to the victim or VLC upon their request unless doing so would impede or compromise an ongoing investigation. The DD Form 2911 (sexual assault forensic examination report) is provided to sexual assault victims upon completion of the sexual assault forensic examination in accordance with Department of Defense Instruction 6495.02, Enclosure 7, para. a.(12)(b).</p> <p>(3) Commander Naval Legal Service Command Instruction 5810.1 is silent on providing medical records to crime victims, as generally trial counsel obtain the victim's medical records with the assistance of the victim. In those rare cases where the victim or their counsel make a request for the victim's medical records within the control of the government, it is appropriate for trial counsel to share those records upon request of the victim or VLC. Of note, service member victims may always request a copy of their own medical records from the medical treatment facility.</p>
<b>USCG</b>	<p>(1) Upon preferral of charges, a crime victim is entitled to a copy of any recordings of interviews of the victim that are in the possession of trial counsel or the staff judge advocate. The release authority can be the trial counsel or Coast Guard Investigative Service (CGIS) special agent.</p> <p>(2) It should be noted at the outset that these records are sensitive and subject to safeguards to ensure the privacy of the victim and the integrity of the investigation. Release of such information is safeguarded under the Privacy Act, the Health Insurance Portability Accountability Act (HIPAA), and other laws such as the Violence Against Women Act. The answer is divided into two parts – forensic medical exams and forensic exams conducted on a victim's property.</p> <p><i>Forensic medical exams</i></p> <p>For forensic medical exams, Coast Guard clinics typically do not conduct these examinations themselves. Instead, they usually collaborate with a state facility where a forensic examiner is often contracted with a state law enforcement agency for Coast Guard members and eligible dependents.</p>

Procedures for generating and releasing information vary among jurisdictions, but the following is a summary of how it is normally done. The exam generates two parts: forensic evidence collection to be used in the investigation of a criminal case and medical care for the evaluation and treatment of injuries. The complete forensic report is maintained separately from the patient's medical record to limit the disclosure of unrelated information and preserve confidentiality. There are separate release protocols for the medical evaluation and the forensic evidence collection aspects of the report. While the victim is generally entitled to view his or her medical records (which will be discussed later), the forensic evidence and its reports are subject to strict safeguards to preserve chain of custody and security. The forensic exam report itself is typically entered in the CGIS Report of Investigation. CGIS Headquarters acts as the release authority. However, its release would be subject to the Privacy Act including any conditions that the originator placed upon its release.

In some cases, it may be more efficient for the victim to obtain the record, or portions of it, directly from the facility itself. For example, facilities often have protocols in place that authorize more ready access to toxicology results as opposed to other portions of the examination. The facility responsible for conducting the exam should have already provided information to the victim regarding the procedures to access the records.

*Forensic exams on a victim's property*

Regarding forensic exams performed on a victim's property, the resulting documents are generally considered law enforcement records. CGIS maintains the system of records notice for these documents and acts as the release authority.

(3) Coast Guard members are entitled to examine their own health record. Coast Guard members may access their health records at a Coast Guard clinic or, for units without a clinic, from their Executive Officer. The recent transition to MHS Genesis, an electronic record system, should also serve to increase access to electronic medical records and health providers.

<b>2. Please describe your Service's current practice for sharing the information described in (1) – (3) above with counsel representing a victim.</b>	
<b>USA</b>	TJAG Policy 22-07 directs the prosecution to provide, without request, the victim/SVC a copy of all statements and documentary evidence produced or provided by the victim upon preferral. After preferral, upon receipt by the government, the prosecution will provide to the victim/SVC a summarized transcript of the victim's testimony at the preliminary hearing. Additional requests are addressed through FOIA.
<b>USMC</b>	The Marine Corps' practice for sharing this information is reflected in the provisions described above from Marine Corps Order 5800.16, Legal Support and Administration Manual, Volume 16, Chapter 4.
<b>USAF</b>	<p>The Air Force's current practice for sharing the information described above is to comply with the requirements set forth in DAFI 51-201, DoD 5400.11-R, paragraph C4.2.1, and Department of Defense Instruction 1030.02, <i>Victim and Witness Assistance</i>. For those records in possession of the Staff Judge Advocate, the Staff Judge Advocate may release records that are minimally required to accomplish the counsel's intended use as articulated in the request. <i>See</i> DoD 5400.11-R, paragraph C4.2.1. DAFI 51-201, paragraph 8.5.3 provides examples of such records, to include, "[c]opies of the VC's client's statements and documents provided by the client" and "[c]opies 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."</p> <p>Before releasing information to the counsel of the victim, Government counsel should redact Privacy Act information regarding individuals other than the attorney's client. <i>See</i> DAFI 51-201, paragraph 8.5.4. In cases where the victim's counsel is a civilian, the Staff Judge Advocate must obtain a signed statement from the civilian counsel stating counsel agrees not to release any protected information to others not involved with representing the victim. <i>See</i> DAFI 51-201, paragraph 8.5.4. In turn, the victim's counsel has a duty to discuss relevant information contained in released documents with his or her client to help the client understand the outcome of the trial or other proceeding, make case-related decisions, or otherwise assist the counsel in performing their duties as they relate to their client. <i>See</i> DAFI 51-207, <i>Victim and Witness Rights and Procedures</i>, paragraph 3.17.</p>
<b>USN</b>	<p>(1) As previously stated, Commander Naval Legal Service Command Instruction 5810.1 calls for any statement of the victim, including a copy of any recording and transcripts be provided to the victim, or VLC, as applicable, upon request.</p> <p>(2) As detailed above, Commander Naval Legal Service Command Instruction 5810.1 calls for any images or videos of the victim collected in the course of the investigation including photographs taken during a Sexual Assault Forensic Examinations, be provided to the victim, or VLC when applicable, upon request. Other portions of a forensic examination are provided to the VLC or victim upon their request unless doing so would impede or compromise an ongoing investigation. The DD Form 2911 (sexual assault forensic examination report) is</p>

	<p>provided to sexual assault victims upon completion of the sexual assault forensic examination in accordance with Department of Defense Instruction 6495.02.</p> <p>(3) Commander Naval Legal Service Command Instruction 5810.1 is silent on providing medical records to crime victims, as victims are generally involved in any attempt by the government to access those medical records. Should the victim or their counsel make a request for the victim's medical records within the control of the government, trial counsel will provide those records.</p>
<b>USCG</b>	<p>Regarding paragraph 1(a), the trial counsel will normally provide information to the victim counsel if they possess such information. Otherwise, the trial counsel will put the victim counsel in contact with the CGIS official who can provide a link for download.</p> <p>Regarding paragraph 1(b), if the victim's counsel wishes to view a forensic medical exam report or a report of a forensic exam on the victim's property, a CGIS special agent or trial counsel can arrange for them to view the report in a secure environment, such as the CGIS office itself. However, if the victim counsel requests a copy of the report, the release authority would be CGIS Headquarters pursuant to the protocols referenced in the answer to paragraph 1(b).</p> <p>Regarding paragraph 1(c), the victim counsel can access the victim's medical records through their client or if the client authorizes the release in writing.</p>



**3. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing the information described in (1) – (3) above with counsel representing a victim on the privacy of individuals, the criminal investigative process, and the military justice system generally?**

<b>USA</b>	<p>The potential positive effects of a uniform policy include: 1) consistency; 2) increased trust; 3) improved ability of SVC/STC to establish expectations on case outcomes with victims; and 4) transparency for victims.</p> <p>The potential negative effects of a uniform policy include: 1) use of the disclosures by defense counsel to cross-examine the victim and suggest that the victim has tailored their testimony based on early access to information; 2) delay in court-martial processing if the policy established a substantive right that required disclosure prior to preferral, referral, or arraignment; and 3) records may contain FOIA/Privacy Act or MRE 513 protected information.</p> <p>OTJAG recommends that the Joint Service Committee be tasked with development of a uniform policy that alleviates possible negative effects. As there is no Department of Justice or model state rule or policy regarding mandatory discovery for victims of sexual assault, development of a uniform policy should be deliberate and coordinated with all stakeholders.</p>
<b>USMC</b>	<p>Uniformity is favorable in many aspects of military justice in order to ensure that similarly situated accused and victims across the services are treated similarly. The Joint Service Committee on Military Justice should be tasked to recommend a modification to the Rules for Courts-Martial that implements a uniform standard for the sharing of this information with counsel representing a victim that accounts for and mitigates potential negative effects.</p>
<b>USAF</b>	<p>Predictability, consistency, and reliability are the main benefits of establishing a uniform policy for sharing information described in 1(a)-(c), as victims' counsel, defense counsel, and investigators will know what, how, and when such information will be provided, regardless of the Military Service involved.</p> <p>While a uniform policy alone does not threaten the accused or third parties' privacy rights, the content of such policy, if written too broadly, may fail to adequately balance their privacy rights against the victim's interests in disclosure.</p> <p>Additionally, a uniform policy would not allow Military Services to tailor their approach to address their unique circumstances. I 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.</p>
<b>USN</b>	<p>A uniform policy would provide certainty for all military justice professionals and eliminate situations where similarly situated individual victims are treated differently because of their Service's policy or the command handling their case.</p>

	<p>While disclosure of these records to the victim may raise additional areas of cross-examination, such a uniform policy, when limited to the matters raised here, is in the best interests of victims and the military justice system as a whole.</p> <p>The Joint Service Committee on Military Justice should be tasked to recommend a modification to the Rules for Courts-Martial that implements a uniform policy that considers both the positive implications and mitigates potential negative effects associated with mandating disclosures prior to various stages of the court-martial.</p>
<b>USCG</b>	<p><i>Positives.</i> (1) A uniform policy would ensure that victims and their lawyers are treated consistently across all branches, eliminating disparities. (2) A uniform policy would promote efficiency by standardizing procedures, reducing the administrative burden of each branch in developing and maintaining different protocols. (3) A uniform policy would facilitate better collaboration and coordination among military services, allowing for the sharing of information in cases involving multiple services. (4) A uniform policy would enable lawyers to access information more readily, regardless of the branch they are working with, leading to improved legal advocacy and outcomes. (5) A uniform policy would promote efficiency in sharing information in cases where a victim is treated in a medical facility operated by a military service other than the military service responsible for the investigation and prosecution.</p> <p><i>Negatives.</i> The development of a uniform policy brings forth certain risks that warrant consideration. (1) A uniform policy must carefully account for the applicable system of records maintained by each military service, as well as other laws protecting sensitive information to avoid unintended, adverse consequences. (2) It may not fully account for the distinct structure and resource limitations of individual services, potentially leading to the adopting of practices employed by branches with greater resources and capability to manage complex procedures. (3) It runs the risk of unduly constraining the discretion of government counsel and investigators to determine what information to share, when, and with whom, a critical aspect in navigating the uncertain landscape of litigation and trial. (4) Any additional burden, though seemingly small or resource-neutral from a headquarters standpoint, could unduly strain limited field resources in unanticipated ways, ultimately degrading the pursuit of justice. (5) The information described in 1(a)-(c) is sensitive, particularly forensic medical examinations, and therefore should only be shared with individuals that have a clear need to know in order to perform an official function.</p>

**4. Please provide your Service's position on the feasibility and advisability of establishing a uniform policy across all the Military Services for the sharing of the following information with 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.**

**USA**

(1) Army OTJAG is not opposed to a uniform policy that the prosecution provide the victim a copy of all statements and documentary evidence produced or provided by the victim upon preferral.

(2) OTJAG is not opposed to a uniform policy that the prosecution will provide the victim/Special Victims' Counsel (SVC) 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 upon referral, subject to the following caveats:

1) the appropriate custodian of the records, such as DHA, must approve the release; 2) release must not occur until all investigative leads have been exhausted; 3) records released must be appropriately redacted or withheld in accordance with FOIA and the Privacy Act interests of any party other than the victim (i.e. accused's health information in SAFE exam or DNA analysis); 4) policy should not create a substantive right for the victim that delays the processing of the court-martial; 5) policy should provide exceptions for non-cooperative victims or victims who elect not to receive the information; 6) policy should address appropriate procedures for minor or incompetent victims; and, 7) policy should allow for an exception if the records, in the opinion of the prosecutor, contain information that is likely to influence the testimony of the victim (i.e. medical opinions or perceptions).

(3) A policy allowing a victim to obtain copies of their own medical records may not be necessary, as military victims can obtain copies of their own records from any medical treatment facility. Nevertheless, OTJAG is not opposed to a uniform policy that the appropriate custodian of a victim's medical records included in investigatory files provide those records to the victim upon referral with the following caveats: 1) records redacted or withheld in accordance with FOIA and the Privacy Act interests of any party other than the victim; 2) policy should provide exceptions for non-cooperative victims or victims who elect not to receive the information; 3) policy should address appropriate procedures for minor or incompetent victims; 4) policy should allow for an exception if the records, in the opinion of the prosecutor, contain information that is likely to influence the

	testimony of the victim (i.e. medical opinions or perceptions); and 5) policy should take into consideration the discussion in United States v. Mellette distinguishing medical records from behavioral health records in regard to Military Rule of Evidence 513.
<b>USMC</b>	Some victim rights are uniformly applicable pursuant to statute and regulation. It follows that establishing a uniform policy for the sharing of this information with counsel representing a victim is feasible. It is advisable only to the extent that the uniform policy allows for an appropriate level of discretion to withhold information in certain limited circumstances. This uniform policy is most appropriate within the Rules for Courts-Martial.
<b>USAF</b>	The Air Force currently has the tools it needs to share appropriate information with counsel. As provided in DAFI 51-201, paragraph 8.5.4, Air Force Staff Judge Advocates can release recorded statements made by the victim, any records of forensic examinations or the person or property of the victim, and any medical examinations of the victim pursuant to an “official use” request made by the counsel of a victim. Staff Judge Advocates have this ability at any stage of the military justice process, so long as such items are maintained by the legal office.
<b>USN</b>	Any changes in this area designed to establish a uniform policy across all Military Services are best handled through amendment and modification of the Rules for Courts-Martial. While this process can be lengthy, it is the most appropriate way to ensure uniformity across all Services for this matter.
<b>USCG</b>	<p>A uniform policy for sharing information with lawyers who represent victims can be beneficial to ensure fair and effective representation and streamline processes reducing administrative complexities for lawyers who might have to represent victims from different services. Implementing a uniform policy has the potential to enhance clarity for investigators and trial counsel, streamlining their workflow and making more efficient use of their time. That said, it is critical that the uniform policy remain focused on the categories outlined in 1(a) – (c) to mitigate significant issues when expanding the scope of sharing information as a matter of course, which necessitates thorough study and research of relevant legal principles and best practices.</p> <p>Furthermore, certain safeguards should be in place to address potential concerns to ensure information sharing is efficient, safe, secure, and beneficial to participants in the military justice system, as listed below.</p> <ul style="list-style-type: none"> <li>• The default sharing/access provision in any uniform policy should be narrowly limited with broader sharing only occurring during litigation and trial preparations.</li> <li>• The policy should comply with the Privacy Act, HIPAA, and other applicable laws. The policy should include provisions outlining the potential consequences of misuse or unauthorized access to information. Clear articulation can promote responsible handling of information.</li> <li>• The policy should provide clarity of when a victim is officially considered as such and at what stage they are entitled to specific information. Relatedly, the Office of Legal Counsel has opined that victims’ rights are generally guaranteed from the</li> </ul>

	<p>time that criminal proceedings are initiated and cease to be available if all charges are dismissed or if the government declines to bring formal charges.</p> <ul style="list-style-type: none"><li>• The policy should allow for individual service flexibility and should strive to make the system more efficient rather than adding additional administrative burdens that could hinder investigations and litigation preparations.</li><li>• It is critical to maintain adaptable procedures to ensure the integrity of the system. It is inherently challenging to account for all the different permutations in which sharing information might lead to negative consequences, particularly when dealing with potentially wrongful actors. For example, preventing gamesmanship or addressing situations where victims might be co-conspirators or involved in wrongful actions themselves requires careful consideration of information sharing at specific stages.</li></ul> <p>Ultimately, the system must strike the right balance between transparency and protection to continue a justice system that is fair to all parties while upholding the legitimate needs of crime victims and addressing the nature of litigation preparations and the operational requirements of law enforcement and medical personnel.</p>
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**5. Please identify:**

**(1) Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.**

**(2) Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.**

**USA**

(1) Rule 1.2(a) and Rule 1.4 of the Army Rules of Professional Conduct for Lawyers could be interpreted to require an SVC to provide to their client information provided to the SVC from the prosecution, or any other party, regarding the investigation. Any uniform policy should clarify the SVC's obligation.

(2) As discussed above, policy should address non-cooperative victims, minor or incompetent victims, records that contain Privacy Act/HIPPA protected information of another party, and an exception if the records, in the opinion of the prosecution, contain information that is likely to influence the testimony of the victim (i.e., medical opinions or perceptions).

**USMC**

(1) JAG Instruction 5803.1E, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, apply to Marine Corps Victims' Legal Counsel. Rule of Professional Conduct 1.4 requires covered attorneys to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," "promptly comply with reasonable requests for information," and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The comment to the Rule says, "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ." It further explains, "In some circumstances, a covered attorney may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority."

(2) Counsel for the government may withhold required information from the victim or counsel representing the victim only after consulting supervisory counsel and in situations involving exceptional circumstances where disclosing the information to the victim would lead to the destruction of evidence, would compromise the investigation, or would otherwise be inconsistent with the pursuit of justice.

**USAF**

(1) The American Bar Association (ABA) Model Rules of Professional Conduct and the Air Force Rules of Professional Conduct address an attorney's professional responsibility to communicate with their clients. Specifically, ABA Model Rule 1.4(a) provides that a lawyer shall: (1) promptly inform the client of any decision or circumstances with respect to which the client's informed consent, as defined by Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with

	<p>reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. This obligation to communicate, however, only extends to information actually provided to counsel.</p> <p>Similarly, Rule 1.4 of the Air Force Rules of Professional Conduct directly mirrors ABA Model 1.4. <i>See</i> AFI 51-110, <i>Professional Responsibility Program</i>, Attachment 2 – Air Force Rules of Professional Conduct, 11 December 2018. As such, counsel representing a victim has the professional responsibility to communicate with their client in compliance with these provisions – which may include discussing the content of the records when necessary to fulfil these obligations.</p> <p>(2) The victim's interest in obtaining his/her recorded statements, records of forensic examinations, and medical records is high. These records relate directly to the victim and DAFI 51-201 expressly provides that any information related to other individuals, consistent with the Privacy Act, must be redacted before providing such records. Such protection minimizes any potential risks associated with providing these records to the victim or counsel representing the victim. Nonetheless, there may be situations where the information should, or should not, be shared. One such circumstance may be that releasing such information could implicate third parties. Another circumstance may be that releasing such information discloses government secrets or investigative techniques, that if shared, may jeopardize national security and/or future investigations. Lastly, release may not be appropriate if there is no official purpose or use for the victim to have such information. Should a victim or counsel for the victim desire such information to embarrass the accused or some other reason not directly related to the counsel's representation, release would not be appropriate.</p>
USN	<p>(1) The Navy Rules of Professional Conduct of Attorneys, JAG Instruction 5803.1E, provides that a lawyer has a duty to provide their client with candid advice (Rule 2.1) and to explain matters to the extent necessary to permit the client to make informed decisions regarding the representation (Rule 1.4). Rule 1.4 requires covered attorneys to "reasonably consult with a client about the means by which the client's objectives are to be accomplished," "promptly comply with reasonable requests for information," and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." This information sharing may be limited in certain circumstances. The comment to Rule 1.4 explains, "In some circumstances, a covered attorney may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority."</p> <p>(2) Such information should be shared with the victim in all cases, unless, in the judgment of the government, such disclosure would lead to destruction of evidence or would impede or compromise an ongoing investigation.</p>
USCG	<p>(1) Pursuant to Rule 1.2 of the Coast Guard Legal Responsibility Program, COMDTINST M5800.1, a lawyer, including a special victims counsel, is</p>

required to adhere to a client's decisions regarding the objectives of the representation and must consult with that client as to the means by which the objectives are to be pursued. Accordingly, Rule 1.4, among other matters, requires that a lawyer keep the client reasonably informed about the matter at hand, promptly comply with reasonable requests for information, and explain matters to the extent necessary for the client to make informed decisions. Rule 1.2 and Rule 1.4 are based upon the ABA Model Rules of Professional Conduct and are consistent with state rules which also govern the conduct of Coast Guard attorneys. These standards ensure that the client's decisions are respected, clients receive relevant information, and can actively participate in the legal process. It is worth noting that the cited ethics rules primarily pertain to the general act of sharing information relating to the representation, not the process of obtaining government documents and providing them to individuals who are not acting as government officials.

(2) In general, the information in paragraphs 1(a)-(c) collected about a crime victim should be sharable, especially after preferral of charges. There, however, may be limited circumstances where information sharing should be restricted to protect the integrity of an ongoing investigation to ensure the safety of other victims or witnesses.

For example, a victim's status as a co-conspirator could pose a foreseeable risk, as their access to statements made by investigators during an interview could be used to potentially intimidate other conspirators or alert them to forthcoming questions, potentially leading to a defense strategy based upon perjury. This concern might be particularly pronounced in cases where the stakes and potential risks are high, such as those involving drug distribution or organized crime. While this fact pattern would be admittedly rare, it is provided as a reminder for the need for the flexibility in information sharing practices to ensure the effectiveness and security of the investigatory process.



**Sec. IV. B. Narrative Questions for the Services' Special Victim's Counsel/Victims'  
Legal Counsel Program Managers (Questions 1 – 4)**

	<p><b>1. How, in practice, do counsel representing a victim as defined in Article 6b, UCMJ, obtain the information described in (1) – (3) below and at what stage of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral?</b></p> <p><b>(a) Any recorded statements of the victim to investigators.</b></p> <p><b>(b) 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.</b></p> <p><b>(c) Any medical record of the victim that is in the possession of investigators or the Government.</b></p>
<p><b>USA</b></p>	<p>Victims, and when applicable their SVCs, are entitled to access certain material at different stages of the investigative and judicial processes.</p> <p>a. Government counsel has an obligation to provide victims all statements and documentary evidence produced or provided by that victim upon preferral of charges. (IAW TJAG Policy 22-07, dated 1 MAR 22) This access includes any of the victim's recorded statements. Often this access is provided earlier in the investigative process, but the right to access vests at the time of preferral. This right does not depend upon whether the victim is eligible for SVC representation, elects SVC representation, or the type of crime at issue – this applies to all victims.</p> <p>b. This disclosure described above includes statements or evidence provided by the victim during any forensic medical exam. However, there is no requirement to provide the victim with parts of forensic examinations of the victim's person or property beyond the victim's statements. For example, when the victim provides clothing or bedding to be forensically examined, the victim does not have a right to access the results of that examination.</p> <p>c. Victims have a right, outside of the military justice process, to their own medical records. If the Government collects medical records that include statements by the victim, those statements must be provided at the time of preferral.</p>
<p><b>USMC</b></p>	<p>(a) Upon request by the victim or victim's counsel, the counsel for the government, normally the trial counsel, provides a copy of the victim's statements, including recorded oral or video statements, to the victim or victim's counsel, if represented. The victim or victim's counsel can request and obtain recorded statements of the victim prior to preferral of charges, or anytime later.</p> <p>[USMC Legal Support and Administrative Manual (LSAM) MCO 5800.16, Chapter 7, para. 040401]</p>

Marine Corps VLC in the field report they typically receive their clients' recorded statements from trial counsel in response to VLC requests, although less frequently they receive statements from NCIS investigators prior to referral. Most VLC choose to request trial counsel provide victims' statements. There does not appear to be any reported issues with trial counsel ignoring requests or refusing to produce victims' recorded statements.

(b) Upon request by the victim or victim's counsel, the counsel for the government, normally the trial counsel, will provide any documentary evidence in their possession or in the possession of the SJA that is derived directly from and pertaining directly to the victim. This would include any record of any sexual assault forensic exam (SAFE) of the victim. The victim or victim's counsel can request and obtain recorded statements of the victim prior to preferral of charges, or anytime later.

[USMC Legal Support and Administrative Manual (LSAM) MCO 5800.16, Chapter 7, para. 040401]

Victims' counsel may receive SAFE reports from NCIS agents prior to preferral of charges, but typically trial counsel provide these in response to VLC requests. Trial counsel are often reluctant to provide more than just the narrative portion of the SAFE report, which serves to document the victim's description of the assault. VLC report that they obtain complete SAFE reports (to include photographs) when they push back against trial counsel objections. However, government disclosure practices regarding timing and content vary across the Marine Corps military justice enterprise.

It is important also in this connection to note the significant differences between SAFE results and the results of other forensic examinations, including digital examinations of a victim's cell phone or other media devices.

(c) Upon request by the victim or victim's counsel, the counsel for the government, normally the trial counsel, will provide any documentary evidence in their possession or in the possession of the SJA that is derived directly from and pertaining directly to the victim's counsel or victim (if not represented). This would include any medical record of the victim. The victim or victim's counsel can request and obtain recorded statements of the victim prior to preferral of charges, or anytime later.

[USMC Legal Support and Administrative Manual (LSAM) MCO 5800.16, Chapter 7, para. 040401]

Marine Corps VLC report that they may receive their client's medical records in possession of the government from NCIS investigators prior to preferral, but more typically receive them from trial counsel when VLC request them before or after preferral. Trial counsel do not appear reluctant to provide victims' medical records to them. However, there are often cases in which a victim's medical records

	inadvertently include disclosure of mental health records protected under Military Rule of Evidence (MRE) 513.
<b>USAF</b>	<p>(a) Per Department of the Air Force Instruction (DAFI) 51-201, <i>Administration of Military Justice</i>, Section 8B, DAF VCs and SVC/VLCs from other services may request records pertaining to a court-martial proceeding involving their client as “official use” requests under the Privacy Act and Freedom of Information Act. See 5 U.S.C. § 552a(b)(1); DoD 5400.11-R, <i>Department of Defense Privacy Program</i>, paragraph C4.2.1. The Staff Judge Advocate is the release authority for records in the legal office’s possession. An SJA’s decision to release information pursuant to an official use 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. Requests must be in writing, provide a detailed description of the requested information, and explain the official need for that information. In practice, these requests are usually submitted during the pre-preferral process.</p> <p>(b) 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.</p> <p>Answer: See B.1.(a) above.</p> <p>(c) Any medical record of the victim that is in the possession of investigators or the government.</p> <p>Answer: See B.1.(a) above.</p>
<b>USN</b>	<p>(a) Upon request, at any stage of the military justice process.</p> <p>[CNLSC INSTRUCTION 5810.1, Disclosure of Information to Crime Victims, 6.a.(1)]</p> <p>(b) Upon request, at any stage of the military justice process when the images or videos from either the Sexual Assault Forensic Examinations (SAFE) or the investigation are subject of a charge for violation of Articles 117a and 120c, UCMJ, with the exception of contraband constituting child pornography.</p> <p>[CNLSC INSTRUCTION 5810.1, Disclosure of Information to Crime Victims, 6.a.(4)]</p> <p>(c) Not specifically addressed in the Disclosure of Information to Crime Victims instruction for Navy and Marine judge advocates or in policy. However, in practice, medical records outside of the SAFE and in possession of government counsel are generally not turned over to Navy VLC.</p>
<b>USCG</b>	<p>(a) During investigation stage and prior to the preferral of charges, a victim is entitled to a copy of all statements and documentary evidence adopted, produced, or provided by the victim that are in possession of TC or an SJA. (COMDTINST M5810.1H Ch. 16-3). Upon preferral of charges, a victim is entitled to a copy of all statements and documentary evidence adopted, produced, or provided by the victim</p>

	<p>and any recordings of interview of the victim that are in the possession of TC or SJA or local servicing attorney.</p> <p>(b) The Coast Guard has no specific policy on forensic exams.</p> <p>(c) The Coast Guard has no specific policy on medical records in possession of investigators or the government.</p>
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<b>2. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing of information described in (1) – (3) above with a victim, or counsel representing a victim, on the privacy of individuals, the criminal investigative process, and the military justice system generally?</b>	
<b>USA</b>	<p>Establishing clear rules for types of information that must be disclosed to victims to ensure all victims are treated equally and military justice practitioners know their obligations would be beneficial. SVCs represent victims who are Soldiers, are Family members, are Civilian employees, and, by exception, are unaffiliated civilians. Thus, we recommend any rules apply to all victims regardless of status. To avoid negative impacts, allow for exceptions where disclosure would negatively impact the prosecution of an offender.</p>
<b>USMC</b>	<p>Uniform policy would yield more timely, efficient and predictable VLC access to information essential to effective legal advice and informed client decision making. Standardizing policy would also mitigate the disparate treatment of victims based on established regional practices and minimize or eliminate objections from investigators and trial counsel to providing this information. The information provided should include what is described in question 1(a)–(c), in addition to the complete law enforcement Report of Investigation (ROI) in possession of the government. Disclosures should be an affirmative obligation of the government and should not require a request by the VLC detailed to the case.</p> <p>The positive effects of providing VLC with timely and complete access to victim statements, SAFE and other forensic reports, medical records, and ROIs would include enabling counsel to provide thorough and competent legal advice and representation based on a more complete and nuanced understanding of the facts of each individual case. More detailed advice would also enhance victims in intelligently exercising their rights, and likely increase victim willingness to participate in criminal proceedings.</p> <p>The potential negative effects largely relate to argument and advocacy concerns related to credibility issues flowing from access to case information, notably a concern that victims would shape trial testimony based on their knowledge of case information gleaned through advice from counsel. These concerns are counterbalanced by advocacy training and rules of evidence related to rehabilitating witness credibility on the stand. In addition, it is far from certain that the shaping of testimony flows only from case file access—victims (and other witnesses) are often cross-examined on bias and other motive to fabricate flowing from information obtained by other sources, to include social media, gossip, and other discussion of a case. Trial skills related to these challenges are the subject of frequent training, and any negative impact would be minimal and vastly outweighed by the benefit of better-informed advice and clients.</p>
<b>USAF</b>	<p>Should the DoD adopt the DAF policy outlined in B.1.(a) above or a policy that mandates release of information described in 1(a)–(c), we see no negative impacts. These are the statements and medical records of the victim; therefore, the victim should presumably already know the information contained therein. If a more restrictive policy is adopted, it may be more difficult for VCs to advise their clients,</p>

	and thus more difficult for victims of crime to make well-informed decisions regarding participation in the military justice process.
USN	<p>The Navy VLCP supports a uniform information sharing policy between government counsel and victims' legal counsel. In addition to 1(a)-(c), victims should have access to Reports of Investigation (ROIs) in possession of government counsel in the form of an in-person review, conducted by victims' legal counsel, during the investigation and throughout the military justice process. When possible, the in-person review would ideally occur in government counsel's office. When in-person review is not possible, the ROI can be reviewed by the victims' legal counsel via a shared drive folder with read-only access (not available for download or printing) or the ROI can be sent to the nearest government counsel's office for the victims' legal counsel to view in-person. Government counsel's discretion to withhold materials should be solely limited to when sharing case material would jeopardize an ongoing investigation. The information withheld should be narrowly tailored to only the portion of information that would impede or compromise an ongoing investigation.</p> <p>The Navy VLCP notes access to case information by unrepresented victims requires further study and review.</p> <p><u>Victim and victims' legal counsel.</u> After reviewing the ROI, victims' legal counsel can comprehensively and competently advise their client. Consequently, the client can then make well-informed decisions. With the benefit of an ROI review, a victims' legal counsel can issue spot areas affecting the victim's rights and take appropriate action. Additionally, access to the ROI allows the victim to identify any potential deficiencies in the investigation. The victim holds a unique and vital viewpoint critical to this crucial check on the thoroughness of the investigation. For example, a victim could confer with government counsel regarding a witness not interviewed or a piece of evidence not collected. A victim's timely access to the ROI aids in ensuring the comprehensiveness of the investigation and ultimately supports a just outcome for all parties. Decisions made by the victim occur well before preferral, and outside of the courtmartial process, highlighting the imperative need for victims' legal counsel to have access to timely case information. Victims' vested interests exist in a variety of matters, including input to the Initial Disposition Authority, pre-trial investigations, confinement and restraint determinations, military and civilian protective orders, administrative hearings, and nonjudicial proceedings. For example, victims' legal counsel may submit matters to the convening authority's staff judge advocate (SJA) for consideration as part of the SJA's pre-trial advice to the convening authority.</p> <p><u>Privacy of individuals.</u> In-person review by victims' legal counsel defeats any concerns regarding unauthorized copies of materials and/or improper release of documents. The review is conducted in a controlled setting with government counsel retaining possession of the ROIs. The establishment of a uniform policy allows individuals with privacy concerns contained within case materials to know precisely how the information will be shared and with whom information will be shared.</p>

	<p><u>Criminal investigative process.</u> All ROIs, interim and final, should be available for a victims' legal counsel in-person review, unless government counsel determines a review of a document would impede or compromise the ongoing investigation. Government counsel should later permit review when the concern to the ongoing investigation is removed.</p> <p><u>Military justice system.</u> Greater access to information will increase victims' trust in the military justice system and likely result in greater engagement by victims. Victims with greater access to information make well-informed decisions and are able to fully exercise their rights as victims. Likewise, greater access to information affords victims' legal counsel the ability to provide comprehensive and competent advice as required by the Navy's rules of professional conduct for judge advocates. Additionally, well-informed victims' legal counsel can better argue M.R.E. 303, 412, 513, 514, and 615 matters, improving the overall integrity and veracity of the entire court-martial process. When a victim is exposed to case information outside of their own statement or evidence they have provided, there is a concern for potentially altered or tainted testimony. However, this concern exists for every witness who testifies and is eliminated by a thorough cross-examination and when appropriate, impeachment of the witness.</p> <p>Any potential negative effect of a uniform policy for greater access to information is outweighed by the overall positive effect of a well-informed and well-advised victim fully and meaningfully exercising their rights.</p>
<b>USCG</b>	<p>The Coast Guard SVC Program does not see any detrimental effect in establishing a uniform policy sharing this information with a victim or their counsel. While the victim's credibility may be called into question on cross examination because of their access to this information, any potential detriment is vastly outweighed by the benefit of better-informed attorneys and clients. Uniformity promotes fairness and trust in the system and avoids potential disparate access to information within the USCG and between services.</p>

**3. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information identified above with counsel representing a victim? With a victim? Why or why not?**

<b>USA</b>	The Army SVC Program supports a uniform policy for the disclosure of victim statements but opposes further mandatory disclosures.
<b>USMC</b>	<p>The Marine Corps VLCO supports the adoption of a uniform policy for the sharing of victims' personal statements, forensic exams, and medical records, in addition to investigative ROIs, among VLC and government counsel.</p> <p>When polled, Marine Corps VLC in the field overwhelmingly supported the adoption of uniform policy for the sharing of this information based on the positive impact this policy would have on their ability to advise their clients and the benefit to victims in making informed decisions.</p>
<b>USAF</b>	The DAF Victims' Counsel Division would support a uniform policy similar to the DAF policy outlined in B.1.(a) above or a policy that mandates release of information described in 1(a)–(c). Access to information is critical for VCs to fulfill their duties of competent representation. Without it, VCs will struggle to keep clients reasonably informed about the status and prospects of the case, making it more difficult for victims of crime to make informed decisions about participation in the military justice process. Additionally, these are the statements and medical records of the victim; therefore, the victim should presumably already know the information contained therein.
<b>USN</b>	<p>The Navy VLCP supports the adoption of a uniform policy for sharing information with represented victims to include items 1(a)-(c) and full access to ROIs on an ongoing basis. As noted above, information provided directly to victims without representation requires further study and analysis.</p> <p>When analyzing disclosure of case information to victims, the National Crime Victim Law Institute noted victims' due process rights and the right to be treated with fairness are affected when case information relevant to the exercise of their victims' rights is denied. An absence of case information negatively impacts a victim's ability to competently confer with government counsel and be heard. Additionally, providing access to investigative materials ensures victims are treated with fairness.</p>
<b>USCG</b>	The Coast Guard SVC Program supports a uniform policy for sharing this information with the victim and counsel. Bar rules contain general provisions about competence and typically require the attorney to have the legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation reasonably necessary for representation. Allowing victim's counsel to have access to specific evidence about their client, the victim, should be allowed so counsel can be better informed about the evidence that support the allegations. Additionally, victims should have access so that they can make well-informed decisions about the direction of the representation. Providing victims and attorneys access to this limited information will enable both to make better informed decisions.



**4. Please identify:**

**(a) Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.**

**(b) Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.**

**USA**

a. SVCs have ethical responsibilities regarding disclosure of information to their clients that require they share information with their clients and then handle that information as directed by their clients. SVCs cannot act as agents of the Government withholding information as directed or preferred by Government counsel. The governing regulation is Army Regulation 27-26, Rules for Professional Conduct of Lawyers.

b. The Government's disclosure of a victim's statements, forensic reports, medical records, or other investigative materials to an SVC does require that SVC notify the victim of the disclosure and to then provide that information to the victim upon request. Rule 1.2.(a) requires the SVC "abide by their client's well-informed and lawful decisions..." To be well informed, clients would need to know, at a minimum, what information is in their SVC's possession. Once they know what the SVC has, the client can then decide what information they want to review – that is one well-informed decision the client, not the Government counsel or SVC, gets to make.

Army SVC clients direct our representation – not the other way around. If the client expresses their desire to review materials we have, we share the materials with the client. There is a small class of information an attorney can withhold from their client. Rule 1.4.(b) provides examples of types of information that can be withheld from one's client such as material classified above the client's security clearance level or a "psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person..." Thus, once the SVC has the materials, the client decides whether to review them.

There are times when the victim reviewing investigative materials will negatively impact the successful prosecution of the offender. Defense counsel must be informed that the materials have been disclosed, whether to the victim directly or through an SVC, and can then use that knowledge of that disclosure in any way that might benefit their client. Thus, if investigative materials have been disclosed to a victim, the defense counsel can cross examine the victim about the impact of those materials. Thus, affecting the victim's testimony at trial.

- i. The victim may respond, "my attorney had the files and didn't show them to me." This statement may implicate confidential communications between the victim and their counsel. The defense counsel may call the SVC as a witness to either confirm or dispute that victim's testimony. Through misunderstanding, misremembering, or lying, this testimony may

	<p>not be consistent with the SVC's potential testimony. Thus, it would put the contents of their confidential communications at issue and possibly result in termination of the attorney-client relationship due to conflict and Rule 3.7.</p> <p>ii. The victim may respond, "I reviewed the materials, but they didn't impact my testimony." This may have no impact on the victim's credibility. However, a factfinder may decide that the investigative materials at issue would have impacted the victim's testimony and that the victim is being disingenuous and is thus less credible as a result.</p> <p>Disclosure of investigative materials, especially those beyond forensic reports, could include statements by other witnesses that are neither admissible nor reliable. Thus, these statements would not be presented at a board or trial – unless the victim's access to that statement becomes a basis for admissibility. When some inflammatory information/opinion is provided in the case file to a victim before the proceedings it could impact the victim in many ways- to include triggering a change to testimony or an allegation that the victim changed their testimony. If that inadmissible statement is a motive to fabricate, a change in the victim's testimony from prior statements could now be a vehicle to present the inflammatory statement regarding a motive to fabricate. For example: CID agent includes in case notes that they do not believe the victim and why. That statement has been disclosed to victim and/or SVC. Victim's testimony has some changes from the initial statement to that CID agent. Defense counsel successfully argues that victim may have changed their story to address the reasons the CID did not believe the allegation. Now, the fact that the experienced investigator doesn't believe the allegations is relevant and admissible - and potentially persuasive.</p> <p>As traumatized people, victims' ability to digest and explain their assault over time changes. Currently, we rely on experts to explain the impact of trauma on memory to a panel. When impact of trauma is the best explanation for new or changed details, the prosecution might be able to overcome that change persuasively with the support of the expert testimony. The expert testimony is much less persuasive after the defense points out that the changes followed access to all the investigative materials. Thus, the ability of the prosecution to gain conviction may be greatly reduced.</p> <p>Victims are critical witnesses- not just our SVC clients. SVCs allow their clients to be better prepared to participate in the military justice process because the SVC protects their interests, presents motions on their behalf, and explains the process throughout. The argument that unlike all other witnesses, victims should be given access to all the evidence presumes their counsel can, in theory, better represent clients after having full access. The counter is two- fold: (1) SVCs are expertly representing clients now and (2) expanded access to investigative materials may negatively impact victim credibility and decrease the ability to achieve a conviction. Thus, providing victims with more than their own prior statements does not benefit victims or their pursuit of justice.</p>
<b>USMC</b>	(a) The professional responsibility regulations governing Marine Corps VLC fall into two categories: the Rules of Professional Conduct for Navy and Marine judge

advocates (JAGINST 5803.1E, Rules of Professional Conduct), and the rule of professional conduct imposed by the respective VLC's state bar. Marine Corps VLCO analysis of this question revealed significant portions of JAGINST 5803.1E indicating access to relevant information is necessary to provide competent and complete advice and representation to their victim-clients.

Rule 1.1 (Competence) of the JAG Instruction governing Navy and Marine judge advocates provides that "[c]ompetent representation requires the legal knowledge, skill, **access to evidence**, thoroughness, and expeditious preparation reasonably necessary for representation." (Emphasis added). Rule 1.2 (Establishment & Scope of Attorney-Client Relationship) also speaks to this issue, noting that a "covered attorney shall follow the client's **well-informed** and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements." (Emphasis added). Taken together, these provisions suggest that an attorney cannot be competent—and clients are less able to make sound decisions about how best to exercise their rights—in the absence of adequate information on which to base reasoned legal analysis and advice. At a minimum, the language of these rules indicates a strong preference for informed counsel and clients.

Enabling competence and advice through timely disclosure of relevant information does not require wholesale disclosure of case files to victims themselves. Under JAGINST Rule 1.4 (Communication), covered attorneys must "promptly comply with reasonable requests for information[,]..." "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation[.]" and "consult with the client about any relevant limitation on the covered attorney's conduct when the covered attorney knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

While VLCO did not conduct a comprehensive review of every state bar rule regarding counsel access to information and obligation to share that information with their clients, Marine Corps VLC did report some illustrative requirements of their state bar rules. A review of these state bar generally identified a common theme of requirements for counsel to provide their clients with information sufficient to keep clients reasonably informed to allow them intelligently to participate in making decisions about case objectives. None of the state bar rules identified contradicted the professional responsibility requirements of JAGINST 5803.1E. Some states (Illinois and Florida, for example) have provisions noting that rules or court orders may restrict the release to a client of information provided to counsel.

Where there is conflict between state and military rules of professional responsibility, JAGINST 5803.1E provides that the military rules prevail. Marine Corps VLCO is not currently aware of any case in which a conflict between bar rules was a significant source of friction in a case. However, the JAGINST was last revised in 2015 and is therefore likely ripe for revision in light of rapidly-evolving VLC practice.

(b) Rules limiting VLC access to case information should be narrowly tailored and construed as contrary both to the professional obligations of counsel and to the

	<p>truth-finding functions of the military justice process. Information should not be shared with victims and/or VLC when contrary to statutory provisions, privileged, when restricted by court order, or during an ongoing investigation when government counsel determines that VLC in-person review of specific information would jeopardize the ongoing investigation. Withholding information pursuant to this exception should be strictly limited to only that portion of the information which would jeopardize the ongoing investigation, and this exception should not apply to discretionary government determinations about its case preparation.</p> <p>Further, VLC should not disclose information to a client when it would be detrimental to their client's safety or well-being, where disclosure would present an identifiable harm to the client, or where the client would be likely to act unlawfully in response to information received through disclosures to counsel or client. This language pertaining to non-disclosure appears in various forms in state bar language.</p>
<b>USAF</b>	<p>(a) Rule 1.4 of the Air Force Rules of Professional Conduct (AFI 51-110, Attachment 2) requires a lawyer to "keep the client reasonably informed about the status of the matter," "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation," and "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."</p> <p>The official use request is a limitation set by the government and not the VC. In practice, VCs are responsible for explaining the limitations of their representation and the client decides whether they would like their VC to request documents pursuant to an official use request, knowing the limitations on release of information.</p> <p>(b) The DAF Victims' Counsel Division finds no reason the victims' own statements and medical records should not be shared with them.</p>
<b>USN</b>	<p>(a) Within the Rules of Professional Conduct for Navy and Marine judge advocates, several rules are applicable to information sharing with a client. Specifically, Rule 1.1 Competence, necessitates "legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation" for competent representation. Access to evidence (evidence such as 1(a)-(c) documents and the ROI) is specifically listed as a requirement for competent representation. Additionally, Rule 1.2. Establishment and Scope of Representation, requires judge advocates to "follow the client's well-informed and lawful decisions" regarding the case. Greater access to information supports the need for clients to make well-informed decisions. Finally, Rule 1.4 Communication, requires judge advocates to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A synthesis of the above-mentioned rules supports greater access to case information to ensure victims' legal counsel are acting in accordance with their professional responsibility requirements and in a position to educate the client so the client can make a well-informed decision.</p>

	<p>(b) Information should not be shared with victims and/or victims' legal counsel when contrary to statutory provisions, pursuant to a court order, or during an ongoing investigation when government counsel determines a victims' legal counsel's in-person review of specific information would jeopardize the ongoing investigation. The withheld information should be narrowly tailored to only the portion of information that would jeopardize the ongoing investigation, not case preparation.</p>
<b>USCG</b>	<p>(a) The Coast Guard Legal Responsibility Program, COMDTINST M5800.1 does not have a specific provision that addresses this. Rule 1.4 (b) does state that a lawyer shall communicate "reasonably with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with reasonable requests for information." Since generally attorneys must fulfill a client's reasonable expectation that information will be shared consistent with an attorney's duty to act in the client's best interests, it would be difficult to justify withholding information from a client without clear authority to do so, such as a court order.</p> <p>(b) The only circumstances where information should not immediately be shared with the victim is when investigators recover information related to an unrelated offense or when information deleted from the victims' phone is recovered and it impacts the credibility of the report. In these situations, the government should have a method of withholding the information so it does not compromise the investigation.</p>

**Sec. IV. C. Narrative Questions for the Services' Chiefs of the Trial Defense Services Organizations (Questions 1 – 3)**

**1. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing of the information described in (a)–(c) below with counsel representing a victim as defined in Article 6b, on the representation of the accused in the investigative process and in military judicial proceedings?**

**(a) Any recorded statements of the victim to investigators.**

**(b) 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.**

**(c) Any medical record of the victim that is in the possession of investigators or the government.**

**USA**

Any policy on this topic should absolutely be uniform across all Services, should specifically identify the circumstances under which information is provided to a Special Victim Counsel (SVC) or directly to a complaining witness (CW), and should not be the subject of prosecutorial discretion. Current practice suggests information is already being shared to some extent through SVC disclosures, and a CW is always able to obtain their own personal medical records. Further, limited information sharing through the assigned SVC may improve expectation management for disposition process outcomes and improve the ability of an assigned SVC to adequately advise on topics that include level of CW participation and consideration of the full range of disposition alternatives.

That said, the obvious concern with providing information to a particular type of witness outside of already existing process, relates to the potential for unfairly influencing/minimizing what may otherwise present as inconsistent statements at trial. Any information provided to a CW has the potential to impact memory of the event. Providing information to any witness in advance of trial clearly elevates the risk, as unintentional as it may be, that witness testimony may be altered.

Highlighting potential inconsistencies in advance of trial may tempt a CW to alter testimony or cause unintentional / subconscious revisions to effect what is perceived as a more compelling narrative that side-steps concerns established by other evidence. Simply put, sharing information in advance of trial this way could at least appear calculated to enhance the government's ability to secure a conviction, even in the face of how evidence would otherwise be presented at trial.

Another negative aspect of such an expanded sharing policy is the potential for unintentional impact on medical personnel or law enforcement officials who may modify how they draft written reports, to include being less comprehensive in recording observations and opinions because of concern related to how a CW may react.

	<p>Also, just as important as what may be released to a CW, is the question of release timing. If there is going to be a policy or rule that expands the way information is provided to witnesses, the government should be required to provide the same information to the accused at least simultaneously so that the defense can better assess if there is an alteration or other testimonial change based on the provided information. To maximize at least the appearance of fairness, special CW releases should not occur before service on the accused and certainly not before arraignment, when major changes to the charge sheet require the accused's consent.</p> <p>Limited medical record sharing is not likely objectionable, given the CW either provided those records or a court compelled their disclosure, as is the case in the majority of instances. However, it isn't clear if carving out an exception to FOIA b(7) (records related to law enforcement) might undermine justification for the entire exemption. If so, one might risk opening more law enforcement files as subject to disclosure pursuant to FOIA. This risk may be greater the earlier any information is shared with the alleged victim. For instance, if information is shared pre-preferral—before the accused may even have counsel—it would seem odd that the alleged victim could have in depth knowledge of a pending investigation but the subject of that investigation would have no right to any information.</p>
<b>USMC</b>	<p>A uniform policy would be welcome by the USMC Defense Services Organization (DSO) insofar as such a policy outlines exactly what information victim's counsel will receive and when, and such decisions will not be at the discretion of the prosecutor.</p> <p>That said, there are major concerns related to what information is provided to victim's counsel. The DSO operates under the belief that, ultimately, all information provided to victim's counsel will be provided to their client. The DSO's chief concern is that the above proposal potentially distorts the memory of the complainant and impacts his/her trial testimony. It is well grounded in psychology that increasing inputs of information related to a particular event can alter how a witness remembers the event. As such, in order to maintain fair, accurate, and minimally biased testimony at trial, our system of justice should seek to minimize unnecessary pre-trial informational inputs for victims. All witnesses should testify to the best of their own belief and memory.</p> <p>Treating CWs who choose to have or "rate" VLC differently than those who don't would be fundamentally unfair to CWs. The below list outlines our concerns:</p> <ol style="list-style-type: none"> <li>1. Providing law enforcement summaries. Any policy requiring summaries produced by law enforcement be provided to victims is problematic. Summaries often include the investigator's interpretation of the events, gleaned from other aspects of the investigation, and not necessarily what the victim stated. Providing such information contaminates witness memory. Additionally, LE may begin to tailor summaries to be read more favorably to complaining witnesses (CW) in order to maintain their participation. There is no good reason to provide the information to the CW that would be different than providing it to any other witness in a case, which we do not do in order to maintain some integrity in the process. Similarly, no other jurisdiction provides this information to CWs. Notably, there is a law</li> </ol>



	<p>enforcement exception to FOIA for just this purpose—to maintain the integrity of the investigative and court process.</p> <p>2. Providing SAFE reports. Similar to item 2, a SAFE report often includes information not relayed by the victim, such as the examiner’s opinion or conclusions. Providing this type of information contaminates the victim’s memory and impacts trial testimony.</p> <p>3. Providing forensic examinations of the victim’s property. The above negative impacts on the investigative and judicial proceedings apply to this investigative measure. Additionally, providing victim’s “[t]he record of any forensic examination of the [...] property of the victim” creates potential for overbroad access to information, likely not intended by the proposal. For example, the CW may be entitled to the digital forensic reports for all electronics in the home where the CW has a joint claim of ownership. This would be overbroad and creates any number of issues including impacts to the CW’s knowledge and memory of events.</p> <p>4. Impact on investigators. If law enforcement agents are aware that victims will receive copies of interviews or summaries/notes, it may affect law enforcement’s willingness to ask hard questions when they know the interview may be released, and may end up in the news, on social media, or strain the relationship with the CW who may be less likely to continue to cooperate or, on the other hand, take measures him/herself to try to “investigate” the case, rally witnesses, search for evidence etc. that negatively impacts LE’s ability to investigate.</p>
<b>USAF</b>	<p>The overall of effect on the administration of courts-martial within the Department of the Air Force should be minimal with the release of the above-listed materials. Medical records are already accessible by the alleged victim by virtue of being the patient. Moreover, the Department of the Air Force has a policy for providing items (a)-(c) listed above, and more, to the Victims’ Counsel (VC).</p> <p>Department of the Air Force Instruction (DAFI) 51-201, <i>Administration of Military Justice</i>, dated 14 April 2022, paragraph 8.5.3 gives Staff Judge Advocates discretion to release information in response to an official use request submitted by a VC. In Air Force practice, VC often request and receive relevant recorded statements made by their clients and SAFE reports in cases in which their clients are the named victim of a charged offense.</p> <p>The positive effects of disclosing this evidence is that alleged victims are able to prepare for trial and, particularly when there is a VC, to engage in well informed discussions related to the exercise of their rights under Article 6b and any inputs they may wish to provide related to case disposition.</p> <p>The potential negative effects are that witnesses may substitute their prior statements for their current recollection of events. However, that potential adverse impact is mitigated through discovery, pretrial interviews with the alleged victim, and cross-examination.</p>
<b>USN</b>	<p>The system would benefit from a uniform policy for sharing information with counsel representing an alleged victim. However, the court-martial's truth-seeking function must remain paramount when determining the appropriate policy.</p>



Therefore, neither the alleged victim nor their counsel should have access to investigative material which could distort, taint, or color the recollection of a percipient witness. Since most cases in which counsel represents an alleged victim are “special victims' cases,” this is of particular concern as the credibility of the alleged victim will always be a critical determination for the finder of fact.

In responding to these RFIs, the Navy Defense Service Offices (DSOs) assume that a victim’s legal counsel is ethically required to provide any information to their client that was provided to them in the course of their representation. Further, it would be incongruous for a victim’s counsel to exercise rights under Article 6b that the alleged victim themselves would not be able to exercise if they were unrepresented. Ultimately, the alleged victim is presumed to receive anything provided to the alleged victim's counsel.

An appropriate uniform policy would provide alleged victims access to their own statements or anything they created (e.g. diary entries, text messages, notes, letters). However, any such policy would not provide access to information related to their case that contains the impressions, observations, or conclusions of others, including the attorneys or investigators on the case.

(a) The Defense Services Offices assume the alleged victims and their counsel are provided a copy of recorded statements they made to investigators in any case handled by attorneys from a Region Legal Service Office based on a policy promulgated by the Assistant for Prosecution Services (APS). From the defense perspective, this policy has yet to have an appreciable impact on the fairness of courts-martial. The alleged victim is not gaining access to information beyond what he or she has already told investigators. A prior recorded statement, or the transcript of that statement, is the same information that trial counsel would likely use to refresh the alleged victim's memory. Therefore, providing the alleged victim with a copy of the recorded statement does not trigger concerns about how it could modify their independent memory of events or enable them to alter their memory to fit conflicting evidence.

(b) The alleged victim receiving records related to forensic examinations of their person or property, including photographs, will harm the fundamental fairness of the court-martial process. This risk of harm is particularly egregious when the alleged victim receives them through privileged communications from their counsel.

While alleged victims and their counsel sometimes gain insights about forensic evidence from pre-trial litigation, providing access to forensic examinations should not be the uniform policy. The purpose of forensic examinations is to preserve and develop reliable evidence. They can include third parties' observations, opinions, and conclusions, including nursing, pathology, or toxicology experts. These observations, opinions, and conclusions should not be made available to alleged victims. If an alleged victim is to provide reliable evidence, then the court-martial process should seek to insulate them from material that could intentionally or unintentionally contaminate their testimony. Observations by those seeking to preserve and collect evidence, including photographs, could distort, taint, or color

	<p>the witness's recollection. If investigators or trial counsel provide alleged victims with the results of forensic examinations, there is a real danger of unfair prejudice to Service Members facing trial. Because the conversations between counsel for an alleged victim and the alleged victim are privileged, and, therefore, shielded from discovery and off-limits during cross-examination, filtering information through that counsel only exacerbates the danger of prejudice to defense clients. This lack of transparency starkly contrasts with occasions when a trial counsel or investigator chooses to share or confront an alleged victim with information while subject to discovery obligations under R.C.M. 701(a)(6) and R.C.M. 914.</p> <p>There are no apparent positive effects from a change that would permit alleged victims, or their counsel, to obtain forensic examinations of their person or property, including photographs. Moreover, no other witness would be given access to investigative material because of the danger to the integrity of the investigation or trial.</p> <p>(c) An alleged victim, especially one with counsel, can obtain their own medical records. There should not be an additional uniform policy created to control a mechanism that already exists. Suppose the investigators or the government sought and obtained them as part of the investigation. Presumably, the records in this hypothetical have independent value to the investigation or prosecution of the case. Should the government or investigators seek clarification on that information with the complaining witness, it should be done as part of the investigation rather than funneling the information through privileged communication via counsel.</p>
<b>USCG</b>	See Navy's Response

**2. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information described in 1(a)-(c) above with counsel representing a victim? Why or why not?**

<b>USA</b>	<p>The United States Army Trial Defense Service only supports an information sharing process expanded beyond currently existing mechanisms to the extent it clearly defines all circumstances under which information is provided directly to a CW or through a SVC, includes at least concurrent sharing with the accused, and is limited to non-forensic information originating with the CW, and is not subject to prosecutorial discretion. Information contemplated for CW release should not include forensic or investigatory comment, agent summaries, opinion, conclusion, or assessment as such editorializations are beyond the scope of what is relevant for someone who is merely a witness and not part of the prosecution team.</p>
<b>USMC</b>	<p>The USMC DSO supports a policy if it clearly defines what can be provided to victim's counsel to include limitations and requires notification to defense counsel of exactly what was provided to the victim's counsel.</p> <p>Specifically, USMC DSO supports the adoption of 1(a) and 1(c) as long as it is only the recorded statement and non-forensic medical records of the victim, and not any supplemental material generated by investigating agencies as part of a report, such are summaries. In its current form, 1(b) is too broad to support.</p> <p>If this policy establishes a minimum of what must be provided to victim's counsel but allows the prosecutor on a case-by-case basis to provide additional information (especially without notifying the Defense), USMC DSO does not support it.</p>
<b>USAF</b>	<p>The Air Force Trial Defense Division supports the adoption of a uniform policy for the sharing of the information described in 1(a)-(c) above, contingent on that policy embedding procedural safeguards to protect the rights of the accused and to ensure defense counsel is made aware of any disclosures made under the policy.</p> <p>(a) Any uniform policy should be accompanied by a requirement for VC to protect the matters listed in 1(a)-(c) from improper release to third parties.</p> <p>(b) Trial Counsel should be required, likely via amendment to the Rules for Courts-Martial, to maintain a log of any evidence that is provided to the VC and to disclose that log to the accused upon request. This will foster open discovery and ensure defense counsel are able to fully exercise their clients' right to confront accusers at court-martial.</p> <p>(c) The policy should make clear that the defense has no obligation to disclose or to provide evidence to the alleged victim.</p>
<b>USN</b>	<p>The Navy DSO does not oppose the adoption of a uniform policy which ensures a consistent practice for disclosures to the alleged victim and his or her counsel – with the caveats discussed in the earlier questions. However, the DSOs oppose any policy which seeks to elevate the rights of the alleged victim to be informed of matters beyond their own statements, as such a policy which could impede the truth seeking function of a court-martial. Specifically, we oppose providing the alleged</p>

	victim, or their counsel, forensic examinations which could include observations and opinions of third parties.
<b>USCG</b>	Refer to Navy's Response.

**3. Please identify and explain any recurring issues in your discovery practice regarding the sharing of information not listed above with counsel representing a victim.**

**USA**

TJAG Policy 22-07, DoDI 6495.02, and general patient medical record access already contemplate CW information sharing. These also provide a commonly understood basis for standardized discovery practices. Issues potentially arise when a prosecution team goes beyond what is specifically authorized if additional information is shared with a CW and not the defense, which can lead to inefficiencies and/or substantive issues that require subsequent motions practice to remedy.

**USMC**

The Defense is not notified what information the trial counsel and NCIS provide to the VLC, and what is provided varies by case. The lack of standardization is difficult for all parties: the prosecutors seem to have difficulty deciding what should be disclosed, the VLC seek broader access than is necessary, and the defense is left in the dark about the information provided rightly necessary to their case preparation.

If any witness is testifying not based on his/her memory, but rather on something he/she read after the fact, that must be demonstrated to the trier of fact in order to maintain fairness to the process and to the accused. As such, it is critical that the Defense understand what information a victim is provided in pre-trial preparation.

Because the proposed rules would provide documents to the VLC to work with their clients and such work being protected communications, the ability for defense counsel to effectively cross examine a CW regarding their case preparation is unfairly limited. When a CW's credibility is critical to the outcome of the case—as it always is, how they prepared for trial is similarly a critical part of cross examination.

Two additional points raised by VLCs during former testimony: VLC want access to all case-related information and notice of all motions. The stated reason for the former was to “explain” to the CW why a case is not going forward. If the case is not going forward, there is no discovery process and FOIA rules apply for the CW to access investigations. As to the latter, CWs are not a party to the litigation and have a voice in only a narrow areas: 412, 413, 513, and quashing subpoenas as it applies to all witnesses. Motions regarding unlawful command influence, multiplicity, discovery etc., all routine motions brought in the course of litigation, are disagreements between the trial counsel/government and the accused/defense counsel. There is generally, with very rare exception, no amicus brief filing at the trial court. It is the trial and defense counsel's responsibility to make the strategic and tactical decisions about how to present their case at trial. To permit amicus briefs would turn the criminal court from “United States vs accused” to Plaintiff vs defendant.” As such, providing all motions to VLC and/or CWs necessarily means that all the exhibits and attachments that are rightfully withheld from disclosure would then be disclosed. Both of these “asks” are ways for the CW to circumvent

	<p>the truth seeking function and fundamental fairness necessary for a criminal justice system founded on integrity, fairness, and the Constitution.</p> <p>Bottom line: fundamental fairness in the court martial process weighs in favor of withholding all information from the VLC or CWs that is not solely the creation of the CW, for example their own statement or text messages.</p>
<b>USAF</b>	<p>The Air Force Trial Defense Division has identified the following recurring issues in our discovery practice regarding the sharing of information with the VC.</p> <p>Since 2020, the Air Force Trial Judiciary has utilized an electronic filing system where parties to the proceeding file their motions, pleadings, and various other documents. While hugely convenient for the prosecution, the defense, and the military judge, the electronic filing system effectively functions as an unintended tool for disclosure of substantial case evidence to the VC that would otherwise not be authorized. Because the Air Force Trial Judiciary establishes only one filing website for each case, VC are on the same website as the parties and, in light of the requirement to include supporting evidence as attachments to motions, thereby essentially become the recipients of large amounts of discovery to which they otherwise have no right under law or regulation, to include evidence that far exceeds the materials originating from the named victim described in 1(a)-(c).</p>
<b>USN</b>	<p>Judicial circuits have been inconsistent regarding which filings must be provided to counsel representing an alleged victim. As a result, in some circuits, counsel representing an alleged victim may receive all motions filed in the case, even if their client does not have standing to respond. This results in an alleged victim having constructive possession of voluminous documents from discovery. For example, suppose the defense counsel files a motion to suppress a statement or illegally obtained evidence. In that case, the enclosures may include the statements of the accused or the evidence obtained from the unlawful search. Counsel representing an alleged victim has no standing to respond to this type of motion, but they would then possess material they could share with their client. Filings like these often result in the most substantive portions of discovery, including summaries of the statements of other witnesses, being shared with the counsel for the alleged victim.</p> <p>The DSO's maintain that the alleged victim and her counsel should have limited standing based on Article 6b for issues like prior sexual behavior and the production of mental health records. Any discovery provided to the alleged victim that expands beyond those limited areas before a guilty finding poses a real danger to the system's fairness.</p>
<b>USCG</b>	Refer to Navy's Response.



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

**2023 Biennial Study on  
Collateral Misconduct**

**Sec. 547 (FY19 NDAA)  
Public Law 115-232 (Aug 13, 2018)**

**September 20, 2023**

**Mr. Pete Yob and Ms. Julie Carson**



## Sec. 547 Biennial Study on Collateral Misconduct

(a) REPORT.—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD shall submit to the congressional defense committees a report that includes...the following:

**\*\*Three Required Statistical Data Elements\*\***





# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

- (1) The number of instances in which a covered individual was **accused of** misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
- (2) The number of instances in which **adverse action** was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

- (3) The **percentage of investigations** of sexual assaults that involved an accusation **or** adverse action against a covered individual as described in paragraphs (1) and (2).



## Task 1: What does SecDef “acting through” the DAC-IPAD mean?

It was decided that DoD would request that the Services collect the required data and would submit a combined report to the DAC-IPAD to review and submit comments back to the Secretary.



## Task 2: Develop clear definitions of the key terms

Only one term is defined in the NDAA provision itself---but even that definition is somewhat ambiguous:

(b) COVERED INDIVIDUAL DEFINED.—In this section, the term “covered individual” means an individual who is identified as a **victim of a sexual assault** in the **case files** of a military criminal investigative organization.



## Task 3: Review and Assess the Data Collected by the Services

## Task 4: Respond to Secretary with Assessment and Recommendations



# Services' Individual Collateral Misconduct Reports Provided to DAC- IPAD for Assessment

## Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization



The estimated cost of this report or study for the Department of Defense is approximately \$\_\_\_\_\_ for the 2019 Fiscal Year. This includes \$0 in expenses and \$\_\_\_\_\_ in DoD labor.

Prepared by the Department of Defense

[Date Submitted]



THE DEPARTMENT OF DEFENSE

### I. INTRODUCTION

The Department of Defense information (1) victim of sexual crimes collateral taken against assault investi

### II. DEFINITION

The following

#### a. Sexual Assault

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#### c. Collateral

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#### e. Adverse

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THE DEPARTMENT OF DEFENSE

### I. INTRODUCTION

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THE DEPARTMENT OF DEFENSE

### I. INTRODUCTION

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DEPARTMENT OF THE ARMY  
OFFICE OF THE ADJUTANT GENERAL

ENCLOSURE 1 - Draft DoD Report Reviewed by DAC-IPAD and Supplemental Service Information

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE



JUN 11 2019

Ms. Martha Bashford  
Chair  
Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in  
the Armed Forces  
One Liberty Center  
875 N. Randolph Street, Suite 150  
Arlington, VA 22203

Dear Ms. Bashford:

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, the Secretary of Defense is required to submit biennial reports, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), addressing allegations of collateral misconduct against individuals identified as the victim of sexual assault in the case files of a military criminal investigative organization. Responsibility for that report has been delegated to me. The first report is due to the Congressional defense committees by September 30, 2019.

Consistent with the letter I sent to you on March 12, 2019, enclosed is a draft report including the information sought by section 547. That report is attached. I am providing the draft report to you to give the DAC-IPAD an opportunity to offer any additional information or analysis it deems appropriate. To facilitate submitting the report to Congress by the September 30, 2019, statutory deadline, please provide me with any input from the DAC-IPAD no later than September 16, 2019.

If you have any questions concerning this request, please contact Dwight Sullivan of my office. You can reach him at 703-695-1055 or dwight.h.sullivan.civ@mail.mil.

Please accept and convey to the other DAC-IPAD members my thanks for your dedication, selfless service, and high-quality analyses.

Sincerely,

*Paul C. Ney, Jr.*  
Paul C. Ney, Jr.  
DoD General Counsel

Enclosure  
As stated



## Significant Variances in Methodology and Definitions Across the Services

1. Definition of “accused”
2. Investigative status of cases reviewed
3. Inclusion of Reservists and National Guard
4. Inclusion of victims from cases investigated by other Service MCIOs
5. Treatment of false SA reports by victims
6. Definition of “sexual assault investigation” – penetrative vs. contact offenses

## DAC-IPAD Analysis of Draft DoD Collateral Misconduct Report (September 2019)

### Comparison of Service-Provided Collateral Misconduct Data

Service Member-Victim Collateral Misconduct	U.S. Army	U.S. Navy	U.S. Marine Corps	U.S. Air Force	U.S. Coast Guard	Total for All Services
Number of Service member victims in cases closed between Apr 1, 2017 and Mar 31, 2019	1,206	1,686	826	1,753	262	5,733
Number of Service member victims " <b>accused</b> " of collateral misconduct in cases closed between Apr 1, 2017 and Mar 31, 2019	146	21	11	105	53	336
Number of instances adverse action was taken against a Service member victim " <b>accused</b> " of collateral misconduct	15	12	10	40	6	83
Percentage of Service member victims <u>accused</u> of collateral misconduct	12%	1%	1%	6%	20%	6%
Percentage of <u>accused</u> Service member victims who <u>receive adverse action</u> for collateral misconduct	10%	57%	91%	38%	11%	25%
Percentage of (all) Service member victims who receive adverse action for collateral misconduct	1%	1%	1%	2%	2%	1%



Type of Alleged Collateral Misconduct	U.S. Army (n=146)	U.S. Navy (n=21)	U.S. Marine Corps (n=11)	U.S. Air Force (n=105)	U.S. Coast Guard (n=53)
Underage Drinking	38%	19%	27%	24%	15%
Adultery/Fraternization/ Inappropriate Relationship	30%	38%	9%	14%	60%
Drug Use	3%	10%	9%	10%	2%
Violation of Order or Policy	14%	24%	36%	19%	15%
False Report*	0%	0%	0%	5%	0%
Other (i.e., DUI, Assault, AWOL, Art. 133, etc.)	15%	10%	18%	29%	8%
	100%	100%	100%	100%	100%

\*A false report as defined by each Service.

Adverse Action Taken for Collateral Misconduct	U.S. Army (n=15)	U.S. Navy (n=12)	U.S. Marine Corps (n=10)	U.S. Air Force (n=40)	U.S. Coast Guard (n=6)
Verbal Counseling	27%	0%	0%	0%	0%
Letter of Reprimand (LOR) (or Service equivalent)	27%	8%	30%	48%	33%
Article 15 Nonjudicial Punishment	40%	67%	50%	30%	50%
Discharge/Separation	7%	17%	0%	0%	0%
Court Martial/CM & Discharge	0%	0%	0%	5%	17%
Liberty Restriction	0%	8%	0%	0%	0%
LOR/Article 15 + Discharge	0%	0%	10%	18%	0%
Retirement	0%	0%	10%	0%	0%
	100%	100%	100%	100%	100%



# The DAC-IPAD Submitted a letter to the Secretary of Defense on Sept. 16, 2019, with 5 recommendations including specific definitions of key terms



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

September 16, 2019

The Honorable Mark T. Esper  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301-1000

Dear Mr. Secretary:

As the Chair of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (the Committee or DAC-IPAD), a federal advisory committee established by section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law No. 113-291), I respectfully submit the analysis and recommendations of the DAC-IPAD regarding the Department of Defense's (DoD's) draft *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*. This analysis is offered pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232) (hereinafter FY19 NDAA), which directs the Secretary of Defense to work with the DAC-IPAD in submitting to the congressional defense committees a biennial report on the number of instances of collateral misconduct committed by alleged sexual assault victims.

Section 547 requires the Secretary's reports to include three statistical data elements: (1) the number of instances in which an individual identified as a victim of a sexual assault in the case files of a military criminal investigation was accused of misconduct or crimes considered collateral to the investigation of sexual assault, (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct or crimes, and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action against those individuals. Each report is to cover the two years preceding the report due date. The first report is to be submitted to the congressional defense committees by September 30, 2019.

The Committee received a draft DoD collateral misconduct report and a request for its input regarding the report from the DoD General Counsel on June 11, 2019; that report included the collateral misconduct data collected by the Army, Navy, Marine Corps, and Air Force. The Coast Guard provided its report on allegations of collateral misconduct to the DAC-IPAD on August 16, 2019.<sup>1</sup> To better understand how the information in the reports was identified and gathered in each Service, the Committee requested representatives from the Services who were involved in the data collection process to meet with the DAC-IPAD staff and provide additional

<sup>1</sup> See Enclosure 1 for the Department of Defense's draft report and the Coast Guard report. The Air Force provided a supplemental report to the DAC-IPAD on August 22, 2019, and it is also included in Enclosure 1.



## Recommendation 1

- Prescribed uniform definitions for the terms: sexual assault, collateral misconduct, covered individual, and adverse action;
- recommended replacing the term “accused of” with “suspected of” (based on review of MCIO investigation file) in order to achieve the intended purpose of the study;



## Recommendation 1 (continued)

- Prescribed a uniform methodology for identifying sexual assault cases and victims and for counting the “number of instances.”
- Prescribed a uniform timeframe for collection of data.



## Recommendation 2

- Victims suspected of making false allegations of sexual assault should not be counted as “suspected of” collateral misconduct.



## Recommendation 3

- Department should report not only the **percentage** of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are **suspected of collateral misconduct and receive an adverse action for the misconduct.**



## Recommendation 4

- The Department should include in its report data on the number of collateral offenses that victims were suspected of **by type of offense** (using the methodology specified in section h of Recommendation 1) and the **number and type of adverse actions** taken for each of the offenses, if any.



## Recommendation 5

- The Services should employ **standardized internal documentation** of sexual assault cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.





## So, what happened next? 2020

- On March 25, 2020 the DoD GC promulgated “Guidance for Preparation of Collateral Misconduct Reports” to the Military Departments adopting nearly all of the methodologies and definitions proposed by the DAC-IPAD
- The DoD GC provided guidance for the definitions of sexual assault, victim, collateral misconduct, “accused of”, and adverse action.
- DoD GC also provided guidance on methodology for cases to be reviewed; counting number of instances; calculation of percentages; and data timelines.



## And then....

- Congress passed the FY 2021 NDAA which codified several of the recommendations of the DAC-IPAD.
- **“accused of”** was amended to **“suspected of”** in the original 2019 law requiring the report and “sexual assault” was changed to “sexual offense” as recommended by DAC-IPAD
- The Secretary of Defense was directed to issue guidance to the Services standardizing definitions and the collection of data, which the DoD GC had already done in its March 2020 memorandum.
- A new policy was also directed to be implemented by DoD that prescribes the handling of minor collateral misconduct<sub>20</sub>



# Safe-To-Report Policy

Preceded by Congressional Proposals for statutory immunity  
FY 2021 NDAA, Sec. 539A

Mandated DOD/Services address this through regulations  
that prescribe:

Handling of collateral minor misconduct

Member of the Armed Forces

Alleged victims of sexual assault

Aggravating circumstances that increase

- Gravity
- Impact on good order and discipline

Required DOD to track incidents of minor collateral  
misconduct related to safe to report policies



## **Safe to Report - Sec. 539A Definitions**

- **Armed Forces:** Includes Reserve Component and Service Academies; Does not include CG
- **Minor collateral misconduct:**
  - Close in time or during the sexual assault
  - Directly related to the incident that formed the basis of the allegation
  - Discovered as a direct result of the report or investigation
  - Does not involved aggravating circumstances that increase the gravity of the misconduct or impact on good order and discipline



# **DOD Safe to Report Memo, 25 October 2021**

- DOD Policy applicable regardless of how the victim reports, or whether the investigation/prosecution is within the military or civilian system
- The Policy does not preclude investigation of collateral misconduct, but may limit commanders' actions
- Directed each Service to produce their own policy on collateral misconduct
- Determination of whether misconduct is minor
  - Apply part V UCMJ criteria for Article 15
  - Commanders have considerable discretion
  - Examples of collateral misconduct generally treated as minor:
    - Underage drinking
    - Unprofessional relationship
    - Lawful orders concerning curfew, off-limits, school standards, or barracks/berthing policy
- Aggravating circumstances, misconduct threatened:
  - Failure of a specified military mission or objective
  - The health or safety of another (but not self-harm or self-defense)
  - Significant damage to government or personal property (unless caused by self-defense)



## **DOD Safe to Report Memo (cont.)**

- Mitigating factors include:
  - Victim's age/military experience
  - Suspect in a position of authority or higher grade
  - Did the suspect stalk, harass, haze, or coerce the victim
  - Did the command know of the collateral misconduct prior to the report of sexual assault
  - The misconduct may be related to trauma
- Commanders should take no disciplinary action for minor misconduct
- Commanders may take no disciplinary action or defer even if collateral misconduct is not minor
- Disciplinary action includes:
  - Reprimand
  - Counseling put into a personnel file
  - NJP
  - Preferral of charges
  - Administrative separation or demotion



## **DOD Safe to Report Memo (cont.)**

- Services required to report statistics to DOD SAPRO, to include why collateral misconduct was deemed minor or not-minor in each incident
- In case of legislation affecting the role of commanders as convening authorities, OGC should refer the Safe to Report Policy to the JSC, to review for recommended changes



## **Safe to Report – Services’ Policies**

- Army – July 6, 2022
- Navy – June 29, 2022
- Air Force – August 25, 2022
- All Service policies require determination of whether collateral misconduct is minor to be made at the O-6 level
- All require reporting of incidents to DOD





## **The DoD Zero Based Review**

- In January 2021, the incoming Defense Secretary placed the work of all DoD federal advisory committees on hold until the mission of each could be reviewed by the Secretary and approved for renewal.
- Consequently, the DAC-IPAD members were unable to evaluate the Services' collateral misconduct data for the biennial report that was due September 30, 2021.



## **2021 Biennial Collateral Misconduct Report**

- In May 2021, the Acting DoD GC promulgated a memo to the Military Departments requesting collateral misconduct data for the September 2021 report and amending the previous OGC guidance definitions in accordance with the NDAA revisions.
- These data reports were submitted to Congress in combined form by the DoD AGC on September 30, 2021, without DAC-IPAD or other comment.

# 2021 Biennial Collateral Misconduct Report

## DAC-IPAD Analysis of Draft DoD Collateral Misconduct Report (September 2021)

### Comparison of Service-Provided Collateral Misconduct Data

Service Member-Victim Collateral Misconduct	U.S. Army	U.S. Navy	U.S. Marine Corps	U.S. Air Force	U.S. Coast Guard	Total for All Services
Number of Service member victims in cases closed between Apr 1, 2019, and Sept 30, 2020	2,002	699	239	1,226	191	4,357
Number of Service member victims "suspected" of collateral misconduct in cases closed between Apr 1, 2019, and Sept 30, 2020	144	13	14	126	73	370
Number of instances adverse action was taken against a Service member victim "suspected" of collateral misconduct	2	6	8	42	3	61
Percentage of Service member victims <u>suspected</u> of collateral misconduct	7%	2%	6%	10%	38%	8%
Percentage of <u>suspected</u> Service member victims who <u>receive adverse action</u> for collateral misconduct	1%	46%	57%	33%	4%	16%
Percentage of (all) Service member victims who receive adverse action for collateral misconduct	0.1%	1%	3%	3%	2%	1%



# 2023 Biennial Collateral Misconduct Report

## DAC-IPAD Analysis of Draft DoD Collateral Misconduct Report (September 2023)

### Comparison of Service-Provided Collateral Misconduct Data

Service Member-Victim Collateral Misconduct	U.S. Army	U.S. Navy	U.S. Marine Corps	U.S. Air Force	U.S. Coast Guard	Total for All Services
Number of Service member victims in cases closed between October 1, 2020, and September 30, 2022	5,356	1,120	580	1,320	N/A	8,376
Number of Service member victims "suspected" of collateral misconduct in cases closed between October 1, 2020, and September 30, 2022	272	64	51	76	N/A	463
Number of instances adverse action was taken against a Service member victim "suspected" of collateral misconduct	231	21	8	14	N/A	274
Percentage of Service member victims <u>suspected</u> of collateral misconduct	5%	6%	9%	6%	N/A	6%
Percentage of <u>suspected</u> Service member victims who <u>receive adverse action</u> for collateral misconduct	85%	33%	16%	18%	N/A	59%
Percentage of (all) Service member victims who receive adverse action for collateral misconduct	4.3%	2%	1%	1%	N/A	3%



## **Analysis of 2023 Collateral Misconduct Data**

- Uniform data collection methodologies, definitions, and timelines were employed by each of the Services.
- The clear standards promulgated by OGC and the NDAA greatly improved the quality and reliability of these reports.
- Only the Air Force included data by type of offense and adverse actions taken. (Neither Congress nor DoD made reporting of these data a requirement, though it was recommended by DAC-IPAD as a best practice for sound policy-making)



## **Analysis of 2023 Collateral Misconduct Data**

- The percentage of Servicemember victims suspected of collateral misconduct related to the sexual offense investigation appears very consistent across the Services at 5-6%.
- The highest was the Marine Corps at 9%, but they are also the smallest in number.
- A second important metric is the percentage of Servicemember victims suspected of collateral misconduct who receive adverse action for the collateral offenses.
- The Services vary widely in whether adverse action results when there is victim collateral misconduct – from 85% of cases in the Army to 16% of cases in the Marine Corps.



## **Conclusions**

- Victim collateral misconduct is extremely rare in sexual offense cases across the Force.
- The Safe-to-Report policy is too new to be reflected in these data, but the expectation in future reports is that the percentage of victims suspected of collateral misconduct who receive adverse action will go down – unless the misconduct is not considered minor, or the policy is not being adequately implemented.



DEPARTMENT OF DEFENSE  
OFFICE OF THE GENERAL COUNSEL

1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

AUG - 7 2023

The Honorable Karla Smith  
Chair  
Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in  
the Armed Forces  
One Liberty Center  
875 N. Randolph Street, Suite 150  
Arlington, VA 22203

Dear Judge Smith:

Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, requires the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), to submit to the congressional defense committees biennial reports addressing allegations of collateral misconduct against individuals identified as the victim of a sexual offense in the case files of a military criminal investigative organization.

Attached are the 2023 reports of the Army, Department of the Air Force, Marine Corps, and Navy. Realizing that the DAC-IPAD has a meeting scheduled for September 19-20, I respectfully request that the DAC-IPAD consider those reports and submit any responsive information to me by close of business on Thursday, September 21. The Department of Defense will then submit the reports, along with any input from the DAC-IPAD, to the congressional defense committees.

If my office can provide any additional information concerning this request, please contact Dwight Sullivan, the DAC-IPAD's Designated Federal Officer, at [dwight.h.sullivan.civ@mail.mil](mailto:dwight.h.sullivan.civ@mail.mil).

Sincerely,

A handwritten signature in black ink, appearing to read "Ruth M.S. Vetter", is located below the "Sincerely," text.

Ruth M.S. Vetter  
Deputy General Counsel (Personnel & Health  
Policy)

Enclosures:  
As stated





**DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
2200 ARMY PENTAGON  
WASHINGTON, DC 20310-2200**

**DEPARTMENT OF THE ARMY REPORT ON ALLEGATIONS OF COLLATERAL  
MISCONDUCT AGAINST VICTIMS OF SEXUAL OFFENSES**

**I. INTRODUCTION**

a. Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, the Secretary of Defense is required to submit biennial reports, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), addressing allegations of collateral misconduct against individuals identified as the victim of a sexual offense in the case files of a military criminal investigative organization (MCIO).

b. To meet this statutory requirement, on 3 June 2023, the Department of Defense Office of General Counsel requested The Judge Advocate General of the Army provide the following information:

1. For the period 1 October 2020 through 30 September 2022, the number of instances in which an individual identified as a victim of a sexual offense in an MCIO report was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual;

2. For the same time period, the number of instances in which adverse action was taken against such an individual for such collateral misconduct; and

3. For the same time period, the percentage of investigations of sexual offenses that involved suspicion of, or adverse action against, such an individual.

**II. RELEVANT DEFINITIONS**

a. As directed in the Office of General Counsel memorandum dated 3 June 2023, the relevant definitions include:

1. "Sexual offense" means the following offenses when they result in an MCIO case file: (1) penetrative and non-penetrative alleged violations of the applicable version of Article 120, Uniform Code of Military Justice (UCMJ); (2) alleged violations of Article 125, UCMJ, for acts of forcible sodomy of a victim 16 years of age or older occurring before 1 January 2019; and (3) alleged attempts and conspiracies to commit any offense listed in (1) or (2).

2. "Collateral misconduct" means any misconduct that is potentially punishable under the UCMJ that: (1) is committed close in time to or during the alleged sexual offense and is directly related to the incident that formed the basis of the sexual offense allegation; and (2) is discovered as a direct result of the report of the sexual offense or the ensuing investigation into the sexual offense.

3. "Adverse action" means an officially documented command action that has been initiated against an alleged victim in response to collateral misconduct. The kinds of adverse action are limited to: (1) letters of reprimand (or Service equivalent) and written records of individual counseling in permanent official personnel files; (2) imposition of nonjudicial punishment; (3) preferral of charges; (4) initiation of involuntary separation proceedings; and (5) administrative demotion.

### III. METHODOLOGY

- a. The Army Criminal Investigation Division (CID) generated a list of all sexual offense investigations closed between 1 October 2020 and 30 September 2022. From this list, CID was able to identify the named victim(s) in each investigation. Additionally, CID was able to generate a list where named victims were accused of collateral misconduct and listed as subjects within the same investigation.
- b. This information was provided to the U.S. Army Office of the Judge Advocate General for review. The Army initially reviewed the list to determine the number of Army victims, including members of the Reserve Component when the victim was in a Title 10 status. For victims from other services, victim and offense information was provided to the appropriate service for inclusion in that service's report. Army victims where the law enforcement investigation was conducted by another service are included in this report.
- c. Named victim information from the CID generated list of sexual offenses was compared to information contained within the Army's military justice database, Military Justice Online (MJO). Military justice records from MJO were then reviewed to determine: (1) whether the victim was involved in misconduct collateral to their report of a sexual offense; (2) if yes, whether the command initiated adverse action against the victim for the collateral misconduct; and (3) if yes, what type of adverse action the command initiated.

### IV. DATA

- a. The data below pertains to the period 1 October 2020 through 30 September 2022:

<b>Total Number of Sexual Assault Investigations involving an Army victim</b>	<b>Total Number of Identified Army Victims</b>	<b>Total Number of instances where victim was accused of collateral misconduct</b>	<b>Total Number of instances where adverse action was initiated as a result of collateral misconduct</b>
5,209	5,356	272 <sup>1</sup>	231

- b. Based on the data received above, the following calculations were determined:

<b>Percentage of investigations where victim was accused of collateral misconduct</b>	<b>Percentage of investigations where victim received adverse action</b>
5.22%	4.43%

---

<sup>1</sup> This total includes instances where a named victim was also identified as a subject within the same CID investigation. It also includes instances of "collateral misconduct" where "adverse action" was initiated as those terms are defined in Section II.



**DEPARTMENT OF THE NAVY**  
**OFFICE OF THE JUDGE ADVOCATE GENERAL**  
1322 PATTERSON AVENUE SE, SUITE 3000  
WASHINGTON NAVY YARD DC 20374-5066

5860  
Ser 00/0131  
17 Jul 23

From: Judge Advocate General of the Navy  
To: Mr. Dwight Sullivan, Office of the General Counsel

Subj: REPORT ON ALLEGATIONS OF COLLATERAL MISCONDUCT BY VICTIMS OF  
SEXUAL OFFENSES

Encl: (1) Navy Report on Allegations of Collateral Misconduct Against Victims of Sexual  
Assault for FY21 and FY22

1. Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, as amended by Section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, and codified by 10 U.S.C. § 1561, requires the military services to report on instances in which service member victims of sexual offenses are alleged to have committed misconduct collateral to the sexual offense investigation. Enclosure (1) is the Navy's contribution to the report.

2. Should you have questions, my point of contact for this matter is CDR Chad Temple, JAGC, USN, Director, Criminal Law Division, at [chad.c.temple.mil@us.navy.mil](mailto:chad.c.temple.mil@us.navy.mil) or 202-685-7057.

*D. E. Crandall*  
D. E. CRANDALL

Copy to:  
OJAG Code 20

SUBJECT: Navy Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault

## I. INTRODUCTION

The U.S. Navy submits the following report pursuant to Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, as amended by Section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283. Codified by 10 U.S.C. § 1561. The report contains the following information for the period 1 October 2020 through 30 September 2022: 1) the number of instances in which an individual identified as the victim of a sexual offense in a military criminal investigative organization (MCIO) report was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual; 2) the number of instances in which adverse action was taken against such an individual for such collateral misconduct; and 3) the percentage of investigations of sexual offenses that involved suspicion of or adverse action against such an individual.

## II. DEFINITIONS

The following definitions were used in compiling this report:

- (a) **Sexual offense:** (1) penetrative and non-penetrative alleged violations of the applicable version of Article 120, Uniform Code of Military Justice (UCMJ); (2) alleged violations of Article 125, UCMJ, for acts of forcible sodomy on a victim 16 years of age or older occurring before January 1, 2019; and 3) alleged attempts and conspiracies to commit the offenses listed in (1) or (2).
- (b) **Collateral misconduct:** any misconduct that is potentially punishable under the UCMJ that (1) is committed close in time to or during the alleged sexual offense and is directly related to the incident that formed the basis of the sexual offense allegation and (2) is discovered as a direct result of the report of the sexual offense or the ensuing investigation into the sexual offense.
- (c) **Adverse action:** an officially documented command action that has been initiated against an alleged victim in response to collateral misconduct, limited to: (1) letters of reprimand and written records of individual counseling in permanent official personnel files; (2) imposition of nonjudicial punishment; (3) preferral of charges; (4) initiation of involuntary separation proceedings; and (5) administrative demotion.

## III. METHODOLOGY

Naval Criminal Investigative Service (NCIS) collected all completed investigations for the specified time period where the identified victim was a member of the Navy. Additionally, the

**SUBJECT: Navy Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault**

Navy coordinated with the other Services to collect cases in which a victim affiliated with the Navy reported to another Service's MCIO. Both categories of completed cases, where the identified victim's attached unit or organization at time of reporting was available, have been included in this report. A team of active and reserve judge advocates organized the list of cases provided by NCIS and contacted the commands responsible for each individual for a determination of (1) whether the victim was suspected of misconduct collateral to their report; and (2) if so, whether the command took adverse action against the victim.

The information received during this review is below.

**IV. DATA**

<b>Total number of sexual offense investigations involving identifiable Navy victims</b>	<b>Total number of instances where a Navy victim was suspected of collateral misconduct</b>	<b>Total number of instances where adverse action was taken as a result of collateral misconduct</b>
1,120	64	21
	<b>Percentage of total sexual offense investigations in which the victim was suspected of collateral misconduct</b>	<b>Percentage of investigations where victim received adverse action</b>
	5.71%	1.87%



## **UNITED STATES MARINE CORPS REPORT ON ALLEGATIONS OF COLLATERAL MISCONDUCT AGAINST VICTIMS OF SEXUAL OFFENSES**

### **I. INTRODUCTION**

The United States Marine Corps submits the following report pursuant to Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115-23, as amended by Section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283. The report contains the following information for the period of October 1, 2020 through September 30, 2022: (1) the number of instances in the Marine Corps where an identified victim of a sexual offense in a military criminal investigative organization report was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual; (2) the number of instances in which adverse action was taken against such an individual for such collateral misconduct; and (3) the percentage of investigations of sexual offenses that involved suspicion of, or adverse action against, such an individual.

### **II. DEFINITIONS**

The following definitions were used in compiling this report:

a. **Sexual Offense**: (1) penetrative and non-penetrative alleged violations of the applicable version of Article 120, Uniform Code of Military Justice (UCMJ); (2) alleged violations of Article 125, UCMJ, for acts of forcible sodomy on a victim 16 years of age or older occurring before January 1, 2019; and (3) alleged attempts and conspiracies to commit the offenses listed in (1) or (2).

b. **Collateral Misconduct**: any misconduct that is potentially punishable under the UCMJ that (1) is committed close in time to or during the alleged sexual offense and is directly related to the incident that formed the basis of the sexual offense allegation; and (2) is discovered as a direct result of the report of the sexual offense or the ensuing investigation into the sexual offense.

c. **Adverse Action**: an officially documented command action that has been initiated against an alleged victim in response to collateral misconduct, limited to: (1) letters of reprimand and written records of individual counseling in permanent official personnel files; (2) imposition of nonjudicial punishment; (3) preferral of charges; (4) initiation of involuntary separation proceedings; and (5) administrative demotion.

### **III. METHODOLOGY**

The Naval Criminal Investigative Service (NCIS) collected all sexual offense investigations for the specified time period where the identified victim was a Marine Corps Service member. In

addition to the names provided by NCIS, the Marine Corps collected victim names from the other Services in cases where a Marine Corps victim reported a sexual offense to the MCIO of another Service. A list of victims provided by NCIS and the other Service MCIO's was forwarded to the commands responsible for each individual case for a determination of whether (1) the victim was suspected of misconduct collateral to their report of sexual assault; (2) if so, whether the command took adverse action against the victim for that collateral misconduct. The information received during this review is reflected in section IV on the following page.

#### IV. DATA

During the period of October 1, 2020 through September 30, 2022:

<b>Total number of sexual offense investigations involving Marine Corps victims</b>	<b>Total number of instances where a Marine Corps victim was suspected of collateral misconduct</b>	<b>Total number of instances where adverse action was taken as a result of such collateral misconduct</b>
<b>580</b>	<b>51</b>	<b>8</b>
	<b>Percentage of total sexual offense investigations in which the victim was suspected of collateral misconduct</b>	<b>Percentage of investigations where the victim received adverse action for such collateral misconduct</b>
	<b>8.79%</b>	<b>1.38%</b>



# **The Department of the Air Force Report on Allegations of Collateral Misconduct Against Victim of Sexual Offenses**

## **I. INTRODUCTION**

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, the Secretary of Defense is required to submit biennial reports, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), addressing allegations of collateral misconduct against individuals identified as the victim of a sexual offense in the case files of a military criminal investigative organization (MCIO).

This report includes relevant data from the Department of the Air Force (DAF) for the period from 1 October 2020 through 30 September 2022 on: 1) the number of instances in which an individual identified as a victim of a sexual offense in an MCIO report was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual; 2) the number of instances in which adverse action was taken against such an individual for such collateral misconduct; and 3) the percentage of investigations of sexual offenses that involved suspicion of, or adverse action against, such an individual.

## **II. RELEVANT DEFINITIONS**

The Department of Defense Office of General Counsel provided the following definitions for the purpose of preparing this report:

a. “Sexual offense” means the following offenses when they resulted in an MCIO case file: (1) penetrative and non-penetrative alleged violations of the applicable version of Article 120, Uniform Code of Military Justice (UCMJ); (2) alleged violations of Article 125, UCMJ, for acts of forcible sodomy of a victim 16 years of age or older occurring before January 1, 2019; and (3) alleged attempts and conspiracies to commit the offenses listed in (1) or (2).

b. “Collateral misconduct” means any misconduct that is potentially punishable under the UCMJ that: (1) is committed close in time to or during the alleged sexual offense and is directly related to the incident that formed the basis of the sexual offense allegation; and (2) is discovered as a direct result of the report of the sexual offense or the ensuing investigation into the sexual offense.

c. “Adverse action” means an officially documented command action that has been initiated against an alleged victim in response to collateral misconduct. The kinds of adverse action addressed by this report are limited to: (1) letters of reprimand (or Service equivalent) and written records of individual counseling in permanent official personnel files; (2) imposition of nonjudicial punishment; (3) preferral of charges; (4) initiation of involuntary separation proceedings; and (5) administrative demotion.

### III. METHODOLOGY

The Air Force Office of Investigations (AFOSI) compiled a list of all investigations into a qualifying sexual offense defined above with a case closed date between 1 October 2020 and 30 September 2022. This data included all victims in the Regular Air Force, Regular Space Force, Reserve Corps, or in the National Guard on Title 10 orders when they reported the sexual offense. This list was then filtered down to every local installation legal office to report on the cases investigated at their installation. Conducting reviews at the installation level ensured the most accurate information on victim misconduct as local installations have the most visibility and access to case information. In addition to the names provided by AFOSI, the Department of the Army and the Department of the Navy provided names of DAF victims who reported a sexual offense investigated by their respective MCIO.

The installation legal offices reviewed each instance involving a sexual offense to confirm: 1) command action for the alleged offense and for any collateral misconduct occurred during the required timeframe; 2) whether the victim was suspected of any collateral misconduct, and if so, what type of alleged misconduct; and 3) whether the command took action on any victim collateral misconduct. The Air Force Military Justice Law and Policy Division (AF/JAJM) consolidated this information into one complete report for data analysis.

In determining the total number of investigations, DAF noted one investigation may have several victims or several subjects. To appropriately capture the percentage of cases in which victim collateral misconduct exists, DAF treated every unique report, meaning every case where there is a different subject and different victim, as one case. If a subject was alleged to have assaulted three individuals, there would be three cases. Similarly, if one victim was allegedly assaulted by two different subjects, there would be two cases. If a subject and victim made a claim against each other, this was counted as two cases.

Additionally, in collecting information from installation legal offices, DAF noted an inconsistency in interpreting “command action,” specifically, for courts-martial. DAF defined command action in a court-martial as preferral of charges and updated the information received to reflect case closure when preferral of charges had taken place during the required timeframe.

### IV. DATA

During the reporting period, AF/JAJM totaled 1,320 sexual assault investigations involving DAF victims with 76 instances (5.76% of investigations) in which command suspected a victim of collateral misconduct. Of the 76 victims suspected of collateral misconduct, 14 DAF victims received adverse action as a result of the collateral misconduct. The following includes every instance of suspected collateral misconduct reported.

<b>Primary Allegation of Collateral Misconduct</b>	<b>Number of Victims Accused</b>	<b>%</b>	<b>LOR/LOA/LOC<sup>1</sup> (maintained in personnel file)</b>	<b>Nonjudicial Punishment</b>	<b>Preferral of Charges</b>	<b>Initiation of Invol. Separation</b>	<b>Admin. Demotion</b>
	<b>Total: 76</b>						
Underage Drinking	28	36.8%					
Violation of Order or Policy (other than underage drinking or unprofessional relationship)	9	11.84%	2	2			
Adultery, Fraternization, or Unprofessional Relationship	13	17.11%	2	1			
Drug Use	2	2.63%					
Counterclaim of Sexual Assault for Same Instance	14	18.42%	1	1	1		
Assault & Battery	5	6.58%	3				
False Official Statement (not false allegation)	4	5.26%	1				
Drunk Driving	1	1.32%					

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<sup>1</sup> Letter of Reprimand (LOR); Letter of Admonishment (LOA); Letter of Counseling (LOC)

Good afternoon, My name is Harold Pflager. I am a 90-year-old Military veteran who is the grandfather of TSgt. Robert Andrew Condon, who our family calls Andy. I'm a veteran of the Korean War 1953 and 1954. I was honorably discharged from the military. In my civilian workplace, I was required to train young men and women in an apprenticeship program which required me to make sure the program was in compliance with all apprenticeship standards, union Constitution, and all state and federal laws. I worked as an area coordinator, the director of operations, and finally as an administrative manager of the union apprentice program which covered the state of Ohio.

Andy spent a lot of time at my house because his parents were both police officers and his grandmother and I were always available as his caretaker. When he was under our care we never had reason to reprimand him for things other than over exuberance. I followed his career in the military and never found fault with what he did and had great pride in his accomplishments.

So, when I received a call from Andy, he explained where he was and asked me to notify his mother. When I notified his mother, she explained the problem further. We arrived at his base the following day. My daughter made arrangements to visit my grandson who was in a civilian jail. This jail was 30 miles plus away from his base and we could only see him that day at 10:30 pm the following evening, which I thought to be unusual. Also, in the room where we were talking to Andy was another Air Force inmate talking to a person. When that Air Force person passed by us leaving before we did, Andy identified him as a person he (Andy) had charged with having possession of or selling narcotics on the base (Hurlburt Field). This was the first time I knew that while doing his job, he found other Air Force individuals violating various drugs on the base.

Andy was told by his commanding officer to do more local work that would help him in getting promoted. When he went out and found nine Air Force members dealing and using drugs is when his activities and reports of such became a serious problem for him. Before these individuals were going to trial Andy was sent to Africa, out of schedule. His partner that was with him when these individuals were charged was then forced to be the one that processed the drug charges. She took two of them to court martial while he was away with guilty verdicts. When Andy returned from Africa is when all the sexual assault charges begin to appear.

The reason for this became quite apparent when a few days later the prosecution effectively charged him with being a serial rapist. At this time a Col. in charge of the base where the trial was being held asked the presiding judge to vacate nine charges filed by Andy against those individuals that were dealing in drugs one way or the other. As best I can understand, the reason for this was that one of the charges of sexual assault was also placed on an individual that had been part of the drug investigation as well. The judge stated that this was not necessary but allowed it to take place. This action took place at least 120 days before Andy was officially charged with any crime.

My daughter and I weren't allowed in the judge's chamber when this action was taking place but once they were making their decision we were allowed to talk with Andy. While waiting for their decision about what would happen when a decision was made. When the transcript of these proceedings were published I could then put my observations with the transcript. I told Andy while waiting for this decision to come down that I would back him

in this endeavor till a justified result could happen. To this point no such result has transpired so we continue to object to this process that happened in this event.

They charged him with three rapes within a 60 day period. After he returned from Africa, the documents filed by one of the investigators had changes made to the original document filed by one of the alleged persons. Without this document they could not have charged Andy as a Serial Rapist and put him in pretrial confinement for the next year. It also was made apparent why the prosecution repeatedly tried to find other accusers for the next year.

This third person was found by the investigator that returned after having left and gone back to Quantico. When asked why he returned, he said he was trolling. No enlisted personnel makes such a move without orders to do so. Who gave the orders? Only one investigator was there for this interview. The prosecutors told my attorney that this person was the second alleged charging person but I can prove she was the third right after she was found to be a participant.

Only one of the individuals actually filed a charge and nothing she said happened was ever proven by evidence. The individual that the prosecutor said was number three had denied such activity took place and on the record had consented to sex and it was documented. The one they said was number two was the one whose report had been changed.

The prosecution regardless of how strongly they investigated all females after this time they could not find a third accuser regardless of how viciously they tried using false statements and lies.

They only found a propensity witness when they went back to Andy's former wife who probably was still by military standards qualified for family and military benefits making it possible to lose the same. When she agreed to say he was violent sometime during the marriage the prosecution then had a propensity witness to use. This happened just slightly before the final trial of Andy, one year after the original time he was put in pretrial confinement. The prosecutor that did this final interview had no witnesses or any written documentation that they took during this interview to prove that what they said to this individual was not coercion.

This supposed interview took place on the phone by a prosecutor after this witness had previously 4 times testified under oath that no such activity took place when interviewed by two or more investigators; and signed an affidavit that there was never violence nor sexual assault during their marriage – while he was being vetted for OSI. The only way that number two could be number two is if they counted her after the real number two had sent a letter to higher authority saying she did not want to be a victim. This is long after Andy had been put in pretrial confinement.

The reason that three alleged accusers are placed in order by the prosecution is that accuser number one is a military person, number two is a military person, the third alleged person was a civilian. For that reason they told my hired attorney that number two was number three and number three was number two. Reason for this is quite apparent in further investigation which included calling all females on Andy's telephone

to find a third alleged female person. This also is why the judge called this a complicated investigation when it really was not.

The prosecutors lost or destroyed evidence. Prosecutors failed to tell the defense all results of background checks as well.

The prosecutors repeatedly said Andy was a liar and had apologized to his former wife. When I found the actual tape conversation there was no apology. This conversation was given to one of the Air Force Defense Attorneys, a female and she gave it to my paid attorney. The next day at the trial I saw my attorney hand the prosecutor a piece of paper. My attorney told me that the prosecutor said it had to have a yellow car on it and it did. This report that I gave to my attorney has not appeared in any of the legal proceedings I have read.

I had hired a private investigator that found the individual that filed the first charge of sexual assault had a felony arrest that was not reported in the trial. Also finding a history of lying was reported and found against the first charging person as well.

When reported to the prosecutor they said they already had it. The female defense attorney that wrote the report for clemency said that she did not have it and if she had she would have used it in her writings.

I could go on and on about violations that took place during these investigations and trials but the one that stands out most at this time is two trial transcripts which could not be an accident. The defense lawyer I hired to handle the appeal procedures had one such transcript and Andy had the real transcript. Before my hired Appellant Attorney received the trial transcript he had asked for it three or four times before he got one which was altered.

We have actual proof that the transcript he received from the prosecution was the one that he used during all appellant proceedings. The fact that there were two transcripts was not reported by the prosecution but discovered after all of our appeals administratively played out. Once I realized there were two transcripts I then understood some of the discourse that was taking place between Andy and his attorney handling the appeal. I thought that without doubt Andy would now get a second chance at appeal retrials but no such thing was forthcoming and that is why we continue and will continue to fight this miscarriage of justice.

One of the most unjust activities done during this case is as follows: the Judge who was the Chief Judge in the region insisted on handling this case himself; he also was found to be in violation of procedures in another case of a sexual problem. Further causing inability to handle Andy's case in a timely manner because of other commitments was the reason which caused delays. He (Judge) had responsibilities at Guantánamo base for trials concerning terrorism. He was found to improperly handle himself while there and all cases that he presided over four the last four years were overturned and the terrorists were not convicted or found innocent. It amazes me that the legal system being used for Andy and terrorism is more lenient for terrorists than for proven dedicated members of the military.

**It is clearly apparent to anyone with common sense reading the above information that for the good of the service this event was used. Command influence had to take place up to the highest levels.**

**A proper result in this command interferes in military legal events is as follows:**

- 1. Andy gets paid the entire time he spent while incarcerated. He retains all of his benefits lost during Incarceration.**
- 2. I am reimbursed all funds that I needed to use defending His case At various courts and bases.**
- 3. I will be reimbursed somehow for all the anxiety I put on myself, my family and my family's reputation by allegations illegally performed by the military justice system as well as the Federal Justice System.**

On September 20, 2023; I intend to speak on behalf of my son, Tech Sergeant Robert Condon, who was falsely accused and wrongfully convicted of crimes that never occurred.

I plan to discuss the unethical, illegal and unconstitutional actions on the part of both the prosecutors and investigators to achieve such an outcome and destroy my son's life and cause devastation to all that love him.

I wish to make the committee aware that these things are happening and that they should be unacceptable to any American citizen.

Respectfully,

Holly Yeager  
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Whitehouse, OH. 43571  
[Toledoyeagers5@aol.com](mailto:Toledoyeagers5@aol.com)  
419-877-0342 or 419-360-5036



## **DESTRUCTION OF EVIDENCE**

Tech Sergeant Condon had placed an ad on Craigslist under Men Seeking Women. This ad suggested exploring aspects of BDSM, [REDACTED] answered that ad. Tech Sergeant Condon was in Africa at the time she answered and began communicating with Ms. [REDACTED] using his government issued Blackberry for at least 53 days. Ms. [REDACTED] interested and expressing that she had explored this type of relationship in the past, sent several suggestive photos and requests to Tech Sergeant Condon on what she would like them to do together.

In fact, she sent him photos and requests for just what she alleges happened on the night in question. However, Tech Sergeant Condon was ending the relationship that evening and maintains that he did not have any sexual relations with Ms. [REDACTED] that evening. The evidence supports his statements, not hers.

In addition, if the messages from this phone were shown in court it would have blown the Prosecution's case entirely. So, that phone was destroyed. That phone was destroyed while in the hands of the Prosecution. And, that phone was destroyed by Global Compusearch.

NOTE: It should be noted that Ms. [REDACTED] turned in an old phone to OSI with only 5 days of communication between them. Even on this phone she had deleted 7 or 8 messages of a sexual or romantic nature. She never turned in the phone with 53 days of communication and even though it was known that she had this phone and was listed in the original interview notes of (2) different OSI agents – the investigators from Quantico ignored this evidence.

Global Compusearch was hired by Tech Sergeant Condon's family as early as November 2013. The government came along in January 2014 and hired Global Compusearch, but the boss of the Condon expert. This is a CONFLICT OF INTEREST and in no way should have been allowed.

Attached are court testimony from Agent Denise Sawyer, Global Compusearch President Josiah Roloff and Special Agent Vorderbruggen (now deceased) dealing with the destruction of this phone and 53 days of communication between Airman [REDACTED] and Tech Sergeant Condon.



TESTIMONY OF AGENT SAWYER

1 Q. And did you understand that he used that phone really as the primary means of  
2 communicating with AIC [REDACTED] while he was deployed?

3 A. There were several phone calls on that phone, yes.

4 Q. In addition to the phone calls, were there not thousands of text messages as well?

5 A. We weren't able to get the data off of that phone.

6 Q. Right. Because that phone was destroyed -- at least the chip that contained the data was  
7 destroyed during the attempt to extract it, right?

8 A. I wasn't aware that it was destroyed in the attempt. I just knew that they -- we had tried,  
9 from headquarters, to have the password reset so we could get access to it and that failed. So, once that  
10 failed, we sent it to Global CompuSearch for them to do the chip off of the phone.

11 Q. But the end result is, today, those messages are lost --

12 A. Yeah, they're gone.

13 Q. -- and gone forever?

14 A. Yeah, unfortunately.

15 Q. And we will never know the content of those messages that were exchanged over those first  
16 couple of months or at least weeks of their relationship?

17 A. Except for what was on Airman [REDACTED] phone.

18 Q. Right, but from the Blackberry.

19 A. That's correct.

20 Q. I want to briefly return to the execution of the search warrant. We have talked about the  
21 laptop and the computer -- the laptop and the desktop -- I'm sorry -- but during the execution of that  
22 search you knew it was important -- you were looking for any information that would tend to  
23 corroborate or refute the version of events that AIC [REDACTED] had told you, right?

24 A. Correct.

25 Q. And during the execution of that search warrant, did you seek or look for a toothbrush?

TESTIMONY OF JOSIAH ROLOFF, PRESIDENT & SENIOR FORENSIC EXAMINER FOR GLOBAL  
COMPUSEARCH

1 A. Yes.

2 Q. Could you tell from that LG phone what the last day of use was?

3 A. I could. From what I recall it was just the next month or probably the first or second day of  
4 the next month.

5 Q. October of 2013?

6 A. Correct.

7 STC: Thank you, Your Honor. I have no further questions.

8 MJ: Defense Counsel, you may proceed.

9 SDC: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY SENIOR DEFENSE COUNSEL:

12 Q. Good morning, Mr. Roloff.

13 A. Good morning.

14 Q. Now, I'd like to start by talking with the chip-off procedures that you did -- that were  
15 conducted.

16 A. Sure.

17 Q. There was chip-off procedures conducted on the LG phone?

18 A. Correct.

19 Q. And on the Blackberry?

20 A. Yes.

21 Q. And the decision to do that chip-off procedure was made by the prosecution?

22 A. Yes.

23 Q. Knowing that it would destroy the phone?

24 A. Correct.

25 Q. Knowing that if it was unsuccessful it would destroy evidence?



1 A. I believe it was earlier that evening, but I don't recall the specific time.

2 Q. Were they taken at approximately 10:55 p.m.?

3 A. That sounds about right.

4 Q. Or I should say 11:55 p.m. Eastern Daylight Time, 10:55 p.m. Central Daylight Time.

5 A. Correct.

6 Q. Now, you talked a little bit on direct examination about the text messages between Sergeant  
7 Condon and Airman First Class [REDACTED]

8 A. Yes.

9 Q. And you talked about the deleted text messages between the two of them?

10 A. Yes.

11 Q. And on direct examination you testified that there did not appear to be a selective deletion of  
12 the text messages?

13 A. Correct.

14 Q. Isn't it true, that in the time period of 30 August 2013 until the 8th of September 2013, there  
15 were a handful of text messages between Sergeant Condon and Airman [REDACTED] that she did selectively  
16 delete?

17 A. During that timeframe, yeah. There were approximately seven that were deleted, but  
18 recovered.

19 Q. So, they were removed from the -- she attempted to remove them from the phone?

20 A. Yes.

21 Q. And that wasn't at the beginning or the end of the time period?

22 A. No. It was kind of sporadically throughout.

23 Q. Did it appear that those messages were selectively deleted?

24 A. Those ones specifically would have had to be individually selected, yes.

TESTIMONY OF SPECIAL AGENT VORDERBRUGGEN

1 A. Yes.

2 Q. Tell me about when you recall seeing that phone for the first time.

3 A. Um, that was a long time ago, and I - I actually recall it being on my desk one day when I  
4 was sitting over here at Hurlburt Field; because I have an office at both bases. Um, and one day, I  
5 noticed someone had sat it on my desk, but I really don't know who put it there.

6 Q. So, you had a chance to look at the evidence tag in the case.

7 A. Yes, I looked at it.

8 Q. And who does that show turned over the phone to you?

9 A. Um, [REDACTED].

10 Q. Tell me about what you did with the phone when you saw it on your desk.

11 A. Um, I kept it there and I don't remember for what amount of time. But I know when it was  
12 logged into evidence. [REDACTED] filled out the tag -- someone else filled out the tag, and he gave it to me  
13 because I was the evi -- I was one of the evidence custodians in our squadron. And so, I would have  
14 logged it in to evidence. And then, we maintained it for I forget how long, um, to be exact, before we  
15 would have logged it out to the other unit that maintained all of our evidence for us for this case.

16 Q. And that would have be the one, the office over at Tyndall, correct?

17 A. Correct.

18 Q. So, what did you -- were you able to get into the phone itself?

19 A. No.

20 Q. Why not.

21 A. It was password protected. And I'm unaware of anybody ever tried to digitally extract it, but  
22 I know it was password protected so nobody could just flip through it and look at it.

23 Q. When you saw it, at some point the phone was on?

24 A. Correct.



1 Q. Going back to the 6th and 7th of September, did you participate in an interview with A1C

2 [REDACTED]  
3 A. Yes.

4 Q. And was, again, was this yourself and Agent Wilson, as well?

5 A. Yes.

6 Q. Specifically, on the 7th of September, did you -- where was this interview taken?

7 A. On the seventh?

8 Q. On the seventh.

9 A. It was over at the SVC Office, here, on Hurlburt Field.

10 Q. And you, at that point, you'd obviously had a chance to speak with her the previous day,  
11 right?

12 A. Yes.

13 Q. So, you were familiar with what she had alleged?

14 A. Yes.

15 Q. Tell me about what your observations of her, specifically -- well, first of all, what uniform  
16 was she wearing when you spoke with her?

17 A. Her ABU's.

18 Q. And were the sleeves down?

19 A. Yes.

20 Q. Tell me about your observations of her, the parts of her body that you could see, say, from  
21 the t-shirt on up.

22 A. Um, they were clear of any injury, if that's what you're getting at. Um, she had no, no  
23 markings or anything that we could see from her neck up.

24 Q. Redness?

25 A. No, I couldn't see any of that.

1 Q. Swelling?

2 A. No.

3 Q. Bruising?

4 A. No.

5 Q. Abrasions?

6 A. No.

7 Q. And did you -- did, at some point, you actually asked her to pull the uniform kind of aside so  
8 you could get a better look?

9 A. Yes.

10 Q. And what did you -- did you notice anything different at that point?

11 A. No.

12 CDC: May I have just a moment?

13 MJ: You may.

14 [Defense counsel confer.]

15 **DIRECT EXAMINATION, (resumed)**

16 **BY CIVILIAN DEFENSE COUNSEL:**

17 Q. Just returning to the Blackberry for a moment.

18 A. Mm-hm.

19 Q. Was it unusual that a work assigned Blackberry would be password protected?

20 A. No. That's required.

21 CDC: Thank you.

22 MJ: Trial Counsel.



**CROSS-EXAMINATION**

**BY SENIOR TRIAL COUNSEL:**

Q. Agent Vorderbruggen, one of your prior jobs in OSI was as an FSC, is that right?

A. Correct.

Q. What's an FSC?

A. A Forensic Science Consultant.

Q. And if you could tell the members, just briefly, what an FSC does?

CDC: This - this is certainly beyond the scope, Judge.

MJ: Trial Counsel?

STC: Your Honor, I think it goes directly to why she did what she did as far as her actions with any phones that the accused had --

MJ: Well, just the Blackberry.

STC: Yes, that's correct, sir.

MJ: That's all she's talking about.

STC: All right, sir.

MJ: Focus on the Blackberry. You may continue.

STC: Okay, sir. And I do intend to ask questions about an iPhone, as well. So, I would ask permission to go ahead and ask the witness this now on the stand. I could certainly use direct examination questions.

MJ: Defense Counsel?

CDC: They can call her in rebuttal if they figure that there was a proper method for the rebuttal. But otherwise, this is not direct examination.

MJ: Concur. Trial Counsel, you can ask about the Blackberry and stay focused on that. If you want to call her back in rebuttal, you may.

STC: Thank you.



**CROSS-EXAMINATION, (resumed)**

**BY SENIOR TRIAL COUNSEL:**

Q. So, this Blackberry -- as far as an FSC goes, are you familiar with, I believe they're called, "Faraday Bags?"

A. I know what they are, yes.

Q. Okay. And the Blackberry was on your desk. Did it have a Faraday Bag on it?

A. No.

Q. All right. What is a Faraday Bag?

A. It is a bag made of special material that when the phone is placed inside of it, it makes it so that nobody can remote access that phone in any way, shape, or form. It can't receive any signal. Nobody can remotely shut it off or do anything to it.

Q. Okay. So, when you had it on your desk, this was also prior to the accused entering into pre-trial confinement?

A. Yes.

Q. Okay. And just to be clear, he didn't have, for at least week, up until he went into pre-trial confinement, he didn't have physical access to that building, correct?

A. Correct.

Q. Because y'all had moved him in the Maintenance Group --

A. Yes.

Q. -- and changed the cypher locks in the doors?

A. Yes.

Q. All right. So, he didn't have physical access to that phone, perhaps, during this time period, but there was no Faraday Bag on it. So, is it possible, then, without a Faraday Bag, for someone to remotely access and attempt to wipe the memory on a phone?

A. I'm not knowledgeable enough in digital evidence or digital media, period --

1 Q. Sure.

2 A. -- to really be able to answer that question.

3 Q. But that's the whole point of the Faraday Bag?

4 A. Correct.

5 Q. And this Blackberry did belong to the accused for quite some time?

6 A. My understanding is yes.

7 Q. In fact, the same one he took with him to Africa?

8 A. Yes.

9 STC: Thank you. I have no further questions.

10 MJ: Defense Counsel, any follow-up?

11 CDC: We don't have any further questions, sir.

12 MJ: Members of the court, do you have any questions for Special Agent Vorderbruggen? That's  
13 a negative response from the court members.

14 Defense Counsel, do you want the witness held subject to recall.

15 CDC: We do not.

16 MJ: Trial Counsel?

17 STC: Yes, Your Honor.

18 [The witness was duly warned, temporarily excused, and withdrew from the courtroom.]

19 CDC: While she's exiting the courtroom, may we have just one moment?

20 MJ: Absolutely.

21 [Defense counsel confer.]

22 CDC: The defense is prepared to proceed.

23 MJ: You may.

24 CDC: The defense calls [REDACTED].

## **Monica Lopez vs Condon's Neighbor**

1. The testimony of TSgt. C's neighbor, Ms. L.. She lives in the townhouse next to TSgt. C. and they have a shared wall. When TSgt. C. used the downstairs bathroom, she can hear it. Right next to this door is where M.L. alleges the assault began, yet this neighbor heard nothing. This neighbor had heard fights in that apartment from previous tenants, but nothing on this evening. Even her little dogs did not alert to a disturbance so close by. One little bark from one dog at 0200 hours, when M. L. was leaving the townhouse, nothing else.

1 Q. And you do so?

2 A. I do.

3 Q. And that's when he proceeds to spank you with the -- a paddle at least, right?

4 A. Yes, sir.

5 Q. And you're nude at this point, right?

6 A. I am.

7 Q. So, there's no clothing on your back side?

8 A. No.

9 Q. And you described him as spanking you very, very hard, right?

10 A. Yes, sir.

11 Q. In fact, so hard that you were screaming in pain?

12 A. Yes, sir.

13 Q. And he struck you more than six times?

14 A. I believe so.

15 Q. Now, your testimony today, as I understood it, you saw Prosecution Exhibit 5, right, the  
16 black paddle, a moment ago, a few moments ago?

17 A. Yes.

18 Q. Is it your testimony today that you've never seen that paddle before?

19 A. I don't know if I have or haven't.

20 Q. Is it your testimony today that you never used a paddle in sexual relationships with Sergeant  
21 Condon?

22 A. No. That's not my testimony.

23 Q. Your testimony is then that you did use a paddle in previous sexual encounters with Sergeant  
24 Condon?

25 A. One previous one we had.

TESTIMONY OF NEIGHBOR- KATHY LAGOZZINO

1 I DC: Sir, it appears that one of the members is missing one of them. Could we ask which one  
2 I they do not have?  
3 I MJ: Absolutely.  
4 I MBR (MSgt McNabb): It's that one. May I please --  
5 I MBR (Capt Miller): - I need --  
6 I MBR (MSgt McNabb): Oh, sorry.  
7 I MBR (Capt Miller): It's missing.  
8 I MJ: Can you see which exhibit that is?  
9 I MBR (MSgt McNabb): H.  
10 I DC: One moment, please.  
11 I MJ: Defense Counsel, you can have mine.  
12 I DC: Thank you. Retrieving -  
13 I MJ: You're welcome.  
14 I DC: - Defense Exhibit H from the military judge.  
15 I MJ: It's a copy. Here you go.  
16 I DC: Thank you, and providing to the military member.  
17 I Sir, at this time, the defense calls Ms. Kathy Lagozzino.  
18 I KATHYLAGOZZINO,  
19 I civilian, was called as a witness for the defense, being duly sworn, testified as follows:  
20 I TC: Ma'am, will you state your name for the record?  
21 I WIT: Yes. Kathy Louis Lagozzino.  
22 I TC: And in what city and state do you reside?  
23 I WIT: Fort Walton Beach, Florida.  
24 I TC: Do you know the accused, Tech Sergeant Condon, in this case?  
25 I WIT: Yes, I do.

1 TC: Do you see him in the room?

2 WIT: Yes, I do.

3 TC: Can you point him out?

4 WIT: Yes, [pointing] he's right there.

5 TC: Positive identification of the accused. Your witness.

6 DC: Thank you.

7 **DIRECT EXAMINATION**

8 **BY DEFENSE COUNSEL:**

9 Q. Good afternoon, Miss Lagozzino. How are you doing?

10 I A. Hi. I'm okay. Thank you.

11 I Q. You said just a minute ago that you do, in fact, know Tech Sergeant Robert Condon?

12 A Yes.

13 Q. How do you know him?

14 I A. He's my next door neighbor.

15 I Q. Now, you say he's your neighbor. Where do you live?

16 I A. I live on - at 455 Waterway Lane, in the Harbor Townhome -Townhomes. He lives at 457.

17 I Q. What type of unit is Tech Sergeant Condon's apartment?

18 A He has a townhome. It's the end unit. It's the last one on the water.

19 Q. And is he on your right or on your left?

20 I A. Facing the units, he's on the right.

21 I Q. Now, Miss Lagozzino, before we go into describing the actual layout of the townhome, I

22 I would like to show you Defense Exhibits F, G, and H.

23 I Your Honor, may I approach the witness?

24 I MJ: You may.



1 I Q. I'm providing Defense Exhibits F, G, and H to the witness. And, if we could, let's just start  
2 I with Defense Exhibit F. Do you know what this is?  
3 I A. Yes.  
4 I Q. Could you explain it to the members?  
5 I A. This is the beginning of Waterway Lane, the beginning of our street -- lane and the  
6 I townhomes.  
7 I Q. And now, we're moving over to Defense Exhibit G. What is this?  
8 I A. The same; just a little closer in, closer to our units; Waterway Lane.  
9 I Q. And are your townhomes on the left or on the right of this picture?  
10 I A. On the left.  
11 I Q. And now, looking at Defense Exhibit H, could you explain to the members what this is a  
12 I picture of?  
13 I A. Yes. This is the very end. This would be where -well, his unit isn't in the picture, but this  
14 I is the very end where the - where it meets the water and his unit is. Just out of the picture on the left.  
15 I Q. And the witness is using her figure to point to the left of Defense Exhibit H.  
16 I A. Yes. And you can also see the gazebo, which is right in front of his unit.  
17 I Q. So, it looks like directly across from yours and Sergeant Condon's townhome that there is  
18 I really no apartment right on --  
19 I A. That's correct. It's water.  
20 I Q. Thank you. I'm retrieving Defense Exhibits F, G, and H from the witness.  
21 I All right. Let's talk a little bit more about the actual layout of your townhome. Could  
22 I you describe for the members the general layout?  
23 I A. Okay. It's a townhome, so it's a two-story. They're not very wide, but they're deep. They  
24 I go long. So, I'm not sure - do you want me to -- exactly what you want me to - each room or -  
25 I Q. No. That's fine. How many bedrooms do you have?

1 A. Two.

2 Q. And downstairs, what types of, I guess, living arrangements is downstairs?

3 I A. The entry foyer, there's a coat closet, kitchen, a small half-bath under the stairs, and the  
4 I living area - the main living area.

5 I Q. Now what parts of your townhome and Tech Sergeant Condon's townhome connect?

6 I A. Okay. We have the entire wall on the right-hand side but upstairs and downstairs. That  
7 I would include the foyer, the closet, the bathroom, the stairway, part of the family room downstairs.  
8 I And, then, upstairs, it would include the major wall on both bedrooms upstairs.

9 I Q. And how long have you been living in your townhome?

10 I A. I bought it in about 1989. I lived there a few years and then I moved away. I came back to  
11 I Fort Walton in about 2002 and I moved back into my unit in 2005.

12 I Q. Do you currently live with anyone?

13 A No.

14 Q. Did you live with anyone back in 2013?

15 I A. No. My daughter would - she went to school in Pensacola, so she would pop back for, you  
16 I know, an occasional weekend, but primarily I lived alone.

17 I Q. How often would you say that you would interact with Tech Sergeant Condon?

18 I A. We were friendly. I'm - you know, whenever I saw him coming or going. I don't know  
19 I how many times total that would be. You know, we might say a few words or, you know, always  
20 I greeted each other if we saw each other.

21 I Q. Would you consider yourself a close friend of his?

22 I A. Not a real close friend, but - but we did have several conversations; especially, when it came  
23 I to - I'm on the Board of Directors for the Harbor Townhome Association. And he needed some help  
24 I with getting in touch with the owner about his unit, or his boat slip. He needed the lift for the Jet Ski  
25 I fixed because it was inoperable. Things, you know -things of that nature.



1 Q. What kind of a neighbor was Tech Sergeant Condon?

2 A. I considered him a very good neighbor. He was very quiet, very, very considerate.

3 Q. Would he have any, like, loud parties?

4 A. Never. No, never.

5 Q. What about his music?

6 A. No. We heard his music one time and it happened to be on a time when my daughter was  
7 home visiting. And it was almost when he just first moved in. And my daughter teased him about his  
8 country music, and I guess, - after that, we never heard anything. So, in my mind, him realizing that we  
9 could hear the music, he turned it down.

10 Q. What about walking up and down the stairs, could you hear that?

11 A. Usually. Yes. Because it's a thin wall and his stairs are not carpeted; so, you can usually  
12 hear when somebody, you know, runs up or down the stairs. Yes.

13 Q. If somebody was in the parking lot would - and you were inside of your townhome, would  
14 you be able to hear, perhaps, a conversation outside?

15 A. Sometimes, if I was --depending on where I was in my unit. Unfortunately, the - all of the  
16 windows are not very well insulated I would say; so, some conversations, yes.

17 Q. Now Tech Sergeant Condon, he has a motorcycle. Would you hear his motorcycle coming  
18 and going?

19 A. No. He wQ.S - he has a Harley, but I can't remember how I found out, but somebody saw  
20 him pushing his motorcycle all the way down to the end of the street before starting it up, so that he  
21 wouldn't disturb anybody.

22 Q. Now, have your neighbors always been this respectful?

23 A. No. No.

24 Q. Could you explain to the members what - a little bit more about what you mean?

1 A. Just a couple of neighbors, in particular, we had. When I first moved back in with my  
2 daughter in about 2005, we had a couple of young Airmen who lived there in his unit. And, the way I  
3 can describe it best is they liked to get dnmk on the weekends and beat each other up. So, there was a  
4 lot of shouting and scuffling and, you know, things hitting the wall and a lot of noise, a lot of noise.

5 Q. And you could hear this noise?

6 A. Yes, absolutely. We could hear them shouting. We could hear them scuffling. We could  
7 actually tell where they were in the unit because, you know, you could just hear it. So, we knew when  
8 they had moved downstairs and upstairs.

9 Q. And the witness is moving her hands from the left to right to show movement.

10 A. And I'm referring to my daughter who was there at the time when those neighbors were  
11 there. My daughter lived with me. So, that was the "we".

12 Q. Could you hear them - I'm just going to break down the locations. Could you hear them  
13 fighting when they were perhaps in the foyer area?

14 A. Sure, absolutely.

15 Q. What about by the staircase? Could you hear fighting then?

16 A. Yes, up and down the stairs and in the bedrooms.

17 Q. And you say bedrooms. Could you hear them in both bedrooms?

18 A. Yes.

19 Q. I believe you said that you could figure out where they were just following the sounds of  
20 their voice?

21 **A. Yeah.**

22 Q. Now do you remember the evening of September 4th?

23 A. Yes.

24 Q. How do you remember that evening?

1 I A. I remember it because shortly after that investigators came to talk to me about that week, that  
2 I particular time period.

3 I Q. I'm going to draw your attention to this entire week just to make sure that we have the right  
4 I nights.

5 I A. Sure.

6 I Q. For this entire week, the week of September 4th, what times were you home?

7 I A. I was home every evening.

8 I Q. After, approximately, what time would you say?

9 I A. In fact, I remember telling them that I'm almost always there. I'm - yes. So I'm -- I am  
10 I medically retired, and I may go out to run an errand or two, but I'm almost always home.

11 I Q. Let's put a timeframe. Perhaps after six o'clock p.m.?

12 I A. For sure. Yes. Almost -

13 I Q. For sure?

14 I A. Yes.

15 I Q. So this entire week you -- for sure, you were home after six o'clock?

16 I A. Yes.

17 I Q. And what were you doing in the evenings?

18 I A. Cooked dinner, watched TV, or read a little bit.

19 I Q. When you watch TV, typically, what volume do you have it at?

20 I A. Oh, very softly.

21 I Q. Why is that?

22 I A. Well, because I know the walls are thin, and on the other side of me, they have surround  
23 I sound, and so it's - it can be loud. So I always keep my TV turned down very softly.

24 I Q. And what time do you typically go to bed?

25 I A. Usually anywhere between 12:00 and 3:00 a.m.

1 Q. And on September 4th, was this night any different?  
2 A. No.  
3 Q. Did your routine change at all?  
4 I A. No. It's always pretty much the same.  
5 I Q. All right. So you said you were downstairs watching TV?  
6 A. Uh-huh.  
7 Q. Let's talk a little bit about what you can hear when you're downstairs watching TV. From  
8 I, your location of the television, where is the - your television located in your house?  
9 I A. It's on the back wall where - to the -- you know, out to the, I guess, the patio. It's on the  
10 I very back wall is where mine is located.  
11 I Q. And is this the wall that would be, perhaps, opposite where you would enter the apartment?  
12 I A. Yes. It would be - it would be as far away from the front door as you could get. Yes.  
13 I Q. And about how close would you say your seat is to the shared wall with Tech Sergeant  
14 I Condon?  
15 A. Pretty close. I have two couches. I always tend to sit in the very same place. So that - the  
16 I one that I'm on is very close to the wall; just a foot or two.  
17 I Q. If someone were in Tech Sergeant Condon's apartment and were to open and close a cabinet  
18 I door, is it possible for you to hear this?  
19 I A. You can usually hear the cabinets if they're on the wall. Yes. You can hear if someone just  
20 I lets one go and not, you know, doesn't close it like that. If you just sort of let it go, you can hear it.  
21 I Q. And what about if you were in the downstairs bathroom by the staircase? What can you hear  
22 I from there?  
23 I A. If you don't turn on the fan, you can just about hear everything.  
24 I Q. And when you say "everything," do you mean bowel movement?

1 A. You could definite -- I don't think I've ever heard that, but you could hear, like, someone  
2 raising the commode and you could actually hear the voiding. Yeah. You could hear it.

3 Q. Voiding like urinating?

4 A. Yes. Yes. Right.

5 Q. Now that night, on September 4th, did you hear anything unusual?

6 A. I did not.

7 Q. Did you hear any yelling?

8 A. No.

9 Q. Any screaming?

10 A. No.

11 Q. Any fighting?

12 A. No.

13 Q. Anythumping?

14 I A. Nothing.

15 I Q. Did you hear anything hit your wall?

16 A. No.

17 Q. Now I recall you may have said at another time that one of your dogs may have barked one  
18 I night that week?

19 A. Uh-huh.

20 Q. Can you tell us a bit about that?

21 I A. Well, they never were real specific about any details when the investigators came to talk to  
22 I me. And, so, I was recalling the entire week, and I was to let them know if any - you know, if I'd heard  
23 I anything any of those nights. And I did say that one night one of my dogs barked.

24 I Q. How many dogs do you have?

25 I A. Four.

1 I Q. Would it be unusual for one of your dogs to bark?  
2 I A. That's kind of unusual for just one to bark without the rest chiming in. Yes.  
3 I Q. Based on what you know about your dogs, what did that tell you?  
4 I A. I'm sorry. Just -  
5 I Q. The fact that just one had barked instead of four?  
6 I A. Oh, probably something minor. Maybe a cabinet closing, a door closing, something like that.  
7 I Something, you know - yeah, something small.  
8 I Q. And approximately what time was it that you heard your dog bark?  
9 I A. It was pretty late. I believe around 2:00 a.m. Somewhere around there, maybe a little later,  
10 I but around that time.  
11 I Q. So around 2:00 a.m. one night, but you're not positive exactly what night?  
12 I A. I don't even know. I told them I didn't even know which night that would have been. Right.  
13 I Q. Now this entire week, including September 4th, did you hear anything at all that resembled  
14 I the interactions you heard when the old roommates were living there?  
15 I A. No, nothing.  
16 I DC: Thank you. Ms. Lagozzino, those are all the questions that I have, but just stay seated for  
17 I just a few minutes and -  
18 I WIT: Ofcourse.  
19 I DC: -- the government may have a few questions -  
20 I WIT: Of course.  
21 I DC: -- for you as well.  
22 I MJ: Trial Counsel, any questions?  
23 I TC: Just one moment, Your Honor.  
24 I [Trial counsel confer.]  
25 I TC: All right Just a few questions for you.

## (Initial Accuser) vs SANE Nurse

M.L. is the only accuser to make a sexual assault report of her own accord and she is a liar. That she is a liar is apparent to anyone that actually takes a look at the trial transcript itself. The truth is in there if anyone reads it and shows that there is no evidence to support these charges.

I have no idea why M. decided to make such an allegation, we may never know. The entire case is one of HE SAID/SHE SAID. The military has a new policy of "believe the victim" but this allows all types of lies. On the night in question, no one was a witness to the alleged offense. However, the next person that the accuser came into contact with was the SANE Nurse.

1. The exam by the nurse, C. C., which occurred at approximately 0400 hours – so just a few hours later. M. alleges an extremely violent attack in which she was choked by being lifted off her feet by her neck, she was thrown to the floor and choked again, she was slapped in the face hard enough that she tasted blood, she was forced to have oral and vaginal sex, she was paddled and she was bitten on her shoulder. Yet read for yourself nurse C.'s findings – how could all this occur without a sign of injury? M. even alleges that she already had bruises from a previous encounter, yet again Nurse C. was unable to find them.

**NOTE:** A special subdermal camera was brought in from Quantico to look beneath the layers of skin on M. L.'s shoulder, no injury was found. The camera was working as they did view her tattoo. TSgt. C's DNA was found on her shoulder but not from a bite, because she crawled into his bed, laid her head on his chest – which placed her shoulder under his armpit the DNA was sweat – hot Florida night.



1 Q. So, you said you went over there with the idea that you were going to talk to him, help him  
2 cope with whatever demons, I think you said, that he was dealing with, right?

3 A. Yes, sir.

4 Q. But when you got over there you ended up staying over through the rest of that night, right?

5 A. I don't remember if I stayed the night.

6 Q. But that was one of your sexual encounters that you --

7 A. Yes, sir.

8 Q. -- talked about on direct because that encounter, was it not, the one that led you to complain  
9 about these bruises that you testified to on September 4th?

10 A. That's correct.

11 Q. And that was the incident that caused those bruises or that was the encounter that caused  
12 those bruises?

13 A. Yes, sir.

14 Q. Were these visible bruises? Could you see them?

15 A. You could see them.

16 Q. You could?

17 A. Yes, sir.

18 Q. And so two days after that time when you were bruised through sexual intercourse, you make  
19 these arrangements to go over again for dinner, right?

20 A. Yes.

21 Q. And you had been over to his house several times before?

22 A. Yes.

23 Q. And you'd spent the night there?

24 A. I believe I stayed the night one or two times, but not every time I went over did I stay the  
25 night.



TESTIMONY OF [REDACTED] (SANE NURSE)

1 MJ: Defense Counsel.

2 SDC: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY SENIOR DEFENSE COUNSEL:

5 Q. You've been a nurse for approximately 20 years?

6 A. Yes, sir.

7 Q. And you've been a SANE for the last three?

8 A. Yes, sir.

9 Q. And you've conducted SANE exams in your career or SAFE exams?

10 A. Yes, sir.

11 Q. In your capacity as a SANE nurse it's your responsibility to write down the history as given  
12 to you?

13 A. Yes, sir.

14 Q. And you do not corroborate the history with anyone else in a case?

15 A. No, sir.

16 Q. When someone complains of a sexual assault and SANE exam is ordered isn't it true that you  
17 have to document any and all findings?

18 A. Yes, sir.

19 Q. Because any and all findings are important.

20 A. Yes, sir.

21 Q. So, if no injury is documented the court can rely on that as record, that that was accurate at  
22 the time of your examination, correct?

23 A. I documented that there were no gross visual — no findings and gross visualization, yes, sir.

24 Q. Now, in your capacity as a SANE, you perform a physical exam and collect evidence?

25 A. Yes, sir.

1 Q. And do you actually perform the examination yourself? The examination that you  
2 documented on the form, did you perform that yourself?

3 A. Yes, I did, sir.

4 Q. And I believe a physician conducted one part.

5 A. Yes, sir.

6 Q. But you were right there documenting everything that was found.

7 A. Absolutely, sir.

8 Q. And you're familiar with the scope of injuries that can occur through sex, correct?

9 A. Yes, sir.

10 Q. And in the course of your career you have documented injuries during SANE examinations?

11 A. Yes, sir.

12 Q. Now, what are some of the common genital injuries involved with the -- sex?

13 A. You can see contusions. You can see abrasions. There can be tearing of tissue. Any number  
14 of things that you can see externally you can also internally.

15 Q. And you would also see redness potentially?

16 A. Potentially.

17 Q. Swelling?

18 A. Potentially.

19 Q. Bruising?

20 A. Potentially.

21 Q. And you talked a little bit about the healing rate of the female genitalia.

22 A. Yes, sir.

23 Q. And isn't it true, "by quickly" you mean that it can heal over the course of several days?

24 A. It could happen over the course of several days. It could happen as quickly as a few hours.  
25 Everybody is different, sir.



1 Q. Now, in the course of your exam, you also document non-genital injuries?

2 A. Yes, sir.

3 Q. And would you say that you're qualified to identify swelling and bruising if present  
4 anywhere on someone's body?

5 A. Absolutely, sir.

6 Q. And in this case, you did a physical examination of Airman [REDACTED]

7 A. Yes, sir.

8 Q. And you examined her from head to toe?

9 A. Yes, sir.

10 Q. You examined her face?

11 A. Yes, sir.

12 Q. Her mouth?

13 A. Yes, sir.

14 Q. And in fact, you had her open her mouth?

15 A. Yes, sir.

16 Q. So that you could examine the inside of her mouth?

17 A. Yes, sir.

18 Q. Now, inside her mouth you examined her cheeks?

19 A. Yes.

20 Q. Her teeth?

21 A. Yes, sir.

22 Q. Her gums?

23 A. Yes, sir.

24 Q. Her tongue?

25 A. Yes, sir.

1 Q. Basically everything that you could see inside her mouth?

2 A. Absolutely, sir.

3 Q. You also examined the rest of her body?

4 A. Yes, sir.

5 Q. Her neck?

6 A. Yes, sir.

7 Q. Her chest?

8 A. Yes, sir.

9 Q. Her arms?

10 A. Yes, sir.

11 Q. Her legs?

12 A. Yes, sir.

13 Q. Including her knees?

14 A. To my recollection, yes, sir, from head to toe.

15 Q. Would you have examined her inner thighs as well?

16 A. Yes, sir.

17 Q. And during this examination, it's safe to say that Airman [REDACTED] was not dressed?

18 A. Correct.

19 Q. Now, you used a Woods Lamp during your examination?

20 A. Yes, sir.

21 Q. Can you explain to the members what a Woods Lamp is?

22 A. A Woods Lamp is a special light that when in darkness you illuminate it over clothing, over  
23 parts of the body, it will illuminate secretions, saliva, seminal fluid, but it can also highlight and  
24 illuminate things like detergents, solutions, so you have to be careful at what you're looking for.

25 Q. And why do you use a Woods Lamp?

1 A. To help us as a tool to give us -- because some of our victims that show up have no  
2 recollection of things that had gone on, so it's very important for us to examine every area. And if they  
3 don't have a recollection, then the Woods Lamp may give us an indication of where we would need to  
4 do swabs or to investigate a little bit further.

5 Q. And is it safe to say that a Woods Lamp would let you see maybe an injury that you couldn't  
6 see with a naked eye?

7 A. It could potentially.

8 Q. Now, I'd like to focus in on a few areas of your exam.

9 A. Yes, sir.

10 Q. Now, you did document one spot on the exam and that was the shoulder?

11 A. Yes, sir.

12 Q. And on the shoulder there was some redness?

13 A. Yes, sir.

14 Q. Now, you examined her mouth and you examined both inside and out, correct?

15 A. Yes, sir.

16 Q. And if there were any injuries, you would have documented it?

17 A. Yes, sir.

18 Q. You would have documented any cuts?

19 A. If I had seen them, yes, sir.

20 Q. Loose teeth?

21 A. Yes, sir.

22 Q. Gum injuries?

23 A. Yes, sir.

24 Q. Basically, any finding inside Airman [REDACTED] mouth, you would have documented it?

25 A. Yes, sir.



1 Q. You did not find any signs of injury to her mouth?

2 A. I did not see anything visible.

3 Q. You also examined her neck?

4 A. Yes, sir.

5 Q. And Airman [REDACTED] told you that her neck was tender?

6 A. Yes.

7 Q. And that would be a subjective sign of injury?

8 A. Yes, sir.

9 Q. And that basically means that you, as a medically provider, have to take her at her word for  
10 that?

11 A. Yes, sir.

12 Q. You found no swelling on her neck?

13 A. No, sir.

14 Q. No redness?

15 A. No, sir.

16 Q. No finger or thumb marks?

17 A. No, sir.

18 Q. No objective evidence of physical injury?

19 A. No, sir.

20 Q. You examined her knees?

21 A. Yes, sir.

22 Q. Did you see any abrasions, cuts, anything on her knees?

23 A. No, sir.

24 Q. In fact, you found no abrasions on her entire body?

25 A. No, sir.

1 Q. When you examined her inner thighs, did you see any evidence of bruising?

2 A. No, sir.

3 Q. You examined her buttocks?

4 A. Yes, sir.

5 Q. Fully unclothed?

6 A. Yes, sir.

7 Q. With and without the special lighting?

8 A. Yes, sir.

9 Q. You found no evidence of trauma?

10 A. No, sir.

11 Q. And you examined her genitals?

12 A. Yes, sir.

13 Q. And you found no objective evidence of genital trauma?

14 A. Nothing that was visible, sir.

15 Q. Now, genital trauma can come from both consensual and non-consensual sex?

16 A. Absolutely, sir,

17 Q. And the mark you found on Airman [REDACTED] shoulder that can come from consensual or non-  
18 consensual activity?

19 A. Yes, sir.

20 SDC: Your Honor, may I have a moment?

21 MJ: You may.

22 [Defense counsel confer.]

23 SDC: Thank you. No further questions, Your Honor.

24 MJ: Trial Counsel?

25 ATC: Thank you, sir.

Good afternoon members of the board my name is Mario Jeffers when i was in the United States Army i was wrongly convicted of a crime of sexual assault i did not commit. I had went out with my accuser to a bar then later on went back to my house and had sex. While not knowing she was being forcibly chaptered out of the military for being an apft failure. She filed a false report of sexual assault against me to keep from being kicked put of the army that I discovered later on. Even though it was clear that she falsified the allegation when it was investigated by the local authorities. She stated to the detective that she consented to having sex with me that in fact she wanted to have sex with me. Even during my military investigation the preliminary hearing officer concluded that there was no probable cause that there was a crime committed. This was also ignored and was not able to be brought up in my court martial. All this evidence was disregarded. I am here as a witness to how unjust the uniform code of military justice is. I lost 4 years of my life in confinement for a crime i did not commit and im punished publicly every day being on the sexual registry. Hopefully my case and my statement today can be a good example of what injustice looks like.



IMSE-CAM-JA-CAL  
SUBJECT: Findings of UCMJ Article 32(b) Preliminary Hearing, United States v. SGT  
Mario I. Jeffers

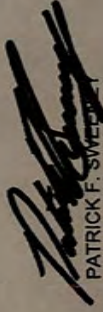
31 July 2014 and no statement from the CID interview can be admitted in a court-martial.

8. Conclusion. The evidence does not support a finding of probable cause to believe that the accused committed the charged offense.

9. The point of contact for this memorandum is the undersigned at (270) 798-0727 or patrick.f.sweeney8.mil@mail.mil.

Encls

1. Government Exhibits
2. Defense Exhibits
3. Summarized Transcript
4. Emails re: Report Deadline



PATRICK F. SWEENEY  
CPT, JA  
Preliminary Hearing Officer

Agency: CITY OF CLARKSVILLE  
Officer ID/Name: 1496 / Dennis Hontholt  
Date: 8/4/2014 3:50:00AM

Case Management  
Incident Number: W2014-14413  
Case Number: W2014-14413

Narrative Title:

I conducted interviews with suspect Mario Jeffers, victim [REDACTED] and the suspects girlfriend, [REDACTED] but gave a detailed account of the incident and stated that it was voluntary.

On 08/04/2014, I interviewed [REDACTED] for a second time at district three CI in the presence of a CID agent. During the interview, I confronted [REDACTED] with the facts of the case. I was aware of [REDACTED] agreed that she did voluntarily kiss Jeffers when he got into bed with her and that she did have sex with him. [REDACTED] was crying and I made it clear to her that the fact that she voluntarily participated in the act excludes it from being a rape.

I am requesting this case be unfounded.

**Summary of Comments for DAC IPAD Meeting**

**September 20, 2023**

**By Dr. Deborah Jenks**

I am set to address the Committee on the wrongful conviction stemming from a false accusation against my son, Caleb Smith.

To provide context, I will briefly touch upon my professional background as well as our family's legacy, emphasizing our commitment to honor, service, and justice.

Central to my comments is the overview of Caleb's case. I will present reasons that underscore his innocence, highlighting discrepancies in the evidence, the absence of motive examination for the accuser, and the procedural shortcomings that have led to this miscarriage of justice.

Respectfully Yours,

Dr. Deborah Jenks, DNP, PMHNP-BC, FNP-C, LCMHCS

To the Honorable Members of the Defense Advisory Committee:

At the time of this September, it will have been one year since I first attended a meeting for this committee and gave public comments with a volume of documents that can easily followed by a letter in my absence months later. In the year since **I addressed the DAC-IPAD about being a victim of Unlawful Command Influence and subsequent wrongful incarceration still without relief.** My letters include and explain the who, what, where, when, why, and how and even offering reasonable and viable solutions based on courses of actions of the past and/or modified versions. Although the committee was very welcoming to my plight, to my knowledge **there has been no real change, I have received no help nor assistance, or guidance on any potential relief system** from anyone.

**Question:** Once all avenues have been exhausted, what is there a veteran to do to to reclaim their good name, recover damages, or file a legal suite against those responsible for the injustice?

*I have been fighting to clear my name for nearly 10 years now and have yet to the see the corrective actions that would enable a way to make right what is terribly wrong for me personally, and the many others like me who have come after me who are also survivors of the animus of Unlawful Command Influence (UCI) in the Armed Forces over the past decade. As people of justice, what would you do if you had to walk a day in my shoes? What would you do when you realized there is no course of action for relief? I am genuinely asking because anyone on this committee would know better than I.*

In this letter, I am reaching out for the purposes of expounding on my plight and highlight one thing that appears more recently to be the correlation of taking injustice returning it to justice while revealing the prejudice. What I am highlighting are several individual stories regarding a few of the brave souls who helped justice prevail that arguably embody the courage and spirit of leadership necessary to assist in the combatting Unlawful Command Influence that is continuing to ruin careers and lives.

Although the case types may vary, at **the root of the problem the problem is the same: UCI.** For this reason, *I hope to inspire those who may be gatekeepers of a simple testimony that may result in someone's freedom, clearing someone's name, and I pray for the return to a somewhat normal life, all things considered.*

### **The Heroic Whistleblowers in Military Legal Cases: Exposing Unlawful Command Influence**

In military legal cases, unlawful command influence (UCI) still poses a serious threat to justice. However, there have been instances where courageous whistleblowers have stepped forward to shed light on these unlawful practices. Their heroic actions have not only exposed wrongdoing but also emphasized the need for transparency, integrity, and accountability within the military justice system.

#### **Case 1: United States v. Barry:**

In the case of United States v. Barry, whistleblowers Rear Admiral Patrick J. Lorge and Captain David Wilson demonstrated exceptional bravery. They spoke out against unlawful command influence, even at the risk of personal and professional repercussions. Their actions exposed the pressure exerted by Admiral Crawford, the Navy's Judge Advocate General, and underscored the importance of upholding justice, regardless of rank.

#### **Case 2: United States v. Gallagher:**

Another significant case involving unlawful command influence was United States v. Gallagher. Here, a brave Navy SEAL whistleblower challenged external influences on the trial of Chief Edward Gallagher, who faced charges of war crimes. Despite the loyalty within the SEAL community, the whistleblower prioritized justice and accountability, highlighting the need to protect the integrity of the military legal system.

**Case 3: United States v. Bergdahl:**

United States v. Bergdahl exemplified the dangers of unlawful command influence. Whistleblowers brought attention to President Trump's remarks, which created a biased atmosphere during the trial. A military defense attorney with immense courage challenged the influence of the Commander-in-Chief, recognizing the importance of fair trials and judicial independence.

**Case 4: United States v. Gilmet:**

In the case of US v. Gilmet, whistleblowers faced a difficult decision. They chose to expose a Lieutenant Colonel's misconduct and misuse of position, despite the risks to their careers and potential retaliation. These individuals demonstrated unwavering commitment to justice and the integrity of the military, setting an example for others to follow.

In Conclusion:

**The heroism displayed by whistleblowers in military legal cases cannot be overstated.** Although some of the story's stem from acts of bullying or cowardice, the whistle blowers' virtuous actions eventually emerge and embody courage, integrity, and a deep sense of responsibility. By exposing unlawful command influence, they help to ensure that justice prevails and set a precedent for transparency, fairness, and accountability within the military justice system. It is essential to recognize, protect, and celebrate these whistleblowers, as their bravery contributes to the continuous improvement of the military legal system.

Thank you for the time and consideration regarding these matters as it is greatly appreciated.

Very Respectfully,

Darin G. Lopez, MBA  
Former Navy Intelligence

**From:** [Rico Mo](#)  
**To:** [WHS Pentagon EM Mailbox DACIPAD](#)  
**Cc:** [Trexler, Dale L CIV OSD OGC \(USA\)](#); [Bovarnick, Jeff A COL USARMY OSD OGC \(USA\)](#); [arvisowens@yahoo.com](mailto:arvisowens@yahoo.com)  
**Date:** Thursday, July 20, 2023 3:16:49 PM

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My name is Ricardo Morales and I am respectfully requesting to speak in person at the next DAC IPAD Sept 19 or 20 when ever they open public comments for . I plan to speak about my wrongful conviction during my military service in the United States Army. I Respectfully request that if chosen to be heard. Please notify me if selected by 19 August 2023 so that I have at least one month to schedule flights and make arrangements to stay in the area.

# Offices of the Special Trial Counsel

## Standard Operating Procedures

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

**Office of the Special Trial Counsel  
Standard Operating Procedures**

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## OSTC Mission Statement

The mission of the US Army Office of Special Trial Counsel is to seek justice by independently and equitably evaluating covered criminal allegations and effectively prosecuting cases warranted by the evidence in the best interests of the Army community, while maintaining honest, clear communication with victims, the Army, and the public in order to promote trust in the military justice system.

## Chapter 1. Introduction.

**1-1 Mission.** The U.S. Army Office of Special Trial Counsel (OSTC) is a Field Operating Agency responsible for supporting the investigation and prosecution of Covered Offenses under the Uniform Code of Military Justice (UCMJ). As part of the OSTC's effort to increase trust and accountability within the military justice system, the OSTC developed standard operating policies for the handling of Covered Offenses in accordance with the Manual for Courts-Martial (MCM), the Rules for Court Martial (RCMs), the Uniform Code of Military Justice (UCMJ), Army Regulation 27-10, and other applicable statutes and regulations as contained herein.

**1-2 Roles and Responsibilities.** Special Trial Counsel (STC) are uniformed Judge Advocates, certified as such under Article 27(b)(2), UCMJ by The Judge Advocate General (TJAG), and further certified by TJAG as a Special Trial Counsel IAW Article 24(a), UCMJ. To act as a Special Trial Counsel, an officer must be assigned to the OSTC. The duties, responsibilities, and authorities of each STC are

aligned with their duty position within the OSTC organization. Within the parameters established by this SOP, STC can exercise statutory authority over Covered Offenses, and each can try Covered Offenses at Courts-Martial.

**1-3 Organization of the OSTC.** The OSTC is led by the Lead Special Trial Counsel (LSTC) who reports directly to the Secretary of the Army, without intervening authority. The OSTC will be headquartered at Fort Belvoir, Virginia, and will execute its statutory duties [initially] as a Field Operating Agency of the Army's Judge Advocate General's Corps (JAGC). From its headquarters, the OSTC will oversee twenty-eight (28) Field Offices, organized within eight (8) geographically-aligned Circuits which provide worldwide coverage. (See, Enclosure 1 for OSTC Organizational Chart).

- a. **Headquarters.** The Headquarters (HQ) and HQ staff of the OSTC will be managed on a day-to-day basis by the Deputy LSTC for Operation, Policy, and Training (D-OPT). Oversight and management of day-to-day operations within the eight Circuits and 28 Field Offices will be divided between two additional Deputies to the LSTC – Field Operations East (D-Ops East) and Field Operations West (D-Ops West). Each Deputy for Field Operations will be responsible for the management of four (4) geographic Circuits. The D-Ops East will oversee the 8th (Europe), 1st (Atlantic), 2nd (Southeast), and 3rd (Mississippi Valley) Circuits. The D-Ops West will oversee the 4th (Great Plains), 5th (Southwest), 6th (West), and 7th (Pacific) Circuits.
- b. **Office of the Chief Circuit Special Trial Counsel.** Each of the eight (8) Circuits will be led by the Chief Circuit Special Trial Counsel (CCSTC) assigned to that Circuit. In addition to the CCSTC, each Circuit office will also be staffed by a Circuit Special Trial Counsel (C-STC) and a senior Non-Commissioned Officer who shall serve as Chief Circuit Special Trial Counsel Paralegal NCO (CC STC NCO).

- c. **Field Office of the OSTC.** Each of the 28 Field Offices will be led by the senior Special Trial Counsel assigned to that Field Office who shall serve as the Field Office Officer-in-Charge (OIC). In addition to the Field Office OIC, each Field Office will also be staffed by at least one Special Trial Counsel Paralegal NCO (STC NCO) and at least one Special Victim Liaison (SVL). Additional STC, STC NCOs, and SVLs will be assigned to certain Field Offices as required by the workload within each Field Office's area of responsibility.

#### **1-4 Primary Duties of Judge Advocates Assigned to the Office of Special Trial Counsel.**

The following paragraph outlines the primary duties and responsibilities of Judge Advocates assigned to STC billets within the OSTC.

- a. **Lead Special Trial Counsel (LSTC).** Per statute, the LSTC shall be an officer in a grade no lower than Brigadier General and will be wholly responsible for all operations of the OSTC. The LSTC can exercise any/all of the case-specific authorities of Special Trial Counsel as set forth in the UCMJ or other applicable policies related to Covered Offenses. The LSTC shall exercise supervisory authority over subordinate Judge Advocates IAW the OSTC rating scheme which shall be published during each rating cycle.
- b. **Deputy LSTC.** Each of the three STC assigned as D-LSTC shall perform duties as outlined in their respective portfolios as described above. Additionally, each D-LSTC shall have the authority to refer cases to General or Special Court Martial under the provisions of Article 601(b), UCMJ, and RCM 401A(c)(1), and within the parameters set forth in the Referral paragraphs below. Each D-LSTC shall exercise supervisory authority over subordinate Judge Advocates IAW the OSTC rating scheme which shall be published during each rating cycle.
- c. **CCSTC.** Each CCSTC shall oversee field operations of the OSTC within the geographic boundaries of their respective Circuit. Additionally, each CCSTC shall have the authority to refer cases to General or Special Court Martial under the provisions of Article 601(b), UCMJ, and RCM 401A(c)(1), and within the parameters set forth in the Referral paragraphs in Chapter 8. Each CCSTC shall exercise supervisory authority over subordinate Judge Advocates, paralegals, and SVLs IAW the OSTC rating scheme which shall be published during each rating cycle.
- d. **Circuit STC (C-STC).** Each C-STC shall execute duties as assigned by the CCSTC of their assigned Circuit, but with a primary focus on the investigation and litigation of Covered Offense cases. Special Trial Counsel assigned as C-STC will not exercise supervisory authority.
- e. **Field Office OIC.** Each Field Office OIC shall oversee field operations of the OSTC within the geographic boundaries of their respective areas of responsibility (AOR). Additionally, each Field Office OIC shall exercise supervisory authority over any assigned subordinate Judge Advocate, paralegals, and SVLs IAW the OSTC rating scheme which shall be published during each rating cycle.
- f. **Field Office STC.** Each Field Office STC shall execute duties as assigned by the Field Office OIC of their assigned Field Office, but with a primary focus on the investigation

and litigation of Covered Offense cases. Special Trial Counsel assigned as Field Office STC will not exercise supervisory authority.

- g. **Staff and Support Personnel.** Uniformed HQ Staff and STC NCOs shall execute duties as set forth in their respective Officer Evaluation Rating/Non-Commission Officer Evaluation Rating Duty Descriptions and as directed by their supervisory chain. Likewise, Civilian personnel assigned to HQ, OSTC and SVLs assigned to each of the 28 Field Offices shall execute their duties as set forth in their respective Position Descriptions and as directed by their supervisory chain.
- h. **Support to Installations Without a Field Office.** Army installations without an OSTC Field Office receive OSTC support IAW the Alignment Chart at Enclosure 2. When covered offenses are alleged to have been committed by a Soldier assigned to a joint billet, stationed with another service, or assigned to a location not included in Enclosure 2, the Field Office that most closely supports that Soldier's General Court-Martial Convening Authority (GCMCA) has primary responsibility for providing OSTC support. Army installations without an OSTC Field Office receive OSTC support IAW the Alignment Chart at Enclosure 2. When covered offenses are alleged to have been committed by a Soldier assigned to a joint billet, stationed with another service, or assigned to a location not included in Enclosure 2, the Field Office that most closely supports that Soldier's General Court-Martial Convening Authority (GCMCA) has primary responsibility for providing OSTC support.
- i. **Support to Reserve Component (RC).** OSTC support to RC units and for covered offense allegations where the subject is an RC Soldier or National Guard Soldier in Title 10 status will be handled as follows: The Field Office that provides OSTC support to the active component GCMCA aligned with the subject's RC unit as outlined Appendix K of AR 27-10, Military Justice, will take responsibility for evaluating the covered offense allegation and advising law enforcement regarding the investigation. Exceptions will be routed to the D-OPT through the appropriate CCSTC and D-Ops.

## **Chapter 2. Field Office Coordination to Ensure Notification of Misconduct by local Law Enforcement and Command Authorities.**

**2-1 Policy. In coordination with Circuit Leadership,** each Field Office shall develop and maintain necessary relationships with law enforcement entities and command authorities across the installations within their geographic AOR and shall establish general policies to ensure local OSTC personnel are promptly notified of all reported Covered, Known, and Related Offenses. Circuit Offices may establish additional policies for notification of specific offenses reported within the Circuit.

- a. At a minimum, each Field Office shall establish a shared Field Office OSTC email inbox accessible by all members of the Field Office.
- (1) Field Office OICs will establish written local policies regarding who manages, accesses, and monitors the shared email account.

(2) Each OSTC Field Office OIC is responsible for coordinating with:

- (a) Installation-level Military Police Investigations (MPI) and Criminal Investigation Division (CID) to ensure they use the shared OSTC Field Office email address to notify the respective Field Office of all reported Covered, Known, and Related offenses.
- (b) Civilian law enforcement to facilitate notification through the shared OSTC Field Office email address, where applicable.
- (c) Chiefs of Administrative Law and Brigade Judge Advocates to ensure AR 15-6 investigations and R.C.M. 303 investigations that identify offenses punishable under the UCMJ are reported to the OSTC orgbox, in addition to any other reporting requirements.
- b. At a minimum, each Field Office shall establish a written local policy with Installation-level MPI and CID regarding immediate notification to the OSTC of critical incidents, including but not limited to, homicides, attempted murders, fresh complaints of child sexual and physical abuse, fresh complaints of rape and/or sexual assault, and domestic violence incidents involving grievous bodily harm, strangulation/suffocation, or violation of a protective order.
- c. Upon initial notification, each allegation will be reviewed promptly to determine if OSTC authority should be exercised IAW Chapter 4 of this SOP.
- d. Each Field Office will establish an internal policy for the review of cases within Military Justice Online (MJO), to include law enforcement investigations that have not yet been associated with a Soldier's unit ("unassociated investigations").

### **Chapter 3. Victim Engagement Plan.**

**3-1 Policy.** The Victim Engagement Plan (VEP) is an affirmative, proactive plan to establish and maintain open and consistent lines of communication with the victim in any case where Special Trial Counsel has exercised authority and not deferred. The goal of each VEP is to ensure that victims are informed, involved, and engaged through the entirety of the process. Each individual plan will outline the engagement process, offer strategies to maintain and enhance engagement, and provide a tool kit of resources to help victims during the process.

**3-2 Initial Victim Engagement.** At a minimum, each Field Office shall develop local policies to ensure that SVLs are notified when specific triggering events occur (e.g., OSTC Notification of a Covered Offense, Law Enforcement Determination of Probable Cause, etc.) related to cases where Special Trial Counsel have exercised authority and not deferred.

- a. **Timeline for Initial Contact with Victims.** The SVL will make initial contact with the victim as soon as practicable after being notified of a triggering event, and should, in normal circumstances, be completed no later than seven (7) calendar days after receiving victim contact information; if contact occurs beyond seven days after receiving victim contact information, the CCSTC must be notified. In the case of a victim who is eligible to receive services from a Special Victim Counsel (SVC), the SVL is responsible for determining whether the victim is a represented party prior to making direct contact.

If the victim is, in fact, a represented party, initial contact with the victim shall be made through the assigned SVC.

- b. **Special Considerations for Cases involving an Expedited Transfer.** In each case where a victim has requested an expedited transfer to another installation, the SVL shall make all reasonable efforts to meet with the victim prior to their departure from the location where Special Trial Counsel have exercised authority.
- c. **Information Communicated.** At the initial meeting with a victim, the SVL will discuss and review: victim rights (based on eligibility of each particular victim); DD Form 2701, *Initial Information for Victims and Witnesses of Crime*; the SVC program; the military justice process; and the victim's role. Further, the SVL will provide the victim a copy of the completed DD Form 2701; determine the victim's preferred method and frequency of communication/engagement; complete a victim contact form; and discuss next steps.

### **3-3 Continuing Engagement Plan.**

- a. The SVL will communicate with the victim on an as-needed basis using the preferred contact method determined during the initial victim engagement meeting.
- b. The SVL will schedule a time to review the Jurisdictional preference form (See Form DD 2910). This meeting should happen in-person and should include fellow Field Office STC Team members and, if applicable, the assigned SVC. In the event the meeting must take place telephonically, the victim will be sent the Jurisdictional preference form in advance in order to review and follow along while the STC discusses the form.
- c. **Alternate Disposition Path.** If the case does not move to prosecution, the SVL will schedule a meeting (preferably in-person) with the victim and the STC team to discuss the decision to not prefer charges, not refer charges, accept a discharge/dismissal in lieu of court martial, or withdrawal of charges, and if applicable, the decision to pursue an alternate disposition. The primary STC on any case, in conjunction with the SVL, will inform the victim of the decision to seek an alternate disposition, any subsequent result, and determine what resources the victim might still need. The STC will ensure the Victim Post Action Form is completed and uploaded to MJO and submitted to the Policy, Training, and Operations section of HQ, OSTC.

**3-4** The Field Office OIC will ensure that a Victim Post Action Form is completed and uploaded to MJO after the meeting with the victim.

**3-5 Prosecution Path.** If the case is moving toward prosecution, the SVL will execute the following tasks.

- a. The SVL will engage with the victim as needed during the prosecution process.
- b. The SVL will provide the victim DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime* and review the form and the military justice process with the victim.
- c. The SVL will timely notify the victim of all case proceedings and events.

- d. The SVL will schedule all victim interviews and be the main point of contact between the victim and the local OSTC team.
- e. If travel of the victim is necessary, the SVL will collect all pertinent data as it relates to the victim (and any support personnel, as applicable) to facilitate victim travel and lodging.
- f. The SVL will ensure that all items are in place for trial, the victim has a safe place to wait during trial, and all barriers to participation have been discussed with the OSTC team and addressed to the greatest extent possible.

### **3-6 Post-Trial and Appeal.**

- a. After the conclusion of any trial, the primary case-STC, in conjunction with the SVL, will meet with the victim to discuss the outcome of the court-martial. This meeting will ordinarily take place within 48 hours of adjournment, but in no case longer than five business days. The primary-case STC will ensure the Victim Post Action Form is completed and uploaded to MJO and submitted to the Policy, Training, and Operations section of HQ, OSTC.
- b. For covered offenses only, the SVL will issue the victim DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*, and review its contents. The SVL will also assist OSJA in collecting victim information contained on the DD Form 2704, *Victim/Witness Certification and Election Concerning Prisoner Status*, and ensure the victim receives a copy. The SVL will continue to be the main point of contact for the victim during all post-trial and appeal matters. Any new events, issues, or other relevant information arising after the trial will be communicated to the victim by the SVL. The SVL will help eligible victims with Transitional Compensation applications and other post-trial assistance as applicable (e.g., State Crime Victims Compensation Fund). If a rehearing is scheduled in the case, the original SVL (if available) will contact the victim as soon as possible and advise them of the event. The SVL will engage with the victim through a rehearing proceeding.

**3-7 Standardized Forms.** To ensure consistency across OSTC Offices, SVLs will utilize the following forms to execute the Victim Engagement Plan.

- a. Enclosure 3 - Victim Contact Forms
- b. Enclosure 4 - Victim Notifications Checklist
- c. Enclosure 5 – Witness Travel Worksheet

## Chapter 4. Exercise of Authority.

### 4-1. Covered Offenses.

- a. *Definition.* Covered Offenses are those offenses defined by Article 1(17), UCMJ.
- b. Special Trial Counsel must conduct a timely review of every covered offense allegation. Upon initial entry of a covered offense investigation into MJO, the entry will automatically default to the OSTC until the local STC determines that the allegation is a covered offense and decides to either exercise its authority over the case or defer the case to the Command.
- c. Where an STC identifies an allegation as a potential covered offense, the STC will evaluate the facts, circumstances, and evidence known at the time to determine whether the alleged offense is a covered offense. Such determination will be made within 72 hours (or as soon as practicable) after learning of the allegation.
  - (1) If the alleged offense(s) is/are covered offense(s), the STC will document the exercise of authority in MJO and will issue an Exercise of Authority Memorandum (EAM), at Enclosure 6, addressed to the Commander exercising Special Court-Martial Convening Authority (SPCMCA) over the alleged suspect. The EAM will be signed by the Special Trial Counsel, and will be transmitted by email to the SPCMCA, with carbon copies ("CC") provided to the SPCMCA's Legal Advisor (i.e., Brigade Judge Advocate) and the Chief of Military Justice (COJ) for the General Court-Martial Convening Authority (GCMCA) over the alleged suspect. The EAM will be uploaded in MJO within 48 hours of the assertion or will be issued via MJO's automated feature.
  - (2) If it is unknown based on the initial report(s) whether the alleged offense(s) is/are covered offense(s), the STC may delay determining whether the alleged offense(s) is/are covered offense(s) until additional investigative activity permits the STC to determine whether there is a covered offense. The STC shall review any delayed decisions every 72 hours. During the pendency of this determination process, the case remains under the authority of the OSTC and may not be acted upon by the Command.
- d. Where an STC exercises authority over covered offense(s), the STC will simultaneously review the investigation for related and known offenses in accordance with Chapter 4, para. 4-2 and 4-3, below.
- e. As soon as practicable upon exercising authority over an allegation, the STC will identify any key and essential witnesses, including the victim, of covered, known, and related offenses. Key and essential witness information will be entered into MJO, and the STC will utilize MJO to assert an "OSTC hold" over those identified individuals. Entry will allow witness information to be added to the key and essential witness tracker within MJO.
- f. If the STC subsequently determines that a potential covered offense allegation is not in fact a covered offense, the STC will: notify (or cause to be notified) the SPCMCA over the accused, with carbon copies provided to the SPCMCA's Legal Advisor and the COJ who supports the Commander exercising GCMCA over the Accused; ensure that any OSTC hold over the primary allegation/case and alleged accused is immediately removed from MJO; ensure that any OSTC hold over other cases and/or witnesses deemed to be key and

essential associated with the primary allegation and/or known/related cases is removed immediately from MJO.

- g. A determination that an allegation does not constitute a covered offense can be reevaluated by an STC at any time, regardless of whether additional information is discovered or not. If reevaluation results in an STC exercising authority, the procedure outlined above will be followed.

#### **4-2. Known Offenses.**

- a. *Definition.* A “known offense” is any offense or charge alleged to have been committed by the same suspect of a covered offense over which an STC has exercised authority and not deferred.

- b. An STC has discretion to exercise authority over any offense or charge alleged to have been committed by the suspect of a covered offense. Once an STC has exercised authority over a “known offense,” only an STC may dispose of that offense, until or unless an STC defers the offense.

- c. *Subject/Accused.* Where known offense(s) are identified involving a subject of a covered offense, an STC will normally exercise authority over the known offense(s). The STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO’s automated feature.

- (1) Where known offenses are identified at or near the time of covered-offense allegations involving the same subject and with a nexus to the covered offense(s), an STC *will* exercise authority over the known offenses. An STC *will also* exercise authority over known offenses which do not have a nexus to the covered offense allegations of the same subject. The STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO’s automated feature. After consultation with the STC’s immediate supervisor, an STC may later choose to defer known offenses if the interests of justice, judicial economy, and trial strategy mitigate against litigating those known offenses at court-martial.

- (2) Where known offenses are identified at any time subsequent to the exercise of authority over a covered offense related to the subject of said covered offense, but prior to the final disposition of the covered offense, an STC *may* exercise authority over the related offenses. The STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO’s automated feature.



#### 4-3. Related Offenses.

a. *Definition.* A “related offense” is any offense or charge alleged to have been committed by anyone subject to the UCMJ who is a witness or victim of a covered offense.

b. *Discretion.* An STC has discretion to exercise authority over any related offense. Once an STC has exercised authority over a related offense, only an STC may dispose of that offense, until or unless an STC defers the offense.

c. *Victim.*

- (1) Where related offenses are identified at or near the time of reported allegations of covered offenses involving the victim of a covered offense and with a nexus to the covered offense(s), an STC *will* exercise authority over the related offense(s). If STC authority is exercised over the related offense, the STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect of the related offense by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO’s automated feature. Where the STC identifies related offenses with no nexus to the covered offense, an STC may still exercise authority over such related offenses. Once an STC has exercised authority over a related offense, the STC may later defer such offense when it is determined that deferral is appropriate by the STC authorized to make deferral decisions IAW the OSTC withhold policy in Chapter 8.
- (2) Where related offenses are identified at any time subsequent to the exercise of jurisdiction for a covered offense involving the victim of the covered offense, but prior to the final disposition of the covered offense, an STC *may* exercise authority over the related offense(s). If STC authority is exercised over the related offense, the STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect of the related offense by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO’s automated feature.

d. *Other Witnesses; “Key” and “Essential” Witnesses.*

- (1) The determination of whether an individual is a key or essential witness in a case involving an allegation of a Covered Offense is within the sole discretion of the STC.
- (2) Where related offenses are identified at or near the time of reported allegations of covered offenses involving a key or essential witness of a covered offense and with a nexus to the covered offense(s), an STC *may* exercise authority over the related offense(s). In deciding whether to exercise authority, an STC must consider the effects assertion of OSTC authority may have on the prosecution of the covered offense(s), including future witness availability and credibility and the timing of any adverse action against a potential witness. If STC authority is exercised over the related offense, the STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect of the related offense by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO’s automated feature.

(3) Where related offenses are identified at any time subsequent to the exercise of jurisdiction for a covered offense involving a key or essential witness of the covered offense, but prior to the final disposition of the covered offense, an STC *may* exercise authority over the related offenses. If STC authority is exercised over the related offense, the STC will document the exercise of authority in MJO and will notify the Commander exercising SPCMCA over the suspect of the related offense by issuing an EAM as outlined above. The EAM will be uploaded in MJO within 48 hours of the exercise of authority or will be issued via MJO's automated feature.

e. *Preexisting Known or Related Offenses.* For known and related offenses previously committed by either a subject, victim, or key witness for which the Command has already began processing adverse action, whether criminal or administrative, an STC may still exercise authority based on the guidance in paragraphs 4-3 (c) and 4-3 (d) above. In cases where charges for previously committed known or related offenses have already been referred to court-martial, an STC *will not* exercise authority except in extraordinary circumstances and with approval of the covered offense Referral/Disposition Authority.

## **Chapter 5. Investigative Support.**

### **5-1. Investigative Support Plan.**

- a. Definition.* An investigative support plan is a collaboration between an OSTC Field Office and OSJA regarding the provision of support to a law enforcement investigative agency for an ongoing investigation.
- b. Identification of Parties.* The investigative support plan will identify the STC and OSJA personnel assigned to support the investigation.
- c.* The investigative support plan should be developed through an investigative support planning meeting conducted as soon as practicable after an investigation begins into allegations of criminal misconduct over which the Special Trial Counsel has exercised authority and not deferred. The meeting should be conducted in-person, but if that is impractical, videoconference or teleconference is permitted. The Special Trial Counsel should organize the meeting and identify tasks for all parties.
- d.* Considerations for the investigative support planning-meeting include, but are not limited to:
  - (1) Identification of primary points of contact for the investigation, to include discussions and direction of investigative leads;
  - (2) Identification of a primary point of contact for magistrate authorizations;
  - (3) Identification of a primary point of contact for pre-referral subpoenas;
  - (4) Identification of a primary point of contact for warrants;
  - (5) Identification of a primary point of contact for consultation on probable cause; and
  - (6) Implementation of a victim engagement plan.
- e. Output of Investigative Support Plan.* The identity and contact information of the primary and secondary STC and OSJA points of contact for the investigation should be provided to the lead law enforcement investigator.
- f. On-going Collaboration.* Identification of the primary and secondary STC and OSJA points of contact during the first investigative support planning-meeting does not alleviate the requirement for on-going collaboration between all parties throughout the course of the investigation.

### **5-2. Investigative Support.**

- a.* Investigative support will be provided in accordance with the investigative support plan.
- b.* The parties identified in the investigative support plan will communicate regularly and meaningfully throughout the course of the investigation. The communications will ensure that all parties are aware of the status of the investigation and latest updates. The on-going

communications will ensure that the OSJA can keep the subject's chain of command apprised of the investigation and MJO updated.

c. Legal Advice Responsibility.

(1) Legal advice to the investigative agency will be provided in accordance with the investigative support plan. For investigations involving offenses where an STC has exercised authority, an STC will ultimately be responsible for the advice provided to the investigative agency.

(2) Legal advice to command will only be provided by the OSJA.

d. Probable Cause Consultation. For an investigation where an STC has exercised authority, an STC will typically be the attorney consulted by the lead investigative agent.

## Chapter 6. Initial Disposition.

**6-1. Initial Disposition Options.** IAW R.C.M. 306A, after exercising authority over an offense that is not currently a preferred charge, an STC must either (a) prefer, or cause to be preferred, a charge, or (b) defer the offense by electing not to prefer a charge. IAW R.C.M. 401A(b), Special Trial Counsel shall promptly determine what disposition will be made in the interest of justice and discipline. Counsel should refer to the non-binding disposition guidance in Appendix 2.1, MCM, when making disposition decisions.

**6-2. Victim Preference.** IAW the Victim Engagement Plan established for the pending case, the victim's preference related to disposition of the offense(s) will be sought prior to the STC's initial disposition decision, unless such action is impracticable.

**6-3. Preferral.** Preferral will be completed IAW para. 7-1 and 7-2 of this SOP. Preferral is not limited to only covered offenses and may also include any known offenses over which an STC has exercised authority. However, an STC will not prefer charges of solely known offenses without an accompanying covered offense without the approval of the LSTC or the LSTC's designee. Similarly, in the case of a victim of a covered offense, an STC will not prefer charges of solely a related offense without the approval of the LSTC, or the LSTC's designee.

### 6-4. Deferral.

- a. Definition.* Where an STC has exercised authority, deferral of an offense means an STC declines to prefer charges for an offense or declines to refer charges to court-martial. Once an STC declines to prefer or refer charges for an offense, the STC shall promptly forward the offense(s) to a commander or convening authority (providing contemporaneous notification to that commander or convening authority's Chief of Military Justice) for disposition.
- b. Timing.* Where an STC has exercised authority over offenses, a determination to defer may be made at any time after exercising authority. However, the STC shall exercise due diligence to make this determination promptly in the interest of justice and discipline.
- c.* If a commander desires an STC to defer offenses where an STC has exercised authority, the commander may submit a request for deferral of specific offense(s) to the STC who exercised authority over the offense(s). The STC may consider this request in light of the totality of the circumstances and the interest of justice and discipline. The STC shall act on the request within 14 calendar days and either deny the request or defer.
- d. Prior to Preferral.*
  - (1) During the preliminary stages of an investigation, if an STC determines that a pending investigation does not include a covered offense, an STC will defer the offense to command based on a lack of authority and will also defer any associated known and related offense(s) over which the STC initially exercised authority.
  - (2) Where an STC determines that probable cause does not exist for any covered offense, the STC will defer the offense and any associated known and related offense(s) over which the STC exercised authority.

(3) If prior to preferral, an STC determines probable cause exists for a covered offense but that the covered offense should not be prosecuted, an STC will document his/her analysis of the covered offense(s), including the STC's deliberative process, legal theories, opinions, impressions, or conclusions, in a non-prosecution memorandum and will forward the memorandum for review and concurrence through the STC's OSTC Field-Office OIC to the CCSTC for that circuit. The non-prosecution memorandum is attorney-work product and is therefore not discoverable IAW RULE RCM 308(d)(2). Upon CCSTC's concurrence, the STC will defer the covered offense(s) and any associated related or known offense(s) over which the STC exercised authority IAW the procedures established above. This paragraph only applies where there is a decision to not prefer a covered offense.

d. *After Preferral.* Where an STC determines that referral of any preferred offense(s) is not warranted, the STC will document his/her analysis, including the STC's deliberative process, legal theories, opinions, impressions, or conclusions, in a non-referral memorandum and will forward the memorandum for review and concurrence to the appropriate OSTC Referral/Disposition Authority. The non-referral memorandum is attorney-work product and is therefore not discoverable IAW RCM 308(d)(2). Upon the Referral Authority's concurrence, the Referral Authority will dismiss the relevant offense(s) and defer any remaining offenses to the command. If all preferred offenses are dismissed, then the STC will also defer any associated known or related offense(s) over which the STC exercised authority. If any known or related offenses remain preferred, the offenses may be dismissed or deferred to the convening authority for disposition.

e. *After Referral.* Where an STC determines that withdrawal of any referred offense(s) is appropriate, an STC will document his/her analysis, including the STC's deliberative process, legal theories, opinions, impressions, or conclusions, in a withdrawal memorandum and will forward the memorandum for review and concurrence through the OSTC Field Office OIC to the Referral Authority. The withdrawal memorandum is attorney-work product and is therefore not discoverable IAW RCM 308(d)(2). Upon the Referral Authority's concurrence, the Referral Authority will withdraw the relevant offense(s). If an STC contemplates dismissing any offenses, he/she will comply with the procedures outlined above.

## **6.5 Close-Out of Investigations in MJO.**

a. *MJO Data Fields.* The OSTC Field Office will ensure all applicable data fields within MJO were completed by the OSJA IAW AR 27-10, para. 14-1 prior to closing out any action where the OSTC was involved.

b. *Upload Exhibits.* Prior to closing out an investigation action in MJO, all exhibits should be uploaded within MJO. The OSTC Field Office will coordinate with the OSJA to ensure exhibits are uploaded.

c. *Article 30a Sessions.* The STC will ensure all Article 30a sessions are retained.

## Chapter 7. Preferral to Referral.

### 7-1. Initial Preferral Steps.

- a. Initiate Court-Martial in MJO.* Once a case is identified for preferral of charges, the OSTC Field Office OIC will ensure that a court-martial action is created within MJO. The OSTC Field Office will be responsible for verifying that all data fields and entries for the court-martial action are completed.
- b. Request Personnel for Detailing.* As soon as is practicable after the initiation of a criminal investigation into offenses over which an STC has exercised authority, the OSTC Field Office OIC will submit a formal written request, at Enclosures 7 and 8, to the GCMCA's Chief of Military Justice (COJ), requesting that the OSJA identify government trial counsel (TC) and other necessary support personnel for eventual detailing to the court-martial. The identified TC and support personnel from the OSJA will be available to assist on all matters concerning the investigation and court-martial.
- c. Detailing of Assistant Trial Counsel (ATC).* IAW RCM 503(c)(1), STCs shall be responsible for the formal detailing of ATCs to represent the government in cases over which the STC has exercised authority. Unless further restricted by the LSTC, this authority is vested in the OSTC Field Office OIC who will ordinarily conduct the formal detailing of counsel IAW the applicable RCM. Counsel assigned to the OSJA will only be detailed with the concurrence of the SJA.
- d. Pre-Trial Plan.*
  - (1) *Definition.* A pre-trial plan (PTP) as contemplated by this paragraph is a written document which sets forth roles and responsibilities for the different personnel from both the OSTC Field Office and the OSJA assigned to support and prosecute an identified case over which the STC has exercised authority. The PTP will vary from case-to-case and will ordinarily set forth the coordination requirements and assignment of tasks and responsibilities throughout the entirety of the case – from initial support and legal advice provided at the inception of a new criminal investigation, preferral and referral of charges, conclusion of trial, and post-trial matters. The PTP should be treated as attorney work product and should not be distributed to outside parties without the approval of both OSTC Field Office and the Detailed ATC.
  - (2) *Preparation.* The OSTC Field Office and the OSJA will complete a PTP for each case as early as practicable after the OSTC and OSJA team is identified and assembled in accordance with para 7-1. c., above. The PTP will be a fluid and living document, and each team will review, revise, and adjust it as necessary throughout the pendency of the case.
  - (3) *Distribution.* The STC or Detailed ATC will distribute the Pre-Trial Plan to the OSTC Field Office OIC and Chief of Justice.
- e. Evidence.*
  - (1) All known evidence will be collected prior to preferral, unless impracticable.

(2) Requests for any evidence in the possession of an outside organization will be submitted as early as practicable.

f. Prepare Prosecution Documents IAW this SOP, including but not limited to:

(1) Prosecution Memorandum;

(2) Proof Matrix;

(3) Chain of Command Recommendation and Transmittal forms; and

(4) Draft Charge Sheet.

g. Victim/Witness Meeting/Interview(s).

(1) After reviewing the evidence and all statements in the investigation, the trial team shall determine if further meetings/interviews are necessary for charging determinations.

(2) Coordinate and execute victim engagement IAW the VEP (see Chapter 3 VEP).

h. *Request Preliminary Hearing Officer.* IAW RCM 405(c)(2), for charges and specifications over which an STC has exercised authority, the STC shall determine whether a Preliminary Hearing is required. If the STC determines that a hearing is required, the STC shall prepare, or cause to be prepared, a written memorandum to the SPCMCA requesting that (1) a Preliminary Hearing be directed, and (2) that a Preliminary Hearing Officer be appointed to conduct it. This request will be staffed through the COJ prior to preferral of charges.

i. Prepare a preferral packet IAW this SOP.

## **7-2. Procedures for Preferral of Charges.**

a. *Definition.* Preferral is the act by which a person subject to the UCMJ accuses another person subject to the UCMJ of an offense. See, RCM 307(a).

b. *Preparation.* The assigned trial team will collaborate to prepare a draft charge sheet IAW the PTP established for the pending case. The TC shall ordinarily be responsible for preparing the first draft of the charge sheet with the support of assigned paralegals from both the OSJA and the OSTC Field Office. The Field Office OIC is required to approve the charge sheet prior to the charges being preferred. Similarly, the detailed STC NCO shall ensure that the preferral packet is complete and ready for execution.

c. *Notification to OSTC Referral/Disposition Authority.* Notification of intent to prefer charges is required prior to preferral of charges. Email notification of intent will be made to the person having referral and disposition authority outlined in para. 8-2 of this SOP.

d. *OSJA Coordination.* Prior to preferral of charges, the COJ shall be provided notice that the STC intends to prefer charges and shall be given an opportunity to review the charge sheet.



e. *Chain of Command Coordination.* Prior to preferral of charges, the assigned STC shall direct coordination (ordinarily through the detailed ATC) with (1) the Accused's immediate Commander, (2) the Commander exercising Summary Court Martial Convening Authority (SCMCA) over the Accused, and (3) the Commander exercising SPCMCA over the Accused to ensure the efficient preferral of charges IAW RCM 307, notification to the Accused of the charges IAW RCM 308, proper forwarding of the charges IAW RCMs 401-404, and, where applicable, the appointment of an Article 32 Preliminary Hearing Officer IAW RCM 405.

f. Preferral.

- (1) IAW RCM 307, anyone subject to the Code may serve as Accuser, including the STC detailed to the case. Ordinarily, the STC or an STC Paralegal assigned to the case shall swear to the charges; however, on a case-by-case basis, in coordination with the Accused's chain of command through their assigned legal advisor, other personnel, including the Accused's immediate commander, may also swear to the charges.
- (2) Regardless of who serves as Accuser, the STC shall ensure the preferred charge sheet is transmitted to the Accused's immediate Commander for the purpose of providing notice of the charges to the Accused IAW RCM 308. Transmittal will ordinarily be done in person, with the preferral packet being hand-carried by the detailed ATC and at least one paralegal from the trial team.
- (3) After notification to the Accused of the preferred charges, the Accused's immediate commander shall be afforded an opportunity to make a disposition recommendation; a commander is not required to provide a recommendation. A Recommendation and Transmittal form shall be included in the preferral packet to facilitate memorialization of the immediate commander's recommendation, if any.
- (4) After the Accused's immediate commander completes his/her recommendation as to the disposition of the charges, the preferral packet will be transmitted to the commander exercising SCMCA over the Accused. If no disposition recommendation is provided, the preferral packet will be transmitted to the commander exercising SCMCA over the Accused. Transmittal will ordinarily be accomplished by the detailed ATC and at least one paralegal from the trial team hand-carrying the packet to the SCMCA. The SCMCA will sign the back of the charge sheet and shall then be afforded an opportunity to make a disposition recommendation; the SCMCA is not required to provide a recommendation. A Recommendation and Transmittal form shall be included in the packet to facilitate memorialization of the Commander's recommendation, if any.
- (5) After the SCMCA completes his/her recommendation as to the disposition of the charges, the preferral packet will be transmitted to the commander exercising SPCMCA over the Accused. If no disposition recommendation is provided, the preferral packet will be transmitted to the commander exercising SPCMCA over the Accused. Transmittal will ordinarily be accomplished by the detailed ATC and at least one paralegal from the trial team hand-carrying the packet to the SPCMCA. If an Article 32 Preliminary Hearing has been requested, the SPCMCA shall sign the appointment memorandum which will have been previously prepared IAW the PTP and included in the preferral packet. If a Preliminary Hearing has not be requested, the SPCMCA shall then be afforded an opportunity to make a disposition recommendation.

A Recommendation and Transmittal form shall be included in the packet to facilitate memorialization of the Commander's recommendation, if any.

(6) After collection of the required signatures and any disposition recommendations from the Accused's chain of command, the original packet will be maintained by the OSTC Field Office IAW locally-established procedures. Copies will be made and distributed to both the Accused's counsel and the COJ.

(7) Upon completion of these steps, the STC assigned to the case shall ensure that MJO is promptly updated and that all appropriate documents are uploaded.

**7-3. Article 32 Preliminary Hearing.** The detailed STC shall ensure the following –

- a.* Compliance with all R.C.M. 405 notice requirements;
- b.* Compliance with PHO notification memo requirements;
- c.* That all pretrial delays are appropriately accounted for and documented;
- d.* Coordination of witness travel with the OSJA, if necessary;
- e.* Attendance at/completion of the Article 32 Preliminary Hearing IAW the PTP;
- f.* That all original Article 32 documents/waivers are added to original casefile; and
- g.* That copies of the PHO report are provided to the DC, the accused's SPCMCA, and the COJ within one business day of receiving the report from the PHO.

**7.4** Should the PHO determine that probable cause exists, the accused's and victim's SPCMCA(s) will be provided the opportunity to make disposition recommendations using the standard transmittal forms. Those recommendations will be included in the standard referral packet that is forwarded to the Referral Authority. Should a SPCMCA not provide a disposition recommendation after five business days, that fact will be documented and the referral packet forwarded to the Referral Authority without SPCMCA recommendation.

## OSTC Prosecution Philosophy

The OSTC will independently evaluate the unique facts and circumstances of each case and consider the factors contained in Appendix 2.1, *Manual for Courts-Martial*, to determine whether referral is appropriate and whether the case evidence is “likely to be sufficient to obtain and sustain a conviction.”

### LSTC Key Takeaways:

- Our duty is to make responsible decisions based on provable facts
- We represent the Army community: the Army, soldiers, families, Army civilians and others who live and work among us
- Victims are a critical part of the community and demand special attention
- Our decision-making must focus on the entire Army community using the factors in MCM, Appendix 2.1
- Refer cases in which the evidence is “likely to be sufficient to obtain and sustain a conviction”
- Objectively weigh all admissible evidence, consider the likely effect on the factfinder, and competently and professionally try cases expecting to achieve favorable results

## Chapter 8. Referral Procedures.

### 8-1. Referral.

- a. *Definition.* Referral is an order that charges and specifications against an Accused will be tried by a specified court-martial. See, RCM 601(a).

*Authority.* With respect to charges and specifications alleging any offense over which a Special Trial Counsel exercises authority, a Special Trial Counsel shall have exclusive authority to refer the charges and specifications for trial by a general or special court-martial. See, Article 24a(c)(3)(B).

### 8-2. Disposition/Referral Authority & Withholding Policy.

- a. *Generally.* The OSTC holds exclusive authority over the disposition of offenses under OSTC authority. In this context, “disposition” includes deferral; referral; withdrawal/dismissal of charges and/or specifications; proffer agreements; cooperation agreements; immunity, approval of expert witness/consultants and plea agreements. The authority to dispose of charges is offense and duty-position based, and inchoate offenses have the same Disposition Authority as the completed offense. (See, Enclosure 9 for OSTC Authorities Matrix).

b. *Withholding of Certain Cases to the LSTC.* Disposition authority is withheld to the level of the LSTC for:

- (1) Capital Cases. The LSTC is the Disposition Authority over any case for which a sentence of death is authorized.
- (2) Unless expressly delegated to a subordinate referral authority by the LSTC, the LSTC is the Disposition Authority for cases involving an accused in the grade of O-6 or above.

c. *Withholding of Certain Cases to the level of the D-LSTC.* Disposition Authority is withheld to the level of the D-LSTC, unless expressly delegated on a case-by-case basis to the CCSTC, for cases involving:

- (1) a charge of homicide (Art. 118), manslaughter (Art. 119), or rape or penetrative sexual assault (Art. 120 & 120b);
- (2) an accused who, at the time of the alleged misconduct, was serving in a Position of Special Trust and Authority (POSTA), as defined by AR 600-20; and

- (3) an accused in the grade of E-8 or above.
- d. Except as set forth above, the Disposition Authority for all other OSTC cases is withheld to the level of the Chief Circuit Special Trial Counsel (CCSTC) for the Circuit wherein the case arises. The CCSTC may not further delegate this authority to a subordinate STC.

### **8-3. Referral Procedures.**

- a. *Standardized Referral Packets.* Prior to forwarding a case to the OSTC Referral Authority, the Field Office OIC shall assemble, or cause to be assembled, the case file IAW a standardized referral packet template approved by HQ, OSTC.
- b. *Recommendation from the Field Office OIC.* For each case forwarded to a higher authority for a referral decision, the Field Office OIC shall include a recommendation as to whether the case should be referred (and, if so, to what level of court-martial), along with an analysis of the facts and circumstances of the case which supports his/her recommendation.
- c. *Requirement for Written Pre-Trial Advice IAW Article 34(c).*
  - (1) For cases where Referral Authority is withheld to the level of the CCSTC, the Field Office OIC shall include in the referral packet a written memorandum providing advice IAW Article 34(c), UCMJ ("Article 34 Advice").
  - (2) For cases where Referral Authority is withheld to the level of the D-LSTC, the CCSTC shall include in the referral packet a written memorandum providing Article 34 Advice.
  - (3) For cases where Referral Authority is withheld to the level of the LSTC, the D-LSTC who oversees the Circuit from which the case arises shall include in the referral packet a written memorandum providing Article 34 Advice.
- d. *Special Considerations for Capital Cases.* For all cases where there is a recommendation to the LSTC that final disposition of a case should include a Capital Referral, STC (at all levels) will comply with the additional requirements of RCM 1004 throughout all stages of processing.
- e. *Additional Considerations; Disagreement with Referral Recommendation.* For cases where there is disagreement related to a referral decision between a subordinate STC and their supervisory STC, the following additional steps shall be taken –
  - (1) For cases where Referral Authority is withheld to the CCSTC, the referral packet shall be forwarded to the D-LSTC responsible for the Circuit wherein the case arises, along with written recommendations from both the Field Office OIC and the CCSTC. In such a case, the referral decision shall be made by the D-LSTC. If the D-LSTC agrees with the recommendation of the CCSTC, then the decision shall be made without further concurrence. If, however, the D-LSTC disagrees with the recommendation of the CCSTC, the D-LSTC must obtain concurrence for their decision from the LSTC, or if directed by the LSTC, at least one of the other Deputy

LSTCs. The concurrence shall be memorialized in a memorandum which will be saved in the HQ, OSTC electronic shared drive.

(2) For cases where Referral Authority is withheld to the D-LSTC, and the D-LSTC disagrees with the referral recommendation of the CCSTC, the D-LSTC must obtain a concurrence for their decision from the LSTC, or if directed by the LSTC, at least one of the other Deputy LSTCs. The concurrence shall be memorialized in a memorandum which will be saved in the HQ, OSTC electronic shared drive.

(3) For any case under this sub-paragraph where agreement and the concurrence of two Deputies cannot be reached, Referral Authority shall be elevated to the LSTC who shall personally make the referral decision.

**8-4. Deferral.** For cases where the Referral Authority decides not to refer any charges to a court martial, the Referral Authority will dismiss all Covered Offenses and return the matter to the Commander exercising GCMCA over the Accused. This decision will be memorialized in a non-Referral Memo and will be transmitted along with any other relevant documentation to the SJA who advises that GCMCA. If the Referral Authority decides to refer only some of the preferred charges, he/she shall dismiss any other charges and shall promptly inform the SJA who advises the GCMCA of that decision. The dismissal and notification acts as a deferral of those particular offenses.

#### **8-5. Referral Documentation.**

- a. *Generally.* The OSTC Referral Authority shall prepare, or cause to be prepared and shall personally sign a memorandum ("Referral Memo") documenting (1) the decision to refer the case to a court-martial, (2) the level of the court-martial, and (3) the Court Martial Convening Order (CMCO) to which the case is referred. Absent extraordinary circumstances and written authorization of the LSTC, a case will be referred to a CMCO issued under the authority of the Commander who exercises GCMCA over the Accused.
- b. *Attorney-Work Product.* All memoranda containing recommendations of STC related to a decision to refer, along with any HQ, OSTC internal memoranda related to a concurrence with a referral decision, shall be considered attorney-work product and shall not be subject to disclosure IAW Rule RCM 308(d)(2).

**8-6. Transmittal of Referral Decision to the GCMCA.** Within one (1) working day of a decision to refer a case to trial by court-martial, the OSTC Referral Authority shall transmit via electronic mail (e-mail) the Referral Memo to the Commander who issued the CMCO to which the case has been referred. This email transmittal will also include (at a minimum) the SJA who advises that GCMCA.

**8-7. Transmittal of Referral Decision to the Trial Judiciary.** Within one (1) working day of a decision to refer a case to trial by court-martial, the OSTC Referral Authority shall transmit via e-mail the Referral Memo to the Chief Circuit Military Judge for the Circuit wherein the case arises. This email transmittal will also include (at a minimum) all subordinate STC who have made a recommendation related to the disposition of the case, the Chief of Justice for the GCMCA, and any additional personnel requested to be notified of referral decisions by the Chief Circuit Military Judge, ie., Clerk of Court, Docketing Judge, etc.

**8-8. Transmittal of Referral Decision to Defense Counsel.** Upon receipt of a referral decision from the OSTC Referral Authority, the Field Office OIC shall promptly transmit by email the Referral Memo and any other materials related to the referral decision which are required to be released by the RCMs to Detailed Defense Counsel for the Accused, or if no Defense Counsel is known to be detailed, to the Senior Defense Counsel for the installation wherein the case arises.



# OSTC HQ Organization



**SECARMY** 

**Lead Special Trial Counsel** 

**West  
(Circuits 4-7)**

**Deputy - West**   
**Special Victim Litigation  
Expert**  
**Paralegal Specialist**

**Admin &  
Support Staff**

**XO**   
**Office Manager**   
**HR Specialist**  
**Admin Officer**  
**IT Specialist**  
**Financial Mgr**  
**Budget Analyst**

**Operations & Policy**

**Deputy – Operations,  
Policy, and Training**   
**Attorney-Advisor -  
Operations**  
**Attorney-Advisor - Policy**  
**Communications Director**  
**Operations Officer**   
**Operations NCO**   
**SVL Program Manager**

**East  
(Circuits 1-3, 8)**

**Deputy - East**   
**Special Victim Litigation  
Expert**  
**Paralegal Specialist**

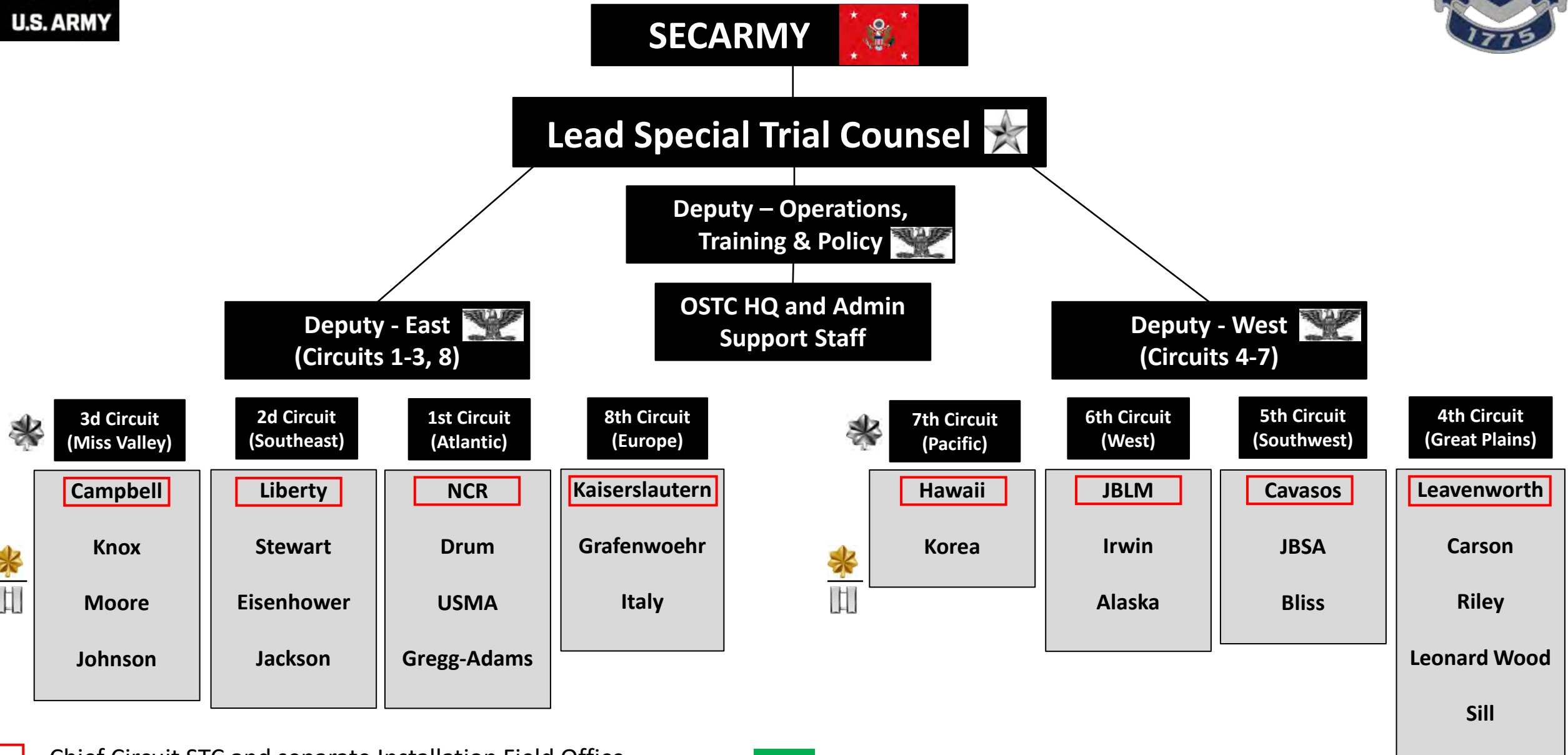
**Complex Litigation Team**

**Litigation Attorney**   
**Litigation Attorney**   
**Special Victim Litigation  
Expert**



CUI

# OSTC Organization



 = Chief Circuit STC and separate Installation Field Office



ENCL 2 – Area of Responsibility (AOR) Alignment for Installations without an on-site OSTC Field Office and OSTC support to USAR and USARNG cases and investigations.

1. The OSTC Field Office at the following installations (left column) will be responsible for coverage of all OSTC related matters and execution of OSTC responsibilities at the aligned installations (right column) that do not have an on-site Field Office.

<b>OSTC Field Office</b>	<b>Remote Installation(s)</b>
Fort McNair, DC/MDW	Fort Myer, VA; Fort McNair, DC; Fort Belvoir, VA; Fort Meade, MD; Fort Detrick, MD; Aberdeen Proving Ground, MD; Pentagon Reservation, DC; Carlisle Barracks, PA
U.S. Military Academy/West Point, NY	Fort Dix, NJ; Fort Hamilton, NY
Fort Gregg-Adams, VA	Fort Eustis, VA
Fort Liberty, NC	Eglin AFB, FL
Fort Stewart, GA	MacDill AFB, FL; Hunter Army Airfield, GA; Guantanamo Bay, Cuba
Fort Moore, GA	Fort Novosel, AL
Fort Johnson, LA	Camp Shelby, MS
Fort Jackson, SC	Shaw AFB, SC
Fort Campbell, KY	Redstone Arsenal, AL
Fort Leavenworth, KS	Fort McCoy, WI; Rock Island Arsenal, IL
Fort Bliss, TX	Fort Huachuca, AZ; White Sands Missile Range, NM
Fort Carson, CO	Dugway Proving Ground, UT
Joint Base Lewis-McChord, WA	Presidio of Monterey, CA
Camp Humphreys, Korea	U.S. Forces – Korea; U.S. Army Forces – Japan
Kaiserslautern, Germany	Wiesbaden, Germany; U.S. Army Forces in the BENELUX
Grafenwoehr, Germany	*Poznan, Poland; U.S. Army Forces deployed in Eastern Europe; Stuttgart, Germany
Vicenza, Italy	U.S. Army Forces in Kuwait, Djibouti, and the Horn of Africa

2. While initial support will usually be triggered by geographic proximity, for all cases and relevant investigations supported by OSTC personnel, as set forth in the chart above, the Field Office OIC for the supporting office (left column) will ensure that thorough coordination is made with the OSJA that provides legal support to the GCMCA who exercises authority over the Subject/Accused to determine subsequent OSTC support requirements, regardless of whether that GCMCA & OSJA are forward deployed or at home station.

3. For other individual cases not captured by the chart above, initial support will be provided by the Field Office in closest geographic proximity to the investigation until such time as coordination can be made with the OSTC and OSJA supporting the GCMCA over the Subject/Accused.

4. For all cases involving personnel from the USAR and/or USARNG personnel (while on Title 10 status), worldwide, OSTC personnel will coordinate with the relevant OSJA for the Coordinating Installation as identified in AR 27-10, Appendix K, Figure K-1.

## Initial Victim-Contact Form

U.S. v. \_\_\_\_\_

### **Victim Information:**

Rank/Title: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone #: \_\_\_\_\_

E-mail: \_\_\_\_\_

Contact Preference:    Email        Phone        Text        Other: \_\_\_\_\_

Contact Frequency:    Weekly    Bi-Weekly    Monthly    Other: \_\_\_\_\_

Military Affiliation:    Yes        No        Type/Status: \_\_\_\_\_

SVC Assigned:        Yes        No        SVC Name: \_\_\_\_\_

Private Attorney:    Yes        No        Name: \_\_\_\_\_

Employment Status:    PT        FT        Address: \_\_\_\_\_

Relation to Offender: \_\_\_\_\_

### **Alternate/Emergency Contact:**

Relation to victim: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone #: \_\_\_\_\_

E-mail: \_\_\_\_\_

Contact Preference:    Email        Phone        Text        Other: \_\_\_\_\_

### **Dependents:**

Yes

No

Name: \_\_\_\_\_ Age: \_\_\_\_\_ Relation to Offender: \_\_\_\_\_

Name: \_\_\_\_\_ Age: \_\_\_\_\_ Relation to Offender: \_\_\_\_\_

Name: \_\_\_\_\_ Age: \_\_\_\_\_ Relation to Offender: \_\_\_\_\_

Name: \_\_\_\_\_ Age: \_\_\_\_\_ Relation to Offender: \_\_\_\_\_

TC Name & Contact #: \_\_\_\_\_

CID/MPI Name & Contact #: \_\_\_\_\_

FAP Name & Contact #: \_\_\_\_\_

VA/SARC Name & Contact #: \_\_\_\_\_

## **Victim Contact Form Continuation Sheet**

U.S. v. \_\_\_\_\_

The following forms were provided to, and discussions were conducted with (victim) \_\_\_\_\_ on the below dates.

- ☐ DD 2701, Initial Information for Victims & Witnesses of Crime  
Issued Date: \_\_\_\_\_ Victim Signature: \_\_\_\_\_
- ☐ Deferred to Command:        YES                NO  
Date of Deferral Discussion: \_\_\_\_\_  
STC Signature: \_\_\_\_\_  
Victim Signature: \_\_\_\_\_
- ☐ Victim Preference Discussion  
Date: \_\_\_\_\_  
STC Signature: \_\_\_\_\_  
Victim Signature: \_\_\_\_\_
- ☐ DD 2702, Court-Martial Information for Victims & Witnesses of Crime  
Issued Date: \_\_\_\_\_ Victim Signature: \_\_\_\_\_
- ☐ DD 2703, Post-Trial Information for Victims & Witnesses of Crime  
Issued Date: \_\_\_\_\_ Victim Signature: \_\_\_\_\_
- ☐ DD 2704, Victim/Witness Certification & Election Concerning Prisoner Status  
Completed Date: \_\_\_\_\_ Victim Signature: \_\_\_\_\_
- ☐ DD 2704-1, Victim Election of Post-Trial & Appellate Rights  
Completed Date: \_\_\_\_\_ Victim Signature: \_\_\_\_\_
- ☐ Final Case Conference – Date: \_\_\_\_\_  
STC Signature: \_\_\_\_\_  
Victim Signature: \_\_\_\_\_
- ☐ Not able to contact victim during investigation, pre-trial, trial, and post-trial phases. See notes.  
Notes: \_\_\_\_\_

## VICTIM NOTIFICATIONS CHECKLIST

DATE/INITIALS	
	<b>INVESTIGATIVE PHASE:</b>
	DD FORM 2701
	Jurisdiction Preference Discussion w/ victim
	Non-Prosecution / Prosecution Discussion w/ victim
	Participation Preference Discussion w/ victim
	<b>DEFERRED TO COMMAND:</b>
	YES ____ NO ____ (Deferral Date: _____)
	<b>PREFERRAL PHASE:</b>
	Preferral documents
	DD FORM 2702
	Date, time, and location of any pretrial confinement review
	Date, time, and location of the preliminary hearing
	<b>PRELIMINARY HEARING:</b>
	Recording of the preliminary hearing (if requested)
	<b>REFERRAL PHASE:</b>
	Referral documents
	Notice of arraignment
	Notice of motions
	Notice / Coordination of travel
	Plea discussions
	Request to interview the victim received from defense counsel
	<b>TRIAL PHASE:</b>
	Victim Impact Statement
	<b>POST-TRIAL PHASE</b>
	Article 60(b) rights
	DD FORM 2703
	DD FORM 2704 & 2704-1
	Travel Voucher
	STR
	EOJ

U.S. v. \_\_\_\_\_

VICTIM: \_\_\_\_\_

**PERSONAL INFORMATION (All information must be accurate and match the ID the traveler will use.)**

1. Last Name		2. First Name and Middle Initial		3. Social Security Number*	
4. Date of Birth*	5. Dependent/minor:	6. Gender	7. Email Address		
8a. Mailing Address		8b. City	8c. State / Zip Code	Residence Address is same as Mailing Address <input type="checkbox"/>	
9a. Residence Address		9b. City	9c. State / Zip Code	10. Residence Phone	
11. Cell Phone	13a. Emergency Contact (Name)	13b. Emergency Contact (Phone)		13c. Relationship to you:	
14a. Status (select)		14b. Unit (if applicable)			

**FINANCIAL INFORMATION**

15a. NAME/ADDRESS OF BANK*		15b. Bank Account Type*	
		15c. Bank Routing Number*	15d. Bank Account Number*

**TRAVEL INFORMATION**

16. Date of Departure	17. Date of Return	18. Mode of Travel (select)	19. Nearest Airport
20. Miles to Airport (one-way)(from Google)	21. Daily Airport Parking Fee		22. Rental Car: Y / N
23a. Passport Number (if traveling from overseas)	23b. Passport Expiration Date	23c. Passport Issuing Country	
24. Preferred seating (select)	25. TSA Known Traveler #	26. TSA Redress Number	
27a. Airline Miles Number	27b. & Airline	28. Special Needs	

**FOR OFFICE USE:**

US v.	Trial Dates	Who's Witness
Does this traveler need an advance?	Date Subpoena Issued:	Lodging Arrangements / Location

\* The traveler must be informed of their rights under the Privacy Act. PRIVACY ACT STATEMENT: Authority, Title 5 U.S.C., S 4103 & EO937. The information contained in a completed worksheet is sensitive and is subject to the Privacy Act. The regulatory authority which authorizes the solicitation of this information is contained in Appendix E of the Department of Defense (DoD) Joint Travel Regulations (JTR). The requested information above is intended to be used in planning and authorizing official TDY travel for DoD. Disclosure of this personal information is voluntary and no adverse action can be taken against individuals for refusing to provide this information. However, failure by an individual to provide required information will result in the inability to process travel on behalf of that individual. All efforts should be made to ensure this information is protected.

\*\* If lodging and/or rental car reservations are needed, personal credit card information may be required.\*\*

1 June 2018

Enclosure 5



DEPARTMENT OF THE ARMY  
FORT XXXXX FIELD OFFICE  
OFFICE OF SPECIAL TRIAL COUNSEL  
ADDRESS  
FORT XX, STATE ZIP CODE

ATZT-JA

[auto date]

MEMORANDUM FOR [Special Court-Martial Convening Authority]

SUBJECT: Exercise of Authority – [SUBJECT]

1. On [DATE], the Fort XXX Field Office, Office of Special Trial Counsel, [exercised its authority and retains authority for all related offense(s) associated with SUBJECT.] Requests for deferral may be routed through the Office of the Staff Judge Advocate to the Office of Special Trial Counsel for a review and determination.

2. The offense(s) associated with this Exercise of Authority are: [auto fill from MJO, Article No.].

3. The point of contact is NAME.

FIRST MI LAST  
RANK, JA  
Special Trial Counsel



DEPARTMENT OF THE ARMY  
OFFICE OF THE SPECIAL TRIAL COUNSEL  
INSTALLATION NAME FIELD OFFICE  
CITY, STATE ZIPCODE

AFZC-JA

XX Month 2023

MEMORANDUM FOR (Staff Judge Advocate) (Chief of Military Justice), Installation  
Name, City, State Zip Code

SUBJECT: Request for Detailing of Office of the Staff Judge Advocate (OSJA) Personnel

1. The Installation Field Office Office of the Special Trial Counsel (OSTC) requests detailing of an assistant Trial Counsel and OSJA support personnel relating to the (investigation) (court martial) of PVT John Smith, Brigade, Fort XX, State. The Installation Filed Office OSTC is requesting the detailing of one Judge Advocate to act as an assistant Trial Counsel, along with paralegal support from a (III Corps litigation paralegal) (brigade legal office).
2. The point of contact for this memorandum is the undersigned at email.mil@army.mil.

NAME  
RANK, JA  
Special Trial Counsel

1. Request for OSJA support personnel is (approved) (disapproved).
2. CPT \_\_\_\_\_ is hereby made available to be detailed as assistant Trial Counsel in the (investigation) (court martial) of PVT John Smith, Brigade, Fort XX, State.
3. OSJA paralegal support will be provided by the (Office litigation paralegals) (corresponding brigade legal office).

NAME  
RANK, JA  
Chief of Military Justice



DEPARTMENT OF THE ARMY  
OFFICE OF THE SPECIAL TRIAL COUNSEL  
INSTALLATION NAME FIELD OFFICE  
CITY, STATE ZIPCODE

AFZC-JA

XX Month 2023

MEMORANDUM FOR (Staff Judge Advocate) (Chief of Military Justice), Installation  
Name, City, State Zip Code

SUBJECT: Request for Detailing of Office of the Staff Judge Advocate (OSJA) Personnel

1. The Installation Field Office Office of the Special Trial Counsel (OSTC) requests detailing of an assistant Trial Counsel and OSJA support personnel relating to all covered offenses that occur at Installation from January 20XX to June 20XX . The Installation Filed Office OSTC is requesting the detailing of one Judge Advocate to act as an assistant Trial Counsel, along with paralegal support from a (Office litigation paralegal) (brigade legal office).
2. The point of contact for this memorandum is the undersigned at email.mil@army.mil.

NAME  
RANK, JA  
Special Trial Counsel

1. Request for OSJA support personnel is (approved) (disapproved).
2. Assignment to support OSTC covered offenses will be based upon brigade assignment. Unless communicated by the CoJ, the MJA/TC assigned to the brigade of the accused is hereby made available to be detailed as assistant Trial Counsel for the entirety of the investigation and/or Court-Martial.
3. OSJA paralegal support will be provided by the corresponding Brigade legal office.

NAME  
RANK, JA  
Chief of Military Justice





# Office of Special Trial Counsel

## Authorities Matrix – Span of Control and Responsibility



### Installation STC

- Make initial determination of covered offense
- Opine consultation
- Support to LE Investigations
- Draft Charges and provide advice on PREFERRED
- Serve as Lead Counsel at trial

### STC Field Office OIC

- Field Office OIC
- **PREFERRED & DEFERRAL AUTHORITY**
- Review and validate "No PC" determinations
- Provide Art. 34 Advice for cases not withheld to HQ
- Serve as Lead Counsel at trial
- Track and Manage all covered cases in AOR

### Chief Circuit STC

- Chief Circuit OIC
- **REFERRAL & DEFERRAL AUTHORITY** for cases not withheld to HQ
- **Plea & Alt. Disp. AUTHORITY** for cases not withheld to HQ
- Review and validate DEFERRAL decisions in "PC-Non Pros" cases
- Provide Art. 34 Advice for cases withheld to HQ
- Can serve as Counsel at trial
- Manage all cases in AOR

### OSTC HQ

- Deputy LSTC East/West
  - **REFERRAL & DEFERRAL AUTHORITY** for cases withheld to HQ
  - **Plea & Alt. Disp. AUTHORITY** for cases withheld to HQ
  - Review & validate NON-REFERRAL-DEFERRAL decisions
  - Track & Manage preferal, deferral, and referral data across the OSTC
- Withheld to HQ**  
Homicide  
Penetrative SA cases  
Accused E-8 & above  
POSTA

### LSTC

- Lead Special Trial Counsel
- **REFERRAL & DEFERRAL AUTHORITY** for CAPITAL decisions & Cases involving O-6 and above Accused
- **Plea & Alt. Disp. AUTHORITY** for cases withheld to the LSTC level

**Withheld to LSTC**  
Accused O-6 & above  
Capital Referral

**1 July 2023**

**OFFICE OF SPECIAL TRIAL COUNSEL**  
**STANDARD OPERATING PROCEDURES**

**COMPLIANCE WITH THIS PUBLICATION IS MANDATORY**

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OPR: SAF/STC

Pages: 14

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This instruction establishes the policies and procedures for the Department of the Air Force (DAF) Office of Special Trial Counsel (OSTC). It is issued in accordance with the directives established by the Secretary of Defense memorandum, *Policies Governing Offices of Special Trial Counsel*, dated 11 March 2022, and the Secretary of the Air Force memorandum, *Policies Governing the Department of the Air Force Office of Special Trial Counsel*, dated 7 September 2022.

**1. Overview.** OSTC is an independent prosecutorial organization in the DAF. In accordance with 10 U.S.C. § 824a, OSTC retains exclusive authority over covered offenses, as enumerated at 10 U.S.C. § 801(17) (see Appendix 1), and may also exercise authority over known and related offenses, as defined in Rule for Courts-Martial 303A. OSTC authority is independent from both DAF command structure and the DAF Judge Advocate General's Corps (JAGC). The Lead Special Trial Counsel reports directly to the Secretary of the Air Force, without intervening authority.

**2. OSTC Mission.** To provide expert, independent, and ethical representation of the United States, under the direct civilian control of the Secretary of the Air Force, in the investigation and trial-level litigation of offenses over which the office exercises authority.

**3. OSTC Personnel and Functions.**

**3.1. Lead Special Trial Counsel (LSTC).** The LSTC is responsible for the oversight and management of OSTC operations. Special Trial Counsel (STC) authorities flow from the LSTC and may be delegated or withheld, as established in this instruction. In accordance with governing policies, the LSTC is the final approval authority for personnel decisions and permission to engage in duties beyond the investigation and prosecution of covered offenses and other offenses over which the office exercises authority.

**3.2. OSTC Headquarters Staff.** The OSTC Headquarters Staff support the LSTC in making personnel and policy decisions, developing training and standard operating procedures, interacting with non-DAF agencies, and exercising STC authorities.

**3.3. District Chief Special Trial Counsel (District Chiefs).** District Chiefs supervise all OSTC members assigned to their respective District Office. Districts will be responsible for

providing case-guidance, assigning duties to district personnel, monitoring workload, managing leave and travel, and developing internal training and professional development plans. As supervisory attorneys, District Chiefs are further responsible for ensuring district personnel comply with professional responsibility standards.

**3.4. Deputy District Chief Special Trial Counsel (District Deputies).** District Deputies support the District Chiefs in all day-to-day field office operations. Generally, deputies oversee the Investigation and Prosecution Support Team (IPST) section within each district and serve as the principal liaison to the Military Criminal Investigation Offices (MCIO) within each district.

**3.5. District Noncommissioned Officer in Charge (NCOIC).** District NCOICs serve as the enlisted leader for each district. District NCOICs support the District Chiefs in all aspects of district operations, budget, training, personnel matters involving readiness, and in the exercise of OSTC authority.

**3.6. Chief of Offense Triage and Administration.** Counsel in the Offense Triage and Administration Section will function as counterparts to the chiefs of military justice at installation legal offices. Counsel in this section manage the intake and triage of reported offenses and provide a communication node for the exercise of exclusive authority. Counsel work closely with District Paralegals and installation legal office personnel to ensure prompt administration and disposition of covered offenses and other offenses under OSTC authority. STC may perform this duty, but certification as an STC is not a prerequisite.

**3.7. Investigation and Prosecution Support Teams (IPST) STC.** IPST STC serve as the investigative team lead for cases under OSTC authority. In addition to the detailed STC, the IPST includes an agent or investigator from an MCIO, assistant trial counsel, assigned case paralegal, Victim/Witness Assistance Program liaison(s), and other personnel as needed. Though installation legal offices and MCIOs will ordinarily be the first notified of a covered offense, IPST STC will provide immediate reach-back and guide the IPST through the appropriate investigative steps to prepare the case for potential prosecution. Specific IPST standard operating procedures are contained in Appendix 2. In some instances, the IPST STC may also be detailed as STC on trial teams.

**3.8. Litigation STC.** Litigation STC lead trial teams in the prosecution of cases under OSTC's authority, and other cases with the permission of the LSTC. In fulfilling their role as lead counsel, Litigation STC will lead and train assistant trial counsel and assigned case paralegals in all aspects of trial preparation and execution. Litigation STC will coordinate with IPST STC during investigations as appropriate.

**3.9. District Paralegal.** The District Paralegal role spans the breadth of OSTC duties and functions, including offense triage, administration, investigation, and litigation. They supervise covered offense case data management, monitor field compliance, collaborate with installation legal offices, and assist in the intake, triage, and administration of covered offenses and cases under OSTC's authority.

**4. Professional Development.** OSTC attorneys and paralegals shall constantly strive to develop their own professional skills and those of others.

**4.1. STC Qualification Course.** Absent a written waiver granted by the LSTC, all STC must complete the STC Qualification Course prior to assuming the role of STC. Written LSTC approval is required to attend another Service's qualification course, and all candidates must still pass the Air Force examination.

**4.2. Annual Training.** All OSTC personnel are expected to attend the STC Annual Training course. OSTC personnel develop and lead this course with curriculum specific to OSTC operations. The LSTC may provide a waiver to the annual training requirement for good cause.

**4.3. Other Training.** Personnel will be provided and are encouraged to seek additional training opportunities, particularly litigation-focused training within and outside the Department of Defense. Training requests must be routed through the District Chief and to OSTC Headquarters Staff for approval.

**4.4. Professional Responsibility.** All OSTC personnel are responsible for knowing and complying with the Air Force Judge Advocate General's Corps annual professional responsibility and certification requirements.

**5. Triaging and Investigating Offenses.** Installation legal offices and MCIOs are responsible for identifying and communicating covered offense reports to OSTC. Upon receipt of a newly reported offense, STC will make an initial determination as to whether the reported misconduct includes a covered offense. STC on-call requirements are outlined in Appendix 2. Additionally, each District shall monitor the District Org Box for OSTC Notification Memoranda.

5.1. Upon receipt of an OSTC Notification Memorandum, the Offense Triage and Administration Section will reply to the installation legal office with an email that includes the covered offense determination, the assigned IPST STC, the Initial Triage Checklist, and notification of OSTC's exercise of authority over the covered offenses and any known or related offenses, whether currently reported or later discovered. A template email response is provided in Appendix 3. Unless impracticable, this initial email response shall occur within one duty day of notification.

5.2. The District Office aligned with the investigating location will ordinarily provide IPST support in the investigation of covered, known, or related offenses. This remains true even if offense disposition and litigation authorities will fall to a separate District (e.g., accused commits a covered offense while TDY). Reported misconduct that includes at least one covered offense will be assigned to an IPST STC.

5.2.1. If a case involves witnesses from multiple districts, the District Office with authority over the underlying covered offense is responsible for exercising authority over any related offenses. For example, if an individual from District 4 commits a covered offense but the

witnesses are from District 2, the District 4 Office will exercise authority over the covered offense and any related offenses committed by the District 2 witnesses.

5.2.2. If an individual suspected of a related offense also commits a covered offense, the District Office with authority over the covered offense will assume authority over any pre-existing related offenses. Using the previous example, if a related District 2 witness also commits a covered offense, the District 2 Office will exercise authority over the covered offense and assume authority from District 4 over the pre-existing related offense. OSTC Headquarters Staff should be notified immediately in these cases.

5.3. The Offense Triage and Administration Section shall monitor installation compliance and failures to report covered offenses. Command reporting compliance will be monitored weekly through case management system queries. District personnel compare the query results against installation reporting and contact installation legal offices that fail to provide initial notification of covered offenses. MAJCOM/FLDCOM compliance reports are compiled monthly and forwarded to OSTC Headquarters Staff.

**6. Detailing Counsel.** District Chiefs are the detailing authority for cases under OSTC authority. They are responsible for detailing IPST STC, Litigation STC, and assistant trial counsel to cases under OSTC authority. District Chiefs are given wide discretion to manage the caseloads of District personnel.

6.1. An IPST STC shall be detailed within one duty day of notification and as part of the initial covered offense determination. Authority to detail IPST STC may be delegated to the Deputy District Chief. Appendix 2 contains standard operating procedures specific to the IPST function, to include victim engagement.

6.2. The District Chief shall detail STC to cases under OSTC authority, to include counsel for the Government at preliminary hearings. The timing of this decision is made on a case-by-case basis, and should balance workload, experience, case complexity, any relationship built with victims, and any other factor deemed relevant by the District Chief.

6.3. The District Chief may detail other counsel to serve as assistant trial counsel in cases under OSTC authority. Ordinarily, the trial team should include at least one trial counsel from the local legal office after coordination with the local Staff Judge Advocate. District Trial Counsel may also be detailed as assistant trial counsel to cases under OSTC authority, following coordination with the Chief, Government Trial and Appellate Operations Division (JAJG).

6.4. Requests to detail STC from a different District must be coordinated with the respective District Chief.

6.5. Requests for STC litigation support on offenses that fall outside OSTC authority, including those committed before 28 December 2023, must be approved by the LSTC.

**7. Preferral.** STC serve as the preferral signatory for offenses under OSTC authority. The Offense Triage and Administration Section is responsible for coordinating with the installation

legal office to generate and route preferral packages. This includes coordinating with the installation legal office on any command and/or victim input. Preferral packages will comply with applicable DAF instructions, manuals, and checklists, and will not contain attorney work-product. The Offense Triage and Administration Section will ensure the installation legal office coordinates with command for the service of preferred charges.

**8. Preliminary Hearings.** The District Chief is the requesting authority for preliminary hearing officers (PHO) under Article 32, UCMJ. This includes the authority to determine that a hearing is not required.

**9. Disposition Authority.** OSTC retains exclusive authority over covered offenses and may also exercise authority over known or related offenses. The Disposition Authority within OSTC is offense-based and withheld to certain duty positions, as outlined in Appendix 1. The Disposition Authority retains authority over offense deferral, offense referral, withdrawal/dismissal of charges and/or specifications, entering plea agreements, and determining practicability of a rehearing.

9.1. There is a single Disposition Authority in each case, and it is determined by the covered offense requiring the highest level of review.

9.2. Inchoate offenses have the same Disposition Authority as the completed offense.

9.3. The LSTC is the Disposition Authority for all offenses with an accused in the rank of E-9 or O-6 and above.

9.4. An O-6 on the OSTC Headquarters Staff is the Disposition Authority for all offenses with an accused in the rank of O-5.

**10. Referral.** In determining whether to refer an offense, the Disposition Authority will comply with the requirements of R.C.M. 601.

10.1. The Offense Triage and Administration Section will coordinate with the installation legal office to generate and route referral packages to the Disposition Authority. Referral packages will comply with applicable DAF instructions, manuals, and checklists, and the package must include a draft Special Trial Counsel Determination Memo.

10.2. Referral decisions that conflict with PHO referral recommendations must be coordinated with the LSTC or the LSTC's designee.

10.3. Unless delegated to a subordinate position, the Disposition Authority is the signatory for referral on the charge sheet.

10.4. The Offense Triage and Administration Section will coordinate referred cases with the installation legal office for service and further processing.

**11. Deferral.** Deferral of covered offenses may be justified if: (1) the R.C.M. 601 referral standard is not met; or (2) the severity of the misconduct does not warrant trial by general or special court-martial.

11.1. The designated Disposition Authority is responsible for making the deferral decision. Deferral decisions that conflict with the recommendations of a PHO must be coordinated with the LSTC or the LSTC's designee.

11.2. Any covered, known, or related offenses not preferred or referred shall be promptly returned to command via written notification to the installation legal office. Referred covered offenses must be withdrawn and dismissed prior to deferral. Appendix 4 contains a template deferral memo.

11.3. Command requests for reconsideration of deferral will be routed back to the designated Disposition Authority for action.

**12. Plea Agreements.** Disposition Authority approval is required to enter into plea agreements. The detailed STC should provide the Disposition Authority with the terms of the agreement, command/victim input, and a recommendation. Following coordination and approval, the STC is authorized to sign a plea agreement.

**13. Changes to Charges or Specifications.**

**13.1. Major and Minor Changes.** The detailed STC may make minor changes to the charge sheet. Major changes must be coordinated with the Disposition Authority prior to action.

**13.2. Withdrawal and Dismissal of Charges.** Disposition Authority approval is required to withdraw and dismiss referred charges. If approved, the detailed STC is authorized to withdraw and dismiss charges.

**14. Immunity Requests.** Immunity requests to the LSTC are routed through the District Chief and Deputy LSTC. Immunity requests should be sent once the need for immunity is identified.

**15. Appeals by the United States.** The LSTC, in coordination with the Chief of JAJG, has exclusive authority to determine whether to file an appeal under 10 U.S.C. §862 in cases involving offenses under OSTC authority. If the decision is made to pursue a Government appeal, the detailed Litigation STC shall support JAJG appellate counsel, as necessary.

**16. Rehearings and Remands.** The Disposition Authority, in coordination with the servicing legal office, will determine the practicability of rehearings and remands.

**17. Additional Matters.**

**17.1. High Interest Reporting.** The District Chief and OSTC Headquarters Staff shall be notified of a covered, known, or related offense that may include high interest items, including those involving General Officers, Commanders, Command Chiefs, First Sergeants,

## OSTC STANDARD OPERATING PROCEDURES

1 July 2023

officers in the grade of O-6, non-commissioned officers in the grade of E-9, OSTC or JAG Corps personnel, national security matters, and/or media interest.

**17.2. Case Summaries.** Within seven duty days of the completion of a court-martial, the detailed STC is responsible for submitting a case summary to the District Chief. The OSTC Case Summary Template, located in Appendix 5, will be used to provide an accurate, candid, and professional summary of the trial. OSTC Headquarters Staff and District Chiefs will have access to all case summaries and may distribute certain summaries to encourage the spread of best practices. All OSTC personnel must be mindful that case summaries are attorney work product, must be marked as such, and should not be shared outside the OSTC.

**17.3. Supplements.** District Chiefs may establish supplemental operating procedures as necessary to ensure efficient case processing and meet the unique needs of commands within their districts.



CHRISTOPHER A. BROWN  
Brigadier General, USAF  
Lead Special Trial Counsel



**Appendix 1 – Covered Offense Disposition Authorities**

<b>Type of Case</b>	<b>Disposition Authority</b>
<b>Article 117a – Wrongful broadcast or distribution of intimate visual images</b>	
Art 117a Wrongful broadcast or distribution of intimate visual images	District Chief STC
<b>Article 118 – Murder</b>	
Art 118 Murder	LSTC
<b>Article 119 – Manslaughter</b>	
Art 119 Manslaughter: Voluntary, involuntary	HQ OSTC O-6
<b>Article 119a – Causing death or injury of an unborn child</b>	
Art 119a Causing death/injury of unborn child	HQ OSTC O-6
<b>Article 120 – Rape and sexual assault</b>	
Art 120 Rape and sexual assault: Rape or sexual assault	HQ OSTC O-6
Art 120 Rape and sexual assault: Aggravated sexual contact or abusive sexual contact	District Chief STC
<b>Article 120a – Mails: Deposit of obscene matter</b>	
Art 120a Mails: Deposit of obscene matter	District Chief STC
<b>Article 120b – Rape and sexual assault of a child</b>	
Art 120b Rape; sexual assault; aggravated sexual contact; or abusive sexual contact with a child	HQ OSTC O-6
<b>Article 120c – Other sexual misconduct</b>	
Art 120c Other sexual misconduct	District Chief STC
<b>Article 125 – Kidnapping</b>	
Art 125 Kidnapping	HQ OSTC O-6
<b>Article 128b – Domestic violence</b>	
Art 128b Domestic violence	District Chief STC
<b>Article 130 – Stalking</b>	
Art 130 Stalking	District Chief STC
<b>Article 132 – Retaliation</b>	
Art 132 Retaliation	District Chief STC
<b>Article 134 – Child pornography</b>	
Art 134 Child pornography: Possess, receive, view, distribute, or possess with intent to distribute	District Chief STC
Art 134 Child pornography: Production	HQ OSTC O-6
<b>Article 134 – Formal, substantiated complaints of sexual harassment (o/a 2 Jan 25)</b>	
Art 134 Sexual harassment	District Chief STC

## Appendix 2 – IPST Standard Operating Procedures

### 1. COORDINATION:

**1.1. Law Enforcement.** IPST STC should attend Office of Special Investigations (OSI) detachment meetings at least twice monthly and are highly encouraged to participate weekly, when practicable. To promote productive time management, IPST STC should coordinate with installation legal and law enforcement personnel to designate specific times to discuss cases under OSTC authority.

1.1.1. IPST STC should encourage investigators to seek STC participation in victim, subject, and key witness interviews as often as practicable.

1.1.2. IPST STC should make every effort to be present for key interviews, either in person or remotely. With District Chief approval, IPST STC are authorized to travel to assist in covered offense investigations when circumstances warrant a site visit. For example, travel may be warranted for sensitive victim or subject interviews and cases involving classified material.

1.1.3. IPST STC shall consult with installation investigators on all search authorizations and search warrants.

1.1.4. To promote evidence sharing and rapid resolution of jurisdictional issues, IPST STC should work with installation investigators and legal personnel to build relationships with civilian law enforcement agencies.

**1.2. Installation Legal Office.** IPST STC should check-in weekly with trial counsel, the chief of military justice, and/or chief of litigation to discuss case updates. Participation in the installation detachment OSI meeting or installation legal office military justice meeting may be sufficient to cover this requirement. In coordination with the District Chief, IPST STC should encourage Staff Judge Advocates and installation trial counsel to call with litigation-related questions relating to covered offenses, outside of regularly scheduled update meetings. To the maximum extent possible, IPST STC should include assigned installation counsel and paralegals on consultation calls with investigators, for integration and training purposes.

**1.3. Litigation STC.** IPST STC are encouraged to consult with litigation STC throughout an investigation. In cases in which a Litigation STC has been detailed prior to the completion of an investigation, the assigned IPST STC should continue to provide investigative support and serve as the primary reach-back for the installation legal office and law enforcement. Litigation STC may engage in sensitive or case dispositive investigative steps, such as forensic child interviews, as appropriate.

## 2. OPERATIONS:

**2.1. On-Call Availability.** IPST STC are expected to be on-call and available for case consultation 24 hours a day and seven days a week. District Chiefs may develop policies to maintain IPST coverage during leave, trial, and other authorized absences.

**2.2. Charging Guidance.** IPST STC are responsible for guiding the scope and nature of a covered offense investigation. This includes preliminary identification of charges/specifications and supervision of the proof analysis prepared by assistant trial counsel.

**2.3. Disposition Recommendation.** IPST STC will make a preliminary disposition recommendation to the District Chief as to each offense under OSTC authority. IPST STC will either recommend an offense be deferred back to command authority or referred to trial by special or general court-martial. Preliminary disposition recommendations should be made as soon as the investigation is functionally complete. IPST STC should not wait until the investigative report is published, unless there is good reason to do so.

**2.4. Victim Engagement.** IPST STC shall seek to make early contact with covered offense victims and remain in contact throughout the course of an investigation. When applicable, victim consultation should be coordinated through detailed Victims' Counsel. The timing and frequency of victim engagements will be unique to each case, but STC should be consistent, reliable, and available in their approach.

2.4.1. IPST STC should attempt to contact covered offense victims within five duty days of detailing. In the initial conversation, STC should introduce themselves, build rapport, establish expectations, and explain OSTC's role in the investigation. The decision on whether to discuss case substance in the initial meeting can be made on a case-by-case basis.

2.4.2. IPST STC are responsible for managing substantive follow-up interviews with covered offense victims. These interviews should address outstanding evidentiary issues, unanswered questions from the initial report, and victim-controlled evidence (e.g., messages, recordings, medical records, etc.). The discussion may also include a general overview of case strengths and weaknesses. In these instances, the STC should continue to explain the status of the investigation, answer questions, and build rapport. If a Litigation STC is detailed, the Litigation STC will determine the primary point of contact with the victim based on the facts and circumstances of the case. If the IPST STC remains the primary point of contact, the IPST STC should explain the Litigation STC's role and lay the groundwork for a future introduction.

2.4.3. IPST STC are also responsible for working with the installation legal office to determine a victim's disposition and jurisdiction preference, if any.

2.4.4. IPST STC, or Litigation STC when serving as the victim's primary point of contact, shall timely update the victim on any major case developments, including disposition decisions, plea agreements, and the setting or changing of trial dates.

**2.5. Case Management.** IPST STC should maintain an easily transferrable case file. Case files should include the document tracking consultation provided to investigators, issues identified by the legal office, inputs regarding victim participation, and all other relevant materials that will minimize disruption if the case needs to be reassigned.

**3. Training.** IPST STC should provide training to both investigators and legal office personnel whenever possible. IPST STC should also be available to provide training to other base-level stakeholders, including Family Advocacy, Sexual Assault Prevention and Response Program, and Victims' Counsel. At least once per year, IPST STC should coordinate with the installation legal office to hold a joint MCIO/JA training for each installation within their assigned area of responsibility. The training should, at a minimum, cover new caselaw, best practices for teaming, and lessons learned from litigation at the installation and/or within the District.

**Appendix 3 – Initial Notification Response and Exercise of Authority**

**Appendix 4 – Offense Deferral Memorandum**

**Appendix 5 – OSTC Case Summary**

# OSTC MANUAL

STANDARD PROCEDURES FOR OSTC COUNSEL AND PARALEGALS

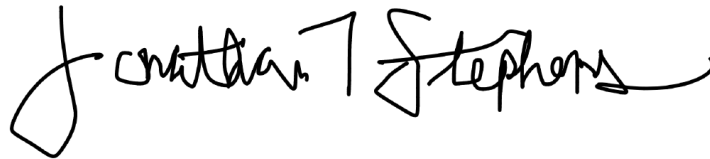


## INTRODUCTION

Welcome to the Office of Special Trial Counsel Manual (OSTCM). This living document is designed to provide Office of Special Trial Counsel (OSTC) prosecutors and supporting staff with a one-stop source for policy guidance, standard operating procedures (SOPs), links to key references, and standard templates.

As a member of the OSTC prosecution team, you have the distinct privilege and significant responsibility of representing the United States in criminal proceedings involving Sailors and other service members in covered and related offense cases. Your primary mission is to achieve justice, and in doing so, provide an effective, efficient, respected, and trusted tool for maintaining good order and discipline in the Navy. You must act with the utmost fairness and integrity in all endeavors. Your words, actions, and involvement in the military justice process – from beginning to end – affect not only your personal reputation, but that of the entire OSTC prosecution team, the JAG Corps, and the Navy. You must exercise your duties free from improper influence. Although you will have full independence to make recommendations, you must fully comply with all statutory and regulatory procedures.

We are all members of one team charged to meet our important and essential mission. Never hesitate to reach out to each other or to headquarters for assistance. We are fortunate to have some of the very best military justice practitioners in the Navy and it is incumbent on all of us to leverage our collective experience at every turn. I welcome all suggestions as we get started. We must consistently assess our practice and be willing to make adjustments to drive improvements. This Manual will be updated periodically to reflect best practices and changes in policy or law. Changes will be publicized to STCs via the chain of command and via a consolidated summary of changes maintained on Teams. You were all selected for a reason – keep up the great work! I look forward to working with all of you and am always only a call away.

A handwritten signature in black ink that reads "Jonathan T. Stephens". The signature is fluid and cursive, with the first name "Jonathan" and last name "Stephens" clearly legible.

J.T. STEPHENS  
Lead Special Trial Counsel (LSTC)  
Office of Special Trial Counsel

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## OSTCM 0000 – GETTING STARTED IN A OSTC

[LINK TO TCM 0000 SUPPORTING MATERIAL FOLDER](#)

When first reporting to OSTC, there are several administrative actions you should complete within the first 14 days of reporting. There are also several documents and references you should become familiar with. The following are a list of recommended steps to take:

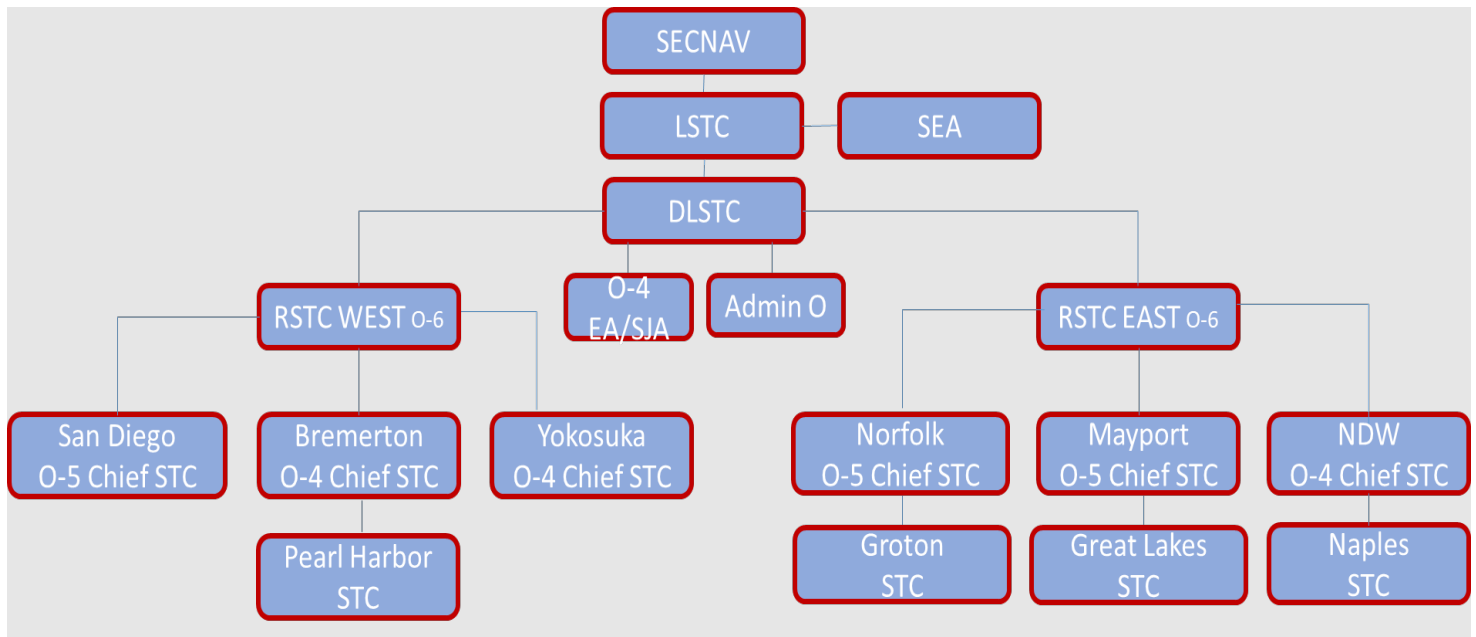
- (1) Review this entire Manual to familiarize yourself with the policies, checklists, and references included within.
- (2) Review, download for easy future reference, and familiarize yourself with:
  - a. [Uniform Rules of Practice Before Navy and Marine Corps Courts-Martial](#)
  - b. [SECNAV M-5216.5 - Department of the Navy Correspondence Manual](#)
  - c. [JAGINST 5803.1 \(series\) - Rules of Professional Responsibility](#)
  - d. [JAGINST 5800.7 \(series\) - JAGMAN CH1 and VI](#)
  - e. [Chapter 11, Navy Regulations](#)
  - f. [Army Criminal Law Deskbook](#)
  - g. [Local Court Rules](#)
  - h. [Electronic Military Judge's Benchbook](#)
  - i. [All Assistant Prosecution Services \(APS\) Policy Notes](#)
- (3) Establish accounts and access on following IT resources:
  - a. [LEXIS+ Advance](#) (Log in information should be provided to you by command representative)
  - b. [Trial Counsel Assistance Program \(TCAP\) SharePoint site](#)
  - c. [Federal Law Enforcement Training Center \(FLETC\) Journal](#)
  - d. [Code 20 SharePoint site](#)
  - e. [Fleet Training, Management, and Planning System \(FLTMPS\)](#)
  - f. [Flankspeed Microsoft Teams and Outlook Groups](#)
  - g. [Wolverine Military Justice Site / Case Management System](#)
  - h. [National Domestic Communications Assistance Center \(NDCAC\)](#)

## OSTCM 0100 – ORGANIZATION OF OSTC

[LINK TO OSTCM 0100 SUPPORTING MATERIAL FOLDER](#)

### 0101 OSTC STRUCTURE

The OSTC is led by the LSTC and is divided into East and West Regions, as shown in the organizational chart below.



### 0102 OSTC MISSION

OSTC offices are responsible for fulfilling the statutory missions outlined in the Fiscal Year 2022 and 2023 National Defense Authorization Acts, including determining whether a reported offense is “covered” or “related.”

Disposition of “covered” and “related” offenses, including:

- Deferral (returning case to traditional convening authority (CA) consistent with Rules for Court-Martial 306 and 401);
- Referral to court-martial;
- Dismissal;
- Entry into plea agreements; and
- Determination whether a rehearing is impracticable following remand.

Residual prosecutorial functions, specifically including, but not limited to:

- Granting immunity;
- Ordering depositions; and
- Approving experts for consultation and/or production.



The OSTC determination to refer charges is binding on any applicable CA. While the traditional CA commanders have no direct ability to convene a special or general court-martial for these cases, commanders for both the accused and victim must be provided an opportunity to provide non-binding input on case disposition.

The OSTC has exclusive referral and deferral authority over covered offenses, which are:

- Article 117a (intimate visual images);
- Article 118 (murder);
- Article 119 (manslaughter);
- Article 119a (death or injury of an unborn child);
- Article 120 (rape and sexual assault);
- Article 120a (mail, deposit of obscene matter);
- Article 120b (sexual assault of a child);
- Article 120c (miscellaneous sex offenses);
- Article 125 (kidnapping);
- Article 128b (domestic violence);
- Article 130 (stalking);
- Article 132 (retaliation);
- Article 134 (child pornography); and
- Article 134 (sexual harassment, effective 1 January 2025).

In support of these statutory duties, OSTC counsel will also:

- Collaborate with NCIS and other law enforcement agents in all aspects of covered offense investigations;
- Comply with Victim Witness Assistance Program requirements;
- Furnish prosecution and military justice advice to convening authorities and cognizant staff judge advocates (SJAs);
- Assist in training NCIS agents; and
- When required, take custody of evidence as necessary for trial, although OSTC evidence will be stored in RLSO evidence lockers.

## 0103 OSTC ROLES AND RESPONSIBILITIES

In order to complete the missions of the OSTC, personnel will have the following duties. .

### Deputy LSTC

Assist and advise the LSTC on all aspects of OSTC operations.	Participate in pre-charging and pre-trial murder boards for covered offense cases as appropriate.
Serve as referral or deferral authority for covered and related offenses as outlined in OSTCM 0700 (series) in the event a Region STC is conflicted or unavailable.	Provide direction and professional/substantive guidance to OSTC personnel as appropriate.
Forward to LSTC for referral any covered and/or related offenses that are under the LSTC's purview if the Article 32 Preliminary Hearing Officer found lacked probable cause, when the DLSTC believes referral is still appropriate.	Serve as exclusive authority to approve plea agreements for courts-martial involving covered and related offenses that the DLSTC referred.
Regularly spot-check NCORS case management system entries.	Mentor OSTC personnel, assisting in professional and personal growth.
With approval from LSTC, participate as counsel of record in motions hearings and/or trials.	Maintain close and coordinated relationship with the Regional STCs.

### Regional STC

Supervise the prosecution of covered and related offenses within their AOR.	Participate in pre-charging and pre-trial murder boards for covered offense cases as appropriate.
Serve as referral or deferral authority for covered and related offenses as outlined in OSTCM 0700 (series).	Provide direction and professional/substantive guidance to personnel assigned to their AOR.
Forward to DLSTC for referral any covered and/or related offenses that the Article 32 Preliminary Hearing Officer found lacked probable cause, when the RSTC believes referral is still appropriate.	Maintain open communication with Region Legal Service Office (RLSO) leadership, ensuring information and status of cases of potential interest to the chain of command is passed up.
As necessary, reassign subordinate STCs in satellite, single-counsel offices to be supervised by an appropriate Chief STC.	Mentor OSTC personnel, assisting in professional and personal growth.
Serve as exclusive authority to approve plea agreements for courts-martial involving covered and related offenses that the RSTC referred. Serve as supervisory authority for all other plea agreements.	Maintain close and coordinated relationship with Office of the Special Trial Counsel (OSTC) leadership.
Regularly spot-check NCORS case management system entries.	With approval from LSTC, participate as counsel of record in motions hearings and/or trials.

In the event a Region STC is conflicted from acting on a case, the cognizant Chief STC will forward the case to the DLSTC who will fulfill the duties that would have been performed by the Region STC. In the event a Region STC is unavailable, the cognizant Chief STC will forward the case to the DLSTC who will fulfill the duties that would have been performed by the Region STC.	
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### Chief STC

Serve as direct supervisor of personnel assigned to the local OSTC office.	Provide oversight of the investigation, screening, charging, and litigation of all cases under department's cognizance.
Ensure assigned personnel are trained and equipped to perform their duties.	Provide direction and professional/substantive guidance to personnel assigned to their department.
Establish and maintain professional relationships with local military justice stakeholders (NCIS, SJAs, VLC, FAP, Fleet and family, SECOS etc.). Hold recurring sync meetings to maintain good communication.	Maintain open communication with Region Legal Service Office (RLSO) leadership, especially on PTC cases and any case that will likely be deferred to the RLSO.
Provide chain of command with accurate and timely responses to RFIs from headquarters.	Train and mentor personnel on their teams, assisting in professional and personal growth.
Awareness and oversight of all plea agreements endorsed by the office, as well as sentences argued for, to ensure office consistency.	Maintain close and coordinated relationship with Office of the Special Trial Counsel (OSTC) leadership.
Ensure the accuracy of information input into NCORS.	Detail counsel to cases according to caseload, skill-set, and other appropriate considerations.
Participate in all pre-charging and pre-trial murder boards for cases in which the office's counsel are lead counsel. Review every charge sheet and preferral package prior to preferral.	Serve as referral or deferral authority for covered and related offenses, as outlined in OSTCM 0700 (series).
Maintain personal caseload, commensurate with supervisory duties. Participates in trials as counsel of record in order to lead by example and train junior counsel.	If in the rank of O-5(sel) or above, empowered with exclusive authority to approve plea agreements for covered and related offenses that the CSTC referred IAW OSTCM 0700 (series).
In the event that a Chief STC is conflicted from acting on a case, the STC will consult the Region STC and the Region STC will fulfill the duties that would have been performed by the Chief STC.	

### Assistant Chief STC, if assigned

Provides oversight and supervision of any assigned of trial teams.	Ensures accuracy of NCORS information for assigned trial teams.
Assists Chief STC in ensuring personnel are trained and equipped to perform their duties.	May serve as Acting Chief STC during periods of CSTC absence, but may not act as referral or deferral authority and may not approve plea agreements,

	which must be forwarded to RSTC in Chief STC's absence.
Carries own caseload, commensurate with skill level and supervisory duties. Personally participates in trials as counsel of record in order to lead by example and train junior counsel.	Assists Chief STC in mentoring personnel on their teams, assisting in professional and personal growth.

### **Regional Leading Chief Petty Officer**

Serve as primary enlisted advisor to the Regional STC.	Lead trial paralegals and mentor Junior Officers.
Oversee paralegal training and qualifications.	Maintain strong working relationship with waterfront/base CPO Mess.
Implement and monitor LN/Trial Counsel collaboration within the department.	Assist with the oversight of all cases and teams that include Legalmen.
Serve as paralegal on an as-needed basis.	Regularly spot-check NCORS database for accuracy.

### **STC Certified Counsel**

Responsible for all cases to which they- or their team – are detailed.	Conduct weekly team meetings to keep everyone informed of current status and pending actions.
Assign/delegate trial team tasks to members of the team.	Ensure cases are updated – at least once every two weeks – and accurately reflected in the Wolverine/NCORS case management system; updates may be made by LN, trial admin, or STC, but clear direction must be given and oversight maintained.
Collaborate with NCIS (or other investigative body) for initial investigative steps.	Review any new appellate opinions issued by CAAF and NMCCA. Consider reviewing new appellate opinions issued by sister service appellate courts.
Serve as lead trial counsel at Article 32s and courts-martial for cases to which they are assigned.	Mentor team members.
Establish and maintain close professional relationships with all local stakeholders (NCIS, VLC, SJAs, etc.).	Ensure victims and witnesses are provided case updates, rights advisements and input IAW VWAP requirements, for cases assigned to their teams.

### **Regional VWAP Program Manager**

Train all regional counsel, paralegals, and administrative staff on VWAP procedures.	Conduct VWAP compliance spot checks one office within the AOR each week.
Generate and route all required VWAP reports.	Regularly review NCORS database to ensure VWAP compliance within the Region.
Oversee VWAP program to ensure compliance.	Provide VWAP notification and forms to witnesses and victims as requested.
Assist Chief STC with RFI responses related to VWAP.	Serve as liaison to answer witness or victims' questions as needed.
Serve as Liaison to Family Advocacy Programs within the Region.	Serve as Liaison to provide case updates to NCIS agents, VLCs, victims and witnesses (unrepresented), SARCs, and FAP personnel.

**Special Trial Counsel (pre-certification)**

Upon approval of Chief STC, represent the gov't at IRO hearings for cases assigned to their trial team. Work with paralegal to ensure all appropriate entries are made into Wolverine / NCORS/ OneNote	Assist STC as needed to organize discovery, draft court filings, prepare or interview witnesses, comply with VWAP requirements, etc.
Upon approval of Chief STC, represent the government at counsel table – as secondary counsel – for Article 32 hearings and courts-martial on cases involving allegations of covered and related offenses.	Draft advanced initial disclosure documents, e.g. MRE 404(b) notice, expert notices, etc.
Upon direction of Chief STC, represent the gov't at administrative separations (ADSEPs) involving covered offenses. Work with LN/civilian trial paralegal to interview defense character witnesses	Draft Recommendations against Prosecution for respective trial teams.
Ensure updates are provided to the trial paralegal for each case in order to update Wolverine/NCORS at least every other week.	Assist RSTCs with referral packages.
Maintain healthy relationships with Legal Officers and Deputy Command Judge Advocates on the waterfront.	

**LN and Civilian Trial Paralegal**

Coordinate with NCIS/Commands/other investigative entities to gather required materials and evidence, including digital media and any necessary hard copy documents.	Obtain and review service record data for accused.
Ensure every case is updated in Wolverine/NCORS at least once every two weeks.	Review evidence for completeness (missing enclosures, missing exhibits, missing physical evidence, etc.) – request missing evidence from NCIS.
Bates stamp, redact personally identifiable information, and organize material for discovery.	Provide case updates to victims and witnesses.
Coordinate and schedule witness interviews for trial counsel.	Prepare binders/ paper case files for Article 32 proceedings and courts-martial.
Draft advanced initial disclosure documents: Military Rule of Evidence 404(b) notice, expert notices, etc.	Serve as prover for witness/victim interviews; preserve any notes taken.
Draft Prosecutorial Merit Memoranda (PMM) and Recommendation against Prosecution (RAP).	Draft subpoenas.
Draft initial charge sheet.	Draft discovery responses.
Draft expert requests.	Draft motions assigned by core counsel.
Transmit/deliver discovery material to defense and document receipt of discovery in discovery logs.	Manage witnesses during trial - ensure they are present for testimony, provide DD 2703/DD 2704 after testimony and document in case management system of record.
Draft post-trial documents: DD 2704, Statement of Trial Results, draft Entry of Judgement, Confinement Order, and brig package.	Issue victim post-trial rights before closing of trial.

Serve as duty court-reporter.	Provide trial logistics support as needed.
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#### **Civilian Trial Legal Assistant / Fleet Sailor assigned to department**

Support Trial Administrative division duties as assigned.	Provide trial teams with administrative support as assigned.
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### **0104 OSTC TRIAL ADMINISTRATIVE DIVISION**

The OSTC trial administrative division serves as the primary intake point for new cases in the OSTC office, facilitates witness travel, maintains archive of original documents and case files, and provides routine administrative support (such as receiving mail) to the trial department as required. Each OSTC office shall have at least one primary POC serving in this role, but may assign additional personnel, based on the size of the office or caseload. Trial Admin/legal clerk responsibilities may be assigned to limited duty fleet sailors, or civilian government employees.

#### **The following are the responsibilities of the Trial Administrative Division:**

<b><u>Witness Travel.</u></b> Assist with travel for witnesses using the Defense Travel System (DTS); create user profile in DTS, when needed; track witness needs; complete cost estimate spreadsheet; and arrange for travel accommodations for witnesses and counsel, and assist in filing travel claim.	<b><u>Subpoenas.</u></b> Draft witness subpoenas for signature.
<b><u>Case Intake.</u></b> Conduct case intake: receive investigative reports from law enforcement; verify completeness of received reports; create new case in Wolverine/NCORS or applicable case management system; create standard case file on OneNote.	<b><u>Courtroom Security.</u></b> Arrange court security personnel/bailiff for all court sessions and brig chasers as needed; coordinate with command for accused transportation to and from confinement; train bailiffs and courtroom security personnel before hearings.
<b><u>Supply.</u></b> Gather requirements from department and submit supply requests.	<b><u>Mail.</u></b> Send and receive packages via FEDEX, USPS, etc.
<b><u>Administrative support.</u></b> Copy, scan, set up courtroom, and other administrative duties as assigned.	<b><u>Redaction / Bates Stamping.</u></b> Bates stamp, redact personally identifiable information, and organize material for discovery.

### **0105 DUTY OSTC COUNSEL**

Each OSTC office shall promulgate contact information sufficient to enable NCIS and other military justice stakeholders to reach a qualified STC at all times. Recognizing differences among offices, Chief STCs have discretion to determine whether to establish a duty trial counsel rotation to meet this requirement.

## 0106 SPECIAL PERMISSION MATTERS AND DELEGATION

The following matters require the specific approval of the Chief STC (or Regional STC where noted). Counsel and staff should become familiar with the table below, and ensure the included matters are brought to the Chief STC or Regional STC's attention *prior* to taking the respective action.

Investigation
Pursuing medical records that may contain mental health records of an accused, witness or victim.
Providing discovery prior to preferral of charges.
Charging
Preferring Charges before – or without – substantive interview of the victim / essential witness conducted by the trial counsel. An essential witness is any witness whose testimony is deemed necessary to prove an element of the Government's case. Note: This should be approved in only <i>very</i> limited circumstances such as those involving child victims – <b>requires approval of the Regional STC.</b> <b>Preferring charges with an eye toward seeking a capital referral requires prior approval of the LSTC.</b>
Preferring Charges under Clauses I, II, or III of Article 134, UCMJ/Incorporation of violations of federal statute
Plea Agreements
Endorsing / Entering into a plea agreement that includes one or more novel or unique provisions (those not included in the Code 20 model plea agreement), including conditional guilty pleas
Endorsing / Entering into a plea agreement that includes a conditional waiver of an Article 32 hearing
Endorsing / Entering a plea agreement that includes provisions for protection from a punitive discharge but not the waiver of an ADSEP board
Litigation
Endorsing a conditional waiver for an Article 32.
Any refusal to disclose a document in possession of the government or the government's assertion of any privilege under the military rules of evidence (M.R.E.s).
Withholding from defense any information or evidence received in the discovery process – <b>requires approval of the Regional STC.</b>
Logistics
Any security-assessment downgrade.
Travel outside of the local area for training or case preparation.
The issuance of compulsory process, except in the case of documents signed and issued by a certified STC.

## 0107 ONEDRIVE

OSTC offices shall maintain a shared OneDrive to house all active OneNote case files, supporting material, regionally specific reference material, and closed/archived case files. Shared drives and SharePoint shall no longer be used for case file storage. OSTC offices shall migrate all casefile material to the department's OneDrive.

## OSTCM 0200 – CASE INTAKE AND SCREENING

[LINK TO OSTCM 0200 SUPPORTING MATERIAL FOLDER](#)

### 0201 INTAKE EMAIL ADDRESS AND INITIAL NOTIFICATION

OSTC offices shall establish a case intake group email address, to be promulgated to NCIS and supported SJAs. The OSTC will also be added to the existing RLSO group email address. The intake email address shall have the following format:

OSTCXX\_Intake.mil@us.navy.mil

The email address is a private email group managed by OSTC trial administration division and designated OSTC leadership personnel. Members of the email distro should include, at a minimum: the Chief STC if assigned, the STC (if no Chief STC is present), the senior paralegal assigned, and the OSTC trial administrative division representative(s) responsible for OneNote file creation and Wolverine/NCORS case creation.

When NCIS notifies the OSTC of a case, or when a command requests an OSTC review of a command investigation, the following information shall be provided in the email, or if relayed verbally, documented on an NCORS case intake form:

- (1) name and rank of the accused;
- (2) accused's command;
- (3) name and rank of the victim;
- (4) victim's command;
- (5) contact information for victim;
- (6) name of Victim's Legal Counsel (if applicable);
- (7) name of the assigned case agent or Investigating Officer;
- (8) date of alleged offense
- (9) brief summary of the alleged facts
- (10) Whether the accused is in any type of restraint or restriction on liberty

### 0202 CASE ASSIGNMENT AND DETAILING

Depending on the structure of the OSTC office, the Chief STC may establish trial teams consisting of a certified STC, non-certified STC (if assigned), and trial paralegal. The Chief STC may divide commands within the office's portfolio amongst the trial teams. This will yield consistency allowing legal personnel from the command to interact with the same trial team. Cases must be detailed to a named STC. Although consistent contact with an STC team is desirable, no one trial team should have substantially more cases than another. Cases or commands within the portfolio should be redistributed when substantial inequities arise. It is the Chief STC's responsibility to detail cases in a timely manner.



## 0203 STANDARD ONENOTE CASE FILE AND PAPER CASE FOLDER

In every case, the OSTC Trial Admin division will create a hard-copy case folder that will be supplemented as needed with *basic* case information. The main case file will be maintained in OneNote.

The OSTC Trial Admin Division will generate a paper case file upon intake of the case. An initial intake case will have limited information and no investigation. The case file will consist of a case information sheet documenting basic case information and points of contact that were used to build the NCORS case entry.

Once charges are preferred, the paper case file will contain, at a minimum, the charge sheet and proof matrix. Once charges are referred, the approved TMO must be added to the paper case file. The STC must bring the paper case file to every court hearing so that in the event of a computer or internet failure, the STC has the most recent charge sheet and TMO available for reference. All other documents may be printed or not according to the STC's preference.

[Fillable Master Checklist](#)  
is located here: [HERE](#).

The OSTC Trial Admin Division will create a standard OneNote case file for each case gained by the OSTC office. The OneNote case file will be constantly updated as the case progresses and will serve as the office's primary case file. This case file will be retained after the case is closed. Individual files or media too large to practically be integrated into the OneNote will be referenced in the OneNote, but stored as separate files within the case folder on the OSTC office's OneDrive. However, when the case is closed, all records need to be retained, so any additional files not in the OneNote will have to be added to the closed case file. Trial teams will ensure all drafts of case related documents are saved onto the OneDrive and not on their personal drives or devices. This practice ensures case materials will be accessible by all members of the trial team, as well as the Chief STC and Regional STC.

## 0204 STANDARD MASTER CHECKLIST

A copy of the master checklist shall be created for every case gained by the OSTC office and saved on the case's OneDrive folder. The master checklist standardizes required steps from initial case receipt all the way through post-trial (should the case ultimately be adjudicated at court-martial). A complete fillable and savable master checklist is hyperlinked within this section. For convenience, the master checklist will also be broken down and embedded directly into specific applicable OSTCM sections.

In addition to providing guidance regarding necessary actions and steps, the checklist is intended to serve as a readily understandable chronology and guide for what must be done in a case, and when properly filled out it shows what has been completed in that case. STCs and paralegals should indicate the completion of a task by entering the date upon which the action was accomplished.

## 0205 CASE INTAKE SOP / STEPS

The following applicable portion of the master checklist shall be initiated upon receipt of initial case notification:

[Standard OneNote](#)  
[Casefile template can](#)  
be found [HERE](#).

## **CASE INTAKE (RCM 302, 304, 305)**

- ☐ Verify suspect(s) – confirm jurisdiction: (1) over offense (2) over accused (3) Within statute of limitations
- ☐ Verify correct OSTC– AOR of the accused’s duty station
- ☐ RLSO or OSTC case? OSTC if any allegation of (or attempts/conspiracy/solicitation of) Articles<sup>1</sup>:
  - 117a – Wrongful Broadcast of Intimate Images
  - 118 – Murder
  - 119 – Manslaughter
  - 119a – Death or Injury to an Unborn Child
  - 120 – Rape and Sexual Assault
  - 120a – Mailing Obscene Matter
  - 120b – Rape and Sexual Assault of a Child
  - 120c – Other Sexual Misconduct (Indecent Exp, Pandering Prostitution, View/Broadcast/Receive Indecent Images)
  - 125 – Kidnapping (under Art 134 prior to 1 Jan 19)
  - 128b – Domestic Violence (can cover wide range of misconduct, depends on relationship; do not assume Art 128 just because it’s listed in the investigation, close calls go to OSTC)
  - 130 – Stalking (under Art 120a prior to 1 Jan 19)
  - 132 – Retaliation
  - 134 – Child Pornography
  - 134 – Sexual Harassment
- ☐ Save ETJ from FLT MPS and NSIPS printout into electronic case file. **Record EAOS: DATE**
- ☐ Ensure Legal Officer/SJA initiates legal hold if necessary. (Follow through to ensure legal hold is executed)
- ☐ Verify pay and entitlements (review PEBD on FLT MPS and request LOPG for special pay) (requires NSIPS ADMIN access)
- ☐ Ensure you have all enclosures and exhibits to the ROI/investigation (for NCIS ROIs, start at the last ROI which should reference all prior ROIs and if they had exhibits, then work forward; NOTE: often ROI exhibits will also have enclosures – make sure you have everything)
- ☐ Make requests for any secondary or related investigations (civilian, command, administrative)
- ☐ Obtain agent/investigator notes and interrogation logs
- ☐ Enter case into Electronic Case Management System: Wolverine / NCORS
- ☐ Notify agent/Legal O/SJA/VLC that you are the detailed TC team for the case
- ☐ For PTC – Note date of restraint in Wolverine/NCORS. **Record date of day 120: DATE**
- ☐ For PTC – complete/review 48/72 hour probable cause and continued confinement determination
- ☐ For PTC – find out when IRO is scheduled, prepare for or assist preparation for IRO
- ☐ For RILA or Conditions on Liberty – request and save a copy of restriction or liberty orders
- ☐ Create master contact list for all POCs (e.g. SJA, Legal O, VLC, ISIC SJA, NCIS Agent, etc.)
- ☐ Initiate VWAP procedures for any victim or witness (excludes NCIS, expert, or character witnesses)
- ☐ At this stage, you should have saved the following into the electronic case file:
  - ETJ from FLT MPS
  - LOPG
  - VWAP compliance checklist for victims
  - VWAP compliance checklist for witnesses

<sup>1</sup> Check on reprisal/retaliation and child endangerment (Art 119b)

- 48/72 hour determination and review ltr
- Confinement order if PTC
- RILA or Conditions on Liberty Orders
- Any investigation matters received

## 0206 CHARGING STANDARD AND CONSIDERATIONS

Criminal allegations received by OSTCs generally fall into one of three categories:

- (1) those that warrant prosecution and have sufficient evidence likely to obtain and sustain a conviction;
- (2) those that lack sufficient evidence to either establish probable cause or to obtain and sustain a conviction;
- (3) those that have sufficient evidence to establish probable cause, but the relative severity or other circumstances render them more appropriately adjudicated outside of court-martial.

STCs should review the American Bar Association's (ABA) Criminal Justice Standards for the Prosecution Function and the National District Attorneys Association's National Prosecution Standards. These publications are not binding on OSTC personnel; however, they contain nationally recognized practices and policies that are useful examples of how to execute the prosecution function.

The ABA standards state, "...The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants."

[Link to ABA Criminal Justice Standards for the Prosecution Function can be found \*\*HERE\*\*.](#)

[Link to National District Attorney Association's National Prosecution Standards can be found \*\*HERE\*\*.](#)

## NAVY OSTC PROSECUTION PHILOSOPHY

**Policy statement:** In order to promote justice, efficiency and effectiveness within the military establishment, to strengthen the national security of the US, and to maintain good order and discipline within the armed forces, the below sets forth the factors for consideration by OSTC Navy prosecution offices when disposing of alleged violations of the Uniform Code of Military Justice. The below information incorporates all the considerations listed in Appendix 2.1 - Non-binding disposition guidance – issued by SECDEF pursuant to Article 33 of the UCMJ.

The Navy OSTC prosecution philosophy specifically requires:

- (1) In order to charge an offense, the prosecutor must believe it is more likely than not that an unbiased finder of fact could find that the United States proved the charges beyond a reasonable doubt at trial. The prosecutor must believe that the evidence will be sufficient to sustain appellate review if a conviction results.
- (2) This assessment of likelihood of a just conviction at trial must be based on the evidence available to the prosecutor at the time of charging and which the prosecutor deems would likely be admissible at trial.

(3) When considering how many and which charges to prefer, among all possibilities, the prosecutor must be confident that:

(a) the charges merit prosecution at trial, when considering the impact of the offenses on the alleged victim and good order and discipline;

(b) the charges reflect the gravamen of the misconduct;

(c) the charges are aimed at distinctly separate criminal acts;

(d) the charges do not over-represent the accused's criminality or unreasonably increase the accused's punitive exposure;

(e) charges for contingencies of proof should not be so many as to undermine the credibility of the case to the extent that it creates the appearance the United States lacks a theory of the case;

(f) comparatively minor charges do not detract from the United States' presentation of the charges that merit trial;

(g) pursuit of these charges is a reasonable use of limited prosecutorial energy; and

(h) if a conviction results, it will be a fair outcome for the United States and not unduly severe to the accused.

(4) A prosecutor may not charge offenses more severe than warranted to pressure an accused to plead guilty to lesser offenses. Before charging an offense requiring Sex Offender notification pursuant to DoDi Inst 5525.20, the prosecutor must be confident that the offense was sufficiently severe that a civilian jurisdiction considering the misconduct would likely pursue such an offense criminally.

(5) If, at any time before trial, circumstances change and certain charges are no longer warranted, the prosecutor must take action to dismiss them.

(6) When negotiating plea agreements, in addition to the factors listed in section 3.2 of Appendix 2.1, a prosecutor must consider the alleged victim's input, the accused's commander's input, the interests of justice, all aggravating, extenuating or mitigating circumstances, and the benefit to the United States of case resolution without a contested trial. Although no two cases are identical, each Regional Special Trial Counsel must ensure, to the greatest extent feasible, that plea agreements are aligned for similar offenses in terms of charge bargaining and sentence limitations.

(7) Before recommending charges or endorsing a plea agreement, a prosecutor must consider principles of unconscious bias and be confident that his or her recommendation is not influenced by the accused's race, religion, gender, ethnicity, national origin, sexual orientation, political beliefs, or any other impermissible consideration.

(8) At all times, the prosecutor's decision-making must be wholly independent from improper influences that would constitute unlawful command influence. Decision-making in any particular case must be based on the circumstances of that case, in the interest of justice and good order and discipline in the Naval service.

(9) This prosecution standard does not give rise to any cognizable right or privilege by any accused.

(10) The prosecutor must apply all binding sources of military law and consider persuasive authority when evaluating potential charging decisions.

(11) When considering whether it is more likely than not that the United States can obtain and sustain a conviction, the following chart is a non-exhaustive list of potentially corroborating evidence:

1.	Immediate reports by a victim to one or more witnesses
2.	Evidence that the accused and victim were in the same location at the time of the offense
3.	Direct eyewitness(es) to all or part of a crime
4.	Video or Audio Recordings from security footage or cell phones
5.	DNA or other physical evidence at the scene
6.	Repeated consistent reports by a victim
7.	Geolocation data
8.	Pretext phone call statements by the accused
9.	Text messages or other electronic evidence
10.	Admissions or confessions to law enforcement
11.	Injuries suffered by a victim
12.	Injuries to an accused corroborating self-defense claim of a victim
13.	Expert opinions, but there should not be overreliance on expert testimony to shore up the victim's testimony
14.	Lay opinions about the character of the accused and/or the victim
15.	Other acts under MRE 404b to show motive, intent, opportunity, plan, identity, etc.
16.	Prior sexual assaults committed by this accused under MRE 413 (adult victims) or 414 (child victims)
17.	Records held by outside entities such as internet service providers, banks, hospitals, corporations, schools, etc.

(12) The following is a non-exhaustive list of factors to consider when evaluating a case for charging that bear on the interests of justice and good order and discipline in the Navy:

1.	Victim desire to participate at trial
2.	Any improper conduct of law enforcement that will affect admissibility of evidence at trial
3.	Exculpatory evidence
4.	Strength of potential defenses
5.	Potential collateral impact on third parties (including impact to a command's mission)
6.	Extenuating and mitigating circumstances of the accused, but this should have bearing only if the offense severity is low
7.	Potential punishments and collateral consequences of those punishments
8.	Treatment of other similarly situated accused or co-conspirators
9.	Accused's investigative cooperation with the Government
10.	Pretrial restraint or confinement status of accused
11.	Concerns regarding mental competency of accused at time of crime or presently
12.	Whether the interests of justice and good order and discipline may be adequately served by adjudication at a lower forum (i.e. ADSEP or NJP)
13.	Whether all evidence necessary to prove the case or bring the case to trial is subject to process and capable of being produced

## 0207 CASE REVIEW SOP / STEPS

The following applicable portion of the master checklist shall be initiated upon initiation of substantive case review and screening:

### **CASE REVIEW** (DETERMINATION OF PREFERRAL/DEFERRAL)

- ☐ Substantively Interview victim(s) and primary witnesses for necessary information to establish elements
  - Ask *Giglio* questions (Note: *Giglio* inquiry should only be made in cases TC expect will result in court-martial. Additionally, TC should exercise judgment in determining whether it is appropriate to conduct *Giglio* inquiry with a victim during the first substantive meeting, or better to wait until rapport is developed.)
  - Verify witness availability for prosecution
- ☐ Assess whether Expert Consultation is needed
- ☐ Continue VWAP procedures:
  - Obtain victim input to CA/OSTC as to outcome
  - Ensure victim(s) are aware of rights through a potential court-martial
  - Ensure victim(s) are aware of the documents he/she may request to receive
  - If offense is CONUS – Obtain victim jurisdiction preference
- ☐ Review any pertinent *Brady* notices (available on Code 20 SharePoint)
- ☐ Prepare a proof matrix for every case – pull the elements for all potential charges from the electronic benchbook
- ☐ Determine any other investigative steps and if you can proceed before those are completed
- ☐ Prepare a Prosecutorial Merit Memorandum (PMM)
- ☐ Schedule time to review case and initial analysis with CSTC
- ☐ For post 27 December 23 allegations, draft a Notification of OSTC Disposition Decision (NODD) to provide to command – If STC intends to prefer, proceed to Pre-Preferral Checklist below
- ☐ For post 27 December 2023 allegations on which the Chief STC/Regional STC decide to defer prosecution, Chief STC/Regional STC shall sign the NODD and provide to accused's command
- ☐ For post 27 December 2023 allegations, the STC will ensure the following:
  - Inform VLC/victim about the recommendation for/against prosecution (offer to answer any questions)
  - Save Proof Matrix, PMM, NODD in electronic case file and upload to Wolverine/NCORS
  - Provide NODD to SJA/Legal O or CA directly if appropriate
- ☐ For pre 27 December 23 allegations, if STC intends to prefer, proceed to Pre-Preferral Checklist below
- ☐ For pre 27 December 2023 allegations, if recommendation will likely be against preferral, STC shall draft initial Recommendation Against Prosecution (RAP) for Chief STC review. RAPs are required for:
  - Adult sexual assault cases involving one or more allegations of penetration and/or sexual contact
  - Child sexual abuse cases involving one or more allegations of penetration and/or contact
  - Domestic violence cases involving one or more allegations of aggravated assault, strangulation, and/or suffocation
  - Any other case where the RSTC or CSTC deems that a written recommendation is warranted
- ☐ For pre 27 December 2023 allegations, if SJA relays that the CA is declining a RAP, make sure SJA knows that this declination must be in writing (e-mail ok); save as a pdf into the electronic casefile, and upload to Wolverine
- ☐ For pre 27 December 2023 allegations, when RAP is approved by Chief STC/Regional STC:

- Inform VLC/victim that you will be providing a recommendation against prosecution (offer to answer any questions)
- Save RAP in electronic case file and upload to Wolverine
- Provide RAP to SJA/Legal O or CA directly if appropriate

☐ At this stage, you should have saved the following into the electronic case file:

- All of the pertinent investigation materials
- VWAP checklists for victims/witnesses (if not previously saved/uploaded)
- Victim jurisdiction preference form, if CONUS offense
- Victim request for documents, if submitted
- Any written materials submitted by the victim for consideration
- Final Proof Matrix
- PMM
- NODD (post 27 December 2023 allegations)
- Prosecution Memo (post 27 December 2023 allegations)
- Any formal RAP declination from SJA/CA
- And any other documents/e-mails you think may be helpful to retain (minimum of 2 years)

[The link to the PMM fillable PDF can be found \*\*HERE.\*\*](#)

## 0208 PROSECUTORIAL MERIT MEMORANDA (PMMS)

Documentation of internal OSTC case screening analysis is captured in a Prosecutorial Merit Memorandum (PMM) in **all cases**. The primary purpose of a PMM is to provide sufficient information for the OSTC disposition decision. The PMM also has a secondary purpose of creating a record of the general factors considered in reaching said recommendation in preparation of the Prosecution Memo (see OSTCM section 0301 below) if the case moves forward. The PMM is an internal OSTC document, which contains as Enclosure (1) a proof matrix in all cases, whether or not the STC intends to pursue preferal of charges. With respect to covered offenses, the disposition decision will be communicated to the command via a Notification of OSTC Disposition Decision (NODD), which contains any recommendation for alternative disposition. The NODD is further described below in OSTCM section 0211.

The PMM is not intended to address all facts and deliberative thoughts of the STC. Rather, the PMM is an overview and documentation of the most salient considerations made by the attorney(s) conducting the analysis. The PMM is work product and pre-decisional, and not intended for release outside of the OSTC trial organization. However, the PMM must sufficiently capture the decision-making process so that a later reviewer, wholly unfamiliar with the case, can understand the reasons underlying the ultimate disposition decision.

All PMMs shall utilize the standard form linked to this section. Pertinent facts shall be documented neutrally, addressing those facts favorable to a prosecution as well as those that are unfavorable. Facts and analysis may be in “bullet” form. PMMs shall be signed by the STC who conducted the review. The PMM is finally approved by the Chief STC or Region STC as appropriate.

[The link to APS Policy Note 1-22: Internal Documentation of Case Analysis – The PMM can be found \*\*HERE.\*\*](#)



## 0209 CASE PROCESSING TIMELINES

Expedient and efficient case processing is essential to meeting the needs of the fleet and victims who have an interest in this process. Excessive case processing timelines undermine stakeholder confidence in the system and waste resources while suspects are held interminably on legal hold or held on active duty when they should otherwise be processed for administrative separation. If a case is to be charged and tried at court-martial, it is crucial to charge the case in a timely manner to limit the loss of witness testimony due to lapse of memory and reduce the likelihood of lost evidence. If a case is going to be deferred, it is important to convey that decision to the victim and suspect's command as soon as feasible. In some cases, a decision cannot be made until every investigative action has been taken, completed, and fully analyzed. In other cases, a decision can be made sooner. Excessive reliance on a "substantially completed ROI" should not impede the decision-making process. The STC, not the NCIS agent, decides when he or she has sufficient information to make a recommendation whether there is more likely than not sufficient proof to obtain and sustain a conviction. STCs should balance the need for delivery of prompt justice to victims, the need for commands and suspects to have resolution of their cases, and the need to build a case that is strong enough to justify preferral and, if required, survive a preliminary hearing. STCs should also remember that any trial will take place several months from date of preferral, allowing time to perfect the case. The following chart establishes other milestone standards expected in the processing of a military justice case. Meeting these milestones will greatly assist in meeting the goal of 80% of cases having preferred charges or a RAP/NODD within 30 days of OSTC receipt of substantially complete investigation. There are reasons why certain cases may necessarily take longer to process. Some cases, however, may be able to be processed in an even shorter time period.

Event	Timeline / Standard
Create newly received case in the Case Management System (Wolverine / NCORS)	Within 48 hours of initial notification
Detail / Assignment of STC	Within 72 hours of initial case notification
OneNote Case File / OneDrive Folder creation	Within 24 hours of assignment of STC
Initial Contact with Victim(s) to schedule first VWAP Meeting	Within 10 days of initial notification
STC Determination of whether to pursue preferral or defer charges	As soon as reasonably feasible. If the decision is based on strength of evidence, the decision should be made as soon as there is sufficient information-- and in any case, no later than 10 days after receipt of a substantially complete investigation. If the decision is made based on the relative severity of the offense, the decision can be made as soon as the STC is confident no more severe offenses were committed and after receiving the victim and suspect's command input.
Draft of Notification of OSTC Disposition Decision (NODD) Complete by trial team	Within 20 days of receipt of substantially complete investigation or as soon as the STC is confident the offense severity and quality of the evidence justifies court-martial prosecution. In the case of a Deferral Letter, this should be completed as soon as the STC is confident the



	case should not be charged and after receiving the victim and suspect's command input.
Charges Preferred / NODD delivered to Command	Within 30 Days of receipt of substantially complete investigation or as soon as the STC is confident the offense severity and quality of the evidence justifies court-martial prosecution and a charge sheet can be properly prepared. In the case of a Deferral Letter, the letter should be conveyed to the suspect's command within 24 hours of its approval by the appropriate authority (Chief STC or Regional STC).
Cases in which a civilian jurisdiction has lead over the investigation	Sailors should not be held on legal hold or in a "pending-investigation" or "pending determination" status for excessive period of time while civilian prosecutors decide whether to charge. In cases where the OSTC is monitoring a primary civilian jurisdiction case, the Chief STC must seek permission of the Regional STC if the Chief STC intends to take no action and the civilian jurisdiction has not made a charging decision within 6 months of the date of offense. Chief STCs should endeavor to either recommend administrative separation in reliance on expected civilian prosecution or if civilian prosecution is doubtful or not timely, the Chief STCs should, in appropriate cases, prefer charges for court-martial disposition.

## 0210 ALTERNATE DISPOSITION

In some cases, an STC may recommend a command dispose of an allegation and resultant investigation through summary court-martial, non-judicial punishment, or through other administrative action, to include taking no further action at all. For post 27 December 2023 allegations, these recommendations will be included in the NODD. For pre 27 December 2023 allegations, these recommendations will be included in the RAP. STCs may recommend alternative disposition for a variety of reasons, such as when:

- (1) The victim(s) declines to participate in the investigation or prosecution
- (2) The victim(s) prefers the case be adjudicated outside of court-martial
- (3) There is insufficient evidence to establish probable cause to believe an offense occurred
- (4) There is insufficient evidence to obtain and sustain a conviction at court-martial
- (5) The alleged offender is outside DoD legal authority, in which case no action can be taken
- (6) The nature, seriousness, and/or circumstances of the alleged offense make alternate disposition more appropriate

No covered offense may be disposed of at a forum less than special or general court-martial unless such recommendation was made by the STC.

## 0211 NOTIFICATION OF DISPOSITION DECISION (NODD)

In all cases screened by OSTC, a NODD will be provided to the command. In the event the OSTC elects not to prefer charges against a suspect, this decision must be communicated to the suspect's command via a deferral NODD, further described below. If STCs intend to prefer charges, STCs will provide the NODD to the CA prior to preferral to ensure that the CA is prepared logistically to support the court-martial (see OSTCM 0306). Should the charges preferred, or ultimately referred, change from those initially communicated in the NODD, the STC shall provide the CA with an updated NODD.

[Notification of OSTC Disposition Decision \(NODD\) can be found \*\*HERE\*\*.](#)

[Recommendation Against Prosecution \(RAP\) form can be found \*\*HERE\*\*.](#)

The NODD will also document deferral decisions and recommend potential additional administrative actions the command might consider. The NODD may recommend closing the case with no further action, sending non-covered offenses to the RLSO for prosecution, or offering non-judicial punishment or initiating administrative separation processing. When conveying a NODD outlining a **deferral** of charges, STCs must provide the proof matrix to facilitate the command/RLSO's handling of the offense and minimize the need for rework. All efforts should be made to provide a comprehensive recommendation that minimizes the need for commands and RLSOs to conduct re-work. A proof matrix need not be included in a NODD sent to a command when the STC is preferring charges.

A deferral NODD is a concise documentation of the OSTC's decision not to charge the case at special or general court-martial. It may contain a succinct description of the reason for deferral but will not contain a recitation of the facts or merits of the case. A Deferral NODD informs the suspect's and victim's command (and VLC, if assigned) of:

- (1) The OSTC's determination not to prefer charges in the case; and

- (2) The categorical reason(s) for the OSTC's decision in accordance with MCM Appendix 2.1; and
- (3) If appropriate, the OSTC's recommendation for alternative disposition or referral of the case to a RLSO for non-covered offense prosecution. If either recommendation is made, the STC will include a proof matrix as an enclosure to the Deferral Letter.

For post 27 December 2023 allegations, if OSTC recommends NJP and the accused refuses, STCs will work with commands to ensure that the OSTC is available and ready to prosecute the case at court-martial if the command so desires.

Delivery: All NODDs shall be delivered electronically to the appropriate authority advising the suspect's commanding officer, with a copy delivered to the advising SJA, victim's command, victim, VLC, if assigned, and NCIS agent. If a recommendation is made to consult the RLSO for non-covered offense prosecution, the deferral NODD should also be provided to the local RLSO. However, earlier coordination should have taken place so that the Deferral NODD is not the first notification to the RLSO of the case.

## 0212 CIVILIAN MONITORING POLICY

**I. OVERVIEW:** OFTEN TIMES, OSTC WILL RECEIVE A NCIS NOTIFICATION THAT A LOCAL CIVILIAN JURISDICTION (USAO, STATE OR CITY ATTORNEY'S OFFICE) RECENTLY OPENED A CRIMINAL INVESTIGATION AGAINST A SERVICE MEMBER. IN THIS SCENARIO, THE LOCAL OSTC OFFICE MUST TAKE THE FOLLOWING ACTIONS WHEN WAITING FOR A CIVILIAN JURISDICTION TO DETERMINE WHETHER TO EXERCISE JURISDICTION OVER ANY CRIMINAL COVERED OFFENSES:

- a. THE LOCAL OSTC OFFICE MUST "OPEN" A NEW WOLVERINE/NCORS ENTRY AND INPUT THE REQUIRED INFORMATION AS ANY OTHER CASE.
- b. ACTIONS REGARDING NCIS:
  - 1. THE LOCAL OSTC OFFICE MUST NOTIFY NCIS (IF NCIS DID NOT ORIGINALLY NOTIFY OSTC) THAT A NEW OFFENSE WAS OPENED BY A LOCAL JURISDICTION.
  - 2. THE LOCAL OSTC OFFICE SHOULD OBTAIN ANY CIVILIAN POLICE LAW ENFORCEMENT CONTACT INFO FOR THE DETECTIVE/SHERIFF/POLICE OFFICER WHO IS PRIMARILY ASSIGNED TO THE CASE.
- c. ACTIONS REGARDING CONTACTS WITH LOCAL LAW ENFORCEMENT:
  - 1. THE OSTC OFFICE SHOULD FIRST CONTACT THE LOCAL LAW ENFORCEMENT AGENCY WITHIN 24-48HRS OF CASE NOTIFICATION.
  - 2. THE LOCAL OSTC OFFICE SHOULD MAKE REGULAR CONTACT WITH THE LOCAL LAW ENFORCEMENT AGENCY REGARDING CASE STATUS-BIWEEKLY AT A MINIMUM.
  - 3. THE LOCAL OSTC OFFICE (EITHER THRU NCIS OR DIRECTLY WITH THE CIVILIAN LAW ENFORCEMENT AGENCY) TRY TO OBTAIN ANY INVESTIGATIVE CRIMINAL REPORTS.
  - 4. THE LOCAL OSTC OFFICE SHOULD NOTIFY THE LOCAL LAW ENFORCEMENT AGENT THAT WE WILL CONTACT THE ALLEGED VICTIM TO SOLICIT THE VICTIM'S PREFERENCE FOR PROSECUTION JURISDICTION AND TO FULFILL OUR VWAP REQUIREMENTS.
- d. THE LOCAL OSTC OFFICE MUST CONTACT WITH THE VICTIM(S) AND PERFORM THE REQUIRED DD 2701/2702 AND JURISDICTION PREFERENCE VWAP NOTIFICATIONS.

**II. GENERAL GUIDANCE REGARDING CIVILIAN CASE PROCESSING TIMELINES:** HISTORICAL CASE ANECDOTES HAVE SHOWN THAT "OPEN" LOCAL LAW ENFORCEMENT INVESTIGATIONS CAN TAKE MORE THAN 365 DAYS FOR THE LOCAL AUTHORITIES TO MAKE A DISPOSITION DECISION. OSTC WANTS TO AVOID BEING NOTIFIED OF A CIVILIAN CASE DISPOSITION DECISION AFTER UNREASONABLE PERIODS OF

TIME THAT COULD SERIOUSLY JEOPARDIZE EFFECTIVE CASE INVESTIGATION WHICH COULD LEAD TO LITIGATION ISSUES AND IG COMPLAINTS. PLEASE TAKE THE FOLLOWING ACTIONS WHEN “MONITORING” AN OPEN LOCAL LAW ENFORCEMENT INVESTIGATION:

- a. **COMPLETE ACTIONS I(c)(1)-(4) ABOVE. WHILE WE ARE NOT ABLE TO DICTATE TIMELINES OF CIVILIAN JURISDICTIONS, WE SHOULD EXPLAIN THAT OUR GENERAL EXPECTATION IS THAT WE WOULD LIKE TO HAVE THEM MAKE THEIR DISPOSITION DECISION BY DAY #180 OF THEIR CASE OPENING.**
- b. **CONTINUE TO MAINTAIN CONTACT WITH THE LOCAL LAW ENFORCEMENT OFFICER WHO IS THE PRIMARY INVESTIGATOR EVERY OTHER WEEK.**
- c. **ACTIONS TO TAKE WHEN THERE IS NO DISPOSITION DECISION BY DAY 180:**
  - a. **CHIEF STCs SHOULD NOTIFY THE REGION STc OF THE DELAY IN CIVILIAN CASE DISPOSITION DECISION. THEY SHOULD DISCUSS THE FACTS AND GENERAL COMMUNICATION WITH THE LOCAL AGENCY THUS FAR.**
  - b. **DEPENDING ON THE UNIQUE CIRCUMSTANCES OF THE CASE, THE CSTC WILL CONTACT THE CIVILIAN SUPERVISOR TO DISCUSS THE TIMELINE AND PROPOSED PLAN FOR CASE DISPOSITION.**
  - c. **IN MOST CASES, THE CHIEF STc SHOULD EITHER RECOMMEND ADMINISTRATIVE SEPARATION PROCESSING IF THE CHIEF STc IS CONFIDENT THAT CIVILIAN PROSECUTION WILL OCCUR. IN THE ALTERNATIVE, IF EVIDENCE IS SUFFICIENT TO PROSECUTE, THE CHIEF STc SHOULD PURSUE PREFERRAL OF CHARGES FOR TRIAL BY COURT-MARTIAL.**
  - d. **IF THE ALLEGED VICTIM HAS EXPRESSED A PREFERENCE THAT CHARGES BE DISPOSED OF BY CIVILIAN AUTHORITIES, THE STc SHOULD INFORM THE VICTIM OF ANY OSTC INTENTION TO RECOMMEND ADMINISTRATIVE SEPARATION AND THE RAMIFICATIONS OF WAITING FOR A CIVILIAN PROSECUTION THAT MAY NOT RESULT.**
- d. **ACTIONS TO TAKE WHEN THERE IS NO DISPOSITION DECISION BY DAY 270:**
  - a. **IF THE RSTc BELIEVES IT IS APPROPRIATE FOR OSTc TO CONTINUE TO MONITOR THE CASE PENDING CIVILIAN DISPOSITION DECISION, THE RSTc WILL SEEK PERMISSION FROM THE LSTc VIA DLSTc.**
- e. **IF THE CIVILIANS CHOOSE TO FILE CHARGES WITH THE RESPECTIVE COURT, OR INDICTS THE ACCUSED, THE CASE MAY BE CLOSED IN WOLVERINE/NCORS USING THE FOLLOWING PROCEDURE:**
  - a. **STc INFORMS COGNIZANT SJA/NCIS/FAP/SARC AND/OR COMMAND THAT THE OSTc WILL NO LONGER BE TRACKING THE CASE DUE TO ACTUAL CIVILIAN PROSECUTION.**
  - b. **NOTIFY THE ALLEGED VICTIM/VLC OF THE CASE DISPOSITION AND THAT THE VICTIM’S SPECIFIC DD2701/2702 AND JURISDICTION PREFERENCE’S WERE FORWARDED TO THE DISPOSITION AUTHORITY.**
  - c. **IN THE “ALTERNATE DISPOSITION” SECTION OF THE “CASE INFORMATION” TAB, SELECT “YES;”**
  - d. **UNDER “ALTERNATE DISPOSITION DATE,” ENTER THE DATE OF THE TRIGGERING EVENT (E.G. FILING OF CHARGES, INDICTMENT); AND**
  - e. **UNDER “ALTERNATE DISPOSITION TYPE,” SELECT “PROSECUTED BY CIVILIAN OR FOREIGN AUTHORITIES.”**

## 0213 FOREIGN CRIMINAL JURISDICTION POLICY

BACKGROUND: USG POLICY IS TO MAXIMIZE JURISDICTION OVER OFFENSES COMMITTED BY SERVICE MEMBERS OVERSEAS. WHEN A SAILOR COMMITS AN OFFENSE AND ANOTHER NATION HAS PRIMARY JURISDICTION, THOSE "FOREIGN CRIMINAL JURISDICTION" (FCJ) CASES ARE PRESENTLY HANDLED BY THE COGNIZANT INSTALLATION COMMANDER AND THE REGION. GENERALLY THIS MEANS EITHER (1) WORKING WITH THE ACCUSED, VICTIM, AND FOREIGN GOVERNMENT AGENCIES TO TRY AND CONVINCE THE FOREIGN GOVERNMENT TO CEDE JURISDICTION OF THE OFFENSE, OR (2) IF THE FOREIGN GOVERNMENT MOVES FORWARD WITH PROSECUTION, ENSURING THAT THE RIGHTS OF THE ACCUSED ARE RESPECTED, MONITORING THE PROCESS, PROVIDING REPRESENTATION, ETC. THE FIRST CONSIDERATION FALLS TO THE OSTc; THE SECOND IS THE RESPONSIBILITY OF STAFF JUDGE ADVOCATES IN THE ACCUSED’S AND THE REGION CHAIN OF COMMAND.

UNDER THE PRESENT RLSO SYSTEM, THE COMMAND SERVICES DEPARTMENT (CSD) HAS PRIMARY RESPONSIBILITY FOR TRACKING FCJ CASES, AS A CSD ATTORNEY IS GENERALLY THE SJA FOR THE INSTALLATION COMMANDER. THE OSTC WILL HAVE SITUATIONAL AWARENESS OF THE CASE IF IT INVOLVES A COVERED OFFENSE COMMITTED ON OR AFTER 28 DECEMBER 2023, BUT NOT TAKE ANY ACTIVE ROLE UNTIL AND UNLESS THE US IS ABLE TO ASSERT JURISDICTION. KEEPING THIS DISTINCTION CLEAR IS PARTICULARLY IMPORTANT IN SO-CALLED "FCJ CONFINEMENT" CASES, WHERE THE ACCUSED IS PLACED IN A MILITARY BRIG AT THE REQUEST OF THE FOREIGN GOVERNMENT. IN THOSE CASES, IT IS CRUCIAL TO FORESTALL ANY SUBSEQUENT ARGUMENT (SHOULD THERE BE A COURT-MARTIAL REFERRAL) THAT THIS CONFINEMENT WAS FOR MILITARY PURPOSES AND TRIGGERS ARTICLE 10 OR RCM 707.

ISSUE: WHEN A REPORT OF A COVERED OFFENSE IS RECEIVED, BUT A FOREIGN GOVERNMENT HAS PRIMARY JURISDICTION, HOW WILL RESPONSIBILITY FOR THE CASE BE DIVIDED BETWEEN RLSO, OSTC, AND THE COGNIZANT REGION?

GIVEN THE "SHALL" LANGUAGE IN SEC. 824(c), EVEN IF A FOREIGN GOVERNMENT HAS PRIMARY JURISDICTION OVER A "REPORTED OFFENSE," OSTC SHOULD STILL MAKE AN INITIAL DETERMINATION WHETHER THE OFFENSE IS COVERED AND WHETHER IT WOULD FALL UNDER THE PURVIEW OF THE OSTC. THAT SAID, GIVEN OUR TREATY OBLIGATIONS, OSTC SHOULD SUSPEND OUR USUAL CASE PROCESSING TIMELINES AND NOTIFY AFFECTED PARTIES THAT IT WILL NOT MAKE A DEFERRAL OR PREFERRAL DECISION UNTIL AND UNLESS THE FOREIGN GOVERNMENT CEDES JURISDICTION. THE RLSO COMMAND SERVICES DEPARTMENT AND REGION SJA WILL RETAIN RESPONSIBILITY FOR MONITORING THE CASE AS IT MOVES THROUGH THE FOREIGN CRIMINAL PROCESS, IDEALLY PROVIDING REGULAR UPDATES AND ANY INVESTIGATIVE MATERIALS TO THE COGNIZANT OSTC ATTORNEY SO THAT A TIMELY PROSECUTION DECISION CAN BE MADE ONCE USG JURISDICTION HAS BEEN OBTAINED.

## OSTCM 0300 – PREFERRAL OF CHARGES

[LINK TO OSTCM 0300 SUPPORTING MATERIAL FOLDER](#)

### 0301 ACTIONS BEFORE PREFERRAL

Charges may not be preferred without approval by the Chief STC, with the exception that any case involving death (including of an unborn child) can only be preferred with the approval of the Region STC. Before requesting permission from the Chief STC or Region STC to prefer charges, STCs must (at a minimum) complete the following:

- (1) Review the entire investigation, to include all witness statements, video recordings, and forensic testing;
- (2) Substantively interview all victims and necessary witnesses, and
- (3) Conduct required VWAP steps.

[Block by Block Charge Sheet Review guide can be found \*\*HERE\*\*.](#)

In preparation of preferring charges, the Standard OSTC Prosecution Memo (PROS MEMO) shall be prepared and provided to the Chief STC or Region STC for review during a charging board. The PROS MEMO contains the following enclosures:

1. Draft charge sheet;
2. PMM with Proof Matrix;
3. Timeline of Events

[Standard OSTC PROS MEMO can be found \*\*HERE\*\*.](#)

### 0302 PRE-PREFERRAL SOP / STEPS

The following applicable portion of the master checklist shall be initiated in anticipation of preferral:

[OSTCM Supplemental Charging Notes can be found \*\*HERE\*\*.](#)

#### **PRE-PREFERRAL CHECKLIST** (RCM 307, 1003)

- ☐ If accused is assigned to a ship, ensure ship is not deployed
- ☐ If case is a penetrative assault, ensure preferral/PHO appointment is by correct CA (O-6 SAIDA)
- ☐ Draft Timeline of Events, PMM with Proof Matrix, and PROS MEMO and route to/review with Chief STC
- ☐ Draft Charge Sheet – DD Form 458 with the following steps:
  - Section I
    - Accused's name spelled consistently? (check both the header and each specification)
    - Verify SSN (use SSN vice DOD ID – assists brig when accused is being released)
    - Verify grade/rank/rate (frocked? – you will know if rate in FLT MPS doesn't match pay grade)
    - Ensure accused's rate/rank in Block 3 is consistent with specs in Block 4
    - Ensure the Unit in Block 5 is consistent with specs
    - Confirm date of birth in Block 5
    - No break in service since entry?
    - Term of enlistment (e.g., 4 years, 4 years + ext. 6 mos., INDEF)

- Pay + Sea Pay (see LOPG)
- Restraint – indicate type and dates, include any breaks

## Section II

- Determine order of charges (chronological? numerical? etc.)
  - Charges properly numbered?
  - Cross-check name/rank/rate/unit
  - Victim name in initials? (Note: know now whether you will need to do a Bill of Particulars later; is the accused properly notified of the charges and who they involve? Is it better to charge, e.g., “S. M., known to the accused as ‘Tiffany Jones’?” Should you charge an “unknown individual?”
  - Does spec allege every element from the EBB?
  - When quoting accused’s words have you confirmed where those exact quotes are in discovery?
  - Did you consider what should be charged vs. attempted as 404(b)?
  - Did you include “on active duty” (jurisdiction)
  - Did you include “at or near” or “on board the USS SHIP?”
  - Do you have words of criminality? e.g., “knowingly,” “wrongfully,” intentionally,” “negligently,” particularly if charging Art 134?
  - Have you check what your LIOs are in the LIO chart? Should you charge another offense as contingencies of proof because it is NOT included as an LIO?
  - Is there a sentencing enhancement for your spec that you should include?
- ☐ Ensure STC (or Chief STC/Region STC) coordinated with CA before preferral
  - ☐ Bates stamp discovery
  - ☐ Mark discovery for redaction
  - ☐ Request copy of case agent file from NCIS/CID; bates and mark for redaction when received
  - ☐ Draft OMPF request for accused & victim
  - ☐ Get OMPF request(s) serialized, dated, signed, and e-mail to PERS-313D (mill\_pers-313req@navy.mil)
  - ☐ Prepare *Henthorn* requests for federal agents listed in ROI; prepare similar state requests, if applicable
  - ☐ Make copies of all CDs/DVDs
  - ☐ Draft discovery receipt for any discs/OMPF/hard copy discovery
  - ☐ Draft Request for Counsel
  - ☐ Identify PHO and date for Article 32
  - ☐ Draft PHO Appointing Order
  - ☐ Provide the following to the SJA/CA (be cognizant that anything documentary that the CA reviews when deciding whether to prefer charges must be produced to defense):
    - Draft charges
    - Forum options
    - Existence of a convening order (for SPCM) – signed by CA, never delegated (no “by direction”)
    - Victim input, if applicable
    - Draft request for counsel
    - Draft Article 32 Appointing Order, if applicable
    - Timeline as to next actions and what to expect (ensure preferral occurs when accused can be notified and the CA can sign the charge sheet and other documents – don’t waste days on your 120 clock that you don’t have to)
  - ☐ At this stage, you should have saved the following into the electronic case file:
    - Proof Matrix
    - PMM
    - NODD

- PROS MEMO
  - Draft charge sheet
  - Charging board notes (attorney work product)
  - Witness interview notes (consider whether these need to be produced in discovery)
  - Any relevant e-mails saved as PDFs
  - Draft request for counsel
  - Draft PHO Appointing Order
  - Any written victim input
- ☐ Update the following in Wolverine:
- Anticipated date of Art 32
  - Current case status note
  - Review case summary, edit to reflect actual charges, not allegations
  - Mark High Visibility, or SVIP if not previously marked
  - Ensure qualified TC is identified in Court Personnel section
  - Fill in any pertinent Article 32 information in the Article 32 tab

### 0303 STANDARD PROOF MATRIX

As noted above, STC shall prepare a “proof matrix,” as an enclosure to the Prosecution Memo or Deferral Letter(NODD), which lists each element of each specification and describes the available evidence to be admitted, foundation for said evidence, and possible objections. An example of the proof matrix format is below.

[OSTCM Standard Proof Matrix can be found HERE.](#)

CHARGE __; SPECIFICATION: VIOLATION OF THE UCMJ, ARTICLE XX			
ELEMENT	PROOF	FOUNDATION	POTENTIAL OBJECTION

### 0304 SUBSTANTIVE WITNESS AND VICTIM INTERVIEWS

As noted above, STC should conduct substantive interviews with victims and key witnesses prior to preferring charges, with almost no exception. Failing to do so can have profound impacts on the case both substantively and procedurally, and raises concerns of professionalism and the ethical obligations of the STC. As such, preferring charges without having conducted a substantive interview with the victim(s) and key witnesses requires express approval by the Regional STC, as noted in [OSTCM section 0106](#). Before meeting with any victim, witness, or technical expert (DNA, ballistics, toxicologist, etc.), the witness should be given any prior statement they have made to review. This includes asking the victim to watch any recording of his or her prior interview(s).



Prover. STCs shall have a “prover” accompany them to all substantive witness interviews. The prover should be a military or civilian paralegal or administrative assistant assigned to the OSTC office, and is most typically the paralegal supporting the trial team assigned to the case. The prover shall take notes on the OSTCM Standard Witness Interview form linked to this section. Notes can be taken electronically, or hand-written on the form, but must be saved to the standard OneNote immediately upon conclusion of the interview. It is *eminently important* to maintain all notes of witness interviews and to provide all substantive statements to the Defense. Delays in providing discovery undermine the United States’ credibility, delay trials, and can result in exclusion of evidence at trial.

[TCM Standard Witness Interview Form can be found \*\*HERE\*\*.](#)

Disclosure and Discovery. Substantially verbatim notes, or any notes created by a witness or reviewed and adopted as the witness’ statement, must be provided to defense in the course of discovery. While only new or different substantive matters are required to be disclosed, under R.C.M. 701, best practice in most cases is to disclose all Standard Witness Interview Forms to defense, to eliminate the possibility or appearance of a discovery violation.

Substantially New Material. In the event that a victim or witness interview brings to light additional alleged criminal offenses, STCs should pause the interview and bring the matter to the attention of the Chief STC. In some cases, best practice may be to alert NCIS, or the cognizant investigative agency in order to conduct a detailed follow-on interview. Substantially new matters may also warrant a reevaluation of the charges or prosecution recommendation.

## 0305 CHARGING BOARDS

Charging boards are essential tools for pooling all the talent and ideas of the OSTC counsel and paralegals into the charging and case strategy process.

All cases will be require a charging board as a prerequisite for preferral, with exceptions – that must be approved by the Region STC, DLSTC, and LSTC – only granted in cases of pretrial confinement or restraint for extraordinary circumstances. The charging board will be held, per office, at a standing time and will be hosted in person and over Teams with the following additional personnel invited: LSTC, DLSTC, Opposite coast Region STC, all other Chief STCs. Although the additional personnel may not attend, the meeting should include them. The times for these charging boards are as follows:

Norfolk (w/Groton)  
Mayport (w/ Great Lakes)  
NDW (w/Naples)  
San Diego  
Bremerton (w/Hawaii)  
Japan

The STC will brief the Chief STC on the prosecution memorandum and proof matrix and seek approval for preferral. The charging board should be open to all assigned OSTC staff. STCs can also seek assistance and participation from TCAP, other OSTC office personnel, and the Regional STC, and are highly encouraged to do so for unique, novel, or “close-call” cases.

### **0306 PRE-PREFERRAL INPUT FROM VICTIM(S) AND COMMANDS OF THE VICTIM(S) AND THE ACCUSED AND NOTIFICATION TO CONVENING AUTHORITY FOR OFFENSES AFTER 28 DECEMBER 2023**

[Fillable TC / SJA / CA Discussion Checklist can be found here can be found \*\*HERE\*\*.](#)

For covered and related offense cases committed on or after 28 December 2023, a STC is required to give the commands of the victim(s) and the accused the opportunity to provide non-binding input regarding case disposition. This input should be documented in writing in the NODD and maintained in the case file.

An STC is also required to solicit victims' input on forum and disposition.

After receiving and considering all input, if the STC intends to recommend preferral of charges, the STC must inform the accused's command of such intention in the NODD. The STC must also notify the convening authority (if different from accused's command) of the intention to prefer charges, whether the STC will request appointment of an Article 32 Preliminary Hearing Officer, and the STC must provide a cost estimate for the trial if contested. Except in extraordinary circumstances, charges should not be preferred without first *notifying* the convening authority.

### **0307 PRE-PREFERRAL BRIEF TO CONVENING AUTHORITY FOR OFFENSES COMMITTED BEFORE 28 DECEMBER 2023**

For offenses committed before 28 December 2023, the STCs do not have referral or deferral authority. In these cases, once the STC has completed an initial case assessment and the Chief STC has approved draft charges, the STC should schedule a meeting to brief the convening authority and/or SJA. This briefing can be conducted remotely, but should be in person whenever feasible. The brief to the CA should include at a minimum:

- (1) proposed charges and specifications;
- (2) the appropriate forum;
- (3) case strengths and weaknesses;
- (4) an estimated timeline;
- (5) anticipated witnesses and associated costs;
- (6) expected sentencing value considering past cases;
- (7) suggested pretrial negotiation terms and conditions; and
- (8) recommended course(s) of action.

The STC should leave this meeting with a clear understanding of the CA's expectations, approval to prefer charges (or not), and by direction authority for plea agreement discussions.

## 0308 PREFERRAL SOP / STEPS

The following portion of the master checklist shall be initiated to support the process of preferring charges. The SOP also envisions the possibility that an Article 32 will be ordered in conjunction with or shortly after charges are preferred. These steps can be ignored for cases where no Article 32 will be ordered.

### PREFERRAL CHECKLIST (RCM 307, 308, 504, 601, 912; ART 2, 136)

- ☐ Ensure accuser has had time to review evidence (including any videos) and draft charge sheet
- ☐ Confirm accuser knows he/she is under no obligation to prefer charges
- ☐ Confirm accuser is a person subject to the UCMJ
- ☐ Ensure a commissioned officer is prepared to administer oath under R.C.M. 807
- ☐ Ensure SJA or Legal O is standing by to receive preferred charges and provide them to the SCMCA/SPCMCA, as applicable
- ☐ After oath is administered, have accuser and officer sign the charge sheet
- ☐ Scan signed charge sheet and save to electronic casefile/OneNote
- ☐ Ensure the accused is notified of the charges; complete **Block 12** when this is confirmed
- ☐ Upload the preferred charge sheet to Wolverine
- ☐ Ensure each VLC/victim is informed of preferral of charges and confirm availability/notification of Article 32 date (if applicable)
- ☐ Redact the accused's PII and provide a copy of the preferred charge sheet to the VLC/victim, if requested per CNLSCINST 5810.1
- ☐ Ensure court reporter is informed of Article 32 date, if necessary
- ☐ Get request for counsel serialized, dated, and signed by direction
- ☐ Send charge sheet, blank page 2 of charge sheet, and draft PHO appointing order to unit SJA/Legal O (get original page 2 back)
- ☐ DoD SAFE the following to DSO paralegals and SDC/OIC (and civilian counsel, if applicable):
  - Request for counsel
  - Charge Sheet
  - All redacted, documentary, electronic discovery
  - Provide all discs/OMPF/hard copy discovery to DSO intake POC along with a paper discovery receipt (do not turn over victim's OMPF until directed by the TC)
- ☐ Get input for RAF for Article 32; ensure RAF is signed and a copy provided to the RLSO CO prior to Article 32
- ☐ Request any necessary security for Article 32
- ☐ Draft Article 32 script and save in casefile
- ☐ TC collaborates with paralegal on preparing Article 32 binder; paralegal should make 3 copies of the binder
- ☐ Create name plates for PHO and accused
- ☐ Enter the following data in Wolverine:
  - Date of preferral
  - Case phase drop down
  - High Visibility drop down
  - SVIP/OSTC case drop down
  - Accused's EAOS (Initial Legal Hold if EAOS is within 90 days)
  - Date of restraint, if applicable

- Name of counsel, paralegal,
- Update current case status
- Enter charges and specs
- Date and name of PHO in Article 32 tab

## 0309 PREFERRAL GUIDANCE AND SCRIPT

The following guidance is provided to supplement the preferral process:

The Accuser. An accuser must be subject to the UCMJ. The Trial Paralegal is an appropriate accuser.

Material to Review. The accuser shall be provided access to the entire investigation file. While review of the entire file may not always be necessary, the accuser must review enough of the material to develop sufficient independent knowledge of the underlying facts and supporting evidence. At a minimum, the accuser must review all ROI summaries and all audio/video recordings of both the victim and accused.

Officer administering oath and Script. An attorney must administer the oath. The officer administering the oath shall confirm that the accuser is a proper one. After so confirming, the officer may administer the oath listed in The Discussion of R.C.M. 307:

**“YOU (SWEAR) (AFFIRM) THAT YOU ARE A PERSON SUBJECT TO THE UNIFORM CODE OF MILITARY JUSTICE, THAT YOU HAVE PERSONAL KNOWLEDGE OF OR HAVE INVESTIGATED THE MATTERS SET FORTH IN THE FOREGOING CHARGE(S) AND SPECIFICATION(S), AND THAT THE SAME ARE TRUE TO THE BEST OF YOUR KNOWLEDGE AND BELIEF. (SO HELP YOU GOD.)”**

**TC: I, (insert name of TC), am a commissioned officer, authorized under Article 136, UCMJ, to administer oaths for the purpose of preferring charges.**

**TC: Are you a person who is subject to the Uniform Code of Military Justice?**

ACCUSER: (Responds).

**TC: Have you had a chance to review the charges and specifications alleged against the accused in the case of United States v. (insert name of accused)?**

ACCUSER: (Responds).

**TC: Do you have personal knowledge of, or have you investigated, the matters set forth in the charges and specifications?**

ACCUSER: (Responds).

**TC: Are the matters set forth in the charges and specifications true to the best of your knowledge and belief?**

ACCUSER: (Responds).

**TC: Are you able to sign and swear to the charges alleged or direct charges nominally to be signed and sworn by another?**

ACCUSER: (Responds).

**TC: Do you have a personal interest in the prosecution of the accused?**

ACCUSER: (Responds).

**TC: Do you have any personal bias towards the accused?**

ACCUSER: (Responds).

**TC: Are you of a higher rank than, or superior in command to, the convening authority in this trial?**

ACCUSER: (Responds).

**TC: Do you understand you may not serve as the accuser *and* convening authority of a general or special court-martial to which these charges are later referred for trial of the person accused?**

ACCUSER: (Responds).

**TC: Do you understand you may not serve as the trial counsel, defense counsel, interpreter, reporter, escort, bailiff, clerk, or orderly in this same case?**

ACCUSER: (Responds).

**TC: Has anyone ordered you to sign the charges and specifications in this case?**

ACCUSER: (Responds).

**TC: Were you influenced or pressured in any way to be the accuser in this case?**

ACCUSER: (Responds).

**TC: Do you certify that you are making a fully independent decision regarding the preferral of the charges and specifications in this case?**

ACCUSER: (Responds).

**TC: Are you willing and able to truthfully make the required oath in this case?**

ACCUSER: (Responds).

**TC: Raise your right hand.**

*OATH: Do you swear or affirm that you are a person subject to the Uniform Code of Military Justice, that you*

*have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specifications(s), and that the same are true to the best of your knowledge and belief. (So help you God).*

ACCUSER: (Responds).

**TC: Please sign item 11(d) in block III at the bottom of page 1 of the charge sheet.**

ACCUSER: (Signs).

## 0310 REQUEST FOR DEFENSE COUNSEL (RFC)

An RFC is official correspondence that should incorporate all needed documents in the possession of the government, at that time, to allow the Defense Services Office (DSO) to assign counsel to the accused for either a special court-martial or an Article 32 hearing. The materials sent to the DSO should be:

- (1) Copy of the preferred charges (with social security number redacted);
- (2) Copy of all redacted and bates-stamped discovery;
- (3) Discovery receipt;
- (4) Article 32 appointing order, if applicable;
- (5) Notice under RCM 404A; and
- (6) RFC.

A standard OSTC form RFC is attached.

# OSTCM 0400 – VICTIM WITNESS ASSISTANCE PROGRAM (VWAP)

[LINK TO OSTCM 0400 SUPPORTING MATERIAL FOLDER](#)

## 0401 VWAP OVERVIEW

In accordance with DoD Instruction 1030.02, OSTCs are committed to “protecting the rights of victims and witnesses of alleged crimes and supporting their needs in the criminal justice process.” In addition to compliance, we will ensure our actions are taken “without infringing on the constitutional or other legal rights of a suspect or an accused.”

VWAP is an all-hands effort. While many actions are taken by STC or their teams, it is important to constantly convey that investigators, SJAs, and convening authorities all play a key role in ensuring full VWAP compliance. When in doubt as to whether a certain VWAP obligation was fulfilled, do it again. Accurate documentation is key. Ensure your VWAP actions and communications are documented in the approved electronic case management system.

## 0402 COMMUNICATION

Early and regular communication with witnesses and victims of crimes is essential to support their needs through the military justice process. It is also critical for achieving a successful prosecution. STCs should regularly engage with victims to apprise them of procedural milestones, to establish rapport, and to maintain situational awareness of any developing issues relevant to the investigation or court-martial.

[TCAP Guide on best practices for working with Victims and Witnesses can be found \*\*HERE\*\*.](#)

(a) Initial Contact. Whenever possible, STC or designee shall make initial contact with the victim within 14 days of receiving case notification from NCIS (or other investigative agency). During this initial contact, an in-person (when possible) VWAP meeting should be scheduled to advise the victim of their VWAP rights. This initial meeting should occur within 30 days of initial case contact, whenever possible.

(b) Represented Parties / Victims’ Legal Counsel (VLC). Prior to any communication with a victim or witness, the assigned STC or designee must verify whether the individual is represented by VLC, or any other attorney. If the victim or witness is represented by counsel, all communication must be made through said counsel.

### VWAP SOURCES OF LAW:

- (A) [DoD INSTRUCTION 1030.02 \(VICTIM AND WITNESS ASSISTANCE\) \(CHANGE 1 EFFECTIVE 12 AUG 2021\)](#)
- (B) [JAG/COMNAVLEGSVCCOM INST 5800.4A \(EXTENSION OF VICTIM WITNESS ASSISTANCE PROGRAM\)](#)
- (C) [JAGMAN 0128 \(DISPOSITION OF CHARGES – VICTIM PREFERENCE FOR JURISDICTION OF SEX-RELATED OFFENSES\)](#)
- (D) [10 U.S.C. §806b \(ARTICLE 6B, UCMJ\)](#)
- (E) [CNLSCINST 5810.1 \(DISCLOSURE OF INFORMATION TO CRIME VICTIMS\)](#)
- (F) [DoD INSTRUCTION 5505.19 \(ESTABLISHMENT OF SPECIAL VICTIM INVESTIGATION AND PROSECUTION \(SVIP\) CAPABILITY WITHIN THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS \(MCIOS\)\)](#)
- (G) [JAGINST 5810.3A \(VLC PROGRAM MANUAL\)](#)
- (H) [JAGMAN 0142A \(VICTIM NOTIFICATION REQUIREMENTS – MILITARY JUSTICE PROCESS\)](#)
- (I) [JAGMAN 0142B \(ADDITIONAL VICTIM NOTIFICATION REQUIREMENTS BY COMMANDER\)](#)
- (K) [JAG/CNLSCINST 5814.1D \(POST-TRIAL PROCESSING\)](#)
- (L) [SECNAVINST 5800.11B](#)
- (M) [OPNAVINST 5800.7A \(UNDER REVISION\)](#)

(c) Case Schedule / Trial Management Order. DoD Instruction 1030.02 requires timely notice of all proceedings be provided to victims. In order to ensure victims are fully aware of the trial schedule, STCs shall provide assigned VLC or representing attorney with a copy of the signed Trial Management Order (TMO) as soon as practicable. If the TMO is later modified, STCs shall ensure an updated copy is provided. If a victim is not represented by an attorney, the TMO shall be provided directly to the victim.

(d) Victim Communication with Defense Counsel / Defense Team. Prosecutors should be careful about communicating to victims about their rights to decide whether to speak with defense counsel. While it is appropriate to inform them of their rights, it is inappropriate to advise them on whether to speak with defense, or to dissuade them from doing so. The following verbiage should be used when broaching this topic with the victim, particularly if they are not represented by VLC:

*“Defense counsel or someone working with defense counsel may contact you. You are under no obligation to speak with him/her, but you may do so if you desire. Defense counsel represent the accused, and his/her job is not to represent you or your interests. If you do elect to speak with him/her, you can require that conversation take place with your victim advocate, and/or STC present (or VLC if they have one/would like to get one). Additionally, if you are ever contacted by someone about this case, and you are unsure who that person is or who they represent, feel free to contact the STC and we will help you determine that person’s identity and role in the proceeding. If you decide to speak with a member of the defense team you may review your prior statements before the meeting. Anything you discuss with the defense team (just as with the OSTC team) may be asked about at trial.”*

## 0403 VWAP CATEGORIES

An individual’s VWAP rights and applicable procedural requirements depend on the nature of the allegations, and the nexus between those allegations and the individual. While a given individual referenced within an investigation may fall into multiple categories depending on the evidence and case phase, generally, each can be categorized as:

- (1) Witness;
- (2) Victim;
- (3) Victim of a covered Special Victim Offense; or
- (4) Exception to VWAP policy/no category.

DoD Instruction 1030.02 defines (or excludes) the following:

WITNESS	VICTIM	VICTIM OF A COVERED SPECIAL VICTIM OFFENSE <sup>2</sup>	NO CATEGORY / EXCEPTED FROM POLICY
<i>“A PERSON WHO HAS INFORMATION OR EVIDENCE ABOUT A CRIMINAL OFFENSE WITHIN THE INVESTIGATIVE</i>	<i>“A PERSON WHO HAS SUFFERED DIRECT PHYSICAL, EMOTIONAL, OR PECUNIARY HARM AS RESULT OF THE</i>	<i>SPECIAL VICTIM COVERED OFFENSES ARE: “UNRESTRICTED REPORTS OF ADULT SEXUAL ASSAULT, UNRESTRICTED REPORTS OF DOMESTIC VIOLENCE</i>	<i>ASSIGNED COURT PERSONNEL (E.G. COUNSEL, PARALEGALS,</i>

<sup>2</sup> What qualifies as a Covered Special Victim Offense under current policy will expand upon formation of the Office of Special Trial Counsel.



<p><b>JURISDICTION OF A DoD COMPONENT AND WHO PROVIDES THAT KNOWLEDGE TO A DoD COMPONENT. WHEN THE WITNESS IS A MINOR, THAT TERM INCLUDES A PARENT OR LEGAL GUARDIAN, OR OTHER PERSON RESPONSIBLE FOR THE CHILD. THE TERM DOES NOT INCLUDE AN INDIVIDUAL INVOLVED IN THE CRIME AS AN ALLEGED PERPETRATOR OR ACCOMPLICE.”</b></p> <p>REF (B) RESTATES THE DEFINITION AS FOLLOWS: “A PERSON WHO HAS INFORMATION OR EVIDENCE CONCERNING A CRIME, AND PROVIDES THAT KNOWLEDGE TO A <b>DON</b> REP ABOUT AN OFFENSE IN THE INVESTIGATIVE JURISDICTION OF <b>DON</b>.”</p>	<p><b>COMMISSION OF A CRIME COMMITTED IN VIOLATION OF THE UCMJ.”</b> REF (B) EXPANDS THE ABOVE DEFINITION TO INCLUDE THE FOLLOWING (BOLDED): <b>A PERSON WHO HAS SUFFERED DIRECT PHYSICAL, EMOTIONAL, OR PECUNIARY HARM AS A RESULT OF THE COMMISSION OF A CRIME IN VIOLATION OF THE UCMJ, OR IN VIOLATION OF THE LAW OF ANOTHER JURISDICTION IN CASES WHERE MILITARY AUTHORITIES HAVE BEEN MADE AWARE.”</b></p>	<p><b>INVOLVING SEXUAL ASSAULT AND/OR AGGRAVATED ASSAULT WITH GRIEVOUS BODILY HARM, CHILD ABUSE INVOLVING CHILD SEXUAL ABUSE AND/OR AGGRAVATED ASSAULT WITH GRIEVOUS BODILY HARM.”</b> REF (A) FURTHER DEFINES “SEXUAL ASSAULT” AS INCLUDING “OFFENSES UNDER ARTICLE 120 (RAPE AND SEXUAL ASSAULT IN GENERAL), 120B (RAPE AND SEXUAL ASSAULT OF A CHILD), AND 120C (OTHER SEXUAL MISCONDUCT), OR FORCIBLE SODOMY UNDER ARTICLE 125 (BEFORE JANUARY 1, 2019) OF THE UCMJ OR ATTEMPTS TO COMMIT SUCH OFFENSES UNDER ARTICLE 80 OF THE UCMJ.”</p> <p>NOTE: ATTEMPTS, CONSPIRACY AND SOLICITATION OF ANY OF THE ABOVE OFFENSES ARE TO BE TREATED AS THE ACTUAL OFFENSE.</p>	<p>COURT-REPORTERS, AND MILITARY JUDGE), DEFENSE WITNESSES (CHARACTER), AND LAW ENFORCEMENT PERSONNEL DO NOT QUALIFY FOR RIGHTS AND PROCEDURAL REQUIREMENTS OF VWAP. HOWEVER, ALL INDIVIDUALS INVOLVED IN A CASE SHOULD BE TREATED WITH DIGNITY AND RESPECT AT ALL TIMES.</p>
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The following color-coded charts outline and consolidate existing required notifications, input touch-points, and documentation for **witnesses** and **victims**, as well as in which temporal phase the requirement occurs. The third chat outlines additional requirements for **victims of special victim offenses**. DoD Instruction 1030.02, citing Article 6b of the UCMJ, requires that all notifications must be “reasonable, accurate and timely.” Italics denotes an action or requirement beyond that of the previous chart.

TCAP consolidated VWAP chart can be found [HERE](#).

Additionally, a single page consolidated chart covering witnesses, victims and special victims is linked to this section.

## 0404 WITNESS REQUIREMENTS CHART

### (1) Witnesses:

The following chart outlines the rights and documentation requirements pertaining to **witnesses** in the court-martial process:

PRIOR TO PREFERRAL		
NOTIFICATIONS:	ACTION	RESPONSIBILITY
	REASONABLE PROTECTION FROM ACCUSED	LOCAL RESPONSIBLE OFFICIAL OR LAW ENFORCEMENT
	BE TREATED WITH FAIRNESS AND RESPECT	LOCAL RESPONSIBLE OFFICIAL OR LAW ENFORCEMENT
	PROCEEDINGS FREE FROM DELAY	LOCAL RESPONSIBLE OFFICIAL OR LAW ENFORCEMENT
	RETAIN ATTORNEY AT THEIR OWN EXPENSE	LOCAL RESPONSIBLE OFFICIAL OR LAW ENFORCEMENT



	BE PROVIDED AND EXPLAINED THE DD FORM 2701	LOCAL RESPONSIBLE OFFICIAL OR LAW ENFORCEMENT
	BE PROVIDED UPDATES ON THE STATUS OF THE INVESTIGATION, TO THE EXTENT PROVIDING INFO DOES NOT INTERFERE IN INVESTIGATION	LOCAL RESPONSIBLE OFFICIAL OR LAW ENFORCEMENT
<b>INPUT:</b>	NONE.	
<b>AT OR AFTER PREFERRAL OR WHEN PREFERRAL IS REASONABLY CONTEMPLATED</b>		
<b>NOTIFICATIONS:</b>	<b>ACTION</b>	<b>RESPONSIBILITY</b>
	BE PROVIDED AND EXPLAINED THE DD FORM 2702	U.S. GOVERNMENT ATTORNEY OR DESIGNEE
<b>AT OR AFTER REFERRAL</b>		
<b>NOTIFICATIONS:</b>	<b>ACTION</b>	<b>RESPONSIBILITY</b>
	BE PROVIDED NOTICE OF COURT MARTIAL HEARING(S)	U.S. GOVERNMENT ATTORNEY OR DESIGNEE
<b>AT OR AFTER CONVICTION</b>		
<b>NOTIFICATIONS:</b>	<b>ACTION</b>	<b>RESPONSIBILITY</b>
	BE PROVIDED NOTIFICATION THAT AFTER COURT PROCEEDINGS, ACTION WILL BE TAKEN TO RETURN PROPERTY HELD AS EVIDENCE AS EXPEDITIOUSLY AS POSSIBLE.	SPECIAL TRIAL COUNSEL
	BE PROVIDED AND EXPLAINED THE DD FORM 2703	SPECIAL TRIAL COUNSEL
	BE EXPLAINED THE DD FORM 2704	SPECIAL TRIAL COUNSEL
<b>INPUT:</b>	PREFERENCE AS TO CONFINEMENT NOTIFICATION UNDER 2704.	SPECIAL TRIAL COUNSEL
<b>PRIOR TO RELEASE FROM POST-TRIAL CONFINEMENT</b>		
<b>NOTIFICATIONS:</b>	<b>ACTION</b>	<b>RESPONSIBILITY</b>
	PROVIDED NOTICE OF CLEMENCY, PAROLE, OR RELEASE	CONFINEMENT FACILITY DESIGNEE
<b>INPUT:</b>	INFORMATION TO APPLICABLE PAROLE BOARD	CONFINEMENT FACILITY DESIGNEE
<b>AT APPELLATE LEVEL</b>		
<b>NOTIFICATIONS:</b>	<b>ACTION</b>	<b>RESPONSIBILITY</b>
	NOTICE OF APPELLATE PROCEEDING	NAVY APPELLATE VWAP PROGRAM MANAGER
	NOTICE OF APPELLATE DISPOSITION	NAVY APPELLATE VWAP PROGRAM MANAGER
	CONFER REGARDING NOTICE OF APPELLATE ACTIONS	NAVY APPELLATE VWAP PROGRAM MANAGER
<b>DOCUMENTATION REQUIREMENTS</b>	<b>SOURCE OF REQUIREMENT</b>	<b>RESPONSIBILITY</b>
DD FORM 2701	REF (A)	LAW ENFORCEMENT
DD FORM 2702	REF (A)	SPECIAL TRIAL COUNSEL / SJA
DD FORM 2703	REF (A)	SPECIAL TRIAL COUNSEL
DD FORM 2704	REF (A)	SPECIAL TRIAL COUNSEL
VWAP CHECKLIST - WITNESS	REF (B)	SPECIAL TRIAL COUNSEL

## 0405 VICTIM REQUIREMENTS CHART

<b>PRIOR TO PREFERRAL</b>		
<b><u>NOTIFICATIONS:</u></b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	REASONABLE PROTECTION FROM ACCUSED	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	TREATED WITH FAIRNESS AND RESPECT	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	PROCEEDINGS FREE FROM DELAY	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	RETAIN ATTORNEY AT OWN EXPENSE	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	PROVIDED AND EXPLAINED THE DD FORM 2701	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>PRETRIAL CONFINEMENT STATUS / NOTICE OF PTC HEARING</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>BE PRESENT AT AND NOT EXCLUDED FROM PTC HEARING</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>RECEIVE RESTITUTION UNDER LAW</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>NOT PREVENTED FROM OR CHARGED FOR SAFE</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>CONSULT WITH LEGAL ASSISTANCE ATTORNEY</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>CONSULT WITH AN ATTORNEY (E.G. VLC, SVC, OR OTHER)</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>PROVIDED UPDATES ON THE STATUS OF THE INVESTIGATION, TO THE EXTENT PROVIDING INFO DOES NOT INTERFERE IN INVESTIGATION (FROM ANY SVIP PERSON, E.G., NCIS, TC, ETC.)</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
	<i>NOTIFIED OF CIVILIAN DISPOSITION, IF KNOWN</i>	"CONVENING AUTHORITY," LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE

	<i>UPDATED ON ACCUSED'S CONFINEMENT STATUS</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
<b>INPUT:</b>	<i>BE HEARD AT PTC HEARING</i>	U.S. GOVERNMENT REPRESENTATIVE
	<i>CONFER WITH COUNSEL FOR GOVERNMENT AT IRO</i>	U.S. GOVERNMENT REPRESENTATIVE
	<i>EXPRESS VIEWS REGARDING DISPOSITION TO THE CA</i>	LOCAL RESPONSIBLE OFFICIAL, LAW ENFORCEMENT, SJA, SPECIAL TRIAL COUNSEL, OR DESIGNEE
<b>AT OR AFTER PREFERRAL OR WHEN PREFERRAL IS REASONABLY CONTEMPLATED</b>		
<b>NOTIFICATIONS:</b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	<i>BE PROVIDED AND EXPLAINED THE DD FORM 2702</i>	SPECIAL TRIAL COUNSEL <sup>3</sup>
	<i>NOTICE OF ART 32</i>	SPECIAL TRIAL COUNSEL
	<i>NOTICE OF THE PHO'S RECOMMENDATION AFTER AN ARTICLE 32</i>	SPECIAL TRIAL COUNSEL
	<i>BE PRESENT AT AND NOT EXCLUDED FROM ART 32</i>	SPECIAL TRIAL COUNSEL
	<i>OPPORTUNITY TO RECEIVE COPY OF, WITHOUT CHANGE: ANY STATEMENT MADE BY VICTIM (RECORDINGS AND TRANSCRIPTIONS), EVIDENCE PRODUCED OR ADOPTED BY VICTIM, EVIDENCE OF COLLATERAL CONDUCT, COPY OF IMAGES OR VIDEOS OF VICTIM, COPY OF OFFICIAL REQUEST/SUBPOENA/CASS/WARRANT FOR VICTIM INFO, CHARGE SHEET, ART 32 APPT ORDER, RECORDING OR TRANSCRIPT OF ART 32, TMO, COURT FILINGS IMPLICATING RIGHTS, PLEA AGREEMENT, STIPULATION OF FACT (REDACTED TO VICTIM INFO ONLY)</i>	SPECIAL TRIAL COUNSEL
	<i>PRIVATE WAITING ROOM</i>	SPECIAL TRIAL COUNSEL
<b>INPUT:</b>	<i>CONFER WITH TRIAL COUNSEL AT ART 32</i>	SPECIAL TRIAL COUNSEL
	<i>BE HEARD AT ART 32 RELATING TO MRE 412, 513, 514, AND OTHER RIGHTS PROVIDED BY STATUTE, REGULATION, OR CASE LAW</i>	SPECIAL TRIAL COUNSEL
	<i>EXPRESS VIEWS REGARDING DISPOSITION TO THE CA</i>	SPECIAL TRIAL COUNSEL
<b>AT OR AFTER REFERRAL</b>		
<b>NOTIFICATIONS:</b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	<i>BE PROVIDED NOTICE OF COURT MARTIAL HEARING(S)</i>	SPECIAL TRIAL COUNSEL
	<i>BE PRESENT AT AND NOT EXCLUDED FROM COURT-MARTIAL HEARINGS</i>	SPECIAL TRIAL COUNSEL
	<i>BE PROVIDED A PRIVATE WAITING AREA DURING COURT-MARTIAL PROCEEDINGS</i>	SPECIAL TRIAL COUNSEL

<sup>3</sup> DoD Instruction 1030.02 states a U.S. government attorney or designee is responsible for victim notifications. However, under the RLSO construct, this function is best performed by trial counsel or trial department support staff in most cases.

	<b>RIGHT TO HAVE GOV'T INFORM EMPLOYER OR CREDITOR OF THE VICTIM THE REASONS FOR THE ABSENCE FROM WORK OR INABILITY TO MAKE TIMELY PAYMENTS ON AN ACCOUNT DUE TO CRIME OR COOPERATION IN THE INVESTIGATION OR PROSECUTION.</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>ASSISTANCE IN OBTAINING SERVICES TO ALLOW VICTIM TO PARTICIPATE IN COURT PROCEEDINGS (CHILDCARE, TRANSLATORS, PARKING, ETC.)</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>CONFINEMENT STATUS OF ACCUSED</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>TO BE INFORMED IN A TIMELY MANNER OF ANY PLEA AGREEMENT, SILENT AGREEMENT, OR NON-PROSECUTION AGREEMENT RELATING TO THE OFFENSE, UNLESS PROVIDING SUCH INFORMATION WOULD JEOPARDIZE A LAW ENFORCEMENT PROCEEDING OR WOULD VIOLATE THE PRIVACY CONCERNS OF AN INDIVIDUAL OTHER THAN THE ACCUSED. <sup>4</sup></b>	
<b>INPUT:</b>	<b>CONFER WITH TC REGARDING TRIAL MANAGEMENT ORDER DATES</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>CONFER WITH TC AT COURT-MARTIAL HEARING</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>BE HEARD AT COURT-MARTIAL HEARING RELATING TO MRE 412, 513, 514, AND OTHER RIGHTS PROVIDED BY STATUTE, REGULATION, OR CASE LAW</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>PROVIDE INPUT ON PLEA AGREEMENTS</b>	<b>SPECIAL TRIAL COUNSEL</b>
<b>AT OR AFTER CONVICTION</b>		
<b>NOTIFICATIONS:</b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	<b>NOTICE OF SENTENCING HEARING</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>PROVIDED AND EXPLAINED THE DD FORM 2703</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>NOTIFIED OF TRANSITIONAL COMPENSATION RESOURCES</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>EXPLAINED DD FORM 2704</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>EXPLAINED DD FORM 2704-1</b>	
	<b>PROVIDED AND EXPLAINED JAG VICTIM APPELLATE RIGHTS</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>OPPORTUNITY TO PROVIDE WRITTEN INPUT TO CA REGARDING CLEMENCY</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>OPPORTUNITY TO RECEIVE COPY OF, WITHOUT CHARGE: RECORD OF TRIAL, SJAR, CA'S ACTION, NOTICE REGARDING APPELLATE PROCEEDINGS</b>	<b>SPECIAL TRIAL COUNSEL</b>
	<b>NOTIFICATION THAT AFTER COURT PROCEEDINGS, ACTION WILL BE TAKEN TO RETURN PROPERTY HELD AS EVIDENCE AS EXPEDITIOUSLY AS POSSIBLE.</b>	<b>SPECIAL TRIAL COUNSEL</b>
<b>INPUT:</b>	<b>CONFER WITH TC AT SENTENCING HEARING</b>	<b>SPECIAL TRIAL COUNSEL</b>

<sup>4</sup> Although currently not reflected in DoD Instruction 1030.02, this notification is required by NDAA FY22 Sec 541 – Rights of the Victim of an offense Under the UCMJ.

	<i>BE PRESENT AT AND NOT EXCLUDED FROM SENTENCING</i>	SPECIAL TRIAL COUNSEL
	<i>PROVIDE VICTIM IMPACT STATEMENT AT SENTENCING</i>	SPECIAL TRIAL COUNSEL
<b>PRIOR TO RELEASE FROM POST-TRIAL CONFINEMENT</b>		
<b><u>NOTIFICATIONS:</u></b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	CONFER WITH COUNSEL FOR THE GOVERNMENT AT CLEMENCY OR PAROLE	CONFINEMENT FACILITY DESIGNEE
	BE HEARD AND PERSONALLY APPEAR AT CLEMENCY AND PAROLE HEARING	CONFINEMENT FACILITY DESIGNEE
<b><u>INPUT:</u></b>	INFORMATION TO APPLICABLE PAROLE BOARD	CONFINEMENT FACILITY DESIGNEE
<b>AT OR AFTER CONVICTION</b>		
<b><u>NOTIFICATIONS:</u></b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	NOTICE OF APPELLATE PROCEEDING	NAVY APPELLATE VWAP PROGRAM MANAGER
	NOTICE OF APPELLATE DISPOSITION	NAVY APPELLATE VWAP PROGRAM MANAGER
	CONFER REGARDING NOTICE OF APPELLATE ACTIONS	NAVY APPELLATE VWAP PROGRAM MANAGER
<b><u>DOCUMENTATION REQUIREMENTS</u></b>	<b><u>SOURCE OF REQUIREMENT</u></b>	<b><u>RESPONSIBILITY</u></b>
DD FORM 2701	REF (A)	LAW ENFORCEMENT (OR OTHER SVIP MBR)
DD FORM 2702	REF (A)	SPECIAL TRIAL COUNSEL / SJA
DD FORM 2703	REF (A)	SPECIAL TRIAL COUNSEL
DD FORM 2704	REF (A)	SPECIAL TRIAL COUNSEL
VWAP CHECKLIST – VICTIM	REF (B)	SPECIAL TRIAL COUNSEL
VICTIM REQUEST FOR DOCUMENTS	REF (E)	SPECIAL TRIAL COUNSEL
VICTIM POST TRIAL RIGHTS STATEMENT	REF (K)	SPECIAL TRIAL COUNSEL
VICTIM RIGHTS TO NOTIFICATION OF APPELLATE REVIEW	REF (K)	SPECIAL TRIAL COUNSEL

## 0406 ADDITIONAL REQUIREMENTS FOR SPECIAL VICTIMS

In addition to the requirements noted on the victim chart above, the following ***additional*** requirements exist for victims of a covered special victim offense:

<b><u>PRIOR TO PREFERRAL</u></b>		
<b><u>NOTIFICATIONS:</u></b>	<b><u>ACTION</u></b>	<b><u>RESPONSIBILITY</u></b>
	<i>BE INFORMED OF DNA AND TOXICOLOGY RESULTS IF THAT INFORMATION WILL NOT IMPEDE OR COMPROMISE ONGOING INVESTIGATION</i>	SVIP-CAPABLE LAW ENFORCEMENT PERSONNEL (SVIP-CERTIFIED TRIAL COUNSEL, PARALEGALS, AND ASP MAY PROVIDE THIS INFORMATION IF LAW ENFORCEMENT WAS UNABLE TO PROVIDE IT)

	FOR OFFENSES COMMITTED ON OR BEFORE 27 DECEMBER 2023, IF A CA DOES NOT REFER CHARGES IN A SEX RELATED OFFENSE AFTER SJA ADVICE UNDER ART 34 TO REFER CHARGES, VICTIM NOTIFIED OF STATUS OF ELEVATED REVIEW.	CONVENING AUTHORITY, SJA, SVIP-CERTIFIED TRIAL COUNSEL
	BE NOTIFIED OF ANY DECISION BY THE CIVILIAN AUTHORITY TO PROSECUTE OR NOT PROSECUTE AN OFFENSE IN CIVILIAN COURT, IF THE CONVENING AUTHORITY LEARNS OF THE DECISION.	CONVENING AUTHORITY (SVIP-CERTIFIED TRIAL COUNSEL, PARALEGALS, AND ASP MAY PROVIDE THIS INFORMATION IF KNOWN TO ASSIST THE CONVENING AUTHORITY)
<b>INPUT:</b>	EXPRESS PREFERENCE REGARDING WHETHER THE OFFENSE SHOULD BE PROSECUTED BY COURT-MARTIAL OR IN A CIVILIAN COURT WITH JURISDICTION OVER THE OFFENSE.  NOTE 1: APPLIES ONLY OFFENSE OCCURS IN THE UNITED STATES  NOTE 2: IF APPLICABLE, THIS MAY TRIGGER REQUIRED NOTIFICATION TO CIVILIAN AUTHORITY	SVIP-CERTIFIED TRIAL COUNSEL, PARALEGALS, AND ASP
<b>AT OR AFTER CONVICTION</b>		
<b>NOTIFICATIONS:</b>	<b>ACTION</b>	<b>RESPONSIBILITY</b>
	UPON REQUEST, NOTICE 60 DAYS PRIOR TO SEXUAL ASSAULT FORENSIC EXAM (SAFE) DESTRUCTION <sup>5</sup>	
<b>INPUT:</b>	NONE.	
<b>DOCUMENTATION REQUIREMENTS</b>	<b>SOURCE OF REQUIREMENT</b>	<b>RESPONSIBILITY</b>
DD FORM 2701	REF (A)	SVIP-CAPABLE LAW ENFORCEMENT PERSONNEL
DD FORM 2702	REF (A)	SVIP-CERTIFIED TRIAL COUNSEL, PARALEGALS, AND ASP
VICTIM JURISDICTION PREFERENCE FORM	REF (C)	SVIP-CERTIFIED TRIAL COUNSEL, PARALEGALS, AND ASP
DD FORM 2703	REF (A)	SVIP-CERTIFIED TRIAL COUNSEL
DD FORM 2704	REF (A)	SVIP-CERTIFIED TRIAL COUNSEL
VWAP CHECKLIST – VICTIM	REF (B)	SVIP-CERTIFIED TRIAL COUNSEL, PARALEGALS, AND ASP
VICTIM REQUEST FOR DOCUMENTS	REF (E)	SVIP-CERTIFIED TRIAL COUNSEL

<sup>5</sup> This is not an exclusive list of actions after conviction, however, this particular action may involve coordination with trial counsel.

<b>VICTIM POST TRIAL RIGHTS STATEMENT</b>	<b>REF (K)</b>	<b>SVIP-CERTIFIED TRIAL COUNSEL</b>
<b>VICTIM RIGHTS TO NOTIFICATION OF APPELLATE REVIEW</b>	<b>REF (K)</b>	<b>SVIP-CERTIFIED TRIAL COUNSEL</b>

## 0407 DOCUMENTATION REQUIREMENTS SUMMARY

Revisions to VWAP policy have resulted in layers of overlapping and sometimes duplicative requirements regarding documentation. At a minimum, all victim and witness communications should be summarized in the VWAP tab of the electronic case management system. The following list displays current requirements regarding required forms and documentation recorded by OSTC personnel:

<b>WITNESS</b>	<b>REQUIRED</b>	<b>DD FORM 2701</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>REQUIRED</b>	<b>DD FORM 2702</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>REQUIRED</b>	<b>VWAP CHECKLIST –WITNESS</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>DD FORM 2703</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>DD FORM 2704</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
<b>VICTIM</b>	<b>REQUIRED</b>	<b>DD FORM 2701</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>REQUIRED</b>	<b>DD FORM 2702</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>REQUIRED</b>	<b>VWAP CHECKLIST – VICTIM</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM REQUEST FOR DOCUMENTS</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM DECLINATION FORM</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>DD FORM 2703</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>DD FORM 2704</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM APPELLATE RIGHTS FORM</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
<b>SVC VICTIM</b>	<b>REQUIRED</b>	<b>DD FORM 2701</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>REQUIRED</b>	<b>DD FORM 2702</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>REQUIRED</b>	<b>VWAP CHECKLIST – VICTIM</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM JURISDICTION PREFERENCE</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM REQUEST FOR DOCUMENTS</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM DECLINATION FORM</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>DD FORM 2703</b>	<b>INSERT DATE AND NOTE IN VWAP TAB IN WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>DD FORM 2704</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>
	<b>DEPENDENT</b>	<b>VICTIM APPELLATE RIGHTS FORM</b>	<b>COMPLETE AND UPLOAD INTO WOLVERINE/NCORS</b>

## 0408 NON-RESPONSIVE VICTIMS

Unless it is impossible or reasonable efforts are ignored, STCs are required to obtain victim input prior to providing a recommendation to the convening authority.

- (1) General Considerations. There is no specific delineated time limit for when a victim's lack of response may be considered "non-responsive," and reasonable efforts depend on the totality of the circumstances of a given case. Such factors to consider when determining whether a special trial counsel exercised reasonable efforts to secure victim input include, but are not limited to: whether the counsel (or delegated OSTC member) ever had contact with the victim in the past; whether the victim previously expressed to the MCIO that he or she did not want to participate in a criminal investigation or did not respond to investigator attempts to contact them; whether speedy trial concerns are involved; how many documented attempts to contact the victim were made; whether different methods of communication were attempted, and known deployment or operational restrictions.
- (2) 14-Day Limit. If a reliable means of communication has been established, special trial counsel may deem a victim "non-responsive" 14 calendar days after requesting input and not receiving a response.
- (3) Documentation of contact attempts. If a victim does not respond to special trial counsel's attempts to reach them, STC shall document each attempt in the electronic case management system in the VWAP section for that victim. STC shall include the date and time of attempted contact as well as the method of attempted contact, and what, if any response was provided or left for the victim (e.g., left a voicemail, or call went straight to voicemail, or number not in service, etc.).



Discovery is the process that ensures the defense has access to all the information and evidence that is relevant and necessary for the preparation of their case. An open discovery process, in compliance with the rules and their spirit, is essential to creating a transparent system that is fair to all participants. Always remember that STCs are advocates for justice. STCs must remain “above board” at all times. If the Government fails to provide discovery, a military judge has discretion to exclude the evidence or—in extreme circumstances—even dismiss charges. If evidence falls within the disclosure obligations of the relevant rules (RCM 308, 404(b), 405, 609, 701), or any of the authorities discussed below, STCs must produce that evidence or make it available for inspection.

[A printable discovery obligations chart can be found \*\*HERE\*\*.](#)

If materials obtained during an investigation do not clearly fall within the various categories of discoverable materials, STCs should err on the side of providing them to defense. By doing so, STCs will not waste time attempting to draw discovery lines, segregating items, and keeping track of materials that were not produced. An STC’s belief about the alleged non-discoverable nature of the items may later be ruled to be incorrect by the military judge. By providing everything as part of “open file” discovery, the government avoids the risk of erroneously deeming evidence non-discoverable. Attorney notes and work product are not discoverable. Also be aware of that privileged documents and records require additional consideration. Consult with your supervisor for help with potentially privileged information.

If STCs are unsure about the discoverability of certain evidence, they should produce it, or alternatively furnish it to the military judge for *in camera* review.

### **DISCOVERY/NOTICES (RCM 701, 703)**

- ☐ Government response/create discovery catalog
- ☐ Check Government witness SRBs (if applicable)
- ☐ Government reciprocal discovery request
- ☐ Government discovery request
- ☐ Written notices to Defense Counsel
- ☐ MRE 202(b)A (Judicial Notice of Law)
- ☐ MRE 304(d) (Confessions and admissions)
- ☐ MRE 404(b) (Other crimes, wrongs, acts)
- ☐ MRE 413(b) (Sexual Assault Cases)
- ☐ MRE 414(b) (Child Molestation Cases)
- ☐ RCM 1004 (Capital cases only)
- ☐ Written notice from Defense Counsel
- ☐ MRE 412(c)(1); affirmative defenses
- ☐ Government disclosures
  - RCM 701
  - RCM 914
  - MRE 301 (d)(2) (Immunity)

- MRE 311(d)(1) (Evidence seized from Δ)
- MRE 321(d)(1) (Lineups)

## 0501 BEFORE PREFERRAL

Special trial counsel have no ethical obligation to provide discovery before preferral. However, there are some circumstances when providing discovery or pre-preferral access to evidence may be prudent and may prevent future litigation or logistical complications. Examples include: PTC cases where earlier discovery could assist in conducting the Article 32 and/or trial sooner, or cases where key evidence may be at risk of permanent loss, destruction or degradation over the course of time. If STCs believe pre-preferral provision of discovery is warranted, they should first consult with their Chief STC.

## 0502 AFTER PREFERRAL AND THE ARTICLE 32

The chart below outlines what, under the rules, must be discovered to defense as well as the source of law. In all cases, once charges have been preferred and the accused has been so informed, the STC will provide the following items as part of the initial discovery package: a copy of the charge sheet, the request for counsel, any papers that accompanied the charge sheet when preferred, and copies of all NCIS or other investigative materials in the custody of the STC. If defense counsel is not yet detailed, provide a copy of the discovery package to the local DSO's Senior Defense Counsel along with the request for counsel.

Authority	Burden On	Trigger/Deadline	Required Disclosure
R.C.M. 701(a)(1)	Government	As soon as practicable after service of charges	Papers accompanying the charges; convening orders; & statements
<i>Brady, Bagley, Roberts, and Adens</i>	Government	As soon as practicable	Evidence favorable and material to the defense
<i>Trombetta, Youngblood, and Garries</i>	Government	Before evidence used up in testing	Inform accused that testing may consume all available samples of evidence (even if that evidence is apparently not exculpatory)
R.C.M. 701(a)(2)	Government	Defense Request	Documents, tangible objects and reports etc. In the possession, custody, or control of military authorities, with no duty by TC to generate documents that do not exist. *Agent notes are discoverable.

R.C.M. 701(a)(3)(B)	Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses
R.C.M. 701(a)(5)	Government	Defense Request	Information to be used at sentencing
M.R.E. 404(b)	Government	Defense Request	Uncharged misconduct, and as a best practice, STC must also disclose the the theory of admissibility of the conduct under M.R.E. 404(b)
M.R.E. 505	Government and Defense	Defense request or government claim of privilege	Classified Information
M.R.E. 506	Government	Defense Request	Privileged information other than classified information
M.R.E. 507	Government (claim of privilege); Defense (motion to disclose)		Identity of informant
M.R.E. 609	Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction
R.C.M. 308	Government	As soon as practicable after preferral	Identification of accuser
R.C.M. 405(j)(3)	Government	Promptly after report is completed	Article 32 Investigating Officer's Report

## 0503 AFTER REFERRAL

Note that many of these rules have different triggers. In practice, all evidence should be disclosed before arraignment. The Military Judge regulates discovery once a case is referred to trial.

Authority	Burden On	Trigger/Deadline	Required Disclosure
R.C.M. 701(a)(4)	Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment

M.R.E. 301	Government	Before arraignment or within reasonable time before witness testifies	Immunity
M.R.E. 304(d)	Government	Before arraignment	Statements of accused relevant to case, regardless of whether government intends to use them or whether they are inculpatory
M.R.E. 311(d)	Government	Before arraignment	Property seized from accused
M.R.E. 321(c)	Government	Before arraignment	Identifications of accused
R.C.M. 1004(b)(1)	Government	Before arraignment	Capital cases – notice of aggravating factors under RCM 1004(c)
M.R.E. 311(f)	Defense	Accused to testify in motion to suppress evidence seized from accused	Notice that accused will testify for limited purposes of the motion
M.R.E. 321(e)	Defense	Accused to testify in motion to suppress out of court identification	Notice that accused will testify for limited purposes of the motion
R.C.M. 706(c)(3)(B)	Government	Completion of sanity board	Mental examination of accused – distribution of the report
R.C.M. 701(b)(1)(B)	Defense	Government request	Pre-sentencing witnesses and evidence
R.C.M. 701(b)(3)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, and has affirmatively requested this information pursuant to this rule)	Documents and tangible objects
R.C.M. 701(b)(4)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, and has affirmatively requested this information pursuant	Reports of results of mental examinations, tests, and scientific experiments

		to this rule)	
R.C.M. 701(a)(3)(A)	Government	Before start of trial	Witnesses in case-in chief
M.R.E. 412(c)	Proponent (normally defense)	Minimum of 5 days before entry of pleas, but this date will be specified in the TMO	Rape shield
M.R.E. 413/414	Government	Minimum of 5 days before scheduled date of trial, but this date will be specified in the TMO	Evidence of similar crimes (child molestation and sexual assault cases)
M.R.E. 404b	Government	Specified in the TMO	Evidence of other crimes, wrongs or acts
R.C.M. 914 (Jencks Act)	Proponent of witness	After witness testifies on direct, on motion of opposing party; however to avoid trial delays, such statements should be provided well in advance of trial	Production of statements concerning which witness testified (could be CID Agent Activity Summaries; Article 32 tapes; witness interview notes; Administrative board proceedings; confidential informant's notes, etc.
R.C.M. 701(b)(1)(A)	Defense	Before trial on the merits	Names of witnesses and statements
R.C.M. 701(b)(2)	Defense	Before trial on the merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, etc.)

## 0504 RECIPROCAL DISCOVERY AND REQUIRED DEFENSE NOTICES

R.C.M. 701(b) provides for reciprocal disclosures by the accused for documents, tangible objects, test and examination reports, and expert testimony. Special trial counsel should demand this material via letter and

[Sample Government Reciprocal Discovery Request and Initial Discovery Request can be found \*\*HERE\*\*.](#)

move to compel if the defense fails to respond or if its response is deficient.

R.C.M. 701(b)(2) requires notice by the accused of an intent to use an alibi defense, which includes the places the accused claims to have been when the crime occurred and the names and addresses of alibi witnesses. Special trial counsel should demand this information in the government's initial discovery letter. Special trial counsel should be mindful that the government then has reciprocal obligations to disclose witnesses who either will place the accused at the scene of the crime or rebut the defense alibi witnesses.

## **0505 BRADY, GIGLIO, AND HENTHORN**

**Brady Material.** The government has a constitutional obligation to produce to the defense evidence that is exculpatory. As a matter of practice, STCs should immediately disclose any evidence that may be exculpatory regardless of trial counsel's assessment of its likely impact. *Brady* applies to evidence of which the STC is actually or constructively aware—meaning the information is contained in files in which the STC has a duty to look either *sua sponte* or upon specific defense request.

**Giglio Material and Inquiries.** The Government also has a duty to disclose all evidence that impeaches the credibility of witnesses. Impeachment information under *Giglio* includes information such as prior criminal records or other acts of misconduct of prosecution witness, or promises of leniency or immunity offered to prosecution witnesses. The exact parameters of potential impeachment information are not easily determined and must be individually assessed on a case-by-case basis. However, impeachment information is not confined to administrative or court findings of prior acts which bear on truthfulness or credibility. Obvious categories include findings of lack of candor or false statement, integrity type crimes such as theft, conversion or even discriminatory (race, gender, age) biases. Special trial counsel will disclose *Giglio* information as soon as practicable after its discovery. This eliminates any possible allegations of withholding information and ensures any *Giglio* disclosure is provided sufficiently in advance of trial to enable defense to independently investigate the information without the need for a continuance. Special trial counsel should conduct *Giglio* inquiries with all the witnesses it requires for its case in chief prior to arraignment. Prior to submitting its final witness list to the court, STC must reconfirm that the Government has conducted a *Giglio* inquiry of all government witnesses. Finally, within one week before trial, STC must ask all of their witnesses whether there have been any changes to the answers the witness initially provided, in order to ensure *Giglio* disclosures are current at the time of trial.

[Giglio Inquiry form can be found \*\*HERE\*\*.](#)

In order to assess whether *Giglio* material exists, the following inquiry should be conducted when interviewing all Government witnesses. (inquiry embedded below, and linked to this section.) For any affirmative response, STC should inquire further to determine whether the matter is appropriate for disclosure. If the case is continued, STC may need to conduct an additional *Giglio* inquiry to ensure it is current. As a practice point, STC shall conduct the questioning verbally with the witness. Special trial counsel should not give the list to the witness to fill out and return. Any writing provided by the witness is a statement that must be disclosed.

For law enforcement officers:

1. Do you know of any substantiated negative findings relating to your official duties?
2. Are you the subject of any pending investigation for official or off-duty conduct?
3. Have you been the subject of any allegations of impropriety that have received publicity?
4. Do you know if you have been the subject of any negative credibility findings by a judge or prosecutor?
5. Have you been arrested, charged, or convicted of a crime of dishonesty?

For other witnesses:

1. Have you ever been arrested, charged or convicted of a crime involving a false official statement, perjury, larceny or other crime of dishonesty?
2. [Military] Have you ever received non-judicial punishment for an act or omission which bears on your truthfulness or credibility?
3. [Military] Have you ever received administrative counseling or other non-punitive measure for an act which bears on your truthfulness or credibility?
4. Are you aware of any matter which might call into question your character for truthfulness?
5. Are you aware of any matter which might raise a question of bias or favoritism towards any party to the case?

[Sample Henthorn request can be found \*\*HERE\*\*.](#)

Henthorn Material and Requests. Special trial counsel are obligated make an inquiry about the existence of discoverable materials in these sensitive and private files of law enforcement agents and investigators. Receipt of said records is accomplished through a *Henthorn* request. Special trial counsel shall submit *Henthorn* request for all law enforcement agents who have been requested by the defense or who the trial counsel plans on calling to testify during the court-martial process. *Henthorn* only requires reviews for individuals that will likely testify. Requests to NCIS should be limited to NCIS agents/investigators as these are the only personnel files they maintain. For other law enforcement agencies you will need to contact the agency directly. If the case is continued, STC may need to resubmit the *Henthorn* (and *Giglio*) requests, to ensure they are still current.

For NCIS trial counsel must request *Henthorn* material from:

Elyse Lawrence, NCIS Paralegal Specialist  
elyse.lawrence@ncis.navy.mil  
(571)305-9095 or cell at (571) 456-9028

Upon receipt of arguable *Brady/Giglio* information about an agent, consult the Chief STC. Disclosure of the misconduct or disciplinary action (impeachment material) is required by law, and must be turned over to

defense. However, STCs should not turn over any personnel files of the agent/investigator. If the defense specifically requests the personnel file, or the STC believes the file must be disclosed for another reason, they should consult the Chief STC and ask the military judge for an *in-camera* review. 5 U.S.C. § 552a requires a court order directing disclosure before STC can release personnel files to the defense. **In addition, STCs should ask the judge for a protective order limiting dissemination and protecting the privacy of the agent/investigator.**

## 0506 DISCOVERY MECHANICS / REDACTION

Special trial counsel's adherence to a standard practice in the disclosure of discovery is necessary to responding to potential defense discovery objections. When processing and conducting discovery, STC shall observe the following:

**Bates numbering.** Also known as Bates stamping or Bates coding, Bates numbering is used to uniquely identify pages of materials to be discovered. All discovery provided by STC for a given case shall be Bates numbered using Adobe Pro software so that a discovery log may be maintained, referencing the Bates numbered pages.

**Redaction.** The following PII (defined and discussed in [OSTCM Section 1104](#)) shall be redacted prior to providing to defense in discovery:

Names of Minors (replace with initials)	Personal Addresses	SSN #s
Dates of Birth	Parent's information	Credit Card #s
Personal Phone Numbers	Taxpayer ID #s	Passport #

If the defense moves to compel production of the redacted information, STC will consider whether the information is relevant to defense preparation. If it is necessary, the STC may permit the defense to review an unredacted version of the discovery, with the specific items of PII unobscured. Special trial counsel should consider the sensitivity of the PII sought, its bearing on the case, and to whom the PII relates. If, considering those factors, the STC believes it is inappropriate to allow the defense counsel to review an unredacted copy of the discovery, the STC must submit a clean copy to the military judge for an *in-camera* review. Judicial time should not be engaged if the information the defense seeks is relevant to preparation. However, the STC can and should seek a protective order if appropriate. **STCs should ask the judge for a protective order to limit dissemination and protect privacy when required.**

Note: In accordance with Rule 7 of the Uniform Rules of Practice before Navy and Marine Corps Courts-Martial ("Uniform Rules"), dockets, filings, court records, pleadings and discovery material electronically transmitted to the court must be redacted to remove the following additional material:

Names of Victims (replace with initials)
Any other sensitive information as determined by the Secretary of the Navy.

**Certificate of received discovery.** Acknowledgment of receipt of all discovery provided will be obtained utilizing a certificate of receipt of discovery. This certificate is to be signed by a defense counsel (or designated paralegal), copied, and original returned to STC to be saved in the official case file. Even production of newly discovered documents or *Brady* mid-trial should be memorialized with a discovery receipt.



Discovery Log. Special trial counsel shall keep the discovery log in their OneNote Casefile up to date, and bring it to court. A discovery log will prove to be useful in cases to provide a quick reference guide as to what evidence was discovered and when. Having this information readily available can assist in resolving issues arising during trial.

Discovery folders and Labeling. The STC shall ensure the case paralegal maintains an electronic discovery folder which thoroughly indexes all produced discovery by Bates range and document title. The documents should be described with enough specificity to distinguish them in the discovery folder and to uniquely identify them in the discovery log and on any discovery receipt. For instance, “Sworn statement of GSM3 John Jones dated 15 January 2014” is better than “Jones Statement.”

[Sample Discovery Log and Response to Initial Discovery Request can be found \*\*HERE\*\*.](#)

## OSTCM 0600 – ARTICLE 32 PRELIMINARY HEARINGS

[LINK TO OSTCM 0600 SUPPORTING MATERIAL FOLDER](#)

Under Article 32, UCMJ, a preliminary hearing must occur prior to the referral of any charge to trial by general court-martial. The Article 32 Preliminary Hearing Officer (PHO) will assess whether probable cause exists, assess whether the convening authority has jurisdiction over the offense and accused, consider the form of charges, and recommend disposition of the case. Preliminary hearings should not be used as means of discovery. The Article 32 process is governed by R.C.M. 405. Special trial counsel should review R.C.M. 405 during initial preparations in order to fully understand the applicable procedural rules.

### 0601 ARTICLE 32 SOP / STEPS

The following applicable portion of the master checklist shall be initiated in preparation of conducting an Article 32 Preliminary Hearing:

#### **ARTICLE 32 CHECKLIST** (ART 32, RCM 404A, 405)

- ☐ STC shall request CA appointment of a hearing officer IAW RCM 405(c).
- ☐ Ensure DC (or SDC if DC not yet detailed) and VLC/victim (if requested per CNLSCINST 5810.1) receive a copy of the PHO appointing order
- ☐ Within 5 days after the date of the appointing order, provide RCM 404A notices to defense; if no DC has been detailed yet, provide the notice to the SDC
- ☐ If a continuance is requested by DC, ensure the CA (or PHO if delegated) acts on the request; ensure VLC/victim receives a copy of any continuance request (if requested per CNLSCINST 5810.1)
- ☐ Ensure VLC/victim is notified and consulted regarding the new Article 32 date
- ☐ If delay is excluded, have CA sign excludable delay letter, upload to Wolverine/NCORS
- ☐ Enter excludable delay dates in Wolverine/NCORS
- ☐ Ensure RAF is signed by Chief STC
- ☐ Reserve a courtroom with the Clerk of Court
- ☐ For PTC – Brig notified of time and date
- ☐ For PTC – Brig chasers (2) Notice to CA (10 days out – include qual/gear reqs)
- ☐ For PTC – Confirm with Brig chasers (3 days out)
- ☐ Op test two methods to record the hearing (typically a court reporter laptop and handheld recording device)
- ☐ Confirm proceeding details with VLC/victim (if applicable)
- ☐ Government response to Defense Counsel witness list
- ☐ Government Response to DC request for evidence
- ☐ Notify any witnesses you intend to call; if civilian witnesses are requested by defense, invite the witness to the proceeding
- ☐ If you choose to call the victim for testimony at the hearing, notify DC
- ☐ Arrange for Brig Chasers and Bailiff if the accused is in pre-trial confinement. For Article 32, the Bailiff does not need to be in the seasonal dress uniform. Request their names and contact info from the command or brig a few days in advance, and establish communications

- ☐ Provide a list of expected attendees to the quarterdeck at least one day prior
- ☐ Review the PHO script
- ☐ Ensure you have a copy of your proof matrix
- ☐ Review the Art 32 binders prepared by the paralegal. Ensure the exhibits are marked as PHEs and a Table of Contents reflects the Bates numbers or disc name
- ☐ Once confirmed with STC, make 4 copies of Article 32 binder
- ☐ At the start of the hearing, set up tech equipment:
  - Using a court reporter laptop, set up an FTR Recording labeled: Art 32-RATE First LAST-DDMMYY
  - Verify that all microphones are functional by speaking into each microphone and listening to the playback
  - Track the time of when each person is speaking in the court by the time listed on the court reporting computer, not by the clock in the courtroom
  - Track the time when the hearing is ordered "closed" and when it is re-opened
  - You should ensure there is a pair of headphones prior to the hearing
  - Make sure a backup recorder is on and working
- ☐ At the end of the hearing:
  - Go into the recording in FTR and using the burner feature, place a blank disc into the laptop and burn the recording
  - Burn 3 copies of the recording (1 for the PHO, 1 for TC, and 1 backup); label the discs: Art 32-RATE First LAST-DDMMYY
  - If the VLC/victim requested a copy of or access to the recording (per CNLSCINST 5810.1), consult with STC as to what should be prepared for them
  - Order a transcription using the time sheet of when the various people spoke and inform court reporting the name of the recording you need to have transcribed
- ☐ For the STC, file any supplemental materials to the PHO within 24 hours of the conclusion of the hearing
- ☐ Confirm with the PHO when to expect the PHO report (due date is calculated from the "close" of the hearing)
- ☐ If the PHO ordered any portion or evidence to be Sealed (if you close the hearing to discuss MRE 412 or any evidence was submitted that includes MRE 412 material, ask the PHO if he/she is ordering that the materials be sealed)
  - Clarify with the PHO which PHEs are to be sealed
  - Do not duplicate the item
  - Draft a Sealing Order, signed by the STC; place the evidence in an envelope and Seal it; tape the signed Sealing order on the sealed envelope and sign and date over the seal
  - Maintain the sealed exhibits securely in your office, while the PHO is required to describe those PHEs in his/her report, if the documents are requested by the SJA or the CA, the PHE may be hand-delivered for inspection
- ☐ When you receive the PHO report:
  - Forward it to the SJA or Legal O (if not previously completed)
  - Forward it to DC (copying STC)
  - Ask STC whether you should forward the report to CA that ordered the Article 32
- ☐ Enter the following data in Wolverine/NCORS:
  - Date of Art 32
  - Name of PHO
  - Any Art 140a data on the Art 32 tab in Wolverine
  - Enter a Current Case Status note and change the Case Phase

## 0602 APPOINTING A PRELIMINARY HEARING OFFICER (PHO)

When it is determined that a referral to general court-martial will be sought, the STC must submit a request to the convening authority to appoint a PHO. The STC may assist the convening authority in requesting assignment of a PHO from the PHO unit. The request shall be submitted using the standard PHO request form which contains all necessary information to appropriately detail and schedule a case. Under normal circumstances, a preferred charge sheet must accompany the request. Deviation from this requirement is within the discretion of the Chief STC, in special or exigent circumstances where preferring charges prior to submitting the PHO request is impracticable.

[Standard PHO Request form can be found HERE.](#)

[Additional guidance on submitting PHO requests can be found in HERE](#)

Special trial counsel are directed to use the Preliminary Hearing Unit or military magistrates/SPCM Judges as their primary/default source. All PHO requests submitted to the reserve Preliminary Hearing Unit, the military magistrates/SPCM judges, or the trial judiciary shall be submitted via email to [ARTICLE32PHOREQUEST@US.NAVY.MIL](mailto:ARTICLE32PHOREQUEST@US.NAVY.MIL). Only if the PHO unit cannot assign a PHO to complete the hearing in the necessary timeline should the STC seek appointment of a PHO outside the PHO unit.

The PHO appointing order is signed by the Special Court Martial Convening Authority. Special trial counsel should assist the SJA in coordination and preparing the appointing order.

## 0603 ARTICLE 32 SCHEDULING, CONTINUANCES AND EXCLUDABLE DELAY

When scheduling an Article 32, STCs must balance PHO availability and the Article 10 and R.C.M. 707 speedy trial clocks, but also bear in mind the overarching priorities of good order and discipline and fairness – priorities that foster Sailor, command, and public confidence in the military justice system. It will also be necessary for defense counsel—for whom the case will likely be new—to prepare for the hearing. Absent exigent circumstances, (PTC, PTR, etc.), STC should request an Article 32 hearing date at least 14 days from the expected date the local DSO will receive the Request for Counsel (RFC). To this end, under normal circumstances, STC should request an Article 32 date approximately 21 days from the date of the Article 32 PHO Request submission.

The PHO is typically delegated the power to grant continuances up to a total of thirty (30) days. Confirm the delegation of authority outlined in the appointing order. In most circumstances, the authority to grant continuances beyond 30 days should be reserved for the Convening Authority alone. Special trial counsel should be cautious with continuance requests involving accused in PTC, as the government, not the defense, is responsible for protecting the accused's right to a speedy trial.

Although the PHO may be given the authority to grant continuances, they are not delegated the authority to deem delay excludable for purposes of R.C.M. 707, a matter solely within the purview of the Convening Authority or Military Judge. (See R.C.M. 707(c) and discussion). In all cases, STCs shall ensure the PHO documents all continuances and the convening authority documents all excludable delay in writing as soon as they occur. These written records shall be filed in the case file and discovered to all parties.

## 0604 ALTERING CHARGES PRIOR TO THE ARTICLE 32

Special trial counsel are permitted to add newly preferred charges prior to the preliminary hearing. This should be an *unusual circumstance* because the STC should have thoroughly considered the evidence before preferring charges. Failure to prefer all known charges at once can result in delay of the Article 32 hearing, and that delay may not be properly excludable as to all preferred charges. In the event a STC intends to add an additional charge or ask the PHO to investigate additional uncharged conduct, the STC must get the permission of the Chief STC to pursue this course of action.

If STC adds charges after a preliminary hearing, but prior to referral, pursuant to a specific recommendation made by the PHO, there may not be a need for an additional preliminary hearing. This will depend on whether the accused had notice the conduct was under investigation and whether the PHO's rights advisement reasonably extended to the additional charges. However, if STC seeks to add charges *after* the preliminary hearing, those charges cannot be referred until they have been reviewed by the PHO. In such cases, STC must seek to either re-open the original Article 32 to have the new charges appropriately reviewed.

If STC intends to ask the PHO to investigate potential additional charges that are not preferred, the STC must provide written notice to the defense and PHO reciting the draft specification and specifically request that the PHO notify the accused the alleged offenses are under investigation and that he/she has all of the same Article 32 rights as to those uncharged offenses. Such notice must be given as soon as the STC receives authorization from the Chief STC to pursue this course of action.

## 0605 ARTICLE 32 EVIDENTIARY CONSIDERATIONS

Special trial counsel should present all evidence that is necessary to establish there is probable cause to support the charged offenses. Special trial counsel should also submit evidence that will enable the PHO to make an informed recommendation about the likelihood of success at trial. However, this does not mean the STC should blindly offer the entire NCIS investigation without specifically selecting the pertinent items of evidence. Special trial counsel should be mindful of the PHO's time and present the relevant statements, summaries of interviews, and portions of video-taped interviews. When video-taped interviews are presented, transcripts should be provided. Video-taped interviews should be edited to extract the relevant portions of video necessary for presentation. If a video-taped interview cannot be edited, the STC should submit the entire video with a list of timed segments of the video counsel is seeking to be admitted and considered. When extracting portions of video, STC must ensure no remaining statements lose context.

Special trial counsel should call an NCIS agent to testify about the investigation if it will be helpful to explain the case and make it easier for the PHO to understand the evidence. Special trial counsel must prepare the agent for testimony and ensure the agent has reviewed the entire file and brings it with them the day of the hearing. If the agent will testify remotely, the STC must ensure the agent has access to the investigation, especially if the agent has transferred duty stations.

## 0606 ARTICLE 32 MECHANICS, SPECIAL CIRCUMSTANCES, AND LOGISTICS

Ex Parte Communications. Once a defense counsel is detailed, STC are required to copy defense counsel on all communications with the PHO.

Waiver. In some cases, the accused may choose to waive his or her right to a preliminary hearing. There are two types of waivers: conditional and unconditional. A conditional waiver is when the parties agree to waive the investigation only if a pretrial agreement is reached. If no pretrial agreement is reached, then the defense can reassert its right to a preliminary hearing. This can cause undue delay in the court martial process. As a result, conditional waivers are **disfavored**. Specific approval of the Chief STC is required before any STC endorses a conditional waiver. By comparison, an unconditional waiver is preferable because the defense cannot reassert that right. The unconditional Article 32 waiver letter signed by the accused and defense counsel then typically replaces the preliminary hearing officer's report and may be forwarded to the Chief STC/RSTC. Bear in mind that although an accused may elect to waive their right to an Article 32, the STC has the discretion to still direct that the Article 32 Preliminary Hearing occurs. There are circumstances when it may be prudent to hold the Article 32 hearing in spite of an accused's waiver. The STC must consult the Chief STC before endorsing this course of action.

Recording. Trial paralegals or admin support personnel must ensure the preliminary hearing is recorded by suitable government recording devices. A second back-up recording device should also be used in case of primary recording failure.

Closed Sessions. Preliminary hearings are public proceedings and should remain open to the public whenever possible. When an overriding interest outweighs the value of an open preliminary hearing, the CA or the PHO may restrict or foreclose access by spectators to all or part of the proceedings. CAs or PHOs must conduct a case-by-case, witness-by-witness, and circumstance-by-circumstance analysis of whether access restriction or closure is necessary. If the PHO or convening authority orders a closed session, precautions should be employed to ensure no unauthorized personnel enter or attend the closed session. Judge advocates serving as supervising attorneys to counsel detailed to the closed session are typically authorized to attend any closed session.

Comments on the Evidence. Counsel may make a closing comments, and/or submit written comments on the evidence after the hearing within the time period ordered by the PHO (typically 24 hours after the close of the hearing, and Defense has 5 days from the closure of the hearing to submit any rebuttal to Gov't additional information submitted). Special trial counsel should remember that often at the time of comments, the PHO has typically not yet had the opportunity to fully review the evidence, particularly any video materials. The STC can request the PHO review the evidence before the close of the hearing. In the appropriate circumstance, the STC should make this request, prioritizing the quality of the advocacy over expediency. If the PHO has not reviewed the evidence, the STC's comments should be made with this in mind. Often a brief closing argument, with later submitted detailed written comments is most effective and helpful to the PHO. Comments should be organized and include: how each element of the charged or proposed charges is supported by probable cause, any significant evidentiary, legal, or witness availability issues, and a justification for the requested disposition of the case. These items will have been encapsulated in the Prosecution Memo and enhanced and refined as the STC has accumulated additional evidence. Best practice is to have the shell of intended written comments prepared prior to the hearing, and to add minor edits to account for other facts or arguments that arose at the hearing.

Non-NLSC Courtroom. When possible, Article 32 hearings should be conducted in a NLSC-courtroom. As a type of military justice proceeding, as defined by CNLSCINST 5530.2D, courtroom security requirements apply. If the Article 32 must be conducted outside of a NLSC courtroom, additional time must be taken into account to properly route the appropriate requests through the AJAG 06.

PTC Cases. For cases where the accused is in PTC, STC will also need to either draft, or ensure the command has drafted, a brig release letter for every proceeding that requires the accused's presence. The letter should be signed by the Chief STC, unless delegated, and sent to the brig at least 24 hours in advance.

Remote Hearings or Participants. The PHO or appointing authority may order the use of audiovisual technology, such as video teleconferencing technology, or telephonic participation among the parties and the PHO for purposes of Article 32 proceedings, consistent with similar provisions guiding Article 39(a), UCMJ, sessions and consistent with R.C.M. 405, 804, and 805. Such technology may include two or more remote sites as long as all parties can hear each other. STC should ensure that the accused and the accused's attorney are physically present together. Video or telephonic participation may also be utilized to facilitate the presence of victims or VLC, exercising a victim's right to be present under RCM 405(g). However, the possibility of video or telephonic participation does not create a right to use such means when doing so imposes too great of a burden on the government, causes undue delay, or prejudices the rights of the accused. The STC should consider whether a request should be made for a PHO to appear in person. Although remote hearings are permitted, in certain cases, especially those involving testifying fact witnesses, a hearing may be best conducted in person.

## **0607 ACTIONS POST-ARTICLE 32 HEARING**

Article 32 Report. The Preliminary Hearing Officer (PHO) shall promptly – typically within 10-14 calendar days – deliver the Article 32 report to the STC. The PHO must submit a written request for any extensions of time beyond the CA's order. Any grants of extensions should be documented in email or writing. Special trial counsel must closely track the receipt of the PHO Report particularly in PTC cases, and those that have the potential for a lengthy delay in scheduling the arraignment. If a PHO report deadline has expired and the STC has still not received the report, the STC should consult the PHO and if necessary, elevate the concern to the Chief STC to address with the PHO or the PHO's command. These circumstances should occur only rarely.

Dissemination of the PHO Report. Once the report is received, the trial team must immediately send the report to the detailed defense counsel. The copy provided to the defense will include a copy of the recording or transcript. Special trial counsel must not provide any portions of the hearing ordered sealed by the PHO to the accused or counsel.

Disclosure to the Victim. Upon adjournment or dismissal of charges that are not intended to be re-preferred, STCs shall provide the victim with access to, or a copy of, the recording or transcript (with the exception of properly sealed materials) if requested. STCs are not normally required to redact the recording or transcript. However, to maintain compliance with the Privacy Act, STCs should release the recording or transcript in the following manner:

(a) If the victim is represented by victim's legal counsel (VLC), the unredacted recording or transcript may be provided to the VLC as an "Official Need to Know" disclosure under the Privacy Act. The VLC must maintain the recording or transcript in accordance with the Privacy Act.



- (b) An unredacted recording or transcript will not be provided directly to the victim.

Transcription. In most instances, a transcript of preliminary-hearing testimony will be necessary to adequately prepare for trial. Trial counsel should request a transcript when the witness is expected to testify at trial. Transcript requests should be made early to avoid delay. Preliminary-hearing transcripts are not done as a matter of course when an NCIS agent has testified for the sole purpose of highlighting the evidence in the case. A transcript will typically only be justified if a material witness has testified, such as the victim or a witness to the events. Otherwise, transcription money is likely better spent transcribing pertinent witness interviews, or interviews of the accused. Counsel should follow existing procedures for requesting a transcription through the court reporters. A court reporter will then (with the assistance of JCAB) contract with a local transcriptionist. Upon receipt of a transcript, STC must immediately read it carefully to make certain the transcript is accurate in every respect. If the transcript contains an error or a typographical error, STC should contact the transcriptionist, enclose the original of the transcript, ask that the tape of the proceeding and the stenographic record be checked as to the suspected errors noted, and request that appropriate corrections be made. Transcripts should be promptly discovered to defense.

Sealing Documents and Protecting Sensitive Information. RCM 1103 specifies the authority, limitations, and procedures relevant to review of sealed materials in or attached to a PHO report. Sealed materials will be kept separate. Sealed documents and each recording or transcript of a closed portion of the hearing will be placed in its own envelope or other suitable container. The envelope or container must be marked "Closed Session." If the PHO determines that record contains graphic materials or matters of a sensitive personal nature, the PHO, with the assistance of trial counsel, must ensure such materials are enclosed separately in an envelope, wrapping, or other suitable container to conceal and protect the materials from inadvertent exposure or tampering. Any graphic materials or matters of sensitive personal nature must be properly labeled and separately enclosed prior to inclusion in the PHO's report. The envelope, wrapping, or container should be marked: "CAUTION, CONTAINS SENSITIVE INFORMATION." These sensitive materials are viewable only by authorized reviewing authorities and support personnel with an official need to view the materials. In the absence of such determination, if the cognizant staff judge advocate later determines that the record includes such matters, that individual will ensure that the matters are enclosed and marked in accordance with the requirements above.

Referral Package. After receiving the Preliminary Hearing Report, the STC must determine who will serve as referral authority for the case. Only the LSTC, DLSTC, Region STC, or Chief STC (O-4s require additional delegation from the LSTC) may serve as referral authority, depending on the specifications to be referred (see OSTCM 0702). The STC should prepare the referral package for referral authority review, which must include:

- (a) The complete PHO report;
- (b) Charge sheet;
- (c) A summary of the character of the accused's service, based on the STC's personal review of the accused's service record;
- (d) For covered and related offenses, referral to a **general or special court-martial** for trial of charges and specifications over which a STC exercises authority must include an STC's written determination:
  - (1) Each specification under a charge alleges an offense under this chapter;
  - (2) There is probable cause to believe that the accused committed the offense charged; and
  - (3) A court-martial would have jurisdiction over the accused and the offense.



(e) Any other administrative documentation that the trial counsel considers pertinent, such as a cost estimate for out-of-area witness travel. **Note: STCs will not provide any additional evidence beyond that which was provided to the PHO.** However, the prosecution memo and its enclosures are attorney work product; they are not evidence and should be provided. Under no circumstances should substantive statements be recited *only* in the prosecution memo and not otherwise be reduced to writing and provided separately to the Defense.

(f) Region Commander's or other appropriate convening authority's current court-martial convening order. STCs will provide the referral package to the appropriate referral authority for the final disposition decision. If the Chief STC is the referral authority, the STC will complete the written determination outlined in paragraph (d). If the Region STC is the referral authority, the Chief STC will complete and/or endorse the written determination outlined in paragraph (d). If the LSTC or DLSTC is the referral authority, the Region STC will complete and/or endorse the written determination outlined in paragraph (d).

STC Brief to Referral Authority. Once a referral package is forwarded to the referral authority (Chief or Region STC), the STC will schedule a referral board with the referral authority and the Chief STC (if the referral authority is the Region STC). At a minimum, STC should be prepared to discuss:

- (a) An assessment of case's strengths and weaknesses;
- (b) Witness availability;
- (c) Victim's input;
- (d) Victim's commander's input;
- (e) Accused's commander's input;
- (f) Estimated costs, such as witness travel and lodging, expert consultation fees, etc.;
- (g) A proposed docketing date;
- (h) Any recommendations made by the Article 32 investigating officer, if appropriate;
- (i) Potential negotiations for a pretrial/plea agreement; and
- (j) A recommended disposition.

## OSTCM 0700– REFERRAL AND ARRAIGNMENT

[LINK TO OSTCM 0700 SUPPORTING MATERIAL FOLDER](#)

Referral occurs when the appropriate referral authority (Chief STC or Region STC) signs the referral block of the charge sheet to send charges to a court-martial that the convening authority has already convened. Referral of charges to court-martial also triggers the court's authority over the case. By arraigning a case, the government is essentially stating it is ready to proceed to trial. In practice, most trials are docketed to occur several months after arraignment. However, there is always the potential for a defense demand for speedy trial, and the government must be ready and prepared to proceed accordingly.

### 0701 CONVENING ORDERS

Before a case can be referred to a court-martial, that court-martial must first exist or be “convened.” Special trial counsel shall proactively coordinate with cognizant SJA to ensure the convening authority has a convening order in place, in anticipation of referral. Special trial counsel will ensure that a convening order was completed by the command prior to referral, and the date of the order must predate the date of referral reflected on the charge sheet. The convening order must state the type of court-martial being convened, list the members detailed (at least four for special court-martial martial and eight for GCM), location, and whether it is a military judge alone SPCM, which will rarely be the forum for OSTC cases. Special trial counsel should check any references on the face of the convening order to ensure proper citation to the intended authority. The convening order should include members who are senior to the accused and should not include anyone who is, or will advise, the convening authority on the case. The Member Selection Primer serves as a guide for CAs on how to appropriately select members (linked in this section). It should be shared with the SJA before members are selected for the convening order, or for any amendments to the convening order.

[Members Selection  
Primer for SJAs HERE.](#)

### 0702 AUTHORITY TO REFER AND DEFER CHARGES

The LSTC and Deputy LSTC shall have authority to refer/defer all covered and related offenses to a General (GCM) or Special court-martial (SPCM). Only the LSTC and Deputy LSTC shall have authority to refer covered and related offenses in which the PHO makes a finding of no probable cause, but the Region STC believes should proceed to court-martial. Only the LSTC may refer charges with instructions to be tried as capital offenses.

Region STCs shall have authority to refer/defer all covered and related offenses (with the exception of cases when the PHO makes a finding of no probable cause and capital offenses) to a GCM or SPCM.

Chief STCs shall have the authority to make a final referral/deferral decision to a GCM (as appropriate) or SPCM on the following covered – and any related – offenses:

- (1) Article 117a (intimate visual images)
- (2) Article 120a (mail – deposit of obscene matter)
- (3) All non-penetrative Art. 120 and Art. 120b offenses
- (4) Art. 120c (miscellaneous sex offenses)

(5) Art. 125 (Kidnapping)

(6) Art. 128b (Domestic Violence: any violent offense that DOES NOT constitute aggravated assault under Art. 128 or involving a firearm, strangulation or suffocation)

(7) Art. 130 (stalking)

(8) Art. 132 (retaliation)

(9) Art. 134 (Child pornography NOT involving production)

(10) Art. 134 (Substantiated Sexual Harassment – as of 1 January 2025)

(11) Conspiracy or attempt to commit any of the offenses in 10001(b).

## **0703 REFERRAL TO SPECIAL COURT-MARTIAL (SPCM)**

If the referral authority intends to refer the charges (not including penetrative sexual act offenses) to a SPCM, special trial counsel will brief the legal representative on the proper referral process. The following portion of the master checklist covers required steps prior to referral to SPCM:

### **REFERRAL TO SPCM CHECKLIST (RCM 403, 601, 603, 905, 907, ART 43)**

- ☐ Finish completion of the charge sheet
- ☐ Receive ORIGINAL page 2 of charge sheet from Legal O/SJA
- ☐ Ensure time is noted in Block 13
- ☐ Ensure sworn charges properly received by officer exercising SCM jurisdiction in Block 13
- ☐ Ensure date in Block 13 is after the date of preferral in Block 11
- ☐ Ensure that there is not a Statute of Limitations problem
- ☐ Ensure the date and convening order number in the referral endorsement (Block 14) are consistent with Convening Order
- ☐ Ensure Convening Authority/predecessor in command is authorized to convene the court and not disqualified
- ☐ Ensure the court-martial and sworn charges existed at the time of referral (i.e., is the preferral date on or before the date of referral?)
- ☐ Ensure the OSTC referral authority is properly identified in the referral endorsement? (Block 14)
- ☐ Are there proper instructions for any additional charges referred? (See RCM 601(e) - did the referral authority specifically order additional charges to be tried jointly?)
- ☐ Ensure the type of court-martial is the same on the convening order and referral endorsement (Block 14) (i.e., GCM, SPCM, SCM)
- ☐ Ensure there has been proper service of referred charges on the accused

## **0704 REFERRAL TO GENERAL COURT-MARTIAL (GCM)**

If an Article 32 preliminary hearing was held, and the STC intends to pursue referral of the case to general court-martial, the STC must forward the case to the appropriate referral authority (Chief STC or Region STC) depending on the charges to be referred. Before referral is sought, the STC must provide notice to the Region GCMCA (to whose convening order the charges will be referred) on the anticipated referral, anticipated referral date, and estimate of costs. This is not a consultation or a request for input, this is a notification to the

GCMCA of the intended referral for planning purposes. Careful attention must be paid to avoid even the appearance of unlawful or unauthorized influence. The forwarding package will be forwarded from the STC to the Chief STC (depending on offenses to be referred) or to the Region STC via the Chief STC. Once charges are referred to a general court-martial, the STC must send a copy of referred charges to detailed defense counsel, the accused's command, the GCMCA, the trial judiciary, and the STC must request the soonest arraignment date.

The following portion of the master checklist covers required steps prior to referral to GCM:

### **REFERRAL TO GCM CHECKLIST (RCM 201, 403, 405, 601, 603, 905, 907, ART 43)**

- ☐ Review the charge sheet once again for accuracy
- ☐ ~~OB~~ Complete the charge sheet
- ☐ Ensure time noted in Block 13
- ☐ Ensure sworn charges properly received by officer exercising SCM jurisdiction in Block 13
- ☐ Ensure date in Block 13 is after the date of preferral in Block 11
- ☐ Ensure that there is not a Statute of Limitations problem
- ☐ Ensure the date and convening order number in the referral endorsement (Block 14) are consistent with Convening Order
- ☐ Ensure Convening Authority/predecessor in command is authorized to convene the court and not disqualified
- ☐ Ensure the court-martial and sworn charges existed at the time of referral (i.e., is the preferral date on or before the date of referral?)
- ☐ Ensure the Referral Authority is properly identified in the referral endorsement? (Block 14)
- ☐ Are there proper instructions for any additional charges referred? (See RCM 601(e) - did the referral authority specifically order additional charges to be tried jointly?)
- ☐ Ensure the type of court-martial is the same on the convening order and referral endorsement (Block 14)? (i.e., GCM, SPCM, SCM)
  - ☐ Article 34 advice submitted to Court Reporter
  - ☐ If Referred Charges require Gun Control Act (GCA) notifications, trial paralegal make appropriate notification to NCIS.

## **0705 FLAP REFERRALS**

Although uncommon, if the charges of DD Form 458 are withdrawn from one court-martial and referred to another court-martial, a flap referral is required. For example, a preferred charge sheet may be withdrawn from a GCM and referred to a SPCM as a condition of a plea agreement (PA) or Pre-Trial Agreement (PTA). The original charge sheet must be preserved, with Block 14 one-lined. A new Block 14 would then be generated and printed onto a completely blank Page 2. The new Block 14 would then be taped on top of the old Block 14a of the Charge Sheet. The flap (or block 14) is to be taped so that any person may lift the 'flap' in order to see the withdrawn charges. This is to allow the court and any appellate authority to inspect all referrals while maintaining all originals in the same place. A flap referral cannot be effected through electronic means. This procedure avoids inadvertently creating two dueling charge sheets and clearly reflects the case history and current referral.

GCA Guide can be found  
[HERE](#).

## 0706 ARRAIGNMENT SOP / STEPS

The following portion of the master checklist covers required steps to prepare for arraignment:

### **ARRAIGNMENT/MOTIONS CHECKLIST (RCM 904)**

- ☐ Has the statutory waiting period for service of charges expired (3 day SPCM/5 day GCM)?
- ☐ Draft Docketing Request
- ☐ Draft PTIR/CMO/TMO
- ☐ Meet with DC and reach agreement (if possible) on trial dates
- ☐ Round-table case with Chief STC
- ☐ Review and Confirm Proof Matrix
- ☐ Prepare sentencing case / evidence
- ☐ Complete Government witness list
- ☐ Draft subpoenas for all Government witnesses
- ☐ Complete arraignment script in Trial Guide
- ☐ Set arraignment date
- ☐ Coordinate with RLSO to complete a Courtroom Security Plan (If assessed as moderate or high risk)
- ☐ Arrange for courtroom personnel
- ☐ Brig chasers if applicable
- ☐ Courtroom Security
- ☐ Bailiff (in proper uniform)
- ☐ Court Reporter
- ☐ Accused Arraigned: Date \_\_\_\_\_
- ☐ Forum and Pleas elected/entered or reserved Forum/Pleas \_\_\_\_\_
- ☐ Receive copy of the signed Case Management Order
  - Trial Date \_\_\_\_\_
  - Motions Date \_\_\_\_\_
  - Motions Date \_\_\_\_\_
- ☐ Arrange for witness travel
- ☐ Government Witness list to Travel Coordinator
- ☐ Provide copy of CMO/TMO to Victim/VLC and Case NCIS Agent/Investigator after arraignment

## 0707 ARRAIGNMENT MECHANICS AND LOGISTICS

Arraignment Timing and R.C.M. 707. Special trial counsel should seek an arraignment date as soon as reasonably possible after receipt of referred charges. Special trial counsel should seek to find a date that works for both government and defense counsel. However, if a mutually agreeable date cannot be agreed upon, or if the STC cannot get a timely response from the defense counsel, STC should request to arraign on the earliest date the government is available. This creates a clear record of the date the Government was prepared to arraign the accused, for the purposes of determining when any arraignment delay will be excludable from the government's RCM 707 speedy trial clock.

Trial Guide / Script. In advance of the scheduled arraignment, the trial paralegal shall ensure the portion of the trial guide script that covers arraignment is current and within the case's OneNote file. If the STC's preference is to use a hard copy script, the paralegal will print a copy. The trial paralegal shall also ensure the following are current and placed in the hard copy file to be brought to court: the charge sheet, convening order, and any draft or approved TMO.

Charge Sheet Verification. After arraignment, no major change may be made to the charge sheet over defense objection. No change may be made without the military judge's permission. The line between a major and minor change may be hard to predict, so it is of the utmost importance that any errors are corrected before arraignment. Therefore, before arraignment, the STC and trial paralegal must review the charge sheet one more time for accuracy.

[Trial Guide with Arraignment Script can be found \*\*HERE\*\*.](#)

In addition, the trial paralegal will review and ensure the correctness of and ensure the appropriate items are contained within the OneNote Case file, as listed in the standard case file.

Logistics for the Accused. For arraignment, as with an Article 32 hearing, the accused should wear their dress whites or blues. It is defense counsel's responsibility to communicate this requirement to them, but it is STC's responsibility to make sure the command has checked with the accused and brig to ensure the accused has the proper uniform items. The accused must always be in the correct uniform. If in PTC, STC should prepare and submit a brig release letter at least three days in advance. Special trial counsel or the trial team paralegal must complete a brig release letter for every meeting or hearing that requires the accused to leave the brig. Special trial counsel or the trial team paralegal are also required to coordinate with the accused's command to ensure two brig chasers are scheduled to escort the accused, if coming from pre-trial confinement, and stay for the duration of arraignment and any meeting with their defense counsel.

Compliance with RCM 904 and 304. Special trial counsel must ensure that arraignment is conducted in accordance with RCM 904. Arraignment begins the court-martial proceedings against accused and satisfies the government's RCM 707 speedy trial responsibilities. Special trial counsel will read the jurisdictional data and charges, unless the accused waives the reading, and the accused will be asked to enter pleas, bring motions, and elect forum, or reserve those elections consistent with a date in the TMO. Special trial counsel must ensure that any pre-referral subpoenas or warrants, or statements of the accused have been turned over to defense counsel prior to arraignment and any Article 30a matters are provided to the court reporter to be appended to the record as appellate exhibits. The arraignment script calls upon STC to state whether any Article 30a proceedings have occurred.

Trial Management Order (TMO) and Case Timing. The military judge will likely order the Article 39(a) and trial dates at arraignment by signing a TMO. Before the hearing, STC should coordinate with defense counsel on availability for the following several months and attempt to reach agreement on dates for pre-trial hearings and court-martial. Special trial counsel, however, should not feel undue pressure to agree to dates not favorable to the government or not in the interests of efficiency or service to the fleet. Special trial counsel should also consult with VLC (if assigned), and consider VLC's schedule and availability when negotiating hearing dates.

Absent specific reason for extension, trial counsel should seek to docket SPCMs no more than 60 days after arraignment and GCMs no more than 90 days after arraignment.

Counsel will submit a proposed TMO to the military judge for review and approval. If the military judge does not accept the proposed TMO, or does not issue a TMO at the hearing, the Chief STC shall be notified immediately. Once signed, a copy of the TMO must be immediately furnished to the accused's command and the convening authority (if the two are not the same). Trial management orders shall also be shared with the VLC/victim and the NCIS agent assigned to the case. Motions and trial dates should have been discussed with all key victims, witnesses, and agents prior to trial counsel submitting a proposed order to the court.

Judicial Warnings about the Accused's Presence at Trial Proceedings. Special trial counsel should request the military judge provide R.C.M. 804 warnings regardless of the accused's pretrial confinement status because a confined accused could be released from pretrial confinement.

## **0708 POST-ARRAIGNMENT**

After the arraignment, STC will notify the accused's command, the CA (if not the same), the NCIS agent, and other relevant individuals of the dates set by the military judge. This includes the victim/VLC and potential witnesses to ensure they will be available for trial. Special trial counsel must comply with all requirements of the TMO, so as not to result in an unnecessary delay of the trial. It is recommended that all members of the trial team post (electronically or hard copy) in a place easily visible, a copy of the TMO. The team should engage in "forceful backup" to ensure no deadlines or milestones are missed.

## OSTCM 0800 – PLEA NEGOTIATIONS

[LINK TO OSTCM 0800 SUPPORTING MATERIAL FOLDER](#)

### 0801 GENERAL CONSIDERATIONS

The resolution of a case through a plea agreement is often in the best interest of justice and expediency. Plea agreements and PTAs provide certainty of resolution rather than the uncertainty that comes with contested trials. Terms, negotiation styles, timing, and reasons for entering a plea all vary dramatically. The authority who referred the charges (if offenses post-date 27 December 2023) is the authority empowered to enter into a plea agreement on behalf of the United States.

Special trial counsel should never rely on, or assume that their case will end with a plea, no matter how strong the case may seem. No case should be charged unless the STC believes it is more likely than not that the case will obtain and sustain a conviction. No STC should recommend charges in a case the STC does not believe merits a contested trial. The STC must work on two parallel tracks: (1) investigation and contested trial preparation; and (2) plea negotiation. Plea negotiations should not undermine or change STC's investigation or preparation for trial. Although it may seem like additional unnecessary work, thorough investigation and trial preparation will only enhance the STC's negotiating position.

Plea agreements must be in writing. "Side deals" (i.e. *sub rosa* provisions) are prohibited. Novel provisions not contained in the standard plea agreement must be approved by the Chief STC. Special trial counsel should consider prior sentences issued in similar cases across the fleet as well as the sentencing guidelines, if they apply based on the offense date (28 December 2023 or later). This creates reliability and consistency. Keep in mind that there may be a wide range of sentences; STCs should speak with their Chief STC or TCAP about sentencing if they are unsure of how to proceed.

In cases involving victims, STCs must seek and receive input from the victim or their counsel on proposed agreements and provide that information to the convening authority, or in the case of an offense committed on or after 28 December 2023, this must be provided to the appropriate authority who referred the case. Special trial counsel must document the date of this conversation in the case management system. Counsel should have discussed a relative range of punishment to negotiate with the Chief STC and (if appropriate because the offense predates 28 December 2023) the convening authority before entering into negotiations with defense. In addition, counsel should consult with the NCIS agent or other law enforcement officials on the case prior to negotiations with defense.

### 0802 PLEA NEGOTIATION SOP / STEPS

The following portion of the master checklist covers required steps when negotiating a Pretrial Agreement (PTA) or Plea agreement (PA).

#### **PLEA NEGOTIATIONS CHECKLIST (RCM)**

- ☐ PTA/Plea Agreement (PA) negotiated with Defense Counsel and (if appropriate) SJA/CA

Criminal Law Deskbook  
Guidance on Plea  
Agreements can be  
found [HERE](#).



- ☐ Consultation with VLC or victim as applicable
- ☐ PTA/PA drafted (Use Track Changes when exchanging versions back and forth with DC)
- ☐ Stipulation of Fact
  - Drafted by STC, Edited with Track Changes
  - Signed by DC/Accused
- ☐ PTA/PA and Stipulation of Fact delivered to CA or appropriate OSTC authority who referred the charges
- ☐ STC formal endorsement requested?
- ☐ PTA /PA signed by Convening Authority for cases with offense dates before 28 December 2023
- ☐ PTA Part I (if applicable) or PA and Stipulation of Fact delivered to Court

### 0901 GENERAL CONSIDERATIONS

Many trials are won or lost during or as a result of motions practice. Key evidence may be deemed admissible or inadmissible, or the court may rule certain arguments as permissible or impermissible. Special trial counsel should both investigate and prepare their case with potential motions and motion responses in mind. Proper pretrial analysis of a case includes identification of potential motions defense counsel may file.

### 0902 AFFIRMATIVE MOTIONS

Rather than simply wait to respond to defense motions, STC should employ an aggressive affirmative motions practice to eliminate uncertainty at trial and posture the government for its strongest possible case. When possible, STCs should file affirmative motions to include, but not limited to: motions seeking a pretrial ruling on the admissibility of evidence, motions related to the admissibility of expert testimony, motions for preliminary ruling on admissibility under M.R.E. 404(b), and motions under M.R.E. 413. Additionally, STCs should always consider filing motions to exclude certain evidence or arguments under M.R.E. 412.

Although evidence of uncharged misconduct or other acts can be strong evidence, the STC should not overvalue other acts evidence to make up for weaknesses in the proof of the charged offenses. STCs may not recommend charges in a case that the STC does not believe can result in a conviction *unless* other acts evidence is admitted without prior approval from the Regional STC.

### 0903 ANTICIPATING AND RESPONDING TO DEFENSE MOTIONS

Special trial counsel should anticipate and prepare for defense motions. When developing a proof matrix and when holding a charging conference, STC should “red cell” the case to view it from the perspective of the defense. Special trial counsel should anticipate and consider potential motions for admission/suppression of evidence, motions to compel witnesses, or dismissal of charges for multiplicity. When a motion to compel employment of an expert is likely forthcoming, STC should seek to build additional 39a sessions into the TMO sufficiently in advance of trial. Additionally, the STC should inform the convening authority of the possibility of having to fund employment of experts.

Requests for experts should not be automatically opposed by STC. The government should carefully consider defense requests for expert assistance, and grant them if the defense have met procedural requirements and if STC agrees that expert assistance is necessary for the preparation of the defense and in the interest of fairness and justice. Special trial counsel should consider the training, experience, and opinion of the defense expert and be prepared to offer a government substitute if adequate and available. Discuss potential experts with the Chief STC or TCAP if there is a question about expertise.

## 0904 PREPARING FOR A MOTIONS HEARING

Special trial counsel must cite and argue current, relevant case law that supports their legal position. They are ethically required to alert the court to binding precedent contrary to the position being argued. STC should acknowledge and *distinguish* facts and precedent that do not favor their position.

A military judge's ruling must be based on Findings of Fact and Conclusions of Law which apply the law to the facts. Without sufficient facts, the military judge cannot rule in the moving party's favor. It is the STC's responsibility to provide evidence to the court from which the military judge may make findings of fact. If documents in the STC's possession are insufficient to provide facts supporting the ruling sought, the STC must call witnesses to establish additional facts (or provide written statements in lieu of testimony). This includes, in limited circumstances, calling victims to testify. Failure to establish necessary facts may result in adverse rulings that the STC may not have an opportunity to revisit at trial. The STC must carefully balance any desire to shield witnesses from testimony with the necessity to present facts that will enable the military judge to rule in the Government's favor. The STC cannot assume that he or she will later be permitted to present additional evidence in a motion to reconsider that could have originally been presented if the military judge issues an adverse ruling.

If cited in the filings, there is no need to bring printed copies of case law to the motion hearing. Special trial counsel should make every effort to avoid last-minute additional citations that are not contained in a written filing. If STC must cite additional case law, a supplemental filing should be submitted to the court, but if this is not possible, STC must bring hard copies of any additional case to court to be provided to the defense counsel, court reporter, and military judge.

Some circuits have specific deadlines by which STCs are required to provide hard copies of each filing, motion, and enclosure to the court reporter to be marked as an appellate exhibit and appended to the record. In all cases, STCs must meet these deadlines. If there are no specific deadlines, the hard copies should be provided sufficiently in advance of the hearing to enable the court reporter to update and print an appellate exhibit list. Emailed motions and enclosures are courtesy copies that may satisfy a filing deadline, but they are not the official record copy. Counsel should request a copy of the appellate exhibit list to verify all motions and responses submitted have been received and appropriately marked by the court reporter.

## 0905 LITIGATION INVOLVING ACTIONS OF A PARTICULAR PROSECUTOR

Sometimes the actions of the STC may be the subject of litigation, or they may be argued to constitute supporting evidence of a particular motion. In speedy trial litigation, for example, a log of the STC's day-to-day actions on the case may be offered as evidence. In some motions involving discovery, the STC's decision whether to provide material, or when to provide it, could be the subject of specific litigation. Supervisory counsel should be cognizant of any situation where a prosecutor may have a personal stake in the litigation, or a potential conflict of interest. In such cases, it is best for either co-counsel or supervisory counsel to argue that particular motion at the Article 39a hearing.

## 0906 ARTICLE 62 APPEALS

Article 62, UCMJ, 10 U.S.C. § 862, allows for interlocutory appeals of a military judge's ruling in limited circumstances. The appeal may not be taken unless STC provides the military judge a written notice of appeal within 72 hours of the order or ruling. Special trial counsel must consult with the Chief STC and Region STC and may consult with Appellate Government (Code 46) in order to determine whether to provide notice to the military judge.

Ultimately, the LSTC will determine whether to file an Article 62 interlocutory appeal, but that decision will be coordinated with Appellate Government.

Appellate Government will ordinarily represent the OSTC counsel before the Navy-Marine Corps Court of Criminal Appeals. Special trial counsel should notify their Chief STC and Region STC as soon as they believe the military judge may make a ruling that would justify an interlocutory appeal. Upon the judge's ruling, STC should immediately request a delay in order to determine whether to appeal the judge's ruling. For comprehensive guidance on interlocutory appeals, see Code 46's standard operating procedures. Although these procedures are not binding on the LSTC, they are informative.

[Code 46 SOP for Article 62 Appeals can be found \*\*HERE\*\*.](#)

## 0907 TCAP MOTIONS BANK

Special trial counsel may use TCAP's Motion Bank for motion shells, examples and templates. OSTC offices are expected to share all local substantive motions filed, all defense responses, and all military judge rulings with TCAP for consolidation and posting in the TCAP Motion Bank.

When using a motions bank document as the foundation of a filing, the STC must ensure the case citations are correct, all names are changed, and all facts are updated. The signatory to the court filing is the person who is asserting the correctness of the legal citations and arguments to the court. Although stock filings assist in avoiding each STC having to start from scratch, ultimately, the STC must confirm he or she is comfortable signing his or her name to the document.

TCAP Motions Bank can be found [HERE](#).

### 1001 PRETRIAL DISCOVERY REVIEW

Although discovery is an ongoing process, it is best practice for the OSTC team to engage in one last check of the discovery and discovery records prior to trial, to ensure all material was properly provided to defense. In the event that some piece of discovery was missed and not provided, it is much better to provide even late discovery prior to trial, than during or after. It is also a good practice to reach out to defense a couple of weeks before trial to ask whether they are missing any information or there are any outstanding issues to resolve before the court-martial.

### 1002 TRIAL SOP / STEPS

Proper advance preparation is the key to maximizing the Government's chances of success at trial. As trial approaches, you should review your proof matrix again to ensure you have the evidence you need to survive an R.C.M. 917 motion. Schedule and conduct a murder board at least 30 days before trial during which you will talk through your trial plan. The murder board topics of discussion should include witnesses, witness order, exhibits, foundation for admitting exhibits, theme, theory, division of labor between trial partners, and anticipated motions or objections by the Defense at trial. EARLY witness preparation is the key to avoiding last minute surprises and continuance requests. Early witness preparation is also the key to understanding your case and to maximizing your witnesses' ability to confidently, calmly, and accurately provide the testimony you will elicit.

The following portion of the master checklist covers required steps when proceeding to Trial.

#### **TRIAL CHECKLIST (RCM)**

- ☐ Complete Order of Attack / Trial Responsibilities Chart (Included in OneNote)
- ☐ Confirm all witnesses are notified of trial dates and have received subpoenas (Government and Defense)
- ☐ Notify witnesses' commands (Time and Uniform)
- ☐ Victim/VLC notified
- ☐ Case NCIS Agent/Investigator notified
- ☐ Arrange for Brig Chasers
- ☐ Confirm Court Reporter/equipment
- ☐ Complete Courtroom Security Plan
- ☐ Members
- ☐ Accused elected forum on the record
- ☐ Amended Convening Order Complete
- ☐ Verify that all members are senior to accused
- ☐ Members Questionnaires Received and provided to DC and to Court
- ☐ Review Members Questionnaires
- ☐ Prepare Page 58 matters

- ☐ Voir Dire
- ☐ Findings worksheet
- ☐ Sentencing worksheet
- ☐ Proposed instructions
- ☐ Combined Witness List
- ☐ Gov't Exhibit List
- ☐ Judicial notice requests
- ☐ Verify Maximum Sentence (Coordinate with DC)
- ☐ Pre-trial confinement credit calculated = \_\_\_\_\_ days (Coordinate with DC)
- ☐ Prepare Members Folders
- ☐ Cleansed charge sheet
- ☐ Convening Order
- ☐ Paper and pen for questions
- ☐ Member name placards (check spelling/rank)
- ☐ Prepare Trial Script
- ☐ Gather exhibits and prepare them for use at trial
- ☐ Provide exhibits to court reporter for marking
- ☐ Prepare witnesses
- ☐ Schedule and conduct Murder Board at least 30 days before trial ☐
- ☐ Prepare closing argument / rebuttal
- ☐ Prepare opening statement
- ☐ Prepare sentencing case
- ☐ Consult with VLC or victim regarding options under RCM 1001A
- ☐ Issue VWAP FORM 2703 as appropriate
- ☐ Prepare VWAP FORM 2704

[Templates for Pretrial Matters can be found HERE.](#)

## 1003 SUBMISSION OF PRETRIAL MATTERS

Pretrial matters must be submitted timely and in accordance with the court's Trial Management Order (TMO). Pre-trial matters consist of providing the following to the court:

- a. Cleansed Charge Sheet
- b. Government Witness List
- c. Proposed Voir Dire
- d. Proposed Findings Instructions
- e. Findings Worksheet
- f. Sentencing Worksheet
- g. Government Notice of Intent to Use Electronic Media and Demonstrative Aids
- h. Members' Questionnaires

## **1004 VOIR DIRE**

Voir dire serves two purposes: to determine whether members have beliefs that make them subject to challenge for actual or apparent bias; and to begin to build rapport and credibility with the members.

Voir dire is sometimes used by parties to attempt to convince the members to view the evidence in a way that is beneficial for said party. Some questions resemble argument, or attempt to box members into that party's position with respect to the facts. The Government should resist the temptation to include these "thematic" questions, and challenge defense's attempts to ask them. Special trial counsel should remain above board and focus purely on questions that go to whether the member has a potential bias.

Special trial counsel should also "play the long game" with respect to member challenges. If STC believes there is potential bias, they should not reflexively oppose a defense challenge. On appeal if a court holds the military judge abused his or her discretion in denying a defense challenge for cause (that the trial counsel likely objected to), the result is reversal of the findings. Therefore, STC should give serious consideration to every defense challenge for cause, and should join in any defense challenges they believe to be valid.

## **1005 OPENING STATEMENT**

Opening statement is an STC's opportunity to present the theme and theory of the case and preview the evidence for the factfinder. Special trial counsel should be careful not to stray into arguing what the evidence means, which is appropriate for closing argument, but not an opening statement. Special trial counsel are free to discuss any evidence they reasonably believe will be admitted into evidence, regardless of whether that evidence has yet to be admitted. Counsel can discuss or even show critical pieces of evidence, such as a weapon, or the accused's confession, during opening statement. When showing evidence that has not yet been admitted, the STC should inform the military judge of this intention in advance.

## **1006 PRESENTATION OF GOVERNMENT'S CASE ON THE MERITS**

The government's case in chief should focus on establishing the elements of all charged offenses beyond a reasonable doubt. This can be done through witness testimony, evidentiary exhibits, and at times through inferences derived from the evidence. STCs should use their proof matrix as a guide for the *minimum* evidence to present during the government's case in chief. STCs should include every potential witness on their witness list to ensure that the Defense is not later surprised.

## **1007 RESPONDING TO RCM 917 MOTIONS**

It is common for defense to move for a finding of not guilty under RCM 917 at the close of the government's case, but the Defense may raise this motion later. The STC should be prepared to state what evidence which, along with all reasonable inferences and applicable presumptions, could reasonably tend to establish every element of the charged offenses. If the Defense motion cites missing evidence, the STC should move the court to allow the government to reopen the case in order to put on the required evidence.

## **1008 PREPARING FOR THE DEFENSE CASE ON THE MERITS**

Trial counsel should be prepared to cross-examine all witnesses on the defense witness list, as well as the accused. Additionally, trial counsel should be prepared to raise any potential objections to inadmissible defense evidence that were not raised via motions *in limine*.

## **1009 GOVERNMENT CASE IN REBUTTAL**

While it is often difficult to anticipate what in the defense case in chief will require a response, there are certain things the government can do to prepare for a rebuttal case ahead of time. One is finding character witnesses who can testify to government witnesses' positive character for truthfulness, which can become admissible if defense calls witnesses to attack the government witnesses' truthfulness. The government may also utilize expert testimony in rebuttal, if defense called an expert in their case in chief. Critically, RCM 701 (a)(2)(B) (iii) requires the government to provide defense with evidence the government anticipates using in rebuttal during the normal course of discovery. Rebuttal must be truly responsive to a specific item of evidence presented in the defense case and cannot be used to offer additional evidence that should have been presented during the government's case in chief, for instance, as a result of defense cross-examination of government witnesses. Trial counsel should not save a crucial piece of evidence for rebuttal because the evidence can only be presented if the defense: (1) presents a case; and (2) presents evidence to which the rebuttal evidence is truly responsive.

## **1010 CLOSING / REBUTTAL ARGUMENT**

Closing argument is the opportunity for trial counsel to summarize the evidence and explain to the factfinder how it establishes each element of the charged offenses beyond a reasonable doubt. Special trial counsel should focus their argument on the evidence and reasonable inferences to be drawn therefrom, and should avoid any sort of personal attacks on the accused or the defense counsel. Additionally, STCs should avoid providing their own opinion or views on a witness's credibility. It is best to avoid "we know" and almost always best to avoid saying "I."

Rebuttal argument is limited to responding to defense's closing argument. Special trial counsel can use this opportunity to rebut points made by defense and to contend that the defense arguments do not give rise to reasonable doubt. Like in closing, trial counsel should not inject their own views or opinions into rebuttal argument. Current judicial circuits and MJ's are not consistent on the question of whether two different government counsel can argue the closing and the rebuttal. Special Trial Counsel should make sure they understand the MJ's stance on this question prior to deciding whether to split closing and rebuttal argument between counsel.

## **1011 PROTECTING THE RECORD**

In addition to obtaining a conviction, STCs must also focus on ensuring the conviction withstands appellate review. In order to do so, STC should ensure all necessary information is in the record (either recorded during trial/in a 39(a) hearing or attached as an exhibit). Special trial counsel should approach all aspects of trial from the perspective that it is their job to protect the record, rather than assuming the military judge will do so. Special trial counsel must ensure the military judge provides rulings on the record for all motions and objections (not just at RCM 802 conferences), ideally with fully articulated reasoning.



## 1012 POST TRIAL ACTIONS

The court reporting division currently reports to the RLSO Command Services Department, or Post-Trial Department. Not all locations have assigned civilian court reporters. Some locations have a Legalman serving as primary court reporter. Other locations have Legalmen serving as alternate court reporters. Although part of the RLSO, counsel should regard court-reporters as neutral parties to the court, similar to that of the military judge or clerk of the court. Because all court reporters are assigned to the RLSO, not the OSTC, STCs should be especially courteous to court reporters. Communication and proper prior planning can ensure that the STC's documents are received, appended, marked, and able to be referred to on the record by their appellate exhibit numbers.

The following portion of the master checklist covers required steps to support Post-Trial processing:

### **POST-TRIAL CHECKLIST (RCM)**

- ☐ Prepare Statement of Trial Results
- ☐ Deliver Results of Trial to:
  - ☐ Brig (if Applicable)
  - ☐ Convening Authority
  - ☐ Accused command
  - ☐ Victim's command in Sexual Assault Case
  - ☐ SACMG chair in Sexual Assault Case (if applicable)
- ☐ Notification of the Result of Trial (via email or phone)
- ☐ CO/XO/OIC/TDH RLSO
- ☐ VLC or victim as applicable and necessary
- ☐ Case NCIS Agent/Investigator notified
- ☐ Clemency advisement and post-trial rights provided to Victim
- ☐ Transfer case to post trial processing unit
- ☐ Ensure Gun Control Act (GCA) Notification complete

### 1101 PAPER CASE FILES

Although STCs are not required to maintain a full paper case file, at a minimum, every STC must have a paper case file for each case, from initial intake to entry of judgment. The minimum contents of the paper case file are stated above. Having a paper case file ensures no pre-preferred case is lost in the cloud and it ensures the STC is never caught unprepared in court when he or she is unable to access electronic documents. Special trial counsel may maintain more extensive supplementary paper case files that contain more than the minimum contents specified in this Manual. The creation of a paper or any other non-standard case file, however, does not eliminate the requirement of additionally maintaining a standard OneNote described in [OSTCM Section 0203](#). Special care should be taken when paper files contain personally identifiable information (PII). Even if a file does not contain PII, counsel must have a Privacy Act Controlled Unclassified Information (CUI) notice affixed to the front of the file. When unattended, paper case file must be secured behind at least one locked door. Storage receptacles containing case files must have a CUI notice affixed on the outside of the receptacle.

### 1102 WOLVERINE – ELECTRONIC CASE MANAGEMENT SYSTEM

Cases should be entered into Wolverine or NCORs, as appropriate, within 24 hours/one work-day of receipt.

Required information for initial case input. The following information must be entered into Wolverine/NCORS upon case receipt. This same information will be initially filled into a case intake form that will be maintained in the paper case file. This document will assist the paralegal in creating the database entries. Fields 1 through 11 are located within the “Start case” tab in Wolverine:

- (1) Last Name
- (2) First Name
- (3) Middle Initial
- (4) Pay Grade
- (5) Service
- (6) Sex
- (7) Race
- (8) Ethnicity
- (9) DOD ID
- (10) Pay entry date (PEBD)
- (11) Date of Birth
- (12) Victim’s name – Intake personnel must then cross-reference victim names in NCORS to see if the victim is named as a victim, accused, or witness in any other case.
  - a. This is essential to determine whether any “related” offenses exist over which the OSTC might decide to exercise authority
- (13) Major Witness names – Intake personnel must then cross-reference witness names in NCORS to see if the witnesses are named as a victim, accused, or witness in any other case.

[Wolverine Business rules can be found \*\*Here\*\*.](#)

- a. This is essential to determine whether any “related” offenses exist over which the OSTC might decide to exercise authority
- (14) Case Description (Located in the Case Status & Chronology Tab). The case description must be sufficiently detailed to apprise the reader of the nature of the case, the allegation, the relationship between the parties, and the circumstances of the alleged offense. All case descriptions must include the date of alleged offense.

Case Updating. Information should be entered into Wolverine/NCORS routinely as the case develops. Case milestones and information located in the “Accused Information,” “Case Information” and “Case Status & Chronology” tabs must be populated prior to case closure. The “Current Case Status” tab shall be updated at least weekly.

- (a) UCMJ Article 140a. The military justice data collection requirements of Article 140a are robust. Enclosure (1) annotates 98 (of 155) 140a fields that must be entered into Wolverine/NCORS, when appropriate. Article 140a fields are also annotated and highlighted in yellow in Wolverine/NCORS. Not all fields will be applicable in every case, but when applicable, fields must be accurately completed.

Case Transfer. Occasionally a case may begin under the cognizance of a RLSO or another OSTC office, but subsequently the case may later be transferred to another office. Alternatively, a case may begin in OSTC and be transferred to a RLSO. The following procedure shall be used when transferring a case in Wolverine/NCORS:

- (a) Transferring office Steps:
  - (1) Select “Yes” on the “Alternate Disposition” field.
  - (2) Under “Type of Alternate Disposition” in the “Case Information” tab, annotate the case as “Transferred.”
  - (3) Annotate in the “Case Chronology” section that the case was transferred to “X” RLSO/OSTC., and list the appropriate POC. Additionally, state the basic reason for transfer (ie. conflict, PCS of accused, home port shift, etc.).
  - (4) Ensure the receiving RLSO/OSTC counsel acknowledges the inbound case.
- (b) Gaining office Steps:
  - (1) Submit a Helpdesk ticket in Wolverine/NCORS requesting the case be transferred to the gaining office. The Helpdesk link can be accessed by clicking “Get Help” in the top right corner of the Wolverine menu.

Case Closure. Closed cases will remain accessible in Wolverine/NCORS, but will no longer populate on the Active Cases screen, or appear on the Access-generated Wolverine reports. The process for case closure differs in each of the following categories:

- (1) Cases with a Statement of Trial Results (STR). If a case has been preferred, referred, and adjudicated through trial, and has an STR, it must be closed by fully completing the “Disposition” tab in Wolverine.

- (2) Cases with preferred charges that are alternatively disposed. If a case has preferred charges, or preferred and referred charges, and is ultimately disposed of outside of court-martial, it must be closed using the “Alternate Disposition” section of the “Case Information” tab, using the following procedure:
  - (a) Select “Yes” on the “Alternate Disposition” field;
  - (b) Complete the “Alternate Disposition Date” and “Type of Alternate Disposition” fields; and
  - (c) Complete a Current Case Status entry beginning with the words “CASE CLOSED” in all capital letters.
- (3) Cases without preferred charges that are alternatively disposed. For cases where charges were never preferred, to include those where a Recommendation Against Prosecution (RAP) was delivered, where the command and/or SJA communicates an intent NOT to prefer charges, but to adjudicate the case in some other manner, the following procedure shall be used:
  - (a) Select “Yes” on the “Alternate Disposition” field;
  - (b) Complete a Current Case Status entry beginning with the words “CASE CLOSED” in all capital letters; and
  - (c) Ensure the “Date RLSO Recommendation to Command” field is completed.
- (4) Civilian Monitoring Cases. If at any point after case creation, a civilian jurisdiction (USAO, State or City Attorney’s Office) files charges with the respective court, or indicts the accused, the case may be closed in Wolverine using the following procedure:
  - (a) Trial Counsel informs cognizant SJA and/or command that the RLSO will no longer be tracking the case due to civilian prosecution.
  - (b) In the “Alternate Disposition” section of the “Case Information” tab, select “Yes;”
  - (c) Under “Alternate Disposition Date,” enter the date of the triggering event (e.g. filing of charges, Indictment); and
  - (d) Under “Alternate Disposition Type,” select “Prosecuted by Civilian or Foreign Authorities.”
- (5) Sexual Assault cases and the SADR. Collection and upload of the Sexual Assault Disposition Report (SADR) into Wolverine is no longer required. Once the triggering event is met for the categories described above, the RLSO may close the case in Wolverine using the above procedures, without waiting for the SADR.

Access-Generated Wolverine Reports/NCORS reports. Accurate report generation at frequent and flexible periodicity ensures OSTC trial teams and the OSTC chain of command have appropriate situational awareness to oversee cases under their cognizance. The Microsoft Access program can be used to organize and more clearly display data exported from the Wolverine Case Management System. Until NCORS is fully operational, all OSTC offices are ordered to use the reports described in this policy as their primary report source. Once NCORS reports are fully functional, these reports will be the ones used for supervision. The continued use of other independently generated local reports fosters inefficiency and contributes to lower quality data entry into the Wolverine Case Management System. Leaders will review their reports with a sufficient periodicity to ensure proper oversight of subordinate counsel and offices.

Instructions for creating the following reports can be found in APS Policy Note 5-22 – Wolverine Access Report Generation, which can be found in the supporting folder of this section.

a. RLSO Active Case Report – Version 1. Displays key information pertaining to all active cases in a given RLSO, organized by trial counsel name.

b. RLSO Active Case Report – Version 2. Displays key information pertaining to all active cases in a given RLSO, organized by case phase and color coded by Trial counsel assigned. Very similar information as Version 1, but a different format.

c. RLSO Case Processing Over 30 Day Report. Displays all cases where RLSO has received (and entered into Wolverine) a substantially complete ROI, and it has been over 30 days with no recommendation, RAP, or preferral.

d. Summarized Active Cases By Category. Brief breakdown of number of cases by status/phase (e.g. Preferred by not referred, Referred GCMs, etc.)

e. RLSO Speedy Trial Report. Displays all cases within a given RLSO where the accused is in any type of pre-trial restraint or confinement, as well as those non-restraint cases with an RCM 707 clock date over 80 days and not yet arraigned.

UNIFORM RULES OF PRACTICE  
BEFORE NAVY AND MARINE  
CORPS COURTS-MARTIAL  
CAN BE FOUND [HERE](#).

### 1103 NCORS - ELECTRONIC CASE MANAGEMENT SYSTEM

The Navy is in the process of developing and testing the new case management system - NCORS. The system should be fully operational by 31 July 2023. There will be a period of time when trial departments and the OSTCs will transition from use of Wolverine to the new system. This section will be populated with instructions at that point.

### 1104 CUI / PRIVACY SENSITIVE INFORMATION (PII)

PII is information about an individual that identifies, links, relates, or is unique to or describes that person. Examples include an individual's social security number, age, rank, grade, marital status, race, salary, telephone number, and other information of a demographic, biometric, personnel, medical, or financial nature. Due to the nature of prosecution duties, personnel are often required to review and handle PII. Because PII is susceptible to exploitation for identity theft and other harms, it must be handled with utmost care and protected from unnecessary release at all times. Failure to do so may result in civil or criminal penalties.

Each OSTC office must ensure PII is properly handled, redacted, and disposed of in accordance with JAGMAN section 0141a, SECNAVINST 5211.5 (series), and the Privacy Act, 5 U.S.C. § 552a. Social security numbers, or any shortened form of the social security number, will not be used on any military justice form (other than the charge sheet), document, or correspondence, and in any electronic case management system, unless specifically required by authorized policy, such as when reporting criminal justice information to the FBI. When documents, forms, correspondence, or a case management system require a unique identifier for an individual, the DoD ID Number will be substituted for the social security number.

Unless otherwise required by law, the Rules for Courts-Martial (R.C.M.), or the Military Rules of Evidence, Section 0141a of the JAGMAN requires all counsel to omit PII from all dockets, filings, pleadings, court records, and exhibits that counsel intend to use at any court proceeding, or that may otherwise be included in the record of trial. Under JAGINST 5813.2, victims must be referred to only by initials in any docket, filing, or court record made publicly available by 10 U.S.C. § 140a. The term *docket* includes information concerning each case docketed with the trial or appellate courts of any military branch. The trial-court docket includes the name of the case, the location of the hearing, the type of hearing, the military judge presiding over the hearing, and the counsel assigned to the case. The docket does not include any hearings before a case has been referred to a court-martial or Article 32 preliminary hearing. The term *filings* means all motions, notices, petitions, and requests submitted to a trial court or appellate court. The term *court records* means the charge sheet, convening order, court rulings, statement of trial results, CA's action, entry of judgment, and appellate court orders and opinions. Court records do not include the Article 32 report, a recording of any court session, or a transcript of the proceedings.

In accordance with Rule 7 of the Uniform Rules of Practice before Navy and Marine Corps Courts-Martial ("Uniform Rules"), dockets, filings, court records, pleadings and discovery material electronically transmitted to the court must be redacted to remove the following PII:

- (1) social security numbers;
- (2) taxpayer identification numbers;
- (3) birthdates;
- (4) names of minors;
- (5) names of victims;
- (6) financial account numbers;
- (7) home addresses;
- (8) personal telephone numbers; and
- (9) any other sensitive information as determined by the Secretary of the Navy.

Any counsel who creates a filing or court record is responsible for redacting protected information before filing the document. If a counsel believes that including such information in any filing or court record is necessary, counsel must first request permission from the military judge to file the document unredacted, in accordance with rules established by the trial judiciary. Counsel should request any filed document necessarily containing unredacted PII be sealed and enclose a proposed sealing order.

JAGMAN SECTION 0141A  
CAN BE FOUND [HERE](#)

## 1105 CASE CLOSURE

Cases disposed of at court-martial may be closed upon entry of judgment. The record of trial and exhibits, along with any associated investigative material will be saved to the case folder on the department's OneDrive. To close a case, the case folder, including the OneNote will be moved to the Closed Cases 20XX subfolder of the OneDrive. Attorney notes or work product should remain with the case file, but must be labeled accordingly. Additionally, the case shall be closed in the applicable case management system, pursuant to guidance set forth in [OSTCM Sections 1102](#) and [1103](#), and the applicable business rules.

For post 27 December 2023 allegations that do not go to trial, cases should be closed upon distribution of the deferral NODD. If the case ultimately involves a mast-refusal that results in a court-martial, STCs can “reopen” the case in NCORS to account for the changed status.

For legacy cases, cases adjudicated outside of court-martial may be closed once STC is notified that the CA does not intend to prefer charges. Prior to closing a case, counsel or an assigned paralegal will remove duplicate items from case files.

## **1106 PERSONAL FILE FOR STC**

After an official file has been closed, STC who want to keep historical files for their own records should transfer their case files to their individual OneDrive or to an NMCI-approved external hard drive. Personal files must never contain PII. For example, STC may retain only the redacted copy of filings submitted to the court. A personal retained copy does not take the place of the official file. STCs are responsible for the proper handling of any retained files.

## **1107 FILE DESTRUCTION**

JAGMAN 0160 requires each office, at minimum, maintain its files for two years. However, in criminal litigation, appeals may extend beyond this time, and there may be litigation hold orders for specific cases. Chief STCs must ensure that their counsel are aware of any cases or items that are subject to legal hold. In addition, Article 73 allows for a petition for new trial within three years after the date of entry of judgment on the grounds of newly discovered evidence or fraud on the court. For these reasons, OSTC offices must retain case files for three (3) years from the entry of judgment, unless there is a longer litigation hold order in place. After three years, administrative support personnel or a paralegal will verify there is no appeal pending or petition for new trial submitted. Once verified, they will request permission for file destruction from the Chief STC. Any existing paper files should be shredded, and electronic files deleted from the OneDrive.

### 1201 COORDINATION WITH INVESTIGATORS

Special trial counsel are required to work alongside investigators as part of a cohesive prosecution team. The STC's responsibility for timely and just investigation and prosecution of the case begins upon initial notification to the OSTC of the case—not on the date NCIS agents believe their ROI is substantially complete. No case gets better with time and any case that will result in a trial will have a better chance of success the sooner it is tried, consistent with responsible case preparation. The STC should regularly communicate with the agents on the status of the case, not only asking for information but actively engaging to help shape the investigation, brainstorm logical leads to follow, and constantly evaluate the strength of the case and whether the STC has enough information to make a preferral or deferral recommendation to the appropriate authority. Frequent and collegial communication between prosecutors and investigators is key to forging an ongoing professional relationship necessary for the efficient pursuit of justice. If counsel experience a lack of communication or collaboration with an investigating agent and cannot resolve the issue at their level, the chain of command should be informed.

Special trial counsel should be an active partner in the investigative stage and work with agents to develop an investigative plan. Unless impossible, STC should observe the victim's and accused's interviews. If possible, the STC should observe interviews of key witnesses. The STC must review preservation requests, warrant and subpoena applications, and provide advice on statutory elements of the crimes being investigated. Special trial counsel must communicate regularly with investigators on all assigned cases. Although every case is unique and requires varying levels of STC engagement, STC should aim to meet with the agents on their cases at least every other week. Cases that are likely to result in a preferral recommendation should be given special attention and shepherded along the process as quickly as is reasonably possible.

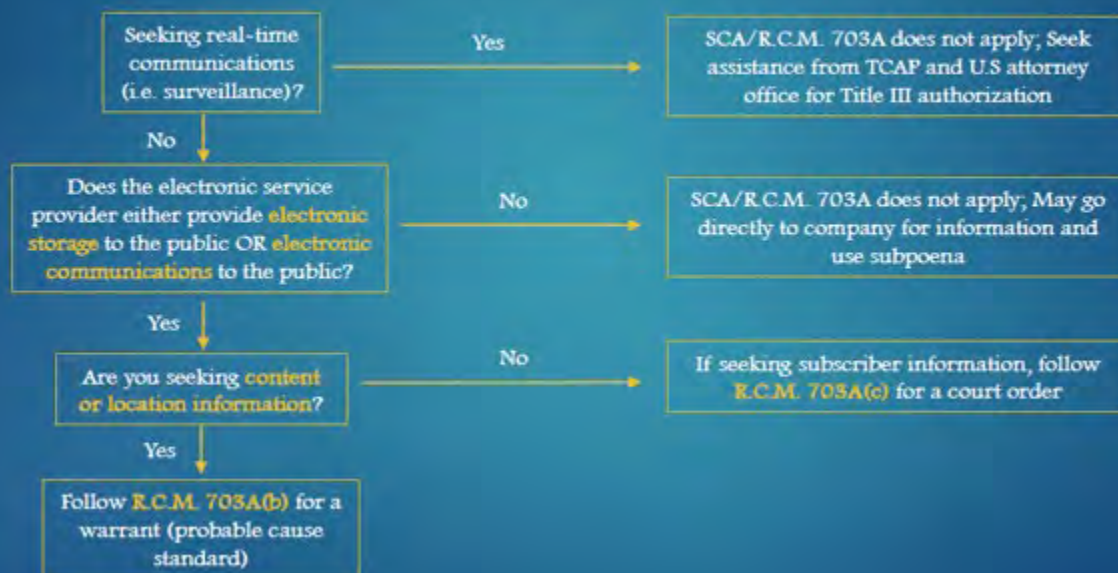
### 1202 ARTICLE 30A MATTERS

Required legal process depends on what item(s) the government is seeking. Below is a non-exhaustive list of commonly requested items by counsel and the legal process / forms required along with a flow chart to determine which authorities apply.



Item (non-exhaustive list)	Process	Form	Approver
Medical Records (MTF or Civilian Facility)	Subpoena	DD Form 453	Magistrate MJ
Financial Records (See RTFPA Guide) • Navy Federal, Bank of America, CashApp, Venmo, etc.	RTFPA Notification, Subpoena, RTFPA Certification	DD Form 453+	Magistrate MJ
Airline Passenger Info	privacy.cbp@cbp.dhs.gov	CBP Form	TC
Airline/Overseas Travel	privacy.cbp@cbp.dhs.gov	CBP Form	TC
Cell Phone Call Logs	Subpoena	DD Form 453	Magistrate MJ
Text Message Logs	Subpoena	DD Form 453	Magistrate MJ
Email Content	Warrant + Affidavit	DD Forms 3057, 3056	Magistrate MJ
Text Message or iMessage Content	Warrant + Affidavit	DD Forms 3057, 3056	Magistrate MJ
Social Media Logs, Subscriber Info	SCA Court Order	2703(d) Application	Magistrate MJ
SnapChat/FB/Social Media Messages or Posts	Warrant + Affidavit	DD Forms 3057, 3056	Magistrate MJ
Amazon Purchase History	Subpoena	DD Form 453	Magistrate MJ
Amazon Alexa History ("content")	Warrant + Affidavit	DD Forms 3057, 3056	Magistrate MJ
IP Address History	SCA Court Order	2703(d) Application	Magistrate MJ
Cell Site Tower Location Information • <i>Carpenter v. United States</i> , 585 U.S. ____ (2018), 183 S. Ct. 2206 (2018)	Warrant + Affidavit	DD Forms 3057, 3056	Magistrate MJ
Lyft/Uber Logs and Receipts	Subpoena	DD Form 453	Magistrate MJ
Lyft/Uber Passenger-Driver Messages	Warrant + Affidavit	DD Forms 3057, 3056	Magistrate MJ
R.C.M. 703 applies	RTFPA applies (follow RTFPA Guide for steps and required documents)	R.C.M. 703A & Stored Communications Act applies	

## Pre-Referral Electronic Subpoenas, Warrants & Orders



The initial step in obtaining digital or electronic evidence is to submit a Preservation Request to the company or companies where STC and investigators believe the evidence will be found. Pursuant to 18 U.S.C. § 2703(f), the government may request a company to “take all necessary steps to preserve records and other evidence in its possession” for a period of 90 days. This preservation request takes a “snapshot” of all records pertaining to a particular account. The preservation request is designed to preserve the records while the government obtains the proper service (subpoena, court order or search warrant) to obtain further information. The government may request an additional 90 days to perfect their request for the appropriate search document. A Preservation Request does not require the government to establish probable cause or any other burden of proof to issue, the only requirement is that there is some relevance to an ongoing investigation. The government may also request that the company not disclose, to the account holder, the existence of the request. While this is merely a request, the vast majority of companies will comply and not notify the account holder.

RTFPA Primer can be found [HERE](#)

Standard Pre-Referral Subpoenas. When determining whether a standard subpoena or warrant is required, STCs must assess how the institution that holds the requested records is categorized. Generally speaking, institutions can be classified into four categories: (1) financial institution; (2) electronic communication service (“ECS”); or (3) remote computing series (“RCS”); and (4) all others. If the record holder is not one of the first three entities, then a standard subpoena can most likely be sent to obtain records. Best practice is to contact the company either through their legal compliance department or via their law enforcement portal, as ask what documents they require. The one caveat is that, currently, most cellular telephone companies will provide logs of phone calls and text messages with a standard subpoena, and do not require any additional documentation to be submitted with the STC’s request. Accordingly, call logs (including to/from phone numbers, date, time and call duration) and text logs (including to/from phone numbers, and date and time stamps) can be obtained with only a standard subpoena. When submitting the completed subpoena form to the judiciary, include a sentence or two explaining how the requested information would aid the criminal investigation. An affidavit from NCIS is not required under the rules.

Template for a Non-Disclosure Order can be found [HERE](#)

Sample Preservation Request can be found [HERE](#)

The Right to Financial Privacy Act Subpoenas. If the record holder is a financial institution, the Right to Financial Privacy Act (RTFPA) is triggered and a few additional steps must be followed in order to obtain financial records. It is the STC’s responsibility to comply with these requirements. First, a standard subpoena must be sent and approved by a military judge. Once signed, STC must send a “notification letter” to the account holder along with the subpoena and template motion to quash and then wait either 10 or 14 days for the account holder to respond. After the waiting period has expired, STC can then submit the signed subpoena and a “certification letter” (attesting that the notification letter and RTFPA requirements have been fulfilled) to the financial institution.

Delayed Notice or Non-Disclosure Order. A delayed notice order or non-disclosure order can be requested from the military judge to delay or not notify the account holder of the STC’s request. The STC must specify facts demonstrating that failure to delay notice will result in: (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidation of potential witnesses, or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. A draft order

should be provided to the military judge, and careful attention should be paid to which basis actually exists. Non-disclosure order requests must be signed by a certified STC.

Stored Communications Act/R.C.M. 703A Court Orders. In 2019, Congress amended the Stored Communications Act to clarify that Article I judges, to include military judges, can sign stored communication warrants, thereby requiring ECS and RCS service providers to honor said warrants. The enactment of R.C.M. 703A adopted, in most part, the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.* R.C.M. 703A allows the government to seek search warrants and court orders from military judges and magistrates for the purposes of collecting stored wire and electronic communications. An ECS or RCS service provider is essentially a company that provides, to the public, a service or repository to send and store electronic communications. Classic examples of an ECS and RCS providers are Google, Facebook, Instagram, Snapchat, Whisper, Discord, etc. Shopping websites, such as Amazon, are not ECS or RCS providers.

R.C.M. 703A(a)(4) allows STCs to seek a court order, similar to 18 U.S.C. § 2703(d), to provide account and transactional information (NOT content) pertaining to a specific account, including:

- (1) the name of the account holder;
- (2) the address of the account holder;
- (3) the local and long distance telephone connection records, or records of session times and durations;
- (4) the length of service and types of service utilized;
- (5) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
- (6) means and source for such service (including any credit card or bank account number).

As noted above, pursuant to R.C.M. 703A(a)(4), to obtain account holder information and/or transactional information, the government must obtain an order signed by a military magistrate or judge. Before signing such an order, the military judge must determine that the government has established “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” R.C.M. 703A(c)(1)(A). This order will allow the government to obtain account holder information and transactional activity of the account. Requests to obtain the content of any account or the geolocation information of a cellular phone must be accomplished through a search warrant.

#### Stored Communications Act/R.C.M. 703A Search Warrants

To obtain content from an ECS or RCS provider, the STC must submit to a military judge a request for a search warrant, R.C.M. 703A(a)(2). In no circumstance should an STC send a request to a military judge without having first personally reviewed it for propriety and without personally concluding that the affidavit states probable cause to search. The search warrant request must include information establishing probable cause to believe that the information sought contains evidence of a crime and the request must not be overly broad. R.C.M. 703A(b)(1)(B). Probable cause is a totality of the circumstances test and is highly fact dependent. It is necessary that the facts included in the affidavit which must show, in essence, that there is a “fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The warrant also shall identify the property to be searched (generally included in an “Attachment A” to the affidavit), a list of the property or items to be seized (generally included in an “Attachment B” to the affidavit), and designate to the military judge to whom the warrant must be returned. R.C.M. 703A(b)(3). The warrant must be narrowly tailored and the facts justifying probable cause must not be stale. Content may include emails, blogs, videos, images, social media posts, text messages, website content, friend lists, etc. It is

important to note that R.C.M. 703A (a)(2) gives the impression that the government can obtain content through the issuance of a court order, however, this is contrary to well- established federal case law which requires a search warrant to obtain any form of content. *See, United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010); *see also Carpenter v. United States*, 585 U.S. 138 S. Ct. 2206 (2018).

R.C.M. 703A(d)(1) allows the government to request delayed notice to the account holder when seeking a court order or search warrant. Before delaying notice of the court order or search warrant, the government must demonstrate to the court that failure to delay notice will result in: (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. The formal request for a non-disclosure order should be submitted with the request for a search warrant. The STC must submit a draft non-disclosure order. Careful attention should be paid to which basis under 18 U.S.C. § 2705(b) actually exists. For instance, if there is reason to believe notice may result in destruction of evidence, do not state that notice may result in endangering the life or safety of an individual. Non-disclosure order requests must be signed a certified STC. Special trial counsel and investigators have multiple resources at their disposal to determine the location and manner to serve search warrants or orders. Among those resources are [www.search.org](http://www.search.org), the law enforcement guide for the service provider, and the Law Enforcement Technology Investigations Resource Guide created by Hawk Analytics. The National Domestic Communications Assistance Center (NDCAC) run by the FBI is an excellent central repository of information for ECS, RCS, and other public companies. Special trial counsel may also contact TCAP for assistance in perfecting service of a search warrant or order.

Guide for processing a CASS can be found [HERE](#)

An Article 30a matters checklist is included with the “Additional Resources” above. Chief STCs must ensure an STC had completed a warrant checklist before submitting any Art. 30a matter to a military judge for review.

Additional Resources in support of Article 30A matters can be found [Here](#).

## **1203 COMMAND-AUTHORIZED SEARCHES AND SEIZURES (CASS)**

Search authorizations executed on persons or places are an important investigative tool. However, they also constitute a substantial intrusion upon a person’s privacy. As such, they must be carefully drafted and limited in scope. Searches may be executed in conjunction with an initial suspect interview or during an investigation. Even though commanders are not lawyers, the STC must still pay particular attention to the affidavit in support of a CASS because any CASS contested at trial will have to survive judicial scrutiny.

The STC should review all search authorizations and affidavits before the investigator presents them to the search authority. Special trial counsel should ensure the request is properly formatted, is prepared for an authority empowered to authorize the search, is sufficiently specific and not overbroad, and that it meets the required probable-cause standard. *See, e.g., M.R.E. 315*. If possible, STC should remain available during the execution of a search to respond to agent questions incident to the search and seizure.

## 1204 BRIG PHONE

Brig officials record all calls to and from confines (except for those with their attorney). These calls may be a valuable source of information or statements. As with any accused's statements, there are disclosure requirements under M.R.E. 304 which must be followed. Statements must be disclosed before arraignment, with non-compliance excused only for good cause. Although post-arraignment statements may be made and collected, any pre-preferral and pre-arraignment statements must be gathered in a timely manner and disclosed to the Defense before arraignment if the STC intends to use them at trial. As for any additional statements that may be included in calls made post-arraignment, the STC should plan on gathering that additional information at least one month before trial to allow for a complete review and effective use at trial. Any request for recordings of an accused's phone calls should be made to the relevant contact at the brig in writing.

Jailhouse calls placed immediately after an accused is placed into PTC may be particularly important to determine if there are any ongoing crimes of obstruction of justice through intimidation of witnesses or soliciting others to destroy evidence. This evidence could be essential in intimate partner or other violent crimes cases where a witness later declines to cooperate or testify for the prosecution.

## 1205 OBTAINING MEDICAL RECORDS

All medical records, however obtained, pose special issues of privilege and confidentiality. It is important that STC be aware of these restrictions and their source. This is an ever-evolving area of the law. Special trial counsel should consult with the Chief STC and/or TCAP if they have any questions. If the medical records that are being sought belong to a victim, the VLC in the case should be consulted so they can make their client aware or assist in the process. If the victim does not have a VLC, consult with the Chief STC on how to coordinate with the victim on this process.

Template for Request for Jailhouse Calls can be found [HERE](#)

There is no recognized medical doctor-patient privilege in the military. The M.R.E. 513 privilege is well-established and has recently been further interpreted by CAAF in *U.S. v. Mellette*, 82 M.J. 374. Special trial counsel should be aware that military medical treatment facilities may purposely or inadvertently make overbroad disclosures of information, including privileged M.R.E. 513 records, when only non-privileged matters were requested. When records may include erroneously-disclosed privileged records, the STC should: 1) notify the VLC (if any) of the possible disclosure; and 2) consult the Chief STC and Region STC to establish a taint team (consisting of personnel assigned to the opposite OSTC Region) to allow one or more judge advocates outside the prosecuting OSTC office to review the records to ensure no privileged information is included. When the need arises, the cognizant Region STC must ask the opposite coast Region STC to nominate one or more judge advocates to review the materials. The Region STC who has cognizance over the case must appoint the taint team in writing and direct the team to review and separate any suspected privilege materials. The taint team appointment letter will further direct that the taint team may not discuss the content of the records with anyone except their own supervisory counsel, and then only for the purpose of getting advice whether the matters are privileged. If the taint team believes privileged information was improperly disclosed, the team will: 1) retain a full unredacted copy of the materials reviewed then 2) provide the assigned STC with a redacted copy of materials that do not contain any

Guidance on Medical and Mental Health Records can be found [HERE](#)



privileged information. The full unredacted copy will be sealed, provided to the STC, and the assigned STC will move the court to permit non-disclosure. The materials will not be further reproduced (electronically or on paper) and the unredacted records will be provided to the court to be sealed and appended to the record.

## 1206 ORAL WIRE INTERCEPTS

Oral-wire intercepts, (sometimes referred to as “pretextual” phone calls and text messages) from victims to suspects, or the less common in-person recorded conversations, are potentially effective investigative tools to gain accused’s statements. Conducting such intercepts is not without risk, for they may run afoul of military protective orders in place, alert an accused to become suspicious, or create a negative impression of a victim to the members. Coordination should be made between the victim or VLC, trial counsel, and NCIS prior to a pretext communication to ensure compliance with any relevant rules and that necessary information is gathered. Close attention should be paid to M.R.E. 317(c) relating to oral wire intercepts by military personnel or their agents.

Oral-wire intercepts typically do not meet all the elements necessary to invoke Article 31(b). The relevant warnings under Article 31(b) need be given only when questioning is done during an official law enforcement investigation or disciplinary inquiry. *United States v. Jones*, 73 MJ 357 (CAAF 2014) set out a two-part test: (1) was the questioner acting in official capacity or through personal motivation; and (2) would a reasonable person consider the questioner to be acting in official law enforcement or disciplinary capacity?

DOJ Guide on Searching and Seizing Computers and Obtaining Electronic Evidence can be found [HERE](#)

If there is an MPO in place, counsel or the agent should contact the SJA of the accused to ensure that the accused is not disciplined for having contact with the victim or cooperating witness as a result of the government oral wire intercept operation. If an oral wire intercept will occur overseas, counsel and the agent should contact an SJA at the local RLISO to ensure they understand the legal landscape and will not violate any terms of status of forces agreements or other local international law that may impact international relations.

## 1207 OBTAINING EVIDENCE FROM DIGITAL DEVICES

Digital devices routinely contain important and relevant evidence. Seizing digital devices raises questions of probable cause, chain of custody, and meeting the particularity requirement of the Fourth Amendment. The Department of Justice has published a useful guide entitled *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, which provides very detailed and effective guidance on these issues.

### 1301 PRIORITY GIVEN TO CASES INVOLVING PTC

Article 10, Uniform Code of Military Justice, requires that cases in which an accused has been placed into pretrial confinement (PTC) be handled more expeditiously than other cases. Special trial counsel must give PTC cases the highest priority. Under Article 10, the government must exercise diligence in bringing a case involving PTC to trial. The right to a speedy trial belongs to the accused. It is the government's responsibility to ensure that right is protected. This includes STC, NCIS, the SJA, and the command. If any of the matters listed below can be completed early, they should be. At a minimum, STC must:

(1) Ensure that the confining command complies with the requirements of RCM 305. Special trial counsel must immediately ascertain whether he or she will be needed to present the case on behalf of the command at the initial review hearing;

(2) Prefer charges ideally within ten days, but no later than 30 days after the initial confinement decision. In many cases, the investigation will continue past that point, and new evidence may become available. In most PTC cases, it is better to prefer known charges as early as possible, and add additional charges as they become viable, rather than risk a speedy trial violation. When there is good cause for delay (e.g. processing of forensic evidence, etc.) counsel should send a written excludable delay (for the purpose of R.C.M. 707) request to the convening authority immediately. Requests should be prospective and not retrospective, when possible. That is, counsel should make a request before the delay occurs and should ask for a specific amount of days. If more time is needed, another request should be sent;

(3) For cases where a GCM is a potential forum, submit a request for a preliminary hearing officer using the Standard PHO Request form, in accordance with APS Note 3-22. The government shall request the earliest possible date it is ready to proceed, without consideration of defense counsel schedule. Reasonable defense request for delay will likely be granted, but it is incumbent on the government to proceed expeditiously;

(4) Remain actively engaged with all SJAs up the referral chain of command;

(5) Ensure charges are referred no later than 45 days following the confinement decision; and

(6) Arraign the case at the earliest opportunity after referral.

STCs are strongly encouraged to use the Speedy Trial Procedural Checklist linked to this section.

Speedy Trial Procedural  
Checklist can be found  
[HERE](#)

In the event the OSTC may defer a case to the RLSO for prosecution of non-covered offenses, the STC must coordinate with the local RLSO via the Chief STC to ensure a RLSO TC is assigned to monitor the case. The STC must maintain close communication with an assigned RLSO TC so that if the case is transferred, the RLSO TC already has cognizance of the case and can pick up the prosecution without delay. The OSTC must avoid unduly delaying the investigation or disposition decision in a case only to hand it off to a RLSO TC with insufficient action taken to allow the RLSO TC to meet the R.C.M. 707 speedy trial clock and to survive an Article 10 motion if one is raised.

## 1302 SPEEDY TRIAL LOG

In all cases involving pretrial confinement, it is essential for the government to exercise continuous due diligence in bringing the accused to trial swiftly. In the event of Article 10 speedy trial litigation, the government will be required to account for its daily activities and efforts in reaching arraignment. Accurate and contemporaneous record keeping of government action is crucial.

The following log shall be used for all cases involving PTC. The log shall be kept in the case's OneNote file and updated daily. Word version is attached to this section.

<u>DATE AND DAY #</u>	<u>OSTC ACTION</u>	<u>COMMAND ACTION</u>	<u>NCIS ACTION</u>

## 1303 OTHER FORMS OF RESTRAINT

In addition to Pre-trial confinement in a brig, there are other forms of restraint on liberty that may affect the STC's speedy trial analysis, and could ultimately be deemed by the court to be tantamount to confinement. Trial counsel should specifically ask the SJA and command whether an accused is under any form of restraint or restriction on liberty, and inquire deeply into the nature of that restraint. Best practice is to treat cases with all forms of restraint with the same level of exigency as one would for confinement.

Article 10 Speedy Trial  
Daily Log found [HERE](#)



## OSTCM 1400 – LAY AND EXPERT WITNESSES

[LINK TO OSTCM 1400 SUPPORTING MATERIAL FOLDER](#)

### 1401 CONDUCTING WITNESS INTERVIEWS

Interacting with witnesses and conducting witness interviews as part of case assessment and preparation is one of the most essential aspects of a trial team’s duties. In order to standardize case files, all OSTC victim or witness interviews will use the attached standard interview form to document interviews for inclusion in the case file.

[TCM Standard Witness Interview Form can be found \*\*HERE\*\*.](#)

Prover. Special trial counsel shall have a “prover” accompany them to all substantive witness interviews. The prover should be a military or civilian paralegal or administrative assistant assigned to the OSTC, or if a RLSO TC is assigned to the case, the prover may be a paralegal assigned to the RLSO. The prover is typically the paralegal supporting the trial team assigned to the case. The prover shall take notes on the OSTCM Standard Witness Interview form linked to this section. Notes can be taken electronically, or hand-written on the form, but must be saved to the standard OneNote immediately upon conclusion of the interview.

Disclosure and Discovery. Substantially verbatim notes must be provided to defense in the course of discovery. While only new matters are required to be disclosed, under R.C.M. 701, best practice in most cases is to disclose all Standard Witness Interview Forms to defense, to eliminate the possibility, or appearance of a discovery violation.

Substantially New Material. In the event that a victim or witness interview brings to light substantially new material or a new alleged offense, STCs are advised to pause the interview and bring the matter to the attention of the Chief STC. In some cases, the best practice may be to alert NCIS, or the cognizant investigative agency in order to conduct a detailed follow-on interview. Substantially new matters may also warrant a reevaluation of the charges or prosecution recommendation.

### 1402 EXPERT CONSULTANTS AND WITNESSES

Experts can make or break a military justice prosecution. Shortly after initiating a case screen, trial teams should assess whether they believe expert consultation or assistance is needed. Special trial counsel should not delay in requesting an expert – the earlier a needed expert becomes involved, the more helpful they can be toward case assessment and preparation. Certain cases are more likely to require an expert, such as homicide cases, alcohol facilitated sexual assaults, and any case where defense has requested an expert. A list of known experts, along with their qualifications and CVs is linked to this section.

[List of known experts with CVs can be found \*\*HERE\*\*.](#)

[Additional guidance on seeking and requesting Expert Assistance can be found \*\*HERE\*\*.](#)

The FY23 NDAA directed the President to prescribe regulations to ensure that “residual prosecutorial duties” – such as hiring experts – in cases

involving covered and related offenses are transferred to the military judge, STCs, or other appropriate authorities as of 28 December 2023. Pursuant to the revised RCM 703(d), when seeking expert assistance for their own case, STCs “shall, in advance of hiring the expert, and with notice to the defense, submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned,” which seemingly fails to meet the intent of the FY23 NDAA. The JAGMAN is currently under revision, so the regulations are pending. In the interim, STCs shall work with the CAs and their Chief STCs when seeking employment of a Government expert.

The statute suggests that Defense expert assistance requests on cases involving covered and related offenses should also be approved by the Government. We will await JAGMAN guidance on that front as well. In the interim, STCs shall work with the CAs and their Chief STCs when seeking employment of a Defense expert.

## 1403 WITNESS PROFFERS

The permission of a Chief STC is necessary before conducting a witness proffer.

An off-the-record proffer is a means by which to obtain information from a prospective cooperating witness or prospective accused either seeking immunity or contemplating cooperation but who wants some protection from direct use of his or her statements against them. A proffer letter provides that the individual’s statements cannot be used directly against her, but that the government may make indirect or “derivative” use of the information to find other evidence which can be used against the individual. Notwithstanding the terms of a proffer letter, M.R.E. 410 bars admissibility of certain statements made by an accused person during plea discussions with, among other persons, the trial counsel.

An exception to this direct-use prohibition exists if the individual giving the proffer testifies or argues at some subsequent hearing to materially different facts than those provided during the proffer. In that scenario, the individual may be cross-examined or confronted with the prior inconsistent proffer statement.

If the prospective witness becomes an accused, or the accused does not end up cooperating, the proffer letter also protects the government against having to establish that its evidence does not derive from a tainted source (as must occur when there is a claim that a prosecution is based on evidence obtained from an accused who had been immunized). The proffer letter does not confer immunity on the individual and cannot be considered to be sworn testimony if the individual testifies at an Article 32 hearing or trial. If a witness who has given a proffer testifies without immunity, the testimony is “on the record” and can be used for any purpose.

Sample Proffer letter  
can be found [HERE](#)

Special trial counsel are not permitted to modify the terms of the standard proffer letter without Regional STC approval. Also, STC are not permitted to make any “side deals” or *sub-rosa* arrangements to extend or alter the protections provided by the proffer letter. If the defense is unwilling to accept the terms of the letter, a proffer will not occur. Attorney proffers are not authorized as they offer no protection to the Government if an accused or witness testifies inconsistently.

A proffer letter is typically used in the following circumstances:

(1) To determine whether immunity is appropriate, STCs will need to determine the extent of a witness's involvement in the crime and the nature and significance of the information he or she can provide. Under these circumstances, the witness could give an off-the-record proffer providing him or her some protection while providing STC with the information needed to determine whether the witness should be immunized; or

(2) When an accused (with no possibility of immunity) wants to cooperate and strike a plea agreement. The witness can give an off-the-record proffer so that STC can determine the appropriateness of a cooperation-guilty-plea agreement.

Other factors that trial counsel should consider include:

(1) The term "off-the-record" is not to be taken literally. The proffer always should be attended by the case agent, who will take notes as if it were a regular interview. The agent's report of the interview is important because cross-examination of the witness about his or her proffer will be based on that interview report. Alternatively, a proffer may be recorded. Agents should not conduct proffers without STCs present. Special trial counsel are not permitted to conduct proffers without the agent present;

Immunity Request  
template can be found  
[HERE](#)

(2) Special trial counsel are under no obligation to offer an off-the-record proffer. If a witness comes in with counsel and does not request an off-the-record proffer, the witness's statements are on the record and the statement are not subject to limitations on use. Special trial counsel should have the case agent note in the report of interview that no proffer letter was requested, none was given, and that the statements were on the record.

## 1404 IMMUNITY

When a witness invokes or is expected to invoke the Fifth Amendment, and his or her testimony is deemed necessary to the successful resolution of the investigation or trial, the government may choose to grant to a witness "testimonial" immunity. Testimonial immunity means that the witness's statements will not be used against him or her, directly or derivatively. It does not preclude subsequent prosecution of the witness, but any such prosecution would face the formidable obstacle of having to be proven to be free of taint from the immunized testimony. *See Kastigar v. United States*, 406 U.S. 441 (1972). Normally, immunity will not be offered absent an off-the-record proffer from the witness. A military judge and/or the LSTC are statutorily permitted to grant immunity. Authority to grant immunity is reserved to the Region STC.

No STC has authority to grant immunity by verbal agreement (also known as "pocket" immunity), by, for example, telling the witness that they will not be prosecuted if he or she cooperates. Immunity may only be granted with the written approval of the Regional STC or the military judge. STCs should ordinarily seek immunity from LSTC via the Region STC. In the event the LSTC rejects the request for immunity, the STC should not petition the military judge. Defense counsel may request immunity through any entity authorized to grant immunity.

To request immunity for a victim or witness, the STC must submit a written memorandum stating the witness's background, the proffered testimony, all relevant facts justifying the proposed immunity, and a draft order. See JAGMAN 0138.

## **1405 DEPOSITIONS**

The FY23 NDAA directed the President to prescribe regulations to ensure that “residual prosecutorial duties” – such as ordering depositions – in cases involving covered and related offenses are transferred to the military judge, STCs, or other appropriate authorities as of 28 December 2023. The revised version of RCM 702(b)(2) does not account for this change with respect to covered offenses. At this time, STCs seeking depositions shall discuss options with their Chief STC before ordering depositions.

## OSTCM 1500 – TRIAL ADMIN / LOGISTICS

[LINK TO OSTCM 1500 SUPPORTING MATERIAL FOLDER](#)

### 1501 WITNESS TRAVEL

Witness travel will be planned and booked primarily by the witness travel coordinator, assigned to the OSTC Trial Administrative Division. Early and consistent coordination of trial travel needs is required to ensure the smooth administration of justice and minimize potential logistical issues on the eve of trial.

Witness Travel forms can be found [HERE](#)

Furnishing of Witness Lists. All government and defense witness lists should be provided to the trial administrative assistant for tracking and action at the earliest opportunity. Government witnesses should have been identified prior to preferral of charges. Almost all defense witnesses are identified by the completion of motions practice. If witnesses are needed in support of a motions hearing, STC should inform the trial administrative division as soon as possible for coordination.

#### Necessary Information for Witness Travel.

The following information is needed to coordinate witness travel, depending on the status of the traveler.

Military members with DTS Account:	Full name, Social Security Number
Military members without DTS Account:	Full Name, Social Security Number, Date of Birth, Banking Information (for reimbursement)
Civilian DoD Employees with DTS Account:	Full Name, Social Security Number
Civilians (non-DoD affiliation):	Full Name, Social Security Number, Date of Birth, Banking Information (for reimbursement)

### 1502 EVIDENCE STORAGE AND HANDLING

Evidence Lockers. Not all OSTC offices will have capacity to store their own evidence. Until the OSTC office has its own evidence locker, pursuant to the Memorandum of Understanding between CNLSC and OSTC, the OSTC will rely on RLSO Trial departments for evidence storage.

The following language pertains:

If OSTC spaces lack sufficiently secure storage lockers, RLSO trial departments will allow OSTC personnel to share any available evidence storage space for use in courts-martial in the department's evidence storage

locker or facility. This will be temporary until long-term OSTC facilities are acquired and operational. OSTC personnel will comply with all CNLSC directives for use of storage lockers and storage of evidence. Access to an evidence locker by OSTC personnel will be strictly limited to the evidence custodian and the alternate custodian. OSTC personnel will not have the combination, nor will they have unescorted access into RLSO spaces. OSTC personnel will be required to coordinate access requests with RLSO personnel who will make evidence available as needed, with prior coordination, between 0830 and 1800 on any contested trial day or during normal business hours of 0800-1630 on a non-trial day.

**For any OSTC office that has its own evidence storage locker, the following guidelines apply.**

Departmental Primary and Alternate Evidence Custodians. Each OSTC office shall have a primary and alternate evidence custodian (typically a civilian paralegal or civilian administrative assistant for continuity purposes). The appointed individuals will ensure that:

- a. All evidence received is inventoried, tagged, packaged, and marked prior to storage;
- b. Evidence custody documents are properly completed by the person delivering the evidence prior to acceptance;
- c. Evidence logs and records are properly maintained;
- d. Evidence is disposed of following current policies; and
- e. Training is held for all personnel regarding proper evidence procedures.

Handling Evidence in Court. Special trial counsel must ensure that during the actual presentation of evidence to the court, efforts are made to minimize impact to the piece of evidence. OSTC offices shall maintain available supply of:

- (1) nitrile gloves;
- (2) large plastic bags; and
- (3) evidence tape.

Counsel must alert the court if they intend to display physical evidence to panel members, especially when the case involves weapons.

## **1503 COURTROOM SECURITY**

Pursuant to a Memorandum of Agreement with CNLSC, in all locations where the RLSO and OSTC are co-located, the RLSO retains primary responsibility for most aspects of courtroom security.

The pertinent portions of the MOA state:

Each RLSO Commanding Officer (CO) remains primarily responsible for courtroom security of covered offense cases except in Mayport. Each RLSO CO, through each RLSO Command Physical Security Officer (CPSO), shall ensure compliance with JAG/COMNAVLEGSVCCOMINST 5530.2D, OJAG/NLSC Physical Security Program and CNLSC 5800.1G, Naval Legal Service Command (NLSC) Manual for every court-martial hearing. The only exception will be OSTC Mayport. OSTC Mayport will be responsible, per the above referenced instructions, for courthouse security.

Because OSTC personnel will have the lines of communication with victims' and accused persons' commands, the OSTC will:

- (1) generate the security risk assessment form (SRAF) for any covered offense case; and
- (2) communicate with the accused's command to ensure they provide a bailiff and the proper number of courthouse security personnel.

The OSTC-drafted SRAF will be routed to the RLSO CO for approval prior to implementing a security plan. OSTC personnel will ensure that courthouse security personnel have been briefed. Other than generating and submitting the SRAF and ensuring the accused's command provides required security personnel, all other elements of the courtroom security remain the responsibility of the RLSO COs.

The Office of the Judge Advocate General (OJAG) Physical Security Specialist (PSS) will supervise security for OSTC spaces. RLSOs will maintain responsibility for physical security and ATPF at all locations where RLSO and OSTC are co-located.

In locations where OSTC and RLSO are not co-located (Mayport and, in the short term, Norfolk), the respective RLSOs will be responsible for physical security, overseen by the OJAG PSS, but OSTC personnel will perform routine local functions, including but not limited to, alarm testing and walk-throughs and report completion to the PSS.

Courts-martial are a period of heightened stress and anxiety for multiple participants. In addition to the accused, who may be undergoing one of the most stressful moments of their life, other witnesses, victims, family members, friends and co-workers may also be under significant stress and anxiety. Many such participants or spectators have reason to be angry or upset with other parties, as well as counsel that represent them. There are many factors that make courts-martial potentially risky evolutions. Counsel should always be thinking about potential security vulnerabilities, as well as ways for those vulnerabilities to be mitigated. Most courts-martial are conducted in NLSC courtrooms, but some are off-site, where security requirements still apply.

[Blank RAF can be found  
HERE](#)

Assistant Courthouse Security Officer. The RLSO will designate an assistant courthouse security officer to work with the command Physical Security Specialist (PSS) to ensure all military justice proceedings are conducted in compliance with security requirements. In any office where the RLSO and OSTC are not co-located, the Chief STC will designate an assistant courthouse security officer.

Security Risk Assessment Forms (RAFs). Special trial counsel must provide input in support of the Risk Assessment Form (RAF) for each military justice proceeding, to include Article 32 preliminary hearings. The RAF must be signed by the RLSO CO. Special trial counsel should confirm the practice in the region as to whether RLSO personnel will send the RAF to the military judge or whether the RLSO CO intends to rely on the STC to send the RAF to the military judge.

### 1601 STANDARD EMAIL SUBJECT LINE

In order to facilitate standardization, and to assist in finding and sorting files at a later date, all emails sent by members of a trial team regarding a particular case shall have the following format:

LAST NAME OF ACCUSED\_FIRST NAME – Topic or subject

e.g. DELANEY\_MORGAN – Witness coordination

If the Accused has a common name include the middle name in the title.

e. g. SMITH\_JOHN\_ETHAN – Witness coordination

### 1602 EMAILS CONTAINING PII

Trial personnel, when sending emails containing PII, in addition to following any other Navy-wide protocols for handling PII, shall:

- (1) Send only to individuals with an official need-to-know;
- (2) Include in the subject line “CUI – CONTAINS PRIVACY SENSITIVE MATERIAL” and, in the body of the email, this disclaimer: “FOR OFFICIAL USE ONLY – PRIVACY SENSITIVE: Any misuse or unauthorized disclosure of this information may result in both criminal and civil penalties;”
- (3) Digitally sign the emails; and
- (4) Encrypt the emails.

DOD SAFE WEBSITE:  
<https://safe.apps.mil/>

The Department of the Navy has approved the use of the DoD SAFE file transfer system for transferring sensitive documents to recipients who are unable to receive encrypted emails. DoD SAFE shall be used as the primary means of transferring privacy sensitive material to parties without access to encrypted email, such as civilian defense counsel and reservists. DoD SAFE transfers of PII require encryption passphrases, which must be separately sent to the recipient.

Unless additional security is deemed appropriate by the sender, the passphrase for files sent by DoD SAFE shall reference the subject accused’s last name, and the current year in the following format: LASTNAME202X!



## **1603 CASE DISCUSSIONS**

Special trial counsel should be aware of their surroundings and potentially unintended audiences when discussing cases. When potentially within earshot of anyone who lacks a need to know, STCs should refrain from discussing any sensitive case information. This includes discussion both inside and outside OSTC spaces. Additionally, much of the subject material that STCs are exposed to daily could be considered shocking to other individuals. Counsel should be aware that persons overhearing conversations about covered offense cases may be offended or may misinterpret what was said. Counsel should always be aware of their surroundings and treat the subject matter of covered offense cases with sensitivity.

Counsel should be particularly mindful while in court and around courtroom spaces. Remember that the parties and potential friends and family members will be watching you at all times. Your demeanor and behavior should reflect the seriousness of the proceedings. Although litigation is stressful and can be enjoyable when done right, the trial is always a stressful event for victims, witnesses, and accused persons. Special trial counsel should approach their duties respectfully and stoically.

## **1604 USE OF SOCIAL MEDIA**

A prosecutor's work should not be the subject of gossip on social media. All comments on social media are presumed to be public statements. Comments or postings about investigations, open or closed cases, witnesses, panel members, counsel, or the judiciary are prohibited. You are not permitted to send friend requests (by any name) to victims, witnesses, or panel members. If you have an existing relationship with a victim, witness, or panel member, this should be disclosed to the court and defense. You are not permitted to comment on any covered offense case handled by the OSTC in any social media forum. Although general commentary on military justice matters is not prohibited, you should be mindful that any comment you make may be used against you in any case you try.

## **1605 WRITTEN CORRESPONDENCE**

All Navy correspondence is governed by SECNAV M-5216.5, the Department of the Navy Correspondence Manual. Attention to detail in correspondence is critical to maintaining the professional reputation of the OSTC and Navy JAG Corps. A STC's failure to abide by basic correspondence guidance can undermine that person's credibility with the command or convening authority and reflect poorly upon the individual, the command, or the JAGC community as a whole.

Emails and text messages should not include substantive case communications between investigating agents and counsel. Such communications, which are generally not protected by privilege, could be deemed discoverable. In an era of social media, victims and witnesses should be advised against commenting on social media platforms about any pending matters. Special trial counsel shall maintain a record of all communications related to each case in order to answer potential court orders to produce communications.

## 1606 PUBLIC AFFAIRS DOCKET REPORT

The Navy's docket is public facing and displays all courts-martial, color coded by circuit. Additionally, the trial judiciary hosts a private docket on SharePoint that provides additional information. A link to the public-facing docket is provided below.

Navy Public Facing Docket  
can be found [HERE](#).

[DOCKET \(DODLIVE.MIL\)](https://dodlive.mil)

## 1607 CONTACT WITH COURT MEMBERS

Trial counsel may participate in debriefs with the members panel, but must ensure the panel does not intentionally or unintentionally indicate the vote of a particular member, or describe their deliberative process. If speaking with the panel, counsel should focus on feedback on advocacy/presentation style. Debriefs should be done in the presence of opposing counsel and are often mediated by the military judge. At all times during the progression of a court-martial, STC are not permitted to speak to members outside of the court room other than to exchange the appropriate greeting of the day.

## 1608 MICROSOFT TEAMS / GROUPS

In addition to the OSTC SharePoint page, STCs must also join the TCAP "Navy Trial Counsel" Team on Flankspeed Teams to collaborate with other core trial counsel from around the globe. The TDH and ATDH should be members of the "Navy TDH and ATDH Chat with TCAP" team to ensure collaboration with TCAP and other trial department leadership.

## OSTCM 1700 – RELATIONSHIP WITH THE REGION LEGAL SERVICE OFFICES

[LINK TO OSTCM 1700 SUPPORTING MATERIAL FOLDER](#)

With the creation of the Office of the Special Trial Counsel (OSTC), the Navy will, for the first time, have two independent prosecution entities, (NLSC and OSTC) each with a different portfolio of cases. There will be many areas where these entities will overlap and intersect, and our attorneys and staff will likely serve in both commands over the course of a career. As with all things, communication and coordination will be key in the short and long term to the success of both commands, and to the provision of effective military justice service to the fleet and nation. As the OSTC comes online and grows, this OSTCM section will expand to provide guidance for STC interaction with RLSO TCs.

\*Future\* OSTC SOP can be found [HERE](#).

In all circumstances, STC will maintain early and clear communication with RLSO TCs when covered offense cases may reasonably be deferred to the RLSO for prosecution.

When a RLSO TC is assigned as associate counsel on a covered offense case, an OSTC certified counsel will ordinarily serve as lead counsel.

RLSO TC may only be assigned to covered offense cases with the RLSO CO's permission and with the knowledge and consent of the Chief STC, as outlined in MOU #1 between OSTC and CNLSC.

In all cases, even when RLSO TC may be assigned, the OSTC certified STC is ultimately responsible for all aspects of investigation and prosecution of the case.

### 1701 CASES DEFERRED BY OSTC

With the dynamic and interplay between the Office of the Special Trial Counsel (OSTC) and the RLSO, there is a potential for stove-piped processes in cases involving covered and non-covered offenses; which could cause delay. When OSTC elects not to prosecute covered offenses for a given case, but the potential exists for the RLSO to prosecute non-covered offenses, local Chief STCs will coordinate with the local TDHs to provide a verbal turnover with the RLSO TC assigned to receive the case. This communication should occur before a deferral notice is sent to the command to ensure a RLSO TC is ready to brief the accused's command on potential charges for non-covered offenses. Good communication is essential to ensure thorough turnover and timely, accurate advice to the Commander. The STC will determine within three (3) days of receipt of a new case whether the alleged offenses include covered offenses. Upon notice from OSTC that an accused is in PTC for both covered and non-covered offenses, RLSOs will assign a TC and RLSO and OSTC counsel will work together.

Current OSTC / CNLSC MOU can be found [HERE](#).

### 1702 MEMORANDA OF UNDERSTANDING (MOU)

An MOU is in development between CNLSC and OSTC that outlines the interactions between RLSO trial departments and OSTC staff.

## 1703 LEGACY CASES

OSTC will reach full operational capacity on 1 September 2023. However, referral authority is limited to offenses which occur after 27 December 2023. From 5 September 2023 – 27 December 2023, there will be numerous cases in various stages of investigation and prosecution that do not yet qualify for the OSTC's deferral and referral authority. These cases would ordinarily remain with the RLSO, but many prosecutors will have been reassigned to the OSTC. Even after 27 December 2023, crimes occurring prior to that date will likely be reported months (sometimes years) later. Those allegations will need to be processed under the "old" system. OSTC will not have referral authority for these "legacy" cases, but will be best positioned to evaluate and prosecute them.

The following process is expected to be followed for legacy cases by all OSTC and RLSO personnel IAW with the CNLSC-OSTC Case Transfer Protocol dated 5 June 2023 (MOU #1):

Beginning 5 September 2023, legacy cases will be primarily investigated, reviewed, and prosecuted by OSTC following existing rules and policies contained in the Manual for Courts-Martial (MCM) and the TCM. Therefore, starting 5 September, NCIS will notify OSTC personnel of covered offenses (vice the RLSO), and OSTC will support the investigation, evaluate the evidence, and provide recommendations to commands on charging. Commanders will make the decision whether to prefer and/or refer charges.

All covered offense cases (as defined in the FY22 and FY23 NDAA's with the exception of sexual harassment until 1 January 2025) will be transferred to an OSTC counsel on a case-by-case basis between 5-15 September 2023, with the exception that the RLSOs will retain cases in which a substantially completed NCIS ROI has already been received and the RLSO chain of command has already determined that a Recommendation Against Prosecution (RAP) will be drafted. In those cases, the RLSO will retain case control and the OSTC will not handle the case. All other cases will be transferred, one-by-one to an OSTC counsel. Pursuant to MOU #1, RLSO TC may remain assigned to covered offense cases.

In no circumstance will any member of the OSTC detail any RLSO TC to a case. Any cross-office detailing or decision to retain a RLSO TC on an existing case must be approved by the RLSO TDH and the Chief STC. For all cases, STCs must pay careful attention to the offense date to determine whether convening authorities or the OSTC have deferral or referral authority.

## OSTCM 1800 POLICIES, REFERENCES, AND GUIDES

[LINK TO OSTCM 1800 SUPPORTING MATERIAL FOLDER](#)

### 1801 REQUIRED REPORTS AND CCIRS

The following matters most applicable to the trial department shall be reported up the chain of command to LSTC immediately:

- a. Engagements with civil authorities or media;
- b. The gaining or development of a “high visibility case,” defined as “those cases with a high likelihood of substantial media interest, cases involving multiple victims (3+), and cases involving a TRIAD/Flag Officer; and
- c. Situations where a flag officer, commanding officer, or victim is unhappy with services provided or action taken by OSTC personnel.
- d. Granted R.C.M. 917 motions.

Additionally, the following matters shall be reported to the Chief STC immediately:

- a. Any allegations of unlawful command influence or prosecutorial misconduct;
- b. Any speedy-trial motions filed;
- c. Any loss of control over personally-identifiable information or classified materials; and
- d. Information that may justify elevation of the security-risk posture of any case.

### 1802 MEETINGS AND COORDINATION

NCIS Sync Meeting. In order for the collaboration to be effective during an investigation between counsel and law enforcement, relationships need to be built and sustained. Every OSTC office shall establish a routine meeting schedule with local NCIS unit(s), occurring at a frequency of at least once a month. This recurring meeting is an opportunity to share case information, training, and docket updates among the groups. Efforts should be made to conduct these meetings jointly with OSTC when possible. Although OSTC, RLSO prosecutors, and NCIS are not part of the same office, they share much of the same mission. Better relationships should allow both offices to work through investigations more efficiently and effectively, which will translate to better service to the Fleet and its Sailors.

SJA Sync Meetings. It is particularly essential to maintain open communication and collaboration with the SJA team assigned to the local region. OSTC leadership shall establish a regularly scheduled meeting with the Region SJA at a frequency of no less than once a month to cultivate this essential relationship.

OSTC Charging Board and Murder Board Schedule. Charging and murder boards will be held by the various OSTC offices on a schedule that will permit the Chief STCs, RSTCs, DLSTC, and LSTC to join in person or remotely. Meetings will be held both in person and on TEAMS and will be held according to the following schedule:

## East

Norfolk and Groton Tuesday, 1000 Eastern  
NDW and Naples: Wednesday, 1000 Eastern  
Mayport and Great Lakes: Thursday, 1000 Eastern

## West

Japan: Monday, 1800 Eastern  
San Diego: Wednesday, 1300 Eastern  
Bremerton and Hawaii: Thursday, 1400 Eastern

TCAP Standard Training Plan can be found [HERE](#).

Chief STC Report Review. The Chief STC shall routinely review each trial team's cases at a frequency they deem appropriate for the office. At a minimum, the Chief STC should review the entire report once per month. Particular attention should be paid to cases in which an accused is in PTC and/or speedy trial is an issue. The Chief STC should provide assistance and guidance for cases still under investigation, where a substantially complete ROI has not yet been received in moving cases forward with the counsel and NCIS.

APS Policy Notes can be found [HERE](#).

## **1803 OSTC STANDARD ANNUAL TRAINING PLAN**

The OSTC has promulgated an annual training plan.

APS Lessons Retained can be found [HERE](#).

## **1804 OSTC AND APS POLICY NOTES**

OSTC and APS Policy notes implement new trial guidance and procedures. These procedures will ultimately be integrated into the OSTCM, although may not include some of the background and justification for the change or policy. Links to all OSTC and APS Policy Notes, along with their enclosures can be found in this section.

## **1805 OSTC AND APS LESSONS RETAINED**

As a learning organization, we must take every opportunity to grow in the wake of less-than optimal outcomes in our military justice practice, as well as learn from our successes. We should also share near-misses, or circumstances where mistakes were made or vulnerabilities discovered that *could* have resulted in a negative event or outcome. The OSTC and APS Lessons Retained series seeks to relay digestible and retainable military justice lessons. Lessons learned do us little good if not retained in our institutional memory. All OSTC personnel are encouraged and *expected* to bring potential lessons to the attention of their chain of command and TCAP. OSTC personnel are encouraged to review the lessons and incorporate them into training and discussion.

## 1806 DETAILED GUIDES FOR UNIQUE CIRCUMSTANCES

The following table lists available guides for unique circumstances that a prosecutor may encounter. Guides can be found in the Supporting material folder for this section.

Guide Topic
Multi-RLSO Coordination
<i>DuBay</i> Hearings
Interpreters and Translators
RCM 909 Hearings
404(b) Evidence
Article 30A Matters
Brady, Giglio and Henthorn
Discovery in Child Pornography Cases
Mistrials
R.C.M. 706 Examination Process
Joint Trials

## OSTCM 1900 \* NEW \* UPDATES

[LINK TO OSTCM 1900 SUPPORTING MATERIAL FOLDER](#)

The world of military justice is always changing. As such, the OSTC Manual is a living document that will adapt and update continuously. As changes are made, or updates added to the OSTC Manual, they will be placed in the table below, with a hyperlink to the section they belong to. Additionally, as new resources and templates are developed, they will first be placed in this section. Approximately every quarter, LSTC/DLSTC will officially incorporate the updates into the main text of the manual, move the hyperlinks into their most applicable section, and remove them from the table below.

### 1901 RECENT OSTCM CHANGE / UPDATE TABLE

Date	Update / Change /Addition	Section / Internal Hyperlink

### 1902 \*NEW\* HYPERLINKED RESOURCE / TEMPLATE TABLE

As new hyperlinks to resources are created, and new standard templates are created and updated, they will be placed in this section.

NEW HYPERLINKS WILL BE  
PLACED [HERE](#).



# **MARINE CORPS OFFICE OF SPECIAL TRIAL COUNSEL**

## **STANDARD OPERATING PROCEDURES**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

<b>VOLUME VERSION</b>	<b>SUMMARY OF CHANGE</b>	<b>ORIGINATION DATE</b>	<b>DATE OF CHANGES</b>
ORIGINAL VOLUME	N/A	30 Jun 2023	N/A

## MARINE CORPS OFFICE OF SPECIAL TRIAL COUNSEL STANDARD OPERATING PROCEDURES

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**REFERENCES**

Uniform Code of Military Justice  
Manual for Courts-Martial  
U.S. Navy Regulations, (1990)  
1 U.S.C. § 112b  
5 U.S.C. §§ 101, 552a, and 3111  
10 U.S.C. §§ 806, 1034, 1044, 1044e, 1059, 1072, 1408, 1565b, 1588, and 8046  
18 U.S.C. §§ 202, 922, and 3509(d)  
31 U.S.C. § 1342  
37 U.S.C. §§ 601-604  
38 U.S.C. §§ 4301-4334  
Public Law No. 115-232  
Public Law No. 116-92, Section 548  
Executive Order 13269, (July 3, 2002)  
Executive Order 12333, (December 4, 1981)  
5 C.F.R. § 2634  
22 C.F.R. Part 181  
27 C.F.R. § 478.11  
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SECNAV M-5210.1 CH-1  
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SECNAVINST 5211.5F  
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Department of the Navy Safe-To-Report Policy  
MCO 1000.6  
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MCO 1300.8  
MCO 1610.7A  
MCO 1752.5C  
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NAVMC 3500.82

Judge Advocate Division Practice Directive No. 2-22

**CHAPTER 1****GENERAL PROVISIONS**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

<b>CHAPTER VERSION</b>	<b>PAGE PARAGRAPH</b>	<b>SUMMARY OF SUBSTANTIVE CHANGES</b>	<b>DATE OF CHANGE</b>

CHAPTER 1

GENERAL PROVISIONS

0101. PURPOSE

This Volume, The Office of Special Trial Counsel: Standard Operating Procedures (OSTC SOP), promulgates the standards, policies, and procedures for the provision and functional supervision of military justice within the Marine Corps Office of Special Trial Counsel, as provided for in law, regulations, and rules of professional conduct.

The OSTC SOP is a living document designed to provide Office of Special Trial Counsel (OSTC) personnel with a one-stop source for policy guidance, and procedures. The OSTC SOP may be supplemented by Policy Letter issued by the Lead Special Trial Counsel.

As a member of the OSTC team, you have the distinct privilege and significant responsibility of representing the United States in the investigation and prosecution of those offenses over which the OSTC exercises authority. Your foremost duty is to do justice! In doing so, you provide an effective, respected, and trusted tool for maintaining good order and discipline in the Marine Corps and thereby help promote the efficiency and effectiveness of the Service and strengthen the national security of the United States. You must act with the utmost fairness and integrity in all endeavors. Your words, actions, and involvement in the military justice process, from beginning to end, must be beyond reproach as they affect not only your personal and professional reputation, but that of the entire OSTC team, the Marine Corps legal community, the Service, and the faith our fellow service members, elected officials, and the public have in the results rendered.

As a member of the inaugural OSTC team, there will be increased scrutiny, from all quarters, on your actions and decisions. You must exercise your duties free from improper influence. The facts and the law must be your guide!

0102. APPLICABILITY

This Volume applies to the Marine Corps OSTC.

0103. GENERAL

010301. Purpose of Military Law

The purpose of military law, as stated in the Preamble to the Manual for Courts-Martial (MCM), “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.”

010302. Mission of the OSTC

The mission of the OSTC is to provide expert, independent, and ethical representation of the United States in the investigation and prosecution of covered offenses as prescribed by Article 1(17) of the Uniform Code of Military Justice (UCMJ), and other offenses over which the OSTC exercises authority pursuant to Article 24a, UCMJ.

010303. Role of OSTC Personnel in Military Justice

Pursuant to title 10 U.S. Code, section 1044f, the activities of the personnel of the OSTC shall be supervised and overseen by the Lead Special Trial Counsel (LSTC). The personnel of the OSTC represent the United States during the investigation and prosecution of the covered offenses and other offenses over which the OSTC exercises authority. All OSTC personnel are responsible for professionally and diligently processing the military justice matters over which the OSTC exercises authority in accordance with the purposes of military law and with respect for the dignity and rights of all participants. OSTC personnel will execute their duties independently of the military chains of command of victims and the accused. OSTC personnel will conduct their



assigned duties free from unlawful or unauthorized influence or coercion. No person from outside the OSTC may attempt to influence the disposition determination regarding any offense to be made by OSTC personnel.

010304. Role of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) in Military Justice and OSTC Operations

Consistent with the provisions of Article 6, UCMJ, the SJA to CMC is accountable to SECNAV (SECNAV) and Commandant of the Marine Corps (CMC) for ensuring readiness for all military justice entities, to include the OSTC. As such, the SJA to CMC will be responsible for addressing the organizing, staffing, training, and equipping of the OSTC required to ensure the OSTC's administrative and operational effectiveness. Additionally, consistent with Article 6, UCMJ, and as described in SECNAVINST 5430.27E and JAGINST 5803.1E, the SJA to CMC exercises professional responsibility oversight within the Marine Corps of all Marine Corps judge advocates and those civilian attorneys practicing under the cognizance of the SJA to CMC, including those judge advocates and civilian attorneys within the OSTC. Although the SJA to CMC exercises such authority and oversight, the OSTC shall exercise its Article 24a, UCMJ, authorities independently from any person outside of the OSTC, including the SJA to CMC.

A. Rules Counsel

The SJA to CMC serves as the Rules Counsel for matters of professional responsibility within the Marine Corps. As the Rules Counsel, the SJA to CMC has the responsibility to exercise professional responsibility oversight over all Marine Corps judge advocates who are not assigned as a trial judge or appellate judge. Informal professional responsibility complaints regarding Marine Corps judge advocates serving within the OSTC will be addressed by the LSTC. Formal professional responsibility complaints regarding judge advocates serving within the OSTC will be forwarded to CMC (JCA) via the judge advocate's OSTC supervisory chain.

0104. EXECUTION OF MILITARY JUSTICE SERVICE FUNCTION

010401. Office of Special Trial Counsel (OSTC)

Unless otherwise conflicted, the OSTC provides military justice representation for the Marine Corps in all cases over which the OSTC exercises authority. Unless otherwise conflicted or limited by this issuance, each Regional OSTC (ROSTC) will provide such representation in all such cases arising within its region. Pursuant to Article 24a, UCMJ, the OSTC shall exercise authority over covered offenses, and may, at its discretion, exercise authority over known or related offenses.

010402. Covered Offense

The term "covered offense" means any offense prescribed by Article 1(17), UCMJ.

010403. Known Offense and Related Offense

The terms "known offense" and "related offenses" are defined by Article 24a, UCMJ.

0105. COMMUNICATION AND CASE MANAGEMENT

010501. Need for Effective Communication

The LSTC's ability to effectively exercise functional supervision and oversight of the OSTC and the SJA to CMC's ability to exercise his/her responsibility over military justice matters in the Marine Corps depends on effective communication. To that end, the requirements to maintain accurate entries in the Marine Corps' designated military justice electronic case management system (CMS) is paramount as the information in CMS is used: to respond to Service, Department, Congressional, and other requests for information concerning military justice matters; to identify military justice requirements, inform military justice policy and personnel decisions; and,

to enable an accurate review of the military justice system by the Military Justice Review Panel in accordance with Article 146, UCMJ.

OSTC personnel shall utilize the Marine Corps' designated CMS to record and document, in detail, the information related to the investigation and prosecution of any offense under the purview of the OSTC.

010502. Immediate Communication Required

Military justice related issues and events can have a strategic impact on the Marine Corps, the OSTC, and/or the Marine Corps legal community. As appropriate, the LSTC will inform SECNAV and/or the SJA to CMC of all military justice issues that, in his/her determination, may have a strategic impact or are likely to garner significant interest from senior DoD officials, elected leaders, or members of the media. Regional STCs will report such issues to the OSTC Headquarters. The LSTC will report such issues to the SECNAV, SJA to CMC, and other DoD officials as appropriate. When in doubt about whether to report an item, err on the side of reporting.

Other incidents that require reporting from the RSTC to OSTC Headquarters, include the following: the death or hospitalization of an OSTC member or an immediate family member; any arrest, allegation of a UCMJ violation, or civilian criminal charge involving an OSTC member (this does not include non-alcohol related minor traffic violations or other civil/non-criminal infractions, e.g. parking tickets); any allegation of professional misconduct made by or against an OSTC member; and, any loss or compromise of classified material or PII by an OSTC member. *See also*, LSTC Critical Information Requirements Policy Letter.

010503. Case Management and Data Collection

Article 140a, UCMJ, requires the Secretary of Defense (SECDEF) to prescribe uniform standards and criteria for the collection and analysis of data concerning military justice matters, as well as military justice case processing and management. To facilitate uniform case management and to avoid imposing excessive administrative burdens on OSTC Headquarters, Judge Advocate Division (JAD), the Office of the JAG (OJAG), and other headquarters, OSTC personnel will collect military justice case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process. Such reporting shall occur via the Marine Corps' CMS of record. All OSTC personnel shall establish and maintain an account for CMS access. OSTC personnel should regularly communicate with JAD (JMJ) and OJAG regarding any updates to CMS.

010504. Standardized Forms and Letters.

The OSTC is in the process of establishing standardized forms and letters to be used by OSTC personnel to accomplish and/or document case actions. These forms and letters will be made available of the OSTC TEAMS Channel. Many standard military justice related forms and letters are also available through the JAD website, the MCM and its appendices, and JAGMAN. If in doubt as to whether a standardized form exists, consult with your local or regional leadership or contact OSTC Headquarters.

**CHAPTER 2****ORGANIZATION, PERSONNEL, AND QUALIFICATIONS**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

<b>CHAPTER VERSION</b>	<b>PAGE PARAGRAPH</b>	<b>SUMMARY OF SUBSTANTIVE CHANGES</b>	<b>DATE OF CHANGE</b>

## CHAPTER 2

ORGANIZATION, PERSONNEL, AND QUALIFICATIONS

## 0201. PURPOSE

This chapter provides guidance for the provision of trial services by the OSTC and describes the organization, roles, and responsibilities of the OSTC and its personnel.

## 0202. GENERAL ORGANIZATION

020201. Role of the OSTC in Military Justice and support provided by TSO

The OSTC exercises independent disposition discretion for all offenses over which it exercises authority in accordance with Article 24a, UCMJ. For those offenses over which the OSTC has authority, the OSTC: has final and binding disposition authority; coordinates with and provides investigative assistance to law enforcement; provides pretrial and trial representation of the United States in special and general courts-martial; assists in the training of command legal personnel on OSTC operations and functions; provides victim and witness support throughout the investigative and court-martial processes; and in coordination with the responsible Law Center's review section, assists with post-trial processing.

The Trial Services Organizations (TSO) will be in general support of OSTC operations. Specifically, the Regional Trial Counsel (RTC), upon request from the Regional Special Trial Counsel (RSTC), will make available for detailing TSO personnel to serve as assistant trial counsel and administrative/enlisted support for the performance of OSTC operations.

Disagreements between the RTC and RSTC concerning the provision of support requested by the OSTC will be forwarded, via their separate supervisory chains, to the Chief Trial Counsel (CTC) and the DLSTC for resolution.

020202. The OSTC

The OSTC is composed of all personnel assigned to the OSTC. The OSTC consists of a Headquarters Element (OSTC HQ) and four Regional Offices of Special Trial Counsel (ROSTC) with Installation Offices of Special Trial Counsel (IOSTC) located in Fleet concentration areas throughout the regions. The ROSTC is responsible for the performance and execution of OSTC operations within its region. The ROSTCs operate under the supervision of OSTC HQ. The IOSTC is responsible for the performance and execution of OSTC operations as assigned by the RSTC. The IOSTCs operate under the supervision of its ROSTC and OSTC HQ.

020203. Performance and Provision of OSTC Investigative and Trial Services

Marine Corps trial services for offenses over which the OSTC exercises authority are performed by commissioned officers who are judge advocates, certified as a Special Trial Counsel (STC) under Articles 24a, UMCJ, sworn under Article 42(a), UCMJ, and assigned to an STC billet within the OSTC. Each ROSTC has the primary responsibility for executing OSTC duties and responsibilities in its region. For those areas not specifically assigned to a ROSTC by this issuance, the OSTC HQ will designate the ROSTC responsible for executing OSTC operations related to the offense over which the OSTC has authority. At his/her discretion, the LSTC may detail a specific STC to perform OSTC duties related to an offense over which the OSTC has authority, regardless of the location of the STC or the ROSTC that would normally have responsibility for executing OSTC operations related to the offense.

020204. Professional Conduct of OSTC Personnel

Professional conduct of OSTC personnel is governed by the JAGINST 5803.1 series. All OSTC personnel are to be familiar with the entire document and refer to Rule 3.8 in particular regarding the special responsibilities of an attorney representing the United States government.

020205. Tour LengthsA. STC

STC will be assigned to the OSTC for a fixed term of not less than three years. Such assignments may be extended by CMC, for subsequent fixed terms of any length.

B. Non-STC Judge Advocates

Those judge advocates who have not been certified as an STC in accordance with Article 24a, UCMJ, will normally be assigned to the OSTC for a term of three years. The three-year fixed assignment requirements for STC are not applicable to non-STC certified judge advocates assigned to the OSTC. Assignments for judge advocates not certified as an STC serving in the OSTC may be curtailed or extended by CMC. OSTC HQ will coordinate with the appropriate Headquarters Marine Corps entities to mitigate the impact of such curtailments or extensions on OSTC operations.

C. Enlisted OSTC Personnel

Enlisted personnel will normally be assigned to the OSTC for a term of three years. The three-year fixed assignment requirements for STC are not applicable to enlisted personnel assigned to the OSTC. Assignments for OSTC enlisted personnel may be curtailed or extended by CMC. OSTC HQ will coordinate with the appropriate Headquarters Marine Corps entities to mitigate the impact of such curtailments or extensions on OSTC operations.

020206. Release of STC before End of Tour

STC may only be released before the end of the fixed term if the STC: leaves active duty; receives LSTC approval on a voluntary reassignment request; or is relieved of duty by the LSTC for cause.

020207. Fitness Reports and Performance Evaluations of OSTC Members

With the exception of E-4 and below members whose evaluation chain will comply with MCO 1616.1, the Junior Enlisted Performance Evaluation System, the fitness reports and performance evaluations of OSTC members will be completed by a supervisor within the OSTC. Unless authorized by the LSTC, no OSTC member's fitness report or performance evaluation will be completed by a member of the same grade or rank.

020208. Reassignment of STC

Only the LSTC may authorize the reassignment of an STC prior to the end of their three-year fixed tour. If the LSTC authorizes the reassignment of an STC before the end of their fixed tour, the LSTC will work with the appropriate Headquarters Marine Corps entity to establish a new end of tour date for the STC.

020209. Reserve Trial Services Branch (JRT)

The RSTC, with the concurrence of the LSTC or DLSTC, may request reserve support through the branch head of the Reserve Trial Services Branch (JRT). If the support requested is to assist in the investigation or prosecution of an offense over which the OSTC has authority, the reserve judge advocates may only be detailed as assistant trial counsel. Only the LSTC or DLSTC is authorized to detail a reserve judge advocate to an investigation or prosecution over which the OSTC has authority.

**0203. OFFICE OF SPECIAL TRIAL COUNSEL HEADQUARTERS (OSTC HQ)****020301. General Description**

The OSTC HQ provides overall functional supervision and administrative control of OSTC operations and personnel. The OSTC HQ is responsible for ensuring the provision of investigative and trial services for all offenses over which it has authority pursuant to Article 24a, UCMJ.

**020302. Structure**

The OSTC HQ is staffed with the following personnel: The Lead Special Trial Counsel (LSTC), the Deputy Lead Special Trial Counsel (DLSTC), Operations Officer (OpsO), Deputy Operations Officer (DepOpsO), GS-15 Policy and Training Attorney Advisor, GS-13 Office Administrator, an E-8 Legal Services Chief (LSC), and additional 44XX enlisted support staff.

**020303. Enlisted Support Staff**

The OSTC HQ will be staffed with appropriate enlisted support staff to assist in the execution of OSTC HQ responsibilities. Normally, OSTC HQ will be staffed with an E8/9 OSTC Legal Services Chief (LSC), a 44XX staff non-commissioned officer, and a non-commissioned officer.

**0204. LEAD SPECIAL TRIAL COUNSEL (LSTC)****020401. General Description**

The LSTC exercises both operational and administrative control over the personnel and activities of the OSTC. The LSTC reports to SECNAV without any intervening authority and is responsible to SECNAV for the effective operation and administration of the OSTC. The LSTC's reporting senior and reviewing officer is SECNAV.

**020402. Eligibility**

The LSTC shall be a Marine judge advocate in a grade no lower than O-7/Brigadier General, with significant military justice experience.

**020403. Specific Duties**

Specific LSTC duties include, but are not limited to:

1. Serve as the supervisor of the OSTC;
2. Independently identifies to the SJA to CMC the requirements for organizing, manning, training, resourcing, and equipping of the OSTC;
3. Serve as a supervisory counsel of all judge advocates assigned to the OSTC;
4. Serve as higher level reviewing authority for the civilian GS-15 Policy and Training Attorney Advisor;
5. Serve as higher level reviewing authority for the civilian GS-13 Office Administrator;
6. Serve as Review Officer for fitness report purposes of the RSTC;
7. Supervise annual training for the OSTC;

8. Serve as the detailing authority for the RSTC;
9. Serve as an STC. The LSTC's case load should not detract from the LSTC's responsibilities to train, mentor, and supervise OSTC personnel or the execution of the LSTC's other responsibilities and duties;
10. Ensure the maintenance and uploading of case entries into CMS;
11. Consult on all personnel moves into or out of the OSTC;
12. Liaise with the CTC, CDC, and the CVLC;
13. Coordinate with the Regional Legal Services Directors and Law Center Directors;
14. Coordinate with the Branch Head, JMJ, for military justice-related legislative and policy matters;
15. Coordinate with the VWAP Director regarding matters related to victim and witness rights and notifications;
16. Ensure OSTC personnel are adhering to all statutory and regulatory victim and witness notification requirements;
17. Implement and supervise a Legal Support Inspection (LSI) Program to ensure compliance with statutes, regulations, and the requirements of this Volume in a manner consistent with the LSI conducted by the SJA, CMC.

0205. DEPUTY LEAD SPECIAL TRIAL COUNSEL (DLSTC)

020501. General Description

The DLSTC is the principal assistant to the LSTC and assists the LSTC in exercising both operational and administrative control over the personnel and activities of the OSTC. The DLSTC performs the functions and exercises those authorities reserved to the LSTC in times when the LSTC billet is vacant or when the LSTC otherwise is unable to perform such functions or exercise such authorities. The DLSTC is directly responsible to the LSTC for the effective operation and administration of the OSTC. The DLSTC is prohibited from performing duties outside of the OSTC without the prior, written approval of the LSTC. The LSTC is the DLSTC's detailing authority. The DLSTC's reporting senior and reviewing officer is the LSTC.

020502. Eligibility

The DLSTC is a Marine judge advocate assigned to the OSTC HQ meeting those qualifications designated by the SJA to CMC in Appendix C.

020503. Specific Duties

Specific DLSTC duties include, but are not limited to:

1. Assist the LSTC with the supervision the OSTC;
2. Serve as a supervisory counsel of all subordinate counsel assigned to or assisting the OSTC;
3. Serve as the rating official for the civilian GS-15 Policy and Training Attorney Advisor;
4. Serve as the rating official for the civilian GS-13 Office Administrator;

5. Serve as the higher level reviewer for the ROSTC civilian GS-12 Office Administrators;
6. Supervise annual training for the OSTC;
7. In the absence of the LSTC, or when delegated to do so by the LSTC, serve as the detailing authority for subordinate STC serving in OSTC HQ and RSTC;
8. When detailed by the LSTC, serve as an STC. The DLSTC's case load should not interfere with the duties to train, mentor, and supervise subordinates within the OSTC;
9. Ensure the maintenance and uploading of case entries into CMS;
10. Consult on all personnel moves into or out of the OSTC in the absence of the LSTC;
11. Liaise with the CTC, CDC, and CVLC;
12. Coordinate with the Regional Legal Services Directors and Law Center Directors;
13. Coordinate with the Branch Head, JMJ for military justice-related legislative and policy matters;
14. Coordinate with the VWAP Director regarding matters related to victim and witness rights and notifications;
15. Ensure OSTC personnel are adhering to victim and witness notification requirements as detailed in Chapter 4 of this Volume;
16. Assist the LSTC in implementing and supervising a Legal Support Inspection (LSI) Program to ensure compliance with statutes, regulations, and the requirements of this Volume in a manner consistent with the LSI conducted by the SJA, CMC; and
17. Serves as the staff coordinator for OSTC HQ.

0206. OSTC LEGAL SERVICES CHIEF (LSC)

020601. General Description

The OSTC Legal Services Chief (LSC) is the senior enlisted advisor to the LSTC. The LSC is directly responsible to the LSTC for the training, supervision, and mentorship of all enlisted personnel assigned to the OSTC. The LSC is an 44XX SNCO in the grade of E-8. The LSC's reporting senior and reviewing officer is the LSTC.

0207. OSTC POLICY AND TRAINING ATTORNEY ADVISOR

020701. General Description

The Policy and Training Attorney Advisor is an experienced civilian GS-15 attorney with significant prosecution experience of covered offense cases. The Policy and Training Attorney Advisor works in the OSTC HQ and is directly responsible to the LSTC for providing policy and training advice to the OSTC. The Policy and Training Attorney Advisor's rating official/supervisor is the DLSTC and their higher level reviewer is the LSTC.

020702. Specific Duties

Specific Policy and Training Attorney Advisor duties include, but are not limited to:



1. Oversees the development of standards and training to ensure the OSTC's military justice training is consistent with statute, regulation, policy, and Congressional intent;
2. Develops and implements LSTC-approved training and education policies for the OSTC;
3. Serves as a member as the OSTC's representative to the Military Justice Training Council;
4. Drafts and prepares formal comment with respect to proposed legislation and regulations impacting military justice;
5. Recommends policies and drafts OSTC procedures and regulations implementing new or amended military justice legislation;
6. Maintain a close, cooperative relationship with all STCs to discuss trends, developing cases, and coordinate responses to emerging issues;
7. Liaises with federal, state, and local law enforcement;
8. Serves as an OSTC representative to conduct Article 6, UCMJ, inspections of legal offices in support of LSTC's and SJA to CMC's military justice oversight responsibilities, incorporating inspection results into systematic review and modification of OSTC training;
9. Formally and informally advises the LSTC on statutes, executive orders, judicial decisions, regulations, and treatises relevant to OSTC operations;
10. Serve as a liaison to Congressionally-mandated military justice advisory committees; and
11. Coordinate and liaise with the Services' Offices of the Judge Advocate General and the Department of Defense Office of General Counsel on matters related to or impacting OSTC operations.

0208. OSTC OPERATIONS OFFICER (OpsO) (*Reserved for future use*)

0209. OSTC DEPUTY OPERATIONS OFFICER (DepOpsO) (*Reserved for future use*)

2010. OSTC HQ OFFICE ADMINISTRATOR

021001. General Description

The OSTC HQ Office Administrator is directly responsible to the LSTC for the efficient operation, management, and execution of the OSTC Headquarters' legal and personnel administrative duties. The OSTC HQ Office Administrator's rating official/supervisor is the DLSTC and their higher level reviewer is the LSTC.

021002. Specific Duties

Specific OSTC HQ Office Administrator duties include, but are not limited to:

1. Manage all administrative functions, tasks, and correspondence associated with OSTC HQ operations;
2. When required and as directed by the LSTC, assist with discovery obligations, VWAP notifications, witness requests and travel authorizations, case information inputs into case management systems, and all other administrative tasks associated with the military justice process that do not require Article 27(b) certification;

3. When required, assist the ROSTCs and IOSTCs with their administrative functions;
4. Assist the OSTC with Defense Travel System coordination, tracking, and oversight;
5. Coordinate with the appropriate personnel to ensure all equipment within OSTC HQ spaces is operational, to ensure the completion of any necessary repairs, and to acquire any needed equipment or supplies;
6. Serves as the principal advisor to the LSTC for issues that arise in OSTC records management and publication programs;
7. Serves as Authorizing Official for the OSTC HQ personnel temporary additional duty orders and travel claims/vouchers;
8. Within the OSTC HQ, serves as the lead technical expert in the application of the Defense Travel System and applicable policies and directives;
9. Serves as the liaison between the OSTC HQ and Human Resources Office;
10. Manages the fiscal resources of the OSTC;
11. Maintain the OSTC Command Chronology;
12. Serves as the OSTC HQ Risk Management and Internal Control Program Coordinator; and
13. When directed, serves as an OSTC representative to conduct Article 6, UCMJ, inspections of legal offices in support of LSTC's and SJA to CMC's military justice oversight responsibilities.

0211. OSTC HQ ADDITIONAL ENLISTED SUPPORT STAFF (*Reserved for future use*)

0212. REGIONAL OFFICES OF SPECIAL TRIAL COUNSEL (ROSTC)

021201. General Description

The ROSTC executes OSTC operations within its region as required by statute, regulation, OSTC policy, and OSTC HQ guidance. The ROSTC is responsible to the LSTC for providing supervision and administration of all IOSTCs within its region.

021202. ROSTC Geographic Areas of Responsibility

A. ROSTC-West. Except as indicated in subparagraph 02072(E) below, ROSTC-West is responsible for the execution of OSTC duties and responsibilities for those offenses over which the OSTC has authority pursuant to Article 24a, UCMJ, committed by active duty personnel stationed in the states of Alaska, Washington, Oregon, California, Arizona, Nevada, Idaho, Indiana, Montana, Wyoming, Utah, Colorado, New Mexico, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Missouri, Iowa, Minnesota, Wisconsin, and Illinois.

B. ROSTC-East. Except as indicated in subparagraph 02072(E) below, ROSTC-East is responsible for the execution of OSTC duties and responsibilities for those offenses over which the OSTC has authority pursuant to Article 24a, UCMJ, committed by active duty personnel stationed in the states of Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Tennessee, Kentucky, Michigan, and Ohio.

C. ROSTC-National Capital Region (NCR). Except as indicated in subparagraph 02072(E) below, ROSTC-NCR is responsible for the execution of OSTC duties and responsibilities for those offenses over which the OSTC has authority pursuant to Article 24a, UCMJ, committed by active duty personnel stationed in the

states of Virginia, West Virginia, Pennsylvania, Maryland, Delaware, New Jersey, New York, Rhode Island, Connecticut, Massachusetts, New Hampshire, Vermont, and Maine.

D. ROSTC-Pacific (PAC). The ROSTC-PAC is responsible for the execution of OSTC duties and responsibilities for those offenses over which the OSTC has authority pursuant to Article 24a, UCMJ, committed by active duty personnel in the USINDOPACOM Area of Responsibility.

E. OSTC HQ will, on a case-by-case basis, assign the ROSTC responsible for the execution of OSTC duties and responsibilities for those offenses over which the OSTC has authority pursuant to Article 24a, UCMJ, committed by reservists subject to UCMJ jurisdiction, Marine Corps retirees, and those active duty personnel serving OCONUS and outside of the USINDOPACOM Area of Responsibility. OSTC HQ will also, on a case-by-case basis, assign the ROSTC responsible for the execution of OSTC duties and responsibilities for those cases over which the OSTC has authority involving classified evidence.

021202. Structure

The ROSTC is structured with the following personnel: Regional Special Trial Counsel (RSTC), GS-12 Office Administrator, and a 44XX SNCO.

021203. Enlisted Support Staff management and assignment

Each ROSTC and IOSTC will be staffed with the enlisted support staff, identified by the SJA to CMC, to assist in the execution of assigned duties and responsibilities within the ROSTC. For E-5s and above, the reporting senior (RS) and reviewing officer (RO) shall be officers assigned to the OSTC. For E-4s and below, the evaluation chain shall comply with MCO 1616.1, the Junior Enlisted Performance Evaluation System.

0213. REGIONAL SPECIAL TRIAL COUNSEL (RSTC)

021301. General Description

The RSTC assists the LSTC in exercising both operational and administrative control over the personnel and activities of the OSTC within their region. The RSTC is directly responsible to the LSTC for the effective operation and administration of their region. The RSTC directly supervises all cases detailed by the RSTC. The reporting senior for the RSTC is the DLSTC and their reviewing officer is the LSTC. The RSTC is prohibited from performing duties outside of the OSTC without the prior, written approval of the LSTC or, in the absence of the LSTC, the DLSTC. Only the LSTC or, in the absence of the LSTC, the DLSTC may approve or deny a request to detail a RSTC to a court-martial in which the OSTC has not exercised authority.

021302. Eligibility

The RSTC is a Marine judge advocate assigned to the OSTC meeting those qualifications designated by the SJA to CMC in Appendix C.

021303. Specific Duties

Specific RSTC duties include, but are not limited to:

1. Train, mentor, and supervise all subordinate ROSTC personnel;
2. Conduct OSTC HQ directed training for all ROSTC personnel serving within the region.
3. Ensure all OSTC personnel attend training appropriate to their grade and billet. This training includes not only OSTC and military justice specific training, but also Professional Military Education, and required annual Marine Corps training;

4. Serve as the primary detailing authority for all STCs serving within the region;
5. Manage and supervise the ROSTC and its members;
6. When detailed to a specific case, perform the duties of an STC. The ROSTC's case load should not interfere with the duties to train, mentor, and supervise subordinate STC within the region;
7. Maintain a cooperative and close working relationship with Marine Corps legal community leaders and commanders in the region;
8. Supervise the maintenance/updating of CMS data;
9. Liaise with the Regional Trial Counsel (RTC), Regional Defense Counsel (RDC), and Regional Victims' Legal Counsel (RVLC) to facilitate the just and efficient resolution of offenses over which the OSTC exercises authority;
10. When applicable, coordinate with regional military confinement facilities that may provide confinement services to supported commands. Any coordination with federal, state, or local confinement facilities requires CMC, PSL (Corrections) notification;
11. Employ the ROSTC to deliver STC capabilities through a task organized combination of STC, victim witness assistance personnel, investigators, administrative support, and paralegal support from across the region.
12. Ensure STCs are detailed to a case and meet or consult with the Naval Criminal Investigative Service (NCIS) SVIP members within 48 hours after notification of a covered offense investigation;
13. Ensure STCs are routinely meeting or consulting with NCIS in order to assist with and assess the progress of investigations and prosecutions of offenses over which the OSTC exercises authority;
14. As appropriate, coordinate with OSTC HQ, other ROSTC's, TSO TCAP, and other TSO RTCs to ensure lessons learned, motions, and best practices are shared across the OSTC and TSO communities; and
15. Coordinate, as needed, with the Regional Director of Legal Services, Directors of Law Centers, and TSO leadership to ensure the provision of courtroom security.

#### 0214. ROSTC OFFICE ADMINISTRATOR

##### 021401. General Description

The ROSTC Office Administrator is directly responsible to the RSTC for the efficient operation, management, and execution of the ROSTC's administrative duties. The ROSTC Office Administrator's rating official/supervisor is the RSTC and their higher level reviewer is the DLSTC.

##### 021402. Specific Duties

Specific ROSTC Office Administrator duties include, but are not limited to:

1. Manage all administrative functions, tasks, and correspondence associated with ROSTC operations;

2. When required and as directed by the RSTC, assist STC within the region with discovery obligations, VWAP notifications, witness requests and travel authorizations, case information inputs into case management systems, and all other administrative tasks associated with the military justice process that do not require Article 27(b) certification;
3. When required, assist the IOSTCs with their administrative functions;
4. Assist the RSTC with VWAP and Defense Travel System coordination, tracking, and oversight;
5. Coordinate with the appropriate personnel to ensure all equipment within OSTC spaces in the region is operational, to ensure the completion of any necessary repairs, and to acquire any needed equipment or supplies;
6. Serves as the principal advisor to the RSTC for issues that arise in OSTC records management and publication programs;
7. Serves as Authorizing Official for the ROSTC's temporary additional duty orders and travel claims/vouchers;
8. Within the ROSTC, serves as the lead technical expert in the application of the Defense Travel System and applicable policies and directives;
9. Serves as the liaison between the ROSTC and Human Resources Office;
10. Manages the fiscal resources of the ROSTC;
11. Serves as the ROSTC's Risk Management and Internal Control Program Coordinator;
12. Maintains the ROSTC's Command Chronology; and
13. When directed, serves as an OSTC representative to conduct Article 6, UCMJ, inspections of legal offices in support of LSTC's and SJA to CMC's military justice oversight responsibilities.

0215. ROSTC SNCO

021501. General Description

The ROSTC SNCO is directly responsible to the RSTC for litigation support to the ROSTC and, when assigned, to subordinate IOSTCs. The ROSTC SNCO is a 44XX SNCO. Unless otherwise directed by the LSTC, the ROSTC SNCO's reporting senior is the RSTC and their reviewing officer is the DLSTC.

021502. Specific Duties

Specific ROSTC SNCO duties include, but are not limited to:

1. Conduct legal research and draft documents;
2. Create and organize case files, including CMS entries;
3. Track covered offense cases and brig confinement reports to alert and assist the RSTC in detailing STC to investigations;
4. Interview witnesses, and arrange for witness courts-martial travel;
5. Supervise and mentor enlisted support staff in the ROSTC and IOSTCs; and

6. Coordinate with and assist the IOSTCs for the provision of investigative and trial services for offenses over which the OSTC exercises authority.

## 0216. INSTALLATION OFFICES OF SPECIAL TRIAL COUNSEL (IOSTC)

### 021601. General Description

Each ROSTC contains a number of IOSTCs. The IOSTC executes OSTC operations within the region in which they are located as required by statute, regulation, OSTC policy, and OSTC HQ guidance. The IOSTC is responsible to the LSTC via the RSTC for providing supervision and administration of all personnel assigned to the IOSTC and OSTC operations to be performed by the IOSTC. The IOSTC is structured with the following personnel: Special Trial Counsel Team Leader (STCTL), STC(s), GS-11 Office Administrator, and a 44XX enlisted support staff.

The staff of the IOSTC will work with and coordinate closely with staff of the TSO, which is primarily responsible for the prosecution of those offenses over which the OSTC does not exercise its authority. Close coordination, support, and teamwork between the RSTC and RTC and between the Special Trial Counsel Team Leader (STCTL) and the Senior Trial Counsel of TSO are key to the success of the Marine Corps' prosecution team.

## 0217. SPECIAL TRIAL COUNSEL TEAM LEADER (STCTL)

### 021701. General Description

The STCTL assists the LSTC and RSTC in exercising both operational and administrative control over the personnel and activities of the IOSTC to which they are assigned. The STCTL is directly responsible to the RSTC for the effective operation and administration of their IOSTC. The STCTL directly supervises all cases detailed by the STCTL. The reporting senior for the STCTL is the RSTC and their reviewing officer is the DLSTC. The STCTL is prohibited from performing duties outside of the OSTC without the prior, written approval of the LSTC or, in the absence of the LSTC, the DLSTC. Only the LSTC or, in the absence of the LSTC, the DLSTC may approve or deny a request to detail a STCTL to a court-martial in which the OSTC has not exercised authority.

### 021702. Eligibility

The STCTL is a Marine judge advocate, normally in the grade of O-4/Major, assigned to the OSTC meeting those qualifications designated by the SJA to CMC in Appendix C.

### 021703. Specific Duties

The STCTL's represents the United States in the investigation and prosecution of offense cases over which the OSTC has authority and assists the RSTC in managing and leading the staff assigned to that STCTL's IOSTC. Unless withheld by higher authority, the STCTL executes those duties and responsibilities granted an STC in Article 24a, UCMJ, for those cases to which the STCTL is detailed.

## 0218. SPECIAL TRIAL COUNSEL (STC)

### 021801. General Description

The STC represents the United States in the investigation and prosecution of offenses over which the OSTC has authority. Unless withheld by higher authority, the STC executes those duties and responsibilities granted an STC in Article 24a, UCMJ, for those cases to which the STC is detailed. The STC's reporting senior is the STCTL and their reviewing officer is the RSTC.

021802. Eligibility

An STC is a Marine judge advocate assigned to the OSTC meeting those qualifications designated by the SJA to CMC in Appendix C.

021803. Specific Duties

The STC's primary duty is to investigate and prosecute offenses over which the OSTC has authority.

## 0219. IOSTC OFFICE ADMINISTRATOR

021901. General Description

The IOSTC Office Administrator is directly responsible to the STCTL for the efficient operation, management, and execution of the IOSTC's legal and personnel administrative duties. The IOSTC Office Administrator's rating official/supervisor is the STCTL and their higher level reviewer is the RSTC.

021902. Specific Duties

Specific IOSTC office administrator duties include, but are not limited to:

1. Manage all administrative functions, tasks, and correspondence associated with IOSTC operations;
2. When required and as directed by the STCTL, assist STC within the region with discovery obligations, VWAP notifications, witness requests and travel authorizations, data entry into CMS, and all other administrative tasks associated with the military justice process that do not require Article 27(b) certification;
3. When required, assist the ROSTCs with their administrative functions;
4. Assist the STCTL with VWAP and Defense Travel System coordination, tracking, and oversight;
5. Coordinate with the LSSS/T LAOs to ensure all OSTC equipment is operational, to ensure the completion of any necessary repairs, and to acquire any needed equipment or supplies;
6. Serves as the principal advisor to the STCTL for issues that arise in OSTC records management and publication programs;
7. Serves as Authorizing Official for the IOSTC's temporary additional duty orders and travel claims/vouchers;
8. Within the IOSTC, serves as the lead technical expert in the application of the Defense Travel System and applicable policies and directives;
9. Serves as the liaison between the IOSTC and Human Resources Office;
10. Manages the fiscal resources of the IOSTC;
11. Serves as the IOSTC's Risk Management and Internal Control Program Coordinator;
12. Maintains the IOSTC's Command Chronology; and
13. When directed, serves as an OSTC representative to conduct Article 6, UCMJ, inspections of legal offices in support of LSTC's and SJA to CMC's military justice oversight responsibilities.

## 0220. IOSTC NCO

022001. General Description

The IOSTC NCO is an enlisted Marine, with the rank of E-4/Corporal or E-5/Sergeant, possessing a 44XX MOS, who assists in the execution of assigned tasks and the management of enlisted Marines assigned to the IOSTC. If the IOSTC NCO is an E-5/Sergeant, their reporting senior is the STCTL and the reviewing officer is the RSTC. If the IOSTC NCO is an E-4/Corporal, their evaluation chain shall comply with MCO 1616.1, the Junior Enlisted Performance Evaluation System.

022002. Specific Duties

The duties of the IOSTC NCO include, by are not limited to:

1. Conduct legal research and draft documents;
2. Create and organize case files, including CMS entries;
3. Track covered offense cases and brig confinement reports to alert and assist the STCTL in detailing STC to investigations; and
4. Interview witnesses and arrange for witness courts-martial travel.

## 0221. NON-STC CERTIFIED JUDGE ADVOCATES ASSIGNED TO OSTC (NON-STC JA)

A NON-STC JA assigned to the OSTC will assist the OSTC in the investigation and prosecution of those offenses over which the OSTC has authority. Although assigned to the OSTC, the NON-STC JA is not authorized to exercise any disposition authorities granted an STC by Article 24a, UCMJ. For those offenses over which the OSTC exercises authority, a NON-STC JA's may only be detailed as assistant trial counsel.



**CHAPTER 3****DETAILING**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

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## CHAPTER 3

DETAILING

## 0301. PURPOSE

This chapter provides the OSTC policy for the detailing of counsel to represent the United States in cases over which the OSTC exercises authority. This detailing policy is established to ensure counsel, STC and non-STC, detailed to represent the United States in a particular case over which the OSTC has authority, possess the requisite experience and expertise the case will require.

## 0302. DETAILING CONSIDERATIONS

The detailing authority will consider the following factors before detailing a counsel to a particular case: any potential conflicts of interest in detailing; the counsel's caseload, experience, temperament, and qualifications; the case complexity; geographic location of the counsel and the expected location of the court-martial; and, the expected rotation date of the counsel. Detailing authority also includes the authority to remove a counsel from a case. Detailing authority may be rescinded or withheld at any time. In addition to the limitations of this chapter, the LSTC, DLSTC, or the RSTC may further limit the detailing authority of any counsel under their supervision.

0303. SPECIAL DETAILING CONSIDERATIONS FOR *DUBAY* HEARINGS AND REMANDS

Prior to detailing counsel to a case over which the OSTC exercises authority that has been remanded by an appellate court for retrial or resentencing, or for a fact-finding hearing in accordance with R.C.M. 1104 (commonly referred to as a *Dubay* Hearing, *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967)), OSTC HQ will consult with Appellate Government Division (Code 46) before detailing counsel. Because the limited purpose of a *DuBay* hearing is to obtain further evidence on a matter under consideration by the Court, these hearings often require specialized knowledge of the unique appellate posture of the case. The RSTC, in coordination with the LSTC, should consider the benefit of having two counsel represent the government for the hearing – a local counsel and an OSTC counsel with Appellate Government experience.

## 0304. DETAILING AUTHORITY OF THE LSTC

The LSTC is the detailing authority for all personnel assigned, or made available, to the OSTC. The LSTC has the discretion to delegate detailing authority to any STC serving in the OSTC. The authority to detail the RSTC to an individual case is withheld to the LSTC, or if so delegated, to the DLSTC. The LSTC may detail himself/herself. Only the LSTC has the authority to detail the DLSTC.

## 0305. DETAILING AUTHORITY OF THE RSTC

Unless restricted by the LSTC, the RSTC is the detailing authority of all STC within the RSTC's region. If delegated the authority to do so by the LSTC, the RSTC is also the detailing authority for any non-STC from the RSTC's region to be detailed to a case over which the OSTC has authority in the RSTC's region. If authorized to do so by the LSTC, the RSTC may further delegate detailing authority to the STCTL for STCs under the STCTL's supervision. Any limitations placed upon the RSTC's detailing authority will be addressed in the LSTC's delegation letter.

## 0306. DETAILING AUTHORITY OF THE STCTL

The STCTL may detail counsel under the STCTL's supervision as delegated by the RSTC. This authority may not be further delegated by the STCTL. The RSTC may appoint a STC as the "Acting STCTL" during periods when the STCTL is absent, however, unless delegated the authority to do so by the LSTC, the "Acting STCTL" will not have the authority to detail counsel.

**0307. DETAILING LETTER**

Detailing of counsel must be in writing and shall specify the counsel's role (i.e., lead counsel, assistant trial counsel, etc.) and the supervisory counsel from whom the counsel may seek assistance. The detailing letter will be maintained in the casefile and by the detailing authority and will be uploaded in CMS. If immediate detailing is necessary, the detailing authority may orally detail a counsel, provided the detailing letter is later signed (digitally or physically) indicating the date the counsel was detailed. The data concerning the date of the detailing, the counsel detailed, and their role shall also be entered in CMS.

**0308. TIMELINE**

The RSTC shall ensure an STC is made available to meet or consult with the cognizant investigating agency within 48 hours after notification of a covered offense and ensure STC is detailed within two (2) business after such notification.

**0309. DETAILING MILITARY JUSTICE SUPPORT PERSONNEL**

There is no requirement to detail military justice clerks and other personnel. However, to ensure military justice clerks gain a breadth of experience and familiarity with the facts of a case, RSTCs and STCTLs should consider developing policies that allow military justice clerks and other support personnel to be, to the greatest extent possible, assigned to cases for the life of the case.

**CHAPTER 4****VICTIM AND WITNESS ASSISTANCE PROGRAM AND THE OSTC**

All Volume changes denoted in **blue font** will reset to black font upon a full revision of this Volume.

<b>CHAPTER VERSION</b>	<b>PAGE PARAGRAPH</b>	<b>SUMMARY OF SUBSTANTIVE CHANGES</b>	<b>DATE OF CHANGE</b>

## CHAPTER 4

VICTIM AND WITNESS ASSISTANCE PROGRAM AND THE OSTC

## 0401. PURPOSE

This Chapter provides information concerning the execution of the Marine Corps' Victim and Witness Assistance Program (VWAP), including specific duties of STC and other personnel in cases involving victims and witnesses. Nothing in this Chapter restricts the legal services provided by members of the VLCO. This Chapter is not intended to create, and does not create, any entitlement, cause of action, or defense in favor of any person arising out of the failure to provide a victim or witness the assistance outlined herein. No limitations are placed on the lawful prerogatives of the Marine Corps or its officials.

The OSTC is committed to protecting the rights of victims and witnesses of alleged crimes and supporting their needs throughout the criminal justice process. In addition, we will ensure our actions are taken without infringing on the constitutional or other legal rights of a suspect or an accused.

VWAP is an all-hands effort. While many actions will be taken by an STC or their support teams, it is important to constantly convey to victims that investigators, SJAs, and convening authorities all play a key role in ensuring full VWAP compliance. When an STC is in doubt as to whether a certain VWAP obligation has been fulfilled, do it. All VWAP actions and communications taken by an OSTC member will be documented in CMS.

040101. Applicability of VWAP

A. VWAP is not limited to criminal offenses prosecuted at courts-martial. In addition to victim notification requirement for offenses prosecuted at courts-martial, victim notification requirements also exist when offenses are adjudicated at non-judicial punishment (NJP), ADSEP proceedings, or via other administrative means. However, as discussed below, STC will only be responsible for such notifications as they pertain to the investigative, deferral, and prosecution at special and general courts-martial of those offenses over which the OSTC has exercised authority.

B. Particular attention shall be paid to cases involving unrestricted reports of violations of Articles 120, 130 (Article 120a if alleged to have been committed prior to January 1, 2019), 120b, 120c, 125 (if alleged to have been committed prior to January 1, 2019), and Article 80 attempts of these offenses under the UCMJ. Such unrestricted reports create additional notification requirements and rights under JAGINST 5800.7G CH-1, which are discussed further in this chapter.

C. The Marine Corps Sexual Assault Prevention and Response Office (SAPRO) supervises and has cognizance over all programs and services provided to adult sexual assault victims, as defined in reference MCO 1752.5C. In all cases involving allegations of sexual assault, personnel shall review MCO 1752.5C for supplemental guidance.

040102. Victim Engagement Plan (VEP)

The VEP is an affirmative, proactive plan to establish and maintain open and consistent lines of communication with the victim of any offense over which the OSTC has authority and has not deferred. The goal of the VEP is to ensure that victims are informed, involved, and engaged throughout the investigative and court-martial process. The LSTC will issue a more detailed VEP via Policy Letter.

A. Initial Victim Engagement: Each IOSTC will ensure, consistent with the concepts outlined in this and subsequent chapters, victims and victim support agencies, such as the VLCO, are notified when a specific triggering event occurs regarding an offense over which the OSTC has authority and has not deferred.

1. Timeline for Initial Contact with Victims: A member of the OSTC team will make initial contact with the victim as soon as practicable after being notified of a triggering event, but not later than (7) days after receiving victim contact information.
2. Special Considerations for Cases Involving an Expedited Transfer: If a victim has requested an expedited transfer to another installation, the detailed STC will make all reasonable efforts to meet with the victim prior to their departure.
3. Information Communicated: At the initial meeting between the victim and a member of the OSTC, the OSTC member will discuss and review with the victim their rights, provide the victim with a DD Form 2701, and determine the victim's preferred method and frequency of communication, and discuss next steps.

B. Continuing Engagement Plan.

1. The detailed STC will communicate with the victim on an as-needed basis using the preferred contact method of the victim.
2. If an offense concerning the victim is preferred, the STC will ensure the victim is provided a DD Form 2702 and kept up to date regarding the status of the court-martial process through the conclusion of trial proceedings.
3. At the conclusion of trial proceedings, the STC will ensure a warm handoff of the victim to the appropriate appellate, convening authority, or Post-Trial Section representative.
4. If the offense concerning the victim is deferred, the STC will ensure a warm handoff to a convening authority representative.

0402. VARYING DEFINITIONS OF VICTIM

Various provisions in the UCMJ, Rules for Courts-Martial (R.C.M.), M.R.E.s, and service regulations guarantee victims certain rights during the military justice process. Practitioners must ensure they are using the correct definition of victim applicable for each circumstance. For example, certain rights are afforded to any victim that has suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ; other rights require the victim to be named in a specification, to have testified at trial, or to have suffered harm as a result of an offense of which the accused was convicted.

0403. NOTIFICATION OF RIGHT TO CONSULT WITH VICTIMS' LEGAL COUNSEL (VLC)

040301. Requirement to Notify Certain Victims of Right to Assistance from a VLC

Pursuant to title 10 U.S. Code, section 1044e victims of alleged sex-related offenses have the right to assistance from a VLC. Additionally, pursuant to title 10 U.S. Code, section 1044e(f) and section 1565b, when an STC meets with a victim of sexual assault or an allegation of a sex-related offense who is not already represented by a VLC, the STC or the STC's representative shall ensure that the victim has been notified of the availability of VLC and offered the option of seeking assistance from a VLC. For purposes of this notification requirement, a sex-related offense is defined as: pre-NDAA FY22: Articles 120, 120a (if alleged to have been committed prior to January 1, 2019), 120b, 120c, 125 (if alleged to have been committed prior to January 1, 2019), 130, 80 attempts of these listed offenses of the UCMJ. Post-NDAA FY22: all offenses over which the OSTC exercises authority with victims as defined in this SOP.

040302. Notifying Other Victims of the Availability of a VLC

Pursuant to Section 548 of the FY20 NDAA, victims of alleged domestic violence offenses are also eligible to seek assistance from a VLC. Additionally, the Chief Victim's Legal Counsel (CVLC) may grant exceptions to

policy to allow representation of victims of other crimes, including victims who are not eligible for services under title 10 U.S. Code, section 1044e. Accordingly, the STC or the STC's representative (e.g. a paralegal or enlisted support) shall notify every victim, as defined in Article 6b, UCMJ, of the availability of VLC to ensure the CVLC is provided the opportunity to exercise this discretion.

040303. Timing of Notification

Absent exigent circumstances, notification to the victim must occur before an STC, or representative of the STC, interviews or requests a statement from the victim. The STC or the STC's representative must document in the case file (e.g. CMS) the notification to the victim or the exigent circumstances that supported an immediate interview of the victim by the STC without informing the victim of their rights.

0404. VICTIM AND WITNESS RIGHTS

STC will ensure victims are accorded their rights under Article 6b, UCMJ. Failure to follow this paragraph and subparagraphs or any other provision of this manual does not create a right, redress, or appellate remedy for any accused in a court martial proceeding.

*Note: The Secretary of the Navy's Policies Governing the Navy and Marine Corps Offices of Special Trial Counsel, issued 7 September 2022, Appendix B, mandates that STC will conduct their assigned duties free from unlawful or unauthorized influence or coercion. No person from outside the OSTC may attempt to influence a STC's determination regarding the disposition of any offense. However, those policies do not, nor are they intended to, restrict a victim's rights under Article 6b of the UCMJ or this chapter.*

040401. Victim Rights

In addition to any other rights afforded to third parties, a crime victim has the right to:

- A. Be reasonably protected from the accused offender.
- B. Be provided with reasonable, accurate, and timely notice of:
  - (1) A public hearing concerning the continuation of pretrial confinement of the accused.
  - (2) A preliminary hearing pursuant to Article 32, UCMJ, relating to the offense, including the right to receive a copy of the appointing order directing the preliminary hearing.
  - (3) A court-martial relating to the offense, including any open hearing held pursuant to Article 39a, UCMJ, and any post-trial vacation hearing.
  - (4) A public proceeding of the Military Department Clemency and Parole Board relating to the offense.
  - (5) The release or escape of the accused, unless such notice may endanger the safety of any person.
  - (6) The date and time of any review of the accused's case by an appellate court, the scheduling (including changes and delays) of each public appellate court proceeding the victim is entitled to attend, and the decision of any appellate court or judge advocate review.

- (7) Any post-trial motion, filing, or hearing addressing either the findings or sentence of a court-martial involving the accused, the unsealing of privileged or private information of the victim, or which may result in the release of the accused.

C. If named in one of the specifications under consideration, the right to receive, upon request, a copy of, or access to, the recording of a preliminary hearing held under Article 32, UCMJ, not later than a reasonable time following the dismissal of the charges, unless charges are dismissed for rereferral, or court-martial adjournment. This provision does not entitle a victim to classified information or sealed materials consistent with an order issued in accordance with R.C.M. 1113.

D. The right to not be excluded from any public hearing or proceeding except under such circumstances as permitted exclusion under M.R.E. 615.

E. Be reasonably heard, personally or through counsel, at:

- (1) A public hearing concerning the continuation of confinement before the court-martial of the accused.
- (2) Preliminary hearings conducted pursuant to Article 32, UCMJ, and court-martial proceedings relating to M.R.E.s 412, 513, and 514 or regarding other rights provided by statute, regulation, or case law.
- (3) A public sentencing hearing relating to the offense.
- (4) A public Military Department Clemency and Parole Board hearing relating to the offense.

F. The right to confer with the attorney for the U.S. Government at any proceeding described in paragraph 040401.B of this chapter.

G. The right to be consulted and express their opinion concerning:

- (1) Pretrial confinement of the accused and release of the accused from pretrial confinement.
- (2) Regarding offense(s) committed against the victim, any decision to not prefer charges and any decision to dispose of the charges by means other than court-martial.
- (3) Regarding offense(s) committed against the victim, any decision concerning whether to dismiss or refer charges.
- (4) The proposed terms and conditions of any plea agreement.
- (5) About testifying as a witness. Note: while the STC should strongly consider the victim preference concerning whether to provide testimony, the victim's preference against testimony does not prevent the government using subpoena, or other appropriate legal process, to require victim testimony in the interest of justice.

H. Crime victims and their dependents who are eligible for legal assistance may consult with a military legal assistance attorney in accordance with DoDI 1030.02 Paragraph 3.4. Additionally, victims may elect to seek the advice of a private attorney, at their own expense.



I. Victims of an offense over which the OSTC exercises authority who are eligible for legal assistance per Military Department or National Guard Bureau policies or in accordance with title 10 U.S. Code, sections 1044 or 1044e, may consult with a VLC in accordance with DoDI 1030.02 Paragraph 3.5. Victims of these offenses will be informed by a sexual assault response coordinator (SARC), victim advocate, victim witness liaison, military criminal investigator, STC, or other responsible official that they have the right to consult with a VLC as soon as they seek assistance in accordance with title 10 U.S. Code, section 1565b, and as otherwise authorized by Military Department and National Guard Bureau policy.

J. Receive restitution as provided in accordance with state and federal law.

K. Proceedings free from unreasonable delay.

L. Be treated with fairness and respect for his or her dignity and privacy.

M. Express his or her views to the STC as to disposition of the case.

N. Not be prevented from, or bear the expense of, receiving a medical forensic examination.

O. Have a sexual assault evidence collection kit or its probative contents preserved, without charge.

P. Be provided a copy of any reports arising from result of a sexual assault evidence collection kit, including a deoxyribonucleic acid (DNA) profile match, toxicology report, or other information collected as part of a medical forensic examination, unless doing so would impede or compromise an ongoing investigation.

Q. Be informed in writing of policies governing the collection and preservation of a sexual assault evidence collection kit.

R. Upon written request, receive written notification from the appropriate official with custody not later than 60 days before the date of the intended destruction or disposal of a sexual assault evidence collection kit.

S. Upon written request, be granted further preservation of the kit or its probative contents.

T. For victims of sex-related offenses committed in the United States, to be provided an opportunity to express a preference regarding whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense.

U. Where the accused was found guilty of an offense tried at a court-martial, the right to submit a written statement to the convening authority after the sentence is adjudged.

V. The right to petition the Navy and Marine Corps Court of Criminal Appeals for a writ of mandamus contesting a ruling in an Article 32, UCMJ, preliminary hearing or court-martial if the victim believes the ruling violates the victim's rights as enumerated in Article 6b, UCMJ, or afforded by M.R.E.s 412, 513, 514, or 615 pursuant to Article 6b(e), UCMJ.

W. In all cases arising after 1 January 2019, the victim has the following additional rights.

(1) The right to petition for an Article 30a, UCMJ, hearing before a military judge for matters arising under Article 6b(c) and (e), UCMJ.

(2) The right to petition for an Article 30a, UCMJ, hearing before a military judge for relief or quashing of an investigative subpoena.

- (3) The right to decline an interview with defense counsel, or to condition such interview on the presence of STC, victim advocate, and/or VLC.
- (4) If named in a specification being considered in an Article 32, UCMJ, preliminary hearing, the right to submit supplemental materials for the preliminary hearing officer's consideration in accordance with the timelines defined for such submissions in R.C.M. 405.
- (5) The right, upon request, to receive a redacted recording of all open sessions of the court-martial.
- (6) The right, upon request, to receive a redacted copy of the court-martial record of trial, provided the victim was named in a specification for which the accused was charged.
- (7) In any case in which the victim testified, the right to receive a redacted copy of the court-martial record of trial, regardless of the findings.
- (8) The right to receive a copy of any post-trial action taken by the convening authority, if applicable.
- (9) The right to receive a copy of the Entry of Judgment.

X. For victims of sex-related offenses, a right to receive notifications in accordance with JAGMAN sections 0128(i), 0142a, and 0142b.

Y. Notification of disposition of the case, to include the acceptance of a plea of "guilty." This also includes the right to be notified of any decision to dispose of an alleged offense at NJP or ADSEP proceeding, and the right to notification of the time, location, and outcome of the NJP or ADSEP proceeding. Note: As administrative proceedings are within the cognizance of the commander and will only occur after deferral by the OSTC of the covered offense to the commander, STC are only responsible for notifying the victim that the covered offense has been deferred to the commander for action. Notifications related to the time, location, and outcome of any administrative proceeding is the responsibility of the commander taking the administrative action.

Z. The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or nonprosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

**040402. Specific Victim Notification Requirements to be Conducted by OSTC Personnel for Offenses over which the OSTC Has Authority**

A. OSTC personnel will ensure that military and civilian victims of offenses over which the OSTC exercises authority receive notifications of the following significant events in the military justice process for such offenses:

- (1) Conclusion of the investigation;
- (2) The initial disposition/deferral decision;
- (3) Pre-trial confinement hearings;
- (4) Preferral of charges;
- (5) Article 32, UCMJ hearings;

- (6) Referral of charges;
- (7) All special and general court-martial proceedings, including arraignment, motions hearings, and trial dates;
- (8) Withdrawal of charges;
- (9) Dismissal of charges;
- (10) Post-trial hearings;
- (11) Vacation hearings; and
- (12) Clemency submissions.

B. Pursuant to R.C.M. 306(e) and paragraphs 0128(a) and 0128(b) of the JAGMAN, OSTC personnel shall provide a victim of an offense, when the offense is committed in the United States and the OSTC exercises authority over the offense, the opportunity to express the victim's preference for jurisdiction of prosecution and whether the victim wishes to participate during any, some, or all of the investigation and prosecution. This victim preference letter (VPL) is accomplished via a standardized form found at Appendix A-1-m of the JAGMAN. If the victim expresses a preference for a civilian jurisdiction to prosecute the offense, the assigned STC is responsible for notifying the civilian jurisdiction of the victim's preference. To ensure notification to the civilian jurisdiction occurs, OSTC personnel shall document the VPL, civilian jurisdiction notification, and victim notifications via CMS. Upon accomplishing the required notifications and documentation in CMS, the OSTC will defer the offense to the cognizant commander, and inform the cognizant SJA, NCIS, and SARC office, as applicable.

*Note: The cognizant commander will ensure the victim is notified of the decision by the civilian authority to prosecute or not prosecute the offense in civilian court. If the STC learns of the decision by the civilian authority to prosecute or not prosecute the offense in civilian court, the STC shall ensure the cognizant commander and the commander's SJA is notified of the civilian jurisdictions decision and remind the cognizant commander and the commander's SJA of their responsibility to ensure the victim is notified of the decision.*

C. The notifications of significant events and of the victim's opportunity to express a preference for jurisdiction via the VPL must be documented and maintained within a system of records. Accordingly, OSTC personnel shall ensure that these notifications are maintained within CMS. Additionally, to document the victim's preference for jurisdiction, OSTC personnel shall document the victim's preference for jurisdiction using the standard VPL which shall be signed by the victim and the STC and uploaded into CMS. *See* Appendix A-1-m of the JAGMAN. No victim signature on a VPL is needed if the victim is requested to sign a VPL and fails to do so after a reasonable time period. When a victim declines to or fails within a reasonable time to sign the VPL, the STC shall document on the VPL what steps were taken to obtain the victims written preference. In such case, the victim's decision to not sign the VPL, or failure to do so within a reasonable time, will be considered by OSTC as indicating the victim does not wish to participate.

040403. Specific Notification Requirements for Victims of Offenses when the OSTC Has Deferred the Offense to the Commander

A. In accordance with paragraph 0142b of the JAGMAN, a commander of a victim of a sex-related offense that has been deferred by the OSTC to the cognizant commander of the accused must provide monthly notifications to the victim concerning the status of a final determination on further action of the deferred sex-related offense, whether nonjudicial punishment, other administrative action, or no action. These monthly notifications must continue until final disposition of the sex-related offense. In certain circumstances, a final disposition of the sex-related offense may occur contemporaneously with the OSTC's deferral of the offense. In that

circumstance, the commander of the victim will satisfy this notification requirement by providing the victim with immediate notice of the OSTC's deferral and the nature of the final disposition the cognizant commander of the accused took concerning the sex-related offense.

B. For the purpose of facilitating these and other notification requirements, good order and discipline, and the efficient administration of military justice, OSTC personnel will keep the cognizant commander, their supporting SJA, and NCIS informed on a regular basis (at least monthly) on the status of an offense over which the OSTC exercises authority until conclusion of court-martial proceedings or deferral of the offense to the cognizant commander.

040404. Witness Rights

A witness has the right:

1. To be treated with fairness and respect for the witness's dignity and privacy.
2. To be reasonably protected from the accused.
3. To be notified of any scheduling changes that will affect the witness's appearance at court-martial.
4. To be notified of any decision to dispose of an alleged offense at court-martial, NJP, or ADSEP proceedings.
5. To be provided information about the resolution of the case to include ADSEP decisions, any punishment awarded to the offender, sentencing, imprisonment and release of the offender, if confined.
6. To be notified of the apprehension of an accused, the initial appearance of an accused before a military judge, the release of the accused pending court-martial, any escape of the accused, and the time and location of any trial, NJP, or ADSEP proceedings (including entry of guilty pleas and sentencing).

0405. NOTIFICATION REQUIREMENTS

040501. Considerations

A. The party responsible for each disclosure and notification is specified in the following subparagraphs.

B. If the victim witness is represented by counsel, information will be provided to the VLC or, if represented by civilian counsel, the civilian counsel unless otherwise specified.

040502. Initial Information and Services for Offenses over which the OSTC Exercises Authority

A. Immediately after identifying a crime victim or witness, OSTC personnel will explain and provide a copy of DD Form 2701, "Initial Information for Victims and Witness of Crime" and provide the below information.

- (1) Contact information for the appropriate victim and witness services, including NCIS/CID, the command Victim and Witness Liaison, the OSTC office, victim compensation personnel, legal assistance, VLC, and the Inspector General's office. Record the date on which the DD Form 2701 was provided to the victim or witness in CMS. Proper completion and recording serve as evidence the victim or witness was timely notified of his or her rights.

- (2) Information about available military and civilian emergency medical and social services, victim advocacy services for victims of domestic violence or sexual assault. When necessary, the party administering DD Form 2701 will aid in securing such services.
- (3) Information about restitution or other relief a victim may be entitled to, and the manner in which such relief may be obtained.
- (4) To victims of intra-familial abuse, information on the availability of limited transitional compensation benefits and possible entitlement a portion of the active duty Servicemember's retirement benefits pursuant to title 10 U.S. Code, sections 1059 and 1408, and DoDI 1342.24.
- (5) Information about public and private programs available to provide counseling, treatment, and other support, including available compensation through federal, state, and local agencies.
- (6) Information about the prohibition against intimidation and harassment of victims and witnesses, and arrangements for the victim or witness to receive reasonable protection from threat, harm, or intimidation from an accused offender and from people acting in concert with or under the control of the accused offender.
- (7) Information concerning military and civilian protective orders, as appropriate.
- (8) If necessary, provide assistance in contacting the people responsible for administering victim and witness services and relief.
- (9) If appropriate, explain how victim or witness experiencing reprisal as a result of their making, preparing to make, or being perceived as making or being prepared to make a protected communication in accordance with title 10 U.S. Code, section 1034 and DoDI 7050.06 may file a military whistleblower complaint with the Inspector General's Office.
- (10) Information about the victim's right to seek the advice of an attorney with respect to his or her rights as a crime victim pursuant to federal law and DoD policy. This includes the right of Servicemembers and their dependents to consult a military legal assistance attorney or a VLC.

040503. Information to be Provided during Investigation of a Crime

A. If additional victims or witnesses are identified in the course of the investigation, STC will ensure the victim or witness has been provided a DD Form 2701 and ensure the victim or witness is informed of the rights and services listed in paragraph 040502 as soon as practicable.

B. STC will ensure victims and witnesses are informed of the status of the investigation of the crime, to the extent providing such information does not interfere with the investigation.

040504. Information and Services to be Provided Concerning the Prosecution of a Crime

A. Prior to or during initial meeting with the victim or witness, the STC will ensure a copy of DD Form 2702, "Court-Martial Information for Victims and Witnesses of Crime," is provided to the victim or witness in order to convey basic information about the court-martial process. The date the DD Form 2702 is provided to the victim or witness shall be recorded in CMS.

B. The STC should ensure the victim or witness understands the information concerning their rights as listed in this chapter, and take steps to ensure the victims and witnesses receive the additional rights and services listed below:

- (1) Explanation of the court-martial process and the victim and witness' role in that process, including the possible need for pretrial interviews with law enforcement, government counsel, and defense

counsel, along with the victim's right to be interviewed by defense counsel only in the presence of their VLC, Victim Advocate, or government counsel.

- (2) Before any court proceedings, help with locating available services such as transportation, parking, childcare, lodging, and courtroom translators or interpreters that may be necessary to allow the victim or witness to participate in court proceedings.
- (3) During the court proceedings, to have a private waiting area out of the sight and hearing of the accused and defense witnesses. In the case of proceedings conducted aboard ship or in a deployed environment, to be provided with a private waiting area to the greatest extent practicable.
- (4) Notification of the scheduling, including changes and delays, of a preliminary hearing conducted pursuant to Article 32, UCMJ, and each court proceeding the victim or witness are entitled to or required to attend will be made without delay.
  - (a) This includes a right to 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.
  - (b) On request of a victim or witness whose absence from work or inability to pay an account is caused by the alleged crime or cooperation in the investigation or prosecution, the employer or creditor of the victim or witness will be informed of the reasons for the absence from work or inability to make timely payments on an account. This requirement does not create an independent entitlement to legal assistance or a legal defense against claims of indebtedness.
- (5) Notification of the preliminary hearing officer's final recommendation.
- (6) Consultation concerning any decision to defer an offense to the cognizant commander, dismiss charges, or enter into a plea agreement.
- (7) Notification of the final disposition of the case for OSTC purposes, to include the acceptance of a plea of "guilty," the rendering of a verdict, the withdrawal or dismissal of charges, or deferral of an offense to the cognizant commander for further action.
- (8) Notification to victims of the opportunity to present to the court at sentencing, in compliance with applicable law and regulations, a statement of the impact of the crime on the victim, including financial, social, psychological, and physical harm suffered by the victim.
- (9) The submission of matters for convening authority's consideration when taking action pursuant to Article 60, UCMJ.
- (10) Notification of the offender's sentence and general information regarding minimum release date, parole, clemency, and mandatory supervised release.

040505. Information and Services to be Provided During Post-Trial Process

A. Upon the court-martial conviction of an offender, the STC will ensure the victims and witnesses are provided a copy of DD Form 2703, "Post-Trial Information for Victims and Witnesses of Crime," to convey basic information about the post-trial process. The STC will ensure the date the DD Form 2703 was provided is recorded in CMS.

B. The STC will ensure victims and witnesses are provided and understand the following concerning the post-trial process and available post-trial services:

- (1) General information about the convening authority's action, the appellate process, the corrections process, work release, furlough, probation, parole, mandatory supervised release, and other forms of release from custody, and eligibility for each.
- (2) Information regarding their right to elect to be notified of further actions in the case including the convening authority's action, entry of judgment, appellate motions, hearings, and decisions, changes in inmate status, and consideration for parole.

C. STC will ensure victims and witnesses are provided a copy of DD Form 2704, "Victim/Witness Certification and Election Concerning Prisoner Status" in order to explain and inform victims and witnesses about their right to elect to be notified of appellate actions, hearings, decisions, and changes in the offender's status in confinement. The DD Form 2704-1, "Victim Election of Post-trial Rights," will be used to record victim and witness elections about whether to receive notifications, records of trial, to submit matters in clemency, and concerning appellate rights.

- (1) In all cases resulting in a sentence of confinement, the DD Form 2704 will be completed and forwarded to Commandant of the Marine Corps; Plans, Policy, and Operations (PPO); Security Division (PS); Law Enforcement, Investigations, and Corrections Branch (PSL); Corrections Section (PSL-CORR), the gaining confinement facility, the convening authority, and the victim or witness.
  - (a) Incomplete DD Forms 2704 received by CMC (PSL-CORR) must be accompanied by a signed memorandum detailing the reasons for the incomplete information, or they will be returned to the responsible legal office for correction.
  - (b) Inmates shall not be granted access to DD Forms 2704, nor shall a copy of the forms be attached to any record to which an inmate has access.
- (2) In all cases resulting in a conviction but no sentence of confinement, the DD Form 2704 will be completed and forwarded to CMC (PSL-CORR), the convening authority, and the victim or witness.

*Note: All copies of DD Form 2704 provided directly to victims and witnesses must be redacted to ensure a victim or witness does not receive personally identifiable information (PII) of any other victim or witness.*

- (3) For all convictions with a qualifying victim, a DD Form 2704-1 will be completed for each victim and forwarded to CMC (PSL-CORR), the Appellate Victim and Witness Liaison Officer, the convening authority, and the victim. This form may be included in the record of trial with appropriate redactions.
- (4) A qualifying victim's signature and initials on a DD Form 2704-1 declining to receive the record of trial, to submit matters in clemency, receive appellate updates, or updates concerning the confinement status of the accused may satisfy the requirement for a written waiver.

D. DD Forms 2704, 2704-1, and 2705, "Notification to Victim/Witness of Prisoner Status," are exempt from release in accordance with DoD Manual 5400.07. The completion of DD Forms 2704 and 2704-1 will be recorded in CMS.

040506. Information and Services to be Provided on Appeal

Victims named in a specification under consideration by an appellate court have a right to receive notifications concerning the filings, hearing, and outcome of the case upon review by the Navy-Marine Corps Court

of Criminal Appeals, the Court of Appeals for the Armed Forces (C.A.A.F.), or the U.S. Supreme Court. STC should ensure victims and witnesses are well informed concerning their right to receive information on the appellate process. STC will ensure that victims are informed that additional notifications concerning the appellate process will be provided by government appellate counsel or Appellate VWAP Director, Office of the Judge Advocate General (OJAG), Code 40.

040507. Additional Procedural Considerations

A. At the conclusion of all court proceedings, the local responsible official (normally the STC assigned to the case in coordination with the NCIS case agent) will take appropriate action to ensure any personal property of the victim or witness held as evidence is safeguarded and returned as expeditiously as possible.

B. Requests for information relating to the investigation and prosecution of a crime from a victim or witness will be processed in accordance with Article 140a, UCMJ, and governing DOD, DON, and Service regulations and policy.

C. Any consultation or notification required by this chapter may be limited to avoid endangering the safety of a victim or witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense.

D. Although the victim's views must be considered, this instruction is not intended to limit the responsibility or authority of the OSTC.

0406. DISCLOSURE TO VICTIMS OF EVIDENCE AND OFFICIAL DOCUMENTS

STC are responsible for the disclosures and notifications under relevant statutory and regulatory requirements. If the victim is represented by counsel, the information will be provided to the VLC or civilian counsel. Counsel withholding any required information must consult supervisory counsel and limit the refusal to situations involving exceptional circumstances where disclosing the information to the victim would lead to the destruction of evidence, compromise of the investigation, or is otherwise inconsistent with the pursuit of justice. Nothing in this section is intended to prevent the victim or the victim's counsel, if applicable, from requesting disclosure of additional documents as necessary to safeguard victims' rights. Nothing in this section is intended to prevent STC from withholding listed information when necessary based on the facts of the case, or disclosing additional documents not listed, if doing so is authorized under 5 U.S.C. § 552a and SECNAVINST 5211.5F. The disclosure requirements listed in this chapter do not eliminate any specific requirements to provide information and materials to victims under the UCMJ, Manual for Courts-Martial, and other sources of applicable law and policy. For purposes of this paragraph, a victim is defined under Article 6b, UCMJ, unless the specific provision states otherwise. Upon request by the victim or the victim's counsel, STC shall provide the following information to the victim or detailed VLC unless otherwise directed by supervising attorney or military judge.

040601. Before Preferral

A copy of the victim's statements, including video statements. This obligation to disclose continues throughout the court-martial proceeding.

040602. After Preferral

A. A copy of the charge sheet, redacted for personally identifiable information (PII), setting forth the preferred specifications pertaining to the victim making the request.

B. Subpoenas for personal or private information regarding a victim named in a specification. *See* R.C.M. 703(g)(3)(C)(ii).



040603. After Referral

A copy of the referred charge sheet, redacted for PII.

040604. Upon Receipt by the Government

A. A copy of any filing, 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 any filing where a victim has a right to be heard regarding the filing, such as a motion filed under M.R.E.s 412 and/or 513.

B. A copy of any proposed agreement and the final signed agreement, including the signed stipulation of fact, if any, related to the offenses involving that victim.

## 0407. NOTIFICATION TO VICTIMS IN CHILD PORNOGRAPHY CASES

040701. Article 6b Applies in Child Pornography Cases

Children depicted in images, videos, and other forms of child pornography are guaranteed all the rights listed in Article 6b, UCMJ, including the rights to reasonable, accurate, and timely notice of proceedings, to confer with counsel for the government, and if the accused is convicted, to be reasonably heard during sentencing. *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018).

040702. VWAP Procedures for Child Pornography Cases

When the identity of the child depicted in the images is known, the STC must provide all information required under paragraphs 0404 and 0405 of this chapter to the victim, or victim's designee. If an image appears to depict a victim whose identity is unknown to NCIS and STC, the STC should work with NCIS to request for review of the image by the Federal Bureau of Investigation (FBI). The FBI will provide information concerning any additional identifiable victims in the form of a Victim Information Report (VIR). The VIR shall be provided to the appellate VWAP manager at OJAG (Code 40), but shall not be further disseminated and information derived from the VIR shall be safeguarded and protected in accordance with 18 U.S.C. § 3509(d).

A. Known Victim Requesting Not to Receive Notifications. Should a victim elect not to be notified, the VIR will contain no contact information. In such cases, STC will respect the victim's preference and will not attempt to make contact. Where a victim has elected not to be notified or participate in a hearing, statements from the victim are not admissible during sentencing under R.C.M. 1001A; *see United States v. Barker*, 77 M.J. 377, at 382-84. In these cases, STC may only seek to introduce the victim's statement as negotiated through a plea agreement, or through independently established grounds for admissibility.

B. Known Victim Requesting Notifications. In cases where a victim was identified and the VIR contains the victim's or their representative's contact information, STC will be responsible for providing a copy of DD Form 2701, DD Form 2702, DD Form 2703, and a copy of the DD Form 2704 with a cover letter containing an explanation of the victim's rights and STC's contact information.

C. Completing a DD Form 2704 in a Child Pornography Case. Section 2 of DD Form 2704 will never apply in a child pornography case, because there are always victims in child pornography cases involving actual children. Section 3 should be signed to reflect that there are eligible victims. Within Section 4, add the contact information provided on the VIR (contact information on VIR is valid for 45 days, STC may need to request an updated VIR). When a known victim declines notification, or when all victims are either unidentified or unknown, Section 4 will contain a short statement explaining why contact information is unavailable.

## 0408. INDIVIDUAL TO ASSUME RIGHTS OF CERTAIN VICTIMS

040801. When Appointment May be Warranted

Under R.C.M. 801(a)(6) and Article 6b, UCMJ, the military judge may appoint a person to assume the victim's rights under the UCMJ if the victim is under 18 years of age and not a member of the armed forces, is incompetent, is incapacitated, or deceased. The military judge is not required to hold a hearing before making such a designation. If the military judge orders a hearing, the STC will ensure the victim is notified of the hearing and their right to be present at the hearing. The STC must consult with the VLC, if applicable, regarding the selection of a designee. Per R.C.M. 801(a)(6)(C), the designee may not be the accused. The STC may make the above notifications through the designated VWAC.

040802. Factors to Consider in Recommending Designee

This paragraph outlines factors and considerations for STC when recommending a designee for appointment by the military judge. Nothing in this paragraph restricts or limits a military judge's discretion under R.C.M. 801(a)(6) to appoint, or not appoint, a particular designee. STC should consider the following about the potential designee: the potential designee's age and maturity; the potential designee's relationship to the victim; the potential designee's physical proximity to key participants and locations, including the probable location of the court-martial; the costs incurred in effecting the appointment; the willingness of the proposed designee to serve as designee; any appointment of a guardian by another court of competent jurisdiction; the victim's preference; potential delays that may result from the specific appointment; and any other relevant information indicating appointing a designee is in the victim's best interest.

040803. Compensation for Designee Paid by Convening Authority

In most cases, the designee will be a family member, parent, or legal guardian not requiring compensation. If the military judge appoints a designee requiring payment for their services (such as a civilian guardian *ad litem* or counselor), the STC will seek an order from the military judge fixing the rate and maximum amount of compensation. The convening authority is responsible for paying these costs. The RSTC may direct their OSTC personnel to provide administrative assistance to ensure proper funding and payment of these costs.

**CHAPTER 5****CHARGING STANDARDS AND CONSIDERATIONS**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

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## CHAPTER 5

CHARGING STANDARDS AND CONSIDERATIONS

## 0501. PROCESSING OF OFFENSES OVER WHICH THE OSTC HAS AUTHORITY

050101. General Guidance

The changes made to our military justice system by the National Defense Authorization Act of 2022 places enormous responsibility on STC and vests them with broad discretion concerning the disposition of covered offenses. The reasoned exercise of that discretion will promote the fair, evenhanded, and effective administration of justice. To help achieve regularity without regimentation, and to prevent unwarranted disparity resulting from unfettered discretion, this Chapter provides guidance on the reasoned exercise of prosecutorial discretion in order to ensure the fair administration of justice in decisions regarding charging.

For every offense over which the OSTC has authority, STC will conduct an unbiased and individualized assessment of all available evidence and relevant circumstances and consider the extent to which any particular charge would be consistent with the purposes of military law, maximize the impact of available resources on crime, and advances the fair, evenhanded, and effective administration of justice. This assessment will be documented in a Prosecution Decision Memorandum (PDM).

Criminal allegations received by the OSTC will generally fall into one of three categories:

- (1) Those that have sufficient evidence likely to obtain and sustain a guilty verdict and warrant prosecution by the OSTC at special or general court-martial;
- (2) Those that have sufficient evidence likely to obtain and sustain a guilty verdict but do not warrant prosecution by the OSTC at special or general court-martial due to the relative severity of the alleged offense or other circumstances that render the offense more appropriately adjudicated by a lesser criminal or administrative forum; and
- (3) Those that lack sufficient evidence to warrant prosecution by the OSTC at special or general court-martial.

STC should review the American Bar Association's (ABA) Criminal Justice Standards for the Prosecution Function. Although not binding of OSTC personnel, this document contains nationally recognized practices and policies that are useful examples of how to execute the prosecution function. The ABA's Criminal Justice Standards for the Prosecution Function can be found at [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition). Of note, the ABA standards state:

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional legal rights of all persons, included suspects and defendants.

050102. Threshold Charging Requirement

**The threshold requirement to charge an offense is that it must be probable that the admissible evidence will be sufficient to obtain and sustain a conviction rendered by a reasonable, unbiased trier of fact. That is, the STC must believe that the accused will, more likely than not, be found guilty beyond a reasonable doubt by a reasonable, unbiased trier of fact and that the conviction will be upheld on appeal.**

In this connection, it should be noted that, when deciding whether sufficient admissible evidence exists to obtain and sustain a conviction, STC need not have in hand, at that time, all the evidence upon which the STC intends to rely at trial. However, the STC must have a reasonable, good faith belief that such evidence will be available and admissible at the time of trial.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the accused or his/her cause is not a factor to be considered. For example, in a case involving an extremely popular service member, it might be clear that the evidence of guilt—viewed objectively by a reasonable, unbiased factfinder—would be sufficient to obtain and sustain a conviction, yet STC might reasonably doubt, based on the circumstances, that a trier of fact would convict the accused. In such a case, despite STC’s negative assessment of the likelihood of a conviction (based on factors extraneous to an objective view of the law and the facts), STC may properly conclude that it is necessary and appropriate in the interests of justice to charge the offense.

A. Military Interest / Non-Criminal Alternatives

Even when this threshold requirement is satisfied, STC should not charge an offense if doing so would not serve a substantial military interest or if there exist adequate, non-criminal alternatives to address the misconduct.

In determining whether prosecution of the offense at special or general court-martial would serve a substantial military interest that would not be served by an available adequate, non-criminal alternative, STC will weigh all relevant circumstances, including: the nature and seriousness of the offense; the impact of the offense on good order and discipline; the accused’s culpability in connection with the offense; the interests of the victim; the accused’s history with respect to criminal activity; the accused’s willingness to cooperate in the investigation and prosecution of others; the accused’s personal circumstances; and the probable sentence or other consequences if the accused is convicted. In assessing the military interest to be served by the prosecution of an offense over which the STC has authority, STC shall obtain input from the convening authority, the commander(s) of the accused and victim(s), and the victim(s). Although this input is not binding on the STC’s determination of whether to charge the offense, such input provides the STC with a more complete picture of the military interests impacts of the charging decision.

B. Impermissible Considerations

In determining whether prosecution of the offense at special or general court-martial is appropriate, STC will not be influenced by the race, gender, ethnicity, national origin, or sexual orientation of the accused or victim or by the STC’s personal feelings or self-interest.

050103. Prosecution Decision ProcedureA. Case Processing Timelines

The effective and efficient resolution of allegations of misconduct is essential to accomplishing the purposes of military justice. Although there is no hard and fast time requirement for the OSTC to reach a charging or deferral decision, OSTC personnel should remain mindful that excessive case processing timelines undermine stakeholder confidence in the military justice system. If an offense is to be charged, it is crucial to charge the offense in a timely manner. If a case is to be deferred, it is equally important to convey that decision to the victim(s), accused, and their commanders. In some cases, a decision cannot be made until every investigation action has been completed and analyzed. In others, the decision may be made sooner. The question for the decision maker

is: “Do you believe you have the information you need to make an informed decision?” OSTC personnel, not NCIS, determines whether there is sufficient information to make a charging decision. STC must balance the need for delivery of prompt justice for victims, the need for commands and accuseds to have a just and timely resolution of the allegations, against the need to thoroughly investigate the allegations in order to make a disposition decision that is supported by the law, facts, and circumstances of each case.

B. Prosecution Decision Memorandum (PDM)

For every offense over which the OSTC has authority, the detailed STC will draft a PDM. The primary purpose of the PDM is to provide sufficient information for the OSTC disposition decision. As part of the PDM, the STC shall prepare a proof matrix for any covered offense reasonably raised by the allegation and/or the evidence. The PDM will be maintained in the case file and uploaded into CMS.

The PDM is not intended to address all facts and deliberative thoughts of the STC. Rather the PDM is an overview and documentation of the most salient considerations made by the STC conducting the analysis. The PDM is a work product and, until signed by the designated deferral authority, is pre-decisional. The PDM is not intended for release outside of the OSTC. However, the PDM must sufficiently capture the decision-making process so that a later reviewer, wholly unfamiliar with the case, can understand the reasons underlying the ultimate disposition decision.

The PDM will be forwarded via the STC’s case supervisory counsel chain to the designated deferral authority. Deferral authorities are designated in paragraph 050103(D), below.

C. Preferral

R.C.M. 307 authorizes any person subject the UCMJ to prefer an offense, this includes the preferral of any offense over which the OSTC exercises authority. Nothing in this issuance shall be interpreted as prohibiting any person subject to the UCMJ, including an STC, from doing so. However, just as any STC has the authority to prefer an offense, so does any STC have the authority to dismiss any preferred offense over which the OSTC has authority.

If, after careful deliberation of those considerations outlined in paragraphs 050101 and 050102 above, an STC determines that an offense over which the OSTC has authority should be preferred, the STC will prepare a PDM and draft charges and forward the PDM and draft charges to the appropriate deferral authority for action.

Should the OSTC have authority over an offense for which a non-STC has preferred a charge, the STC will consider whether such preferred charge should be referred or deferred based upon those considerations outlined in paragraphs 050101 and 050102 above. If it is determined that the preferred offense should not be maintained, the STC will prepare a PDM and forward the PDM and the non-STC preferred charge to the appropriate deferral authority for action.

If the deferral authority determines that preferral of an offense over which the OSTC has authority is warranted, the deferral authority will endorse the PDM authorizing the preferral and notify the STC of this action.

Upon receipt of a PDM authorizing preferral, the detailed STC will cause the approved charges to be preferred and will notify, in writing, the following of the disposition decision: the convening authority’s servicing SJA; if applicable, the victim’s commander; the NCIS case agent; and the victim (or if represented by counsel, their VLC).

D. Deferral Authority

Except for those offenses reserved for decision by the LSTC as detailed in the paragraph immediately following, the deferral authority for all offenses over which the OSTC has authority is the RSTC. In the absence of an RSTC, the DLSTC will serve as the deferral authority. With the concurrence of the LSTC, the RSTC may further delegate this authority to any STC over whom the RSTC exercises supervisory authority.

The LSTC is the deferral authority for the following offenses: Article 118 (Murder); 119 (Manslaughter); 119a (Death of an Unborn Child); or any attempts, solicitations, or conspiracies to commit these offenses.

E. Deferral Actions

If, after careful deliberation of those considerations outlined in paragraphs 050101 and 050102 above, the deferral authority determines that an offense over which the OSTC has authority should not be preferred, the deferral authority will endorse the PDM indicating those offenses over which the OSTC has authority that is/are being returned to the convening authority.

If an offense over which the OSTC has authority is deferred, the detailed STC will notify the following persons of the OSTC deferral decision: the convening authority's servicing SJA, the victim's commander if the victim and accused report to different commanders, the NCIS case agent, and the victim or VLC if the victim is represented by counsel.

Without detailing the deliberative process resulting in the deferral, the written deferral notification will indicate the following: (1) no probable cause for any covered offense; (2) probable cause exists for a covered offense, but the OSTC assesses there is insufficient admissible evidence to obtain and sustain a conviction by a reasonable, unbiased finder of fact for the covered offense; or (3) although there is sufficient admissible evidence to obtain and sustain a conviction by a reasonable, unbiased finder of fact for the covered offense, prosecution of the covered offense at a special or general court-martial would not serve a substantial military interest as there exists adequate, non-criminal alternatives to address the misconduct.

The SJA is responsible for informing the commander of the accused and the convening authority of the deferral. The deferral notification will be provided in writing and documented in CMS.

After notification of the deferral decision, the convening authority may then take any authorized disciplinary or administrative action regarding the accused's alleged misconduct. The only limiting factor on any disciplinary action to be taken by the convening authority is that the convening authority is prohibited from referring any deferred covered offense for trial by special or general court-martial.

**CHAPTER 6**  
**PRETRIAL MATTERS**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

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## CHAPTER 6

PRETRIAL MATTERS

## 0601. CONFLICTS OF INTEREST

060101. Obligation to Avoid the Appearance of Conflicts

All military justice practitioners, to include those within the OSTC, have an obligation to adhere to the rules of professional responsibility prohibiting conflicts of interest, such as JAGINST 5803.1E and individual state bar rules. Additionally, practitioners should strive to the greatest extent possible to avoid the appearance of conflicts. Even if no actual conflict exists, counsel should avoid situations where their loyalties might be questioned, or situations that might cause members of the public to question the fairness of the proceedings.

060102. Conflicts of Interest Involving Non-OSTC Counsel

Because the resolution of conflicts of interests within the TSO, DSO, and VLCO may involve confidential information and relevant facts not known by the STC, STCs who believe a conflict of interest may exist will report that possible conflict to their OSTC supervisory counsel. If OSTC supervisory counsel believes that a conflict, or appearance of a conflict of interest exists, the OSTC supervisory counsel will address the situation with the appropriate supervisory counsel within the organization of the potentially conflicted non-OSTC counsel. This allows the supervisory counsel of that organization to address and, if necessary, resolve the conflict. In cases that are post-referral, if the conflict or the appearance of a conflict persist after notification, after conferring with supervisory counsel, the STC should timely inform the military judge of the facts creating the potential conflict. *See United States v. Lee*, 70 M.J. 535, 542 (N-M. Ct. Crim. App. 2011).

060103. Conflicts of Interest Involving OSTC Counsel

Counsel assigned to or performing duties on behalf of the OSTC are prohibited from representing the United States concerning an offense over which the OSTC exercises authority when that counsel owes a duty under the rules of professional responsibility to a former client involved in the offense. For example, the OSTC counsel previously served as a defense counsel for the accused, a VLC for the victim, received confidential communications related to a case, or otherwise participated in the case in a way that would create an appearance that the counsel's actions related to the case creates a conflict. Counsel, legal services specialists, or investigators prohibited from being detailed to a case because of previous involvement or other conflicts, must also not provide any assistance to other OSTC personnel performing duties related to the offense or reveal information or strategies obtained through their prior involvement, or from their knowledge of the accused or victim. If a conflict prevents a member of the OSTC from being detailed to a case, the supervisor of the person not detailed will direct the person, in writing, not to participate in the case or aid those who do. A copy of the directive shall be provided to the STC detailed to the case and recorded in CMS. If the conflicted person serves in a supervisory role to the STC detailed to the case, the written directive shall also detail an alternate supervisory counsel for the detailed STC.

## 0602. FUNDING FOR CASE-RELATED EXPENSES

060201. Convening Authority Responsibility

Unless otherwise authorized by competent authority in writing, all case-related expenses shall be paid by the convening authority. The convening authority is responsible for selecting and detailing the members to the court-martial in accordance with Article 25, UCMJ. The Manual for Courts-Martial, JAGMAN and LSAM include detailed guidance for payment of case-related expenses, such as witness travel and expert witness fees. The following paragraphs provide additional definitions and guidance to supplement these references.

060202. Definition of Case-Related Expense

Generally, case-related expenses are those expenses that are unique to a particular case or arise under contracts entered in support of a particular case. They do not include routine training for counsel, maintenance of facilities or offices, or the purchase of equipment or supplies routinely used by a Law Center. Case-related expenses include, but are not limited to, the purchase of specialized equipment or supplies required for a particular case; the contracting expenses related to expert consultants and/or witnesses; and travel expenses for any STC detailed to a case when the travel is for the purposes of case investigation and preparation, a preliminary hearing under Article 32, or any session of court. Case-related expenses also include expenses under DoDI 1030.02 (victim and witness procedures) that allow a victim or witness to participate in court proceedings, such as funding for transportation, parking, child care, lodging, translators, interpreters, as well as funding of travel for a support person, counselor, guardian, or other personnel who enables a victim or witness to participate in a proceeding.

060203. Hardware and Software Contracts

Hardware, software, or other official applications used by OSTC offices are funded by the supporting MCI-COM and/or JAD. Any requests for hardware, software, or other official application to be used by an OSTC office must be routed to the LSTC via the OSTC HQ Operations Officer. OSTC HQ will coordinate with JAD for the contracting and purchasing of specialized equipment.

## 0603. PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION (PII)

060301. Requirement to Protect PII

Each OSTC Office must have adequate policies in place to ensure PII is properly handled, redacted, and disposed of in accordance with JAGMAN section 0141a, SECNAVINST 5211.5 (series) and the Privacy Act, 5 U.S.C. § 552a. Social security numbers, or any shortened form of the social security number, will not be used on any military justice forms, documents, or correspondence, including the charge sheet and in any electronic case management system, unless specifically required by authorized policy, such as when reporting criminal justice information to the FBI. When documents, forms, correspondence, or CMS require a unique identifier for an individual, the DoD ID Number will be substituted for the social security number. The Navy Marine Corps Trial Judiciary Uniform Rules of Practice, JAGMAN, and other LSAM volumes provide additional guidance to STC regarding protection of PII during the discovery process.

060302. Redacting Dockets, Filings, and Trial-Level Court Documents

Unless otherwise required by law, the Rules for Courts-Martial, or the Military Rules of Evidence, and Section 0141a of the JAGMAN require counsel to omit PII from all dockets, filings, pleadings, and trial-level court documents counsel intend to use at any court proceeding including the Article 32, UCMJ preliminary hearing, or that may otherwise be included in the record of trial. Victims shall be referenced by initials only in any docket, filing, or trial-level court document made publicly available by 10 U.S.C. § 140a in accordance with JAGINST 5813.2.

A. Definitions

“Docket” includes information concerning each case docketed with the trial or appellate courts of each military department. The trial court docket includes the name of the case, the location of the hearing, the type of hearing, the military judge presiding over the hearing, and the counsel assigned to the case. The docket may be limited to hearings conducted after the case has been referred to a court-martial; Article 32, UCMJ preliminary hearings are not required to be published in a docket.

“Filings” consist of all pleadings, notices, petitions, and requests submitted to a trial court, military judge, or a military magistrate designated under Articles 19 or 30a, UCMJ. “Filings” do not include any evidence or matters submitted in support of any pleading, notice, petition, or request.

“Trial-level court documents” consist of the charge sheet, convening order(s), court rulings, statement of trial results, convening authority’s action, and entry of judgment, and appellate court orders and opinions. In accordance with General Counsel of the DoD Memorandum, *Revised Uniform Standards and Criteria Required by Article 140a, UCMJ*, dated 12 January 2023, trial level court documents do not include the Article 32, UCMJ preliminary hearing report, a recording of any court session, exhibits (unless otherwise publicly accessible, or a transcript of the proceedings).

B. Redactions Required

Dockets, filings, and trial-level court documents will be redacted to remove the following information from the documents: (1) all social security numbers; (2) all taxpayer identification numbers; (3) birthdates; (4) names of minors; (5) names of victims; (6) all financial account numbers; (7) any other sensitive information as determined by SECNAV. Any counsel responsible for creating a filing or court record is responsible for redacting such information from the document before filing it. If a counsel believes including such information in any filing or court record is necessary, counsel shall first request permission from the military judge to file the document unredacted, in accordance with rules established by the trial judiciary. STC should request any filed document containing unredacted information be sealed.

0604. NO REQUEST FOR LEGAL SERVICES REQUIRED

For offenses over which the OSTC exercises authority, no Request for Legal Services (RLS) is needed, nor will one be requested by the OSTC.

0605. EXERCISE OF COURT-MARTIAL JURISDICTION OVER RETIRED, RESERVE, FLEET RESERVE, FLEET MARINE CORPS RESERVE, AND DISCHARGED PERSONNEL

060501. Purpose

Occasionally the needs of good order and discipline or of pursuing justice require the recall of a reservist to active duty or bringing a retiree to face a court-martial. This is an unusual and exceptional circumstance that should not be done lightly or without careful contemplation or good cause. This paragraph supplements section 0123 of the JAGMAN and provides guidance in those situations. The paragraph assumes that there is both subject matter and personal jurisdiction over the alleged crime and individual Service member. See Articles 2 and 3, UCMJ; JAGMAN sections 0123 and 0145.

060502. Routing of Cases Requiring Prior SECNAV Authorization

The authority to refer charges or impose confinement in certain situations is withheld, without the prior authorization of SECNAV. Section 0123 of the JAGMAN contains detailed instructions for cases when the exercise of courts-martial jurisdiction requires prior authorization from SECNAV. Subparagraph (b) of that provision requires all requests to be addressed to SECNAV, via OJAG (Code 20) or HQMC (JA), as appropriate. For cases involving offenses over which the OSTC exercises authority, the request shall be forwarded to the LSTC for endorsement. The LSTC will forward the request to HQMC (JA) for action..

060503. Contents of Request

The JAGMAN lists six pieces of information that must be included in the request:

1. Draft charge(s) and specification(s) (do not prefer charges until authorization has been received from SECNAV; care should be exercised to avoid triggering the speedy trial provisions of R.C.M. 707);
2. A summary of the evidence in the case;
3. The facts showing amenability of the accused or suspected person to trial by court-martial;

4. Whether civilian jurisdiction exists, and if so, whether the civilian jurisdiction has declined to prosecute the case at the time of the request; and in applicable cases, the victim's preference as to jurisdiction (see subsection 0128(a));
5. The military status of the accused or suspected person at present and at the time of the alleged offense; and
6. The reasons that make trial by court-martial advisable.

In addition to these minimum requirements, requests should strive to provide all relevant information to streamline the process and answer questions that arise. For example, instead of a mere summary of the evidence, it is often beneficial to provide a full copy of all the evidence. The request should contain documented communication from the civilian agency declining jurisdiction, if applicable. At a minimum, an email from a representative of any such agency is desirable. Victim preferences or considerations that make trial by court-martial advisable should also be included in the request.

060504. Disciplinary Disposition Authorities for Reservists and Retirees

Because reservists and retirees are distinct in so many relevant aspects (*e.g.*, jurisdiction, recall requirements, and unit association), this chapter discusses each category separately. Service members who have transferred to the Fleet Marine Corps Reserve after 20 years of service are considered, for purposes of this chapter, with retirees. The disciplinary disposition authority (DDA) is the entity initially authorized to recall a reservist, to bring a retiree back on active duty, or to otherwise adjudicate reports of misconduct levied against reservists or retirees. In order to appraise the DDA of the available disciplinary options regarding a reservist or retiree alleged to have committed an offense over which the OSTC exercises authority, the LSTC will provide the DDA notice of whether the OSTC would pursue charging the reservist or retiree at general or special court-martial.

060505. Reservists

A. General Guidance on Reservists

Reservists are "recalled" to active duty when jurisdiction is sought under Articles 2(a)(3), 2(d), and 3(d), UCMJ. Reservists may be recalled to active duty by a General Court-Martial Convening Authority (GCMCA) or by SECNAV. If the recall authority is the GCMCA, then charges against the reservist may be investigated at an Article 32, referred to court-martial, or disposed of through NJP. Section 0123e(3)(a) of the JAGMAN states charges should not be preferred before SECNAV authorization is obtained to avoid prematurely triggering the speedy trial clock.

B. Enlisted Reservists

The DDA is the commanding general of 4th Marine Division, 4th Marine Aircraft Wing, 4th Marine Logistics Group, Force Headquarters Group, or Marine Forces Reserve as appropriate. Any of these commanders may authorize GCMCA recalls of enlisted reservists. In the case of an IMA reservist who is attached to an active component command, the accused's active component GCMCA also possesses the authority to recall the accused to active duty.

C. Officer Reservists

The disposition authority for officer cases is the Commander, Marine Forces Reserve. Therefore, only Commander, Marine Forces Reserve may authorize GCMCA recalls of officer reservists. In the case of an IMA reservist who is attached to an active component command, the accused's active component GCMCA also possesses the authority to recall the accused to active duty.

D. Mobilized Reservists and Individual Mobilization Augmentees

Individual Mobilization Augmentees (IMAs) and Reservists mobilized and joined to units not otherwise within the MFR structure are attached to the units they are supporting. Commanders of these units exercise operational control (OPCON) or administrative control (ADCON), as delegated, over assigned or attached forces. In such cases, the DDA is the relevant commander in the chain of command. If the DDA is not a GCMCA, then the GCMCA over the DDA can authorize a recall for such individuals.

060506. Retirees and Members of the Fleet Marine Corps Reserve (FMCR)

Retirees are not “recalled,” although this terminology is often used to connote the action of bringing a retiree to face court-martial. A retiree may be brought to face a court-martial at any time pursuant to Article 2(a)(4), UCMJ. A member of the FMCR (i.e., an enlisted member who retired between years 20 and 30), is subject to recall under Article 2(a)(6) until the individual reaches 30 years and transfers to the Active Duty Retired List (ADRL). While it is possible to prefer charges against a retiree without SECNAV authorization, prior authorization must be sought from SECNAV if referral of charges is desired. In addition to the authorization required to refer charges, separate and specific authorization is required to arrest, apprehend, or confine a retiree. If an investigation implicates a retiree or member of the FMCR with no logical connection to any DDA, the investigation shall be forwarded to Commanding General (CG), Marine Corps Training and Education Command. SECNAV authorization to refer charges, or to arrest, apprehend, or confine a retiree contains authorization to serve as the DDA for that case, unless SECNAV designates another DDA in the authorization.

060507. Templates and Forms

Templates and forms used in requesting a SECNAV authorization are available by contacting OSTC HQ OpsO.

## 0606. JURISDICTION OVER CASES TRIED IN CIVILIAN COURTS

060601. State or Foreign Courts

For offenses over which the OSTC has authority occurring on or after 28 December 2023 for which a civilian jurisdiction adjudication or diversion has occurred, charges will not be referred to a special or general court-martial unless it is determined by the OSTC that such trial by court-martial is considered essential in the interests of justice, discipline, and proper administration within the Naval Service. STC’s subordinate to the LSTC who determine that court-martial is essential for such offenses shall document the circumstances and justification for that determination in a PDM which will be routed, via their OSTC supervisory chain, to the LSTC for final determination.

No GCMCA approval is required for an STC to refer to special or general court-martial offenses over which the OSTC has authority occurring on or after 28 December 2023.

STCs shall memorialize jurisdictional analysis along with other relevant factors under Section 3 of Appendix 2.1 to the MCM and this SOP in the PDM.

060602. Federal Courts

Servicemembers who have been tried by courts that derive their authority from the United States Government, such as U.S. District Courts, will not be tried by court-martial or be subjected to nonjudicial punishment for the same act or acts.

## 0607. GENERAL CONSIDERATIONS WHEN CONCURRENT JURISDICTION EXISTS

060701. General Policy

When concurrent military/civilian jurisdiction exists for an offense over which the OSTC has authority that the victim has expressed a preference for military jurisdiction or the OSTC desires to prosecute the case, it is essential that the assigned STC proactively engage with the civilian prosecutors representing that jurisdiction. Engagement should occur as early as possible. In foreign countries, concurrent jurisdiction is often addressed in status of forces agreements. In such cases where the offenses are ultimately prosecuted in a civilian jurisdiction, STCs should maintain an open, supportive relationship with the civilian prosecutors until the case is resolved. A PDM, signed by the RSTC or STCTL, is still required in such cases in order to memorializes the OSTC's viability of prosecution determination.

060702. Engagement by STC with Civilian Authority

Engagement does not mean the Marine Corps is attempting to prosecute every case in which concurrent military/civilian jurisdiction exists. In certain cases, a state may have a more compelling interest than the Marine Corps in prosecuting the case, as might be true in a capital case. In other cases, however, particularly cases that concern Marine-on-Marine offenses, the Marine Corps may have a greater interest in acquiring jurisdiction over the case in order to ensure appropriate accountability for the subject/accused, proper support for the victim, and good order and discipline within the Marine Corps. That said, even in cases where civilian authorities have a strong interest in prosecuting the case and are well equipped to do so, STCs should engage early and, where appropriate, remain involved until completion of the civilian criminal proceedings. Proactive engagement by STCs is the standard for all concurrent jurisdiction cases.

060703. Consideration of Victim's Preference Regarding Jurisdiction

Considerations when concurrent military/civilian jurisdiction exists must take into account a victim's preference for jurisdiction, if applicable. See R.C.M. 306, JAGMAN section 0128 and Chapter 4 of this volume for additional details.

## 0608. COURT-MARTIAL JURISDICTION OVER MAJOR FEDERAL OFFENSES

060801. Coordination with Civilian Authorities Required

The United States Attorney General and SECDEF have signed a Memorandum of Understanding on guidelines for determining which authorities will have jurisdiction to investigate and prosecute major crimes in cases where there is concurrent jurisdiction. See Appendix 3, MCM; DoDI 5525.07; JAGMAN section 0125. NCIS administers this program on behalf of the Naval Service. See SECNAVINST 5430.107 (series). This close coordination and possible limitation on courts-martial jurisdiction ensures that actions under the UCMJ do not preclude appropriate action by civilian federal authorities in cases likely to be prosecuted in U.S. District Courts. Pursuant to this Memorandum of Understanding, the OSTC will coordinate with the DOJ on major federal offenses before issuing a grant of immunity, referring charges to trial by court-martial, or approving a plea agreement.

060802. Procedure

RSTC receiving information a Service member committed a major federal offense as defined in SECNAVINST 5430.107 (series), including major federal offenses committed on a military installation, will refrain from taking action with a view towards court-martial, but will coordinate with the cognizant NCIS and the local U.S. Attorney's Office. See JAGMAN section 0125 for further details on appropriate procedures.

060803. Immediate Military Prosecution Required

When federal civilian law enforcement agencies are investigating a case that concerns an offense over which the OSTC has authority, but existing conditions require immediate military prosecution (e.g. an accused is

placed into pretrial confinement and the OSTC decides to prosecute the covered offense allegation), the RSTC must contact the cognizant U.S. Attorney to coordinate immediate trial by court-martial. If the RSTC and cognizant U.S. Attorney cannot reach an agreement on whether immediate military prosecution is advisable, the RSTC will notify the LSTC, who will refer the matter to OJAG (Code 20) or HQMC (JA), as appropriate, for disposition.

#### 0609. NATIONAL SECURITY CASES

##### 060901. Definition and Procedure

Paragraph 0126 of the JAGMAN defines a national security case and contains detailed procedures for the processing of these cases.

##### 060902. Required Notifications

NCIS is responsible for investigating actual, suspected, or alleged national security incidents. Commanders must immediately refer any such incidents to NCIS, just as all allegations of covered offense violations must be referred to NCIS for investigation. SECNAVINST 5430.107 (series) and SECNAVINST 5510.36 (series) also pertain. If any NCIS investigation or preliminary inquiry referenced in JAGMAN section 0126(d) indicates a case involving covered offenses may meet the criteria of a national security case, the DLSTC must be informed. Anyone making notifications under this paragraph must consult with applicable classification officials and NCIS before making these notifications to determine whether notification via unclassified means is permitted, keeping in mind that separate pieces of unclassified information may become classified when combined in a single message.

#### 0610. AUTHORITY TO GRANT IMMUNITY FROM PROSECUTION.

##### 061001. Types of Immunity

Two types of immunity may be granted under R.C.M. 704. *Transactional immunity*: A person may be granted transactional immunity from trial by court-martial for one or more offenses under the UCMJ. *Testimonial immunity*: A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial. See the discussion to the R.C.M. 704 for further details.

##### 061002. Witnesses Subject to the Uniform Code of Military Justice (UCMJ)

For offenses over which the OSTC has exercised authority and has not deferred, if authorized, an STC may grant immunity to a person subject to the UCMJ from prosecution under the UCMJ. However, as specified in R.C.M. 704(c)(1) approval from the Attorney General or designee is required before granting a person immunity from federal civilian prosecution. Use the procedures in the following paragraph to request immunity from federal civilian prosecution.

##### 061003. Civilian Witnesses

See JAGMAN section 0138(c) for procedures to request immunity for civilian witnesses from the Department of Justice. When the JAGMAN requires such requests to be routed through HQMC (JA), contact JMJ for further details. Sample documents related to immunity requests and approvals are available from JAD (JMJ).

##### 061004. National Security Cases

All requests for immunity in national security cases must be routed through OJAG (Code 30) for the purpose of consultation with the Department of Justice. See JAGMAN section 0138(d) for further details.

CHAPTER 7

INITIAL REVIEW OF PRETRIAL CONFINEMENT

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## CHAPTER 7

INITIAL REVIEW OF PRETRIAL CONFINEMENT

## 0701. DETAILING INITIAL REVIEW OFFICER

All GCMCAs have authority to designate one or more officers of the grade of O-4 or higher to act as the initial review officer (IRO) for purposes of R.C.M. 305(i)(2). The GCMCA exercising jurisdiction over the confinement facility shall coordinate the assignment of initial review officers to specific cases.

## 0702. LOCATION

Initial reviews shall normally be conducted at the confinement facility. Every effort shall be made to provide an atmosphere appropriate for a review. *See* SECNAVINST 1640.9D

## 0703. RESPONSIBILITIES OF INITIAL REVIEW OFFICER

The IRO is empowered to order the release from pretrial confinement (PTC) of anyone ordered into pretrial confinement pursuant to R.C.M. 305 when continued pretrial confinement does not satisfy legal requirements. Although the pretrial confinement review is not an adversarial proceeding, the IRO may exercise discretion by allowing the pretrial confinee, defense counsel, or government representative to present evidence and cross-examine witnesses. Upon completion of review, the reviewing officer shall approve continued pretrial confinement or order immediate release.

## 0704. CONTENT OF IRO'S MEMORANDUM

The IRO decision to continue pretrial confinement or order immediate release must be set forth in a written memorandum. This memorandum will include the factual findings on which their decision is based, whether the victim was notified of the review, whether the victim was given the opportunity to confer with the representative of the command or counsel for the government, and whether the victim was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the IRO shall be provided to the accused or the Government on request.

## 0705. NOTICE TO VICTIM(S)

The Command shall provide the alleged victim or victim's counsel with the date, time, and location of any pretrial confinement review and notice of the right to be heard during the review. *See* R.C.M. 305(i)(2)(A)(iv). However, the hearing may not be unduly delayed for this purpose. If the reviewing officer orders immediate release of confinement, a victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person.

## 0706. RECONSIDERATION OF APPROVAL OF CONTINUED CONFINEMENT

The IRO shall upon request, and after notice to the parties, reconsider the decision that confinement was warranted based upon any significant information not previously considered.

## 0707. AUTHORITY OF OFFICERS SERVING AS STC REGARDING PRETRIAL CONFINEMENT

No STC is authorized to order the pretrial confinement of an officer. Only a commanding officer to whose authority an officer is subject may order that officer into pretrial confinement. Although authorized by R.C.M. 306(b) to order the pretrial restraint of any enlisted person, no STC, while in the performance of their duties as an STC, will order the pretrial confinement of an enlisted person. An STC may file a motion to have an accused released from pretrial confinement for good cause. Such motion shall be filed with court in accordance with the procedures established in the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice. The filing of a motion by an STC

to have an accused released from pretrial confinement requires the prior written authorization of the ROSTC. Notification of the filing of the motion shall be made to the DLSTC.

CHAPTER 8

**INVESTIGATIVE SUBPOENAS, WARRANTS, ORDERS, ARTICLE 30a PROCEEDINGS, AND  
SEARCH AUTHORIZATIONS**

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

## CHAPTER 8

**INVESTIGATIVE SUBPOENAS, WARRANTS, ORDERS, ARTICLE 30a PROCEEDINGS, AND SEARCH AUTHORIZATIONS**

## 0801. COORDINATION BETWEEN OSTC AND LAW ENFORCEMENT

080101. Office of Special Trial Counsel

A. The OSTC confers regularly with the local CID and NCIS offices to assist with the investigation of and to discuss all developing cases. At a minimum, each ROSTC should consult with any military law enforcement agency at the initiation of, and critical stages in, the investigation of any covered offense. The ROSTC shall ensure an STC is made available to meet or consult with the cognizant investigating agency within 48 hours after notification of a covered offense and ensure STC is detailed within two (2) business after such notification.

B. Once notified of the initiation of an investigation involving an offense over which the OSTC has authority, the designated STC will work closely with and provide legal advice to and assist the investigative agency throughout the investigative process. STC will assist law enforcement in obtaining search and seizure authorizations, subpoenas, orders, and warrants pursuant to the UCMJ.

080102. Law Enforcement

Military law enforcement agencies will work closely with the OSTC in investigating offenses over which the OSTC has authority. Requests for investigative subpoenas pursuant to RCM 703(g)(3)(C) and warrants pursuant to RCM 703A will normally be submitted through the STC. Although RCM 703A allows a law enforcement officer to submit a written application for a warrant to a military judge, section 0132c(c) of the JAGMAN specifies that “only a Government counsel” may submit such application. Government counsel is defined as an STC or trial counsel. While the STC submits the application to the judge, the STC does not serve as the affiant for the application. For offenses over which the OSTC exercises authority, law enforcement personnel will continue to assist investigating the case consistent with their regulations and any MOUs established between the OSTC and the investigative agency.

## 0802. INVESTIGATIVE SUBPOENAS

080201. Applicability

This chapter deals only with investigative subpoenas issued before charges are referred to courts-martial. It does not address subpoenas issued after referral of charges or subpoenas issued by the president of a board of inquiry. Subpoenas issued after referral of charges will comply with R.C.M. 703.

080202. When permitted

A. A pre-referral investigative subpoena issued under RCM 703 may only be used to obtain evidence for use in an investigation of an offense under the UCMJ. An “investigation of an offense under the UCMJ” is a military criminal investigation conducted by investigators or agents from CID, NCIS, Department of Defense police, military police, or any counterpart from the investigative agencies of another military service, or a command investigator appointed to investigate suspected criminal activity likely to result in trial by courts-martial. The issuance of subpoenas for non-criminal administrative investigations is not permitted by 10 U.S.C. §846 or this Chapter but may be authorized by other authorities.

B. Charges do not need to be preferred nor must a particular suspect be identified before a subpoena may be issued. However, because Article 30a and R.C.M. 703-703A are only tools to obtain evidence of crimes under the UCMJ for potential use at a later court-martial, there must be probable cause to believe the suspect would likely be subject to the UCMJ to use these authorities. Law enforcement and STCs should closely consult

with the SJA and civilian authorities in obtaining subpoenas when it appears the suspect may not be subject to the UCMJ. This helps avoid violating *Posse Comitatus*-like restrictions under 10 U.S.C. § 275 and DoDI 3025.21, and ensures any compulsory process is issued by a person with authority to do so.

C. A pre-referral investigative subpoena may also be issued in accordance with R.C.M. 309 or 703(g)(3)(D)(v) for the production of evidence not under the control of the government for use at an Article 32 preliminary hearing.

080203. Who May Issue

A. A military judge may issue a subpoena before or after referral. Before referral, the STC must be authorized by the GCMCA to issue the subpoena. After referral, the STC is authorized to issue the subpoena without obtaining GCMCA authorization.

B. STC should ordinarily seek a military judge's issuance of a subpoena. Doing so enables the development of uniform standards and procedures, results in greater predictability for law enforcement, and more uniform protection of Servicemembers' rights. It also avoids unnecessarily entangling the GCMCA in investigations of subordinate convening authorities.

080204. Procedure for Issuing a Subpoena

A. Required Coordination

The assigned STC will coordinate with the supporting law enforcement agency to complete the subpoena request, supporting affidavit, and all other matters supporting the request. The request will be submitted to the military judge in accordance with the procedures outlined in the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice.

B. Contents of request

When seeking a subpoena from a military judge, the request shall include a completed subpoena (DD Form 453) ready for signature by the military judge as the issuing authority. The request shall also include any matters sufficient to show the material sought is relevant to the investigation, and the request is lawful, i.e., not overbroad, unreasonable, or oppressive.

080205. Defense Requests for Investigative Subpoenas

A. Applicability

Defense requests for a subpoena in relation to a preliminary hearing pursuant to Article 32, UCMJ, will be processed in accordance with R.C.M. 405(h). This paragraph deals with all other defense requests for pre-referral investigative subpoenas.

B. Contents of Request and Procedure

Defense counsel may request the Government counsel make an application for a pre-referral investigative subpoena. In cases over which the OSTC exercises authority, the defense request will be submitted to the STC. The request must include a completed subpoena (DD Form 453) ready for signature by the issuing authority and sufficient information to show issuance of the subpoena is lawful, i.e., overbroad, unreasonable, or oppressive. The STC may present the defense request to the military judge or may defer considering the request until after a referral decision has been made. Reasons to defer considering the request include the likelihood the referral decision will make the defense request moot or unnecessary. If the request is for perishable matter that may be lost or destroyed in the event of delay, the request should clearly indicate that fact, including the basis for such a belief.

080206. Investigative Subpoenas for Personal or Confidential Information About a VictimA. Written notice required

The STC will provide a victim named in a specification notice of a request for a subpoena for personal or confidential information about that victim. *See* R.C.M. 703(g)(3)(C)(ii). The STC will maintain a record of such written notice to the victim in the case file and document the request for the subpoena and notification to the victim in CMS.

B. Personal or Confidential Information

Personal or confidential information is information that relates to or comes from a victim, and is generally regarded as private. It includes, but is not limited to, the following types of information: any information which the victim could assert a claim of privilege over; any information for which the victim has a reasonable expectation of privacy; any information where unauthorized release is restricted by law, such as records protected by the Privacy Act, medical records covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or student education records covered by the Family Educational Rights and Privacy Act (FERPA); any information specific to a victim that is not normally released by the holder of the information to members of the public, such as employee records, insurance records; and, any financial records of the victim. Subpoenas for financial records might be subject to additional statutory requirements, *e.g.*, the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, which applies to financial records. Note that classifying information as personal or confidential does not mean the information will not ultimately be subject to subpoena under applicable rules and constitutional provisions. It simply means the victim must be provided notice of the request for the subpoena. Therefore, if in doubt about whether information pertaining to a victim is “personal or confidential,” err on the side of providing notice to the victim, unless there are exceptional circumstances not to.

C. Exceptional Circumstances Not Requiring Notification

Exceptional circumstances may justify withholding the required notice to a victim. The discussion to R.C.M. 703(g)(3)(C)(ii) cites to Fed. R. Crim. P. 17 (Advisory Committee Notes, 2008 Amendments) for the following discussion of exceptional circumstances: “Such exceptional circumstances would include evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided *ex parte* and authorize service of the third-party subpoena without notice to anyone.” A party believing exceptional circumstances justify withholding notification to a victim must clearly state the exceptional circumstances in the request, including the basis for the belief.

## 0803. WARRANTS

080301. Authorization

Pursuant to R.C.M. 703A(b) and 18 U.S.C. § 2703, a military judge may issue a warrant authorizing the search for and seizure of information specified in R.C.M. 703A(a) (1), (2), (3), or (4).

080302. When Permitted

A. Although the R.C.M. allows an STC *or* federal law enforcement officer to apply for a warrant, the JAGMAN has restricted that ability to only an STC in the applicable circuit where the warrant will be sought. *See* JAGMAN section 0132c(c). The application must contain an affidavit or sworn testimony establishing probable cause to believe that the information contains evidence of a crime. While STC submits the application on behalf of law enforcement, the STC does not serve as the affiant. “Crime” means an offense under the UCMJ (a covered offense for purposes of this SOP). When applying for a warrant, identification of a particular suspect may not be possible. However, there must be enough information provided in the application to show the crime is an offense under the UCMJ, meaning the suspect is likely subject to the UCMJ. Otherwise, the person applying for the

warrant risks violating *Posse Comitatus*-like restrictions under 10 U.S.C. § 275 proscribing direct assistance to civilian law enforcement.

B. A warrant, not a court order, must be used under 18 U.S.C. § 2703 and R.C.M. 703A when the information sought is covered in R.C.M. 703A(a)(1) (disclosure by a provider of electronic communication service of the contents of any wire or electronic communication in electronic storage for 180 days or less). However, paragraph 080402 further restricts the use of court orders when the customer or subscriber has a reasonable expectation of privacy in the information sought. In those cases, a warrant, not a court order, must be sought.

080303. Contents of Warrant Application

The application for a warrant must be completed on DD form 3057, and must contain an affidavit or sworn testimony subject to examination by a military judge. Specific minimum requirements are listed in the JAGMAN, section 0132a.(a). The application must include a completed warrant (DD form 3056), ready for signature by the military judge. The STC will submit the application for a warrant electronically in accordance with the procedures established in the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and local Circuit Rules.

080304. Preservation Letters

Pursuant to 18 U.S.C. § 2703(f) and R.C.M. 703A(f), an STC or a federal law enforcement officer may request a provider of wire or electronic communication services or a remote computing service take all necessary steps to preserve records and other evidence in its possession pending the issuance of a warrant. Whether preservation has been sought and the expiration date of any preservation period must be included in the application to the military judge.

080305. Defense Requests for Warrants

The defense may request Government counsel make an application for a warrant. In cases over which the OSTC exercises authority, defense requests shall include all information described in paragraph 080303 above (completed DD forms 3056 and 3057), and a written application ready for signature by the STC. If the request is for perishable matter that may be lost or destroyed in the event of delay, the request shall clearly indicate that fact, including the basis for such a belief. If the defense requests issuance of a preservation letter, the defense request must also include a preservation letter ready for signature by the STC or a federal law enforcement officer. Unlike subpoenas or court orders, the STC may not delay considering the request until after a referral decision is made.

0804. ORDERS FOR WIRE OR ELECTRONIC COMMUNICATIONS

080401. Authorization

Pursuant to R.C.M. 703A(c) and 18 U.S.C. § 2703(d), a military judge may issue an order authorizing the disclosure of information specified in R.C.M. 703A(a) (2), (3), or (4).

080402. When Permitted

A. Like warrants, the JAGMAN restricts the ability to apply for orders to an STC in the applicable circuit where the warrant will be sought. See JAGMAN section 0132c(c). The application must contain specific and articulable facts that establish reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation. The phrase “ongoing criminal investigation” under R.C.M. 703A(c) means the same thing as “investigation of an offense under the UCMJ” as defined in paragraph 080202 of this chapter. Generally, an ongoing investigation is “criminal” if it is of an offense under the UCMJ and is conducted by law enforcement agencies. The fact that a commander may later dispose of a criminal offense through administrative means does not change the nature of a criminal investigation, or invalidate any evidence obtained through court order during the investigation. But court orders may not be used to obtain evidence for non-criminal administrative investigations.

B. Although 18 U.S.C. § 2703(d) and R.C.M. 703A allow use of a court order to obtain content data that has been in storage for over 180 days, many courts require a warrant. *See e.g., United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). Warrants are required when a suspect in an investigation has a reasonable expectation of privacy in the information being sought from a third party. For example, historical cell-site location information must be obtained through a warrant, because a suspect maintains a legitimate expectation of privacy in the historical record of their physical movements as captured through cell-site location information. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). STC should always consult with supervisory counsel and read current case law to determine whether an order is sufficient to obtain the data sought. Unless applicable case law clearly supports getting the information via a court order, the safer course is to seek a warrant.

080403. Contents of Order Request

The order request must contain specific and articulable facts that establish reasonable grounds to believe the information sought is relevant and material to an ongoing criminal investigation. Specific minimum requirements are listed in the JAGMAN, section 0132a.(a). The request must include a completed court order, ready for signature by the military judge. The order must not be unreasonable, oppressive, or prohibited by law. Court orders may be unreasonable or oppressive if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on a provider. Pursuant to R.C.M. 703A(c)(1)(B), the STC seeking the order must also include in the application whether prior notice has been provided to the subscriber or customer of the application for the order, unless delayed notice of an order is requested as outlined below.

080404. Delayed Notice of Order

An STC may include in the application a request for an order delaying the notification to the subscriber or customer required by R.C.M. 703A(c)(1)(B). The request for delayed notice must be included in the application and must comply with R.C.M. 703A(d). Upon expiration of the applicable period of delay of notification, the federal law enforcement officer, STC, or other authorized counsel for the government may request an additional period of delay, or otherwise shall serve upon, or deliver by registered first-class mail to, the customer or subscriber a copy of the process or request together with the required notices in R.C.M. 703A(d)(3).

080405. Preservation Letters

Pursuant to 18 U.S.C. § 2703(f) and R.C.M. 703A(f), STC or a federal law enforcement officer may request a provider of wire or electronic communication services, or a remote computing service, take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order. Whether preservation has been sought and the expiration date of any preservation period must be included in the application to the military judge.

080406. Defense Requests for Orders

The defense may request the STC make application for an order for wire or electronic communications. Defense requests shall include all information described in paragraph 080403, and a written application ready for signature by the STC. If the request is for perishable matter that may be lost or destroyed in the event of delay, the request shall clearly indicate that fact, including the basis for such a belief. If the defense requests issuance of a preservation letter, the defense request must also include a preservation letter ready for signature by the STC or a federal law enforcement officer. The STC may present the application for an order to a military judge or may defer considering the request until after a referral decision has been made if it is likely the referral decision will make the defense request moot or unnecessary. If the STC presents the application to the military judge, the STC is responsible for providing the required notice to the subscriber or customer listed in R.C.M. 703A(c)(1)(B) or requesting delayed notice as described in paragraph 080404 above. The military judge may grant or deny the application for an order, or may, as a matter of discretion, afford the defense an opportunity to be heard.



## 0805. PROCEDURES FOR ARTICLE 30a HEARINGS

080501. General Guidance

See R.C.M. 309 and JAGMAN, section 0132a for specific guidance on the conduct of pre-referral judicial proceedings. Any request for an *ex parte*, *in camera*, or closed hearing must be made in writing. STC must also ensure they are following procedures for the conduct of pre-referral proceedings established by the trial judiciary.

080502. Preparing, Maintaining, and Distributing Copies of the Proceedings

If hearings are held as part of the proceeding, only witnesses whose testimony is relevant to establishing probable cause for the warrant may be called. A victim, as defined in Article 6b, UCMJ, may not be compelled to testify at the proceeding. The military judge may examine any witnesses called. The hearing will be recorded and the court reporter will maintain a copy of the recording for the later of two years from the date of the proceeding or until final disposition of the charges related to the proceedings. Records are not required to be transcribed before referral. After referral of charges, such record will be transcribed to the same extent as required for post-referral proceedings. The court reporter will provide the record of the proceeding to the STC. If charges are referred, the court reporter will ensure the record is provided to the military judge detailed to the court-martial and the detailed defense counsel and made a part of the official record of trial. If the record of any pre-referral proceeding or part of any such proceeding is ordered sealed by the military judge, the court reporter is responsible for complying with the order pursuant to R.C.M. 1113.

## 0806 COST REIMBURSEMENT FOR A SUBPOENA, ORDER, OR WARRANT

In accordance with 18 U.S.C. § 2706, electronic communications and electronic service providers are entitled to reimbursement of costs reasonably necessary and directly incurred in searching for, assembling, reproducing, or otherwise providing the information sought. Such reimbursable costs might include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which such information may be stored. Before seeking compulsory process, which could obligate the government to pay costs associated with compliance, the STC or law enforcement agent seeking the compulsory process shall inform the relevant convening authority, via the SJA, of the financial obligation that may be incurred. After obtaining the convening authority's approval, the STC may obligate the government for any costs associated with the subpoena, order, or warrant, which the convening authority will pay. The convening authority's authorization may be provided orally or in writing.

## 0807. REQUESTS FOR RELIEF FROM COMPULSORY PROCESS

080701. General Guidance

Under Article 46(e), UCMJ, a military judge shall review requests for relief from a subpoena or other compulsory process such as a warrant or order on grounds compliance is unreasonable or oppressive, or prohibited by law. A military judge detailed in accordance with Article 26 or 30a, UCMJ, shall review the request and shall: (1) order the subpoena or other process be modified or withdrawn, as appropriate; or (2) order the person to comply with the subpoena or other process. Additionally, if the government and an entity providing information cannot mutually agree on the amount of compensation under 18 U.S.C. § 2706, the military judge in the location where a criminal prosecution relating to the information would be brought may determine the amount of the fee.

080702. Procedures for Requesting Relief

Any compulsory process described in this chapter (investigative subpoena, warrant, or court order) will contain contact information for questions and requests for relief. The contact information will include the name, phone number, and email address of the person who can answer questions on filing a request for relief, usually a clerk for a judge in the trial judiciary office in which any request for relief would be filed. See Rule 8, Navy-Marine Corps Trial Judiciary Uniform Rules of Practice.

080703. Appeals

Appeal of an adverse ruling by a military judge on a request for relief from compulsory process may be sought by petitioning the Navy-Marine Corps Court of Criminal Appeals in accordance with the rules of that court, which are available at <http://www.jag.navy.mil/nmcca.htm>.

## 0808. COMMAND AUTHORIZATIONS FOR SEARCH AND SEIZURE

080801. Who May Authorize

Probable cause searches may be authorized by a commander who has control over the place where the property or person to be searched is located. *See* R.C.M. 315. SJAs, STC, and law enforcement personnel must ensure that the commander from whom a search authorization is sought is the individual who possesses command authority over the location to be searched. A battalion or squadron commander likely has control over the unit's workspace and over subordinates' barracks. However, the installation commander or the area commander who has control over the physical location to be searched will always possess the authority to issue the search authorization. For this reason, installation and area commanders will often be the individuals with the clearest legal authority to execute a search authorization. The officer who executes the search authorization must be the actual commander. The authority to execute a search authorization may not be delegated to subordinate members of the commander's staff, such as the executive officer. An "acting" commanding officer should only execute a search authorization if, and only if, command authority has *devolved* from the commanding officer to the acting commanding officer. Whether a devolution of command occurs depends on a complicated functional analysis, and commanders should consult with their SJAs and consider whether to seek an authorization from a sitting commander with concurrent jurisdiction over the area to be searched rather than relying on the assumption that command authority has devolved. If an "acting" commander executes the search authorization, the question will be whether the subordinate was in fact functioning as a commander while the commander was absent from the command. When considering whether a devolution of command occurred, military justice practitioners and law enforcement officers should consider the following: (1) the location of the commander; (2) the accessibility of the commander; (3) whether the commander contemplated a devolution of authority; (4) whether the individual acting in the commander's place is exercising command functions; and (5) how others within the unit understand the role and authority of the individual acting in the commander's place. *See United States v. Armendariz*, 80 M.J. 130 (C.A.A.F. 2020); *United States v. Law*, 17 M.J. 229 (C.M.A. 1984); *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981).

080802. Searches of Offices that Contain Privileged Communications and Material

Command Authorizations for Search and Seizure which involve the search of DSO or VLCO personnel, clergy, mental health providers, the workspaces of any of those individuals, or any places where privileged information is likely to exist, present significant Fourth Amendment, Fifth Amendment, Sixth Amendment, and professional responsibility concerns. Although highly discouraged, there may be rare occasions when it is necessary to search the offices of individuals who maintain materials that may be privileged under Section V of the Military Rules of Evidence. In the absence of exigent circumstances, before an STC seeks or advises a law enforcement agency to seek search authorization for such described areas, the RSTC shall notify and consult with the DLSTC. Because of the potential effect of this type of search on the privileged relationships and the possibility that the government may encounter material protected by a legitimate claim of privilege, it is important to exercise close control over this type of search and, unless the material seized are of a contraband nature, copies of the seized materials will be provided to the affected professionals. The following guidelines are to be strongly encouraged by the STC with respect to such searches:

- A. Take the least intrusive approach available balanced against the need to obtain and preserve evidence. Consideration should be given to obtaining information from other sources or by less intrusive means, such as requesting voluntary disclosure from the holder of the privilege or their counsel, or through the use of a preservation order or judicial order, unless such efforts are unavailable to government actors, could compromise the investigation, could result in the destruction of evidence, or otherwise would be ineffective.

- B. Prior to granting a search authorization, the commander should consult with the cognizant SJA. Prior to advising said commander, the cognizant SJA should consult with the law enforcement officials seeking the search authorization.
- C. The SJA should strive to ensure there are adequate precautions in place to minimize the exposure of privileged materials. At a minimum, the command authorized search and seizure should be drafted in a way that minimizes the need to search where privileged materials may be located and drawn as narrowly as possible to minimize the possibility of agents viewing privileged material, but broad enough to ensure the discovery and seizure of items(s) subject to the command authorized search and seizure. The SJA should also endeavor to ensure there are adequate procedures to minimize the intrusion on potentially privileged materials. These procedures should address specifically how the search should be conducted, what materials should or should not be reviewed, and how to handle materials in “client” files. The SJA should also work to ensure there are adequate procedures addressing how to handle materials seized during the search, how to store the materials, who will conduct the review of the materials, and how the review will be conducted to minimize exposure to privileged material.
- D. There should be a “privilege team” appointed to conduct the search and review the materials seized. The privilege team should consist of an investigator(s) and at least one judge advocate (not a member of the OSTC, TSO, DSO, or VLCO) in the rank of Major or higher, all of whom are unassociated with the underlying investigation or court-martial.
- E. Copies of seized materials that are not contraband should be provided to the affected professionals that maintained the privileged materials. In addition, affected professionals that maintained the privileged materials should be permitted reasonable opportunity to view and inspect any tangible items that are seized.

CHAPTER 9

ARTICLE 32 PRELIMINARY HEARINGS, REFERRALS, AND DISMISSALS

All Volume changes denoted in blue font will reset to black font upon a full revision of this Volume.

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## CHAPTER 9

**ARTICLE 32 PRELIMINARY HEARINGS, REFERRALS, AND DISMISSALS**

## 0901. DETERMINATION OF REQUIREMENT FOR PRELIMINARY HEARING

For charges and specifications over which the OSTC has exercised authority, STC will determine whether a preliminary hearing is required. If it is determined that a preliminary hearing is required, STC will request, and the convening authority must provide, a preliminary hearing officer and direct a preliminary hearing in accordance with R.C.M. 405.

090101. Notification to Convening Authority of Request for Preliminary Hearing

When an STC determines that a preliminary hearing is required, the STC will notify the convening authority who, based upon the offenses to be investigated at the preliminary hearing, is authorized to direct the hearing in accordance with regulations established by SECNAV. *See* JAGMAN 0128(g).

The notification to the convening authority by the STC will be made in writing via the convening authority's servicing SJA with a copy to the accused's defense counsel and any victim(s) named in any specification or their VLC if represented. The notification will identify for the convening authority the recommended date and location of the preliminary hearing and the name(s) of reasonably available, qualified preliminary hearing officers. A copy of the preferred charge sheet will be appended to the notification.

## 0902. DETAILING OF PRELIMINARY HEARING OFFICERS (PHO)

The convening authority will choose a capable and fully qualified officer who is reasonably available to serve as the PHO. Factors the STC should consider when identifying reasonably available, qualified PHOs and that the convening authority should consider for selection include, but are not limited to, the following: the offenses to be considered at the preliminary hearing; the education, training, and experience of the PHO candidate; any applicable conflict-of-interest analysis; the case complexity; the PHO candidate's civilian or primary military duties; the geographic locations of the accused and counsel; the expected date and location of the hearing; media interest; the classification level of any evidence that may be considered; and the expected duration of the hearing.

090201. Eligibility to Serve as a PHO

The PHO shall be a judge advocate certified under Article 27(b), UCMJ; sworn under Article 42(a), UCMJ; if practicable, equal in grade to or senior in grade to both the trial and defense counsel; and in the grade of O-4/Major or higher, subject to the exceptions below. A judge advocate below the grade of O-4/Major may only be detailed as a PHO if they have at least six months of experience as a trial or defense counsel, subject to the limitations in this section. If the case involves an allegation of sexual assault identified in JAGINST 5800.7G, Subparagraph 0132(a), the PHO must be a judge advocate.

090202. Education Requirements

Prior to conducting the hearing, the PHO should familiarize themselves with the requirements of R.C.M. 405 and the "Article 32 Preliminary Hearing Officer's Guide" which is published by Naval Justice School.

090203. Appointment Letter

The convening authority will appoint a PHO in writing.

## 0903. SEXUAL ASSAULT OFFENSE CASES

In those cases involving a sexual assault offense identified in JAGINST 5800.7G, Subparagraph 0132(a), a judge advocate below the grade of O-4/Major may only be detailed as a PHO if they have previously been certified as an STC, VLC, or SVIP qualified TC or DC.

## 0904. ISSUING WARRANTS OR SUBPOENAS

See R.C.M. 405 regarding production of evidence for a preliminary hearing. The PHO has no authority to issue a subpoena or warrant. However, the PHO can direct counsel for the Government to: issue a subpoena; request the issuance of a subpoena from a military judge in accordance with R.C.M. 309; or, obtain authorization from a GCMCA to issue the subpoena. If the counsel for the Government refuses or is unable to obtain a subpoena, the counsel for the Government must set forth the reasons why the subpoena was not obtained in a written statement that must be included in the preliminary hearing report. The PHO must also note in the report what evidence the PHO determined was relevant, not cumulative, and necessary to the determination of the issues at the preliminary hearing, along with the counsel for the Government's refusal or inability to obtain the evidence.

## 0905. VICTIM RIGHT NOT TO TESTIFY

A victim named in a specification under consideration at the hearing cannot be required to testify at the preliminary hearing. However, if the STC believes that it is necessary for the victim to testify for the STC to make an informed referral decision, the STC should address this concern with the victim, or if represented, the victim's VLC.

## 0906. CLOSED SESSIONS

Preliminary hearings are public proceedings and should remain open to the public to the greatest extent practicable. When an overriding interest outweighs the value of an open preliminary hearing, the convening authority or the PHO may restrict or foreclose access by spectators to all or part of the proceedings. Convening authorities or PHOs must conduct a case-by-case, witness-by-witness, and circumstance-by-circumstance analysis of whether restriction or closure is necessary. If the PHO or convening authority orders a closed session, precautions should be employed to ensure no unauthorized personnel enter or attend the closed session. Judge Advocates serving as supervising attorneys to counsel detailed to the closed session are authorized to attend any closed session.

090601. M.R.E. 412 Hearing

If the PHO conducts a hearing to determine the admissibility of M.R.E. 412 evidence, the hearing shall be closed. The victim shall be afforded a reasonable opportunity to attend and be heard, to include being heard through counsel.

090602. Procedures

The procedures for determining the admissibility and/or sealing of evidence in cases of an alleged sexual offense, as defined under M.R.E. 412(d) are found in R.C.M. 405(i)(2).

## 0907. PROVIDING SUPPLEMENTARY INFORMATION TO THE PHO

Upon final closure of the preliminary hearing, any supplementary information to be presented to the PHO for consideration must be provided to the PHO, with copies to all relevant parties, within 24 hours. All rebuttal to any supplementary information must be submitted to the PHO within five (5) days of the final closure of the preliminary hearing.

The opportunity to submit supplementary information will not be used to raise, for the first time, a request for the PHO to consider uncharged misconduct, even if evidence regarding that misconduct was presented during the hearing. R.C.M. 405 provides an accused the right to be advised of the charges under consideration at the preliminary hearing and to present matters relevant to the issues for determination at the hearing.

## 0908. PHO REPORT

The PHO shall assemble the preliminary hearing report in accordance with R.C.M. 405(l). In addition to those items listed in the rule, the preliminary hearing report will contain: DD Form 457, Preliminary Hearing Officer Report, and any attachments; DD Form 458, Charge Sheet, and any attachments; and the PHO appointment letter. The PHO must include a copy of the preliminary hearing recording. The report is advisory and does not bind the STC.

## 0909. DISTRIBUTING THE PHO REPORT

For preliminary hearings requested by an STC, the PHO shall promptly cause the delivery of the report to the detailed STC and the convening authority. The STC must cause the PHO Report to be served on the accused. STC will obtain a receipt of service from the accused or the accused counsel upon service of the PHO Report and document the service in CMS.

## 0910. OBJECTING TO THE PHO REPORT

Any objections to the PHO Report must be submitted in accordance with R.C.M. 405(l)(2)(K)(5) within five days of receipt. The day the accused receives the report is not counted in calculating the five-day window in which the accused may raise objections. The five-day period does not prohibit referring any charge or taking any other action within the five-day period.

## 0911. UNCHARGED OFFENSES

If an accused is properly notified of an uncharged offense and that offense is examined by the PHO in the preliminary hearing, it may be preferred and referred by the STC after the preliminary hearing without directing an additional preliminary hearing, provided the Article 34, UCMJ letter addresses the offense per R.C.M. 601(d)(2).

## 0912. SEALING DOCUMENTS

Refer to R.C.M. 1103A for authority, limitations, and procedures relevant to review of sealed materials in or attached to a PHO Report. Sealed materials will be kept separate. Sealed documents and or each recording/transcripts of the closed portion of the hearing will be placed in its own envelope or other suitable container. The envelope or container shall be labeled in a manner that clearly identifies the contents of the envelope or container and notes that the contents are from a "CLOSED SESSION."

091201. Sensitive Information

If the PHO determines a record contains graphic materials or matters of a sensitive personal nature, the PHO, with the assistance of the STC, will ensure such materials are enclosed separately in an envelope, wrapping, or other suitable container to conceal and protect the materials from inadvertent exposure or tampering. Any graphic materials or matters of sensitive personal nature must be properly labeled and separately enclosed prior to inclusion in the PHO's report. The envelope, wrapping, or container should clearly identify the contents and be marked: "CAUTION, CONTAINS SENSITIVE INFORMATION." These sensitive materials are viewable only by authorized reviewing authorities and support personnel with an official need to view the materials. In the absence of such determination, should the STC later determine the record includes such matters, the STC will ensure the matters are enclosed and marked in accordance with the requirements above.

## 0913. RECORDING THE PRELIMINARY HEARING

Government Counsel shall ensure the preliminary hearing is recorded by suitable government recording devices. Due to potential recording software or hardware malfunctions, loss of power, poor acoustics, or other hazards, a minimum of two (2) recording mechanisms will be used.

091301. Providing Preliminary Hearing Recording to the Accused

The Accused will receive a copy of the preliminary hearing report, which includes a copy of the recording or transcript. Do not provide any portions of the hearing ordered sealed by the PHO to the accused or counsel.

091302. Providing Preliminary Hearing Recording to the Victim(s)

Upon written request from a victim named in one of the specifications at the preliminary hearing (or victim's counsel), the STC will provide the victim with access to, or a copy of, the recording or transcript. Do not provide any portions of the hearing ordered sealed by the PHO to the victim or victim's counsel. Government counsel is not normally required to redact the recording or transcript except as indicated below. However, to maintain compliance with the Privacy Act, the government should release the recording or transcript in the following manner:

A. If the victim is represented by a VLC, the unredacted recording or transcript should be provided to the victim's VLC as an "Official Need to Know disclosure under the Privacy Act. The VLC must maintain the recording or transcript in accordance with the Privacy Act.

B. An unredacted recording or transcript may not be provided directly to the victim.

## 0914. HEARINGS VIA REMOTE MEANS

The PHO or convening authority may order the use of audiovisual technology, such as video teleconferencing technology, or telephonic participation among the parties and the PHO for purposes of preliminary hearings consistent with similar provisions guiding Article 39(a), UCMJ, sessions and consistent with R.C.M. 405, 804, and 805. Such technology may include two or more remote sites provided all parties can hear each other. VTC or telephonic participation may also be utilized to facilitate the presence of victims or VLC exercising a victim's right to be present under R.C.M. 405(g). However, the possibility of VTC or telephonic participation does not create a right to use such means when doing so imposes too great of a burden on the government, causes undue delay, or prejudices the rights of the accused.

## 0915. REOPENING OF PRELIMINARY HEARINGS

For charges and specifications over which the OSTC has exercised authority, if an STC determines that a previous preliminary hearing must be reopened, STC will request, and the convening authority must reopen the preliminary hearing.

When an STC determines a previous preliminary hearing must be reopened, the STC will notify the convening authority who, based upon the offenses to be investigated at the reopened preliminary hearing, is authorized to direct the hearing in accordance with regulations established by SECNAV. See JAGINST 5800.7G, Subsection 0128(g).

The notification to the convening authority by the STC will be made in writing via the convening authority's servicing SJA with a copy to the accused's defense counsel. The notification will identify for the convening authority the recommended date and location for the reopened hearing and, if the original PHO is no longer reasonably available or qualified to serve as the PHO, the name(s) of reasonably available, qualified preliminary hearing officers. The notification will clearly state the reason(s) for requesting that the preliminary hearing be reopened.

## 0916. WAIVER OF PRELIMINARY HEARING

An accused may waive a preliminary hearing. If an accused waives their preliminary hearing, the waiver must be reduced to writing and provided to the STC. The STC will provide the convening authority with a copy of the written waiver and ensure the waiver is uploaded into the CMS. Relief from the waiver may be granted by the convening authority who would have directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.



## 0917. REFERRAL

091701. Referral Authority

The LSTC shall have the authority to refer any offenses over which the OSTC has exercised authority to a general or special court-martial, subject only to the limitations placed upon the referral of charges by R.C.M. 201(f)(1)(D). The LSTC is the sole referral authority for offenses over which the OSTC has exercised authority when the accused is a general or flag officer.

The DLSTC shall have the authority to refer any offense over which the OSTC has exercised authority to a general or special court-martial, subject to the limitations placed upon the referral of charges by R.C.M. 201(f)(1)(D) and with the exception that, only in the absence of the LSTC, the DLSTC may refer offenses alleging violations of Article 118 (Murder), 119 (Manslaughter), 119a (Death of an Unborn Child), or any attempts, solicitations, or conspiracies to commit these offenses.

The RSTC shall have the authority to refer any offense over which the OSTC has exercised authority to a general or special court-martial wherein the named accused is an officer serving in the grade of O-5 or below or an enlisted service member serving in the grade of E-8 or below, subject to the limitations place upon the referral of charges by R.C.M. 201(f)(1)(D) and with the exception that the RSTC is not authorized to refer any charge alleging violations of Article 118 (Murder), 119 (Manslaughter), 119a (Death of an Unborn Child), or any attempts, solicitations, or conspiracies to commit these offenses, or for any offense for which the PHO makes a finding of no probable cause.

The STCTL shall have the authority to refer any offense over which the OSTC has exercised authority to a general or special court-martial wherein the named accused is an officer serving in the grade of O-4 or below or an enlisted service member serving in the grade of E-7 or below, subject to the limitations place upon the referral of charges by R.C.M. 201(f)(1)(D) and with the exception that the STCTL is not authorized to refer any charge alleging violations of Article 118 (Murder), 119 (Manslaughter), 119a (Death of an Unborn Child), 120 (Rape and Sexual Assault), 120b (Rape and Sexual Assault of a Child), or any attempts, solicitations, or conspiracies to commit these offenses, or for any offense for which the PHO makes a finding of no probable cause.

An STC who is not serving as the LSTC, DLSTC, RSTC, or STCTL is not authorized to refer any offense over which the OSTC exercises authority unless authorized to do so, in writing, by the LSTC.

091702. Referral Recommendation Process

Before forwarding a preferred offense over which the OSTC has exercised authority to the referral authority for a referral decision, the detailed STC will again assess the considerations outlined in paragraphs 050101 and 050102 above. The detailed will prepare and forward to the referral authority via the STC's case supervisory counsel chain a referral recommendation package that shall include the following:

- (1) A referral recommendation memorandum stating:
  - a. That the offense be referred, and if referred, to what forum it should be referred;
  - b. That the offense not be referred and the reasons therefor;
- (2) The preferred charge;
- (3) Convening order; and
- (4) If applicable, the complete PHO report or Article 32 Waiver.

Upon receipt of a referral recommendation, a case supervisory counsel who is not the referral authority will again assess the considerations outlined in paragraphs 050101 and 050102 above and provide their recommendation by appropriate endorsement on the referral recommendation. If any case supervisory counsel does not concur in a

referral recommendation made by a subordinate counsel, the supervisory counsel shall document the reasons therefor in the endorsement.

Upon receipt of the referral recommendation, the referral authority will again assess the considerations outlined in paragraphs 050101 and 050102 above and then may:

- (1) If all subordinate counsel recommend the offense be referred, and the referral authority agrees the offense should be referred, refer the offense;
- (2) If all subordinate counsel recommend the offense not be referred, and the referral authority agrees that the offense not be referred, dismiss the offense;
- (3) If all subordinate counsel recommend the offense not be referred, and the referral authority believes the offense should be referred, forward the referral recommendation to the next senior referral authority documenting the reasons therefor in the endorsement; or
- (4) If all subordinate counsel recommend the offense be referred, and the referral authority believes the offense should not be referred, forward the referral recommendation to the next senior referral authority documenting the reasons therefor in the endorsement.

Any offense referred to a general or special court-martial by the OSTC, must be accompanied by a written determination from the referral authority that:

- (1) Each specification under a charge alleges an offense of the UCMJ;
- (2) There is probable cause to believe the accused committed the offense charged; and
- (3) A court-martial would have jurisdiction over the accused and the offense.

091703. Notification of Referral Decision

A. Referral Notifications: Upon referral of an offense by the OSTC, the detailed STC will send a copy of the referred charges to the detailed defense counsel, the convening authority, the NCIS case agent, and the trial judiciary. The detailed STC will also request the soonest available arraignment date.

B. Dismissal Notifications: If a preferred or referred offense is dismissed by an STC, the deferral authority will cause to be notified the following: the detailed defense counsel, the convening authority, the trial judiciary, any victim named in the dismissed offense (or if represented their VLC), and the NCIS case agent. The notification to the convening authority will generically describe the reason(s) for the dismissal and inform the convening authority that the offense has been deferred to them for their action.

0918. DISMISSAL

091801. Dismissal Authority

A preferred offense shall only be dismissed by an STC who has the authority to refer the offense. A referred offense shall only be dismissed by the Court or an STC who referred the offense. The STC who referred the offense may authorize a subordinate STC to withdraw or withdraw and dismiss a referred offense on their behalf.

091802. Dismissal Notifications

See paragraph 091703.B of this Chapter regarding dismissal notification actions required.

**CHAPTER 10****DISCOVERY**

All Volume changes denoted in **blue font** will reset to black font upon a full revision of this Volume.

<b>CHAPTER VERSION</b>	<b>PAGE PARAGRAPH</b>	<b>SUMMARY OF SUBSTANTIVE CHANGES</b>	<b>DATE OF CHANGE</b>

## CHAPTER 10

DISCOVERY

## 1001. PURPOSE

This section provides policy guidance to STC on how to meet their discovery obligations as set forth in the Rules for Courts-Martial, the Military Rules of Evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), and the *Giglio v. United States*, 504 U.S. 150 (1972) line of cases. This policy guidance is not intended to confer any additional rights, privileges, or benefits on any party or third person.

## 1002. APPLICABILITY

This chapter applies to all STC, legal administrative officers, litigation attorney advisors, legal services specialists, investigators, and administrative support personnel who provide military justice services within the OSTC, or who assist the OSTC prosecution function. Discovery obligations of personnel who serve in billets within the DSO and the VLCO are covered by relevant constitutional provisions, statutes, rules, regulations, and other policies published by the leaders of their organizations.

## 1003. GENERAL

100301. Role of the STC in Discovery

The STC is the gatekeeper for discovery on behalf of the United States for offenses over which the OSTC exercises authority and does not defer and must never abdicate this role. The guiding principle for the STC in every court-martial is that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935). Any intentional discovery violation is a serious matter and a violation of the rules of professional responsibility. Remaining willfully ignorant of evidence that reasonably tends to be exculpatory so as to avoid a discovery obligation is also a discovery violation and is inconsistent with the pursuit of justice. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). It does not matter if the failure to disclose discoverable information is in good faith or bad. *Giglio*, 405 U.S. at 153. Even unintentional isolated lapses can have a disproportionate effect on public and judicial confidence in the OSTC, the individual STC, and the military justice system. Beyond the consequences in the individual case, which can include continuances, exclusion of evidence, or dismissal of charges, such a loss in confidence can have significant negative consequences on the effort to achieve justice in every case.

100302. Liberal Discovery in Courts-Martial

Consistent with the role to seek justice, broad and early disclosure facilitates the speedy resolution of cases and assists in preserving limited resources. For instance, the DOJ Justice Manual requires federal prosecutors to take a broad view of discovery and err on the side of disclosure of exculpatory and impeachment evidence beyond that which is constitutionally and legally required. USAM § 9-5.001. That is true to an even greater extent for STC. “Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial.” *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). STC should always evaluate discovery and disclosure issues considering the “liberal mandate” of discovery practice in courts-martial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). But while broad discovery is desirable, disclosures beyond those required by relevant statutes, rules, and policies may risk harm to victims or witnesses, or have other ramifications contrary to the pursuit of justice. In recognition of these competing goals, the STC must make discovery determinations on a case-by-case basis. The STC should provide timely, open, and broad discovery, while still protecting victim and witness privacy interests as established under 10 U.S.C. § 806b, the Military Rules of Evidence, the Privacy Act, and relevant case law.

100303. Overview of Discovery Process

The discovery process is basically a three-step process. First, unless a privilege exists, the STC must actively seek out all potentially discoverable material in possession of the Government. Second, after obtaining the material, the STC must determine whether any of the discoverable material should not be disclosed. Because the default is that it should be disclosed, this must be done on a case-by-case and document-by-document basis. Finally, the STC must disclose the materials deemed discoverable expeditiously in accordance with the Rules for Courts-Martial, case law, and this chapter. The disclosure may include the opportunity to inspect the materials. If copies are provided to the defense or VLC, the materials must be properly redacted to remove PII or privileged material, or include a disclosure notice in accordance with this chapter.

100304. Evidence Relevant to Defense Preparation

When making the discovery determination described above, the government must always turn over certain types of information. For example, any material which accompanied the charges when they were referred, the convening order and any modifications, and any sworn or signed statement relating to an offense charged must always be disclosed. Other types of information in the possession of the government need only be discovered if they are “relevant to defense preparation.” See R.C.M. 701(a)(2). “Relevant to defense preparation” broadens the scope of discovery from the prior standard of “material” to defense preparation. See App. 15, MCM (2019 ed.). Information does not need to be admissible under the rules of evidence or be directly related to the government’s case in chief to be relevant to defense preparation. The defense may possess confidential information or have a theory of the case of which the Government is unaware. Therefore, the STC may not always understand how a piece of requested information is relevant. STC should normally assume information specifically requested by the defense is relevant to the preparation of a defense, although discovery might not be required for other reasons. However, if the requested information appears to be irrelevant, and unlikely to lead to any useful information, the STC may deny the request or request the defense provide additional information to demonstrate the relevancy of the requested material.

## 1004. SOURCES OF DISCOVERY

100401. Exculpatory Information Not in the STC’s Files

It is the obligation of STC, in preparing for trial, to seek out, obtain, and disclose to the defense all exculpatory and impeachment information held by government agencies participating in the investigation. The STC must look beyond their own physical files for exculpatory evidence and has a duty to learn of any exculpatory evidence known to others acting on the Government’s behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419 (1995). The scope of the STC’s inquiry beyond the STC’s own files depends upon the nature of the request and the STC’s relationship to the holder of the information. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). An STC must always review law enforcement case files related to the case. Potential files that might also need to be reviewed include those of other federal, state, and local law enforcement agencies, forensic laboratories, child protective services, social services, command investigators, and other civilian or government officials participating in the investigation or testing of evidence in the case.

100402. Information Held by Non-Law Enforcement Government Agencies

An STC is normally not required to review the records of agencies that are not closely aligned with the prosecution. When determining whether another federal, state, or local agency may be in possession of discoverable evidence, STC should look to the following factors:

1. Whether the agency’s primary purpose is to assist law enforcement or the prosecution, or the agency shared resources with law enforcement;
2. Whether the agency played an active role in the investigation, including obtaining evidence, interviewing witnesses, or otherwise acting as part of the investigation team;

3. Whether the STC knows of and has access to discoverable information held by the agency;
4. The degree to which the STC or law enforcement have shared information with the agency;
5. The degree to which the agency has provided input on decisions regarding civil, criminal, or administrative charges;
6. The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party;
7. Whether the agency routinely releases the information requested to representatives of the government;
8. Whether any person could assert a privilege over any of the information requested;
9. Whether the information requested is protected from release by other statutes or regulations, such as medical records, school records, counseling records, or mental health or substance-abuse treatment records.

#### 1005. SPECIFIC EVIDENCE TO REVIEW FOR DISCOVERY

##### 100501. Evidence Gathered During the Investigation

The STC will review all evidence and information gathered during the investigation.

##### 100502. The Military Law Enforcement File

The STC will review all documents within the case file of the investigating agent or the investigating officer. The STC should not treat the case file as a single document for discovery purposes, but instead should consider the case file as a container for individual documents and media. These documents and media include all documents, reports, witness statements, video recordings, and confidential witness files within the case file as well as case agent notes, e-mails about the case, and any other correspondence regarding the case. Additionally, STC will inspect any evidence seized by investigative agencies connected to the case.

##### 100503. Impeachment and Bias Information

###### A. Witness Background Checks

(1) Law Enforcement Witnesses. The STC must make a reasonable inquiry regarding the existence of any material information affecting the agent's credibility or other information favorable to the defense in the personnel files of any law enforcement witness. A reasonable inquiry usually involves asking the law enforcement agent involved. Law enforcement personnel are obligated to notify the STC of any adverse material in their personnel files affecting their credibility. If the STC is aware of any adverse information, the existence of the adverse information shall be disclosed to the defense. If the STC is not aware of any potentially adverse material, the STC only has a duty to examine the personnel files of law enforcement witnesses if an accused requests their production. Balancing the defense's need for potential impeachment material against the privacy interests of the agents, the obligation is normally satisfied by obtaining a *Henthorn* letter or functional equivalent from the appropriate authority. A *Henthorn* letter is a letter signed by a supervisor or other authorized official for the law enforcement agency (NCIS general counsel office for example) certifying they have reviewed the contents of the law enforcement witness's personnel files, and there is no adverse material in the files relevant to the case, such as any information that would affect the witness's credibility, truthfulness, or show a particular bias.

(2) Other Witnesses. The STC will ensure a National Crime Information Center (NCIC) background check is run on all witnesses, both government and defense witnesses, anticipated to testify at trial. Additionally, all military witness personnel files should be reviewed for adverse materials. When the STC discovers

adverse materials, the STC must make a necessity determination under R.C.M. 701 and M.R.E.s 608 and 609, and at a minimum, disclose to the defense the existence of adverse materials.

B. Other Impeachment and Bias Information

Additionally, the following information known by or in the possession of the government about witnesses must be gathered, reviewed, and disclosed to the defense.

- (1) Prior inconsistent statements;
- (2) Statements or reports reflecting witness statement variations;
- (3) Benefits provided to witnesses including:
  - (a) immunity;
  - (b) assistance in state or local criminal proceedings;
  - (c) non-prosecution agreements or reduced charges;
  - (d) letters to other officials setting forth the extent of a witness's assistance;
  - (e) relocation assistance or expedited transfer;
  - (f) benefits to third-parties who have a relationship with the witness; and
  - (g) any other consideration or benefit provided that may reasonably affect credibility or bias.
- (4) Other conditions that could affect the witness's impartiality such as:
  - (a) animosity toward a group of which the accused is a member;
  - (b) relationship with the victim; and
  - (c) uncharged criminal conduct.
- (5) Specific instances of truthfulness or untruthfulness under M.R.E. 608; and
- (6) Any issue that could affect the witness's ability to perceive or recall events.

100504. Information Obtained in Witness Interviews

A. The STC should have a third person or "prover" present during all witness interviews and all trial preparation meetings conducted by the STC. A best practice is to have the assigned case agent present during important witness interviews when practicable.

B. The STC must disclose to the defense any signed or adopted statements made by a witness during a witness interview.

C. The prover must memorialize any inconsistent statements or variances within the witness's statement even if they occur within the same interview. Recognizing it is sometimes difficult to assess the materiality of evidence before trial, the STC must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence, even when such evidence may not be admissible at trial. These inconsistent statements or material variances shall be disclosed to the defense.

D. The STC or prover should also memorialize all relevant new information learned during the witness interview or trial preparation meeting. This new information, even if it is not exculpatory, will be disclosed to the defense.

100505. Mental Health Records

The STC should not seek to obtain privileged mental health records without permission from the patient or an order from a court pursuant to M.R.E. 513. Upon a request for mental health records, the STC may attempt to determine if mental health records exist and where they are located. The STC should normally ask potential witnesses if they have or had any medical or mental health issues that may have affected their ability to perceive or understand events, or recall past events. If the STC becomes independently aware of a mental health disorder materially affecting a victim or witness, the existence of that condition must normally be disclosed to the defense. The STC may seek permission from the patient to obtain such records or may otherwise attempt to obtain the records pursuant to M.R.E. 513.

1006. PREPARING DISCOVERY

100601. Discovery Inventory Required

The STC shall maintain a discovery inventory of the items reviewed, items disclosed, and the rationale for any items not disclosed. For material that is reviewed and disclosed to the defense, the electronic discovery file may serve as the discovery inventory. For items not disclosed, the STC should provide notice of the existence of these items to the defense.

100602. Privileged Material Log

The STC shall identify material that is protected or privileged under the 500 series of the Military Rules of Evidence. If the STC becomes aware of privileged material that is relevant to defense preparation, the STC must notify the defense of the existence of these documents. However, the STC will not disclose this material until the proper administrative and judicial processes have been followed and the privilege is either waived by the holder or a court has ordered disclosure.

100603. Special Considerations Applicable to a Law Enforcement Case File

A. An investigator's file has law enforcement sensitive information and requires careful handling by the STC and, when applicable, by the defense counsel.

B. As described above, the STC must personally review law enforcement files, determine what information within the file must be disclosed, and determine the manner of disclosure. Investigators' notes should be reviewed for *Brady* material regardless of whether they testify.

C. The STC must inform the case agent of all materials within the file the STC intends to disclose, the timing of the disclosure, and the manner of disclosure to provide the investigation agency sufficient opportunity to assert any privileges over these materials.

D. The STC shall disclose all documents within the file that are relevant to defense preparation and not subject to a claim of privilege.

1. The STC shall inform the defense of the existence of privileged material under M.R.E.s 505-507, but shall not disclose this material without authorization from the holder of the privilege.
2. For confidential witness information, STC may produce a summary letter to defense counsel disclosing all necessary and material information while still protecting the



identity of the informant. Summary letters must be approved by the holder of the M.R.E. 507 privilege.

E. After the STC has provided copies of or allowed the defense to inspect relevant portions of the case file, the defense may request to inspect the original and complete law enforcement case file. STC shall forward any request to review the original case file to the law enforcement agency involved. Every request must be evaluated on the unique facts of the case. Allowing the defense to inspect the original case file may help avoid unnecessary delays in the case and save judicial resources by avoiding unnecessary litigation. On the other hand, many courts have held that *Brady* and related cases impose an obligation on the government to disclose, but do not entitle the defense to personally inspect the government's files. "Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). Routinely granting requests to inspect the original case file can create an institutional culture implying such a right exists and ultimately harm the integrity of law enforcement investigations.

100604. Special Concerns Related to Safety Investigations

Safety investigations may contain privileged material protected from discovery by M.R.E. 506. The privilege for safety investigations is claimed by SECNAV. If SECNAV believes waiver of the privilege is warranted, SECNAV may authorize waiver for the limited use in the trial, subject to appropriate protective measures, and after first consulting with the DoD General Counsel and DUSD (I&E). Outside of authorizing release for *in camera* review, the SECNAV has never waived the safety privilege for a criminal prosecution. STC should consult with supervisory counsel and consider the ramifications of the privileged nature of safety investigations and statements provided therein before deciding whether to prefer charges in any given case where disclosure of such material might be warranted.

100605. Special Concerns Related to Classified Information

Prior to disclosure to the defense, all classified information must be reviewed by the Original Classification Authority (OCA) for a determination of whether the M.R.E. 505 privilege applies and whether it will be invoked. The STC will coordinate with OJAG (Code 30) as soon as possible in all cases involving classified information. STC will not disclose classified information until these processes have been completed and the OCA authorizes such disclosure. STC should consult with supervisory counsel and consider the ramifications classified information may have before deciding whether to prefer charges in any given case where disclosure of such material might be warranted.

100606. Attorney-Work Product

To the extent any attorney work product is included in material gathered for discovery, such as notes of witness interviews, the STC may redact the material before disclosing to the defense. Redactions shall be clearly labeled indicating attorney work product has been removed. An STC may also meet disclosure obligations by producing a summary document of all exculpatory and new information learned, without disclosing the original notes containing the attorney work product.

1007. CONDUCTING DISCOVERY

100701. Preference for Electronic Discovery

Even if discovery is required, a physical copy of every item subject to disclosure need not be made in every case. For cases involving large volumes of potentially discoverable information, to protect witness privacy, or for other similar rationale, STC may discharge their disclosure obligations by choosing to make items subject to disclosure available to the defense for inspection rather than providing a copy. When STC do provide copies of discovery, they are encouraged to make all efforts to provide electronic copies of discovery, in lieu of paper copies, when practicable.

100702. Timing

A. STCs are encouraged to disclose relevant, non-protected material as soon as it is received, personally reviewed by the STC, and accounted for in the discovery index. Exculpatory material, regardless of whether the information is memorialized, must be disclosed to the accused promptly after discovery even if court-ordered deadlines have not arisen. Impeachment and bias information as described above shall be disclosed when the STC make the determination that a witness will likely be called to testify at trial.

B. Discovery obligations are on-going and continue after trial. The STC must be alert to developments occurring throughout the preparation, during, and after a trial that may impact their discovery obligations and require disclosure of information not previously disclosed.

100703. Use of Bates Stamp and Electronic Discovery

To the maximum extent practicable, all documents disclosed to the defense shall be electronically served through a shared network drive or a secured internet site. All materials will be Bates stamped. A Bates stamp refers to numbering each document provided in discovery with a sequential number for that case. All electronic evidence should be available to the defense in a read only manner, and the date of discovery must be recorded electronically. All electronic files should be labeled by the Bates stamp numbers and the name of the case.

100704. Personally Identifiable Information (PII)

If PII is material to the preparation of the defense, it shall be disclosed under the applicable exceptions to the Privacy Act. If an STC provides defense counsel with materials that include PII under the Routine Uses exception, the STC must use a Standard Form 901 cover sheet notifying the defense of their obligation to protect this material. STCs may provide the defense with a copy of discoverable materials with PII redacted, so long as the STC provides the defense access to inspect an unredacted version of all PII material to the preparation of the defense.

100705. Contraband Material

STC shall not provide any person with any evidence or copies of evidence that is illegal for the person to possess. Examples include controlled substances, child pornography, and prohibited weapons. In appropriate circumstances, and in coordination with NCIS or the applicable law enforcement agency, contraband materials will be made available for inspection. Inspection of contraband material normally takes place at secured NCIS office spaces. Counsel are strongly encouraged to consult with supervisory counsel regarding the appropriate use and handling of contraband material.

100706. Classified Information

Before disclosing the nature of any classified information, STC must ensure an appropriate protective order is in place and the defense counsel has the appropriate security clearance. Contact OJAG (Code 30) early in any case involving classified information for further guidance and best practices.

100707. Other Sensitive Information

STC may allow defense an opportunity to inspect other information relevant to the preparation of a defense, copies of which are sensitive and should be kept under close control. Examples of such information include photographs of a person's private area taken during a sexual assault medical forensic exam (SAMFE). Normally, the appropriate way to handle such photographs or other sensitive items is to allow the defense an opportunity to inspect such items if doing so is relevant to the preparation of a defense, while also seeking a court order to seal the items. This will assist in preventing copies being made or the showing the photographs to others, including the accused, without a court order.

**1008. DISCLOSURES TO WITNESSES, VICTIMS, AND VLC**

STC's disclosures to a victim are covered in chapter 4 of this volume. To avoid tainting potential witness testimony, STC should normally not disclose other investigative materials to a witness, beyond the witness's own statement or materials provided by the witness. In some cases, VLC may request additional documents. For example, if a motion filed under Mil. R. Evid. 412 relied exclusively on facts contained in another witness's statement, the VLC might request a copy of that statement in order to adequately respond to the motion. Although another witness's statement is not normally disclosed to the VLC, STC may disclose such a statement, so long as doing so would not violate the Privacy Act or the Rules for Professional Responsibility. If requested by the defense, the STC shall inform the defense what, if any, witness statements or materials were provided to the VLC or victim.

**CHAPTER 11**  
**TRIAL MATTERS**

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CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

## CHAPTER 11

TRIAL MATTERS

## 1101. GENERAL GUIDANCE

At all trial proceedings involving offenses over which the OSTC has exercised authority, the United States must be represented by an STC.

## 1102. ARRAIGNMENT

110201. Arraignment Mechanics and Logistics

A. Arraignment Timing and R.C.M. 707: The detailed STC should seek an arraignment as soon as reasonably possible after the referral of charges. Working with the detailed defense counsel and, if detailed, the VLC, the detailed STC should seek a date that is agreeable to all parties. However, if a mutually agreeable date cannot be reached, or if the STC fails to receive a timely response from the other parties, STC should request to arraign on the earliest date the Government is available. This creates a clear record for any request to exclude any delay in the arraignment from the Government's R.C.M. 707 speedy trial clock.

B. Trial Guide/Script: In advance of the scheduled arraignment, STC should ensure that a trial script for the case is prepared and made available to all co-counsel.

C. Charge Sheet Verification: Before arraignment, the STC must review the charge sheet for any errors. This is important because, after arraignment no major change may be made to the charge sheet over defense objection and no change, minor or major, may be made without the military judge's permission. The line between a major and minor change is often difficult to discern. Accordingly, it is important that any errors on the charge sheet are addressed and corrected prior to the arraignment.

D. Documents Available at the Arraignment: At the arraignment, the STC should have ready access to the trial script, referred charge sheet, convening order, and any draft or approved TMO. It is advisable that these documents be available in printed form.

E. Logistics for the Accused: It is the STC's responsibility to ensure that the accused is present in the appropriate uniform at the arraignment. Although the detailed defense counsel should inform the accused of these matters, the STC will coordinate with the accused's command to ensure appropriate arrangements have been made.

F. Compliance with R.C.M. 904: STC will ensure that the arraignment is conducted in accordance with R.C.M. 904. The arraignment begins the court-martial proceedings and satisfies the Government's 707 speedy trial obligation. STC will read the jurisdictional data and, unless waived, the charges. The accused will be asked to enter pleas, bring motions, and elect forum, or reserve those elections until a later date in accordance with the Trial Management Order (TMO). STC must ensure that any pre-referral subpoenas or warrants, or statements of the accused have been discovered to the defense prior to the arraignment. The STC will also ensure that any Article 30a matters have been provided to the court reporter so that they may be appended to record.

G. TMO and Case Timing: The military judge will likely order any future Article 39(a) and the trial dates at arraignment by signing the TMO. Before the arraignment, STC should coordinate with the defense and VLC regarding their availability to reach mutually agreed upon TMO dates. However, STC should not agree to dates that are not favorable to the Government or needlessly prolong the proceedings. Proposed motions and trial dates should be discussed with all key witnesses and the NCIS case agent prior to submission of any proposed TMO. Absent unusual circumstances, STC should seek to docket Special Courts-Martial no later than 60 days after the arraignment and General Courts-Martial no later than 90 days after the arraignment. STC will submit a proposed TMO to the military judge for review and approval. If the military judge does not accept the proposed TMO, or does not issue a TMO at or immediately following the arraignment, the STC shall notify the RSTC. Once issued, a

copy of the TMO will be provided to the convening authority, accused's command (if the not the same as the convening authority), the NCIS case agent, and the victim, or if represented, the VLC.

H. Post-Arraignment: STC will comply with all requirements of the TMO and will highlight for the Court when the Defense or VLC fails to do so. If an STC knows that they will not be able to comply with a TMO ordered deadline, the STC will inform their supervisory counsel they will not be able to comply and the reasons therefore and notify the Court and opposing counsel.

## 1103. MOTIONS

### 110301. General Considerations

Trials are often won or lost during motions litigation. It is during this phase of the court-martial proceedings where the landscape of the upcoming trial is shaped. Key evidence may be deemed admissible or inadmissible, and theories of culpability or innocence deemed permissible or not. Accordingly, STC will investigate and prepare each case with potential motions and responses in mind. As in combat, we must view the battlefield not only from our perspective, but that of our opponent.

### 110302. Affirmative Motions Posture

To reduce uncertainty at trial and posture the Government to present it strongest possible case, STC should employ an aggressive, affirmative motions practice. When appropriate, STCs should file affirmative motions seeking pretrial rulings on the admissibility of key real, documentary, and testimonial evidence; the admissibility of expert testimony; and the admissibility of M.R.E. 404(b), 412, 413, and evidence.

### 110303. Anticipating and Responding to Motions

STC should anticipate and be prepared to respond to defense motions. When developing a proof matrix, STC should "red cell" the case from the perspective of the defense. Doing so will also assist the STC in determining whether additional Article 39(a) sessions should be ordered in the TMO as well as identifying what types of motions each Article 39(a) session should target.

### 110304. Preparing for a Motions Hearing

STC will cite and argue current, relevant case law that support their legal position. They will also alert the Court to binding precedent contrary to the position being argued. STC should acknowledge and distinguish facts and precedent that do not favor their position.

A military judge's ruling on a motion filed with the Court must be based on Findings of Fact supported by the record and Conclusions of Law. It is the STC's responsibility to provide the Court with the evidence the military judge requires to rule in favor of the Government. Often, establishing a record from which the military judge can glean the necessary Findings of Fact to rule in favor of the Government will require the admission of not only documentary evidence, but also testimonial evidence ... to include the testimony of a victim. Failure to sufficiently develop record may result in adverse rulings that the STC may not have the opportunity to revisit before or during trial. The STC must carefully balance any desire to shield witnesses from having to provide pre-trial testimony with the necessity to present the facts necessary to enable the military judge to rule in the Government's favor on the motion.

## 1104. TRIAL

### 110401. Trial Preparation

Proper advance preparation is the key to maximizing the Government's chances of success at trial. STC should continually review and improve upon the case proof matrix to ensure you will have the evidence needed to best prove the case.

For every contested court-martial, the RSTC will ensure that at least one murder board is conducted, preferably not later than 30 days prior to the docketed trial date. Murder board topics should include a review of the proof matrix, expected witness testimony, witness order, exhibits, evidentiary foundation requirements, theme, theory, division of labor between co-counsel, findings and sentencing instructions, and anticipated motions and objections by the Defense at trial ... and anticipated responses.

Early and often witness engagement and preparation is key to avoiding last minute surprises and the likely continuances that will be granted as a result. Such engagement and preparation is also the key to maximizing your witnesses' ability to confidently, calmly, and accurately provide the testimony you will elicit.

Although the Defense has no obligation to present any evidence at trial, the STC must still be prepared to raise objections to inadmissible defense offered evidence not raised via a motion *in limine* and to cross-examine all witnesses on the Defense witness list, as well as the accused.

The STC will prepare a contested court-martial trial script tailored to the appropriate forum.

110402. Engagement with the SJA

As the convening authority bears the financial cost of the trial and is responsible for selecting and detailing the members to the court-martial, the STC will maintain an open line of communication with the convening authority's SJA regarding trial timelines and TMO deadlines and funding support requirements.

110403. The Trial

You are ready. Execute the trial plan. Your Team, Region, and fellow OSTC members and leadership will be available to support you should the need arise.

As the representative of the United States, the STC also has the duty to protect the record. A well-trying case that results in a conviction is a waste of time and resources if the conviction fails to withstand appellate review because the record was lacking. The STC will not depend on the military judge to protect the record. STC should ensure all necessary information is in the record (either recorded during trial or in an Article 39(a) session, or attached to the record as an exhibit. Ensure the military judge provides rulings on the record (not just in an R.C.M. 802 conference) for all motions and objections, ideally with fully articulated reasoning for the ruling.

110404. Post-Trial Actions

A. Statement of Trial Results

Once any general or special court-martial in which charges were referred by the OSTC is adjourned, the STC will ensure the Statement of Trial Results (SOTR) is created. The SOTR will be signed by the military judge and provided to the court reporter in accordance with R.C.M. 1101(a). The detailed STC will also ensure that a complete unredacted copy of the SOTR is uploaded into CMS and a copy of the completed SOTR is provided to defense counsel, convening authority, accused's command (if not the same as the convening authority), any victim named in a specification or their VLC as appropriate, NCIS case agent, and, when appropriate, the brig.

B. Notification to Eligible Victims of Opportunity Receive a Copy of the Record

Per R.C.M. 1112(e), the STC will inform any victim entitled to receive a copy of the certified record of trial of this opportunity. If an eligible victim requests a copy of the certified record of trial, the Post-Trial Section will be responsible for providing the record.

C. Appeal of Sentence by the United States

Pursuant to Article 56(d), UCMJ, the Government, with the approval of the Judge Advocate General, may, within 60 days after entry of judgment, appeal a sentence to the Court of Criminal Appeals on the grounds that the sentence violates the law or the sentence is plainly unreasonable as determined in accordance with standards and procedures prescribed by the President. Only the LSTC, or, in the LSTC's absence, the DLSTC, in coordination with Code 46, may seek to obtain approval from the Navy Judge Advocate General to appeal a sentence pursuant to Article 56(d), UCMJ.



CHAPTER 12

PLEA AGREEMENTS

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## CHAPTER 12

PLEA AGREEMENTS

## 1201. PLEA AGREEMENTS

The term “plea agreement” as used in this Chapter refers to plea agreements for those offenses over which the OSTC exercises authority and are signed by an STC on behalf of the U.S. Government. Note that plea agreements have different sets of permissible terms and procedures. Follow the model forms found here: [https://www.jag.navy.mil/trial\\_judiciary.htm](https://www.jag.navy.mil/trial_judiciary.htm)

Practitioners must apply the correct framework to a particular case as outlined in this chapter, the UCMJ, and the Rules for Courts-Martial. See R.C.M. 705 and JAGMAN section 0137 for additional guidance on plea agreements, and section 0126 for special consideration on plea agreements in national security cases.

Plea agreements are governed by the versions of Article 53a, UCMJ, R.C.M. 705 and R.C.M. 910 that are in effect on 1 January 2019, and relevant case and statutory law.

## 1202. CONSULTATION BEFORE ENTERING INTO AGREEMENTS

In the interests of justice, efficiency, and for good cause; STC may enter into plea agreements on behalf of the U.S. Government to resolve a referred case with defense counsel and the accused. Consultation before an STC signs a plea agreement is required with: (1) the victim (and VLC if retained), and (2) the commanders of the victim and the accused. A victim has the right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused. Moreover, commanders of the victim and the accused in cases involving a covered offense shall have the opportunity to provide input to an STC regarding case disposition, but that input is not binding on the STC. For example, the best practice is for the STC to socialize a draft plea agreement with the VLC and the SJA to the relevant commander prior to the STC signing the plea agreement on behalf of the U.S. Government. However, the failure of the VLC (or victim) and/or SJA for the commander to timely respond to the consultation will not preclude the STC from signing the plea agreement.

*Note: The FY22 NDAA only authorizes an STC to enter into a plea agreement for referred charges.*

## 1203. USE OF MODEL PLEA AGREEMENT

To the greatest extent possible, military justice practitioners should use language from model plea agreements, as referenced by the Navy-Marine Corps Trial Judiciary. Approved model plea agreement terms are usually available at [http://www.jag.navy.mil/trial\\_judiciary.htm](http://www.jag.navy.mil/trial_judiciary.htm). If an STC modifies a standard term in a proposed agreement, the STC will inform the opposing party of the change.

## 1204. CONDITIONAL GUILTY PLEAS

Pursuant to R.C.M. 910(a)(2), with the approval of the military judge and consent of the STC, an accused may enter a conditional plea of guilty for an offense over which the OSTC exercises authority, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. Conditional guilty pleas are disfavored by the OSTC. Prior to entering into any plea agreement which contains any conditional guilty plea, the RSTC for the case must consult with the LSTC or DLSTC.

120401. Authority to Consent to Conditional Plea

The R.C.M. further states that unless the Secretary concerned prescribes otherwise, the trial counsel may consent to a conditional guilty plea on behalf of the government. SECNAV has not prescribed otherwise.

Therefore, under the rule an STC may consent to a conditional plea on behalf of the government. However, the STC must obtain the approval of the RSTC or STCTL before consenting to a conditional plea. If the accused has entered into a plea agreement, the conditional nature of any plea must be agreed to by the STC and made a part of the written agreement.

120402. Information Required in the Record

If the military judge has approved a conditional plea, the STC shall ensure the following is reflected in the record: (1) the entry of the conditional plea is in writing and clearly details the motion the accused wishes to preserve on appeal; (2) the government's consent to the plea is also in writing or clearly annotated in the record; and (3) the motion preserved was fully litigated before the military judge with all necessary findings of fact and conclusions of law reflected in the record.

120403. Effect of Non-Compliance

There is no constitutional right to enter a conditional guilty plea - compliance with R.C.M. 910(a)(2) is the only mechanism to do so. *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010). All other pleas of guilty are unconditional and generally waive all non-jurisdictional defects occurring earlier in the proceeding. *United States v. Lee*, 73 M.J. 166 (C.A.A.F. 2014).

1205. VARIOUS PLEA AGREEMENT TERMS

120501. Prohibited Terms

R.C.M. 705 lists prohibited and permissible terms and conditions in an agreement. R.C.M.s 905-907 also lists motions that are not waivable. A plea agreement may not prohibit the accused from raising certain motions that are not waivable. The following additional guidance applies to certain common terms in agreements.

120502. Specific Sentence in Plea Agreement

R.C.M. 705(d)(1) allows a plea agreement to limit the maximum and/or minimum punishments that can be imposed. There is no requirement that the maximum and minimum be any specified range apart from each other and they may be the same.

120503. Restitution

As previously discussed in this issuance, a victim must be given the opportunity to provide input on a proposed agreement. An STC will consider the appropriateness of requiring victim restitution as a term of an agreement when appropriate or requested by the victim. Restitution may be appropriate if a victim has suffered verifiable loss, injury, or financial harm because of the offenses, regardless of whether an accused has been personally enriched. The ultimate determination of whether to require restitution as a term in a plea agreement is within the sole discretion of the STC.

120504. Stipulation of Facts

Unless otherwise authorized to do so by the deferral authority, any plea agreement entered into by an STC must contain a signed, mutually agreed upon stipulation of fact. The stipulation of fact must be sufficiently detailed to demonstrate that the accused can stratify the factual sufficiency of each element of every offense to which the accused is offering to plead guilty. The stipulation shall include the specific facts establishing the factual basis for the plea and not simply be a collection of legal conclusions. The stipulation should address any potential defenses that may exist that the accused is asserting do not apply. This specificity minimizes potential surprise and promotes the efficiency of the plea process. A stipulation agreed to and signed by an accused offered with a proposed plea agreement is covered under M.R.E. 410.

120505. Certain Evidence Presented in Sentencing Proceeding

To the greatest extent possible, STC will ensure any plea agreement entered into contains a provision specifically identifying the exhibits and evidence to which no object will be made and/or to which any objection that could be made is waived. Specifically identifying which exhibits and what evidence will be offered for admission and consideration for the court, prior to the plea, avoids unnecessary litigation and avoids miscommunication and potential delay in bringing the case to resolution.

120506. Automatic Reduction

Because automatic reduction provisions may change based on the signing of an executive order, military justice practitioners should exercise care placing automatic reduction provisions in an agreement to ensure the accused has a correct understanding of applicable automatic reduction provisions and the government is able to comply with the agreement.

120507. Conditions During Confinement

An accused's post-trial confinement is governed by service regulations applicable to the confinement facility and is not within a particular STC's or even a military judge's ability to control. While an STC may agree to make recommendations to a confinement facility or corrections authorities, an agreement shall not include terms requiring an accused to be confined at a certain facility, participate in certain treatment programs, or contain any other terms specifying the manner in which confinement will be carried out.

120508. Withdrawal by the STC

The STC may withdraw from any plea agreement entered into with an accused at any time before the accused begins substantial performance, if the accused fails to fulfill any material promise or condition of the agreement, when inquiry by a military judge discloses a disagreement as to a material term in the agreement, or if the findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. See R.C.M. 705

## 1206. RESIGNATION IN LIEU OF TRIAL FOR OFFICERS

Officer resignations in lieu of trial must be submitted in accordance with Volume 15 of the LSAM (Officer Misconduct and Substandard Performance of Duty). Such resignations must be approved by SECNAV. The submission of a resignation request normally proceeds simultaneously with any court-martial proceedings.

120601. STC's Discretion to Delay Court-Martial

A resignation request is normally not grounds to delay a court-martial. With concurrence of the deferral authority, the detailed STC may take steps to delay a court-martial pending consideration of a resignation request such as withdrawing charges from a court-martial or excluding delay before referring charges. The officer requesting resignation may consider including specific language in a request for delay which excludes any requested delay from both R.C.M. 707 and Article 10 calculations as applicable.

120602. When Court-Martial Has Not Been Delayed

If the STC has not taken any action to delay the trial, the accused's chain of command shall forward the resignation request as soon as practicable in accordance with Volume 15 of the LSAM. An accused may include in the resignation request any docketing information about the pending case. Note that if findings are announced, the convening authority (pursuant to Art. 60a & Art. 60b), and SECNAV (pursuant to Art. 74) have limited or no authority to set aside the findings of a court-martial. Therefore, an officer who submits a resignation in lieu of trial request, but who has not negotiated with the STC to delay the court-martial, must submit the resignation request as

soon as possible to allow SECNAV sufficient time to consider and act on the resignation before findings are announced.

**CHAPTER 13****MILITARY JUSTICE DATA COLLECTION**

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## CHAPTER 13

MILITARY JUSTICE DATA COLLECTION

## 1301. PURPOSE

Accurate data collection and management is essential to the effective and fair administration of military justice. Additionally, military justice is routinely an area of intense congressional and public interest. As public servants, we have an obligation to answer congressional inquiries for statistical data concerning military justice. Article 140a, UCMJ, requires SECDEF to prescribe uniform standards and criteria for the conduct of each of the following functions at all stages of the military justice system, including retrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

1. Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and enhances the quality of periodic reviews under Article 146a, UCMJ.
2. Case processing and management.
3. Timely, efficient, and accurate production and distribution of records of trial within the military justice system.
4. Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.

*Note: The Department of the Navy is in the process of developing and testing the new case management system – NCORS. The system should be fully operational by 31 July 2023. All references to data fields or CMS actions to be taken contained in this Chapter relate to the current CMS, Wolverine. Upon the launch of NCORS, this Chapter will be updated to reference NCORS.*

## 1302. REQUIRED DATA POINTS

130201. General Guidance

Article 140a, UCMJ, requires SECDEF to prescribe standards for information that is required to be collected in every military justice case. In furtherance of that requirement, the DoD General Counsel's memorandum dated 17 January 2023, Appendix D, prescribes the required military justice data which each service must track and maintain. The electronic case management system is designed to track each of those required data points. Accordingly, OSTC personnel must routinely update electronic case management system entries to ensure all data points are included for each case, to the extent practicable.

130202. Specific Guidance for Demographic Data

A. Personnel within the OSTC must ensure that demographic data (race, ethnicity, and gender) for both the accused and the victim, if applicable, are entered within the CMS. The accused's demographic data, and the victim's demographic data when the victim is a Service member, shall be sourced from the Marine Corps Total Force System (MCTFS) personnel database.

B. When the victim is a civilian, source the victim's demographic data from the NCIS or CID investigative report.

C. If the investigative report identifies the civilian victim's race or ethnicity as "unknown," select the "victim declined to provide" option within the electronic case management system.

D. If the investigative report identifies the civilian victim's race as "Asian/Pacific Islander," OSTC personnel shall ask the victim to clarify whether the victim is "Asian" or "Native Hawaiian/Pacific Islander." If the victim chooses not to clarify, select the "victim declined to provide" option in the electronic case management system.

130203. Specific Guidance when the Servicemember-Subject is Unknown

When the identity of a Service member-subject is unknown, OSTC personnel shall enter "unknown" in the data fields for first name and last name. Additionally, OSTC personnel shall enter "9999999999" for the subject's EDIPI. The investigative case control number (CCN) shall be included within the case information section.

1303. ELECTRONIC CASE MANAGEMENT SYSTEM (CMS) ENTRIES

CMS refers to the applicable electronic case tracking system that is used to track military justice data, cases, and actions. All significant pending actions and case developments must be properly documented. Cases will be tracked through completion of the appellate review process and will be created in the electronic case management system—regardless of the anticipated disposition—at the earlier of:

- (1) Notification to the OSTC by the Command, a Military Criminal Investigative Organization (MCIO) or other law enforcement agency of any offense over which the OSTC has authority; or;
- (2) Within 3 business days after notification of the imposition of pretrial confinement of an accused for an offense over which the OSTC exercises authority.

The following documents will be uploaded into CMS as applicable:

- (1) Prosecution Decision Memorandum (PDM);
- (2) Signed victim preference letter;
- (3) Preferred and referred charge sheet;
- (4) Withdrawal/withdrawal and dismissal letter;
- (5) Deferral notification letter;
- (6) Plea agreement;
- (7) Report of Result of Trial/Statement of Trial Results;
- (8) Entry of Judgment; and
- (9) Any notification made pursuant to chapter 14 of the LSAM (criminal justice reporting, sex offender notification, etc.).

1304. SUPERVISION

OSTC Leaders at all levels will enforce the use of case management systems and oversee the accuracy, quality, and completeness of the information contained in the system. RSTC and STCTL should review electronic CMS entries at least once a week to ensure subordinate STC and military justice clerks are making appropriate entries in cases and keeping the data within each case up to date. The RSTC shall periodically review the electronic case management system entries to ensure this supervision is taking place. Completion of the electronic case management system entries is subject to inspection pursuant to Article 6, UCMJ, and the inspection procedures outlined in the LSAM.



## APPENDIX A



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

MAR 11 2022

### MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Policies Governing Offices of Special Trial Counsel

In accordance with title 10, U.S. Code, section 1044f, as enacted by section 532 of the National Defense Authorization Act for Fiscal Year (FY) 2022, effective immediately, I establish the following policies for the Military Departments' Offices of Special Trial Counsel and their personnel. These policies will be incorporated in issuances promulgated by the Secretary of each Military Department to be issued within 180 days of the date of this memorandum.

#### I. Mission

The mission of the Offices of Special Trial Counsel is to provide expert, specialized, independent, and ethical representation of the United States, under the direct civilian control of the Secretary of the applicable Military Department, in the investigation and trial-level litigation of covered offenses as prescribed by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the offices exercise authority.

#### II. Offices' Establishment

- A. Not later than December 27, 2023, the Secretaries of the Military Departments will ensure that an Office of Special Trial Counsel with respect to each Military Service within their respective Military Department is at full operational capability, recognizing that those offices cannot exercise the authorities newly enacted by the National Defense Authorization Act for FY 2022 with respect to offenses that occur before December 28, 2023. In preparation for full operational capability, the Secretaries of the Military Departments will take the following actions, completion of which will be reported to the General Counsel of the Department of Defense:
1. Not later than July 15, 2022, establish the Offices of Special Trial Counsel. For purposes of initial operational capability, the Department of the Air Force may establish a single Office of Special Trial Counsel for both the Air Force and the Space Force.
  2. Not later than September 30, 2022, identify recommended nominees for Lead Special Trial Counsel.
  3. Not later than October 15, 2022, identify Special Trial Counsel.
  4. Not later than December 31, 2022, develop and issue initial training and education policies for the Offices of Special Trial Counsel.



OSD001504-22/CMD001846-22

5. Not later than January 1, 2023, or such later date on which each Lead Special Trial Counsel is confirmed and appointed as a general or flag officer, assign, and where applicable ensure the permanent change of station of, Lead Special Trial Counsel to that permanent general/flag officer position.
  6. Not later than August 31, 2023, assign or detail, and where applicable ensure the permanent change of station of, judge advocates to fill the Special Trial Counsel positions. Until December 27, 2023, either (a) the Lead Special Trial Counsel, or (b) if the Lead Special Trial Counsel has not yet been appointed, the Secretary of the Military Department concerned may make Special Trial Counsel available to perform duties outside of the Office of Special Trial Counsel, provided that the primary duty of the Special Trial Counsel is within the Office of Special Trial Counsel. This authority of the Lead Special Trial Counsel or the Secretary of the Military Department concerned may not be delegated. Beginning on December 27, 2023, the provisions of para. IV.B.4 will apply.
  7. Not later than July 1, 2023, establish standard operating procedures for the Offices of Special Trial Counsel, including the reciprocal agreements required by para. III.B.2.
- B. Pursuant to section 958(b)(1) of the National Defense Authorization Act for FY 2020, Public Law No. 116-92 (2019), the Secretary of the Air Force may designate a single Space Force judge advocate to be the Lead Special Trial Counsel for both the Air Force and the Space Force.

### III. Offices' Functions

- A. All Lead Special Trial Counsel, Special Trial Counsel, and other support personnel deemed appropriate by the Secretary of the Military Department concerned will be assigned to an Office of Special Trial Counsel, which will supervise and oversee the United States' legal representation in the investigation and trial-level litigation of covered offenses as defined by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the office exercises authority.
- B. Independence
1. The Offices of Special Trial Counsel will operate independently of the military chains of command of both the victims of alleged covered offenses and those accused of covered offenses as defined by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and any other offenses over which the offices exercise authority.
  2. The Military Departments will enter into reciprocal agreements to provide for the legal representation of the United States in the investigation and trial-level litigation by another Military Service's Office of Special Trial Counsel of any

offense over which an Office of Special Trial Counsel is precluded from exercising authority because either the alleged offender or victim is a member of the relevant Office of Special Trial Counsel (see para. III.B.1).

3. Special Trial Counsel will conduct their assigned activities free from unlawful or otherwise unauthorized influence or coercion.

#### IV. Personnel

##### A. Office Head

1. Each Office of Special Trial Counsel will be headed by a general or flag officer with significant military justice experience with the title, "Lead Special Trial Counsel."
2. To promote both the appearance and the actuality of independence to the maximum extent possible, each Lead Special Trial Counsel will serve for a specified fixed term of not less than three years, with an option for that term to be renewed for a subsequent fixed term or terms of any length. A Lead Special Trial Counsel may be relieved of duty prior to the end of his or her term only for cause, unless he or she leaves active duty or is promoted. The Secretaries of the Military Departments will promulgate issuances governing the grounds and procedures for relieving a Lead Special Trial Counsel for cause. Only the Secretary of the Military Department concerned or the Secretary's superior may relieve a Lead Special Trial Counsel for cause.
3. Each Lead Special Trial Counsel will report directly to the Secretary of the Military Department concerned with no intervening authority.
4. No Lead Special Trial Counsel may be assigned any additional duties with the following exception. If favorably endorsed by a Lead Special Trial Counsel, a request for that Lead Special Trial Counsel to serve on an officer promotion selection board may, at the discretion of the Secretary of the Military Department, be granted.
5. No Lead Special Trial Counsel may be supervised or rated by anyone other than the Secretary of the applicable Military Department.
6. In cases over which an Office of Special Trial Counsel exercises authority, the Lead Special Trial Counsel of the applicable Military Service will have exclusive authority to determine whether to file an appeal under Article 62 of the Uniform Code of Military Justice (10 U.S.C. § 862), in consultation with appellate government counsel in the office of the Judge Advocate General of the applicable Military Department. Appellate government counsel will litigate those appeals on behalf of the United States and are responsible for the substance and content of submissions to the appellate courts.

## B. Special Trial Counsel

1. Special Trial Counsel will be assigned to the Office of Special Trial Counsel for a fixed term of not less than three years. Those assignments may, with the permission of the applicable Judge Advocate General or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps, be renewed for subsequent fixed terms of any length. Each Military Department's issuance governing its Office or Offices of Special Trial Counsel will provide that a Special Trial Counsel may be released before the end of the fixed term only if the Special Trial Counsel leaves active duty or at the direction or with the permission of the Lead Special Trial Counsel with notice to the applicable Judge Advocate General or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps.
2. Special Trial Counsel will be highly skilled, experienced, well-trained, and competent in handling the investigation and trial-level litigation of covered offenses.
3. Special Trial Counsel will be supervised and rated only by personnel assigned to the applicable Office of Special Trial Counsel.
4. The Military Services will instruct promotion boards to value litigation experience.
5. A request may be made to a Lead Special Trial Counsel to detail a Special Trial Counsel to a case that does not fall under the authority of an Office of Special Trial Counsel. The Lead Special Trial Counsel will have exclusive and unreviewable authority to grant or deny such a request. If a Special Trial Counsel is detailed to a case that does not fall under the authority of an Office of Special Trial Counsel, no one other than a member of an Office of Special Trial Counsel will prepare a performance evaluation for the Special Trial Counsel for the period during which the Special Trial Counsel performs those duties.

## V. Command Input

The commander of any victim of an alleged covered offense and the commander of any accused in a case involving a covered offense will be given a reasonable opportunity to provide input to the Special Trial Counsel regarding case disposition, but that input is not binding on the Special Trial Counsel.

## VI. Training

The Lead Special Trial Counsel will establish appropriate training programs for personnel assigned to their respective offices. Joint training among the Military Services' Offices of Special Trial Counsel is encouraged. Lead Special Trial Counsel are encouraged to

have personnel assigned to their respective offices participate in training with judge advocates outside of the Offices of Special Trial Counsel in addition to appropriate specialized training within the Office of Special Trial Counsel concerned. Lead Special Trial Counsel are encouraged to send their respective personnel to training programs outside the Department of Defense, including those offered by the Department of Justice.

#### VII. Exceptions to Policy

Exceptions to these policies may be granted only by the Secretary of Defense or the Deputy Secretary of Defense. That authority may not be delegated.

A handwritten signature in black ink, appearing to read "R. J. Lust". The signature is written in a cursive, stylized font with a large initial "R" and a prominent "L".



## APPENDIX B



### THE SECRETARY OF THE NAVY WASHINGTON, D.C. 20350-1000

September 7, 2022

#### MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Policies Governing the Navy and Marine Corps Offices of Special Trial Counsel

In accordance with title 10, U.S. Code, section 1044f, as enacted by section 532 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81, Dec. 27, 2021) and pursuant to your Memorandum For Secretaries of the Military Departments: Policies Governing Offices of Special Trial Counsel dated March 11, 2022, I have established the policies, roles, and responsibilities as contained in Enclosure (1) for the Department of the Navy's Offices of Special Trial Counsel and their personnel.

The Navy and Marine Corps Offices of Special Trial Counsel shall be independent - both in appearance and in fact; specialized - focused on statutorily enumerated covered offenses; and expert - possessed of the capacity and expertise necessary to effectively perform the duties assigned. The enclosed policies are intended to promote and preserve these tenets with respect to the establishment and operations of the Offices of Special Trial Counsel.

Nothing in this guidance limits the authorities provided by Article 6, UCMJ, title 10 U.S. Code, section 806. The Department of the Navy will continue to evaluate and adjust where appropriate, in particular when we receive additional guidance and direction from you and the Congress on this matter.

  
Carlos Del Toro

Attachments:  
As stated

## ENCLOSURE 1

### I. Mission

The mission of the Navy and Marine Corps Offices of Special Trial Counsel is to provide expert, specialized, independent, and ethical representation of the United States in the investigation and prosecution of covered offenses as prescribed by Article 1 (17) of the Uniform Code of Military Justice (UCMJ), title 10 U.S. Code, section 801(17), and other offenses over which the offices exercise authority pursuant to Article 24a, UCMJ, title 10 U.S. Code, section 824a.

### II. Establishment of the Offices of Special Trial Counsel

A. In accordance with 10 U.S. Code, section 1044f(a), Offices of Special Trial Counsel have been established in both the Navy and Marine Corps.

B. Not later than December 27, 2023, the Services are directed to ensure their respective Office of Special Trial Counsel are appropriately staffed and resourced and have attained full operational capability. In order to facilitate this requirement, the following guidance applies:

1. Not later than September 15, 2022, the Chief of Naval Operations and the Commandant of the Marine Corps shall identify their Service's nominee for Lead Special Trial Counsel.
2. Not later than September 30, 2022, the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps shall establish criteria, consistent with Article 24a(b), UCMJ, title 10 U.S. Code, section 824a(b), for the certification of judge advocates as Special Trial Counsel within their respective Service.
3. Not later than October 10, 2022, the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps shall identify those Navy and Marine Corps judge advocates who possess the requisite personal and professional qualities to be considered, in accordance with Article 24a(b), title 10 U.S. Code, section 824a(b), for certification as Special Trial Counsel.
4. Not later than December 31, 2022, the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, in coordination with the assigned Office of Special Trial Counsel leadership, shall develop and promulgate initial training and education policies for the Offices of Special Trial Counsel.
5. Not later than January 1, 2023, or such later date on which each Lead Special Trial Counsel is confirmed and appointed a general or flag officer, the Services shall assign, and where applicable ensure the permanent change of station of, Lead Special Trial Counsel to that permanent general or flag officer position.

6. Not later than July 1, 2023, the Service's Lead Special Trial Counsel shall establish standard operating procedures for the Offices of Special Trial Counsel.

7. Not later than July 1, 2023, the Service Chiefs shall establish reciprocal agreements required by para. III.B.5.

8. Not later than August 31, 2023, the Services shall ensure the assignment, as appropriate, of those judge advocates identified by the Judge Advocate General of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps to serve as Special Trial Counsel.

9. Not later than August 31, 2023, the Services shall ensure the assignment, as appropriate, of uniformed Office of Special Trial Counsel support personnel identified by the Judge Advocate General of the Navy or Staff Judge Advocate to the Commandant of the Marine Corps for service in the Office of Special Trial Counsel.

### III. Offices of Special Trial Counsel—Operations

A. The Services' Offices of Special Trial Counsel represent the United States during the investigation and prosecution of the covered offenses as prescribed by Article 1 (17), UCMJ, title 10 U.S. Code, section 801(17), and other offenses over which the offices exercise authority pursuant to Article 24a, UCMJ, title 10 U.S. Code, section 824a.

#### B. Independence and Readiness

1. The Services' Offices of Special Trial Counsel will execute their duties independently of the military chains of command of both the victims of alleged covered offenses and those accused of covered offenses and any other offenses over which the offices exercise authority. The commanders of the victim and the accused in a case involving a covered offense shall, in accordance with 10 U.S. Code, section 1044f(a)(5), have the opportunity to provide non-binding input to the Special Trial Counsel regarding case disposition.

2. Special Trial Counsel will conduct their assigned activities free from unlawful or unauthorized influence or coercion. No person from outside the Office of the Special Trial Counsel may attempt to influence a Special Trial Counsel's determination regarding the disposition of any offense.

3. Consistent with 10 U.S. Code, section 1044f, superior Special Trial Counsel shall supervise and oversee the activities of the Special Trial Counsel. Special Trial Counsel will be rated only by personnel assigned to their respective Office of Special Trial Counsel.



4. Lead Special Trial Counsel shall be responsible to the Secretary of the Navy for the effective operations and administration of their respective Offices of the Special Trial Counsel, and as such, will independently identify requirements for organizing, manning, training, resourcing, and equipping their respective organizations.

5. Consistent with the provisions of Article 6, UCMJ, title 10 U.S. Code, section 806, the Judge Advocate General of the Navy and the Staff Judge Advocate are accountable to the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps for ensuring readiness for all military justice entities, and as such, will be responsible for addressing the organizing, manning, training, and equipping requirements identified by the Lead Special Trial Counsel within their respective Service.

6. Both the Navy and Marine Corps will enter into reciprocal agreements with all other Services to provide for the legal representation of the United States in the investigation and trial-level litigation by another Service's Office of Special Trial Counsel of any offense over which that Office of Special Trial Counsel is precluded from exercising authority because either the alleged offender or victim is a member of the relevant Office of Special Trial Counsel. The reciprocal agreement between the Navy and the Marine Corps will provide that their Offices of Special Trial Counsel will provide the primary conflict-free support for each other's Service unless otherwise precluded.

#### C. Specialization

1. Special Trial Counsel will not perform duties outside the Office of Special Trial Counsel, unless approved by competent authority. For the purposes of this guidance, competent authority means the Lead Special Trial Counsel or, in the absence of the Lead Special Trial Counsel, that officer then exercising the authorities of the Lead Special Trial Counsel.

2. Only the Lead Special Trial Counsel or, in the absence of the Lead Special Trial Counsel, that officer then exercising the authorities of the Lead Special Trial Counsel, may approve or deny a request to detail a Special Trial Counsel to a court-martial in which the Office of Special Trial Counsel has not exercised its authority. Requests to detail Special Trial Counsel to a case over which the Office of Special Trial Counsel has not exercised authority will be made to the Lead Special Trial Counsel of the same service. The authority to grant or deny such requests may not be further delegated and the decision to grant or deny such a request is unreviewable.

#### D. Expertise and Professional Responsibility of the Offices of Special Trial Counsel

1. The Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, in accordance with Article 24a, UCMJ, title 10

U.S. Code, section 824a and Article 27b, UCMJ, title 10 U.S. Code, section 827b, will certify Special Trial Counsel as qualified by reason of education, training, experience, and temperament.

2. The Judge Advocate General of the Navy is responsible for the professional supervision and discipline of all judges, magistrates, judge advocates, and other lawyers who practice in proceedings governed by the UCMJ and the Manual for Courts-Martial within the Department of the Navy.

3. The Staff Judge Advocate to the Commandant of the Marine Corps serves as the Rules Counsel for matters of professional responsibility involving Marine Corps judge advocates or civilian attorneys under the Staff Judge Advocate's cognizance and reports to the Judge Advocate General of the Navy regarding oversight of professional responsibility matters in the Marine Corps.

4. These authorities in paragraphs III.D.1-3 above extend to judge advocates and other legal personnel assigned or detailed to the Offices of Special Trial Counsel. Nothing in this guidance limits these important responsibilities.

#### IV. Offices of the Special Trial Counsel – Personnel and Activities

##### A. Lead Special Trial Counsel.

1. The Office of Special Trial Counsel for the Navy will be headed by a flag officer with significant military justice experience with the title, "Lead Special Trial Counsel of the Navy." The Office of Special Trial Counsel for the Marine Corps will be headed by a general officer with significant military justice experience with the title, "Lead Special Trial Counsel of the Marine Corps."

2. Lead Special Trial Counsel will lead their respective Service's Office of Special Trial Counsel, exercising both operational and administrative control over the personnel and activities of their respective Service's Office of Special Trial Counsel.

3. To facilitate independence in the execution of assigned duties, each Lead Special Trial Counsel will report directly to the Secretary of the Navy with no intervening authority. The Secretary of the Navy is the rating official for each Lead Special Trial Counsel.

4. Lead Special Trial Counsel will serve for a specified fixed term of three years, with an option for that term to be renewed at the discretion of the Secretary of the Navy for a subsequent fixed term of any length. The subsequent term may be again renewed in increments as determined by the Secretary of the Navy, consistent with title 10 U.S. Code, Chapter 36.

5. Only the Secretary of the Navy may relieve a Lead Special Trial Counsel for cause. Grounds for such relief exist when the Secretary of the Navy, for any reason, loses confidence in the Lead Special Trial Counsel's ability to perform the duties of his or her office.

6. In cases over which an Office of Special Trial Counsel exercises authority, the Lead Special Trial Counsel will have exclusive authority to determine whether to file an appeal under Article 62, UCMJ, title 10, U.S. Code, section 862. Prior to directing an appeal, the Lead Special Trial Counsel will consult with the Office of the Judge Advocate General, Appellate Government Division (Code 46), on the advisability of filing such appeal. If an appeal is filed, appellate government counsel will litigate those appeals on behalf of the United States and will be responsible for the substance and content of submissions to the appellate courts.

#### B. Special Trial Counsel

1. For the purpose of this guidance, a Special Trial Counsel is a judge advocate certified under Article 24a(b), title 10 U.S. Code, section 824a(b), and assigned to the Office of Special Trial Counsel.

2. Special Trial Counsel will be assigned to the Office of Special Trial Counsel for a fixed term of not less than three years. Such assignment may be extended by the Judge Advocate General of the Navy, or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps, for subsequent fixed terms of any length.

3. A Special Trial Counsel may only be released before the end of the fixed term if the Special Trial Counsel: leaves active duty; receives Lead Special Trial Counsel approval on a voluntary reassignment request; or, is relieved of duty by competent authority for cause.

#### V. Training

Consistent with Article 6, UCMJ, title 10 U.S. Code, section 806, the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, in coordination with the assigned Office of Special Trial Counsel leadership, will ensure the establishment and execution of training programs for personnel to be assigned to their respective offices.

#### VI. Exceptions to Policy

Unless otherwise stated herein, exceptions to these policies may be granted only by the Secretary of the Navy or higher authority.

## APPENDIX C



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3000 MARINE CORPS PENTAGON  
WASHINGTON, DC 20350-3000

IN REPLY REFER TO

5800

SJA

SEP 12 2022

From: Staff Judge Advocate to the Commandant of the Marine Corps  
To: Deputy Director Military Justice

Subj: CRITERIA FOR CERTIFICATION AND ASSIGNMENT OF MARINE CORPS  
SPECIAL TRIAL COUNSEL

Ref: (a) Article 24a, UCMJ  
(b) Secretary of Defense Memorandum for the Secretaries of the  
Military Departments dated 11 March 2022 (Policies  
Governing Offices of Special Trial Counsel)  
(c) Secretary of the Navy Memorandum for the Secretary of  
Defense dated 7 September 2022 (Policies Governing the Navy  
and Marine Corps Offices of Special Trial Counsel)  
(d) MCO 5800.16 CH-7

1. Reference (a) requires the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) to certify Marine Corps judge advocates as qualified to serve as Special Trial Counsel (STC). In accordance with reference (a), to be certified as an STC, a judge advocate must be a member of the bar of a Federal court or a member of the bar of the highest court of a State, well-trained, experienced, highly skilled, and competent in handling cases involving covered offenses, and be certified as qualified for duty as STC by reason of education, training, experience, and temperament.

2. Reference (b) requires the initial identification of those eligible to serve as an STC not later than October 15, 2022. Reference (c) requires the establishment of criteria for certifying a judge advocate as an STC not later than September 20, 2022. Pursuant to references (a) through (c), the following criteria for certification are established:

a. Education.

- 1) The judge advocate must have completed all educational and licensing requirements necessary to be assigned the MOS of 4402 and be: (1) assigned the MOS of 4402; (2) certified by the Judge Advocate General of the Navy (JAG) to be detailed as a trial counsel for a general court-martial in accordance with Article 27(b), UCMJ; (3) sworn to perform the duties of a trial counsel in accordance with Article 42(a), UCMJ; and (4) have successfully completed a course specifically focused on the litigation of special victim crimes or a course specifically focused on the litigation

Subj: CRITERIA FOR CERTIFICATION AND ASSIGNMENT OF MARINE CORPS  
SPECIAL TRIAL COUNSEL

of covered offenses.<sup>1</sup> The course completion may be waived for good cause.

- 2) Judge advocates in the grade of O-5 or O-6 who have not previously been certified as STC must satisfy all previously stated educational requirements. Additionally, as these senior judge advocates will be in Office of Special Trial Counsel (OSTC) leadership billets (Regional STC and Deputy Lead STC), they must also possess a Masters of Criminal Law (LL.M.) (AMOS 4409), have completed an analogous fellowship, or possess the AMOS of 4411 (Military Judge).<sup>2</sup>

b. **Training.** The judge advocate must attend and successfully complete an STC certification course.<sup>3</sup>

- 1) This is a non-waivable requirement for certification.
- 2) The SJA to CMC may authorize the assignment of a judge advocate to the OSTC who has yet to complete an STC certification course. However, that individual may not exercise the authority granted an STC by reference (a) until completion of an STC certification course and subsequent written certification as an STC.

c. **Experience.** The judge advocate must possess experience in military justice litigation, which is defined as having served in the following military justice billets: Trial or Defense Counsel, Military Justice Officer, Military Commissions Trial or Defense Counsel, Special Assistant U.S. Attorney, Senior Trial or Defense Counsel, Appellate Government or Defense Counsel, Trial Counsel or Defense Counsel Assistance Program, Victims' Legal Counsel, Regional Trial or Defense Counsel, Chief or Deputy Chief Trial or Defense Counsel, Judge Advocate Division Military Justice Branch (JMJ), Office of the Judge Advocate General (Code 20), Military Trial or Appellate Judge, and Military Commissions Trial or Appellate Judge.

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<sup>1</sup> The courses meeting this requirement would be those courses required for certification as a special victim qualified trial or defense counsel, Victims' Legal Counsel certification, or Military Judge certification.

<sup>2</sup> Upon the establishment of litigation AMOSs, assignment of any litigation AMOS will satisfy the additional educational requirement for O-5 or O-6 judge advocates who have not previously been certified as STC.

<sup>3</sup> Although not required, to the extent practicable, a judge advocate who has never served as trial counsel, and those who have not served in a military justice billet within the previous five (5) years, should also attend the trial counsel track of the Military Justice Orientation Course prior to assignment to the OSTC.

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- 1) To be certified as an STC, the judge advocate must have at least 24 months of military justice litigation experience during which the judge advocate:
  - i. participated<sup>4</sup> in a minimum of 10 courts-martial, tribunals, or complex hearings involving covered offenses; and
  - ii. at least one (1) of the courts-martial or tribunals involving a covered offense was tried to verdict.<sup>5</sup>
- 2) If not previously certified as an STC, to be certified a judge advocate in the grade O-5 must have at least 72 months of military justice litigation experience during which the judge advocate:
  - i. participated in a minimum of 25 courts-martial, tribunals, or complex hearings involving covered offenses; and
  - ii. at least three (3) of the courts-martial or tribunals involving a covered offense were tried to verdict.<sup>6</sup>
- 3) If not previously certified as an STC, to be certified a judge advocate in the grade of O-6 must have at least 96 months of military justice litigation experience during which the judge advocate:
  - i. Participated in a minimum of 50 courts-martial, tribunals, or complex hearings involving covered offenses; and

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<sup>4</sup> For the purposes of the criteria contained herein, a judge advocate is deemed to have participated in a court-martial, tribunal, or complex hearing if they were a counsel of record or judge in the court-martial, tribunal, or complex hearing. A judge advocate is deemed to have been a counsel of record if that judge advocate was detailed to the court-martial (at the trial or appellate level), tribunal, or complex hearing. A complex hearing includes all pretrial court-martial, tribunal, and Court of Inquiry proceedings.

<sup>5</sup> A judge advocate possessing the AMOS of 4411 (Military Judge) satisfies this experience requirement. Upon the establishment of litigation AMOSs, assignment of any litigation AMOS will satisfy this experience requirement.

<sup>6</sup> A judge advocate possessing the AMOS of 4411 (Military Judge) satisfies this experience requirement. Upon the establishment of litigation AMOSs, assignment of the any litigation AMOS requiring at least 72 months of military justice litigation experience will satisfy this experience requirement.

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- ii. at least five (5) of the courts-martial or tribunals involving a covered offense were tried to verdict.<sup>7</sup>
- 4) In order to best evaluate whether the judge advocate possesses the requisite experience to serve as an STC, input from the judge advocate's supervisors and military judges before whom the judge advocate has practiced will, when available, be considered.
- 5) This requirement may be waived.
- d. **Temperament.** The judge advocate must have the appropriate temperament to be certified as an STC. Appropriate temperament means sound judgment under stressful circumstances, maturity, composure, level-headedness, fairness, character, and integrity.
  - 1) In order to best evaluate whether the judge advocate possesses the appropriate temperament to serve as an STC, input from the judge advocate's supervisors and military judges before whom the judge advocate has practiced will, when available, be considered.
  - 2) Prior to certification, the judge advocate will undergo a sensitive screening process. The sensitive screening will be conducted at Judge Advocate Division (JAD) and will include a review of the Officer Disciplinary Notebook and the judge advocate's Official Military Personnel File. A judge advocate whose sensitive screening reveals the officer is the subject of an open investigation of, or substantiated finding on, a covered offense or any other offense that reasonably calls into question the judge advocate's temperament, is ineligible to be certified as an STC.
  - 3) Appropriate temperament is a non-waivable requirement.
- e. **SJA to CMC Waiver of Education and Experience Criteria for Certification Requirements.** The SJA to CMC may waive, for good cause, the education and experience criteria for certification. If such a waiver is granted, the SJA to CMC will document the good cause rationale for issuing such waiver in the judge advocate's certification letter. A judge advocate may request, upon meeting the requirements previously waived, the issuance of a new STC certification letter. A new certification letter will only be issued if the judge advocate is serving as an STC at the time the request is made.

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<sup>7</sup> Upon the establishment of litigation AMOSs, assignment of the any litigation AMOS requiring at least 96 months of military justice litigation experience will satisfy this experience requirement.

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f. **Process for Certification.** To ensure the SJA to CMC is fully informed of a judge advocate's suitability for certification as an STC, the following, or similar process, will be followed:

- 1) Screening Board. The SJA to CMC will convene a board composed of members, well-experienced in military justice litigation, to consider the records and qualifications of judge advocates identified for potential service in the OSTC.<sup>8</sup> This board will determine whether, in its opinion as expressed by a majority vote of the board, the judge advocate under consideration meets the above identified education, experience, and temperament criteria for certification.
  - i. For those judge advocates identified as not meeting the required education and experience, the board is authorized to recommend the SJA to CMC consider granting a criteria requirement waiver.
  - ii. The board will prepare a report of their proceedings identifying those judge advocates meeting the education, experience, and temperament certification requirements. The report will also identify those judge advocates who do not meet the education and/or experience certification requirement(s) but for whom the board recommends the SJA to CMC consider granting a waiver.
  - iii. The board will attach to its report the matters considered for those meeting the education, experience, and temperament requirements and for those the board recommends the SJA to CMC consider granting a waiver.
- 2) Review and Endorsement of Board Report by OSTC. The report of the board and its attachments will be forwarded to OSTC Headquarters leadership for review and endorsement. The Lead STC (LSTC), or in the absence of the LSTC, the Deputy LSTC, will endorse the report of the board. If applicable, the endorsement will identify any objection to or concern with the potential certification of any judge advocate identified as meeting all certification requirements or recommended for consideration of a waiver.
- 3) Sensitive Screening Review. A sensitive screening of the board results will be conducted by JAD and amended to the board report.

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<sup>8</sup>At a minimum, the screening board will consist of the Deputy Director Military Justice, Deputy Lead STC, Chief Trial Counsel, Chief Defense Counsel, Chief Victims Legal Counsel, former trial/appellate judge, and (once available) a former Regional STC.



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- 4) SJA to CMC Action on the Board Report. The SJA to CMC will review the recommendations of the board and, in his or her sole discretion, designate judge advocates as eligible for duty as an STC by reason of education, experience, and temperament. The eligibility determination will remain in effect for four (4) years. During this period, a judge advocate identified as qualified for duty as STC by reason of education, experience, and temperament will not need to be rescreened by the board. However, prior to JAD taking the actions identified below, JAD will conduct a new sensitive screening review and reaffirm with the SJA to CMC that the judge advocate remains qualified for duty as an STC by reason of education, experience, and temperament.
- 5) Assignment of STC-Eligible Judge Advocates to the OSTC. Prior to assigning a judge advocate to the OSTC, JAD will conduct another sensitive screening review and notify the SJA to CMC of any adverse results. JAD will fund attendance at an STC certification course for those judge advocates pending assignment to the OSTC.
- 6) Successful Completion of an STC Certification Course. The judge advocate attends and successfully completes the certification course.
- 7) Written Certification. The SJA to CMC certifies in writing that the judge advocate is qualified for duty as an STC by reason of education, training, experience, and temperament.
- 8) Exercise of Article 24a Authorities. Upon certification by the SJA to CMC as an STC, the judge advocate may exercise the authorities granted an STC by Article 24a when assigned to the OSTC.

3. You are directed to take those actions necessary to ensure the criteria and processes described herein are incorporated into reference (d).

  
D. J. BLIGH

## APPENDIX D



GENERAL COUNSEL

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

JAN 17 2023

### MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Revised Uniform Standards and Criteria Required by Article 140a,  
Uniform Code of Military Justice

Pursuant to Article 140a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 940a, and Department of Defense Directive 5145.01, General Counsel of the Department of Defense (GC DoD), ¶ 3.j (Dec. 2, 2013, as amended), I issue the attached revised Military Justice Case Management, Data Collection, and Accessibility Standards. The standards issued on December 17, 2018, as amended, are canceled.

The revised standards are effective immediately, with the following caveats:

1. The Military Departments and Services will reach full compliance with ¶ IV.E.2 no later than December 27, 2023.
2. The Secretaries of the Military Departments will issue regulations as prescribed by the revised standards within 240 days of the date of this memorandum. Pending the issuance of those regulations, the Military Departments and Services may make the filings and records identified by ¶ IV.F.1.a, b, and c available upon receipt of a request or on their own initiative in accordance with ¶ IV.F.2 and 3.

A handwritten signature in black ink, appearing to read "Caroline Krass", is positioned above the printed name.

Caroline Krass

Attachment:  
As stated

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

## **Military Justice Case Management, Data Collection, and Accessibility Standards**

### **I. Case Management System**

A. Each Military Service will maintain and operate a military justice case processing and management system. Each system will track every military justice case within that Military Service until completion through the final disposition within the military justice system. Each military justice case processing and management system will maintain all data collected in accordance with National Archives and Records Administration-approved records management schedules to ensure complete and accurate reporting. Each Military Service must ensure the data entered into and maintained by the system throughout the military justice process is complete and accurate.

B. Two or more Military Services may operate a military justice case processing and management system in conjunction with each other.

### **II. Collection and Analysis of Data Concerning Substantive Offenses and Procedural Matters**

A. Each military justice case processing and management system will be capable of collecting information in accordance with the Data Points and Uniform Definitions set out in Appendix A.

B. Each Military Service is responsible for implementing standards to ensure the data entry is complete and accurate. To ensure the collection of uniform data across the Services, each case processing and management system will identify criminal offenses by the appropriate National Incident-Based Reporting System (NIBRS) Codes. To ensure the collection of uniform data concerning race and ethnicity, the definitions of race and ethnicity as established by the Office of Management and Budget Statistical Policy Directive No. 15 (OMB 15), Race and Ethnic Standards for Federal Statistics and Administrative Reporting, will be applied by each military justice case processing and management system. A Military Service may elect to have its military justice case processing and management system capture expanded ethnic or racial categories; however, for reporting purposes, expanded categories will aggregate to those established by OMB 15.

### **III. Distribution of Recordings of Open Court-Martial Sessions, Evidence, and Records of Trial Within the Military Justice System**

A. In accordance with Rule for Courts-Martial (RCM) 1106, a request by the accused for a copy of the recording of all open sessions of the court-martial and copies of or access to the evidence admitted at the court-martial will be submitted to the trial counsel. All copies of the those recordings and/or exhibits that are eligible for review by the accused will be made available to the accused or defense counsel as soon as practicable after a valid request is received and in compliance with the Privacy Act.

B. In accordance with RCM 1106A, a request by a victim for a copy of the recording of all open sessions of the court-martial and copies of or access to the evidence admitted at the court-

martial will be submitted to the trial counsel. All copies of the recordings and/or exhibits that are eligible for review by the victim will be made available to the victim or the victim's counsel as soon as practicable after a valid request is received and in compliance with the Privacy Act.

C. The accused and any victim as defined in RCM 1112(e) will be notified of the opportunity to obtain a copy of the certified record of trial within 10 days of the certification. Each Military Service will implement procedures to ensure adequate notification is provided. Each Military Service will implement procedures to ensure that copies of certified records released to accused or victims do not contain any sealed exhibits, classified information, or information from closed court sessions.

#### IV. Public Access to Military Justice Docket Information, Filings, Trial-Level Court Documents, and Appellate Documents

A. Public access to military justice docket information, filings, trial-level court documents, and appellate documents should follow the best practices of Federal and State courts, to the extent practicable.

B. The Privacy Act is relevant to the manner in which information and documents from the military justice system are to be made accessible to the public. Additionally, Article 140a, Uniform Code of Military Justice (UCMJ), requires restricting access to certain personally identifiable information of minors and victims of crimes.

C. For the purposes of Part IV of these Military Justice Case Management, Data Collection, and Accessibility Standards, across all Military Services, the following definitions are provided:

1. "Docket" includes information concerning each case docketed with the trial or appellate courts of each Military Service.

a. The trial court docket includes the name of the case, the location of the hearing, the type of hearing, the military judge presiding over the hearing, and the counsel assigned to the case. While the name of the case, the location of the hearing, and the type of case will be updated on an ongoing basis, the military judge presiding over the hearing and the counsel assigned to the case may be updated and made accessible to the public at a reasonable time following the hearing. The docket may be limited to hearings conducted after the case has been referred to a court-martial; Article 32 preliminary hearings are not required to be published in this docket.

b. The appellate court docket includes the name of the case, the panel to which the case is assigned, and the date and location of any scheduled oral argument.

2. "Filings" consist of all pleadings, notices, petitions, and requests submitted to a trial court, military judge, or a military magistrate designated under Article 19 or Article 30a. "Filings" do not include any evidence or matters submitted in support of any pleading, notice, petition, or request.

3. “Trial-level court documents” consist of the charge sheet, convening order(s), court rulings, statement of trial results, action by the convening authority pursuant to RCM 1109 or RCM 1110, and entry of judgment. For purposes of Part IV of these Military Justice Case Management, Data Collection, and Accessibility Standards, the term “trial-level court documents” does not include the Article 32 preliminary hearing report, a recording of any court session, exhibits (unless otherwise publicly accessible), or any transcript of the proceedings.

4. “Appellate documents” consist of pleadings, notices, petitions, and requests submitted to a Court of Criminal Appeals and orders and opinions of a Court of Criminal Appeals.

5. “Secretary concerned” is defined by 10 U.S.C. § 101(9).

#### D. Procedures, Standards, and Training.

1. With respect to the creation, maintenance, use, and dissemination of covered records at any stage of the proceedings, the Military Services must comply with the Privacy Act and other applicable laws and regulations related to the protection of personal, governmental, and classified information or otherwise sealed materials.

2. The Secretaries concerned will implement standards and procedures to ensure all publicly accessible dockets, filings, trial-level court documents, and appellate documents are redacted to conform with the requirements of paragraph IV.D.1 of these Military Justice Case Management, Data Collection, and Accessibility Standards.

3. The Secretaries concerned will prescribe standards for training the individuals responsible for making redactions to ensure compliance with paragraph IV.D.1 of these Military Justice Case Management, Data Collection, and Accessibility Standards.

4. The Secretaries concerned will prescribe standards to administer and maintain dockets, filings, trial-level court documents, and appellate documents on a publicly accessible website for their respective judiciaries.

5. Each Court of Criminal Appeals will maintain its docket and appellate documents on a publicly accessible website.

6. Filings, trial-level court documents, and appellate documents will be made publicly accessible pursuant to paragraphs IV.E and IV.F. The Secretaries concerned will prescribe standards for reconsideration of initial denials of requests to make any docket, filing, trial-level court document, or appellate document publicly accessible.

7. These Military Justice Case Management, Data Collection, and Accessibility Standards do not impose any requirement on the United States Court of Appeals for the Armed Forces.

E. Minimum standards for public access to dockets, filings, trial-level court documents, and appellate documents.

1. Each Secretary concerned will provide for the publication of dockets, filings, trial-level court documents, and appellate documents prepared for public release in accordance with paragraph IV.D.1 of these Military Justice Case Management, Data Collection, and Accessibility Standards on a publicly accessible website.

2. Absent extraordinary circumstances, filings, trial-level court documents, and appellate documents will be publicly accessible no later than 45 calendar days after the certification of the record of trial (at the trial court level) or after the Court of Criminal Appeals decision (at the appellate level). This standard does not preclude a Military Service from making filings, trial-level court documents, or appellate documents publicly accessible earlier than the 45-day deadline.

F. Additional public access in specific cases.

1. In accordance with regulations prescribed by the Secretary concerned, the Services may, upon receipt of a request or on their own initiative, make publicly accessible:

a. Filings, trial-level court documents, or appellate documents prior to the date required by paragraph IV.E.2.

b. Filings and trial-level court documents from courts-martial in which there were no findings of guilty.

c. Items not made publicly accessible under paragraph IV.E (*e.g.*, an appellate exhibit list).

2. The items to be made publicly accessible pursuant to this paragraph must comply with the requirements of paragraph IV.D.1 of these Military Justice Case Management, Data Collection, and Accessibility Standards. When deciding whether to provide public access to an item or set of items addressed by paragraph IV.F, and in furtherance of the fair administration of justice, the Services must balance the public interest in disclosure of the item(s) requested against the privacy interests of the accused, minors, and victims of crimes after appropriate redactions are made.

3. When evaluating the public interest in disclosure, non-exhaustive factors to consider include:

- a. Offenses involving property damage or loss greater than \$2 million;
- b. Offenses punishable by death with at least one aggravating factor as defined in RCM 1004;
- c. Offenses resulting in death;

- d. Grave breaches or serious crimes under the Law of Armed Conflict;
- e. A proceeding involving an accused who is:
  - i. A general or flag officer; or
  - ii. Serving in a command billet in the grade of E-9 or O-5 or above; or
- f. Other cases of potential high public interest, as determined under procedures established by the Secretary concerned.

4. The determination whether to make items publicly accessible under paragraph IV.F should be made in an expeditious manner. If items are to be made publicly accessible, that should be accomplished as expeditiously as practicable, absent extraordinary circumstances.

5. The Secretary concerned shall designate the authority responsible for making the determination regarding the public accessibility of those items addressed in paragraph IV.F of these Military Justice Case Management, Data Collection, and Accessibility Standards.

6. Public access under Article 140a, UCMJ, is distinct from the right to request Federal records, including court-martial records, under the Freedom of Information Act, 5 U.S.C. § 552.

## V. Preservation of Court-Martial Records of Trial

General and special court-martial records of trial will be preserved, without regard to the outcome of the proceeding concerned, for at least 15 years. Regulations prescribed by the Secretary concerned will establish the duration of the availability of information and documents pursuant to Article 140a, UCMJ.

## VI. No Cause of Action

Nothing in these Military Justice Case Management, Data Collection, and Accessibility Standards is intended to, and these standards do not, provide a cause of action at law or in equity, or serve as a basis for a liability claim or complaint against the Federal Government, its officers, employees or agents, or any other individual or entity.

**Appendix A**  
**Data Points & Uniform Definitions for Collection by the Services**

<b>Data Point</b>		<b>Uniform Definition</b>
<u>Basic Data (Subject/Accused)</u>		
1. Last name		n/a
2. First name		n/a
3. Middle initial		n/a
4. Pay grade		-E-1 -E-2 -E-3 -E-4 -E-5 -E-6 -E-7 -E-8 -E-9 -W-1 -W-2 -W-3 -W-4 -W-5 -O1E -O2E -O3E -O-1 -O-2 -O-3 -O-4 -O-5 -O-6 -O-7+ -Cadet -Midshipman -Civilian
5. SSN or DOD ID No.		####
6. Date of birth		Format (MM/DD/YYYY)
7. Sex		-M -F
8. Ethnicity		-Hispanic or Latino -Not Hispanic or Latino
9. Race		-American Indian/Alaska Native -Asian -Black or African American -Native Hawaiian or Other Pacific Islander -White -Other



Data Point	Uniform Definition
10. Branch of Service	<ul style="list-style-type: none"> <li>-Army</li> <li>-Air Force</li> <li>-Marine Corps</li> <li>-Navy</li> <li>-Coast Guard</li> <li>-Army National Guard</li> <li>-Air National Guard</li> <li>-USAR</li> <li>-USNR</li> <li>-USAFR</li> <li>-USMCR</li> <li>-USCGR</li> <li>-Other</li> <li>-N/A</li> </ul>
11. Pay entry date/Pay date	Format (MM/DD/YYYY)
<u>Investigation</u>	
12. Investigating entity	<ul style="list-style-type: none"> <li>-Chain of command</li> <li>-Military Criminal Investigative Organization</li> <li>-Military police</li> <li>-Civilian</li> <li>-Foreign</li> <li>-N/A</li> </ul>
13. Investigation number	Service dependent
14. Date investigation opened	Format (MM/DD/YYYY)
15. Date of earliest offense	Format (MM/DD/YYYY)
16. Date earliest offense reported/discovered	Format (MM/DD/YYYY)
17. Offenses investigated related to the accused	DIBRS code (DODM 7730.47 volume 2)
<u>Victim of Sexual Assault &amp; Domestic Violence</u>	
18. Does any charged offense involve a victim as defined by DoD Directive 1030.1?	<ul style="list-style-type: none"> <li>-Yes</li> <li>-No</li> </ul>
19. Number of victims: [questions 20-XX, should be captured for each victim]	##
20. Identification of victim	Initials of first & last names
21. Sex of victim:	<ul style="list-style-type: none"> <li>-M</li> <li>-F</li> </ul>
22. Status of victim:	<ul style="list-style-type: none"> <li>-Military</li> <li>-Military-spouse</li> <li>-Civilian-spouse</li> <li>-Civilian-dependent</li> <li>-Civilian-Department/Service employee</li> <li>-Civilian-non-Department/Service employee</li> <li>-Other</li> <li>-Unknown</li> </ul>

Data Point	Uniform Definition
23. Is victim a victim of domestic violence, as defined by Enclosure 2 of DoDI 6400.06?	-Yes -No
a. If "Yes," the victim's relation to the accused is:	-Current spouse -Former spouse -Person with whom the accused shares a child in common -Current intimate partner with whom the accused shares a common domicile -Former intimate partner with whom the accused shared a common domicile
24. VWAP notifications & elections (captured for each qualifying victim)	Date served and explained
a. DD Form 2701 – Initial Information for Victims and Witnesses of Crime	Format (MM/DD/YYYY)
b. DD Form 2702 – Court-Martial Information for Victims and Witnesses of Crime	Format (MM/DD/YYYY)
c. DD Form 2703 – Post-trial Information for Victims and Witnesses of Crime	Format (MM/DD/YYYY)
d. DD Form 2704 – Victim/Witness Certification and Election Concerning Prisoner Status	Format (MM/DD/YYYY)
e. Victim election to be notified under DD Form 2704	-Yes -No
f. DD Form 2704-1 – Victim Election of Post-trial Rights	Format (MM/DD/YYYY)
g. Victim election to be notified under DD Form 2704-1	-Yes -No
25. Was the victim notified of the opportunity for SVC services?	-Yes -No -N/A
a. Has an SVC been provided?	-Yes -No, victim requested SVC -No, victim declined -N/A
26. Did the victim request an expedited transfer?	-Yes -No -N/A
a. If "Yes," action on the expedited transfer:	-Approved -Disapproved
27. Was the victim advised, in accordance with Section 534(b), FY15 NDAA, of victim's right to submit a preference regarding exercise of civilian or military jurisdiction over offenses allegedly committed in the United States?	-Yes -No -N/A

Data Point		Uniform Definition
a. Victim jurisdiction preference:		-Military -Civilian -N/A
<b>Pretrial</b>		
<i>Pretrial restraint/confinement</i>		
28. Has pretrial restraint/confinement of the accused been imposed?		-Yes -No
a. Type of pretrial restraint/confinement imposed:		-Conditions on liberty -Restriction in lieu of arrest -Arrest -Confinement
b. If "yes," date imposed:		Format (MM/DD/YYYY)
c. Date pretrial restrain/confinement terminated:		Format (MM/DD/YYYY)
<i>Preferral of Charges</i>		
29. Earliest preferral date		Format (MM/DD/YYYY)
30. Was there an additional preferral?		-Yes -No
a. If "yes," date of preferral:		Format (MM/DD/YYYY)
31. Offense(s) charged:		DIBRS code (See DODM 7730.47 volume 2)
32. Does any offense involve alcohol and/or illegal use of drugs by the accused?		-N/A -Alcohol only -Illegal use of drugs only -Alcohol AND illegal use of drugs
33. Does any offense involve alcohol and/or illegal use of drugs by a victim?		-N/A -Alcohol only -Illegal use of drugs only -Alcohol AND illegal use of drugs
34. Was a firearm utilized in the commission of an offense?		-Yes -No
<i>Pre-referral judicial proceedings (R.C.M.) 309</i>		
35. Was a pre-referral investigative subpoena requested? If yes, then		-Yes -No
a. Was the request granted?		-Yes -No
b. Action by individual subject to subpoena:		-Comply -Seek relief/Other
c. Judge action on a request for relief:		-Ordered to comply -Modify -Quash subpoena
36. Was a pre-referral warrant or order for wire or electronic communications requested?		-Yes -No
a. Was request granted?		-Yes -No
b. Action by individual/service provider subject to warrant or order		-Comply -Seek relief/Other

Data Point	Uniform Definition
c. Judge action on request for relief:	<ul style="list-style-type: none"> <li>-Order to comply</li> <li>-Modify</li> <li>-Quash subpoena</li> </ul>
<i>Action by Chain of Command</i>	
37. Action by commander not authorized to convene courts-martial (R.C.M. 402). If commander takes separate action on individual preferred specification, input must reflect data for each specification.	<ul style="list-style-type: none"> <li>-N/A</li> <li>-Dismissed</li> <li>-Forwarded to superior commander for disposition</li> <li>-Imposition of nonjudicial punishment</li> </ul>
a. Date of action	Format (MM/DD/YYYY)
38. Action by commander exercising summary court-martial jurisdiction (R.C.M. 403). If commander takes separate action on individual preferred specifications, input must reflect data for each specification.	<ul style="list-style-type: none"> <li>-N/A</li> <li>-Dismissed</li> <li>-Dismissed and forwarded to subordinate commander for disposition</li> <li>-Forwarded to subordinate commander for disposition</li> <li>- Referred to summary court-martial</li> <li>-Preliminary hearing directed under R.C.M. 405 and Article 32</li> <li>- Imposition of nonjudicial punishment</li> </ul>
a. Date of action	Format (MM/DD/YYYY)
39. Action by commander exercising special court-martial jurisdiction (R.C.M. 404). If commander takes separate action on individual preferred specifications, input must reflect data for each specification.	<ul style="list-style-type: none"> <li>-N/A</li> <li>-Dismissed</li> <li>-Dismissed and forwarded to subordinate commander for disposition</li> <li>-Forwarded to subordinate commander for disposition</li> <li>-Forwarded to superior commander for disposition</li> <li>-Referred to summary court-martial</li> <li>-Preliminary hearing directed under R.C.M. 405 and Article 32</li> <li>-Referral to an Article 16(c)(2)(A) Special Court-Martial</li> <li>-Referral to Special Court-Martial</li> <li>-Imposition of nonjudicial punishment</li> </ul>
40. Date of action:	Format (MM/DD/YYYY)
<i>Article 32 Preliminary Hearing (R.C.M. 405)</i>	
41. Was an Article 32 preliminary hearing ordered?	<ul style="list-style-type: none"> <li>-Yes</li> <li>-No</li> </ul>
42. Did appointing authority grant waiver of Article 32 preliminary hearing?	<ul style="list-style-type: none"> <li>-Yes</li> <li>-No</li> </ul>

Data Point	Uniform Definition
	-N/A
a. Date appointing authority acted on waiver request:	Format (MM/DD/YYYY)
43. Date of Article 32 hearing:	-Format (MM/DD/YYYY) -N/A
44. Were all victims, as defined by R.C.M. 405(g)(1), provided notice of the preliminary hearing?	-Yes -No -N/A
45. Did any victim, as defined by R.C.M. 405(g)(1), testify at the Article 32 preliminary hearing?	-Yes -No -N/A
46. Did any victim file a petition for writ of mandamus with the Court of Criminal Appeals pursuant to Article 6b, UCMJ?	-Yes -No
47. Action by Court of Criminal Appeals:	-Relief Granted -Relief Denied
48. Date report submitted by Preliminary Hearing Officer (PHO):	Format (MM/DD/YYYY)
49. PHO determination of whether convening authority has jurisdiction over the accused:	-Yes -No
50. For each specification, PHO determination of the following:	
a. Is there a recommendation to modify the specification?	-Yes -No
b. Does the convening authority have jurisdiction over the offense?	-Yes -No
c. Does the specification allege an offense?	-Yes -No
d. Does probable cause exist to believe the accused committed the offense?	-Yes -No
51. Did the PHO determine probable cause existed to believe the accused committed additional, uncharged offenses?	-Yes -No
a. If yes, provide offense(s)	DIBRS code
52. Recommendation as to disposition of the case:	-No action -Administrative action -Nonjudicial punishment -Referral to Summary Court-Martial -Referral to an Article 16(c)(2)(A) Special Court-Martial -Referral to Special Court-Martial -Referral to General Court-Martial
<i>SJA Pretrial Advice (R.C.M. 406)</i>	

Data Point	Uniform Definition
53. Is Article 34, UCMJ, SJA advice required? If “yes,” system must capture the following conclusions by the SJA for each specification:	-Yes -No
a. Does the specification allege an offense under the UCMJ?	-Yes -No
b. Is there probable cause to believe the accused committed the offense?	-Yes -No
c. Did the SJA recommend dismissal of the specification?	-Yes -No
d. Does the convening authority have jurisdiction over the offense?	-Yes -No
54. SJA conclusion of whether the convening authority has jurisdiction over the accused:	-Yes -No
55. SJA disposition recommendation	-No action -Administrative action -Nonjudicial punishment -Referral to court-martial
56. Date of Article 34, UCMJ, SJA advice	Format (MM/DD/YYYY)
<i>Referral</i>	
57. Name of Command/GCMCA	Look up by Unit Identification Code
58. Disposition of each charge and specification (R.C.M. 407)	-Dismissed -Dismissed and forwarded to subordinate commander for disposition -Forwarded to subordinate commander for disposition -Forwarded to superior commander for disposition -Referred to court-martial - Imposition of nonjudicial punishment
59. When referred to court-martial:	
a. Level of court-martial to which charges were referred:	Dropdown: -Summary Court-Martial - Article 16(c)(2)(A) Special Court-Martial -Special Court-Martial -General Court-Martial
b. If referral is to a Special Court-Martial, did the convening authority consult with a judge advocate, in accordance with R.C.M. 406A?	-Yes -No
60. Was elevated review by the next higher GCMCA triggered? (A situation in which the SJA and GCMCA both concur that a sex-related offense, as defined by § 1744 of the FY 2014 NDAA and § 541 of the FY 2015 NDAA, should not be referred to trial)	-Yes -No
a. If yes, decision by reviewing GCMCA:	-Referred charges to court-martial

Data Point	Uniform Definition
	-The decision of the subordinate GCMCA was upheld
b. Date of decision by reviewing GCMCA:	Format (MM/DD/YYYY)
61. Was elevated review by the Secretary of the Military Department/Commandant of the USCG triggered? (Either: 1. The SJA recommends referral and the GCMCA declines referral; OR 2. The SJA and GCMCA both concur with non-referral, but the Service Chief Prosecutor seeks Secretarial/Commandant of USCG review when the non-referral decision involves a sex-related offense, as defined by § 1744 of the FY 2014 NDAA and § 541 of the FY 2015 NDAA)	-Yes -No
a. Decision by Secretary of the Military Department/Commandant of the USCG:	-Referred charges to court-martial -The decision of the subordinate GCMCA was upheld
b. Date of decision by Secretary of the Military Department/Commandant of the USCG:	Format (MM/DD/YYYY)
<i>Plea Agreement (R.C.M. 705)</i>	
62. Is there a plea agreement?	-Yes -No
63. Date plea agreement approved:	Format (MM/DD/YYYY)
64. Does the plea agreement contain an offer to plead guilty? If yes, the following shall be answered for each charge and specification referred to court-martial	-Yes -No
a. Plea of the accused	-Plea of Guilty -Plea of Guilty to LIO or other offense -Plea of Not Guilty -Withdrawn and/or Dismissed
b. LIO or other offense– Article, UCMJ	DIBRS code
65. If applicable, was the victim, as defined by R.C.M. 705(e)(3)(B), provided the opportunity to submit views concerning the plea agreement?	-Yes -No -N/A
a. Did victim submit views concerning plea agreement?	-Yes -No
b. Date victim submitted views concerning plea agreement:	Format (MM/DD/YYYY)
66. Is there an agreed-upon composition for sentencing?	-Members -Judge -Magistrate judge -No forum agreed upon
67. Is there an agreement to refer to a particular forum?	-Summary Court-Martial - Article 16(c)(2)(A) Special Court-Martial -Special Court-Martial -None
<i>Enlisted Separation/Officer Resignation in Lieu of Court-Martial</i>	

Data Point		Uniform Definition
68. Was a request for Separation/Resignation in Lieu of Court-Martial submitted?	-Yes -No	
69. Was request approved?	-Yes -No	
a. Date request approved/denied:	Format (MM/DD/YYYY)	
70. Characterization of Service	Dropdown: -Honorable -General, Under Honorable Conditions -Other than Honorable	
<i>Inquiry Into Mental Capacity/Mental Responsibility of the Accused (R.C.M. 706)</i>		
71. R.C.M. 706 inquiry requested?	-Yes -No	
72. R.C.M. 706 inquiry request approved?	-Yes -No	
a. Date R.C.M. 706 inquiry request approved/denied:	Format (MM/DD/YYYY)	
73. R.C.M. 706 inquiry completed date:	Format (MM/DD/YYYY)	
74. Determination of the R.C.M. 706 inquiry:		
a. As a result of the accused suffering from a severe mental disease or defect, was the accused unable to appreciate the nature and quality or wrongfulness of his or her conduct?	-Yes -No	
b. As a result of a present mental disease or defect, is the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently with the defense?	-Yes -No	
75. The court found the accused incompetent to stand trial pursuant to R.C.M. 909:	-Yes -No -N/A	
<u>Trial</u>		
<i>Forum (R.C.M. 903)</i>		
76. Composition of the Court for merits phase:	-Members -Members with at least 1/3 enlisted representation at the accused's election -Officer members at the accused's election -Military judge alone -Magistrate judge alone	
<i>Pleas (R.C.M. 910)</i>		
77. Plea(s) of the accused to each charge and specification:	-Guilty -Not guilty of an offense as charged, but guilty of a named lesser included offense (LIO) or other offense	



Data Point	Uniform Definition
	<ul style="list-style-type: none"> <li>-Guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any</li> <li>-Not guilty</li> </ul>
a. In the case of guilty of LIO or other offense:	DIBRS Code
<i>Findings (R.C.M. 918)</i>	
78. Prior to findings, whether the convening authority caused any of the charges or specifications to be withdrawn and or dismissed. For each charge and specification, as applicable:	<ul style="list-style-type: none"> <li>-Withdrawn</li> <li>-Withdrawn and dismissed</li> </ul>
79. Mistrial (R.C.M. 915):	<ul style="list-style-type: none"> <li>-Yes</li> <li>-No</li> </ul>
a. If mistrial, date of mistrial:	Format (MM/DD/YYYY)
80. Finding as to each specification:	<ul style="list-style-type: none"> <li>-Guilty</li> <li>-Not guilty of an offense as charged, but guilty of a named LIO or other offense</li> <li>-Guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any</li> <li>-Not guilty only by reason of lack of mental responsibility</li> <li>-Not guilty</li> <li>-Not guilty pursuant to R.C.M. 917</li> <li>-Withdrawn and dismissed</li> </ul>
81. In the case of guilty of LIO or other offense:	DIBRS code
82. Finding as to each charge:	<ul style="list-style-type: none"> <li>-Guilty</li> <li>-Not guilty, but guilty of violation of Article ____</li> <li>-Not guilty only by reason of lack of mental responsibility</li> <li>-Not guilty</li> </ul>
83. Date of Findings:	Format (MM/DD/YYYY)
<i>Sentence (if applicable)</i>	
84. Composition of court for sentencing phase:	<ul style="list-style-type: none"> <li>-Members</li> <li>-Members with at least 1/3 enlisted representation at the accused's election</li> <li>-Officer members at the accused's election</li> <li>-Military judge alone</li> <li>-Magistrate judge alone</li> </ul>
85. Did a crime victim of an offense of which the accused has been found guilty exercise his/her right to be heard at the presentencing (R.C.M. 1001(c)) relating to that	<ul style="list-style-type: none"> <li>-N/A</li> <li>-Yes</li> <li>-No</li> </ul>

Data Point	Uniform Definition
offense? System must capture victim who exercised right.	
86. Date sentence adjudged:	Format (MM/DD/YYYY)
87. Sentence adjudged (if sentenced by military judge under the sentencing system enacted by the Military Justice Act of 2016, those parts of the sentence adjudging a fine or confinement, subparagraphs e. and h. below, must be included for each specification for which there was a finding of guilty). System must capture whether part of sentence was impacted by plea agreement.	
a. No punishment	-No punishment adjudged
b. Reprimand:	-None adjudged; -Adjudged
c. Reduction to the grade of:	-None adjudged -E-1 -E-2 -E-3 -E-4 -E-5 -E-6 -E-7 -E-8
d. Forfeitures:	-None adjudged -\$ #####.## per month for ## months
e. Fine:	-None adjudged -\$ #####.##
f. Restriction to specific limits:	-None adjudged -## months -## days
g. Hard labor w/out confinement:	-None adjudged -## months -## days
h. Confinement:	-None adjudged -Life without eligibility for parole -Life -## years -## months -## days -FOR JUDGE ALONE: must include "To be served: consecutively or concurrently" if sentence is imposed for more than one specification
i. Punitive discharge:	-None adjudged -Bad-Conduct Discharge -Bad-Conduct Discharge (mandated) -Dishonorable Discharge -Dishonorable Discharge (mandated)

Data Point	Uniform Definition
	-Dismissal -Dismissal (mandated)
j. Death	-Yes -No
88. Days of pretrial confinement credit:	-## days
89. Days of judicially ordered credit	-## days
90. Total days of credit	-## days
91. Did the military judge recommend a suspension of any portion of the sentence?	-Yes -No
92. Did the Government submit a request to the Judge Advocate General to appeal the sentence either because it violates the law or is plainly unreasonable (Article 56(d), UCMJ, and R.C.M 1117)?	-Yes -No
a. Did any victim, as defined in R.C.M. 1001, submit matters for consideration to the Judge Advocate General	-Yes -No
b. Action by the Judge Advocate General on the Government's request to appeal the sentence:	-Denied -Approved
c. Decision by the Court of Criminal Appeals on Government's appeal of sentence:	-Denied -Set aside and remanded, sentence as adjudged is unlawful -Set aside and remanded, sentence as adjudged is plainly unreasonable
<u>Post-trial</u>	
<i>Processing Related to Conviction and Sentence</i>	
93. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	-Yes -No
94. Is sex offender registration reporting required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	-Yes -No
95. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	-Yes -No
96. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	-Yes -No
97. Date confinement ordered:	Format (MM/DD/YYYY)
98. Law enforcement agency notified of disposition for criminal indexing purposes:	-Yes -No
<i>Deferment and Waiver (R.C.M 1103)</i>	
99. Deferment:	-N/A -Deferment requested by accused, approved -Deferment requested by accused, denied -Deferment of confinement ordered without request from accused
100. Date of action on deferment:	Format (MM/DD/YYYY)

Data Point	Uniform Definition
101. Did the convening authority waive automatic forfeitures by operation of Article 58(b), UCMJ?	-Yes -No
<i>Post-trial Motions and Proceedings (R.C.M. 1104)</i>	
102. Did any post-trial Article 39(a) sessions occur?	-Yes -No
103. Did any post-trial Article 39(a) session impact any part of the findings or sentence?	-Yes -No
<i>Post-trial Action by the Convening Authority</i>	
104. Was a copy of the recording of all open sessions of the court-martial and copies/access to admitted evidence at the court-martial and the appellate exhibits provided, upon request, to the accused or accused's counsel (R.C.M. 1106)?	-Yes -No
105. Accused action regarding submission of matters pursuant to R.C.M. 1106:	-Submitted -Expressly waived right to submit matters -Failed to submit matters
106. Was notice provided to all qualifying crime victims of their right to submit matters pursuant to R.C.M. 1106A (DD Form 2703)? Must capture by victim.	-N/A -Yes -No
107. Was a copy of the recording of all open sessions of the court-martial and copies/access to admitted evidence at the court-martial and the appellate exhibits provided, upon request, to any qualifying victim (R.C.M. 1106A)? System must capture each victim provided.	-Yes -No
108. Were matters submitted by crime victims pursuant to R.C.M. 1106A? System must capture each victim who submitted matters.	-N/A -Yes -No
109. Was any portion of the sentence suspended or remitted by the convening authority prior to the entry of judgment (R.C.M. 1107)?	-Yes -No
a. If the convening authority suspended any portion of the sentence, was that suspension later vacated (R.C.M. 1108)?	-Yes -No
b. Were any victims of the underlying offense(s) for which the probationer received a suspended sentence, or any victim of the alleged offense that is the subject of the vacation hearing, provided notice of the vacation hearing?	-N/A -Yes -No
110. Did the convening authority take any action impacting a finding of guilty, pursuant to R.C.M. 1110?	-Yes -No
111. Did the convening authority take any action impacting a portion of the sentence, pursuant to R.C.M. 1109 and/or 1110?	-Yes -No
<i>Entry of Judgment (R.C.M. 1111)</i>	
112. Date of entry of judgment:	Format (MM/DD/YYYY)
113. Date copy of entry of judgment provided to accused:	Format (MM/DD/YYYY)

Data Point	Uniform Definition
114. Was a copy of the entry of judgment provided to any crime victim or crime victim's counsel, upon request?	-N/A -Yes -No
<i>Preparation and Forwarding to Court of Criminal Appeals</i>	
115. Type of transcript prepared (R.C.M. 1114):	-Transcript not prepared -Verbatim -Summarized
116. Date record of trial certified as containing all required contents pursuant to R.C.M. 1112(b):	Format (MM/DD/YYYY)
117. Date copy of certified record of trial was provided to accused or counsel (R.C.M. 1112(e)):	Format (MM/DD/YYYY)
118. Date copy of certified record of trial was provided to victim, or counsel for the victim, of an offense of which the accused was charged if the victim testified during the proceedings (R.C.M. 1112(e)):	Format (MM/DD/YYYY)
119. Date copy of certified record of trial was provided to any victim, or counsel for any victim, named in a specification of which the accused was charged, upon request, without regard to the findings of the court-martial (R.C.M. 1112(e)):	Format (MM/DD/YYYY)
120. Date certified record of trial forwarded to appropriate reviewing authority:	Format (MM/DD/YYYY)
<i>Waiver or Withdrawal of Appellate Review (R.C.M. 1115)</i>	
121. Date waiver or withdrawal submitted by accused:	-N/A -Format (MM/DD/YYYY)
122. Determination of review in cases in which the accused has waived or withdrawn appellate review (R.C.M. 1201):	
a. Whether the court had jurisdiction over the accused and the offense	-Yes -No
b. Whether each charge and specification stated an offense	-Yes -No
c. Whether the sentence was within the limits prescribed as a matter of law	-Yes -No
d. Date of review:	Format (MM/DD/YYYY)
<i>Review by the Judge Advocate General</i>	
123. For each certified record of trial received by the Judge Advocate General pursuant to R.C.M. 1201 and Article 69, UCMJ, the following determinations will be made:	
a. Whether the court had jurisdiction over the accused and the offense	-Yes -No
b. Whether each charge and specification stated an offense	-Yes -No
c. Whether the sentence was within the limits prescribed as a matter of law	-Yes -No

Data Point	Uniform Definition
d. Whether the response contained any response to an allegation of error made in writing by the accused	-Yes -No
124. Was a remedy granted by the Judge Advocate General?	-Yes -No
125. Date accused notified of results of review conducted by the Judge Advocate General:	Format (MM/DD/YYYY)
a. Date application submitted for relief to the Judge Advocate General after final review (R.C.M. 1201(h))	-N/A - Format (MM/DD/YYYY)
126. Action by the Judge Advocate General upon an application for relief	-N/A -Relief granted -Relief denied
127. Was any remission or suspension of any unexecuted portion of any sentence by the Judge Advocate General pursuant to R.C.M. 1201(i) and Article 74, UCMJ?	-Yes -No
128. Date action taken by the Judge Advocate General under R.C.M. 1201(h) or (j) referred or submitted to or requested by the Court of Criminal Appeals (R.C.M. 1201(k)):	-N/A -Format (MM/DD/YYYY)
129. Action taken by the Court of Criminal Appeals upon such a referral or submission:	-Affirmed -Reversed
a. Date of action by the Court of Criminal Appeals:	Format (MM/DD/YYYY)
<i>Review by Court of Criminal Appeals (R.C.M. 1203)</i>	
130. Court of Criminal Appeals determined accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings:	-Yes -No
131. Action on findings of guilty, by charge and its specification(s)	-Affirmed -Affirmed in part, remanded -Affirmed in part, dismissed -Reversed
132. Action on sentence	-Affirmed -Affirmed in part, remanded -Affirmed in part, reassessed -Set aside, remanded -Set aside, reassessed
133. Date of opinion of the Criminal Court of Appeals	Format (MM/DD/YYYY)
134. Date accused notified of opinion of the Criminal Court of Appeals	Format (MM/DD/YYYY)
135. Decision of the Criminal Court of Appeals upon a request for reconsideration	-N/A -Denied -Granted
136. Decision upon reconsideration:	-N/A -Relief denied -Relief granted
137. Date of certification by the Judge Advocate General to the Court of Appeals for the Armed Forces (C.A.A.F.):	-N/A -Format (MM/DD/YYYY)

Data Point	Uniform Definition
138. Date of petition by accused to C.A.A.F.:	-N/A -Format (MM/DD/YYYY)
139. Date record of trial forwarded to C.A.A.F.:	-N/A -Format (MM/DD/YYYY)
<i>Review by the Court of Appeals for the Armed Forces (R.C.M. 1204)</i>	
140. Action on petition by the accused for review:	-Denied -Granted
141. Date of action on petition:	Format (MM/DD/YYYY)
142. Opinion of the Court of Appeals for the Armed Forces (C.A.A.F.) regarding findings and sentence:	-Affirmed -Affirmed in part, remanded -Affirmed in part, dismissed -Reversed
143. Date of opinion of C.A.A.F.	Format (MM/DD/YYYY)
144. Decision of C.A.A.F. upon a request for reconsideration	-N/A -Denied -Granted
a. Date of decision on request for reconsideration	Format (MM/DD/YYYY)
145. Decision of C.A.A.F. upon reconsideration	-Relief denied -Relief granted
a. Date of reconsideration decision:	Format (MM/DD/YYYY)
<i>Review by the Supreme Court of the United States (R.C.M. 1205)</i>	
146. Date petition for writ of certiorari filed:	-N/A -Format (MM/DD/YYYY)
147. Petition for writ of certiorari filed by:	-United States -Accused
148. Action on petition for writ of certiorari:	-N/A -Denied -Granted
149. Date of action on petition for writ of certiorari	Format (MM/DD/YYYY)
150. If certiorari was granted, was the C.A.A.F. opinion summarily vacated and remanded?	-Yes -No
151. If certiorari was granted, was briefing ordered?	-Yes -No
152. If certiorari was granted, was oral argument held?	-Yes -No
153. If certiorari was granted, the outcome was:	-Dismissed as improvidently granted -Affirmed -Affirmed in part, reversed in part -Reversed -Other
<i>Action by the Secretary concerned</i>	
154. Upon final judgment involving the dismissal of a commissioned officer, cadet, or midshipman, action by the Secretary concerned or designee	-Approved and ordered executed -Substituted, for good cause, for an administrative form of discharge -Remitted -Suspended
a. Date of action on the dismissal	Format (DD/MM/YYYY)

Data Point	Uniform Definition
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<i>Action by the President of the United States</i>	
155. Action upon a sentence to death by the President	<ul style="list-style-type: none"> <li>-Approved</li> <li>-Commutated to life without eligibility for parole</li> <li>-Commutated to life</li> <li>-Commutated to confinement for a term of years</li> </ul>
a. Date of action by the President	Format (MM/DD/YYYY)