

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

Meeting Materials

December 5-6, 2023

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

32nd PUBLIC MEETING

December 5-6, 2023

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

Tuesday, December 5, 2023	Day 1
9:30 a.m. – 11:30 a.m.	DAC-IPAD Subcommittee meetings <i>9:30 a.m. – 10:30 a.m. Case Review Subcommittee Meeting</i> <i>10:30 a.m. – 11:30 a.m. Policy Subcommittee Meeting</i> <i>10:30 a.m. – 11:30 a.m. Special Projects Subcommittee Meeting</i>
11:30 a.m. – 12:15 p.m.	Lunch <i>(45 minutes)</i>
12:15 p.m. – 2:30 p.m.	DAC-IPAD Administrative Session <i>(2 hours, 15 minutes)</i> <u>Purpose:</u> <i>Overview of the agenda, read-ahead materials, and draft Committee Reports</i>
2:30 p.m. – 2:40 p.m.	Break
2:40 p.m. – 2:45 p.m.	Welcome and Introduction to Public Meeting <i>Director: Mr. Pete Yob</i> <i>DFO: Dwight Sullivan</i>
2:45 p.m. – 3:45 p.m.	DAC-IPAD Deliberations on the Draft Report on Randomizing Court-Martial Panel Member Selection <i>(1 hour)</i> <u>Purpose:</u> <i>Committee deliberations on the report supporting the DAC-IPAD's approved recommendations.</i> <i>Staff Attorneys: Ms. Terry Gallagher and Ms. Terri Saunders</i>
3:45 p.m. – 4:45 p.m.	DAC-IPAD Deliberations on the Draft Report on Sharing Information with Victims and their Counsel <i>(1 hour)</i> <u>Purpose:</u> <i>Committee deliberations on the report supporting the DAC-IPAD's approved recommendations.</i> <i>Staff Attorneys: Ms. Eleanor Vuono and Ms. Meghan Peters</i>

4:45 p.m.

Public Meeting Day 1 Adjourned

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

32nd PUBLIC MEETING

Wednesday, December 6, 2023	Day 2
8:45 a.m. – 9:00 a.m.	DAC-IPAD Administrative Session
9:00 a.m. – 9:05 a.m.	Welcome and Overview of Day 2 <i>Director: Mr. Pete Yob</i> <i>DFO: Mr. Dwight Sullivan</i>
9:05 a.m. – 10:25 a.m.	Panel Selection Study Update and Discussion <i>(1 hour, 20 minutes)</i> <i>Speaker: Dr. William Wells, Professor, Department of Criminal Justice and Criminology, Sam Houston State University</i> <u>Purpose:</u> To advise the Committee on the preliminary results of the panel selection study and to review the legal landscape for panel selection procedures that inform this study. <i>Staff Attorneys: Ms. Kate Tagert and Ms. Nalini Gupta</i>
10:25 a.m. – 11:15 a.m.	Performance Metrics for the Offices of Special Trial Counsel <i>(50 minutes)</i> <u>Purpose:</u> Staff briefing to summarize current proposals for assessing the implementation and performance of special trial counsel in all Services so that the DAC-IPAD can consider whether to study this topic. <i>Staff Attorney: Ms. Nalini Gupta</i>
11:15 a.m. – 11:30 a.m.	Break
11:30 a.m. – 11:45 a.m.	Special Projects Subcommittee Update <i>(15 minutes)</i> <i>Staff Attorneys: Ms. Eleanor Vuono and Ms. Meghan Peters</i>
11:45 a.m. – 12:00 p.m.	Policy Subcommittee Update <i>(15 minutes)</i> <i>Staff Attorneys: Ms. Terry Gallagher and Ms. Terri Saunders</i>
12:00 p.m. – 1:00 p.m.	Lunch <i>(1 hour)</i>
1:00 p.m. – 1:30 p.m.	Public Comment <i>(30 Minutes)</i>
1:30 p.m. – 2:00 p.m.	Meeting Wrap-Up & Preview of Next Meeting <i>(30 minutes)</i> <i>Director: Mr. Pete Yob</i> <i>DFO: Mr. Dwight Sullivan</i>

2:00 p.m.

Public Meeting Day 2 Adjourned

Draft DAC-IPAD Report on Randomizing Court-Martial Panel Member Selection provided for the December 5-6, 2023, DAC-IPAD public meeting

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

RANDOMIZING COURT-MARTIAL PANEL MEMBER
SELECTION: A REPORT ON IMPROVING AN
OUTDATED SYSTEM

DECEMBER 2023

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Executive Summary

Since Congress established Article 25 in the Uniform Code of Military Justice (UCMJ) in 1950, there have been repeated calls to change the court-martial panel member selection system to a more objective, transparent process, driven in large part by concerns about fairness and the perception of fairness. Under the current selection process, the convening authority decides whether the accused will be tried by court-martial and the offenses for which they will be tried, and also selects, using subjective selection criteria, the panel members who will sit in judgment of the accused. This consolidation of authority in the convening authority presents the opportunity for intentional abuse or unintentional insertion of bias, and raises the perception of unfairness in the court-martial process. The same concerns remain under the process beginning in December 2023, in which the Offices of Special Trial Counsel (OSTCs) determine whether select offenses will be tried but convening authorities—whether or not they support the referral decision—retain power to select the panel members.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) makes 10 recommendations in this report that, when taken together, provide a road map for a panel selection process that removes subjectivity and the potential for bias and replaces the existing method with objective criteria for determining the eligibility of panel members and a transparent, objective process for randomly selecting panel members.

In completing this study and the 10 recommendations accompanying it, the DAC-IPAD was guided by the goals of rebuilding trust in the military justice system, promoting fairness and the perception of fairness in selecting panel members, and ensuring transparency in the process. In discussing the origins of Article 25 and the panel selection process, this report reveals an outdated system that has not evolved to keep pace with numerous groundbreaking changes in the military justice process.

The DAC-IPAD's recommendations build upon multiple studies of the court-martial panel selection system, most of which concluded that the process should be changed to a more objective and transparent system. Most recently, the Independent Review Commission on Sexual Assault in the Military (IRC) recommended in a June 2021 report that Article 25, UCMJ, be amended to establish random selection of panel members in order to “enhance the perception and reality of a fair and impartial panel.”¹

Congress agreed that changes to the panel selection process were necessary, and in the National Defense Authorization Act (NDAA) for Fiscal Year 2023 it amended Article 25 to require random selection of panel members, to the maximum extent practicable, by December 2025, under regulations prescribed by the President.² However, Congress did not remove the

¹ 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>.

² National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 [FY23 NDAA], §543, 136 Stat. 2395 (2022).

requirement that convening authorities select those members they subjectively consider “best qualified” to perform the duty, using the selection criteria of age, education, training, experience, length of service, and judicial temperament.³ The Committee believes that a true randomized selection process is incompatible with allowing the convening authority to select members on the basis of this subjective determination. To make random selection meaningful, the Committee recommends that Congress take the additional step of eliminating from Article 25 the requirement that the convening authority select and detail those members they consider best qualified and, instead, require them to detail only those members identified through a randomized selection process.

In the past, some have argued for retaining the subjective “best qualified” mandate and preserving the convening authority selection process because military panel members have broader duties than their civilian jury counterparts, that require complex analysis and judgment. However, multiple changes to the military justice system—including the advent of the trial judiciary in 1968, the statutory change effective in 2019 that a military judge must preside over all general and special courts-martial, and the FY22 NDAA statutory amendment requiring all sentencing, except in capital cases, to be conducted by the military judge—means that the role of military panel members is virtually identical to the role of jurors in federal and most state systems.

In addition, the Military Services now have computerized rosters of all Service personnel that can be used to produce random selections of panel members based on objective criteria—such as requiring that all members have at least two years’ time in service and be senior in grade or rank to the accused. This improved technology can be drawn on to increase efficiency, fairness, and objectivity in the panel selection process, without an overall increase in administrative requirements and regardless of location and operational posture.

While the DAC-IPAD has determined that a randomized selection process involving limited objective selection criteria is the best practice, the Committee also recommends that convening authorities remain an integral part of this process. Convening authorities should retain the authority to detail the appropriate number of randomly selected court-martial members, make availability determinations, and excuse members for operational and personal reasons.

Implementing a randomized process for selecting panel members with limited objective qualification criteria applied transparently will help restore confidence and trust in the military justice system, increasing the perception of fairness among Service members and the public. It will reduce the potential for bias or favoritism in panel selection and promote a broader representation of military personnel, including different ranks, backgrounds, and experiences. A selection process that is more transparent will be less susceptible to manipulation or undue influence. For all of these reasons, now is the time for change.

³ 10 U.S.C. § 825 (2021) (Art. 25).

Recommendations and Findings

Recommendation 53: Congress should 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.”

- 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. In addition, military judges will soon serve as sentencing authority in all but capital cases, reducing the panel’s role to determining the guilt or innocence of the accused, as is the case in federal and most state courts. This reduction in the role of the panel eliminates the rationale for the “best qualified” criteria in Article 25(e).
- Finding 2: The Article 25(e) criteria and “best qualified” mandate result in courts-martial panels composed primarily of officers and senior enlisted Service members. There is not a military requirement to support this composition.

Recommendation 54: Congress should retain the Article 25(e)(4) requirement for the convening authority to detail members randomly selected under regulations prescribed by the President. The qualifying words “to the maximum extent practicable” should be removed.

- Finding 3: Removal 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 those members most likely to reach a certain result and thus will increase trust and confidence in the military justice system.
- Finding 4: Randomizing the court-martial member selection process is not compatible with the Article 25(d) requirement for the convening authority to select members who are “best qualified” according to existing criteria.
- Finding 5: Officers and enlisted members of all grades are qualified to serve on courts-martial panels.

Recommendation 55: In prescribing rules for the randomized selection of qualified personnel pursuant to Article 25(e)(4), the President should provide for a randomized court-martial panel member selection process utilizing the Military Services’ personnel and pay systems to select the members. This process should preclude the convening authority or other members of command or the judge advocate office from hand selecting members. In addition to the statutory qualification requirements, the randomized selection process should provide for diversity of members based on grade.

- Finding 6: The Military Services have the capability to use their personnel and pay systems to generate a randomized pool of Service members for court-martial duty based

on objective criteria. This technology will enable increased efficiency, fairness, and objectivity in the panel selection process.

- Finding 7: A purely random selection of Service members would result in a panel primarily consisting of junior members. Selecting panel members of different grades will lead to a more diverse panel based on age and experience.

Recommendation 56: The Secretary of Defense should direct that a pilot project be initiated to create a court administrator position to be responsible for the panel member selection process—rather than the staff judge advocate or command staff.

- Finding 8: A randomized method of panel selection that removes from the convening authority or others in the chain of command or judge advocate office the responsibility to administer the selection process will provide more transparency and increase Service members' and the public's trust in the court-martial process.

Recommendation 57: Congress should amend Article 25 to explicitly give 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 for operational requirements or personal reasons after they have been detailed.

- Finding 9: In the interest of military readiness, convening authorities must retain availability and excusal determination authority.

Recommendation 58: The President should amend the Rules for Courts-Martial to provide a transparent method for convening authorities to document availability and excusal determinations.

- Finding 10: Documentation of the bases for excusal and availability determinations increases transparency and the perception of fairness, and minimizes abuse of the process.

Recommendation 59: Retain 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.

- Finding 11: The Article 25 requirement that court-martial members be senior in rank and grade to the accused serves a specific military purpose to ensure that the hierarchical rank structure of the military is maintained.

Recommendation 60: Amend Article 25 to add a two-year time-in-service requirement for court-martial panel member eligibility. For Service Academy cadets and midshipman, the calculation of time in service would commence upon commissioning.

- Finding 12: A minimum length of service requirement is supported by specific military purposes: to ensure that initial military training is completed and to give Service members a greater understanding of military culture.
- Finding 13: A minimum length of service requirement of two years eliminates the need to require a minimum age for serving as a panel member.

Recommendation 61: The President should amend the Rules for Courts-Martial to establish uniform criteria for automatic exemption from serving as a court-martial member. Such criteria may include whether the potential members have a felony or misdemeanor conviction or are under investigation for a criminal offense. The President should delegate authority to each Military Department Secretary to promulgate regulations that establish additional bases for automatic exemption. To ensure maximum transparency, any additional exempting criteria established by the Military Departments should be made public through the Federal Register and by other appropriate means.

- Finding 14: 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 be convicted of a felony. Department of Defense accession regulations ensure that all Service members are proficient in English and have no disqualifying mental or physical condition.

Recommendation 62: 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 the swearing in of the detailed members and the assembly of the court-martial.

- Finding 15: The requirement to detail members at the time a case is referred 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, given the length of time from referral to empanelment and the low percentage of courts-martial in which the accused elects to be tried by members.
- Finding 16: Providing the flexibility to detail members later in the process will enable the convening authority to determine more accurately the appropriate number of qualified members to detail to a specific court-martial.

I. Introduction

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.⁴

This Committee has long been concerned about the fairness of the military justice system and the role of bias in courts-martial and other disciplinary actions in sexual assault cases. These concerns, along with the pending requirement for randomization of the court-martial member selection process, were the impetus for the Committee to embark on this study.

Since Congress established Article 25 in the UCMJ in 1950, there have been repeated calls to change the system of selecting court-martial panel members to a more objective, transparent process, in large part spurred by concerns about fairness and the perception of fairness. The perception of this process is especially problematic for cases involving sexual offenses⁵—which constitute a significant portion of general court-martial cases.⁶

This panel selection study builds on the 2021 report of the Independent Review Commission on Sexual Assault in the Military (IRC).⁷ Following its study of the military's treatment of sexual

⁴ *United States v. Benedict*, 55 M.J. 451, 456 (2001) (Effron, J., dissenting) (citations omitted).

⁵ During the public comment sessions at the DAC-IPAD's September and December 2022 public meetings, attendees heard from two individuals who had been court-martialed for sexual offenses. Both men were Black and perceived the panel selection and empanelment process as biased and discriminatory; one described having all-white panel members selected to hear his case and the second described seeing members of color removed from the panel through the voir dire process. *See Transcript of DAC-IPAD Public Meeting* 356 (Sept. 21, 2022); *Transcript of Public Meeting* 345-346 (Dec. 6, 2022). Mr. William Cassara, a DAC-IPAD member with substantial experience as a civilian defense attorney representing Service members before courts-martial, noted that in his 30-year career as a defense counsel, his first court-martial was an all-white jury and his last court-martial was an all-white jury. *See Transcript of DAC-IPAD Public Meeting* 124 (Sept. 19, 2023). Transcripts of all DAC-IPAD public meetings can be found on the DAC-IPAD website at <https://dacipad.whs.mil/>.

⁶ According to the Military Services' Article 146a, UCMJ, reports from FY22, a total of 670 general courts-martial (GCMs) were tried; and according to the Sexual Assault Prevention and Response Office (SAPRO) report for FY22 a total of 301 courts-martial were completed for sexual assault offenses, defined as rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, and attempts to commit such offenses. Child sexual assault cases and sexual assault cases in which the victim is a spouse or intimate partner are not included in the 301 cases. The Article 146a reports from FY22 establish that 207 of the total GCMs were tried by members but the SAPRO report does not have data on how many of the sexual assault cases were tried by members. The Military Services' Article 146a reports can be found on the Joint Service Committee website at <https://jsc.defense.gov/Annual-Reports/>. Dep't of Def., SAPRO, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2022, Enclosures 1-3. DoD SAPRO reports can be found at <https://sapro.mil/reports>.

⁷ IRC Report, *supra* note 1.

assault offenses, the IRC concluded that “there is a wide chasm between what senior leaders believe is happening under their commands, and what junior enlisted Service members actually experience,” resulting in broken trust between commanders and the Service men and women under their care.⁸ Among the recommendations made to improve the military’s response to sexual offenses, the IRC proposed that Article 25, UCMJ, be amended to establish random selection of panel members in order to “enhance the perception and reality of a fair and impartial panel.”⁹ The IRC’s recommended changes address a concern among many of those they interviewed “that commanders hand pick members to deliver desired court-martial results.”¹⁰

Congress agreed that changes to the panel selection process were necessary, and in the National Defense Authorization Act for Fiscal Year 2023 it amended Article 25 to require by December 2025 the random selection of panel members to the maximum extent possible, under regulations prescribed by the President.¹¹ However, it did not remove the Article 25 mandate for convening authorities to select those members they consider best qualified to perform the duty.

In completing this study and the 10 recommendations accompanying it, the DAC-IPAD was guided by the goals of rebuilding trust in the military justice system, promoting both fairness and the perception of fairness in selecting panel members, and ensuring transparency. In discussing the origins of Article 25 and the panel selection process, this report reveals an outdated system that has not evolved to keep pace with numerous groundbreaking changes in the military justice system.

The 10 recommendations in this report, taken together, provide a road map for a panel selection process that removes subjectivity and the potential for bias and replaces it with limited objective criteria for determining the eligibility of panel members. This will lead to a transparent and objective process for randomly selecting panel members.

Section II of this report provides an overview of the current court-martial panel member selection process and provides historical background. Section III discusses randomizing the selection process and reviews past studies of this approach as well as the recent statutory requirement to randomize the process. Section IV summarizes stakeholder perspectives on the selection process. Section V provides the Committee’s analysis explaining why these recommended changes should be implemented. Section VI details the Committee’s proposed reforms to the selection process and how the new process would work in practice. Finally, Section VII contains the Committee’s findings and recommendations.

⁸ *Id.* at 3–4.

⁹ See IRC Recommendation 1.7 d, Random Selection of Panel Members; *id.* at Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System 54, IRC Report, *supra* note 1.

¹⁰ *Id.* at 18.

¹¹ FY23 NDAA, *supra* note 2, §543.

II. Background on the Current Court-Martial Panel Member Selection Process and Criteria

A. Convening a Court-Martial

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.¹² This is always true, regardless of whether a commander serving as convening authority or a special trial counsel refers the case to a general or special court-martial.¹³

When convening the court-martial, the convening authority must also simultaneously detail members of the Armed Forces to serve as panel members.¹⁴ While the process for detailing members varies among and within the Military Services, typically lower-level commanders provide a list of nominees, diversified by grade, to the convening authority's staff judge advocate, who then prepares for the convening authority a packet 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.

In reviewing this selection process, the Court of Appeals for the Armed Forces (CAAF) noted that the government has the upper hand in the selection of court-martial members owing to the extensive prescreening built into the nomination and selection processes with the aim of producing the "best qualified" members. In order to provide balance, CAAF created the liberal grant mandate, which requires that military judges liberally grant challenges for cause brought by the defense in the voir dire process.¹⁵

B. Article 25, Uniform Code of Military Justice, Selection Criteria

Article 25, UCMJ, outlines the criteria according to 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" on the basis of six criteria: "age, education, training, experience, length of service, and judicial temperament."¹⁶

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

¹² 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).

¹³ *Id.*

¹⁴ Art. 25(e)(2); R.C.M. 503(a) and R.C.M. 504(d)(1)(A)(ii).

¹⁵ See *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); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995); and *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005).

¹⁶ Art. 25(e)(2), UCMJ.

Historical Background

In military courts-martial, accused Service members do not have a Sixth Amendment right to a trial by jury.¹⁷ The Military Justice Review Group summarized the history of Article 25 in its 2015 report, noting that Congress first set forth criteria for service on courts-martial panels in the 1920 Articles of War, which Congress then incorporated into the UCMJ as Article 25 upon its enactment in 1950.¹⁸

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[.]”¹⁹ Article 4 also included a clause stating that officers with less than two years of service should not sit as panel members “if it can be avoided without manifest injury to the service.”²⁰ When the UCMJ was enacted in 1950, Article 25 adopted the selection criteria from Article 4, adding education and length of service to the existing criteria and eliminating the baseline requirement of two years of service.²¹

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 in 1948 of the Elston Act, which allowed an enlisted member to select a panel composed of at least one-third enlisted members.²² Congress incorporated this provision into Article 25, UCMJ. 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.²³ Prior to this change, convening authorities could detail only officer members in the initial convening order.

For many years courts-martial operated with no trial judiciary. Following the implementation of the UCMJ in 1950, all general courts-martial had a law officer assigned, though this position did not have the authority and power of a military judge.²⁴ The senior officer of the panel—who was not an attorney—served as its president. That individual presided during hearings and performed many administrative and judicial functions, such as setting the time and place of the court-

¹⁷ *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).

¹⁸ REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I 252 (Dec. 22, 2015) [MJRG Report].

¹⁹ The Articles of War of 1920, art. 4 (June 4, 1920) reprinted in MANUAL FOR COURTS-MARTIAL, UNITED STATES (1921 ed.), app. 1, at 494, available at <https://www.loc.gov/item/2011525334/>.

²⁰ *Id.*

²¹ Art. 25, UCMJ (1950).

²² The Articles of War of 1948, art. 4 (June 24, 1948) reprinted in MANUAL FOR COURTS-MARTIAL, UNITED STATES (1949 ed.) app. 1, at 273, available at <https://www.loc.gov/item/2011525325/>.

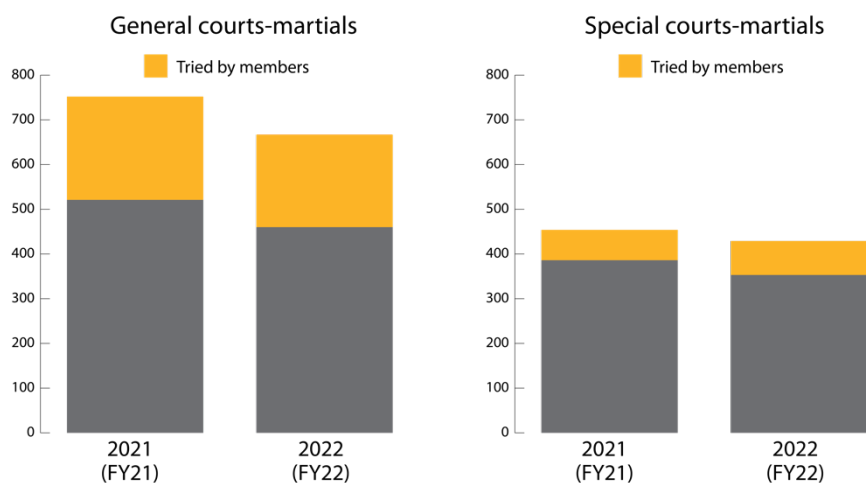
²³ Art. 25(c)(1).

²⁴ Edward F. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 44 (1970).

martial, administering oaths to counsel, and presiding over closed sessions.²⁵ In addition, the court-martial panel determined challenges for cause against a member and could make a determination on a motion for a finding of not guilty or on the accused's sanity, if any member objected to the law officer's ruling.²⁶ This system remained largely unchanged until 1968, when Congress amended the UCMJ to provide for military trial judges to preside over all general and most special courts-martial.²⁷ This change 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.²⁸ 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.²⁹

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, 2023.³⁰

In fiscal years 2021 (FY21) and 2022 (FY22), less than a third of general and special courts-martial were tried before panel members.³¹ In FY21, the Services tried a total of 752 general courts-martial, of which 231 (31%) were tried by members,³² and a total of 454 special courts-martial, of which 68 (15%) were tried by members.³³ In FY22, the Services tried a total of 667



²⁵ *Id.*

²⁶ *Id.*

²⁷ Wayne L. Friesner, *Military Justice and the Military Justice Act of 1968: How Far Have We Come?*, 23 SW. L.J. 554, 568–69 (1969).

²⁸ *Id.* at 569.

²⁹ MJRG Report, *supra* note 18, 221 (conforming to the long-standing military practice requiring a military judge to preside over all special courts-martial).

³⁰ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 [FY22 NDAA], §539E, 135 Stat. 1541 (2021).

³¹ See Article 146a, UCMJ, annual reports to Congress from the Military Services' Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps for Fiscal Years 2021 and 2022.

³² *Id.*

³³ *Id.*

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.³⁴

Diversity of Panel Membership

Neither the Constitution nor the UCMJ provides an accused Service member the right to a cross-sectional representation of the community on their court-martial panel.³⁵ Case law provides only that significant and identifiable groups may not be systematically excluded from the selection process.³⁶

It is no longer permissible for convening authorities to consider race in selecting courts-martial panel members for purposes of inclusion. In its 1964 decision of *United States v. Crawford*, the Court of Military Appeals (now the Court of Appeals for the Armed Forces) first recognized the permissibility of including a panel member on the basis of race, so long as the motivation remained compatible with the criteria in Article 25, UCMJ.³⁷

Subsequent appellate court decisions relied on this holding for decades,³⁸ but the recent Court of Appeals for the Armed Forces (CAAF) decision in *United States v. Jeter*³⁹ held that the *Crawford* decision was abrogated by the Supreme Court's holding in *Batson v. Kentucky*, which provided that "[a] person's race simply is unrelated to his fitness as a juror."⁴⁰ In holding that a convening authority could not—even in good faith—use race as a criterion for selection in order to make the members panel more representative of the accused's race, CAAF stated: "We cannot blind ourselves to the fact that the military justice system, its member selection process in particular, remains vulnerable to actions by those who harbor outdated views regarding women and minorities."⁴¹ The *Jeter* decision requires that an accused's prima facie showing that race played a role in the panel selection process will give rise to a presumption that the panel was not properly constituted, a presumption that the government may then seek to rebut.⁴² CAAF previously extended the holding in *Crawford* to allow the convening authority to take gender into account in selecting panel members if they are seeking in good faith to select a panel representative of the military population.⁴³ It is likely the *Jeter* decision will also apply to the convening authority's consideration of gender for purposes of inclusion in panels, making this practice no longer permissible.

³⁴ *Id.*

³⁵ *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988).

³⁶ *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).

³⁷ *United States v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964).

³⁸ *See, e.g.*, *United States v. Cunningham*, 21 M.J. 585, 586 (C.M.R. 1985).

³⁹ *United States v. Jeter*, xx M.J. xx, 2023 CAAF LEXIS 676 (C.A.A.F. 2023).

⁴⁰ *Id.* at *1, citing *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

⁴¹ *United States v. Jeter* at *6.

⁴² *Id.* at *2.

⁴³ *United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988).

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 and Grade

The convening authority may not, when it is possible, select members junior in rank or grade to the accused.⁴⁴ Aside from that statutory prohibition, the convening authority may not use rank as a device to deliberately and systematically exclude otherwise qualified court members.⁴⁵

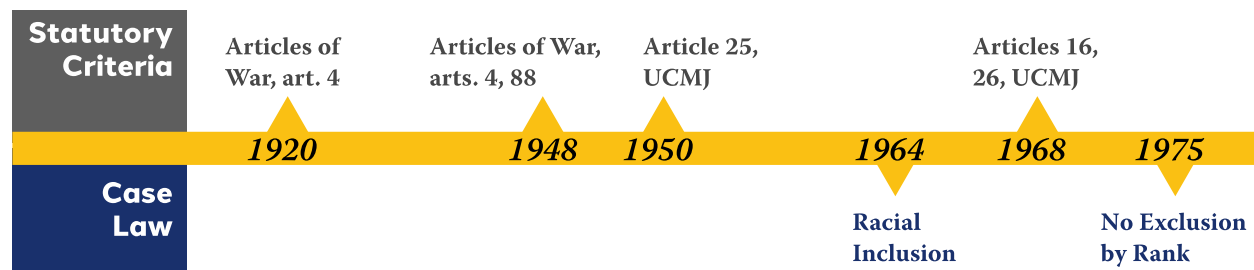
2. Position and Occupation

The convening authority may select members on the basis of duty position (e.g., commanders) in a good faith effort to comply with Article 25 criteria. CAAF has 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.”⁴⁶

Occupation is not a permissible basis for excluding members. The decision by CAAF in *United States v. Bartlett* invalidated an Army regulation that prohibited certain occupational specialties from being detailed as panel members.⁴⁷ The Court noted that convening authorities possess

Panel Member Selection Criteria

A Timeline Outlining Statutory Amendments and Case Law Affecting Panel Composition



⁴⁴ Article 25(e)(1).

⁴⁵ *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).

⁴⁶ *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)).

⁴⁷ *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008).

“broad power to detail any officer to a panel as long as the requirements of Article 25, UCMJ, are met.”⁴⁸

C. Detailing Court-Martial Panel Members and Trial Delays

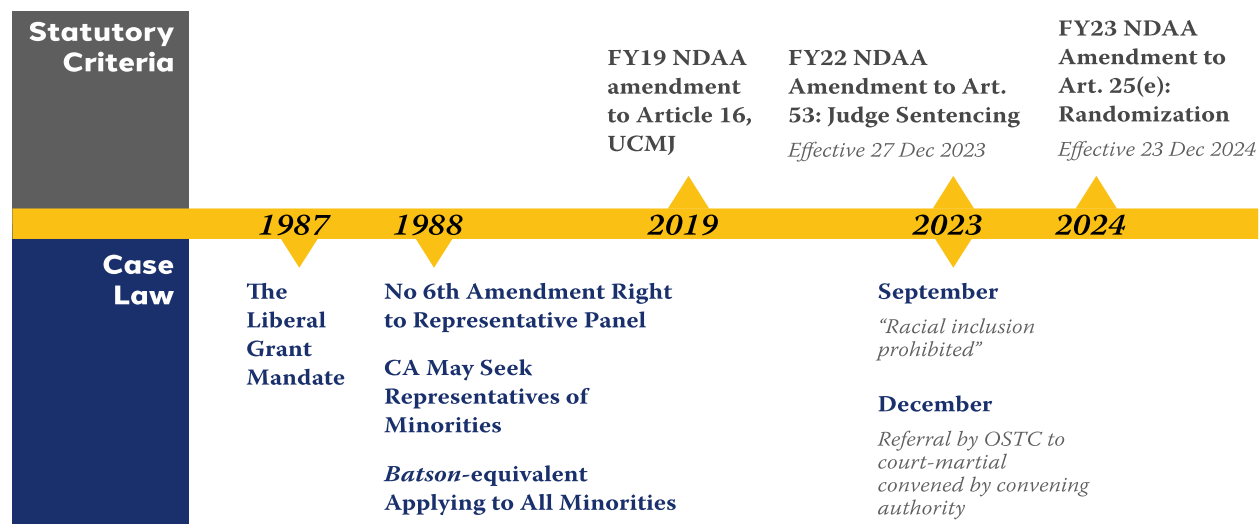
Article 25(e)(2) requires the convening authority to detail court-martial panel members at the time the court-martial is convened, when charges are referred.⁴⁹ It is not uncommon for months to elapse between the convening of the court-martial and the beginning of the trial. Members that were available to serve on the panel when the court-martial was convened may no longer be available, for reasons including military deployment or training, six months or more later when the court-martial begins. The Military Services, with the exception of the Air Force, therefore create “standing” convening orders, often on a yearly basis, under which all courts-martial of that type (special or general) are initially convened. In the absence of a trial date and with the knowledge that the trial may not be scheduled for several months, these standing convening orders often have “straw panels” detailed—essentially members included on the convening order without any 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 to the particular court-martial members 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.

[[Timeline is still being reworked](#)]

Panel Member Selection Criteria

A Timeline Outlining Statutory Amendments and Case Law Affecting Panel Composition



⁴⁸ *Id.* at 429.

⁴⁹ Art. 25(e)(2); R.C.M. 503(a) and R.C.M. 504(d)(1)(A)(ii).

The method used by the Air Force is slightly different. 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 as the process used by the other Military Services.

By an 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 and to determine how many of the detailed members must be present at the initial session of the court-martial.⁵⁰ The general process under the amended rule 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. Military judges then control the process: they randomly assign numbers to all detailed members in an open court session and determine how many of the detailed members appear at court for the initial session.⁵¹ At assembly (swearing in of the members), the military judge will account for the members present and those whom they have temporarily excused. The military judge then uses the list to require additional members to appear in the randomly assigned order, as needed.⁵² Under this new process, the additional members can continue to perform their regular military duties in a stand-by status until they are notified to appear in court.

III. Randomizing the Selection Process

In the FY23 NDAA, Congress amended Article 25(e), UCMJ, to require the convening authority to detail members “under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.”⁵³ The President must prescribe implementing regulations by December 23, 2024.⁵⁴ However, Congress did not eliminate the Article 25(e) requirement for convening authorities to detail members best qualified for duty.

The JSC has been tasked to propose amendments to the Manual for Courts-Martial to implement the congressional requirement for the convening authority to detail qualified members through random selection.⁵⁵

⁵⁰ Executive Order 14103, Annex 2, para. jjjj (July 28, 2023), *available at* <https://jsc.defense.gov/Military-Law/Executive-Orders/>. Previously, all detailed members that had not been excused were required to appear at the initial session.

⁵¹ *Id.*

⁵² Executive Order 14103, Annex 2, para. mmmm (July 28, 2023), *available at* <https://jsc.defense.gov/Military-Law/Executive-Orders/>.

⁵³ FY23 NDAA, *supra* note 2, §543.

⁵⁴ *Id.*

⁵⁵ *See Transcript of DAC-IPAD Public Meeting 13* (February 21, 2023) (testimony of Captain Anita Scott).

Randomizing the court-martial member selection process is not a new concept. On the contrary, it has been the subject of studies,⁵⁶ reports,⁵⁷ and scholarly articles⁵⁸ since the inception of the UCMJ. This section highlights several of these reviews.

A. Fort Riley, Kansas, Study (1973)

In 1973, the Army conducted a 13-month test of a randomized selection process at Fort Riley, Kansas.⁵⁹ Relying on selection criteria established by the GCMCA, a computer generated a randomized list of qualified Service members for the convening authority to use in detailing court-martial members.⁶⁰ Using this random selection method, 6 general courts-martial and 23 special courts-martial were tried before mixed officer and enlisted panels and 1 special court-martial was tried before an officer panel.⁶¹ The percentage of warrant officers and of 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.⁶²

Following the test period, affected community members provided their opinions on the random selection process.⁶³ Service members at Fort Riley favored randomization, noting an increase in both the appearance of fairness and the actual fairness of the process to the accused.⁶⁴ Trial counsel and the military judge voiced concern about the intelligence levels of members and their

⁵⁶ REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, Vol. II (Nov 30, 1972) [Laird Task Force Report] (Secretary of Defense—commissioned study recommending that court-martial members be randomly selected without convening authority involvement in the selection process); U.S. Government Accountability Office, *Military Jury System Needs Safeguards Found in Civilian Federal Courts* (June 6, 1977) [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) [JSC Member Selection Report].

⁵⁷ IRC Report, *supra* note 1; Honorable Walter T. Cox III et al., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001) [Cox Commission Report].

⁵⁸ Major S. A. Lamb, *The Court-Martial Panel Member Selection Process: A Critical Analysis*, 40th 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*, 16 DUKE J. COMPAR. & INT'L L. 169 (2006).

⁵⁹ JSC Member Selection Report, *supra* note 56, Appendix J—Past Experimentation and Studies (summarizing the Fort Riley random member selection test program).

⁶⁰ 1977 GAO Military Jury Report, *supra* note 56 at 26.

⁶¹ *Id.* at Appendix J at 4–5.

⁶² 1977 GAO Military Jury Report, *supra* note 56, at 26–29.

⁶³ *Id.* at 29 (800 questionnaires were distributed and 456 responses received; 86% of the responses were from field grade officers).

⁶⁴ *Id.* at 29; *see also* JSC Member Selection Report, *supra* note 56, 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).

ability to understand the evidence, instructions, and arguments by counsel,⁶⁵ while defense counsel credited the inclusion of a “broader range of grades and experience” with increasing actual and perceived fairness.⁶⁶ The Chief Counsel of the Coast Guard publicly commended the process, noting that commanders and defendants generally liked 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 that the members would not all be very senior enlisted.⁶⁷

B. GAO Review (1977)

The General Accounting Office (now called the Government Accountability Office, GAO) conducted a two-year study of civilian and military jury selection processes that included analysis of the Fort Riley test.⁶⁸ The GAO report, which was completed in 1977, 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.”⁶⁹

C. Joint Service Committee Study (1999)

In the FY99 NDAA, Congress directed the Secretary of Defense to submit a report on the processes for selecting court-martial members along with alternative methods, including random selection.⁷⁰ A limitation on the study was that the alternatives had to be consistent with the existing requirements for court-martial service specified in Article 25(e).⁷¹

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.”⁷² The JSC proposed that many of the randomization models could be modified to

⁶⁵ JSC Member Selection Report, *supra* note 56, Appendix J, Fort Riley Material, Memorandum For: Deputy Staff Judge Advocate, Subject: Remarks Concerning Random Juries, dated 20 Feb. 1975 from Trial Counsel, and Letter to Deputy Staff Judge Advocate, dated 13 Dec. 1974 from the Military Judge, at 5–9.

⁶⁶ *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.

⁶⁷ *Id.* at Appendix J at 31.

⁶⁸ *Id.* at Appendix J at 4.

⁶⁹ 1977 GAO Military Jury Report, *supra* note 56, at *i* and 44.

⁷⁰ National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, §552, 112 Stat. 1920 (1998).

⁷¹ JSC Member Selection Report, *supra* note 56, n.11 at 6 (noting alternatives that were determined to be beyond the scope of the study). The criteria identified in the report as in Article 25(d) are now located in Article 25(e)(2), UCMJ.

⁷² *Id.* at 8.

ensure the pool included Service members from all grades or ranges of grades senior to the accused.⁷³

In addition, the report emphasized the need for court-martial members to have a high level of competence, relying in part on two factors unique to the military that are no longer applicable to panel member duties.⁷⁴ First, unlike civilian jurors, court-martial members were responsible for adjudging a sentence, a task that 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.”⁷⁵ Second, 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.”⁷⁶

The JSC considered several methods of randomizing court-martial member selection while still adhering to the mandate in Article 25(e) that the best qualified members be chosen; it concluded the current selection practice best applied the criteria in Article 25(e) in a fair and efficient manner.⁷⁷

D. Cox Commission Report (2001)

The Cox Commission—a privately funded study sponsored by the National Institute of Military Justice and led by the Honorable Walter T. Cox III, who had previously served as Chief Judge on the Court of Appeals for the Armed Forces—held a public hearing and received written submissions on improving the military justice system. The commission issued a report in May 2001 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.”⁷⁸ 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.”⁷⁹ In making this recommendation, the commission stated:

There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the

⁷³ *Id.* at 21.

⁷⁴ *Id.* at 8, nn.21 and 22, and 12 (a third rationale was the presumption that “best qualified” members would more efficiently reach fair and accurate verdicts, thereby contributing to respect for the verdict and to the expeditious resolution of cases).

⁷⁵ *Id.* at 8, n.22. Effective December 2023, sentencing at all non-capital cases will be determined by military judges. FY22 NDAA, §539E.

⁷⁶ *Id.* Effective January 2019, military judges are required to preside at all special courts-martial. FY22 NDAA §5161.

⁷⁷ JSC Member Selection Report, *supra* note 56, at 47.

⁷⁸ Cox Commission Report, *supra* note 57.

⁷⁹ *Id.* at 7.

antiquated process of panel selection. The current practice is an invitation to mischief. It permits—indeed, requires—a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority.⁸⁰

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

On February 26, 2021, at the direction of the President, the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military (IRC) and directed its members to conduct a 90-day assessment of the military’s treatment of sexual assault and sexual harassment.⁸¹ In its June 2021 report, the IRC concluded that “there is a wide chasm between what senior leaders believe is happening under their commands, and what junior enlisted Service members actually experience,” resulting in broken trust between commanders and the Service men and women under their care.⁸² The IRC made numerous wide-ranging recommendations to correct problems in military justice and prevention processes, all of which the Secretary of Defense directed be studied and implemented to the extent feasible.⁸³

As part of its assessment, the IRC studied the court-martial panel selection process and recommended that Article 25 be amended to establish random selection of panel members in order to “enhance the perception and reality of a fair and impartial panel,” while acknowledging that the process should account for “practical realities of location and availability.”⁸⁴ The IRC’s recommended changes address the concern the IRC heard from many witnesses and noted in its report, “that commanders hand pick members to deliver desired court-martial results.”⁸⁵

IV. Stakeholder Perspectives

The DAC-IPAD’s Policy Subcommittee sent a request for information (RFI) to each of the Military Services’ criminal law/military justice organizations, Offices of Special Trial Counsel (OSTCs), trial defense organizations, and victims’ counsel organizations, requesting their responses to a series of questions on Article 25 criteria and panel selection, including the new requirement for randomization.⁸⁶ Each of these organizations also spoke at DAC-IPAD public

⁸⁰ *Id.* at 7.

⁸¹ *See* IRC Report, *supra* note 1.

⁸² *Id.* at 3–4.

⁸³ *See* Memorandum from Defense Secretary Lloyd Austin, *Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military* (Sept. 22, 2021).

⁸⁴ IRC Report, *supra* note 1, 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.

⁸⁵ *Id.* at 18.

⁸⁶ *See* DAC-IPAD Request for Information 2.9 (April 24, 2023) and responses from Service criminal law organizations, Offices of Special Trial Counsel, trial defense organizations, and victims’ counsel organizations, Appendix E and *available at* <https://dacipad.whs.mil/>.

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meetings or Policy Subcommittee meetings, answering members' questions on these topics. In addition, the DAC-IPAD heard the perspectives of senior enlisted leaders,⁸⁷ former general court-martial convening authorities (GCMCAs),⁸⁸ and several prosecutors with both military and civilian experience.⁸⁹

The Policy Subcommittee also invited responses to questions on these issues from several victim advocacy organizations and from scholars 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 several members of academia: Professor Eugene Fidell, Dean Lisa Schenk, Professor David Schlueter, and Professor Richard Rosen.⁹⁰

While perspectives differed on whether and how a randomized member selection process would work, on the convening authority's role in selecting members, and on the criteria that should be used for selection, each group and individual provided valuable insights to the Committee. Because the role of the convening authority in member selection is fundamental to the process, the Committee believes it is appropriate to highlight the testimony of the convening authorities who appeared before the Committee.

The former GCMCAs who spoke to the DAC-IPAD declared that the current Article 25 requirement that the convening authority select those members believed to be best qualified to serve on a court-martial panel should remain and is important for ensuring good order and discipline and military readiness, as well as promoting justice.⁹¹ They acknowledged the importance of the perception of fairness in the system, which can affect good order and discipline, with one member adding that he selected panel members mindful that the selection

⁸⁷ See *Transcript of DAC-IPAD Public Meeting* 163-215 (June 13, 2023) (testimony of 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).

⁸⁸ See *Transcript of DAC-IPAD Public Meeting* 112-220 (Sept. 19, 2023) (testimony Major General David Hodne, U.S. Army; Rear Admiral (Ret.) Charles Rock, U.S. Navy; Major General Kenneth Bibb, U.S. Air Force; Major General Len Anderson IV, U.S. Marine Corps; and Rear Admiral Brian Penoyer, U.S. Coast Guard).

⁸⁹ See *Transcript of DAC-IPAD Public Meeting* 100-162 (June 13, 2023) (testimony of Brigadier General Bobby Christine, Lieutenant Colonel (Promotable) Joshua Bearden, Ms. Magdalena Acevedo, and Ms. Kathleen Muldoon).

⁹⁰ 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; 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; Professor David Schlueter, Professor of Law Emeritus, St. Mary's University School of Law; and Professor Richard Rosen, Glenn D. West Endowed Research Professor of Law, Texas Tech University School of Law, and Colonel (Ret.), U.S. Army. Responses to the DAC-IPAD's request for information to these interest groups and members of academia can be found at Appendices K and L and are available at <https://dacipad.whs.mil/>.

⁹¹ *Transcript of DAC-IPAD Public Meeting* 119 (Sept. 19, 2023) (testimony of Major General Hodne).

must be perceived as fair and not as favoring those members most likely to convict.⁹² The GCMCAs expressed concern that a randomized system would not allow for evaluation of members' judicial temperament—a factor that is undefined in statute, but that the GCMCAs considered to be important in providing context to other criteria. They described applying the judicial temperament criterion to select members who possessed good judgment, sound reasoning skills, and emotional intelligence; who were open-minded; and who could think critically.⁹³ Several stated they used the “best qualified” mandate to provide diversity in the racial, ethnic, and gender makeup of the panel, cautioning that randomization would likely result in panels that were less diverse.⁹⁴ Some GCMCAs acknowledged that while they would not put all young Service members in the category of “best qualified,” most are capable of understanding the proceedings and participating in the process.⁹⁵

One member of the GCMCA panel disagreed with the claim that moving to a randomized selection process would lead to more trust and transparency in the system, stating that it is the convening authorities' involvement in the process that builds trust into the system.⁹⁶ Several of the GCMCAs agreed that a random selection process cannot replicate the convening authorities' ability to apply the Article 25 criteria, with an understanding of the pressures on the force and of the impact on mission capability. Convening authorities rely on this understanding in making availability determinations.⁹⁷ When asked about the perception that one individual is selecting the members, several noted that they selected members with input from their staff judge advocates.⁹⁸ Several GCMCAs suggested that because they believed a randomization system would create a less qualified panel, Service members would lose trust in the process.⁹⁹

In addition, several GCMCAs expressed the concern that randomization would eliminate the thorough prescreening necessary to facilitate detailing “best qualified” members and would require detailing of a larger number of members to allow for a greater number of members challenged for cause, placing a burden on the force and harming mission readiness.¹⁰⁰ Some on the panel also suggested that if randomization was instituted and the “best qualified” mandate eliminated, then the best way to get a more diverse panel overall might be an algorithm that

⁹² *Id.* at 154 (testimony of Major General Bibb).

⁹³ *Id.* at 119–20, 141, 160 (testimony of Major General Hodne); 144, 164–65, 178–79 (testimony of Major General Bibb); 157 (testimony of Major General Anderson); 158, 167–69, 173–74 (testimony of Rear Admiral Penoyer).

⁹⁴ *Id.* at 125–26 (testimony of Major General Bibb), 128 (testimony of Major General Hodne), 130 (testimony of Rear Admiral Penoyer). Note: this panel was held several days before CAAF issued the *United States v. Jeter* decision, which held that it is impermissible to use race as a factor in panel selection.

⁹⁵ *Id.* at 147 (testimony of Major General Anderson), 148 (testimony of Major General Bibb).

⁹⁶ *Id.* at 133–34 (testimony of Major General Hodne).

⁹⁷ *Transcript of DAC-IPAD Public Meeting* (Sept. 19, 2023): 133–34 (testimony of Major General Hodne), 134–35 (testimony of Major General Anderson), 135–36 (testimony of Major General Bibb).

⁹⁸ *Id.* at 154 (testimony of Major General Bibb), 155 (testimony of Major General Anderson).

⁹⁹ *Id.* at 156 (testimony of Major General Anderson), 196 (testimony of Rear Admiral Rock), 196 (testimony of Major General Bibb), 212–213 (testimony of Rear Admiral Penoyer).

¹⁰⁰ *Id.* at 197–98 (testimony of Major General Hodne), 200–201 (testimony of Rear Admiral Penoyer).

ensured a diversity of rank.¹⁰¹ One GCMCA pointed out that diversifying by rank would be a way to incorporate the Article 25 factors of training, experience, and age.¹⁰²

The collected RFI responses from many of these stakeholders are included at Appendices E, F, and G.

V. The Need for Change Now

A. Analysis

Since Article 25 was established in the UCMJ in 1950, there have been repeated calls to change the system of selecting court-martial panel members to something more objective and transparent, in large part because of concerns about fairness and the perception of fairness. Under the current process, the individual who decides whether the accused will be tried by court-martial and the offenses for which they will be tried is the same person who selects the panel members who will sit in judgment of the accused. This system creates the opportunity for intentional abuse or the unintentional insertion of bias, and as numerous prior studies have pointed out provides the appearance of unfairness. These concerns remain under the process beginning in December 2023, in which the Offices of Special Trial Counsel determine whether select offenses will be tried but the convening authority—whether or not they support the referral decision—retains power to select the panel members. The IRC pointed out in its June 2021 report that there is a lack of trust in the military justice system. Removing the convening authority from the selection process in favor of a randomized method will address concerns that the convening authority is selecting members who will deliver a desired result.

For decades—from the Fort Riley randomized panel selection test program and the GAO report on panel selection in 1977 to the 2001 Cox Commission to the 2021 IRC recommendations to institute randomized panel selection and remove the convening authority from the selection process—studies and reports have recognized that the current system in which the convening authority hand selects panel members using a subjective “best qualified” criterion creates a perception of bias and unfairness in the system.

Statutory changes to the UCMJ and technological advances, among other reasons, make clear that now is the time to finally change a system that has long been recognized as problematic. Congress acknowledged the need for change when it enacted a requirement for randomized panel selection in the FY23 NDAA.

One of the reasons repeatedly put forth for retaining the subjective “best qualified” mandate and the convening authority selection process is that military panel members have broader duties than their civilian jury counterparts, which require more complexity of thought. But following the institution of the trial judiciary in 1968; the statutory change requiring that all general and special courts-martial be presided over by a military judge, effective in 2019; and the statutory

¹⁰¹ *Id.* at 210 (testimony of Rear Admiral Rock), 213 (testimony of Major General Bibb).

¹⁰² *Id.* at 210 (testimony of Rear Admiral Rock).

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amendment requiring that all sentencing, except in capital cases, be conducted by the military judge, enacted in the FY22 NDAA, the role of military panel members will soon be virtually identical to the role of jurors in federal and most state systems.

In addition, the Military Services now can employ computerized rosters of all Service personnel to produce random selections of panel members based on objective criteria—such as requiring that all members have at least two years’ time in service and be senior in grade to the accused. This improved technology can be drawn on to increase efficiency, fairness, and objectivity in the panel selection process, without an increase in administrative requirements and regardless of location and operational posture.

Some stakeholders, including the panel of former general court-martial convening authorities who spoke to the Committee at its September 2023 public meeting, pointed out that under the current system convening authorities are able to select panel members in a way that purposefully includes members of minority groups, thereby helping to ensure diversity among panel members. Although this practice of selection mindful of race would be the most difficult to replicate under a randomized selection process, it is in fact no longer legally permissible following CAAF’s September 25, 2023, decision in *United States v. Jeter*. Going forward, panel member selection—by whatever process—must be race-blind. A randomized selection process that factors in diversity of grade and includes greater numbers of junior enlisted members may have the collateral effect of increasing the racial and ethnic diversity of panels.

While the Committee concludes that a randomized selection process involving objective selection criteria is the best practice, it also recommends that convening authorities should have the authority to make availability determinations and to excuse members for operational and personal reasons. This authority must be wielded with the utmost transparency to promote fairness and to prevent abuse, even as members’ privacy interests and operational security are taken into account.

Finally, the realities of modern practice make clear that requiring that panel members be detailed at the time that charges are referred and the court-martial is convened is impractical. Members who are available to sit as panel members at the time of referral are often no longer available many months later when the trial actually takes place. Separating the panel detailing requirement from the court-martial convening process will provide the Military Services with greater flexibility and will enable members to be selected closer in time to the trial, ensuring that fewer substitutions will be needed.

In enacting a requirement for a randomized selection process in the FY23 NDAA, Congress did not eliminate the requirement that the convening authority select the “best qualified” members as established by enumerated criteria. The Committee believes that a truly randomized selection process is incompatible with allowing the convening authority to make this subjective determination. For all of the reasons detailed in this report, the Committee recommends that Congress take the additional step of eliminating this requirement from Article 25.

Implementing a randomized system for selecting panel members on the basis of objective qualification criteria applied transparently will help restore confidence and trust in the military

justice system, increasing the perception of fairness among Service members and the public. It will reduce the potential for bias or favoritism in panel selection and promote a broader representation of military personnel, including different ranks, ages, backgrounds, and experiences. A selection process that is more transparent will be less susceptible to manipulation or undue influence.

Following the changes in the military justice system described above, courts-martial panel members are now performing the same role as jurors in civilian courts: there is thus no reason to retain the outdated, subjective panel selection system that has been the source of concern and the subject of reform proposals for almost as long as it has been in place. The legitimacy of the court-martial panel selection process depends on its being perceived by Service members and the public as fair, unbiased, and transparent. Now is the time to make these important changes.

B. Recommendations

The DAC-IPAD makes the following recommendations:

Recommendation 53: Congress should 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.”

Recommendation 54: Congress should retain the Article 25(e)(4) requirement for the convening authority to detail members randomly selected under regulations prescribed by the President. The qualifying words “to the maximum extent practicable” should be removed.

Recommendation 55: In prescribing rules for the randomized selection of qualified personnel pursuant to Article 25(e)(4), the President should provide for a randomized court-martial panel member selection process utilizing the Military Services’ personnel and pay systems to select the members. This process should preclude the convening authority or other members of command or the judge advocate office from hand selecting members. In addition to the statutory qualification requirements, the randomized selection process should provide for diversity of members based on grade.

Recommendation 56: The Secretary of Defense should direct that a pilot project be initiated to create a court administrator position to be responsible for the panel member selection process—rather than the staff judge advocate or command staff.

Recommendation 57: Congress should amend Article 25 to explicitly give 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 for operational requirements or personal reasons after they have been detailed.

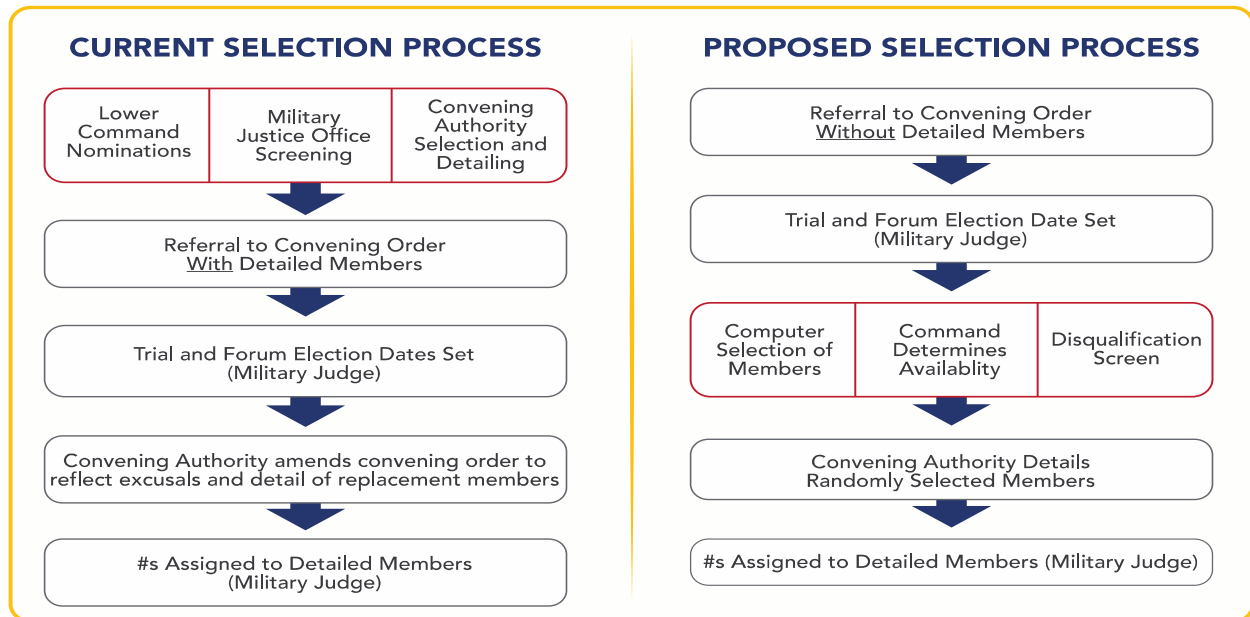
Recommendation 58: The President should amend the Rules for Courts-Martial to provide a transparent method for convening authorities to document availability and excusal determinations.

Recommendation 59: Retain 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.

Recommendation 60: Amend Article 25 to add a two-year time-in-service requirement for court-martial panel member eligibility. For Service Academy cadets and midshipman, the calculation of time in service would commence upon commissioning.

VI. Proposed Reforms to the Panel Member Selection Process

The following comparison chart depicts the flow of the current court-martial panel selection process described in detail in Section II of this report and the proposed court-martial panel selection process described below:



The proposed system will begin with referral of charges and the convening of the court-martial. Rather than members being detailed to the court-martial when it is convened, panel selection will take place later.

Following referral, the military judge will set a trial date and a date for the accused to elect whether to be tried by a panel of members or by a military judge. If the accused and government enter into a plea agreement requiring the accused to be tried by a military judge alone—or if the accused otherwise elects to be tried by a military judge—panel members will not be selected for the trial.

If the accused requests a panel of members to hear the case, or if forum election is deferred until the start of trial, the panel members will be selected in time for the appropriate number to be detailed to the courts-martial at least two weeks before the scheduled trial date.

To select panel members, using a database interface with the Service's personnel system, the official assigned to run the selection process directs the computer to select a random slate of military members (e.g., 100 members) from the command or from a certain geographic location. Because the selection of members is subject to a number of filters placed on the system, it is not completely randomized. These filters include

- Grade, and for the accused's grade, rank: members must, when possible, be senior to the accused
- Time in service: members must have at least two years in service
- Availability: those members who are in the system as deployed or TDY, or otherwise unavailable, during the trial dates are filtered out
- Diversity in grade and rank: to ensure diversity in grade on the panel, the numbers or percentages of randomly selected members by each enlisted grade (for enlisted accused) and officer grades are set

The Services already have the capability to use its personnel and pay system as the basis for generating a randomized pool of Service members for court-martial duty.¹⁰³ Each system maintains information on Service members' age, rank, time in service, education, location, unit, assignment, training, gender, race, ethnicity, and availability. Updated information for these mission-critical systems is generally added within 24 hours and the systems are accessible everywhere there is an internet connection. The Services are able to build or use existing analytical tools with a user interface in order to quickly and easily produce a computer-generated randomized list of panel members based on requirements programmed into the system. Lists can be generated based on units and/or locations. While some availability criteria would be in the systems (e.g., permanent change-of-station orders), follow-up with the commands and/or the Service members would be required to reliably determine future availability affected by leave, temporary duty (TDY), and other mission requirements. The depth of information available on each criterion varies by Service.

After selecting the initial pool of members using the randomized system, the selected members' commanders are notified and asked to make a recommendation regarding the availability of the members for the projected trial dates. The convening authority (or designee) makes final availability determinations and, if a member is determined to be unavailable, documents the reason in a way that provides transparency while protecting national security and the member's personal information.

The designated selection official will send courts-martial questionnaires to those selected members determined to be available in order to identify other disqualifying criteria as determined by statute, the President, or the Services (e.g., exclusion of members if they were the accuser, had served as preliminary hearing officer or counsel, will be witnesses in the case, have

¹⁰³ As part of this study, DAC-IPAD staff interviewed experts on the Services Personnel and Pay Systems (hereinafter Personnel Systems) to determine what information relevant to court-martial member selection 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.

been convicted of a felony, are under criminal investigation, or are in confinement). The designated selection official will review the questionnaires and remove disqualified members from the list.

After the modified randomized selection process picks the designated number of panel members and those members determined to be unavailable or otherwise disqualified have been removed from the list, the remaining members are detailed to the court-martial by the convening authority. The members are notified that they have been detailed and are required to inform the designated selection official of any changes that would preclude them from participating in the court-martial during the projected dates of trial.

The list of detailed members is then provided to the military judge, who randomly assigns numbers to the detailed members and determines the number that are required to appear at the court-martial. The members selected to appear at the court-martial are notified and provided instructions on where and when to be present for court-martial duty. The remaining members are notified that they should remain available during the projected dates of trial in case they are needed.

If need arises between the time that members are detailed and the court assembles, the convening authority or designee may, upon request of the panel member and their commander, excuse the member. If this request occurs after assembly of the court, the convening authority may excuse a member only for good cause. The excusal must be documented in a way that provides transparency while protecting national security and the member's personal information.

If the trial is delayed after the members have been detailed but prior to assembly, the convening authority may excuse detailed members who are not available for the new trial dates. Excused members will be replaced by previously detailed members in the numerical order previously prescribed by the military judge. If, after excusals, additional members are required, the designated selection official will use the modified randomized selection process discussed above to select a cohort of additional members available for detail to the court by the convening authority. The list of additional members will be provided to the military judge for random assignment of numbers.

The Military Services should have some discretion and flexibility to modify this system as best meets their needs. For example, members may be selected for each court-martial, or members may be selected in a pool from which the members of each court-martial are drawn for a prescribed period of time (e.g., six months).

VII. Conclusion

To increase Service members' trust in the court-martial process, the outdated, subjective panel selection system must evolve. Congress recognized this need by enacting a requirement for a randomized panel selection process. The DAC-IPAD recommends Congress take the next step in fully implementing this process by eliminating the Article 25 "best qualified" mandate and replacing it with objective selection criteria, applied transparently.

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The Committee believes this holistic restructuring of the panel selection process appropriately takes into account the need for objectivity and transparency, the reduced role of court-martial panel members, technological advancements available to implement random selection, and the necessity for convening authorities to retain availability and excusal determination authority. In addition, detailing panel members closer in time to the trial date acknowledges that many accused Service members elect trial by military judge alone and the increased length of time between referral of charges and the start of court-martial proceedings.

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

RECOMMENDATIONS FOR A UNIFORM POLICY
FOR SHARING INFORMATION WITH VICTIMS
AND THEIR COUNSEL

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I. INTRODUCTION AND RECOMMENDATIONS

In 2014, Congress codified the rights of crime victims in the Uniform Code of Military Justice (UCMJ),¹ aligning the military’s legal landscape with federal civilian practice under the Crime Victim’s Rights Act.² In the same legislation, Congress required each Military Service to develop special victims’ counsel programs to represent victims of sex-related offenses throughout the military justice process. These important rights, including the right to legal representation, have been implemented through changes to the Manual for Courts-Martial, in case law, and in policies prescribed by the Military Services.

Victims’ counsel programs—both military and civilian—have proven instrumental in identifying the need for additional mechanisms to uphold victims’ interests and procedural rights. Two common themes are the value of increasing transparency in the military justice process and the need to provide victims with information that is critical to a meaningful exercise of their rights.

Congress, in response to these concerns, tasked the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to submit a report on “the feasibility and advisability of establishing a uniform policy for the sharing of the 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).”³ The task requires the DAC-IPAD to assess the sharing of information in the following three categories:

- (1) Any recorded statements of the victim to investigators.
- (2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government.
- (3) Any medical record of the victim that is in the possession of investigators or the Government.⁴

The Committee recognizes that while the Department of Defense (DoD) and the Military Services have developed policies regarding the sharing of these items, the establishment of a uniform and comprehensive policy would enhance trust in the system and bring much-needed

¹ National Defense Authorization Act for Fiscal Year 2014 [FY14 NDAA], Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013), 10 U.S.C. § 806b. *See also* FY14 NDAA, § 1716(a), amending Title 10, Section 1044e, of the United States Code to require special victims’ counsel programs within each military Service for the purpose of “providing legal assistance to military victims of sexual assault.” The following groups may be eligible for representation by special victim’s counsel: active duty Service members and their dependents, Reserve and National Guard members when on active duty or inactive training duty and their dependents, retired Service members and their dependents, certain civilians overseas, and, on request, child victims when the accused is subject to court-martial.

² 18 U.S.C. § 3771.

³ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 [FY23 NDAA], § 549B(a), 136 Stat. 2395 (2022), *available at* Appendix A.

⁴ FY23 NDAA, *supra* note 3, at § 549B(c).

transparency to an increasingly complex criminal investigation and justice process. Therefore, this Committee makes the following recommendations.

DAC-IPAD Recommendation 63: That the President amend the Rules for Courts-Martial to establish uniformity with respect to the sharing of the following information with a victim and their counsel, if represented:

1. All recorded and written statements of the victim to investigators or government counsel.
2. The record of any medical forensic examination of the person or property of the victim, including the record of any sexual assault medical forensic exam of the victim that is in the possession of investigators or the government.
3. Any other medical record of the victim that is in the possession of investigators or the government.

The rules should specify that these three categories of information, including copies of statements, recordings, or documents, shall be made available promptly upon request by a victim or their counsel, subject to the following conditions:

1. The prosecutor shall disclose the information requested promptly, in consultation with the military criminal investigation organization (MCIO), unless otherwise prohibited by law, or unless the prosecutor determines, with good cause, that disclosure would impede or compromise an ongoing investigation. If so, the prosecutor shall state in writing any reasons for nondisclosure and may do so in camera to a military judge or a military magistrate;
2. Disclosure of these three categories of information may be subject to a protective order if sought by the prosecutor upon a showing of good cause; and
3. The rules should include a provision that ensures in any case that the policy must not be construed to interfere with the provision of health care to a victim or with a victim's access to veterans' benefits.

DAC-IPAD Recommendation 64: That the President amend the Rules for Courts-Martial to provide a process for issuance of a protective order by a military judge, upon a showing of good cause, to accompany disclosures to victims and counsel, in accordance with Article 30a, UCMJ.

DAC-IPAD Recommendation 65: That the Secretary of Defense should modify DoD instructions to align with the new rules for sharing these three categories of information.

II. BACKGROUND AND METHODOLOGY

In the National Defense Authorization Act for Fiscal Year 2023, Congress tasked the DAC-IPAD to submit a report on “the feasibility and advisability of establishing a uniform policy for the sharing of the 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).”⁵ The task requires the DAC-IPAD to assess the sharing of any recorded statements of the victim to investigators, the record of any medical forensic examination of the person or property of the victim, including the record of any sexual assault medical forensic exam of the victim, and any other medical record of the victim that is in the possession of investigators or the government.⁶

Victims are key stakeholders in policies related to the collection, use, and release of their own information during the military justice process. Once a crime is reported to law enforcement, victims provide crucial evidence to investigators and those responsible for the disposition of criminal offenses in the military. Victim’s rights experts have described the significance and sensitivity of this information:

These records may include private information about victims, such as information about victims’ mental or medical health, and their home, employment, family and more. Because of the private nature of these types of records, their potential disclosure . . . implicates victims’ rights and interests—including the rights to protection, privacy and to be treated fairly and with dignity and respect[.]⁷

To understand the current policies and practices for handling this sensitive information, the Committee reviewed existing DoD and Service-specific policies and heard from key stakeholders, including civilian and military victim’s counsel, victim advocates, prosecutors, defense counsel, military criminal investigators, and military justice policy experts. The Committee found that existing policies address the disclosure of a victim’s statements, medical forensic examinations and other medical records; however, these policies do not speak uniformly or clearly to circumstances involving the sharing of this information with victims and, if represented, with their counsel. Importantly, the Committee notes that in practice, unrepresented victims do not always receive the same information provided to counsel representing a victim. Therefore, the Committee seeks to ensure that a uniform policy protects the rights of all victims, not merely those who retain lawyers.

The Committee’s report and recommendations focus on the need to clarify how information may be shared with all crime victims under the UCMJ, regardless of whether they choose and are able to obtain legal representation. In addition, the Committee considered the potential effect of a

⁵ FY23 NDAA, *supra* note 3, § 549B(a).

⁶ *Id.* at § 549B(c).

⁷ National Crime Victim’s Law Institute *Protecting Victims’ Rights and Interests in the Context of Open Records Laws*, Victim Law Bulletin, 1 (Feb. 2020), available at <https://ncvli.org/protecting-victims-rights-and-interests-in-the-context-of-open-record-laws-2020>.

uniform policy on the privacy of individuals involved in the justice process, and on the military justice system in general.⁸ Finally, the Committee considered when in the military justice process information should be shared with victims, as well as circumstances under which information sharing may be restricted.

III. ANALYSIS

The DAC-IPAD finds that a uniform policy is both feasible and advisable with respect to sharing the following information with a victim and their counsel, if represented:

- (1) All recorded and written statements of the victim to investigators or government counsel.
- (2) The record of any medical forensic examination of the person or property of the victim, including the record of any sexual assault medical forensic exam of the victim that is in the possession of investigators or the government.
- (3) Any other medical record of the victim that is in the possession of investigators or the government.

Although existing DoD and Service policies address disclosure of these three categories of information, in some areas current DoD instructions do not provide clear guidance.⁹ For example, a victim's statements, the results of medical forensic exams¹⁰, and other medical records are maintained for different purposes and by different records custodians, including military criminal investigation organizations (MCIOs), military prosecutors, and military treatment facilities or civilian health care providers. A uniform policy would eliminate the barriers that currently exist when victims seek information from multiple records custodians who operate under different regulations.¹¹

⁸ As tasked by FY23 NDAA, *supra* note 3, § 549B(b).

⁹ See DoD Instruction 1030.02, *Victim and Witness Assistance* (July 27, 2023) (paragraph 3.2.c, directing investigators to inform victims of the status of the investigation to the extent such information does not interfere with investigation); DoD Instruction 6495.02, Vol. 1, *Sexual Assault Prevention and Response: Program Procedures* (Mar. 28, 2013) (Incorporating Change 7, Sept. 6, 2022) [DoDI 6495.02] (Enclosure 7a.(12)b. requiring that the sexual assault victim be given hard copy of the completed DoD Sexual Assault Forensic Examination (SAFE) Report DD 2911); see also DD Form 2701, *Initial Information for Victims & Witnesses of Crime* (Oct. 2022) [DD Form 2701] (requiring that the victim be informed of any result of a sexual assault evidence collection kit if disclosure would not impede or compromise an ongoing investigation).

¹⁰ The results of medical forensic exams may include DNA results, toxicology reports, pregnancy tests, films on a strangulation patient, or other results from samples collected at the exam.

¹¹ The statutory task assigned to the DAC-IPAD broadly covers medical forensic examinations of the person or property of the victim. The DAC-IPAD recognizes that forensic evidence may include not just the results of a SAFE exam but also examinations of electronic communications and devices.

The timing of the release of information also varies among the Services.¹² All the Services provide a copy of the victim's recorded statement to victims or to victim's counsel, although their practice varies: some provide it upon request and others wait until after charges are preferred.¹³ In some cases, a victim's request for investigative reports and related documents may be processed in accordance with the DoD Freedom of Information Act (FOIA) program, often a lengthy and time-consuming process.¹⁴ In at least one Service, a victim's counsel's request for investigative reports is treated as an official-use or routine-use request by counsel for purposes of furthering their representation but may not be shared with the victim-client.¹⁵

In testimony and written responses to the DAC-IPAD, all the Services agreed that a uniform policy for the sharing of information with victims is feasible and advisable.¹⁶ Accordingly, the DAC-IPAD recommends that the Joint Service Committee on Military Justice develop a proposal for the President to amend the Rules for Courts-Martial as follows:

- The three categories of information discussed above, including copies of statements, recordings, or documents, should be shared with victims promptly upon request, regardless of whether the victim has retained counsel, unless disclosure would impede or compromise an investigation or is otherwise prohibited by law.
- In cases in which disclosure would impede or compromise an investigation, prosecutors should seek a protective order from a military judge or magistrate that may limit the victim's use of that information or their ability to disclose it to third parties pursuant to the pre-referral authority of Article 30a, UCMJ.
- A military judge or magistrate may issue a protective order to accompany disclosures to the victim of these three categories of information only upon a showing of good cause. A protective order may limit the victim's use of the information or prohibit further dissemination to persons other than the victim, counsel, or medical providers.
- Prosecutors are responsible for promptly providing the requested information to the victim or their counsel.
- The uniform policy should include a provision to ensure that it does not interfere with the provision of health care to a victim or prevent their access to veterans' benefits.

The DAC-IPAD considered the advisability of an automatic disclosure rule, but chose instead to make these targeted recommendations, which aim to protect the privacy of individuals, the

¹² Appendix B to this report summarizes the Military Services' responses to DACI-PAD Request for Information Set 3.0 (May 1, 2023).

¹³ *Id.*

¹⁴ See DoDI 1030.02, *supra* note 9 (paragraph 3.2.d, requiring a victim's request for investigative reports and related documents to be processed in accordance with DoD Manual 5400.07, *DoD FOIA Program* (Apr. 5, 2019)). Notably, this DACI-PAD report and these recommendations do not address or propose changes to FOIA, because FOIA is a separate authority with a different purpose.

¹⁵ See AF Instruction 51-201, *Administration of Military Justice* (April 14, 2022) (Section 8b, paras. 8.4-8.5 directing victims' counsel to file official or routine use requests under the Privacy Act or FOIA for access to information).

¹⁶ See generally *Transcript of DAC-IPAD Public Meeting 9–215* (June 13, 2023); transcripts of all DAC-IPAD public meetings can be found on the DAC-IPAD website at <https://dacipad.whs.mil>. See also Appendix B.

integrity of the criminal investigative process, and the military justice system generally. When making this assessment, the DAC-IPAD evaluated policies in the civilian courts that govern sharing these categories of information with victims. The DAC-IPAD also considered the Services' policies and practices, the views of the military criminal investigative organizations (MCIOs), and perspectives from the military victims' counsel programs.¹⁷ The Committee heard testimony about the complexity of cases involving interpersonal violence. Victims may become potential targets when they are in possession of documents in a criminal case. The complexity of interpersonal relationships in a criminal case may affect an investigation or prosecution, perhaps influencing the testimony of potential witnesses.

The establishment of a uniform policy is particularly timely now, because of the creation of the new Offices of Special Trial Counsel. Uniform access to information addresses concerns about trust in the system and the importance of transparency for victims. A uniform policy would not require statutory change: it can be accomplished through an executive order, accompanied by implementing policies issued by DoD and the Military Services.

A. Timelines for Disclosure of Information

To ensure a victim's timely access to this information, the Secretary of Defense should update DoD instructions and forms, including DD Form 2701,¹⁸ so that victims are informed of their right to these three categories of information and the prosecutor's responsibility to provide the specific information promptly upon request. In particular, victims who are unrepresented by counsel need to know what information they are entitled to receive and how to request access to this material. Whether a victim makes a restricted or unrestricted report, the victim and witness assistance programs and policies must clearly explain how to obtain this information and ensure that the process is easy and prompt. Finally, the policy should make clear that release should not be delayed until preferral of charges in a case.¹⁹

These recommendations recognize that the victim may independently access their own medical records at any time without submitting a request through the prosecutor. A victim may be a patient receiving medical treatment. In such cases, the victim will have access to their medical information well in advance of litigation. For example, if a victim tested positive for a sexually transmitted infection, the treating physician would have shared that information long before any legal process was under way.²⁰ Thus, the timeline for receipt of medical information often differs from that for the other categories of information. The recommended uniform policy must ensure that the rules do not interfere with a victim's access to medical care or to veterans' benefits. The

¹⁷ *Transcript of DAC-IPAD Public Meeting* pp. 9-162 (June 13, 2023).

¹⁸ DD Form 2701, *supra* note 9, which is prescribed by DoD Instruction 1030.02, *supra* note 9, provides initial information for victims and witnesses of crime as required by the DoD Victim and Witness Assistance Program.

¹⁹ *Transcript of DAC-IPAD Public Meeting* 100 (June 14, 2023) (testimony of Mr. Ryan Guilds, civilian victims' counsel).

²⁰ Defense Health Agency Procedural Instruction Number 6310.01, *Healthcare Management of Patients Associated with Interpersonal Violence and the Department of Defense Forensic Healthcare Program* (Aug. 10, 2023) [DHA Procedural Instruction Number 6310.01]; DoDI 6495.02, *supra* note 9.

policy also must recognize that a victim has an interest in knowing what medical records are in the possession of investigators.

B. Circumstances in Which Information Should Not Be Shared

The DAC-IPAD recognizes that in some limited circumstances, disclosure of information to third parties may impede an ongoing investigation or perhaps endanger a victim of domestic violence. For example, a victim could use a statement in their possession to influence the testimony of other witnesses. The prosecutor may want to limit the victim from sharing that statement with people other than counsel.

In addition, the military defense counsel expressed concerns about giving a victim access to investigative materials or records that include third parties' observations, opinions, and conclusions, including those of medical, pathology, or toxicology experts.²¹ From the defense perspective, giving the victim records of forensic examinations of their person or property, including photographs, could harm the fairness of the court-martial process by intentionally or unintentionally contaminating their testimony, because observations by those seeking to preserve and collect evidence, including photographs, could distort, taint, or color the witness's recollection.²²

In those circumstances in which good cause can be shown for the need to protect the integrity of an investigation, the DAC-IPAD recommends that the Rules for Courts-Martial be amended to provide a process for a prosecutor to seek a protective order from a military judge or magistrate, including pursuant to Article 30a, UCMJ. The protective order must be narrowly tailored in its limitations on accessing the information or in its prohibitions on dissemination to persons other than the victim, counsel, or medical providers. In addition, the process for obtaining a protective order must be subject to challenge by the victim and must provide an opportunity for the military judge or magistrate to consider the victim's views on the request for a protective order. An in camera review by the judge or magistrate of the prosecution's request for a protective order may be appropriate and should be part of the uniform policy.

In any case, a protective order should not be construed as preventing a victim from receiving or sharing information that is required for medical care. Information in a victim's records also may need to be shared with state or federal agencies when veterans' benefits are sought. The Defense Health Agency recently issued guidance on the need for a patient-centered, trauma-informed health care response when a patient discloses interpersonal violence such as sexual assault, domestic violence, intimate partner violence, child abuse and neglect, or other acts of unwanted violence.²³ These new policies require coordinated health care, including forensic health care and sexual assault medical forensic examinations (SAFEs), for patients both within military medical facilities and in remote and operational environments.²⁴

²¹ See Appendix B, Sec. IV.C.1-3.

²² *Id.*

²³ DHA Procedural Instruction Number 6310.01, *supra* note 19.

²⁴ *Id.*

C. Recommendations for Regulatory Action

Recommendation 1, to establish a uniform policy for sharing the three categories of information, would require updates to DoD policies and procedures. Recommendations 2 and 3 would task the Joint Service Committee on Military Justice to develop a uniform policy and to ensure that appropriate DoD instructions and forms are aligned. For example, the Rules for Court-Martial should be amended to include a process for the military judge or magistrate to issue a protective order, pursuant to Article 30a, UCMJ, in those limited circumstances when the government has good cause to believe that disclosure to third parties would compromise an ongoing investigation.



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

Panel Selection Study

December 6, 2023

Dr. William Wells, Ms. Kate Tagert,
Ms. Stacy Boggess, and Ms. Nalini Gupta



Purpose of the Study

- (1) Understand the demographics of panel members, judge advocates, **victims**, and the accused.
- (2) Obtain data about multiple stages of the selection process that lead to impanelment.
- (3) Understand the feasibility of collecting data and information concerning panel selection from the Service branches.

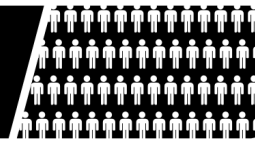


Importance of the Study

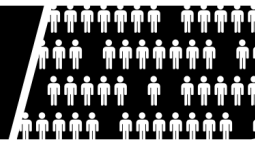
- (1) No study exists on the race, gender, and ethnicity of detailed and/or impaneled military members.
- (2) The results of this study will establish a baseline for potential further study on the impact of:
 - U.S. v. Jeter*
 - Randomization selection (**December 2023**)



All Personnel in Command



Command Roster



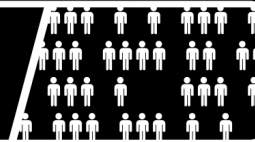
Subordinate commander
nominates personnel

Subordinate commander
nominates personnel

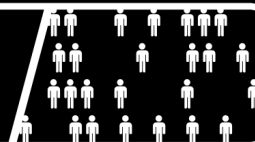
Subordinate commander
nominates personnel



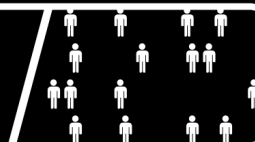
SJA refers nominees to Convening Authority



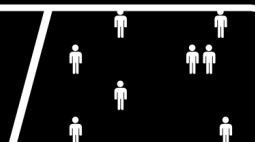
Convening Authority details members and creates court-martial



Voir dire and challenges for cause



MJ impanels members





	Frequency	Percentage
10 Members	3	2.4
12 Members	4	3.2
13 Members	5	4.0
14 Members	53	42.7
15 Members	7	5.6
16 Members	19	15.3
17 Members	1	.8
18 Members	5	4.0
19 Members	4	3.2
20 Members	13	10.5
21 Members	5	4.0
23 Members	2	1.6
24 Members	1	.8
25 Members	1	.8
28 Members	1	.8
Total	124	100



Panel Selection Process After Assembly of the Court: Challenges for Cause

Challenges for cause (statutory disqualifications, bias, or matters that impact accused's right to an impartial court).

- **Actual bias:** a subjective standard which asks whether a challenged member's bias is so inflexible that they cannot yield to the evidence presented and the judge's instructions.
- **Implied bias:** an objective standard which asks whether the system's appearance of fairness would be questioned if the challenged member served on the panel.



Panel Selection Process After Assembly of the Court: Liberal Grant Mandate

Military judges must liberally grant defense challenges for cause. *U.S. v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005)

Reasons:

- Only 1 peremptory challenge.
- Manner of appointment of court-martial members
“present perils that are not encountered elsewhere.”



Panel Selection Process After Assembly of the Court: Randomization and Peremptory Challenges

- (1) After challenges for cause are decided, if necessary, the judge will direct that each remaining member be assigned a random number.
- (2) Peremptory challenges are applied to those remaining members and the requisite number of members are impaneled.



Methodology

DAC-IPAD staff reviewed the following documents and recorded the following data points:

- Convening orders (information on detailed members)
- Transcripts/Trial Audio (impaneled members, reasons for exclusion, information on court personnel)
- Randomization documents (exclusion)
- Entry of judgment (outcome of case, forum, and accused information)



Complications

- Documents not searchable
- Transfer and download of audios and review of documents were labor intensive



Total Data Fields: Contested Courts-Martial (Sexual Assault Cases)

Fiscal Year 2021 / 2022

Number of Accused and Panel Member Data Fields

Service	Cases Reviewed	Case / Accused Data Fields (17)	Panel Member	Panel Member Data Fields (10)	Total Data Fields
Army	124	2,108	1,965	19,650	21,758
Marine Corps	41	697	690	6,900	7,597
Navy	51	867	907	9,070	9,937
Air Force / Space Force*	61	1,037	1,093	10,930	11,967
Coast Guard	TBD	TBD	TBD	TBD	TBD
Total	277	4,709	4,655	46,550	51,259

*As of November 30, 2023



Analysis Plan

Part 1: Summarizes information about the courts-martial in terms of the accused and case outcomes.

Part 2: Combines all individuals involved in the cases, including the service members detailed in the cases, the service members impaneled, judges, defense counsel, and trial counsel. Summarizes information about these individuals.



Analysis Plan (continued)

Part 3: Presents information about the details and the panels that were part of the cases. Information in this section summarizes *characteristics of cases* as opposed to individual-level information. For part 3 of the analysis, information about individuals is grouped together at the *case level*. The case is considered the unit of analysis in this section; information pertains to cases.



Results: Part 1

124 contested sexual assault courts-martial cases

Fiscal Year 2021 = 72 cases (58.1%)

Fiscal Year 2022 = 52 cases (41.9%)

Race and ethnicity of the accused

	Frequency	Percentage
White, not Hispanic	49	39.5
Black, not Hispanic	37	29.8
Hispanic	27	21.8
Asian or Pacific Islander	6	4.8
American Indian or Alaskan Native	2	1.6
Missing	3	2.4



Results: Part 1

Gender of accused = 119 male (96%)

Rank of accused = 113 enlisted (91.1%)

Case adjudication on 120 offense

Acquitted = 73 (58.9%)

Guilty = 51 (41.1%)

All officer panel = 19 (15.3%)



Results: Part 2

Race and ethnicity of detailed members

	Frequency	Percentage
White, not Hispanic	1001	50.9
Black, not Hispanic	431	21.9
Hispanic	266	13.5
Asian or Pacific Islander	116	5.9
American Indian or Alaskan Native	15	.8
Missing Data	136	6.9
Total	1965	100



Army Demographics: FY2022

463,083 Active Duty Service Members

Male service members = 84.3% (390,605)

Female service members = 15.7% (72,478)

Race and ethnicity

	Frequency	Percentage
White, not Hispanic	248,054	53.6
Black, not Hispanic	93,874	20.3
Hispanic	81,281	17.6
Asian or Pacific Islander	31,984	6.9
American Indian or Alaskan Native	4,054	0.9
Unknown / Other	3,836	0.8



Results: Part 2

Race and ethnicity of detailed members

	Frequency	Percentage
White, not Hispanic	1001	50.9
Minority Race and Ethnic Groups	828	42.1
Unknown/Other	136	6.9
Total	1965	100



Army Demographics: FY2022

Race and ethnicity aggregated into two categories

	Frequency	Percentage
White, not Hispanic	248,054	54.0
Minority Race and Ethnic Groups	211,193	46.0

Representation of race, ethnicity, and gender within ranks

	Enlisted	Officer
White, not Hispanic	49.7%	67.9%
Minority Race and Ethnic Groups	49.8%	29.8%
Unknown/Other	0.4%	2.4%
Male	85.2%	81.0%
Female	14.8%	19.0%



Results: Part 2

Impaneled members

	Frequency	Percentage
Impaneled	960	48.9
Not Impaneled	1005	51.1
Total	1965	100



Results: Part 2

Impaneled members by race and ethnicity

	White, not Hispanic	Minority Service Members	Total
Impaneled	487 (48.7%)	402 (48.6%)	889 (48.6%)
Not Impaneled	514 (51.3%)	426 (51.4%)	940 (51.4%)
Total	1001 (100%)	828 (100%)	1829 (100%)



Results: Part 2

Race and ethnicity of service members not impaneled and reason for excusal

	White, not Hispanic	Minority Service Members	Total
Challenge for cause	337 (65.6%)	279 (65.5%)	616 (65.5%)
Peremptory challenge	94 (18.3%)	68 (16.0%)	162 (17.2%)
Randomization	80 (15.6%)	74 (17.4%)	154 (16.4%)
Other reason	3 (0.6%)	5 (1.2%)	8 (0.9%)
Total	514 (100%)	426 (100%)	940 (100%)



Results: Part 2

Gender of detailed members

	Frequency	Percentage
Male	1478	75.2
Female	397	20.2
Missing Data	90	4.6
Total	1965	100



Results: Part 2

Gender of impaneled members

	Female	Male	Total
Impaneled	150 (37.8%)	763 (51.6%)	913 (48.7%)
Not Impaneled	247 (62.2%)	715 (48.4%)	962 (51.3%)
Total	397 (100%)	1478 (100%)	1875 (100%)



Results: Part 2

Gender of service members not impaneled and reason for excusal

	Female	Male	Total
Challenge for cause	162 (65.6%)	468 (65.5%)	630 (65.5%)
Peremptory challenge	44 (17.8%)	124 (17.3%)	168 (17.5%)
Randomization	40 (16.2%)	116 (16.6%)	156 (16.2%)
Other reason	1 (0.4%)	7 (1.0%)	8 (0.8%)
Total	247 (100%)	715 (100%)	962 (100%)



Results: Part 2

Race, ethnicity, and gender of detailed members

	Frequency	Percentage
White, not Hispanic Male	839	42.7
White, not Hispanic Female	162	8.2
Minority Male Service Member	604	30.7
Minority Female Service member	224	11.4
Missing Data	136	6.9
Total	1965	100



Results: Part 2

Race, Ethnicity, and Gender of impaneled members

	White, not Hispanic Female	Minority Female Service Member	White, not Hispanic Male	Minority Male Service Member	Total
Impaneled	47 (29.0%)	97 (43.3%)	440 (52.4%)	305 (50.5%)	889 (48.6%)
Not Impaneled	115 (71.0%)	127 (56.7%)	399 (47.6%)	299 (49.5%)	940 (51.4%)
Total	162 (100%)	224 (100%)	839 (100%)	604 (100%)	1829 (100%)



Results: Part 2

Race, ethnicity, and gender of service members not impaneled and reason for excusal

	White, not Hispanic Female	Minority Female Service Members	White, not Hispanic Male	Minority Male Service Members	Total
Challenge for cause	75 (65.2%)	83 (65.4%)	262 (65.6%)	196 (65.6%)	616 (65.6%)
Peremptory challenge	23 (20.0%)	20 (15.7%)	71 (17.8%)	48 (16.1%)	162 (17.2%)
Randomization	17 (14.8%)	23 (18.1%)	63 (15.8%)	51 (17.1%)	154 (16.4%)
Other reason	0 (0%)	1 (0.8%)	3 (0.8%)	4 (1.3%)	8 (0.9%)
Total	115 (100%)	127 (100%)	399 (100%)	299 (100%)	940 (100%)



Results: Part 3

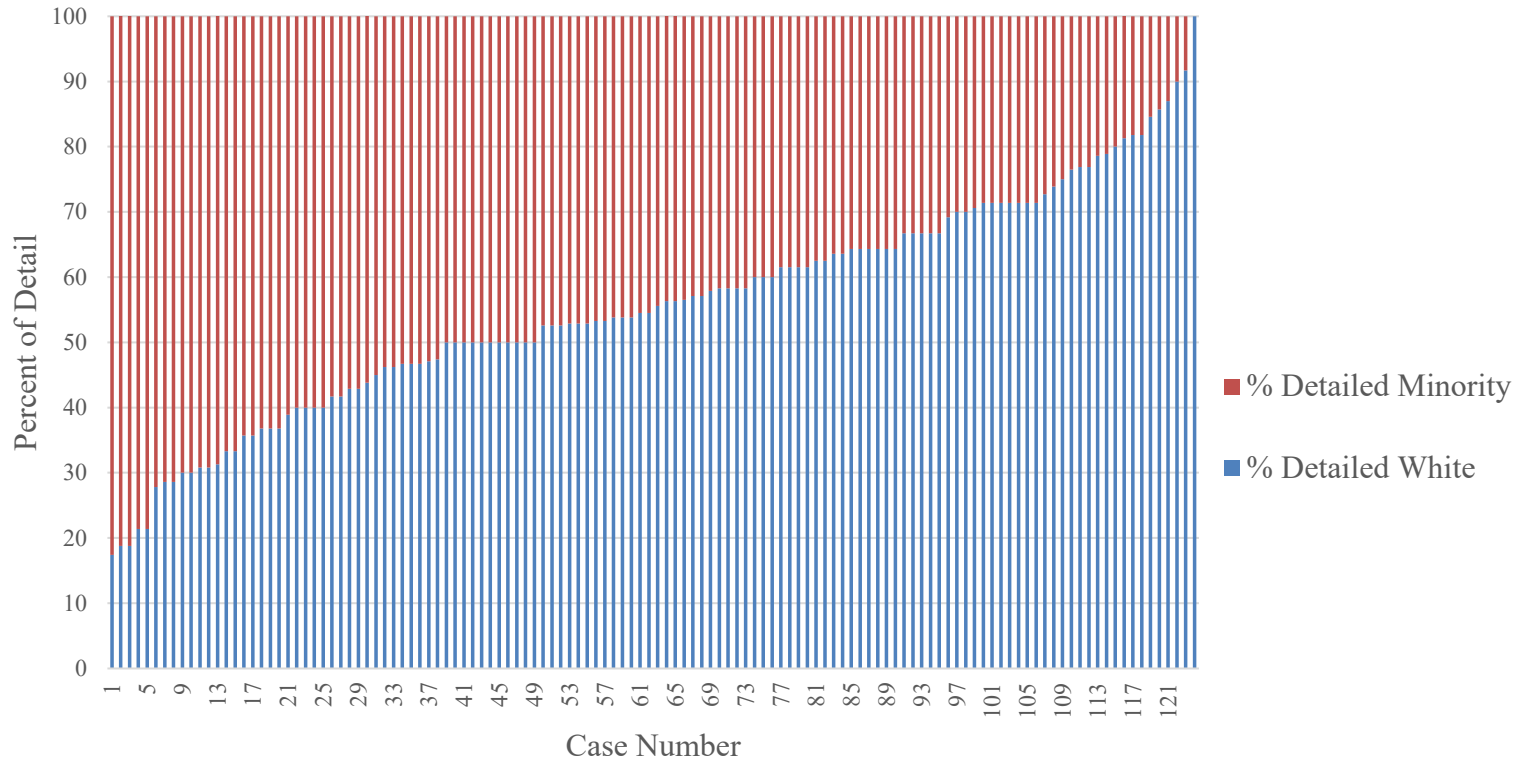
Representation of race and ethnicity of service members detailed

	Average	Std. Deviation	Minimum	Maximum
Percent of Detailed Members Comprised of White, not Hispanic Members	55.6%	16.9%	17.4%	100%
Percent of Detailed Members Comprised of Racial and Ethnic Minority Members	44.4%	16.9%	0%	82.6%



Results: Part 3

Race/Ethnicity Composition of Detailed Members





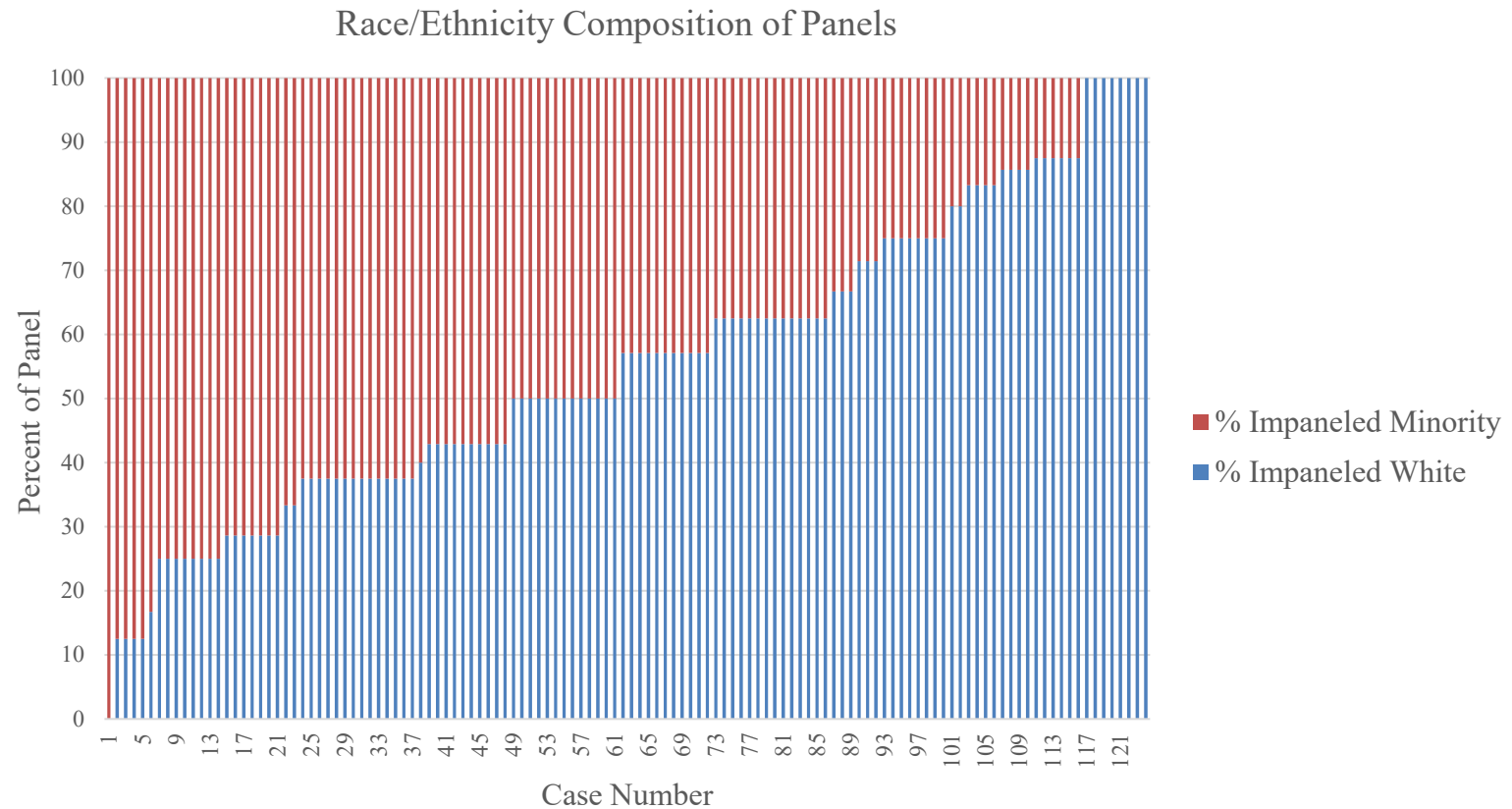
Results: Part 3

Representation of race and ethnicity of service members impaneled

	Average	Std. Deviation	Minimum	Maximum
Percent of Panel Comprised of White, non-Hispanic Members	55.3%	23.4%	0%	100%
Percent of Panel Comprised of Racial and Ethnic Minority Members	44.7%	23.4%	0%	100%



Results: Part 3





Results: Part 3

Representation of race and ethnicity of service members impaneled by race and ethnicity of the accused

	Accused – White, not Hispanic	Accused – Minority Service Member
Average Percent of Panel Comprised of White, not Hispanic Service Members	59.6 (SD = 20.4)	51.0 (SD = 24.1)



Results: Part 3

Representation of race and ethnicity of service members impaneled by officer panel

	All Officer Panel	Enlisted Panel
Average Percent of Panel Comprised of White, not Hispanic Service Members	63.0 (SD = 19.1)	53.9 (SD = 23.8)



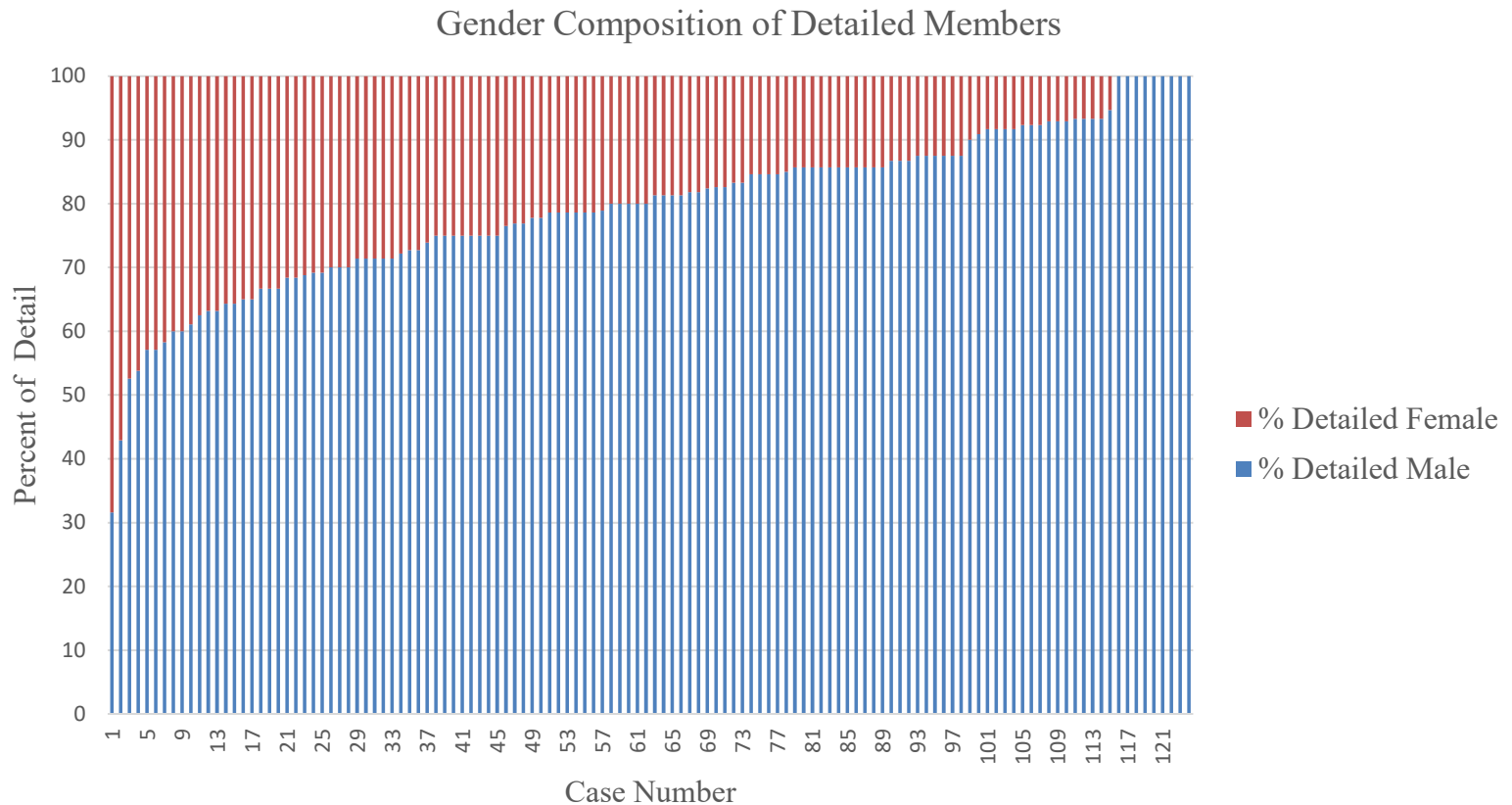
Results: Part 3

Representation of gender of service members detailed

	Average	Std. Deviation	Minimum	Maximum
Percent of Detailed Members Comprised of Females	20.6%	12.5%	0%	68%
Percent of Detailed Members Comprised of Males	79.4%	12.5%	32%	100%



Results: Part 3





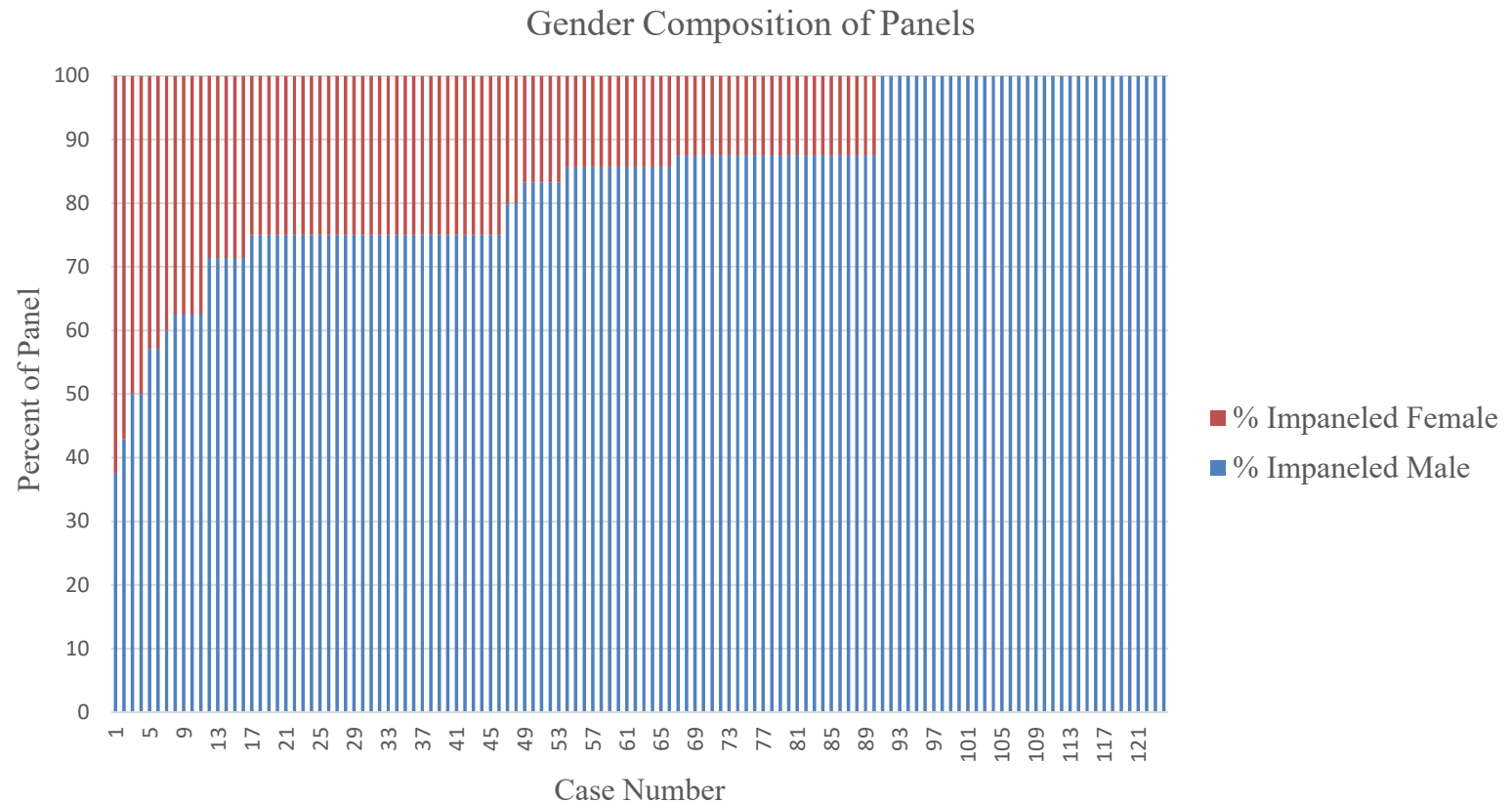
Results: Part 3

Representation of gender of service members impaneled

	Average	Std. Deviation	Minimum	Maximum
Percent of Panel Comprised of Females	16.1%	13.5%	0%	63%
Percent of Panel Comprised of Males	83.9%	13.5%	38%	100%



Results: Part 3





Results: Part 3

Representation of gender of service members impaneled by race and ethnicity of the accused

	Accused – White, not Hispanic	Accused – Minority Service Member
Average Percent of Panel Comprised of Males	80.6 (SD = 10.0)	78.6 (SD = 13.8)



Results: Part 3

Representation of gender of service members impaneled by officer panel

	All Officer Panel	Enlisted Panel
Average Percent of Panel Comprised of Males	75.3 (SD = 14.5)	80.2 (SD = 12.0)



Results: Part 3

Representation of race, ethnicity, and gender of service members detailed

	Average	Std. Deviation	Minimum	Maximum
Percent of Detailed Members Comprised of White, not Hispanic Female Members	8.7%	8.5%	0%	40.0%
Percent of Detailed Members Comprised of Racial and Ethnic Minority Female Members	11.9%	8.9%	0%	55.6%
Percent of Detailed Members Comprised of White, not Hispanic Male Members	46.9%	17.6%	6.3%	100%
Percent of Detailed Members Comprised of Racial and Ethnic Minority Male Members	32.5%	14.7%	0%	69.6%



Results: Part 3

Representation of race, ethnicity, and gender of service members
impaneled

	Average	Std. Deviation	Minimum	Maximum
Percent of Impaneled Members Comprised of White, not Hispanic Female Members	5.4%	8.6%	0%	37.5%
Percent of Impaneled Members Comprised of Racial and Ethnic Minority Female Members	10.7%	11.5%	0%	62.5%
Percent of Impaneled Members Comprised of White, not Hispanic Male Members	49.8%	22.5%	0%	100%
Percent of Impaneled Members Comprised of Racial and Ethnic Minority Male Members	34.0%	20.7%	0%	87.5%



Army Demographics: FY2022

463,083 Active Duty Service Members

Male service members = 84.3% (390,605)

Female service members = 15.7% (72,478)

Race and ethnicity

	Frequency	Percentage
White, not Hispanic	248,054	53.6
Black, not Hispanic	93,874	20.3
Hispanic	81,281	17.6
Asian or Pacific Islander	31,984	6.9
American Indian or Alaskan Native	4,054	0.9
Unknown / Other	3,836	0.8



Army Demographics: FY2022

Race and ethnicity aggregated into two categories

	Frequency	Percentage
White, not Hispanic	248,054	54.0
Minority Race and Ethnic Groups	211,193	46.0

Representation of race, ethnicity, and gender within ranks

	Enlisted	Officer
White, not Hispanic	49.7%	67.9%
Minority Race and Ethnic Groups	49.8%	29.8%
Unknown/Other	0.4%	2.4%
Male	85.2%	81.0%
Female	14.8%	19.0%

Overview of Army Case-Level Data
November 29, 2023

Section 1 presents information about 124 contested sexual assault courts-martial, including demographic information of the accused service members, case outcomes, and the type of forum requested. Section 2 summarizes information about service members detailed in the case, the service members impaneled, judges, defense counsel, and trial counsel. The data presented in section 2 describe individuals involved in the cases and are aggregated together. In other words, all individuals from the cases are grouped together. Section 3 summarizes information about cases, in terms of the individuals involved as detailed members, impaneled members, judges, defense counsel, and trial counsel.

Section 1. 124 Contested Sexual Assault Courts-Martial

Table 1.1 Case fiscal year

	Frequency	Percentage
2021	72	58.1
2022	52	41.9

Table 1.2 Gender of accused

	Frequency	Percentage
Male	119	96.0
Female	2	1.6
Missing	3	2.4

Table 1.3 Race and ethnicity of accused

	Frequency	Percentage
White, not Hispanic	49	39.5
Black, not Hispanic	37	29.8
Hispanic	27	21.8
Asian or Pacific Islander	6	4.8
American Indian or Alaskan Native	2	1.6
Missing	3	2.4

Table 1.4 Rank of accused

	Frequency	Percentage
Enlisted	113	91.1
Officer	11	8.9
Missing	0	0

Table 1.5 Case adjudication on Article 120 offense

	Frequency	Percentage
Acquitted	73	58.9
Guilty	51	41.1

Table 1.6 Guilty of a penetrative offense

	Frequency	Percentage
Yes	38	74.5
No	13	25.5

Table 1.7 Guilty of a non-sexual assault offense

	Frequency	Percentage
Yes	24	47.1
No	27	52.9

Table 1.8 Among accused enlisted service members, member requested enlisted panel

	Frequency	Percentage
Requested enlisted panel	105	92.9
Did not request enlisted panel	8	7.1

Table 1.9 The case involved an all officer panel¹

	Frequency	Percentage
Yes	19	15.3
No	105	84.7

¹ 8 enlisted members selected an officer panel.

Section 2. Individuals within 124 Contested Sexual Assault Courts-Martial

The information in section 2 describes the service members detailed in the cases, the service members impaneled, judges, defense counsel, and trial counsel. The data presented here about individuals involved in the cases are derived from the set of 124 cases and are aggregated together. In other words, the information in this section groups together all individuals regardless of the case in which they were involved. Individuals are the unit of analysis. Section 3 below summarizes information about cases, in terms of the individuals involved as members of details, members of panels, judges, defense counsel, and trial counsel.

Table 2.1 Detailed service members' race and ethnicity

	Frequency	Percentage
White, not Hispanic	1001	50.9
Black, not Hispanic	431	21.9
Hispanic	266	13.5
Asian or Pacific Islander	116	5.9
American Indian or Alaskan Native	15	.8
Missing Data	136	6.9
Unable to locate person	89	4.5
Unknown/Other	47	2.4
Total	1965	100

Table 2.2 Detailed service members' race and ethnicity aggregated into two categories

	Frequency	Percentage
White, not Hispanic	1001	50.9
Minority Race and Ethnic Groups	828	42.1
Unknown/Other	136	6.9
Total	1965	100

Table 2.3 Detailed service members' gender

	Frequency	Percentage
Male	1478	75.2
Female	397	20.2
Missing Data	90	4.6
Total	1965	100

Table 2.4 Service members who were impaneled

	Frequency	Percentage
Impaneled	960	48.9
Not impaneled	1005	51.1
Total Members	1965	100

Table 2.5 Race and ethnicity of service members who were impaneled²

	White, not Hispanic	Minority Service Members	Total
Impaneled	487 (48.7%)	402 (48.6%)	889 (48.6%)
Not Impaneled	514 (51.3%)	426 (51.4%)	940 (51.4%)
Total	1001 (100%)	828 (100%)	1829 (100%)

Table 2.5 shows that 48.7% of White, not Hispanic service members were impaneled, compared to 48.6% of service members from minority race and ethnic groups. The differences across the two race/ethnic categories are small and not statistically significant.

Table 2.6 Race and ethnicity of service members not impaneled and reason for excusal³

	White, not Hispanic	Minority Service Members	Total
Challenge for cause	337 (65.6%)	279 (65.5%)	616 (65.5%)
Peremptory challenge	94 (18.3%)	68 (16.0%)	162 (17.2%)
Randomization	80 (15.6%)	74 (17.4%)	154 (16.4%)
Other reason	3 (0.6%)	5 (1.2%)	8 (0.9%)
Total	514 (100%)	426 (100%)	940 (100%)

Table 2.6 shows the reasons used to excuse detailed members from panels. The patterns show similarities in challenges across the two demographic groups. For example, 65.6% of White, not Hispanic service members were excused because of for-cause challenges and 65.5% of service members from minority race and ethnic groups were excused because of for-cause challenges. In addition, 18.3% of White, not Hispanic service members were excused because of peremptory challenges and 16.0% of Minority service members were excused because of peremptory challenges. The differences in reasons for removal are not statistically significant.

² Table 2.5 excludes 136 individuals (6.9% of panel members) with missing race and/or ethnicity information. Among these 136 individuals with missing information about their race and ethnicity, 71 (52.2%) of the service members were impaneled and 65 (47.8%) of the individuals were not impaneled.

³ Table 2.6 excludes information about 65 individuals who were not impaneled and were missing information about their race and ethnicity. Among this group, 39 (60.0%) were excused by a challenge for cause, 17 (26.2%) were excused because of a peremptory challenge, 8 (12.3%) were excused through randomization, and 1 (1.5%) was excused for some other reason.

Table 2.7 Gender of service members who were impaneled⁴

	Female	Male	Total
Impaneled	150 (37.8%)	763 (51.6%)	913 (48.7%)
Not Impaneled	247 (62.2%)	715 (48.4%)	962 (51.3%)
Total	397 (100%)	1478 (100%)	1875 (100%)

Table 2.7 shows 37.8% of female service members across the 124 Army cases were impaneled compared to 51.6% of male service members. This difference is statistically significant (chi-square = 23.96).

Table 2.8 Gender of service members not impaneled and reason for excusal⁵

	Female	Male	Total
Challenge for cause	162 (65.6%)	468 (65.5%)	630 (65.5%)
Peremptory challenge	44 (17.8%)	124 (17.3%)	168 (17.5%)
Randomization	40 (16.2%)	116 (16.2%)	156 (16.2%)
Other reason	1 (0.4%)	7 (1.0%)	8 (0.8%)
Total	247 (100%)	715 (100%)	962 (100%)

Table 2.7 shows male service members were impaneled at a higher rate than female service members (51.6% compared to 37.8%). Table 2.8 summarizes information about the group of service members who were not impaneled. Table 2.8 shows the reasons used to excuse detailed members from panels. The patterns show similarities in reasons for excusal across female and male service members. For example, 17.8% of female service members were excused because of peremptory challenges and 17.3% of male service members were excused because of peremptory challenges. The same percentage of male and female service members were excused because of randomization (16.2%). The differences between males and females are not statistically significant. Even though females are excused at a higher rate than males, the reasons for excusing females and males are used in similar proportions.

⁴ Table 2.7 excludes 90 service members with missing information about their gender. Among this group, 47 (52.2%) of the service members were impaneled and 43 (47.8%) of the individuals were not impaneled.

⁵ Table 2.8 excludes 43 individuals who were not impaneled and were missing information about their gender. Among this group, 25 (58.1%) were excused by a challenge for cause, 11 (25.5%) were excused because of a peremptory challenge, 6 (14.0%) were excused through randomization, and 1 (2.3%) was excused for some other reason.

Table 2.9. Race, gender, and ethnicity of detailed service members

	Frequency	Percentage
White, not Hispanic Female	162	8.2
Minority Female	224	11.4
White, not Hispanic Male	839	42.7
Minority Male	604	30.7
Missing	136	6.9
Total	1965	100

Table 2.10. Service members who were impaneled by race, ethnicity, and gender⁶

	White, not Hispanic Female	Minority Female	White, not Hispanic Male	Minority Male	Total
Impaneled	47 (29.0%)	97 (43.3%)	440 (52.4%)	305 (50.5%)	889 (48.6%)
Not Impaneled	115 (71.0%)	127 (56.7%)	399 (47.6%)	299 (49.5%)	940 (51.4%)
Total	162 (100%)	224 (100%)	839 (100%)	604 (100%)	1829 (100%)

Table 2.10 shows White, not Hispanic female service members were impaneled at the lowest rate (29.0%), followed by Minority female service members (43.3%). Male service members were impaneled at higher rates: 50.5% of Minority male service members were impaneled and 52.4% of White, not Hispanic male service members were impaneled. The relationship in Table 2.10 is statistically significant.

⁶ Table 2.10 excludes 136 service members with missing information about their race, ethnicity, and gender. Among this group, 71 (52.2%) of the service members were impaneled and 65 (47.8%) of the service members were not impaneled.

Table 2.11. Race, ethnicity, and gender of service members not impaneled and reason for excusal⁷

	White, not Hispanic Female	Minority Female	White, not Hispanic Male	Minority Male	Total
Challenge for cause	75 (65.2%)	83 (65.4%)	262 (65.6%)	196 (65.6%)	616 (65.6%)
Peremptory challenge	23 (20.0%)	20 (15.7%)	71 (17.8%)	48 (16.1%)	162 (17.2%)
Randomization	17 (14.8%)	23 (18.1%)	63 (15.8%)	51 (17.1%)	154 (16.4%)
Other reason	0 (0%)	1 (0.8%)	3 (0.8%)	4 (1.3%)	8 (0.9%)
Total	115 (100%)	127 (100%)	399 (100%)	299 (100%)	940 (100%)

Table 2.11 shows the reasons for excusal among 940 service members who were not impaneled. The pattern shows the rates at which reasons for excusal are used are similar across race, ethnicity, and gender. For example, a challenge for cause is used to excuse approximately 65% of service members within each of the four demographic groups. Peremptory challenges are also used at similar rates across the groups (14.8% to 18.1%). The relationship in Table 2.11 is not statistically significant.

Judges

Table 2.12. Judges' race and ethnicity

	Frequency	Percentage
White, not Hispanic	78	62.9
Black, not Hispanic	9	7.3
Hispanic	3	2.4
Asian or Pacific Islander	10	8.1
American Indian or Alaskan Native	0	0
Missing Data	24	19.3
Unable to locate person	19	15.3
Unknown/Other	5	4.0
Total	124	100

⁷ Table 2.11 excludes 65 individuals who were not impaneled and were missing information about their race, ethnicity, and gender. Among this group, 39 (60.0%) were excused by a challenge for cause, 17 (26.2%) were excused because of a peremptory challenge, 8 (12.3%) were excused through randomization, and 1 (1.5%) was excused for some other reason.

Table 2.13. Judges' gender

	Frequency	Percentage
Male	77	62.1
Female	27	21.8
Missing Data	20	16.1
Total	124	100

Lead Defense Counsel**Table 2.14. Lead defense counsels' race and ethnicity**

	Frequency	Percentage
White, not Hispanic	66	75.9
Black, not Hispanic	9	10.3
Hispanic	0	0
Asian or Pacific Islander	5	5.7
American Indian or Alaskan Native	0	0
Missing Data	7	8.0
Unable to locate person	2	2.3
Unknown/Other	5	5.7
Total	87	100

Table 2.15. Lead defense counsels' gender

	Frequency	Percentage
Male	54	62.1
Female	31	35.6
Missing Data	2	2.3
Total	87	100

Trial Counsel

Table 2.16. Trial counsels' race and ethnicity

	Frequency	Percentage
White, not Hispanic	92	74.2
Black, not Hispanic	12	9.7
Hispanic	5	4.0
Asian or Pacific Islander	1	.8
American Indian or Alaskan Native	6	4.8
Missing Data	8	6.4
Unable to locate person	1	.8
Unknown/Other	7	5.6
Total	124	100

Table 2.17. Trial counsels' gender

	Frequency	Percentage
Male	85	68.5
Female	32	25.8
Missing Data	7	5.6
Total	124	100

Section 3. 124 Contested Sexual Assault Courts-Martial

Information in this section summarizes *characteristics of cases* as opposed to individual-level information. For these analyses, information about individuals is grouped together at the *case level*. The case is considered the unit of analysis in this section; information pertains to cases.

Table 3.1. Number of members detailed to individual courts-martial

	Frequency	Percentage
10 Members	3	2.4
12 Members	4	3.2
13 Members	5	4.0
14 Members	53	42.7
15 Members	7	5.6
16 Members	19	15.3
17 Members	1	.8
18 Members	5	4.0
19 Members	4	3.2
20 Members	13	10.5
21 Members	5	4.0
23 Members	2	1.6
24 Members	1	.8
25 Members	1	.8
28 Members	1	.8
Total	124	100

Table 3.1 presents information about the number of members detailed to the cases. Over 40 percent of the cases (53 / 124, 42.7%) had 14 members detailed to the court-martial; the next most commonly occurring number of members detailed to the court-martial was 16, occurring 19 times (15.3% of the cases).

Table 3.2 Number of members impaneled

	Frequency	Percentage
4 Members	4	3.2
5 Members	1	.8
6 Members	2	1.6
7 Members	9	7.3
8 Members	108	87.1
Total	124	100

Table 3.2 describes the number of members impaneled in each case. Nearly 90 percent of cases involved panels of 8 service members (108 / 124; 87.1%); the next most frequently occurring panel size was 7 jurors, occurring in 9 out of 124 cases (7.3%).

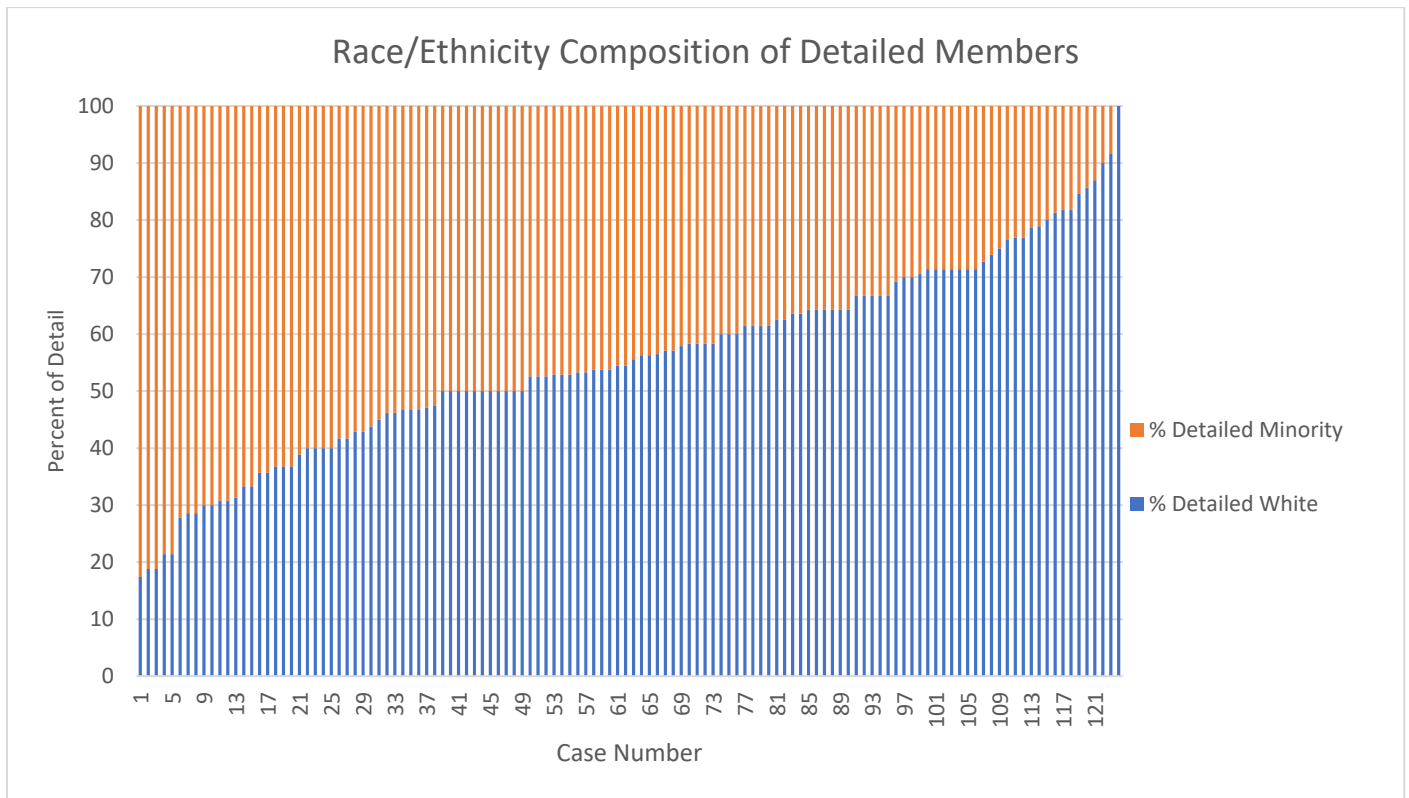
Race and ethnicity of detailed service members in 124 sexual assault courts-martial

- In 75 of the 124 cases (60.4% of cases), White, not Hispanic service members made up more than half of the detailed members.
- In 38 of the 124 cases (30.6%), service members belonging to racial and ethnic Minority groups made up more than half of the detailed members.
- There were 11 cases in which half of the detail was comprised of White, not Hispanic individuals and half of the detail was comprised of service members belonging to racial and ethnic Minority groups.
- In 34 of the 124 cases (27.4%), more than two-thirds of the detailed members were White, not Hispanic. There was one case in which all detailed members were White, not Hispanic.
- In 13 of the 124 cases (10.5%), fewer than one-third of the detailed members were White, not Hispanic.
- Table 3.3 shows that, across the 124 cases, the average percent of detailed members that were White, not Hispanic was 55.6 percent; the average percent of detailed members that were other racial and ethnic groups was 44.4 percent. Individual members who were missing data on their race and/or ethnicity were excluded from the results in Table 3.3.

Table 3.3. Representation of race and ethnicity of service members detailed to courts-martial

	Average	Std. Deviation	Minimum	Maximum
Percent of Detailed Members Comprised of White, not Hispanic Members	55.6%	16.9%	17.4%	100%
Percent of Detailed Members Comprised of Racial and Ethnic Minority Members	44.4%	16.9%	0%	82.6%

Figure 3.1



Race and ethnicity of impaneled service members in 124 sexual assault courts-martial

- In 63 of 124 panels (50.8%), more than half of the panel was comprised of White, not Hispanic members, including 8 juries in which all members were White, not Hispanic.
- In 48 of 124 panels (38.7%), more than half of the panel was comprised of service members belonging to racial and ethnic Minority groups, including 1 jury in which all members belong to racial and ethnic Minority groups.
- Table 3.4 shows that, across the 124 panels, the average percent of panels that were comprised of White, not Hispanic members was 55.3 percent, the average percent of detailed members comprised of racial and ethnic service members was 44.7 percent.

Table 3.4 Representation of race and ethnicity of service members impaneled

	Average	Std. Deviation	Minimum	Maximum
Percent of Panel Comprised of White, not Hispanic Members	55.3%	23.4%	0%	100%
Percent of Panel Comprised of Racial and Ethnic Minority Members	44.7%	23.4%	0%	100%

Figure 3.2

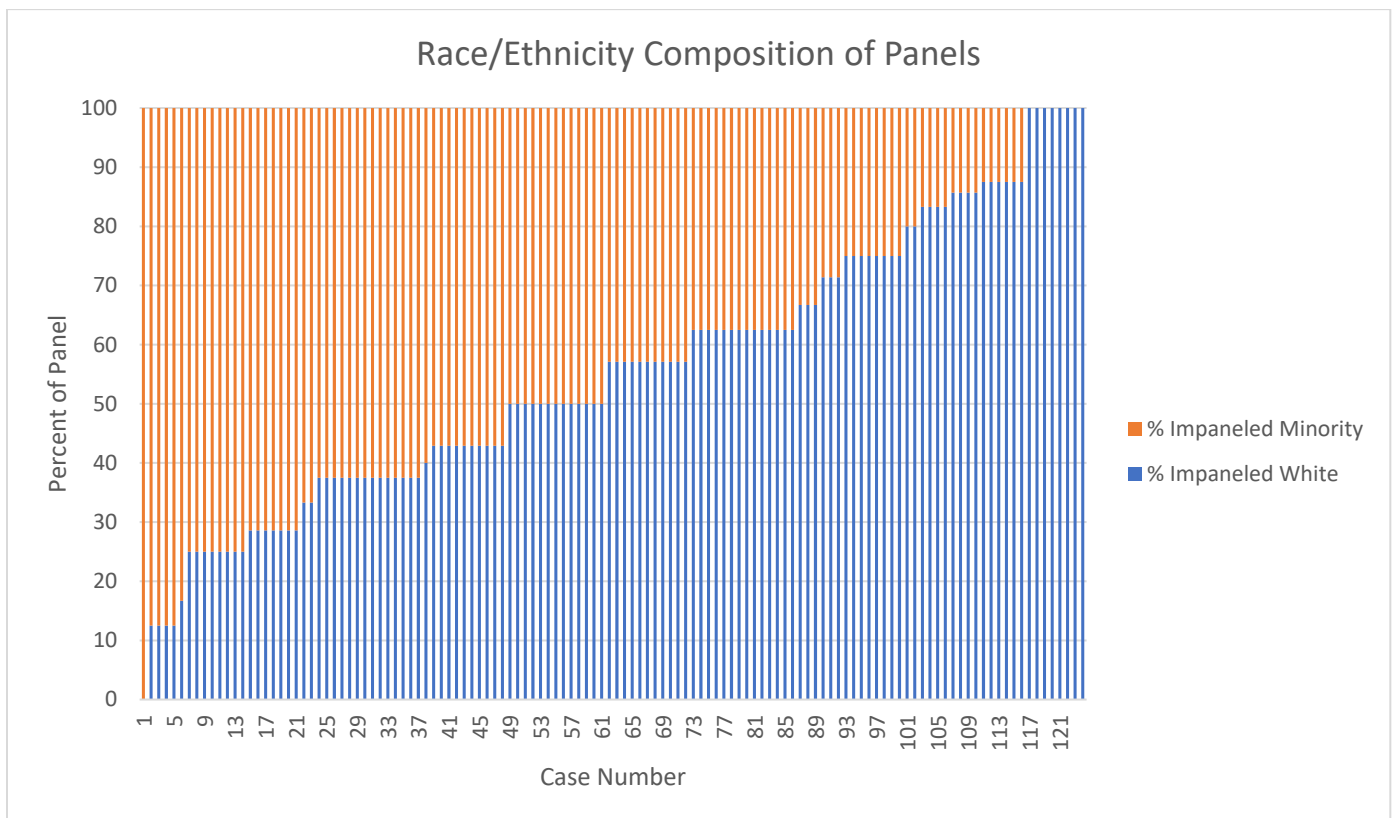


Table 3.5 Representation of gender of service members detailed to courts-martial

	Average	Std. Deviation	Minimum	Maximum
Percent of Detailed Members Comprised of Females	20.6%	12.5%	0%	68%
Percent of Detailed Members Comprised of Males	79.4%	12.5%	32%	100%

Figure 3.3

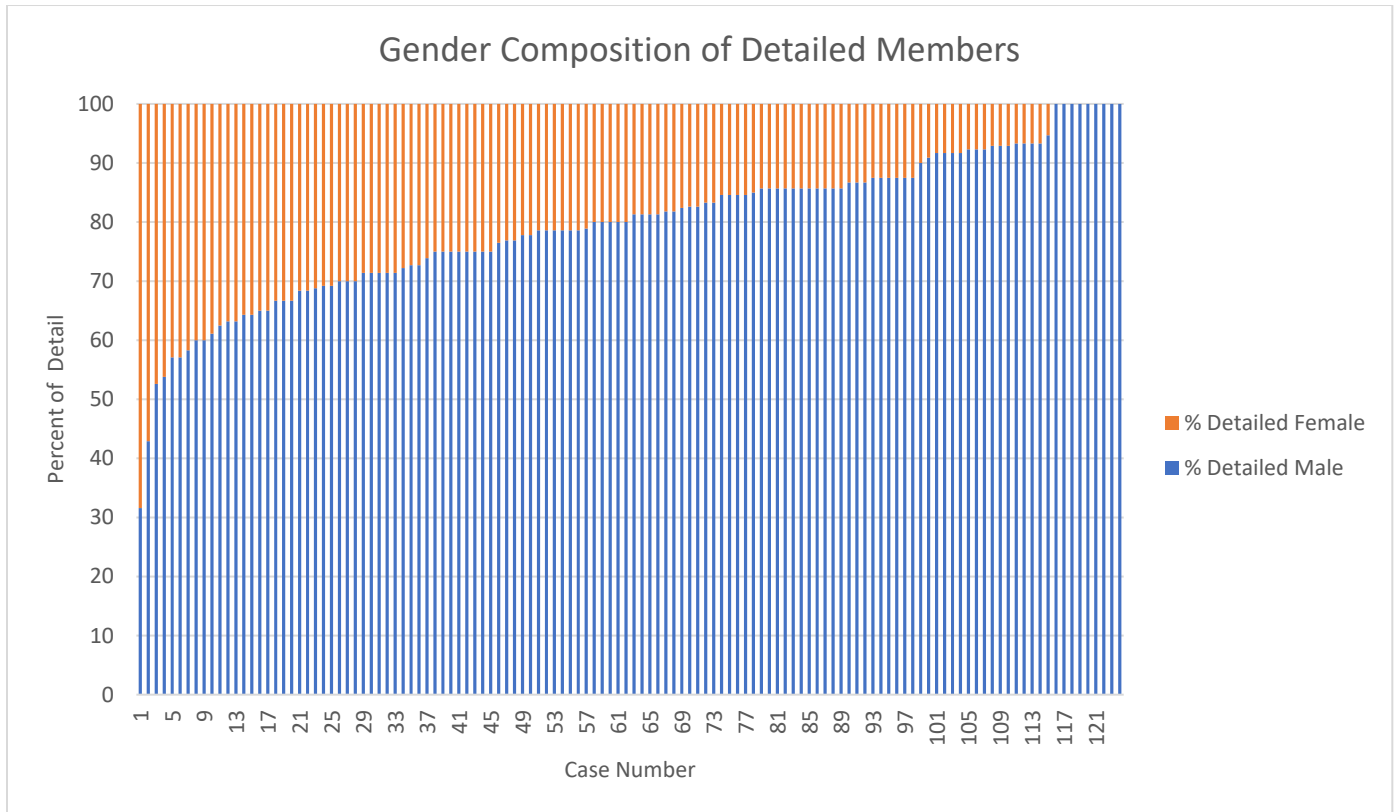
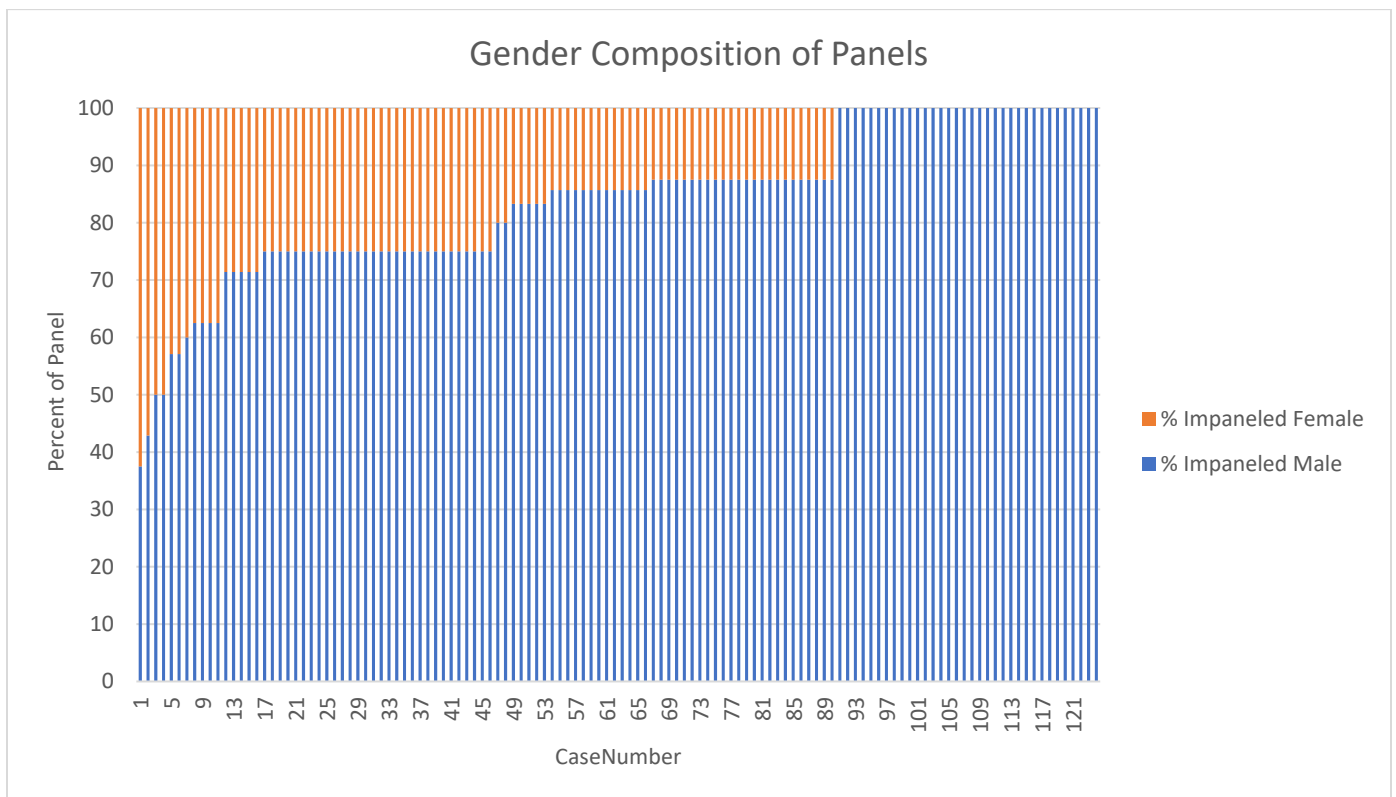


Table 3.6 Representation of gender of service members impaneled

	Average	Std. Deviation	Minimum	Maximum
Percent of Impaneled Members Comprised of Females	16.1%	13.5%	0%	63%
Percent of Impaneled Members Comprised of Males	83.9%	13.5%	38%	100%

Figure 3.4



In terms of averages, the above pattern in Tables 3.5 and 3.6 shows the percent of panels made up of female members is lower (16.1%) than the percent of females detailed in cases (20.6%). This difference is statistically significant.

Table 3.7 Representation of race and ethnicity of service members impaneled and race and ethnicity of the accused

	Accused – White, not Hispanic	Accused – Minority Service Member
Average Percent of Panel Comprised of White, not Hispanic Service Members	59.6 (SD = 20.4)	51.0 (SD = 24.1)

In cases with an accused service member who was White, not Hispanic, the typical panel was comprised of 59.6% White, not Hispanic service members and 40.4% minority service members (Table 3.7). In cases with an accused minority service member, the typical panel was comprised of 51.0% White, not Hispanic service members and 49.0% minority service members. This difference in average percentages across race/ethnicity of the accused service member is statistically significant.

Table 3.8. Representation of gender of service members impaneled and race and ethnicity of the accused

	Accused – White, not Hispanic	Accused – Minority Service Member
Average Percent of Panel Comprised of Male Service Members	80.6 (SD = 10.0)	78.6 (SD = 13.8)

In cases with an accused service member who was White, not Hispanic, the typical panel was comprised of 80.6% male service members and 19.4% female service members (Table 3.8). In cases with an accused minority service member, the typical panel was comprised of 78.6% male service members and 21.4% female service members. This difference in average percentages across race/ethnicity of the accused service member is not statistically significant.

Table 3.9 Representation of race and ethnicity of service members impaneled among officer and enlisted panels

	All Officer Panel	Enlisted Panel
Average Percent of Panel Comprised of White, not Hispanic Service Members	63.0 (SD = 19.1)	53.9 (SD = 23.8)

In cases with an all officer panel, the typical panel was comprised of 63.0% White, not Hispanic service members and 37.0% minority service members (Table 3.9). In cases with an enlisted panel, the typical panel was comprised of 53.9% White, not Hispanic service members and

46.1% minority service members. This difference in average percentages across panel type is statistically significant.

Table 3.10 Representation of gender of service members impaneled among officer and enlisted panels

	All Officer Panel	Enlisted Panel
Average Percent of Panel Comprised of Male Service Members	75.3 (SD = 14.5)	80.2 (SD = 12.0)

In cases with an all officer panel, the typical panel was comprised of 75.3% male service members and 24.7% female service members (Table 3.10). In cases with an enlisted panel, the typical panel was comprised of 80.2% male service members and 19.8% female service members. This difference in average percentages across panel type is not statistically significant.

Table 3.11. Representation of race, ethnicity, and gender of service members detailed to courts-martial

	Average	Std. Deviation	Minimum	Maximum
Percent of Detailed Members Comprised of White, not Hispanic Female Members	8.7%	8.5%	0%	40.0%
Percent of Detailed Members Comprised of Racial and Ethnic Minority Female Members	11.9%	8.9%	0%	55.6%
Percent of Detailed Members Comprised of White, not Hispanic Male Members	46.9%	17.6%	6.3%	100%
Percent of Detailed Members Comprised of Racial and Ethnic Minority Male Members	32.5%	14.7%	0%	69.6%

Table 3.11 shows that White, not Hispanic female service members were detailed at the lowest rates (8.7% average) followed by racial and ethnic minority female service members (11.9%). White, not Hispanic male service members were detailed at the highest rate (46.9%) followed by racial and ethnic minority male service members (32.5%).

Table 3.12. Representation of race, ethnicity, and gender of service members impaneled

	Average	Std. Deviation	Minimum	Maximum
Percent of Impaneled Members Comprised of White, not Hispanic Female Members	5.4%	8.6%	0%	37.5%
Percent of Impaneled Members Comprised of Racial and Ethnic Minority Female Members	10.7%	11.5%	0%	62.5%
Percent of Impaneled Members Comprised of White, not Hispanic Male Members	49.8%	22.5%	0%	100%
Percent of Impaneled Members Comprised of Racial and Ethnic Minority Male Members	34.0%	20.7%	0%	87.5%

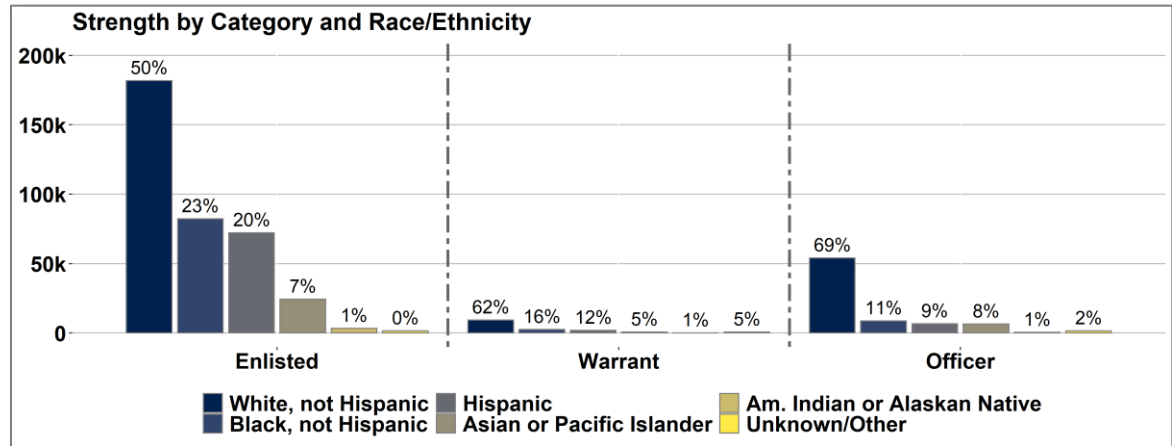
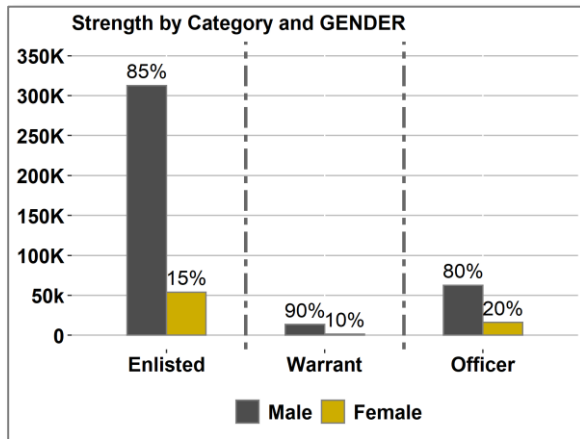
Tables 3.11 and 3.12 show the representation of White, not Hispanic females on panels (5.4%) is lower than their representation on details (8.7%). The representation of racial and ethnic minority female service members on panels (10.7%) is slightly lower than their representation on details (11.9%). The representation of White, not Hispanic males and racial and ethnic minority male service members on panels is somewhat greater than their representation on details.



Active Component Demographics

Data as of 31 October 2022

The total number of Soldiers in the Active Component is 463,083. Males account for 84.3% and Females account for 15.7% of the total. The Racial/Ethnic distribution of the Army is as follows – White, Not Hispanic: 53.6%, Black, Not Hispanic: 20.3%, Hispanic: 17.6%, Asian or Pacific Islander: 6.9%, American Indian or Alaskan Native: 0.9%, and Unknown/Other: 0.8%.



Grade	Inventory	Gender		Race/Ethnicity					
		Male	Female	Hispanic	Am. Indian or Alaskan Native	Asian or Pacific Islander	White, not Hispanic	Black, not Hispanic	Unknown/Other
Enlisted Subtotal	365,440	311,495	53,945	72,147	3,372	24,348	181,800	82,246	1,527
Enlisted %	79%	85%	15%	20%	1%	7%	50%	23%	0%
Officer Subtotal	78,147	62,134	16,013	6,749	567	6,453	54,123	8,685	1,570
Officer %	17%	80%	20%	9%	1%	8%	69%	11%	2%
Warrant Officer Subtotal	15,131	13,611	1,520	1,836	78	734	9,358	2,425	700
Warrant Officer %	3%	90%	10%	12%	1%	5%	62%	16%	5%
USMA Cadet Subtotal	4,365	3,365	1,000	549	37	449	2,773	518	39
USMA Cadet %	1%	77%	23%	13%	1%	10%	64%	12%	1%
Active Component Total	463,083	390,605	72,478	81,281	4,054	31,984	248,054	93,874	3,836
Active Component %		84.3%	15.7%	17.6%	0.9%	6.9%	53.6%	20.3%	0.8%



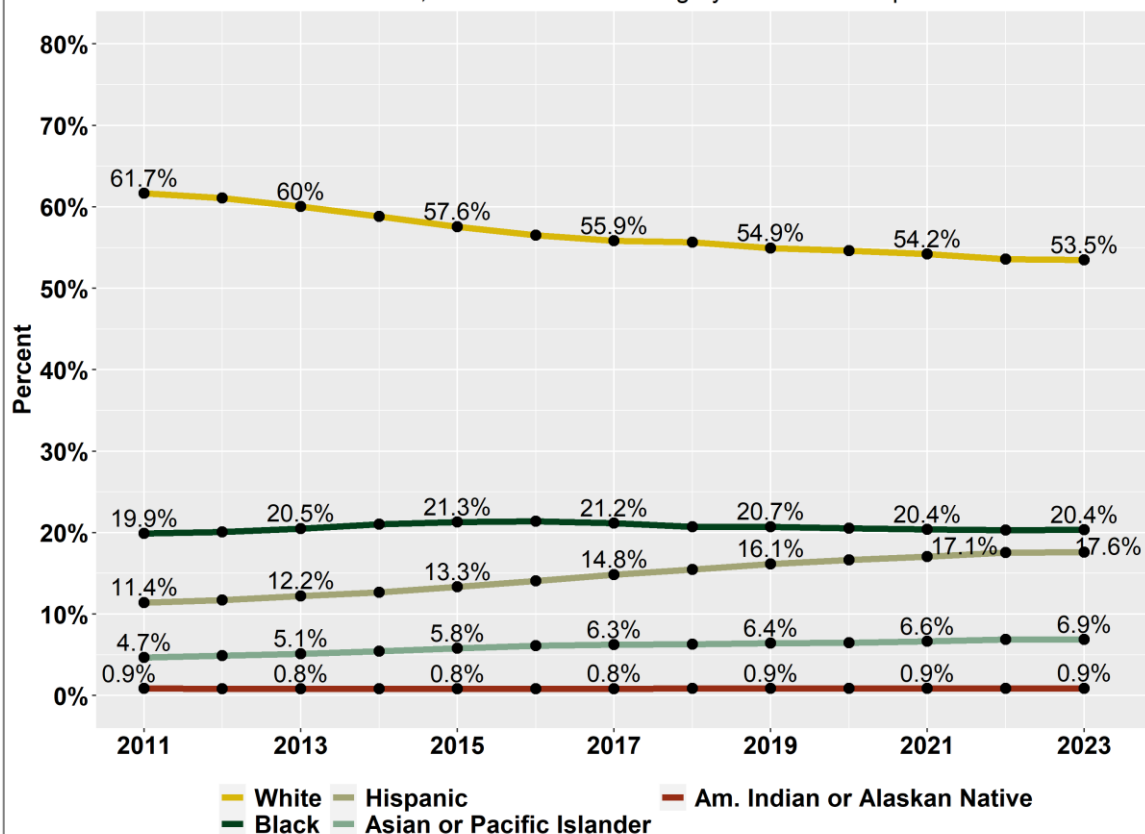
Active Component Demographic Trends

Data as of 31 October 2022

Racial/Ethnic trends show a reduction in the White Soldiers (61.7% to 53.3%), an increase in Hispanic Soldiers (11.4% to 17.6%), and an increase in Asian/Pacific Islander Soldiers (4.7% to 6.9%); other Races/Ethnicities show slight or negligible change. Females comprise an increasing share of the population, moving from 13.5% to 15.6%.

Active Component Race/Ethnicity

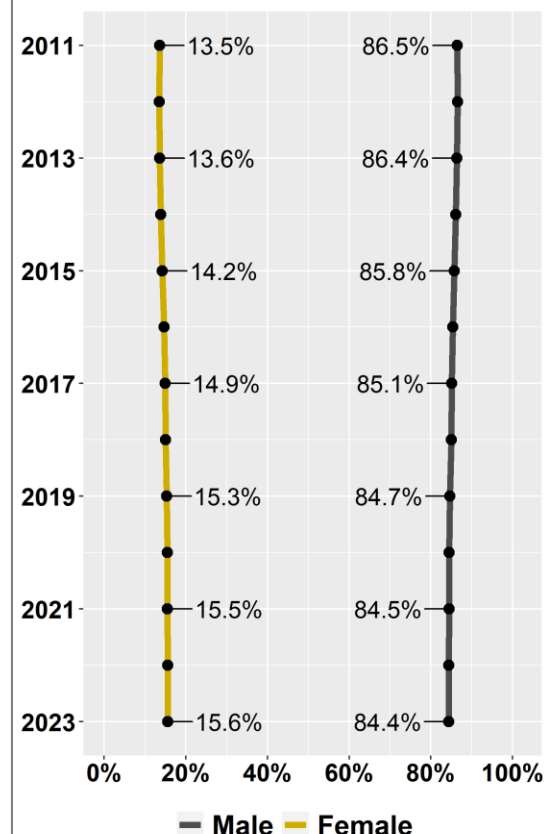
Data does not include Cadets; "Unknown/Other" category excluded from presentation



*Unknown/Other accounts for ~1% of the AC per year and is not included in the above graph.

Active Component GENDER

Data does not include Cadets

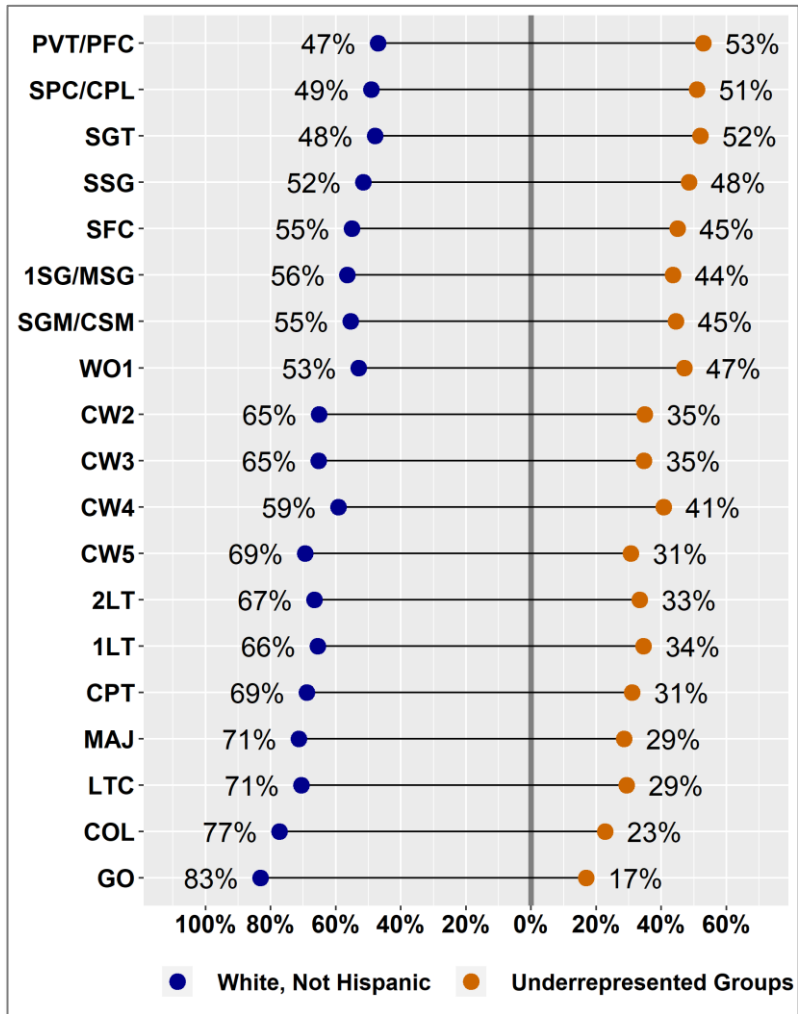




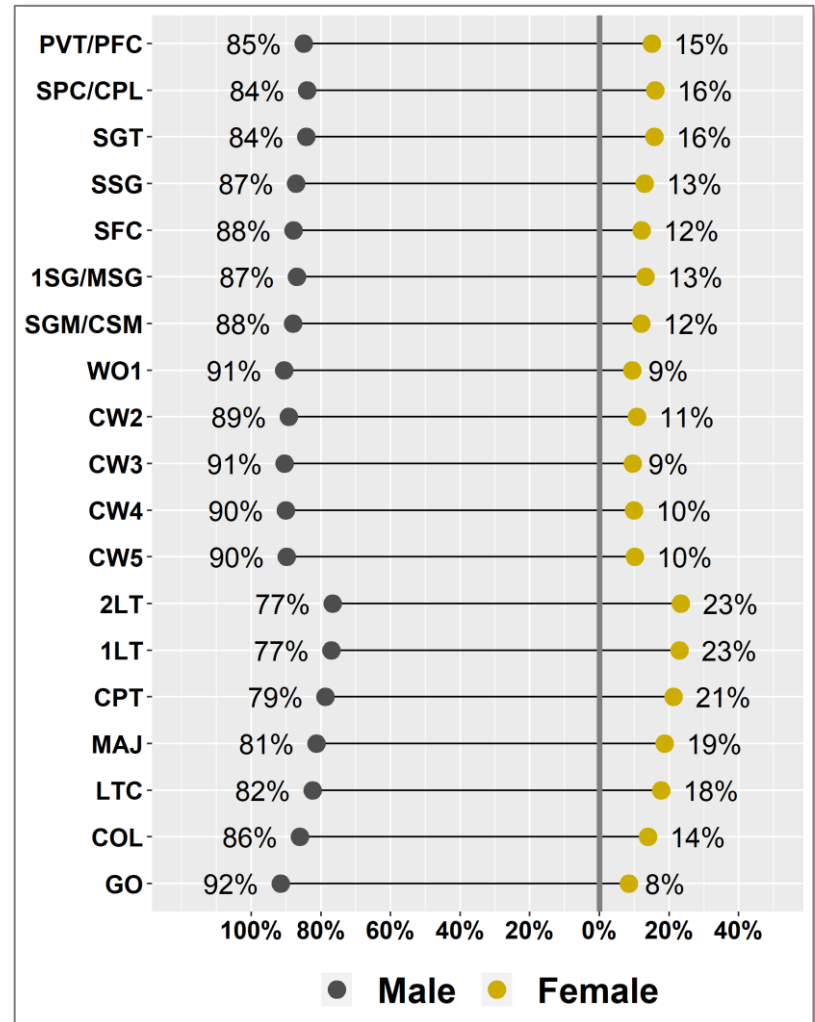
Active Component Demographics

Data as of 31 October 2022

Proportion of Active Component Race/Ethnicity by Rank



Proportion of Active Component Gender by Rank





Active Component Demographics

Data as of 31 October 2022

Grade	Inventory	Gender		Race/Ethnicity					
		Male	Female	Hispanic	Am. Indian or Alaskan Native	Asian or Pacific Islander	White, not Hispanic	Black, not Hispanic	Unknown/ Other
E1	11,613	10,042	1,571	2,729	149	603	5,064	3,066	2
E2	15,595	13,433	2,162	3,540	188	872	7,260	3,735	0
E3	47,570	40,031	7,539	10,456	506	2,938	22,878	10,779	13
E4	110,145	92,479	17,666	22,973	1,060	7,383	54,068	24,537	124
E5	70,365	59,262	11,103	14,066	625	5,260	33,769	16,409	236
E6	58,187	50,687	7,500	10,078	463	4,146	29,990	13,178	332
E7	37,170	32,668	4,502	5,931	272	2,384	20,449	7,648	486
E8	11,312	9,826	1,486	1,874	85	614	6,389	2,131	219
E9	3,483	3,067	416	500	24	148	1,933	763	115
Enlisted Subtotal	365,440	311,495	53,945	72,147	3,372	24,348	181,800	82,246	1,527
Enlisted %	79%	85%	15%	20%	1%	7%	50%	23%	0%
O1	10,040	7,696	2,344	1,062	99	897	6,686	1,112	184
O2	12,291	9,464	2,827	1,366	113	1,108	8,056	1,504	144
O3	26,809	21,097	5,712	2,356	203	2,368	18,487	2,892	503
O4	16,101	13,083	3,018	1,177	82	1,228	11,494	1,721	399
O5	8,852	7,289	1,563	612	48	640	6,250	1,034	268
O6	3,770	3,245	525	171	20	205	2,914	388	72
O7	117	103	14	1	2	3	100	11	0
O8	104	99	5	2	0	1	88	13	0
O9	47	43	4	2	0	2	35	8	0
O10	16	15	1	0	0	1	13	2	0
Officer Subtotal	78,147	62,134	16,013	6,749	567	6,453	54,123	8,685	1,570
Officer %	17%	80%	20%	9%	1%	8%	69%	11%	2%
W1	3,440	3,115	325	447	16	196	1,821	559	401
W2	6,015	5,369	646	726	29	287	3,916	954	103
W3	3,293	2,981	312	401	19	161	2,151	492	69
W4	1,802	1,624	178	214	12	68	1,067	332	109
W5	581	522	59	48	2	22	403	88	18
Warrant Officer Subtotal	15,131	13,611	1,520	1,836	78	734	9,358	2,425	700
Warrant Officer %	3%	90%	10%	12%	1%	5%	62%	16%	5%
USMA Cadet Subtotal	4,365	3,365	1,000	549	37	449	2,773	518	39
USMA Cadet %	1%	77%	23%	13%	1%	10%	64%	12%	1%
Active Component Total	463,083	390,605	72,478	81,281	4,054	31,984	248,054	93,874	3,836
Active Component %		84.3%	15.7%	17.6%	0.9%	6.9%	53.6%	20.3%	0.8%



Female Active Component Demographics

Data as of 31 October 2022

		Race/Ethnicity					
Grade	Female	Hispanic	Am. Indian or Alaskan Native	Asian or Pacific Islander	White, not Hispanic	Black, not Hispanic	Unknown/ Other
E1	1,571	456	23	89	433	569	1
E2	2,162	599	22	132	592	817	0
E3	7,539	2,121	85	499	2,433	2,401	0
E4	17,666	4,337	198	1,388	5,586	6,133	24
E5	11,103	2,591	117	1,009	3,331	3,999	56
E6	7,500	1,469	74	715	2,327	2,827	88
E7	4,502	791	47	409	1,237	1,896	122
E8	1,486	310	16	111	414	592	43
E9	416	72	2	20	110	193	19
Female Enlisted Subtotal	53,945	12,746	584	4,372	16,463	19,427	353
Female Enlisted %	75%	24%	1%	8%	31%	36%	1%
O1	2,344	310	25	211	1,388	355	55
O2	2,827	375	27	281	1,614	486	44
O3	5,712	585	34	578	3,423	941	151
O4	3,018	254	20	262	1,722	644	116
O5	1,563	110	9	166	860	354	64
O6	525	29	2	49	325	110	10
O7	14	0	0	0	14	0	0
O8	5	0	0	1	3	1	0
O9	4	0	0	0	3	1	0
O10	1	0	0	0	1	0	0
Female Officer Subtotal	16,013	1,663	117	1,548	9,353	2,892	440
Female Officer %	22%	10%	1%	10%	58%	18%	3%
W1	325	56	6	32	92	99	40
W2	646	111	2	52	226	232	23
W3	312	46	2	27	116	105	16
W4	178	35	3	16	51	67	6
W5	59	12	0	4	20	21	2
Female Warrant Officer Subtotal	1,520	260	13	131	505	524	87
Female Warrant Officer %	2%	17%	1%	9%	33%	34%	6%
Female Active Component Total	71,478	14,669	714	6,051	26,321	22,843	880
Female Active Component %		20.5%	1.0%	8.5%	36.8%	32.0%	1.2%

**Data does not include USMA Cadets



Male Active Component Demographics

Data as of 31 October 2022

Grade	Male	Race/Ethnicity					
		Hispanic	Am. Indian or Alaskan Native	Asian or Pacific Islander	White, not Hispanic	Black, not Hispanic	Unknown/ Other
E1	10,042	2,273	126	514	4,631	2,497	1
E2	13,433	2,941	166	740	6,668	2,918	0
E3	40,031	8,335	421	2,439	20,445	8,378	13
E4	92,479	18,636	862	5,995	48,482	18,404	100
E5	59,262	11,475	508	4,251	30,438	12,410	180
E6	50,687	8,609	389	3,431	27,663	10,351	244
E7	32,668	5,140	225	1,975	19,212	5,752	364
E8	9,826	1,564	69	503	5,975	1,539	176
E9	3,067	428	22	128	1,823	570	96
Male Enlisted Subtotal	311,495	59,401	2,788	19,976	165,337	62,819	1,174
Male Enlisted %	80%	19%	1%	6%	53%	20%	0%
O1	7,696	752	74	686	5,298	757	129
O2	9,464	991	86	827	6,442	1,018	100
O3	21,097	1,771	169	1,790	15,064	1,951	352
O4	13,083	923	62	966	9,772	1,077	283
O5	7,289	502	39	474	5,390	680	204
O6	3,245	142	18	156	2,589	278	62
O7	103	1	2	3	86	11	0
O8	99	2	0	0	85	12	0
O9	43	2	0	2	32	7	0
O10	15	0	0	1	12	2	0
Male Officer Subtotal	62,134	5,086	450	4,905	44,770	5,793	1,130
Male Officer %	16%	8%	1%	8%	72%	9%	2%
W1	3,115	391	10	164	1,729	460	361
W2	5,369	615	27	235	3,690	722	80
W3	2,981	355	17	134	2,035	387	53
W4	1,624	179	9	52	1,016	265	103
W5	522	36	2	18	383	67	16
Male Warrant Officer Subtotal	13,611	1,576	65	603	8,853	1,901	613
Male Warrant Officer %	4%	12%	0%	4%	65%	14%	5%
Male Active Component Total	387,240	66,063	3,303	25,484	218,960	70,513	2,917
Male Active Component %		17.1%	0.9%	6.6%	56.5%	18.2%	0.8%

**Data does not include USMA Cadets

Panel Selection Study Update and Discussion
Presenter Biography

Dr. William Wells, Sam Houston State University

Dr. William Wells is a Professor in the Department of Criminal Justice and Criminology and Director of the Center for Intelligence and Crime Analysis at Sam Houston State University. Dr. Wells has worked on applied research projects with criminal justice system organizations in the United States and internationally since 1995. In 2021 Dr. Wells received the Sam Houston State University Award for Excellence in Scholarly and Creative Accomplishments. He is currently collaborating on projects with the U.S. Attorney's Office for the Southern District of Texas, the Texas Commission on Jail Standards, the Houston Police Department, and the Harris County (TX) Sheriff's Office. His projects have been funded by the Office of Community Oriented Policing Services, the National Institute of Justice, the Bureau of Justice Assistance, and the Office of the Governor of Texas. His published research has appeared in *The Proceedings of the National Academy of Sciences*, *Injury Prevention*, *Journal of Quantitative Criminology*, *Journal of Interpersonal Violence*, *Criminology*, *Journal of Research in Crime & Delinquency*, *Justice Quarterly*, *Crime & Delinquency*, and *American Journal of Public Health*.

DoD Plan on Performance Measures

December 6, 2023

Nalini Gupta, DLSA Attorney

Background and Methodology

FY22 NDAA, Section 547: Required the Secretary of Defense to “publish a plan addressing the manner in which the Department of Defense will analyze the effects of the changes in law and policy . . . with respect to the [disposition of offenses over which a special trial counsel at any time exercises authority](#).”

DLSA Research and Consultation for DoD 2022 Plan to Congress:

- Prosecutorial Performance Indicators Project
- Justice Management Institute
- Aequitas
- Department of Justice
- DoD Sexual Assault Prevention and Response Office
- Services

Relevance to DAC-IPAD

- DoD submitted Plan to Congress in December 2022
- JSC currently reviewing DoD Plan and performance measures; comments will be due to DoD General Counsel
- DoD will then issue updated Plan for performance measures
- DAC-IPAD may choose to issue its own recommendations for performance measures, and/or
- DAC-IPAD may choose to study certain performance measures, collect data, and publish results

Categories of Performance Measures and Collected Data

- (1) **Due Process Protections**: measures intended to assess protection of the rights of the accused;
- (2) **Alleged Victim Experience**: measures intended to assess the participation and experience of alleged victims throughout the military justice process as well as adherence to their rights;
- (3) **Accountability**: measures intended to assess the accountability of the accused with regard to substantiated allegations;
- (4) **Timeliness and Resource Prioritization**: measures intended to assess the efficiency and timeliness of case processing and the appropriate prioritization of OSTC resources;
- (5) **Competence and Capacity**: measures intended to assess the experience levels and capacity of STCs;
- (6) **Communication**: measures intended to assess communication between STCs and commanders in the military justice process; and
- (7) **Demographics**: measures intended to capture demographic factors of the accused at various stages of the military justice process.

Considerations

- At least 3 years of data and performance measures are required for meaningful trend analysis
- Consistent data fields and definitions are required to make comparisons across Services
- Performance measures are only a *first-level analysis* to help Department understand trends and identify anomalies

Due Process Protections

- 1.1.** Cases Dismissed or Reversed for Prosecutorial Error
- 1.2.** Cases Reversed for Ineffective Assistance of Counsel
- 1.3.** Cases Reversed for Judicial Error

Alleged Victim Experience

- 2.1.** Restricted Reports Converted to Unrestricted Report
- 2.2.** Alleged Victim Participation in OSTC Cases
- 2.3.** SVC Assignment Timeline
- 2.4.** Continuity of Alleged Victim-SVC Relationship
- 2.5.** STC Consultation with Alleged Victim Prior to Initial Disposition Decision
- 2.6.** Victim Satisfaction

Accountability

3.1. Prosecution Rate for Covered Offenses

3.2. Deferral Rate and Cases Resulting in Alternative Dispositions

3.3. Conviction Rates for Covered Offenses

3.4. Conviction Rates for Covered or Known or Related Offenses

3.5. Confinement Terms for Covered Offenses

3.6. OSTC Cases Affirmed on Appeal by CCA and CAAF

Timeliness and Resource Prioritization

4.1. Timeliness of Investigation

4.2. Timeliness of STC Involvement

4.3. Timeliness of Case Processing

4.4. Timeliness of Final Disposition by Command for Deferred Cases

4.5. Timeliness of First-Level Appellate Review

4.6. Ability to Identify Dismissable Cases Prior to Preferral

4.7. Rate of Referral After No Probable Cause Finding at Article 32

4.8. Conviction Rates for Cases Referred After No PC Finding at Article 32

Competency and Capacity

5.1. STC Caseload

5.2. STC Experience Levels

5.3. STC Training

Communication

6.1. Communication Between STCs and Commanders Regarding Case Disposition

6.2. Communication Between STCs and Commanders at Deferral

Demographics

7.1. Accused/Victim Representation by Racial Group for OSTC Cases

7.2. Accused/Victim Representation by Ethnic Group for OSTC Cases

7.3. Accused/Victim Representation by Sex for OSTC Cases

7.4. Accused/Victim Representation by Grade for OSTC Cases

7.5. Accused/Victim Representation by Military Occupational Specialties for OSTC Cases

Other Initiatives

- FY23 NDAA, Section 541: Requires SECDEF to submit report to SASC and HASC assessing the holistic effects of the OSTC on the military justice system, including:
 - (1) The effect on the military justice system and good order and discipline;
 - (2) The percentage of caseload and courts-martial meeting the definition of covered offense;
 - (3) Data on disposition of cases by commanders after declination of prosecution by STCs;
 - (4) The effect on non-judicial punishment concerning covered and non-covered offenses; and
 - (5) The resources and personnel required to maintain and execute the reforms.

*Excerpt from the DoD GC proposed plan to develop metrics
to assess the effect of OSTC on the disposition of covered offenses*

IV. § 547 (c): Plan for Assessing Effects of Changes in Law (Plan C)

Section 547(c) of the FY22 NDAA requires the Secretary of Defense to “publish a plan addressing the manner in which the Department of Defense will analyze the effects of the changes in law and policy ... with respect to the disposition of offenses over which a special trial counsel at any time exercises authority.”

A. Background

This proposed plan presents systemic performance measures to monitor the disposition of offenses over which special trial counsel (STCs) exercise authority. The proposed plan was informed by performance measures developed by the Armed Forces, the Department of Justice, and numerous non-profit and research organizations—including the Prosecutorial Performance Indicators Project, the Justice Management Institute, and Aequitas. The categories of performance measures used in this plan were adopted from a 2011 report prepared by the Justice Management Institute for the Navy Judge Advocate General Program. Appropriate modifications have been made to reflect the changes in military law and policy over the past decade, the applicability of the performance measures to all the Services, and the focus of the FY22 NDAA on offenses that fall within the authority of STCs.

B. Joint Service Committee on Military Justice (JSC)

No later than June 30, 2023, the JSC will seek authorization to establish a subcommittee with STC representation and representation from the Office of the Under Secretary of Defense for Personnel and Readiness to review and enhance the proposed performance measures and collected data from this plan, ensure consistent definitions of all necessary terms, and submit such measures and data for review and approval by the DoD General Counsel. To the extent the subcommittee recommends modifications that meaningfully deviate from this proposed plan, written explanation will be provided to the DoD General Counsel. The Department will collect performance measures and data in accordance with the final plan for each Service for each fiscal year. Nothing in the final plan will preclude the Services from developing additional or separate performance measures and data for their individual use.

C. Proposed Performance Measures and Collected Data

The seven proposed categories of performance measures and collected data are:

- (1) Due Process Protections: measures intended to assess protection of the rights of the accused;
- (2) Alleged Victim Experience: measures intended to assess the participation and experience of alleged victims throughout the military justice process as well as adherence to their rights;
- (3) Accountability: measures intended to assess the accountability of the accused with regard to substantiated allegations;
- (4) Timeliness and Resource Prioritization: measures intended to assess the efficiency and timeliness of case processing and the appropriate prioritization of OSTC resources;
- (5) Competence and Capacity: measures intended to assess the experience levels and capacity of STCs;
- (6) Communication: measures intended to assess communication between STCs and commanders in the military justice process; and

- (7) Demographics: measures intended to capture demographic factors of the accused and alleged victim at various stages of the military justice process.

The proposed performance measures and data collected within each category are included in the following chart for the working group's review. Appendix C contains the specifics for the data collected and rationale for each proposed performance measure.

1. Due Process Protections – Proposed Performance Measures	
1.1	Cases Dismissed or Reversed for Prosecutorial Error
1.2	Cases Reversed for Ineffective Assistance of Counsel
1.3	Cases Reversed for Judicial Error
2. Alleged Victim Experience – Proposed Performance Measures	
2.1	Restricted Reports Converted to Unrestricted Report
2.2	Alleged Victim Participation in OSTC Cases
2.3	Special Victims' Counsel (SVC) / Victims' Legal Counsel (VLC) / Victims' Counsel (VC) Assignment Timeline
2.4	Continuity of Alleged Victim-SVC / VLC / VC Relationship
2.5	STC Consultation with Alleged Victim Prior to Initial Disposition Decision
2.6	Timeliness
3. Accountability – Collected Data	
3.1	Prosecution Rate for Covered Offenses
3.2	Deferral Rate and Cases Resulting in Alternative Dispositions
3.3	Conviction Rates for Covered Offenses
3.4	Conviction Rates for Covered or Known or Related Offenses
3.5	Confinement Terms for Covered Offenses
3.6	OSTC Cases Affirmed on Appeal by Court of Criminal Appeals (CCA) and the Court of Appeals for the Armed Forces (CAAF)
4. Timeliness and Resource Prioritization – Proposed Performance Measures	
4.1	Timeliness of Investigation
4.2	Timeliness of STC Involvement
4.3	Timeliness of Case Processing
4.4	Timeliness of Final Disposition by Command for Deferred Cases
4.5	Timeliness of First-Level Appellate Review
4.6	Ability to Identify Dismissible Cases Prior to Preferral
4.7	Rate of Referral After No Probable Cause Finding at Article 32 Preliminary Hearing
4.8	Conviction Rates for Cases Referred After No Probable Cause Finding at Article 32

5. Competence and Capacity of STCs – Proposed Performance Measures	
5.1	STC Caseload
5.2	STC Experience Levels
5.3	STC Training
6. Communication – Collected Data	
6.1	Communication Between STCs and Commanders Regarding Case Disposition
6.2	Communication Between STCs and Commanders at Deferral
7. Demographics – Collected Data	
7.1	Representation by Racial Group for OSTC Cases (accused)
7.2	Representation by Ethnic Group for OSTC Cases (accused)
7.3	Representation by Sex for OSTC Cases (accused)
7.4	Representation by Grade for OSTC Cases (accused)
7.5	Representation of Military Occupational Specialties (MOS) for OSTC Cases (accused)
7.6	Representation by Racial Group for OSTC Cases (alleged victim)
7.7	Representation by Ethnic Group for OSTC Cases (alleged victim)
7.8	Representation by Sex for OSTC Cases (alleged victim)
7.9	Representation by Grade for OSTC Cases (alleged victim)
7.10	Representation of Military Occupational Specialties (MOS) for OSTC Cases (alleged victim)

3. Considerations

The Department has identified important considerations for successful implementation of this plan. First, at least three years of performance measures on offenses committed on or after December 28, 2023, are required for meaningful trend analysis of the OSTCs. Until such data are available, comparisons between the new data set and the historical data set will be limited. Consistent data fields and definitions are required for meaningful comparisons of the Services' OSTCs.

Second, the performance measures and collected data are only the first-level analysis to help the Department understand data trends and identify anomalies. More in-depth studies, such as case reviews and advanced data analyses, will be required to explain why any trends are occurring.

V. Conclusion

These three independent, but interrelated plans, in consultation with DHS, encompass DoD's response to Section 547 of the FY22 NDAA. Plan-specific working groups will collaborate to develop the necessary codebook, data dictionary, and performance measures during the initial stages of each plan's implementation. Once approved, these tools will set the uniform standard for the Armed Forces for collecting and maintaining information on matters within the military justice system, including information maintained for purposes of UCMJ, Article 140a; for collecting, tracking, and maintaining pretrial records and data; and for analyzing the effects of the changes in law, and aid the Department in future assessments of the military justice system.

Appendix C. Plan C Performance Measures and Data Collected

1. Due Process Protections – Proposed Performance Measures		
1.1	Cases Dismissed or Reversed for Prosecutorial Error	
	How measured; Data collected	<p><i>Percentage of cases reversed on appeal for prosecutorial error =</i> Number of OSTC cases in which one or more findings were set aside by an appellate court for prosecutorial error or ethics violation and the sentence was reduced or reversed ÷ Number of OSTC cases reviewed by an appellate court on direct appeal</p> <p><i>Percentage of cases dismissed for prosecutorial error =</i> Number of OSTC cases in which the case was dismissed for prosecutorial error or ethics violation ÷ Number of OSTC cases with charges referred</p>
	Rationale	Prosecutorial errors can have significant effects on both the alleged victims and the accused. By examining trends in cases dismissed or reversed for prosecutorial error, the Services can identify the need for targeted trainings or amended policies for STCs.
1.2	Cases Reversed for Ineffective Assistance of Counsel	
	How measured; Data collected	<p><i>Percentage of cases reversed on appeal for ineffective assistance of counsel =</i> Number of OSTC cases in which one or more findings were set aside by an appellate court for ineffective assistance of counsel and the sentence was reduced or reversed ÷ Number of OSTC cases reviewed by an appellate court on direct appeal</p>
	Rationale	Service members have both a constitutional and a statutory right to counsel. The FY22 NDAA requires that military defense counsel detailed to represent a Service member accused of a covered offense be well-trained and experienced, highly skilled, and competent in the defense of cases involving covered offenses. By examining trends in cases reversed for ineffective assistance of counsel—that is, deficient performance that renders the results of a trial unreliable or fundamentally unfair—the Services can identify the need for targeted trainings or amended policies for defense counsel.
1.3	Cases Reversed for Judicial Error	
	How measured; Data collected	<p><i>Percentage of cases reversed on appeal for judicial error =</i> Number of OSTC cases in which one or more findings were set aside by an appellate court for judicial error and the sentence was reduced or reversed ÷ Number of OSTC cases reviewed by an appellate court on direct appeal</p>
	Rationale	By examining trends in cases reversed for judicial error, the Services can identify the need for targeted trainings or amended policies for military judges.

Appendix C. Plan C Performance Measures and Data Collected

2. Alleged Victim Experience – Proposed Performance Measures		
2.1	Restricted Reports Converted to Unrestricted Report	
	How measured; Data collected	<i>Percentage of restricted reports of sexual assault converted to unrestricted reports</i> = Number of restricted reports converted to unrestricted reports ÷ Total number of restricted reports
	Rationale	An alleged victim's decision to convert a restricted report of sexual assault to an unrestricted report allows a military criminal investigative organization to initiate an investigation. Studying trends in the percentage of alleged victims who convert their report will assist the Department and Services in understanding the reasons behind this decision.
2.2	Alleged Victim Participation in OSTC Cases	
	How measured; Data collected	<p><i>Overall percentage of cases with alleged victims who decline to participate in OSTC cases</i> = Number of alleged victims who decline to participate in OSTC cases ÷ Total number of alleged victims who make an unrestricted report of a covered offense</p> <p><i>Percentage of alleged victims who decline to participate during investigative stage</i> = Number of alleged victims who decline to participate prior to substantial completion of investigation ÷ Total number of alleged victims who decline to participate in OSTC cases</p> <p><i>Percentage of alleged victims who decline to participate after preferral of charges (before referral of charges)</i> = Number of alleged victims who decline to participate after preferral of charges (before referral of charges) ÷ Total number of alleged victims who decline to participate in OSTC cases</p> <p><i>Percentage of alleged victims who decline to participate after referral of charges</i> = Number of alleged victims who decline to participate after referral of charges ÷ Total number of alleged victims who decline to participate in OSTC cases</p>
	Rationale	Studying trends in alleged victim participation in OSTC cases—along with identifying the stage at which alleged victims most frequently decline to participate in the military justice process—will assist the Department and Services in understanding the reasons behind this decision.

Appendix C. Plan C Performance Measures and Data Collected

2.3	Special Victims' Counsel (SVC) / Victims' Legal Counsel (VLC) / Victims' Counsel (VC) Assignment Timeline	
	How measured; Data collected	<i>Percentage of eligible alleged victims who have access to an SVC/VLC/VC within 72 hours</i> = Number of eligible alleged victims who have access to an SVC/VLC/VC within 72 hours of request ÷ Total number of eligible alleged victims who request access to an SVC/VLC/VC
	Rationale	Under 10 U.S.C. § 1044e, an SVC/VLC/VC must be made available on a military installation no later than 72 hours after an alleged victim's request for one, unless it is determined that this is not possible due to exigent circumstances related to military activities.
2.4	Continuity of Alleged Victim-SVC/VLC/VC Relationship	
	How measured; Data collected	Number of SVCs/VLCs/VCs per eligible alleged victim (median across all eligible alleged victims)
	Rationale	A DAC-IPAD 2022 report observed that alleged victims represented by SVCs/VLCs/VCs felt changing counsel during a case was stressful. Given that an SVC/VLC/VC's tour may end before a case is resolved, or an alleged victim may request a new SVC/VLC/VC, some turnover is inevitable; however, the DAC-IPAD found that, in general, alleged victims are better served by longer relationships with fewer counsel.
2.5	STC Consultation with Alleged Victim Prior to Initial Disposition Decision	
	How measured; Data collected	<i>Percentage of alleged victims offered opportunity to confer with STC about initial disposition decision</i> = Number of alleged victims offered opportunity to confer with STC about initial disposition decision ÷ Total number of alleged victims involved in OSTC cases
	Rationale	Under Article 6b of the UCMJ, alleged victims have a number of rights in the court-martial process, including the right to confer with trial counsel. However, according to the Independent Review Commission on Sexual Assault in the Military (IRC), many alleged victims reported that the prosecutor handling their case rarely—if ever—allowed opportunity for conferral on their cases.
2.6	Timeliness and Victim Satisfaction	
	How measured; Data collected	<i>See 4. Timeliness and Resource Prioritization.</i> The JSC subcommittee should include common definitions and processes for measuring the timeliness of the overall process and alleged victim satisfaction.
	Rationale	<i>See 4. Timeliness and Resource Prioritization.</i> The JSC subcommittee should include common definitions and processes for measuring the timeliness of the overall process and alleged victim satisfaction.

Appendix C. Plan C Performance Measures and Data Collected

3. Accountability – Collected Data		
3.1	Prosecution Rate for Covered Offenses	
	How measured; Data collected	<p><i>Preferral rate</i> = Number of military investigations resulting in preferral of charges by OSTC for a covered offense (broken down by each covered offense) ÷ Number of military investigations involving a covered offense alleged to have been committed by a Service member (broken down by each covered offense)</p> <p><i>Referral rate</i> = Number of military investigations resulting in referral of charges by OSTC for a covered offense (broken down by each covered offense) ÷ Number of military investigations resulting in preferral of charges for a covered offense (broken down by each covered offense)</p>
	Rationale	Many military investigations do not result in prosecution; for example, a DAC-IPAD study found that only 27.2% of cases involving a military criminal investigation of a penetrative sexual offense resulted in preferral of charges for the penetrative sexual offense. Understanding prosecution rates for the covered offenses is critical for those seeking to assess attrition rates and to gain context for conviction rates. The Department and Services should conduct further study to determine the reasons that some investigations do not result in prosecution, which may include lack of probable cause or an alleged victim's decision to not participate.
3.2	Deferral Rate and Cases Resulting in Alternative Dispositions	
	How measured; Data collected	<p><i>Deferral rate</i> = Number of military investigations involving a covered offense resulting in deferral by STC to commanders ÷ Number of military investigations involving a covered offense alleged to have been committed by a Service member</p> <p><i>Percentage of deferred cases resulting in alternative dispositions</i> = Number of deferred cases resulting in noncriminal alternative disposition by commander (including summary court-martial, nonjudicial punishment, and administrative action) ÷ Number of military investigations involving a covered offense resulting in deferral by STC to commanders</p>
	Rationale	The FY22 NDAA outlines a process for STCs to defer cases to commanders. Understanding deferral rates and the extent to which deferred cases result in noncriminal alternative dispositions is critical to assessing the impact of the creation of the OSTC.

Appendix C. Plan C Performance Measures and Data Collected

3.3	Conviction Rates for Covered Offenses	
	How measured; Data collected	<p><i>Overall conviction rate for covered offenses</i> = Total number of accused in OSTC cases convicted of a covered offense in trial by court-martial (broken down by each covered offense) ÷ Total number of accused tried by court-martial by OSTC for a covered offense, including guilty pleas (broken down by each covered offense)</p> <p><i>Conviction rate for covered offenses (contested cases)</i> = Total number of accused in OSTC cases convicted of at least one covered offense at a contested court-martial (broken down by each covered offense) ÷ Total number of accused tried by court-martial by OSTC for a covered offense, not including guilty pleas (broken down by each covered offense)</p>
	Rationale	While conviction rates should not be viewed as a performance measure, they can be helpful for understanding the operation of the OSTCs, particularly when analyzed in conjunction with prosecution rates.
3.4	Conviction Rates for Covered or Known or Related Offenses	
	How measured; Data collected	<p><i>Overall conviction rate for covered or known or related offenses</i> = Total number of accused in OSTC cases convicted of at least one covered or known or related offense in trial by court-martial ÷ Total number of accused tried by court-martial by OSTC for a covered or known or related offense, including guilty pleas</p> <p><i>Conviction rate for covered or known or related offenses (contested cases)</i> = Total number of accused in OSTC cases convicted of at least one covered or known or related offense at a contested court-martial ÷ Total number of accused tried by court-martial by OSTC for a covered or known or related offense, not including guilty pleas</p>
	Rationale	This measure is aimed at assessing the total conviction rate for OSTC cases involving covered or known or related offenses, including cases in which a conviction is obtained for a known or related offense but not a covered offense.
3.5	Confinement Terms for Covered Offenses	
	How measured; Data collected	Median confinement term, broken down by offense, for all covered offenses resulting in conviction in cases in which a military judge imposes sentence and applies segmented sentencing
	Rationale	Under recent changes to court-martial sentencing, in non-capital cases in which all offenses resulting in a finding of guilty were committed after December 27, 2023, a military judge will sentence the accused. Military judges apply segmented sentencing: that is, a separate term of confinement and/or fine is adjudged for each specification. Calculating the median confinement terms for cases involving segmented sentencing will assist the Department and Services in understanding the severity of the punishment imposed for covered offenses.

Appendix C. Plan C Performance Measures and Data Collected

3.6	OSTC Cases Affirmed on Appeal by Court of Criminal Appeals (CCA) and the Court of Appeals for the Armed Forces (CAAF)	
	How measured; Data collected	<i>Percentage of cases affirmed on appeal by the CCA and CAAF</i> = Number of OSTC cases in which one or more findings and the sentence were affirmed by the CCA and CAAF ÷ Number of OSTC cases reviewed by the CCA and CAAF on direct appeal
	Rationale	One of the considerations in determining the disposition of charges and specifications under the UCMJ is whether admissible evidence will likely be sufficient to obtain <i>and sustain</i> a conviction in a trial by court-martial. The percentage of cases affirmed on appeal must be examined in conjunction with conviction rates so that the Department and Services can understand whether the interests of justice and good order and discipline were served by trial by court-martial.

4. Timeliness and Resource Prioritization – Proposed Performance Measures		
4.1	Timeliness of Investigation	
	How measured; Data collected	<i>Duration of investigation</i> = Number of days between (1) date of unrestricted report of covered offense and (2) date of substantial completion of investigation (median across each covered offense)
	Rationale	Both the Fort Hood Independent Review Committee (FHIRC) and the IRC found that investigations of sexual assault cases are interminably long and involve unreasonable delays. A DAC-IPAD report observed that length of time is one of the most significant factors in an alleged victim's decision to not participate in the military justice process. Defense counsel testified before the DAC-IPAD that the initiation of an investigation results in significant adverse consequences for a Service member, even when no charges are preferred; these harms are often exacerbated by long delays. Calculating the median length of investigation will highlight what types of investigations are taking too long, enabling the Services to conduct further study to determine the causes.

Appendix C. Plan C Performance Measures and Data Collected

4.2	Timeliness of STC Involvement	
	How measured; Data collected	<p><i>Time of STC notification</i> = Number of days between (1) date of unrestricted report of offense and (2) date of STC notification (median across all cases in which STC is notified)</p> <p><i>Time of STC determination of covered offense</i> = Number of days between (1) date of STC notification and (2) date of STC's determination of whether a reported offense is a covered offense (median across all cases in which STC makes determination)</p>
	Rationale	Under the FY22 NDAA, the STC has exclusive authority to determine if a reported offense is a covered offense, and thus early coordination between STCs and investigative agencies will be necessary. Studying the timeliness of STC involvement in investigations will enable the Services to determine whether delays by STCs are causing investigations into covered offenses to proceed more slowly than investigations into non-covered offenses or whether, on the contrary, STCs' early involvement is expediting the investigative process.
4.3	Timeliness of Case Processing	
	How measured; Data collected	<p><i>Time of initial disposition decision</i> = Number of days between (1) date of substantial completion of investigation and (2) date of initial disposition decision (preferral or deferral) (median across each covered offense)</p> <p><i>Time of further action for preferred cases</i> = Number of days between (1) date of preferral and (2) date of further action by STC (referral or deferral) (median across each covered offense)</p> <p><i>Time of adjudication for referred cases</i> = Number of days between (1) date of referral and (2) date of adjudication (median across each covered offense)</p>
	Rationale	Much as they had done in their findings on investigations, the IRC and FHIRC emphasized that the time until adjudication is unduly long, which harms both the alleged victim and the accused. Calculating the duration for each phase of the military justice process will enable the Services to understand where delays are occurring and will guide further research into the reasons for these delays.

Appendix C. Plan C Performance Measures and Data Collected

4.4	Timeliness of Final Disposition by Command for Deferred Cases	
	How measured; Data collected	<p><i>Time of final disposition decision for deferred cases</i> = Number of days between (1) date of deferral by STC and (2) date of final disposition decision by command, including decision to take no action (median across all deferred offenses)</p> <p><i>Time of completed final disposition action for deferred cases (excluding no action cases)</i> = Number of days between (1) date of final disposition decision by command and (2) date of completed final disposition action (median across all deferred offenses)</p>
	Rationale	The deferral of a case to a commander has the potential to exacerbate delays in its investigation and processing.
4.5	Timeliness of First-Level Appellate Review	
	How measured; Data collected	<p><i>Time of docketing by CCA</i> = Number of days between (1) date accused was sentenced and (2) date CCA docketed case (median across all OSTC cases)</p> <p><i>Time of decision by CCA</i> = Number of days between (1) date CCA docketed case and (2) date of final decision by CCA (median across all OSTC cases)</p>
	Rationale	In <i>United States v. Moreno</i> , 63 M.J. 129 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces held that due process entitles convicted Service members to a timely review and appeal of court-martial convictions. While some of the time standards set forth in <i>Moreno</i> have been superseded by the implementation of the Military Justice Act of 2016, in general the Services presume unreasonable delay in cases in which more than 150 days elapse between sentencing and docketing with the CCA, or more than 18 months elapse between the case's being docketed with the CCA and the CCA's rendering a decision. This measure does not take into account extensions requested by appellate defense counsel, which may be analyzed through further study.
4.6	Ability to Identify Dismissible Cases Prior to Preferral	
	How measured; Data collected	Percentage of investigations in which charges are not preferred by OSTC vs. percentage of investigations in which charges are dismissed after preferral by OSTC
	Rationale	While there may be appropriate reasons for preferring charges and later dismissing them, in general early identification of dismissible cases reduces negative consequences for the alleged victim and the accused.

Appendix C. Plan C Performance Measures and Data Collected

4.7	Rate of Referral After No Probable Cause Finding at Article 32 Preliminary Hearing	
	How measured; Data collected	<i>Percentage of OSTC cases referred to general courts-martial after no probable cause finding at Article 32</i> = Number of OSTC cases referred to general courts-martial after no probable cause finding at Article 32 ÷ Total number of OSTC cases with no probable cause finding at Article 32
	Rationale	The IRC recommended further study of Article 32 preliminary hearings, writing that numerous stakeholders agreed that it is not fair to the administration of justice to proceed with a court-martial despite a no probable cause finding. Studying the frequency at which cases are referred after a no-probable-cause finding in conjunction with these cases' final dispositions may highlight a potential issue of fairness or resource prioritization for the OSTC.
4.8	Conviction Rates for Cases Referred After No Probable Cause Finding at Article 32 Preliminary Hearing	
	How measured; Data collected	<i>Overall conviction rate for cases referred after no probable cause finding at Article 32 preliminary hearing</i> = Total number of accused in OSTC cases convicted of at least one offense in trial by court-martial after case was referred with no probable cause finding at Article 32 preliminary hearing ÷ Total number of OSTC cases with no probable cause finding at Article 32
	Rationale	This is intended to measure the outcome of the cases referred after a no probable cause determination at the Article 32.

5. Competence and Capacity of STCs – Proposed Performance Measures		
5.1	STC Caseload	
	How measured; Data collected	<i>Percentage of STCs with caseloads within the optimum caseload range</i> = Number of STCs whose caseloads are within optimum caseload range as determined by each Service ÷ Total number of STCs
	Rationale	Section 539F requires the Services to present to Congress the optimum caseload goal assigned to personnel who participate in the military justice process. For STCs, the Army presented the goal of 7–10 courts-martial per year and 50–75 law enforcement reports per year; the Navy and Marine Corps presented the goal of lead counsel handling about 50 cases per year, resulting in 8–10 completed courts-martial per year; and the Air Force presented the goal of 8–12 courts-martial per year. The Services should use consistent terms in defining their optimum caseload goal, and then determine what percentage of actual STC caseloads are within the optimum range.

Appendix C. Plan C Performance Measures and Data Collected

5.2	STC Experience Levels	
	How measured; Data collected	<i>Percentage of STCs who met target experience levels prior to assignment</i> = Number of STCs who worked the target number of cases prior to assignment as STC ÷ Total number of STCs
	Rationale	The Services must submit a plan for detailing officers to serve as STCs, including how they will place appropriate emphasis and value on litigation experience for judge advocates in order to ensure they are experienced, prepared, and qualified to handle covered offenses. If the Secretaries' plans for litigation experience include a target number of cases worked by judge advocates prior to assignment as STCs, the Services should determine what percentage of STCs have met those targets. The Services should use consistent terms in defining the target number of cases worked.
5.3	STC Training	
	How measured; Data collected	<i>Percentage of STCs who completed required training</i> = Number of STCs who completed training requirements ÷ Total number of STCs
	Rationale	Each STC must be certified to be qualified, by reason of education, training, experience, and temperament, for duty. Under DoD policy, the lead STC will establish appropriate training for their office. The Services should determine what percentage of STCs have completed their training requirements.

6. Communication – Collected Data		
6.1	Communication Between STCs and Commanders Regarding Case Disposition	
	How measured; Data collected	<p><i>Percentage of Service member alleged victims' commanders who provide input to an STC</i> = Total number of Service member alleged victims whose commander provided input to an STC ÷ Total number of cases with covered or known or related offenses</p> <p><i>Percentage of Service member accused's commanders who provide input to an STC</i> = Total number of Service members accused of a covered or known or related offenses whose commander provided input to an STC ÷ Total number of Service members accused of a covered or known or related offense</p>
	Rationale	Under the FY22 NDAA, commanders of the alleged victim and the accused in a case involving a covered offense will have the opportunity to provide non-binding input to the STC regarding case disposition. Once the Services determine the exact process for commanders to provide input to STCs, the Services should assess the percentage of cases in which commanders provided such input.

Appendix C. Plan C Performance Measures and Data Collected

6.2	Communication Between STCs and Commanders at Deferral	
	How measured; Data collected	Percentage of cases involving deferral in which STCs provide necessary information to commanders; exact data elements and computation to be determined
	Rationale	Once the Services determine the exact process for deferral, the Services should assess the percentage of cases in which the STC is meeting the requirements for providing necessary information to the commander.

7. Demographics – Collected Data		
7.1	Representation by Racial Group for OSTC Cases (accused)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of investigative subjects belonging to a certain racial group ÷ Percentage of Service members belonging to the same racial group in total Service population (Example: XX% of accused who are Black ÷ YY% of total Service population that is Black)</p> <p><i>Ratio at preferral</i> = Percentage of accused at preferral belonging to a certain racial group ÷ Percentage of investigative subjects at investigation belonging to a same racial group</p> <p><i>Ratio at referral</i> = Percentage of accused at referral belonging to a certain racial group ÷ Percentage of accused at preferral belonging to the same racial group</p> <p><i>Ratio at conviction</i> = Percentage of accused at conviction belonging to a certain racial group ÷ Percentage of accused at referral belonging to the same racial group</p> <p><i>Ratio receiving confinement</i> = Percentage of accused belonging to a certain racial group receiving confinement ÷ Percentage of accused at conviction belonging to the same racial group</p>
	Rationale	<p>This performance measure—which adopts the methodology used by the Sentencing Project, a research and advocacy center—will enable the Department and Services to identify disparities in the military justice system and make comparisons across the Services. A disparity ratio greater than 1 indicates that a racial group is disproportionately represented at a given stage in comparison to its representation at the previous stage. A ratio less than 1 means that a racial group is underrepresented at this stage compared to the previous stage.</p> <p>This is a first-level analysis of the data; the next step would be to identify possible causes of any disparity, including by using multivariate regression analyses to control for outside influences, such as crime rate or reporting rate.</p>

Appendix C. Plan C Performance Measures and Data Collected

7.2	Representation by Ethnic Group for OSTC Cases (accused)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of investigative subjects belonging to a certain ethnic group ÷ Percentage of Service members belonging to the same ethnic group in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of accused at preferral belonging to a certain ethnic group ÷ Percentage of investigative subjects belonging to the same ethnic group</p> <p><i>Ratio at referral</i> = Percentage of accused at referral belonging to a certain ethnic group ÷ Percentage of accused at preferral belonging to same ethnic group</p> <p><i>Ratio at conviction</i> = Percentage of accused at conviction belonging to a certain ethnic group ÷ Percentage of accused at referral belonging to the same ethnic group</p> <p><i>Ratio receiving confinement</i> = Percentage of accused belonging to a certain ethnic group receiving confinement ÷ Percentage of accused at conviction belonging to the same ethnic group</p>
	Rationale	This measure would identify disproportionate representation based on ethnicity, one of the demographic categories in which Congress expressed interest in the FY22 NDAA.
7.3	Representation by Sex for OSTC Cases (accused)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of investigative subjects of a certain sex ÷ Percentage of Service members of the same sex in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of accused at preferral of a certain sex ÷ Percentage of investigative subjects of the same sex</p> <p><i>Ratio at referral</i> = Percentage of accused at referral of a certain sex ÷ Percentage of accused at preferral of the same sex</p> <p><i>Ratio at conviction</i> = Percentage of accused at conviction of a certain sex ÷ Percentage of accused at referral of the same sex</p> <p><i>Ratio receiving confinement</i> = Percentage of accused of a certain sex receiving confinement ÷ Percentage of accused at conviction of the same sex</p>
	Rationale	This measure would identify disproportionate representation based on sex, one of the demographic categories in which Congress expressed interest in the FY22 NDAA.

Appendix C. Plan C Performance Measures and Data Collected

7.4	Representation by Grade for OSTC Cases (accused)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of investigative subjects in a certain grade ÷ Percentage of Service members in the same grade in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of accused at preferral in a certain grade ÷ Percentage of investigative subjects in the same grade</p> <p><i>Ratio at referral</i> = Percentage of accused at referral in a certain grade ÷ Percentage of accused at preferral in the same grade</p> <p><i>Ratio at conviction</i> = Percentage of accused at conviction in a certain grade ÷ Percentage of accused at referral in the same grade</p> <p><i>Ratio receiving confinement</i> = Percentage of accused in a certain grade receiving confinement ÷ Percentage of accused at conviction in the same grade</p>
	Rationale	This measure would identify disproportionate representation based on grade, one of the demographic categories in which Congress expressed interest in the FY22 NDAA.
7.5	Representation of Military Occupational Specialties (MOS) for OSTC Cases (accused)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of investigative subjects assigned to a certain MOS ÷ Percentage of Service members assigned to the same MOS in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of accused at preferral assigned to a certain MOS ÷ Percentage of investigative subjects assigned to the same MOS</p> <p><i>Ratio at referral</i> = Percentage of accused at referral assigned to a certain MOS ÷ Percentage of accused at preferral assigned to the same MOS</p> <p><i>Ratio at conviction</i> = Percentage of accused at conviction assigned to a certain MOS ÷ Percentage of accused at referral assigned to the same MOS</p> <p><i>Ratio receiving confinement</i> = Percentage of accused assigned to a certain MOS receiving confinement ÷ Percentage of accused at conviction assigned to the same MOS</p>
	Rationale	Even though Congress did not direct the Services to measure military justice outcomes disaggregated by MOS, this performance measure would identify disproportionate representation based on the demographic category.

Appendix C. Plan C Performance Measures and Data Collected

7.6	Representation by Racial Group for OSTC Cases (alleged victim)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of alleged victims belonging to a certain racial group ÷ Percentage of Service members belonging to the same racial group in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of alleged victims at preferral belonging to a certain racial group ÷ Percentage of alleged victims at investigation belonging to a same racial group</p> <p><i>Ratio at referral</i> = Percentage of alleged victims at referral belonging to a certain racial group ÷ Percentage of alleged victims at preferral belonging to the same racial group</p> <p><i>Ratio at conviction</i> = Percentage of alleged victims at conviction belonging to a certain racial group ÷ Percentage of alleged victims at referral belonging to the same racial group</p> <p><i>Ratio receiving confinement</i> = Percentage of alleged victims belonging to a certain racial group for cases in which accused receives confinement ÷ Percentage of alleged victims at conviction belonging to the same racial group</p>
	Rationale	These measures mirror those of the accused, above.
7.7	Representation by Ethnic Group for OSTC Cases (alleged victim)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of alleged victims belonging to certain ethnic group ÷ Percentage of Service members belonging to the same ethnic group in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of alleged victims at preferral belonging to certain ethnic group ÷ Percentage of alleged victims belonging to the same ethnic group</p> <p><i>Ratio at referral</i> = Percentage of alleged victims at referral belonging to certain ethnic group ÷ Percentage of alleged victims at preferral belonging to same ethnic group</p> <p><i>Ratio at conviction</i> = Percentage of alleged victims at conviction belonging to certain ethnic group ÷ Percentage of alleged victims at referral belonging to the same ethnic group</p> <p><i>Ratio receiving confinement</i> = Percentage of alleged victims belonging to a certain ethnic group for cases in which accused receives confinement ÷ Percentage of alleged victims at conviction belonging to the same ethnic group</p>
	Rationale	These measures mirror those of the accused, above.

Appendix C. Plan C Performance Measures and Data Collected

7.8	Representation by Sex for OSTC Cases (alleged victim)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of alleged victims of a certain sex ÷ Percentage of Service members of the same sex in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of alleged victim at preferral of a certain sex ÷ Percentage of alleged victims of the same sex</p> <p><i>Ratio at referral</i> = Percentage of alleged victims at referral of a certain sex ÷ Percentage of alleged victims at preferral of the same sex</p> <p><i>Ratio at conviction</i> = Percentage of alleged victims at conviction of a certain sex ÷ Percentage of alleged victims at referral of the same sex</p> <p><i>Ratio receiving confinement</i> = Percentage of alleged victims of a certain sex for cases in which accused receives confinement ÷ Percentage of alleged victims at conviction of same sex</p>
	Rationale	These measures mirror those of the accused, above.
7.9	Representation by Grade for OSTC Cases (alleged victim)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of alleged victims in a certain grade ÷ Percentage of Service members in the same grade in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of alleged victims at preferral in a certain grade ÷ Percentage of alleged victims in the same grade</p> <p><i>Ratio at referral</i> = Percentage of alleged victims at referral in a certain grade ÷ Percentage of alleged victims at preferral in the same grade</p> <p><i>Ratio at conviction</i> = Percentage of alleged victims at conviction in a certain grade ÷ Percentage of alleged victims at referral in the same grade</p> <p><i>Ratio receiving confinement</i> = Percentage of alleged victims in a certain grade for cases in which accused receives confinement ÷ Percentage of alleged victims at conviction in same grade</p>
	Rationale	These measures mirror those of the accused, above.

Appendix C. Plan C Performance Measures and Data Collected

7.10	Representation of Military Occupational Specialties (MOS) for OSTC Cases (alleged victim)	
	How measured; Data collected	<p><i>Ratio at investigation</i> = Percentage of alleged victims assigned to a certain MOS ÷ Percentage of Service members assigned to the same MOS in total Service population</p> <p><i>Ratio at preferral</i> = Percentage of alleged victims at preferral assigned to a certain MOS ÷ Percentage of alleged victims assigned to the same MOS</p> <p><i>Ratio at referral</i> = Percentage of alleged victims at referral assigned to a certain MOS ÷ Percentage of alleged victims at preferral assigned to the same MOS</p> <p><i>Ratio at conviction</i> = Percentage of alleged victims at conviction assigned to a certain MOS ÷ Percentage of alleged victims at referral assigned to the same MOS</p> <p><i>Ratio receiving confinement</i> = Percentage of alleged victims assigned to a certain MOS for cases in which accused receives confinement ÷ Percentage of alleged victims at conviction assigned to the same MOS</p>
	Rationale	These measures mirror those of the accused, above.

National Defense Authorization Act for Fiscal Year 2023

SEC. 541. MATTERS IN CONNECTION WITH SPECIAL TRIAL COUNSEL.

(a) DEFINITION OF COVERED OFFENSE.—

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

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

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

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

(A) by striking “or”; and

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

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

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

the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 10 U.S.C. 801 note), in consideration of due process for all parties involved in such a case.

- (d) **AMENDMENT TO THE RULES FOR COURTS-MARTIAL.**—The President shall prescribe in regulation such modifications to Rule 813 of the Rules for Courts-Martial and other Rules as appropriate to ensure that at the beginning of each court-martial convened, the presentation of orders does not in open court specify the name, rank, or position of the convening authority convening such court, unless such convening authority is the Secretary concerned, the Secretary of Defense, or the President.
- (e) **BRIEFING REQUIRED.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives a briefing on the progress of the Department of Defense in implementing this section, including an identification of—
 - (1) the duties to be transferred under subsection (c); and
 - (2) the positions to which those duties will be transferred;
 - (3) any provisions of law or Rules for Courts Martial that must be amended or modified to fully complete the transfer.
- (f) **ADDITIONAL REPORTING RELATING TO IMPLEMENTATION OF SUBTITLE D OF TITLE V OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2022.**—Not later than February 1, 2025, and annually thereafter for five years, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report assessing the holistic effect of the reforms contained in subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) on the military justice system. The report shall include the following elements:
 - (1) An overall assessment of the effect such reforms have had on the military justice system and the maintenance of good order and discipline in the ranks.
 - (2) The percentage of caseload and courts-martial assessed as meeting, or having been assessed as potentially meeting, the definition of “covered offense” under section 801(17) of title 10, United States Code (article 1(17) of the Uniform Code of Military Justice) (as added by section 533 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1695)), disaggregated by offense and military service where possible.
 - (3) An assessment of prevalence and data concerning disposition of cases by commanders after declination of prosecution by special trial counsel, disaggregated by offense and military service when possible.
 - (4) Assessment of the effect, if any, the reforms contained in such subtitle have had on non-judicial punishment concerning covered and non-covered offenses.

(5) A description of the resources and personnel required to maintain and execute the reforms made by such subtitle during the reporting period relative to fiscal year 2022.

(6) A description of any other factors or matters considered by the Secretary to be important to a holistic assessment of those reforms on the military justice system.



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

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:

I am writing to provide the Department of Defense's assessment of recommendations 38 through 40 of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), which were included in the DAC-IPAD's December 2020 Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military. Each of those recommendations calls for the Secretary of Defense to "direct" the Military Justice Review Panel (MJRP) to make a specified determination or assessment. It would be inappropriate for the Department of Defense to direct the MJRP to study particular topics. The MJRP is statutorily tasked with conducting "independent periodic reviews and assessments of the operations of" the Uniform Code of Military Justice. Uniform Code of Military Justice (UCMJ) art. 146(a), 10 U.S.C. § 946(a). The statute provides that the MJRP "may" also review and assess specific matters "at the request of the Secretary of Defense." UCMJ art. 146(f)(4), 10 U.S.C. § 946(f)(4). I have called the Chair of the MJRP's attention to the recommendations in the DAC-IPAD's December 2020 report for such consideration or action as the MJRP deems appropriate.

Sincerely,

A handwritten signature in black ink, reading "Ruth M.S. Vetter", followed by the date "11/20/22".

Ruth M.S. Vetter
Deputy General Counsel (Personnel & Health
Policy)




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

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:

I am writing to update you on the status of the Department of Defense's consideration of recommendations 41 and 42 of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, which concern special victims' counsel's tour lengths and Army special victims' counsel's supervisory rating structure. The Department is in the process of issuing a Department of Defense Instruction (DoDI) governing special victims' counsel programs. The Department carefully considered recommendations 41 and 42 in the process of developing that DoDI. The Department will notify you when that DoDI is issued and provide you with a copy. We are grateful for the DAC-IPAD's August 10, 2022, Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs, which has been helpful in developing the special victims' counsel DoDI.

Sincerely,

 11/28/23
Ruth M.S. Vetter
Deputy General Counsel (Personnel & Health
Policy)

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
Expedited Transfer			
DAC-IPAD Second Annual Report R-1 Mar 2018	(DoD) Dispel the Misperception of Widespread Abuse of the Expedited Transfer Policy	Recommendation 1: The Secretary of Defense take action to dispel the misperception of widespread abuse of the expedited transfer policy, including addressing the issue in the training of all military personnel. IMPLEMENTATION: No response from DoD or Congress as of Nov 2023.	No Action
DAC-IPAD Second Annual Report R-2 Mar 2018	(DoD) Identify and Track Appropriate Metrics to Monitor Expedited Transfer Policy	Recommendation 2: The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it. IMPLEMENTATION: No response from DoD or Congress as of Nov 2023.	No Action
DAC-IPAD Second Annual Report R-3 (and interim assessment 5) Mar 2018	(DoD) Extend the Expedited Transfer Policy to FAP Sexual Assault Victims (DoD) Extend the Expedited Transfer Policy to Include Family Members	Recommendation 3: The DoD Family Advocacy Program (FAP) policy and Coast Guard equivalent Family Advocacy Program (FAP) policy include provisions for expedited transfer of active-duty Service members who are victims of sexual assault similar to the expedited transfer provisions in the DoD Sexual Assault Prevention and Response (SAPR) policy and consistent with 10 U.S.C. § 673. DAC-IPAD Interim Assessment 5: The DAC-IPAD believes that the expedited transfer policy should be a complete program without gaps in eligibility within the military community, and thus should include family members. The PWG will continue to explore this issue. IMPLEMENTATION: (CONGRESS) FY 2019 NDAA § 536. Directs the Secretary of Defense to implement a standardized expedited transfer process for a Service member who is the alleged victim of sexual assault, regardless of whether the case is handled by the SAPR or the FAP Programs, as well as for those Service members who are victims of physical domestic violence committed by a spouse or intimate partner. Section 536 also requires the Secretary to extend the policy to include Service members whose dependent is the victim of a sexual assault perpetrated by a member of the Armed Forces who is not related to the victim. (DoD) USD P&R Memo to the Secretaries of the Military Departments “Revisions to the Sexual Assault Prevention and Response Program’s Expedited Transfer Policy” (Feb. 10, 2020).	FY19 NDAA § 536 USD P&R Memo (Feb. 10, 2020) DoDI 6495.02 (Incorporating Change 4, Sept. 11, 2020) Service Regulations

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		<p>Provides guidance on implementation of FY 2019 NDAA § 536 – for SAPR personnel only (not FAP) (Feb. 10, 2020).</p> <p>DoDI 6495.02, “<i>Sexual Assault Prevention and Response (SAPR) Program Procedures</i>” (Incorporating Change 4, Sept. 11, 2020) Incorporated the policy revision contained in the Feb. 10, 2020 USD P&R memorandum – for SAPR only.</p> <p>Army: ALARACT 095/2020 Replaced by ALARACT 013/2021 Dated 22 February 2021 // Additional Sexual Harassment/Assault Response and Prevention Program Guidance. Expands expedited transfer policy to the Army FAP.</p> <p><u>USMC: MARADMINs: 561/20 – Family Advocacy Program Expedited Transfers (Sep 2020).</u> Expands the expedited transfer policy to the USMC FAP.</p> <p><u>Air Force: AFI 40-301 Family Advocacy Program (Nov 13, 2020).</u> Expands the expedited transfer policy to AF FAP.</p> <p>Navy: OPNAVINST 1752.2C Family Advocacy Policy (May 2020). Expands the expedited transfer policy.</p>	
DAC-IPAD Second Annual Report R-4 Mar 2018	(DoD) Require Commander Coordination with SAPR and FAP for Expedited Transfers Throughout the Transfer Process	<p>Recommendation 4: The DoD-level military personnel assignments policy (DoD Instruction 1315.18) and Coast Guard equivalent include a requirement that assignments personnel or commanders coordinate with and keep SAPR and FAP personnel informed throughout the expedited transfer, safety transfer, and humanitarian/compassionate transfer assignment process when the transfer involves an allegation of sexual assault.</p> <p>IMPLEMENTATION: (DoD) USD P&R Memo to the Secretaries of the Military Departments “<i>Revisions to the Sexual Assault Prevention and Response Program's Expedited Transfer Policy</i>” (Feb. 10, 2020). Provides guidance for implementing the requirements of FY 2019 NDAA § 536, guidance on including commanding officers’ interactions with SAPR personnel (but not FAP) and victims at both receiving and losing installations.</p> <p>DoDI 6495.02, “<i>Sexual Assault Prevention and Response (SAPR) Program Procedures</i>” (Incorporating Change 4, Sept. 11, 2020) Incorporated the policy revision contained in the Feb. 10, 2020 USD P&R memorandum but for SAPR personnel only.</p>	<p>FY19 NDAA § 536</p> <p>USD P&R Memo (Feb. 10, 2020)</p> <p>DoDI 6495.02 (Incorporating Change 4, Sept. 11, 2020)</p>

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Third Annual Report R-13 Mar 2019	(DoD) Expand Expedited Transfer Option to Victims Making Restricted Reports	<p>Recommendation 13: The Secretary of Defense expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:</p> <ul style="list-style-type: none"> a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander. b. The victim's commander and senior enlisted leader, at both the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the subject's identity or other facts of the case—thereby enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care. c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the subject not being held accountable for his or her actions and the absence of evidence should the victim later decide to unrestrict his or her report. <p>IMPLEMENTATION: Although DoD policy allows Services to request an exception to policy for victims filing a restricted report, at the time of DAC-IPAD March 2019 report there had been no exceptions to policy requested by any Service.</p> <p>No response regarding R-13 from DoD or Congress as of Nov. 2023.</p>	No action

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Third Annual Report R-15 Mar 2019	(DoD) Revise the Goal and Purpose of the Expedited Transfer Policy and Credible Report Criteria	<p>Recommendation 15: The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) revise the DoD expedited transfer policy (and the policy governing the Coast Guard with respect to expedited transfers) to include the following points:</p> <ul style="list-style-type: none"> a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should focus on that goal when they make decisions regarding such requests. b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery (e.g., proximity to the subject or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault). c. The requirement that a commander determine that a report be credible is not aligned with the core purpose of the expedited transfer policy. It should be eliminated, and instead an addition should be made to the criteria that commanders must consider in making a decision on an expedited transfer request: "any evidence that the victim's report is not credible." <p>IMPLEMENTATION: No response from DoD or Congress as of Nov. 2023.</p>	No Action
DAC-IPAD Third Annual Report R-16 Mar 2019	(Congress) Increase Expedited Transfer Request Response Timeframe	<p>Recommendation 16: Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five workdays.</p> <p>IMPLEMENTATION: (CONGRESS) FY21 NDAA § 531. Extended the statutory time frame for approval of expedited transfers to five calendar days.</p>	FY21 NDAA § 531
DAC-IPAD Third Annual Report R-17	(Military Services) Track and Report Specific Metrics for Expedited Transfer Requests	<p>Recommendation 17: The Services track and report the following data in order to best evaluate the expedited transfer program:</p> <ul style="list-style-type: none"> a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex 	No Action

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
Mar 2019		<p>and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final.</p> <p>b. Data on the number of accused transferred; the grade and job title of the accused; the sex and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final.</p> <p>c. Data on victim participation in investigation/prosecution before and after an expedited transfer.</p> <p>d. Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers and accused Service members who are transferred under this program.</p> <p>e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.</p> <p>f. Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.</p> <p>g. Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.</p> <p>h. Data on victim satisfaction with the expedited transfer program.</p> <p>i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.</p> <p>IMPLEMENTATION: No response from DoD or Congress as of Nov. 2023.</p>	

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Third Annual Report R-18 Mar 2019	(DoD) Include Policy for Transitional Care Similar to Wounded Warrior Program for Victims.	<p>Recommendation 18: The Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.</p> <p>IMPLEMENTATION: FY21 NDAA § 538(c)(1) REPORT ON RESIDENTIAL TREATMENT. – Not later than 180 days after date of the enactment of this Act, the Secretaries of Defense and Veterans Affairs shall provide a report to the appropriate committees of Congress regarding the availability of residential treatment programs for survivors of sexual trauma, including (A) barriers to access for such programs; and (B) resources required to reduce such barriers.</p> <p>No response from DoD or Congress as of Nov. 2023.</p>	FY21 NDAA § 538
Option for Sexual Offense Victims to Limit Further Investigation in Certain Circumstances			
DAC-PAD Third Annual Report R-14 Mar 2019	(DoD) Establish a Working Group to Review an Option That Would Allow the Victim to Request that the Investigation Be Terminated	<p>Recommendation 14: The Secretary of Defense (in consultation with the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) establish a working group to review whether victims should have the option to request that further disclosure or investigation of a sexual assault report be restricted in situations in which the member has lost the ability to file a restricted report, whether because a third party has reported the sexual assault or because the member has disclosed the assault to a member of the chain of command or to military law enforcement. The working group's goal should be to find a feasible solution that would, in appropriate circumstances, allow the victim to request that the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes; it should also consider whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This working group should consider developing such a policy with the following requirements:</p> <p>a. The victim be required to meet with an SVC or VLC</p>	<p>FY20 NDAA § 540K</p> <p>Acting SecDef Memo Approved (May 1, 2019)</p>

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		<p>before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.</p> <p>b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.</p> <p>c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request.</p> <p>d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.</p> <p>e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault.</p> <p>IMPLEMENTATION: (CONGRESS) FY20 NDAA § 540K. Directed the Sec Def to consult with the DAC-IPAD and submit a report to Congress on the feasibility and advisability of a policy for DoD that would permit a Service member or an adult military dependent victim of a sexual assault that is or may be investigated as a result of a communication to exercise the option of a restricted report, regardless of who has initiated or received such communication.</p> <p>(DoD) Sexual Assault Accountability and Investigation Task Force (SAAITF) Report – included recommendation supporting DAC-IPAD R-14 (April 30, 2019).</p> <p>(DoD) Acting Sec Def Memo “<i>Actions to Address and Prevent Sexual Assault in the Military</i>” (May 1, 2019). Approved all recommendations contained in the SAAITF report.</p> <p>(DoD) “CATCH A Serial Offender Program” launched Aug. 2019 to provide people making a restricted sexual assault report the opportunity to anonymously submit suspect information to help the DoD identify serial offenders, using DD Form 2910-4.</p>	
DAC-PAD Letter to	(DoD) Allow Victims to Request that the	<i>Recommendation 14a:</i> The Secretary of Defense establish a policy that would provide adult sexual assault victims the option to request termination of the criminal investigation	Acting SecDef Memo

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
Secretary of Defense R-14a May 2020	Investigation Be Terminated When Report Made by Third Parties	<p>when a third party has reported the sexual assault or when the victim has inadvertently disclosed the assault to a member of the chain of command. The proposed policy should take into account specific circumstances, such as the interests of justice and safety, under which a case may merit further investigation regardless of the victim's wishes; it should also take into account whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This policy should contain the following requirements:</p> <ul style="list-style-type: none"> The victim be offered a referral to and encouraged to meet with a special victims' counsel (SVC) or victims' legal counsel (VLC) before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation. The investigative agent be required to obtain supervisory or military criminal investigative organization (MCIO) headquarters-level approval to close a case in these circumstances. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request. Cases in which the subject is in a position of authority over the victim be excluded from such a policy. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault. <p>IMPLEMENTATION: (DoD) <i>SAPRO Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims</i> (Apr. 7, 2020) (as required by FY20 NDAA § 540K).</p> <p>DoDD 6495.01 policy update to expand eligibility for Restricted Reporting (implementing FY20 § 540K).</p> <p>Deputy Secretary of Defense Memorandum "Updates to DoD Policy and Procedures for the Sexual Assault Prevention and Response Program and Adult Sexual Assault Investigation" (November 10, 2021)</p>	<p>Approved (May 1, 2019)</p> <p>DoD SAPRO Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims (Apr. 7, 2020)</p>
Uniform Command Action Form			

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Third Annual Report R-5 Mar 2019	(DoD) Develop a Standard Set of Disposition Options for the Uniform Command Action Form Required by FY19 NDAA	<p>Recommendation 5: In developing a uniform command action form in accordance with section 535 of the FY19 National Defense Authorization Act (NDAA), the Secretary of Defense should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.</p> <p>The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should ensure that the standard set of options for documenting command disposition decisions is based on recognized legal and investigatory terminology and standards that are uniformly defined across the Services and accurately reflect command action source documents.</p> <p>IMPLEMENTATION: DD 3114 Uniform Command Disposition Form (January 2022)</p>	DD Form 3114 (Jan 2022)
DAC-IPAD Third Annual Report R-6 Mar 2019	(DoD) Require Judge Advocates to Provide Advice to Commanders for Completing Disposition/Action Reports	<p>Recommendation 6: The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should require that judge advocates or civilian attorneys employed by the Services in a similar capacity provide advice to commanders in completing command disposition/action reports in order to make certain that the documentation of that decision is accurate and complete.</p> <p>IMPLEMENTATION: DD 3114 Uniform Command Disposition Form (January 2022)</p>	DD Form 3114 (Jan 2022)
Information Provided to Federal Crime Databases			
DAC-IPAD Third Annual Report R-7 Mar 2019	(DoD) Provide Uniform Guidance Regarding Submission of Information to Federal Databases.	<p>Recommendation 7: The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should provide uniform guidance to the Services regarding the submission of final disposition information to federal databases for sexual assault cases in which, after fingerprints have been submitted, the command took no action, or took action only for an offense other than sexual assault.</p> <p>IMPLEMENTATION: (CONGRESS) FY19 NDAA § 546. Directed Sec Def and the Secretaries of the Military Departments to establish a consolidated tracking process to ensure increased oversight of the timely submission of crime reporting data to the Federal Bureau of Investigation.</p>	<p>FY19 NDAA § 546</p> <p>FY21 NDAA § 545</p> <p>DoDI 5505.11 (Oct. 2019)</p>

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		(CONGRESS) FY21 NDAA § 545. Requires the Secretary of Defense to establish and maintain a policy and process that enables a qualifying subject to request that their name and personally identifying information “be corrected in, or expunged or otherwise removed from...systems of record maintained by or on behalf of the Department. (DoD) DoDI 5505.11 <i>Fingerprint Reporting Requirements</i> (Updated October 31, 2019)	
Article 140a, UCMJ, Data Management			
DAC-IPAD Third Annual Report R-8 Mar 2019	(DoD) Adopt Best Practices for Article 140a Standards and Criteria.	<p>Recommendation 8: The uniform standards and criteria developed to implement Article 140a, Uniform Code of Military Justice (UCMJ), should reflect the following best practices for case data collection:</p> <ol style="list-style-type: none"> Collect all case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process, such as the initial report of investigation, the commander’s report of disciplinary or administrative action, the charge sheet, the Article 32 report, and the Report of Result of Trial. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD. Develop one electronic database for the storage and analysis of standardized source documents, and locate that database in the centralized military justice data office/organization within DoD. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible. Have data entered from source documents into the electronic database by one independent team of trained professionals whose full-time occupation is document analysis and data entry. This team should have expertise in the military justice process and in social science research methods, and should ensure that the data are audited at regular intervals. <p>IMPLEMENTATION: (DoD) OGC Response Letter to DAC-IPAD Chair (Jan, 23, 2019) – DoD disapproved this recommendation but suggested a pilot program may be possible in the future to assess feasibility of a single data collection system.</p>	<p>DoD Disapproved (Jan. 23, 2019)</p> <p>FY20 NDAA § 540G</p> <p>FY22 NDAA § 547</p>

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		<p>(CONGRESS) FY20 NDAA § 540G – Directed DoD to provide a plan for the standardization among Military Departments for collecting and maintaining Article 140a of the UCMJ case information; and an assessment of establishing a single department-wide management system.</p> <p>(CONGRESS) FY22 NDAA § 547 Directed Sec Def to publish a plan to establish a single document management system for use by each Armed Force to collect and present information on matters within the military justice system, including information collected and maintained for purposes of Article 140a, UCMJ.</p>	
DAC-IPAD Third Annual Report R-9 Mar 2019	(DoD) Source Documents Should Contain Uniform Content	<p>Recommendation 9: The source documents referenced in DAC-IPAD Recommendation 8 should contain uniformly defined content covering all data elements that DoD decides to collect to meet the requirements of Articles 140a and 146, UCMJ.</p> <p>IMPLEMENTATION: (DoD) OGC Response Letter to DAC-IPAD Chair (Jan, 23, 2019) – DoD disapproved this recommendation.</p>	DoD Disapproved (Jan. 23, 2019)
DAC-IPAD Third Annual Report R-10 Mar 2019	(DoD) Article 140a Data Should Be the Primary Source for the MJRP	<p>Recommendation 10: The data produced pursuant to Article 140a, UCMJ, should serve as the primary source for the Military Justice Review Panel’s periodic assessments of the military justice system, which are required by Article 146, UCMJ, and as the sole source of military justice data for all other organizations in DoD and for external entities.</p> <p>IMPLEMENTATION: (DoD) OGC Response Letter to DAC-IPAD Chair (Jan, 23, 2019) – DoD disapproved this recommendation.</p>	DoD Disapproved (Jan. 23, 2019)
DAC-IPAD Third Annual Report R-11 Mar 2019	(DoD) Article 140a Data Collection Requirements for Adult and Child Victims of Sexual Assault.	<p>Recommendation 11: Article 140a, UCMJ, should be implemented so as to require collection of the following information with respect to allegations of both adult-victim and child-victim sexual offenses, within the meaning of Articles 120, 120b, and 125, UCMJ (10 U.S.C. §§ 920, 920b, and 925 (2016)):</p> <ol style="list-style-type: none"> A summary of the initial complaint giving rise to a criminal investigation by a military criminal investigative organization (MCIO) concerning a military member who is subject to the UCMJ, and how the complaint became known to law enforcement; Whether an unrestricted report of sexual assault 	DoD Disapproved (Jan. 23, 2019)

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		<p>originated as a restricted report;</p> <p>c. Demographic data pertaining to each victim and accused, including race and sex;</p> <p>d. The nature of any relationship between the accused and the victim(s);</p> <p>e. The initial disposition decision under Rule for Court-Martial 306, including the decision to take no action, and the outcome of any administrative action, any disciplinary action, or any case in which one or more charges of sexual assault were preferred, through the completion of court-martial and appellate review;</p> <p>f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;</p> <p>g. Whether a victim declined to participate at any point in the military justice process;</p> <p>h. Whether a defense counsel requested expert assistance on behalf of a military accused, whether those requests were approved by a convening authority or military judge, and whether the government availed itself of expert assistance; and</p> <p>i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.</p> <p>IMPLEMENTATION: (DoD) OGC Response Letter to DAC-IPAD Chair (Jan, 23, 2019) – DoD disapproved this recommendation.</p>	
DAC-IPAD Third Annual Report R-12 Mar 2019	(Services) Continue Separate Case Management Systems with Plan to Transition to One Uniform Case Management System	<p>Recommendation 12: The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that</p> <p>a. The Services use the same uniform standards and definitions to refer to common procedures and substantive offenses in the Manual for Courts-Martial, as required by Article 140a; and</p> <p>b. The Services develop a plan to transition toward operating one uniform case management system across all of the Services, similar to the federal judiciary's Case Management/ Electronic Court Filing (CM/ECF) system.</p> <p>IMPLEMENTATION: (DoD) OGC Response Letter to DAC-IPAD Chair (Jan, 23, 2019) – DoD disapproved</p>	<p>DoD Disapproved (Jan. 23, 2019)</p> <p>FY22 NDAA § 547</p>

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		<p>this recommendation.</p> <p>(CONGRESS) FY22 NDAA § 547 Directed Sec Def to publish a plan to establish a single document management system for use by each Armed Force to collect and present information on matters within the military justice system, including information collected and maintained for purposes of Article 140a, UCMJ.</p>	
<p>DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-35 Dec 2020</p>	<p>(Congress) Authorize and Fund a Pilot Program for Developing a Single Document-Based Data System for All Sexual Offenses</p>	<p>Recommendation 35: Congress authorize and appropriate funds for the Secretary of Defense to establish a pilot program operating one uniform, document-based data system for collecting and reporting contact and penetrative sexual offenses across all of the Military Services. The pilot program, which should cover every sexual offense allegation made against a Service member under the military’s jurisdiction that is investigated by a military criminal investigative organization (MCIO), will record case data from standardized source documents provided to the pilot program by the Military Services and will include demographic data pertaining to each victim and accused—including race and ethnicity.</p> <p>IMPLEMENTATION: (DoD) OGC Memo “Plans Required by Section 547 of the National Defense Authorization Act for Fiscal Year 2022” (Dec 23, 2022). The Defense Legal Services Agency (DLSA) would host and operate a single centralized document management system (DMS) to pull data and information from each Armed Force’s respective military justice case management system and other databases, as appropriate. Once established, the DMS’s primary purpose is to serve as the central repository for military justice data to assess and analyze both changes in law and policy and the overall health of the military justice system.</p>	<p>FY22 NDAA § 547</p> <p>(DoD) OGC Memo “Plans Required by Section 547 of the National Defense Authorization Act for Fiscal Year 2022” (Dec 23, 2022)</p>
Victim Collateral Misconduct			
<p>DAC-IPAD Fourth Annual Report R-19 Mar 2020</p>	<p>(DoD) Recommended Collateral Misconduct Data Reporting Requirements and Definitions of Terms</p>	<p>Recommendation 19: The Department of Defense should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Military Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 [of the FY19 NDAA] by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles... <i>[editor’s note: the list is</i></p>	<p>DoD OGC Memo Partially Approved (Mar 25, 2020)</p> <p>FY21 NDAA § 536, § 539A</p>

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
		<p><i>not included here. Please see DACIPAD Fourth Annual Report, R-19 for comprehensive list</i>]:</p> <p>IMPLEMENTATION: (DoD) OGC Memo “<i>Guidance for Preparation of Collateral Misconduct Reports</i>” (Mar. 25, 2020) – Provides implementation guidance on definitions and standards to produce data in the collateral misconduct reports.</p> <p>(CONGRESS) FY21 NDAA § 536 - Amends “accused of collateral misconduct” to “suspected of collateral misconduct,” and defines the term; clarifies that data must be reported on each victim of a sexual offense that occurred while that individual was a Service member; directs the Sec Def to issue guidance to standardize definitions of the terms “sexual offense,” “collateral misconduct,” and “adverse action” and to standardize methods for collecting collateral misconduct data.</p> <p>(CONGRESS) FY21 NDAA § 539A – Directs the Sec Def to establish a safe-to-report policy that prescribes the handling of victim minor collateral misconduct. Requires the Sec Def to develop and implement a process to track incidents of minor collateral misconduct that are subject to the safe-to-report policy.</p>	
DAC-IPAD Fourth Annual Report R-20 Mar 2020	(DoD) Should Not Classify False Allegations of a Sexual Offense as Collateral Misconduct	<p>Recommendation 20: Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.</p> <p>IMPLEMENTATION: (DoD) OGC Memo “<i>Guidance for Preparation of Collateral Misconduct Reports</i>” (Mar. 25, 2020) – Excludes false allegations from the definition of collateral misconduct as recommended.</p>	DoD OGC Memo Approved (Mar 25, 2020)

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Fourth Annual Report R-21 Mar 2020	(DoD) Should Report Percentage of Victims Suspected of Collateral Misconduct Who Received Adverse Action for Collateral Misconduct	<p>Recommendation 21: For purposes of the third statistical data element required by section 547 [of the FY19 NDAA], the Department of Defense 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 then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim's receiving an adverse action for collateral misconduct once they are suspected of such misconduct.</p> <p>IMPLEMENTATION: (DoD) OGC Memo "Guidance for Preparation of Collateral Misconduct Reports" (Mar. 25, 2020) – Disapproved</p>	DoD OGC Memo Disapproved (Mar 25, 2020)
DAC-IPAD Fourth Annual Report R-22 Mar 2020	(DoD) Should Report Type of Collateral Offense and Type of Adverse Action Taken for Each Instance	<p>Recommendation 22: The Department of Defense 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 19) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.</p> <p>IMPLEMENTATION: (DoD) OGC Memorandum to Secretaries of Military Departments (Mar. 25, 2020) – Disapproved</p> <p>(CONGRESS) FY21 NDAA § 536, - Directed Sec Def to standardize methods for collecting collateral misconduct data.</p> <p>(CONGRESS) FY21 NDAA § 539A – (Related provision) Requires Sec Def to develop and implement a process to track incidents of minor collateral misconduct that are subject to the safe-to-report policy.</p>	DoD OGC Memo Disapproved (Mar 25, 2020) FY 21 NDAA § 536, § 539A

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Fourth Annual Report R-23 Mar 2020	(Services) Should Standardize Documentation of Collateral Misconduct Reporting	<p>Recommendation 23: To facilitate production of the future collateral misconduct reports required by section 547 [of the FY19 NDAA], the Military Services should employ standardized internal documentation of sexual offense cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.</p> <p>IMPLEMENTATION: OGC Memo “Guidance for Preparation of Collateral Misconduct Reports” (Mar. 25, 2020) – Disapproved</p> <p>(CONGRESS) FY21 NDAA § 536, - Directs Sec Def to standardize methods for collecting collateral misconduct data (does not require “standardized documentation” however)</p> <p>(CONGRESS) FY21 NDAA § 539A – Directs Sec Def to establish a safe-to-report policy that prescribes the handling of victim minor collateral misconduct. Requires Sec Def to develop and implement a process to track incidents of minor collateral misconduct that are subject to the safe-to-report policy. (This provision allows but does not require “standardized documentation” of collateral misconduct by offense).</p>	<p>DoD OGC Memo Disapproved (Mar 25, 2020)</p> <p>FY 21 NDAA § 536, § 539A</p>
DAC-IPAD Collateral Misconduct Report R-51 Sept 2023	(Congress) Amend Section 547 of the FY2019 NDAA.	<p>Recommendation 51: The DAC-IPAD recommends that Congress amend section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, to require the Military Services to report the number of incidents of collateral misconduct by type of offense and adverse action taken, if any, in future victim collateral misconduct reports.</p>	
DAC-IPAD Collateral Misconduct Report R-52 Sept 2023	(Congress) Require DoD to provide service specific data.	<p>Recommendation 52: The DAC-IPAD recommends that Congress require DoD to provide the Service-specific data collected pursuant to its Safe-to-Report policy in accordance with section 539A of the FY21 NDAA, to the DAC-IPAD at the same time and covering the same time periods that it currently collects and submits victim collateral misconduct data to the DAC-IPAD pursuant to FY19 NDAA section 547 biennial collateral misconduct reports.</p>	

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
Advisability of Guardian ad Litem Program in the Military			
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-24 Jun 2020	(Services) Enhance Funding and Training for SVCs/VLCs And Hire HQEs with Child Victim Expertise	<p>Recommendation 24: Secretaries of the Military Departments enhance funding and training for SVCs/VLCs appointed to represent child victims, including authorization to hire civilian highly qualified experts (HQEs) with experience and expertise in representing child victims, including expertise in child development, within the SVC/VLC Programs.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-25 Jun 2020	(Services) Develop Cadre of SVCs/VLCs with Specialized Expertise to Represent Child Victims	<p>Recommendation 25: In conjunction with Recommendation 24, the Judge Advocates General of the Military Services including the Coast Guard and the Staff Judge Advocate to the Commandant of the Marine Corps develop a cadre of identifiable SVCs/VLCs who have specialized training, experience, and expertise in representing child victims of sex-related offenses by utilizing military personnel mechanisms such as Additional Skill Identifiers.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-26 Jun 2020	(DoD IG and Services) Assess Whether MCIOs and FAP Are Notifying Child Victims of Right to SVC/VLC	<p>Recommendation 26: The Department of Defense Office of the Inspector General and the Secretaries of the Military Departments assess whether the MCIOs and FAP currently are providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported, and if necessary, take corrective action.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-27 Jun 2020	(Congress) Expand SVC/VLC Eligibility to All Child Victims of Sex Offenses	<p>Recommendation 27: Congress amend 10 U.S.C. § 1044e to expand SVC/VLC eligibility to any child victim of a sex-related offense committed by an individual subject to the UCMJ.</p> <p>IMPLEMENTATION: No response from Congress as of Nov 2023.</p>	No Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-28 Jun 2020	(Congress) Authorize Judges to Direct Appointment of SVC/VLC for a Child Victim.	<p>Recommendation 28: Congress amend the UCMJ to authorize the military judge to direct the appointment of an SVC/VLC for a child victim of a sex-related offense and/or of an independent best interest advocate to advise the military judge when they find that the child's interests are not otherwise adequately protected.</p> <p>IMPLEMENTATION: No response from Congress as of Nov 2023.</p>	No Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-29 Jun 2020	(DoD) Develop a Child Victim Advocate Capability Within the Services for Sexual Offenses	<p>Recommendation 29: The Secretary of Defense and the Secretaries of the Military Departments develop a child victim advocate capability within each of the Services to support certain child victims of sexual offenses. The child victim advocate should reside within the SVC/VLC Programs and work as part of the SVC/VLC team in order to ensure that the child's legal interests are fully represented and protected. The child victim advocate should have expertise in social work, child development, and family dynamics.</p> <p>IMPLEMENTATION: (CONGRESS) FY21 NDAA § 549B - Directed the military to ensure that the services of trained civilian child victim advocates are made available to ensure that a child's interests are protected in the courtroom when the child victim lacks a supportive family member or cannot direct their own legal representation. Requires the Secretary of each Military Department to enter into a memorandum of understanding with the National Children's Alliance, or similar organization. [Note: This provision does not require internal military capability as recommended, but does require access to child victim advocates].</p>	FY 21 NDAA § 549B

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-30 Jun 2020	(Congress) Require Art. 6b, UCMJ, Representatives to Protect Victim's Interests	Recommendation 30: Congress amend Article 6b, UCMJ, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests; any such representative should be appointed as early as possible in the military justice process. IMPLEMENTATION: No response from Congress as of Nov 2023.	No Action
DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims R-31 Jun 2020	(DoD) Not Advisable to Establish a GAL Program	Recommendation 31: Provided that the Department of Defense adopts and implements DAC-IPAD Recommendations 24–30, it is not advisable or necessary to establish a military guardian ad litem program within the Department of Defense for child victims of alleged sex-related offenses in courts-martial. IMPLEMENTATION: No action required	No action required
Article 34, UCMJ – SJA Advice to Convening Authority			
DAC-IPAD Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in FY2017 R-32 Oct 2020	(Congress) Amend Article 34, UCMJ to Require SJA to Advise on Sufficiency of Admissible Evidence to Obtain and Sustain a Conviction	Recommendation 32: Congress amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial. IMPLEMENTATION: No response from Congress as of Nov 2023.	No Action
Race and Ethnicity Data Collection			

DAC-IPAD Recommendations with Implementation Status

Rec. Number	Brief Description	Recommendation and Implementation Status	Action
DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-33 Dec 2020	(DoD) Designate the Military Personnel System as Primary Data System for Collecting Military Personnel Demographics	<p>Recommendation 33: The Secretary of Defense designate the military personnel system as the primary data system in the Department of Defense for the collection of demographic information such as race and ethnicity. All other Department of Defense systems that collect demographic data regarding military personnel, such as the military criminal investigative system and the military justice system, should obtain demographic information on military personnel from the military personnel system.</p> <p>IMPLEMENTATION: (DoD), Acting Sec Def Memo “<i>Actions to Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military</i>” (Dec 17, 2020) – Requires a plan to standardize a DoD Human Resources Data System for Diversity and Inclusion Analysis.</p>	Acting Sec Def Memo (Dec 17, 2020)
DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-34 Dec 2020	(DoD) Direct the Military to Uniformly Record Race and Ethnicity in MCIO Databases.	<p>Recommendation 34: The Secretary of Defense direct each Military Department to record race and ethnicity in military criminal investigative organization databases, military justice databases, and military personnel databases using the same racial and ethnic categories. The Secretary of Defense should direct each Military Department to report race using the following six categories: <i>American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, More Than One Race/ Other, and White</i>, and to report ethnicity using the following two categories: <i>Hispanic or Latino</i> and <i>Not Hispanic or Latino</i>.</p> <p>IMPLEMENTATION: (Congress) FY 22 NDAA § 549G directs the Services to submit annually to Sec Def a report on racial, ethnic and gender demographics in the military justice system from the prior year with statistics on UCMJ offenses and disciplinary actions. Sec Def must provide these reports to Congress by April 30 of each year.</p> <p>(DoD) OGC Memo “<i>Recording Court-Martial Demographic Information</i>” (June 8, 2020)</p> <p>(DoD) Internal Review Team on Racial Disparities in the Investigative and MJ Systems Report (Aug 31, 2022)</p> <p>(13) Improve and standardize data collection across all phases of the investigative, administrative, and military justice systems, particularly at the initial intake stages. Several of the IRT’s data collection and reporting recommendations can be implemented relatively quickly by standardizing existing DoD-wide reporting requirements. The IRT analyzed two statutorily required reports that assist Congress in exercising its oversight of the military justice</p>	<p>FY 22 NDAA § 549G</p> <p>DoD OGC Memo (Jun. 8, 2020)</p> <p>DoD Internal Review Team on Racial Disparities in the Investigative and MJ Systems Report (Aug 31, 2022)</p>

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		system: the 549G and 146a reports. As noted above, our analysis of the data in these two reports revealed vast inconsistencies in how the Services defined and reported the data, and exposed gaps in data needed to form the basis of meaningful review and analysis.	
DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-36 Dec 2020	(DoD) Require Services to Track Demographic Data for Victims and Subjects Throughout the Military Justice Process	<p>Recommendation 36: The Secretary of Defense direct the Military Departments to record and track the race, ethnicity, sex, gender, age, and grade of the victim(s) and the accused for every investigation initiated by military law enforcement in which a Service member is identified as a subject through the final disposition within the military justice system.</p> <p>IMPLEMENTATION: (DoD) GC Memo “<i>Recording Court-Martial Demographic Information</i>” (June 8, 2020) (directing collection of race, ethnicity, & gender of accused and victim for every court-martial)</p> <p>(DoD) GC Memo “<i>Revised Uniform Standards and Criteria Required by Article 140a, UCMJ</i>” (Jan 17, 2023) (mandatory data collection fields with race/ethnicity for accused but not victim)</p>	Incomplete implementation in DoD GC Memos to the Military Depts
DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-37 Dec 2020	(DoD) Require Services Maintain Race and Ethnicity Data of All Participants Involved in the Processing of Sexual Offense Cases	<p>Recommendation 37: The Secretary of Defense direct the Military Departments to record, beginning in fiscal year 2022, the race and ethnicity of military police and criminal investigators, trial counsel, defense counsel, victims’ counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges involved in every case investigated by military law enforcement in which a Service member is the subject of an allegation of a contact or penetrative sexual offense. The source information for these data should be collected from the military personnel databases and maintained for future studies by the DAC-IPAD on racial and ethnic disparities in cases involving contact and penetrative sexual offenses.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action

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DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-38 Dec 2020	(DoD) Require the MJRP to Assess Race and Ethnicity Demographics of All Participants Involved in the Military Justice System.	<p>Recommendation 38: The Secretary of Defense direct the newly established Military Justice Review Panel to determine whether to review and assess, by functional roles and/or on an individual case basis, the race and ethnicity demographics of the various participants in the military justice process, including military police and criminal investigators, trial counsel, defense counsel, victims' counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action
DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military R-39 Dec 2020	(DoD) Require the MJRP to Conduct Periodic Reviews of Race and Ethnicity Disparities in the Military Justice System	<p>Recommendation 39: Once the Department of Defense has implemented new data collection processes as recommended in this report and as required pursuant to Article 140a, UCMJ, the Secretary of Defense direct the newly established Military Justice Review Panel to determine whether to review and assess racial and ethnic disparities in every aspect of the military justice system as part of its charter for periodic and comprehensive reviews. This review and assessment of racial and ethnic disparities should include, but not be limited to, cases involving sexual offenses.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action
DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities In Investigation, Prosecution, Conviction of Sexual Offenses in the Military R-40 Dec 2020	(DoD) Require the MJRP to Assess Uniform Training on Explicit and Implicit Bias for all Military Justice System Personnel	<p>Recommendation 40: The Secretary of Defense direct the Military Justice Review Panel to assess whether a uniform training system on explicit and implicit bias should be developed for all military personnel who perform duties in the military justice system, including military police and criminal investigators, trial counsel, defense counsel, victims' counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate judges.</p> <p>IMPLEMENTATION: No response from DoD as of Nov 2023.</p>	No Action

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs			
DAC-IPAD Special Victims' Counsel/Victims' Legal Counsel Program Report R-41 Aug 2022	(DoD) Services should adopt an 18-month minimum assignment length.	<p>Recommendation 41: All of the Services should adopt an 18-month minimum assignment length for SVC/VLC serving in their first tour as a judge advocate, and a 24-month minimum for all other SVCs/VLCs, with appropriate exceptions for personal or operational reasons.</p> <p>IMPLEMENTATION: (DOD) new DoD Instruction is pending and expected to address Service special victims' counsel programs.</p>	Pending: DODI on special victims' counsel program
DAC-IPAD Special Victims' Counsel/Victims' Legal Counsel Program Report R-42 Aug 2022	(DoD) Army should establish an independent rating structure.	<p>Recommendation 42: The Army should establish an independent supervisory rating structure for SVCs outside of the OSJA and local command.</p> <p>IMPLEMENTATION: (DOD) new DoD Instruction is pending and expected to address Service special victims' counsel programs.</p>	Pending: DODI on special victims' counsel programs
Victim Impact Statements at Court-Martial Presentencing Proceedings			
DAC-IPAD Victim Impact Statements Report R-43 Mar 2023	(DoD and President) JSC should draft amendment to R.C.M. 1001(c)(2)(B).	<p>Recommendation 43: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words "or indirectly" to the definition of victim impact, amending the section as follows:</p> <p>"For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly <i>or indirectly</i> relating to or arising from the offense of which the accused has been found guilty."</p> <p>IMPLEMENTATION: EO 14103, Annex 3 amends R.C.M. 1001(c) and victim impact statements at presentencing proceedings to remove the word "directly" before the words "relating to or arising from" from the definition of victim impact. These amendments take effect Dec. 27, 2023.</p>	EO 14103 (Jul. 28, 2023) and R.C.M. 1001(c)(2)(B)

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DAC-IPAD Victim Impact Statements Report R-44 Mar 2023	(DoD and President) JSC should draft amendment to R.C.M. 1001(c)(3).	Recommendation 44: The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases. IMPLEMENTATION: EO 14103 amends R.C.M. 1001(c)(3) to allow victims to recommend a specific sentence during their impact statements in noncapital cases.	EO 14103 (Jul. 28, 2023) and R.C.M. 1001(c)
DAC-IPAD Victim Impact Statements Report R-45 Mar 2023	(DoD and President) JSC should draft amendment to R.C.M. 1001(c)(5)(A).	Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to allowing the statement orally, in writing, or both. IMPLEMENTATION: No response from DoD as of Nov 2023.	No action
DAC-IPAD Victim Impact Statements Report R-46 Mar 2023	(DoD and President) JSC should draft amendment to R.C.M. 1001(c)(5)(B).	Recommendation 46: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the “upon good cause shown” clause to be consistent with the JSC’s proposed change to R.C.M. 1001(c)(5)(A). IMPLEMENTATION: EO 14103 amends R.C.M. 1001(c)(5) to remove the requirement to show “good cause” in order for the victim’s counsel to read the victim impact statement.	EO 14103 (Jul. 28, 2023) and R.C.M. 1001(c)(5)
DAC-IPAD Victim Impact Statements Report R-47 Mar 2023	(DoD and President) JSC should draft amendment to R.C.M. 1001(c)(5)(B).	Recommendation 47: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings. IMPLEMENTATION: EO 14103 amends R.C.M. 1001(c)(5) to remove 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.	EO 14103 (Jul. 28, 2023) and R.C.M. 1001(c)(5)

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Rec. Number	Brief Description	Recommendation and Implementation Status	Action
Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards			
DAC-IPAD Report on Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards R-48a Jun 2023	(Congress) Amend Article 32	Recommendation 48a: Amend Article 32 to provide that a preliminary hearing officer's determination of no probable cause precludes referral of the affected specification(s) to a general court-martial—subject to reconsideration as described in Recommendation 48b—without prejudice to the government to prefer new charges.	No action
DAC-IPAD Report on Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards R-48b Jun 2023	(Congress) Amend Article 32 (DoD and President) JSC should draft amendment to R.C.M. 405	Recommendation 48b: Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer's no-probable-cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following: 1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented. After 10 days, a petition may be made only for good cause shown. The preliminary hearing officer shall reconsider their previous no-probable-cause determination one time upon reopening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final, but is without prejudice to the government to prefer new charges.	No action
DAC-IPAD Report on Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards	(DoD) Revise Appendix 2.1, Manual for Courts-Martial	Recommendation 49: The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to align with the prosecution principles contained in official guidance of the United States Attorney General with respect to disposition of federal criminal cases. These revisions should provide that special trial counsel refer charges to a court-martial, and judge advocates recommend that a convening authority refer charges to a court-martial, only if they believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be	Appendix 2.1 Disposition Guidance for the MCM (Oct 24, 2023)

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R-49 Jun 2023		<p>sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.</p> <p>IMPLEMENTATION: Oct. 24, 2023 Sec Def signed a revised Appendix 2.1 Disposition Guidance for the MCM implementing Recommendation 49. The new language reads:</p> <p>2.1. Interests of Justice and Good Order and Discipline. a. Whether admissible evidence will probably be sufficient to obtain and sustain a finding of guilty in a trial by court-martial when viewed objectively by an unbiased factfinder;</p> <p>2.3. Referral. b. A special trial counsel should not refer, and a staff judge advocate or other judge advocate involved in the disposition process should not recommend that a convening authority refer, a charge to a court-martial unless the special trial counsel, staff judge advocate, or other judge advocate believes that the Service member's conduct constitutes an offense under the UCMJ and that the admissible evidence will probably be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder.</p>	
DAC-IPAD Report on Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards R-50 Jun 2023	(DoD) Require training on prosecution standards.	Recommendation 50: The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.	No action