

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

Meeting Materials

December 6 & 7, 2022

**Defense Advisory Committee on Investigation, Prosecution, and Defense of
Sexual Assault in the Armed Forces (DAC-IPAD)
25th Public Meeting**

**December 6 & 7, 2022
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**Defense Advisory Committee on Investigation, Prosecution, and Defense
of Sexual Assault in the Armed Forces (DAC-IPAD)**

PUBLIC MEETING AGENDA

**December 6-7, 2022
Ritz-Carlton, Pentagon City, Virginia**

Tuesday, December 6, 2022 (Day 1)

8:30 a.m. – 8:50 a.m. Administrative Session (Closed) (Plaza B)

Colonel Jeff A. Bovarnick, Director, DAC-IPAD

9:00 a.m. - 9:10 a.m. Welcome and Introduction to Public Meeting (Grand Ballroom)

*Mr. Dwight Sullivan, Designated Federal Officer, Opens Meeting
Honorable Karla N. Smith, Chair, Opening Remarks*

**9:10 a.m. – 10:10 a.m. Uniform Code of Military Justice Panel Selection
(60 minutes)**

*Colonel Christopher Kennebeck, Chief, Criminal Law, OTJAG, U.S. Army
Captain Andrew House, SJA, U.S. Naval Academy, U.S. Navy
Colonel Shannon Sherwin, SJA, Air Education & Training Command,
U.S. Air Force
Colonel Christopher G. Tolar, Deputy SJA to the Commandant of the
Marine Corps, U.S. Marine Corps
Commander Kismet Wunder, Legal Services Command, U.S. Coast Guard*

10:10 a.m. – 10:15 a.m. Break

**10:15 a.m. – 11:15 a.m. Survivors United
(60 minutes)**

*Ms. Adrian Perry, Victim Advocate, Survivors United
Dr. Breck Perry, Victim Advocate, Survivors United
Mr. Ryan Guilds, Special Victims' Counsel, Arnold & Porter LLP*

11:15 a.m. – 11:30 a.m. Break

**11:30 a.m. – 12:30 p.m. Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Panel
(60 minutes)**

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

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

PUBLIC MEETING AGENDA

12:30 p.m. – 1:30 p.m. Lunch

1:30 p.m. – 3:00 p.m. Offices of Special Trial Counsel Panel
(60 minutes)

Honorable Carrie F. Ricci, General Counsel, Department of the Army

Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army

Honorable John P. “Sean” Coffey, General Counsel, Department of the Navy

Vice Admiral Darse E. “Del” Crandall, Jr., Judge Advocate General, U.S. Navy

*Major General David J. Bligh, Staff Judge Advocate to the Commandant,
U.S. Marine Corps*

Honorable Peter J. Beshar, General Counsel, Department of the Air Force

*Lieutenant General Charles L. Plummer, The Judge Advocate General,
U.S. Air Force*

**3:00 p.m. – 3:30 p.m. DAC-IPAD and U.S. Government Accountability Office (GAO) Racial
Disparity Reports Discussion**
(30 minutes)

Mr. Chuck Mason, DAC-IPAD Staff Attorney

Ms. Nalini Gupta, DAC-IPAD Staff Attorney

3:30 p.m. – 3:45 p.m. Break

3:45 p.m. – 4:00 p.m. Preview Next Day Meeting

4:00 p.m. – 4:15 p.m. Public Comment
(15 minutes)

Mr. Christopher Hines

4:15 p.m. Public Meeting Adjourned

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

PUBLIC MEETING AGENDA

Wednesday, December 7, 2022 (Day 2)

- 8:55 a.m. – 9:00 a.m.** **Welcome and Overview of Day** (*Grand Ballroom*)
- 9:00 a.m. – 9:30 a.m.** **Case Review Subcommittee Update**
(30 minutes)

Ms. Audrey Critchley, DAC-IPAD Staff Attorney
Ms. Kate Tagert, DAC-IPAD Staff Attorney
- 9:30 a.m. – 10:00 a.m.** **Special Projects Subcommittee Update**
(30 minutes)

Ms. Meghan Peters, DAC-IPAD Staff Attorney
Ms. Eleanor Magers Vuono, DAC-IPAD Staff Attorney
- 10:00 a.m. – 10:30 a.m.** **Policy Subcommittee Update**
(30 minutes)

Ms. Terri Saunders, DAC-IPAD Staff Attorney
Ms. Theresa Gallagher, DAC-IPAD Staff Attorney
- 10:30 a.m. – 10:45 a.m.** **Break**
- 10:45 a.m. – 11:45 a.m.** **Deliberations**
(60 minutes)

March 2023 Report

Colonel Jeff A. Bovarnick, Director, DAC-IPAD
- 11:45 a.m. – 12:00 p.m.** **Meeting Wrap-up; Preview Next Meeting**
(15 minutes)
- 12:00 p.m.** **Public Meeting Adjourned**



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

MINUTES OF SEPTEMBER 21, 2022, PUBLIC MEETING

AUTHORIZATION

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

EVENT

The Committee held its twenty-fourth public meeting on September 21, 2022.

LOCATION

The meeting was held at the Doubletree Hotel, Pentagon City, located at 300 Army-Navy Drive, Arlington, Virginia. Location details were provided to the public in the Federal Register and on the DAC-IPAD’s website.

MATERIALS

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

PARTICIPANTS

Participating Committee Members

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

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

Absent Committee Member

Dr. Cassia C. Spohn
Mr. William E. Cassara

Committee Staff

Colonel Jeff A. Bovarnick, U.S. Army,
Executive Director
Ms. Julie Carson, Deputy Director
Mr. Dale Trexler, Chief of Staff
Ms. Audrey Critchley, Attorney-Advisor
Dr. Alice Falk, Technical Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Mr. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst
Ms. Laurel Prucha Moran, Graphic Designer
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Ms. Eleanor Magers Vuono, Attorney-Advisor
Dr. William Wells, Criminologist

Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

MEETING MINUTES

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 8:30 a.m. Mr. Sullivan introduced the Honorable Karla N. Smith, DAC-IPAD Chair, who provided opening remarks welcoming those in attendance; explained the purpose of the meeting; outlined the agenda; and introduced Colonel Jeff Bovarnick, DAC-IPAD Executive Director, who provided a brief overview of the meeting and introduced the first session.

Court-Martial Observation Briefing

In this session, Ms. Terri Saunders and Member Martha Bashford provided a briefing of their attendance and observations of a contested court-martial that was held at Naval Base Kitsap, Bremerton, Washington. The court-martial was a re-trial of a case that resulted in a conviction that was overturned on appeal. Major Steven Dray of the Judge Advocate General's Legal Center and School participated in the briefing as the post-trial subject matter expert.

Observations for discussion:

The defendant, an officer, pleaded not guilty before an officer panel.

Voir Dire: From 15 members, 7 men and 1 woman were selected to comprise the panel. It was observed that the voir dire was scripted and cursory.

Ms. Bashford: The question portion of the selection process could have been more effective in eliciting panel biases. The military judge addressed a panel member's concern and explained that a unanimous verdict is not required and individual members' votes would be anonymous.

Panel Composition and Selection: The Committee expressed interest in how panels are selected as well as the demographics of the selected panel members.

Major Dray: Article 25, UCMJ, governs a convening authority's selection of members based on age, experience, training, education, judicial temperament, and length of service.

Motions and Objections: Pre-trial issues were re-litigated during the trial. There were several Article 39(a) sessions where the panel was dismissed for the point to be argued, and at times while the witness remained on the stand.

Expert Testimony: Both trial and defense counsel called one expert witness.

Victim Testimony: The victim testified as a prosecution witness.

Ms. Bashford: The victim demonstrated "unreliable memory," conflating incidents that occurred several years prior.

Trial Delay: The case was tried six years after the alleged events.

Evidence: The trial and defense counsel provided clips of forensic interviews that lacked coherence.

Additional Trial Notes: The prosecution and defense were well-staffed and well-prepared. Each side demonstrated skill and knowledge of the law. Both provided excellent openings and summations.

The military judge provided clear communication and maintained control of the proceedings throughout the trial.

The Victim's Legal Counsel was present and participated during the trial.

Verdict: The defendant was acquitted of all offenses.

Advanced Litigation Course Observation Briefing

This session provided the Committee with a briefing of the recent advanced litigation courses attended by certain members.

This panel included the following Committee Members:

Ms. Martha Bashford and Ms. Suzanne Goldberg

Ms. Meghan Peters escorted Ms. Bashford, Ms. Goldberg, and Dr. Cassia Spohn to the Advanced Sexual Assault Litigation Course hosted at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Montgomery, Alabama. Ms. Peters explained that the course was a joint training event of special interest to the Committee since it focused on developing skills and training for members who had been selected for the Office of the Special Trial Counsel.

Ms. Theresa Gallagher escorted Ms. Bashford to the Sexual Assault Trial Advocacy Course conducted by the Army Trial Counsel Assistance Program located at the Army Advocacy Center, Fort Belvoir, Virginia. Ms. Gallagher explained that the course is in the process of being developed for the special trial counsel certification course and will be available in June 2023.

Ms. Bashford observed a lack of attention to detail by participants in both the Air Force and Army courses regarding to the presented fact patterns. The Air Force and Army courses both discussed the OSTC changes coming into effect. She stated that the Committee needs more clarification on a reference made that the Special Trial Counsel would opine based on preponderance of evidence. She suggested to the Army that it conduct a six-month to one-year follow-up with attendees of the course to find what was useful or not useful. She also noted the Air Force and Army course participants' reluctance to use the SAFE exam. She stated that the Services' OSTC plans for triaging the volume of cases they will be taking is unclear. She requested that more information be provided to the Committee in January.

Ms. Markowitz observed that medical evidence in most adult sexual assault cases is nonspecific, but is important as medical evidence and best explained by medical experts. The idea that a SAFE exam is not relevant is very problematic and this must be addressed from a training perspective.

Ms. Garvin noted that protecting the victim's privacy and using injury evidence to get a conviction is a complex issue.

Ms. Goldberg stated that the Air Force had excellent teachers at the highest level in terms of engaging the students. She suggested that future courses should provide more follow-up with students and have modeling exercises in the course. She noted a structural challenge with panel composition as it relates to women: (1) women who have experienced sexual assault are dismissed, and (2) people trained as victims' counsel are predominantly women are dismissed for cause. She added that more clarity around the role of the victim's legal counsel is needed.

Uniform Code of Military Justice Appellate Process Overview

Major Steven Dray briefed the Committee on the military justice appeals process, covering the Courts of Criminal Appeals' (CCA) statutory responsibilities and authorities; the Court of Appeals for the Armed Forces' (CAAF) jurisdiction and responsibilities; and the jurisdiction of the Supreme Court. He addressed members' questions and explained the composition of each of the appellate courts.

Mr. Sullivan noted that the SASC recently reported out, at DoD's request, a provision in the NDAA for FY 2023 to eliminate sub-jurisdictional cases, allowing those cases to go to the applicable CCA.

FY 2021 Appellate Case Data

This panel consisted of the following staff attorney-advisors:

Ms. Audrey Critchley; Ms. Kate Tagert; Ms. Meghan Peters; and Ms. Terri Saunders

Ms. Critchley and Ms. Tagert briefed the Committee on the Appellate Case Review Task as contained in the DAC-IPAD Terms of Reference. Based on the Committee's decision at the June 21, 2022 public meeting, the briefing addressed the initial findings of cases reviewed for recurring issues. The findings for discussion included:

- 27% of FY21 CCA cases involved military sexual assault (MSA)
- More than one third of MSA convictions involved child victims
- One third of MSA convictions resulted from guilty pleas
- Appellants were more likely to plead guilty in MSA child victim cases
- 212 MSA cases resulted in 262 CCA decisions
- 25% of decisions were summary affirmances, with significant differences among the CCAs
- Two thirds of CCA decisions affirmed the findings and sentence
- Court of Appeals for the Armed Forces (CAAF) reviewed 59 decisions
- CAAF affirmed findings and sentence in 56% of the MSA cases it reviewed
- Recurring issues most often discussed in CCA opinions
 - Evidentiary Issues – Military Rules of Evidence (MRE):
 - 801/803 (hearsay, exceptions, exclusions)
 - 413/414 (propensity)
 - 412 (rape shield)
 - 311 (search and seizure)
 - 513 (psychotherapist – patient privilege)
 - 403 (relevance balancing)
 - Factual and legal sufficiency
 - post-trial delay and processing errors
 - ineffective assistance of counsel

Ms. Garvin expressed interest in an in-depth analysis of the lower-rate recurring issues.

Ms. Bashford inquired about prosecutorial misconduct – improper argument and the consequences for improper prosecutorial conduct.

Chair Smith asked about ineffective assistance of counsel; the staff advised here that several types were addressed in the appellate decisions, including failure to challenge a member, failure to object to instructions, and failure to pursue a case lead.

Judge Walton asked about the impact the new factual sufficiency rule would have on case outcomes. The staff responded that they were not available to analyze yet. Ms. Tagert stated one theory is, because the CCAs will no longer have a *sua sponte* duty to address factual sufficiency, the rate at which appellants raise the issue will increase.

General Anderson asked about questioning an accused who has pleaded guilty, to determine if the defendant understands the agreement.

Ms. Peters responded and described the conversation between the military judge and the accused to establish the facts upon which the plea is based.

Mr. Sullivan clarified the military justice system does not have *Alford* pleas. He explained that to protect against an accused being pressured into a guilty plea, the accused is put under oath and the military judge carefully questions the accused.

Ms. Goldberg noted the small numbers of appeals and the variances among the Services.

Ms. Gentile-Long stated that to tell the whole story you must show the plea rate as a percentage of the total number of cases coming in.

Appellate Government Division Current Practice & Perspectives

This panel included:

- Major Dustin Morgan, (former) Government Appellate Division, U.S. Army
- Major Brittany Speirs, Government Trial and Appellate Counsel Division, U.S. Air Force
- Mr. Brian Keller, Deputy Director, Appellate Government Division, U.S. Navy
- Captain Anita Scott, Chief, Military Justice, U.S. Coast Guard

The panel provided an in-depth dialogue (through a question and answer format) with Committee members covering division composition, training and experience, and caseload.

Significant issues to effectively representing the government include the lack of information sharing between the Services to cohesively argue complex issues. Article 140a mandated the facilitation of public access to certain court-martial materials, but the systems, unlike Lexis, lack the ability to search by record or issue. Other challenges include staffing during PCS season, lack of power for an appellate government division to petition the CAAF to grant discretionary review, and lack of statutory language defining what an appellate record is and its contents.

Common issues in military appellate cases include post-trial processing errors and post-trial delays. Post-trial delay is when it takes too long for a record to reach the appellate courts, or when it takes too long for briefs to be filed with the applicable CCA or when it takes too long for a CCA to issue an opinion. Processing issues include whether the record contains all required materials.

Concerning the role victims' counsel during the appeal process, the appellate government counsel communicate with victims' counsel. Procedurally, victims' counsel participate in litigation during direct appeals by filing amicus briefs. They have access to appellate filings and provide feedback. They also participate in rehearings that are ordered by appellate courts.

The Secretary of Defense issued policy guidance for the OSTCs that provides the lead special trial counsel with the authority to decide whether to file an interlocutory appeal.

Appellate government counsel receive sex crime training and experts in the field support them as necessary when they write appellate briefs.

The panelists opined that a single joint CCA would be undesirable because of difficulties is judges from one Military Service understanding the regulations and Service cultures of other military services, and a lack of diversity of opinion that would result.

All panelists confirmed they have the required resources to support their caseload and are adequately prepared.

Appellate Defense Division Current Practice & Perspectives

This panel included:

Major Rachel Gordienko, Branch Chief (II), Defense Appellate Division, U.S. Army

Major Jenna Arroyo, Appellate Defense Division, U.S. Air Force

Ms. Rebecca Snyder, Deputy Director, Appellate Defense Division, U.S. Navy

Mr. Thomas Cook, Chief, Legal Assistance & Defense Services, U.S. Coast Guard

The panel provided an in-depth dialogue (through a question and answer format) with Committee members covering division composition, training and experience, and caseload.

Currently, trial experience is not required to serve in an appellate defense division. Other than the Navy and Coast Guard, most come into the appellate defense division with trial experience.

Merit submissions (appeals with no assignment of error) are filed most often in guilty plea cases.

Appellants sometimes withdraw their cases from appellate review. The most typical reason is to expedite finality, though in some instances an appeal is withdrawn due to potential adverse consequences—such as an increased sentence on rehearing—if an appeal is successful. The most common appellate issues in Article 120 cases include factual sufficiency, instructions, waiver, prosecutorial misconduct, MRE 513, search and seizure, member selection, and obtaining expert witnesses or consultants.

Standard instructions are provided by the Military Judges' Benchbook, which is continually updated.

Most contested courts-martial, for all Services, are sexual assault and sexual misconduct cases. Common issues include factual sufficiency, instructions, entrapment, sentence severity, and client access to the record of trial.

The prosecution and defense generally have comparable resources and expertise; with regard to expert witnesses, however, there is sometimes an imbalance in their experience or qualifications.

There are significant disparities in sentences and it is unclear if the disparities are based on biases, such as race or gender, or the severity of the crime. The appellate defense divisions do not currently aggregate this information.

Mr. Sullivan noted that demographic data are collected and submitted to Congress.

Ms. Janet Mansfield, an Army representative, observed that GAO published a study on racial disparities in the military justice system that found Black and Hispanic service members were less likely to receive a severe sentence compared to White service members.

Court-martial member panels (the functional equivalent of juries) cannot be stacked in an attempt to obtain a particular outcome. Driven largely by demographics at particular installations, there are sometimes panels of all white men at the officer level. Enlisted panels tend to have more diversity. Neither having been a victim of a comparable offense nor having attended victim advocate training is a *per se* basis for a member's disqualification, but can form the basis for challenge to a particular member on the basis of bias.

Issues that affect the appellate defense divisions' ability to adequately prepare appellate cases include the lack of a knowledge management system searchable by issue to allow appellate defense counsel to obtain briefs from other appellate defense divisions; access to digital evidence in the record, the lack of experienced counsel, and IT challenges.

Instruction issues include disagreement between the military judge and counsel regarding whether evidence has been introduced to warrant a particular instruction. Difficulties sometimes arise after Congress has amended a UCMJ punitive article before the President issues implementation guidance in the Manual for Courts-Martial.

At the appellate level, client input is significantly less robust than at trial. It can be difficult to speak with a client who is confined; the necessity to obtain appointments to speak with confined clients sometimes injects delay. It is often difficult or impossible for clients to obtain access to their record of trial. When the client is not confined, it is sometimes difficult to locate the client.

Appellate Practice Issues and Committee Guidance

This session, led by Ms. Critchley and Ms. Tagert, provided the Committee an overview of the appellate review tasking by the DoD General Counsel and additional recommendations for a study to complete that tasking. After a thorough discussion, the Committee agreed to the following:

The Committee tasked the pending subcommittee to study:

- Post-trial processing errors
- Post-trial delay
- Ineffective assistance of counsel
- Evidentiary issues—hearsay; propensity; rape shield law; search & seizure; psych/patient privilege
- Instructional error; member selection; prosecutorial misconduct

Additionally, cases will be provided to members for review based on their topic(s) of interest.

Public Comment

The Committee received testimony from the following three public commenters:

Mr. Clarence Anderson; Mr. Darin Lopez; and Mr. Arvis Owens

Their testimony is available in the meeting transcript located at the DAC-IPAD website <https://dacipad.whs.mil/>.

Victim Impact Statements, FY21 Preliminary Data

Ms. Terri Saunders briefed the Committee on the Joint Explanatory Statement task to assess whether military judges are:

- according appropriate deference to victims of crimes who exercise their right to be heard under R.C.M. 1001(c) at sentencing hearings, and
- appropriately permitting other witnesses to testify about the impact of the crime under R.C.M. 1001

She provided the Committee preliminary data from 173 identified cases with a guilty verdict in which a victim provided a statement and requested Committee volunteers to assist in reviewing 27 additional cases. For the December meeting, the Committee agreed to hear from Survivor's United and a SVC/VLC panel to provide their perspectives on victim impact statements.

Meeting Wrap-Up; Subcommittee Update; Preview Next Meeting

Colonel Bovarnick reviewed the due-outs to the Committee; discussed the December meeting agenda and potential panels; and announced the next public meeting will be held on December 6-7, 2022. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD.

The DFO closed the public meeting at 4:59 p.m.

CERTIFICATION

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



Honorable Karla N. Smith, Chair

MATERIALS

Materials Provided Prior to and at the Public Meeting

1. DAC-IPAD Public Meeting Agenda, September 21, 2022
2. Presenter Biographies
3. DAC-IPAD Public Meeting Minutes, June 21-22, 2022
4. Court-Martial Observation Trip Report Form
5. Upcoming Courts-Martial Schedule
6. DAC-IPAD Staff-Prepared White Paper, Appellate Review of Courts-Martial
7. DAC-IPAD Appellate Review Data Points
8. UCMJ Appellate Process Presentation
9. DAC-IPAD Appellate Review Presentation
10. DAC-IPAD Victim Impact Statements FY21 Data Presentation
11. DAC-IPAD Office of Special Trial Counsel RFI Documents Received
12. DAC-IPAD Diversity RFI Responses
13. Public Comment Background Documents



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

November 17, 2022

Colonel Elizabeth Hernandez, U.S. Air Force
Chair, Joint Service Committee on Military Justice
Department of Defense
Office of the Assistant to the Secretary of Defense
For Privacy, Civil Liberties, and Transparency,
Regulatory Directorate
4800 Mark Center Drive
Mailbox #24, Suite 08D09
Alexandria, Virginia 22350-1700

Dear Colonel Hernandez:

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) submits the following questions to the Joint Service Committee on Military Justice for consideration and response.

Topics are organized in the enclosure with the current rule, the draft change, and the DAC-IPAD's comments, questions, and recommendations.

Thank you for your consideration of the committee's comments, questions, and recommendations.

Sincerely,

A handwritten signature in blue ink, appearing to read "Karla N. Smith".

Karla N. Smith, Chair

Enclosure

Topic #1: Preamble

Part I (3) currently reads: 3. Nature and purpose of military law. Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

Draft change to Part I (3): Nature and purpose of military law. Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purposes of military law **are** to promote justice, **to deter misconduct, to facilitate appropriate accountability**, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

DAC-IPAD Questions:

- 1a. What is the purpose of adding language on deterrence and appropriate accountability to the preamble?
- 1b. What is intended by the change and what prompted the change?

Topic #2: OSTC determination to “exercise authority”

New R.C.M. 103(12): **“Exercise authority over” means any time a special trial counsel takes action related to a covered, related, or known offense. Special trial counsel must exercise authority over a covered offense and has discretion to exercise authority over any known or related offense. Once a special trial counsel has exercised authority over an offense, only a special trial counsel may dispose of that offense, until or unless special trial counsel defers the offense.**

DAC-IPAD Questions:

- 2a. Can the new R.C.M. 103(12) include a requirement to document or notify designated persons when an STC “exercises authority over” covered, related, or known offenses?
- 2b. If this requirement is better suited in a different rule, please specify.

Topic #3: Communications among convening authorities, staff judge advocates, STC

R.C.M. 105 currently reads: Direct communications: convening authorities and staff judge advocates; among staff judge advocates;

(a) *Convening authorities and staff judge advocates.* Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.

(b) *Among staff judge advocates and with the Judge Advocate General.* The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, the Judge Advocate General.

Draft change to R.C.M. 105: Direct communications: convening authorities and staff judge advocates; among staff judge advocates; **with special trial counsel**

(a) *Convening authorities and staff judge advocates.* Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice, **and may communicate directly with special trial counsel, though any input by the convening authority regarding case dispositions shall be non-binding on the special trial counsel for cases involving covered, known, and related offenses.**

(b) *Among staff judge advocates and with the Judge Advocate General.* The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, the Judge Advocate General, **or, in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps.**

(c) **Communications between special trial counsel, staff judge advocates, and convening authorities. Special trial counsel, staff judge advocates, and convening authorities may communicate directly while ensuring that all communications regarding case disposition for covered, related, and known offenses are non-binding on the special trial counsel, and free from unlawful or unauthorized influence or coercion.**

DAC-IPAD Comment:

The new statutory language creating the OSTC makes no mention of an avenue for SJAs to communicate with STC regarding case disposition for covered, related, and known offenses; however, the legislation specifically emphasizes the independence of OSTC and “without intervening authority.” The DoD Independent Review Commission (DoD IRC) recommended an exception for commanders to communicate with STC, but did not recommend an exception for SJAs in order to safeguard the independence of the OSTC. The new subparagraph R.C.M. 105(c) could undermine the IRC’s recommendation and the Congressional intent to achieve an independent prosecution office.

DAC-IPAD Questions:

3a. What is the purpose of subparagraph (c)?

3b. Can the entire subparagraph (c) be deleted?

3c. If subparagraph (c) is retained, can all three R.C.M. 105 subparagraphs (a), (b), and (c), require communications “free from unlawful or unauthorized influence or coercion?”

3d. Is there a reason the language “free from unlawful or unauthorized influence or coercion?” does not appear in subparagraphs (a) and (b)?

Topic #4: Reporting an offense

R.C.M. 301 currently reads: Report of offense

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports conveyed for disposition.* Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

Draft change to R.C.M. 301: Report of offense

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports conveyed for disposition.* Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

(c) Special trial counsel. All allegations of covered offenses shall be forwarded promptly to a special trial counsel. A special trial counsel shall have the authority to determine whether a reported offense is a covered, known, or related offense in accordance with R.C.M. 303A.

DAC-IPAD Comment and recommendation:

4. For consistency within this rule and with related rules, the new subparagraph RCM 301(c) should use the word “reports” instead of “allegations” in the first sentence.

Recommendation: Change first sentence of RCM 301(c) to read:

“All reports of covered offenses shall be forwarded promptly to a special trial counsel.”

*New R.C.M. 306A reads: **Initial disposition for offenses over which special trial counsel exercises authority***

(a) Disposition of offenses that are not the subject of preferred charges. For each offense over which a special trial counsel has exercised authority, a special trial counsel shall:

(1) Prefer, or cause to be preferred, a charge; or

(2) Defer the offense by electing not to prefer a charge. If a special trial counsel defers the offense, special trial counsel shall promptly forward the offense to a commander or convening authority for disposition, and the commander or convening authority shall dispose of the offense pursuant to R.C.M. 306.

(b) Disposition of a preferred specification. Special trial counsel shall dispose of each preferred specification in accordance with R.C.M. 401A.

(c) National security matters. If a commander believes trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the Secretary concerned for action.

(d) Sex-related offenses.

(1) For purposes of this subsection, a “sex-related offense” means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80, UCMJ.

(2) Under such regulations as the Secretary concerned may prescribe, for alleged sex-related offenses committed in the United States, the victim of the sex-related offense shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. Special trial counsel shall consider such views as to the victim’s preference for jurisdiction, if available, prior to making an initial disposition decision. For purposes of this rule, “victim” is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense as defined in paragraph (d)(1) of this rule.

(3) Under such regulations as the Secretary concerned may prescribe, if the victim of an alleged sex-related offense expresses a preference for prosecution of the offense in a civilian court, special trial counsel shall ensure that the civilian authority with jurisdiction over the offense is notified of the victim’s preference for civilian prosecution. If special trial counsel learns of any decision by the civilian authority to prosecute or not prosecute the offense in civilian court, special trial counsel shall ensure the victim is notified.

DAC-IPAD Questions:

5a. Why does the new R.C.M. 306A limit the victim’s right to express a preference as to jurisdiction only for sex-related offenses?

5b. What law or policy prevents extending to the victim a right to express a preference as to jurisdiction for all covered offenses?

5c. Can this rule be revised to consider the victim’s preference as to jurisdiction when an investigation is initiated upon a report of a sex-related or covered offense?

Topic #6: Preferral of charges by special trial counsel

R.C.M. 307A currently reads: Preferral of charges

(a) *Who may prefer charges.* Any person subject to the UCMJ may prefer charges.

Draft change to R.C.M. 307A: **Preferral of charges In general. In accordance with R.C.M. 307(b), preferral is the act by which a person subject to the UCMJ formally accuses another person subject to the UCMJ of an offense.** Any person subject to the UCMJ may prefer charges.

DAC-IPAD Comment and recommendation:

The last sentence of R.C.M. 307A should conform with the 2022 NDAA legislation.

Recommendation: Amend the last sentence of RCM 307A to read:

“Any person subject to the UCMJ may prefer charges, however, once the STC asserts jurisdiction over an offense, only the special trial counsel may prefer charges.”

The new R.C.M. 401A reads: **Disposition of charges over which a special trial counsel exercises authority and has not deferred**

(a) Who may dispose of preferred specifications. Regardless of who preferred a specification, only a special trial counsel may dispose of a specification alleging a covered offense or another offense over which a special trial counsel has exercised authority and has not deferred. A superior competent authority may withhold the authority of a subordinate special trial counsel to dispose of offenses charged in individual cases, types of cases, or generally.

(b) Prompt determination. Special trial counsel shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) Disposition of preferred specifications.

(1) Referral. For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may refer a charge and any specification thereunder to a special or general court-martial. If a preliminary hearing in accordance with Article 32, UCMJ, and R.C.M. 405 is required, special trial counsel shall request a hearing officer and a hearing officer shall be provided by the convening authority.

(2) Dismissal. For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may dismiss any charge or specification thereunder. Further disposition in 42 accordance with this rule is not barred. A dismissal may be accompanied by a deferral as defined in this rule.

(3) Deferral.

(A) Pre-referral. Special trial counsel may defer a charged offense by electing not to refer the charged offense to a special or general court-martial. Upon such determination, special trial counsel shall promptly forward the matter to the commander or convening authority for disposition. The commander or convening authority shall dispose of the offense pursuant to R.C.M. 306 or the charged offense pursuant to R.C.M. 401, as applicable, including dismissing charges preferred by special trial counsel. However, a convening authority may not refer a covered offense to a special or general court-martial.

(B) Post-referral. After referral, a charged offense must be withdrawn by special trial counsel before it may be deferred.

DAC-IPAD Comment and Questions:

Under R.C.M. 401A, the OSTC is allowed to prefer and refer. Thus, the STC can be an accuser and still refer a case – something prohibited in the non-covered offense cases.

DAC-IPAD Questions:

7a. What risks does this revision pose to the fairness of the system?

7b. How do the rules address or mitigate any of those risks?

7c. Who has withholding authority as “a superior competent authority” within R.C.M. 401A?

7d. For example, would a Service TJAG be a superior competent authority?

7e. Is there a reason that the rule does not explicitly define who may act as a withholding authority under R.C.M. 401A?

Topic #8: Randomization when selecting panel members

R.C.M. 503(a)(1) currently reads: (a) Members. (1) In general. The convening authority shall--

(A) detail qualified persons as members for courts-martial;

(B) detail not fewer than the number of members required under R.C.M. 501(a), as applicable; and

(C) state whether the military judge is—(i) authorized to impanel a specified number of alternate members; or (ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain.

Draft change to R.C.M. 503(a)(1): (a) Members. (1) In general. The convening authority shall—

(A) detail qualified persons as members for courts-martial **in accordance with the criteria described in Article 25, UCMJ;**

(B) state whether the military judge is—(i) authorized to impanel a specified number of alternate members; or (ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain; **and**

(C) provide a list of the detailed members to the military judge to randomize in accordance with R.C.M. 911.

R.C.M. 911 currently reads: Assembly of the court-martial. The military judge shall announce the assembly of the court-martial.

Draft change to R.C.M. 911: **Randomization and assembly of the court-martial panel.**

(a) Prior to assembly of the court-martial, at an open session of the court-martial, the military judge, or a designee thereof, shall randomly assign numbers to the members detailed by the convening authority.

(b) The military judge shall determine, after accounting for any excusals by the convening authority or designee, how many members detailed by the convening authority must be present at the initial session for which members are required. The required number of members shall be present, according to the randomly assigned order determined in subparagraph (a) of this rule. The military judge may temporarily excuse any member who has been detailed but is not present.

(c) At the initial session for which members are required, the military judge shall cause the members who are present to be sworn, account on the record for any members who are temporarily excused, and then announce assembly of the court-martial.

(d) The military judge shall ensure any additional member is sworn at the first court session at which the member is present.

DAC-IPAD Comment and Questions:

A proposed change to RCM 911 requires randomization of the panel after the members have been detailed to a court-martial.

8a. What is the purpose of this recommendation?

8b. Did the JSC consider the feasibility and advisability of randomizing the process at an earlier stage, for example, when detailing members under RCM 503?

Topic #9: Victim Impact Statements

R.C.M. 1001(c)(3) currently reads: “Contents of statement. The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence.”

Draft change to R.C.M. 1001(c)(3): “Contents of statement. The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. [the sentence stating “The statement may not include a recommendation of a specific sentence.” has been removed.]

DAC-IPAD Comments and Questions:

The deleted sentence was added to R.C.M. 1001(c)(2)(D)(i), explicitly stating that in capital cases, the victim impact statement may not include a recommendation of a specific sentence. One of the proposed changes to R.C.M. 1001 in the draft E.O. would remove the prohibition against a victim recommending a specific sentence for the accused in non-capital cases during a victim impact statement.

Questions:

9a. Is the intent of this proposed change to allow a victim to recommend a specific sentence in their victim impact statement, or is the intent to provide military judges the discretion whether to allow such recommendations?

9b. If the intent is to allow a victim to make a specific sentence recommendation, did the JSC consider making this explicit within the text of R.C.M. 1001(c)(3), similar to how an accused is explicitly permitted to request a specific sentence under R.C.M. 1001(d)(2)(A)?

Comment: Without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation either “victim impact” or “matters in mitigation,” per the language of the rule.

Current and draft R.C.M. 1001:

- VIS-related standards for aggravation (1001(b)(4))--"evidence of financial, social, psychological, and medical impact on or cost to....),
- Crime victim definition (R.C.M. 1001(c)(2)(A))—“direct physical, emotional, or pecuniary harm,” and
- Victim impact definition (R.C.M. 1001(c)(2)(B))—“any financial, social, psychological, or medical impact...directly relating to or arising from....”

DAC-IPAD Comments and Questions:

Both provide different definitions or descriptions of victim impact. This seems overly complicated and potentially confusing.

9c. Is there a reason that three different definitions or descriptions of victim impact are necessary within R.C.M. 1001?

9d. Is it necessary or is there a simpler way?

Topic #9: Victim Impact Statements (continued)

R.C.M. 1001(c)(2)(D)(ii) currently reads: “In noncapital cases, for purposes of this subsection, the “right to be reasonably heard” means the right to make a sworn statement, an unsworn statement, or both.”

Draft change to R.C.M. 1001(c)(2)(D)(ii): Adds the following sentence “This right includes the right to be heard on any objection to any unsworn statement.”

DAC-IPAD Question:

9e. Should the victim also have the right to be heard on an objection to the victim impact statement in a capital case when the victim has that right in a non-capital case?

Current and draft R.C.M. 1001(c)(5)(A)

DAC-IPAD Comments and Question:

Both provide that the defense may rebut "any statements of fact" in a victim's unsworn statement. R.C.M. 1001(d)(1) states that the defense may rebut “any material presented by...the crime victim,” though R.C.M. 1001(d)(2)(A) limits the rebuttal to “statements of fact contained in the crime victim’s sworn or unsworn statement.”

9f. Is there a reason for the disparity in the language between R.C.M. 1001(d)(1) and 1001(c)(5)(A)/1001(d)(2)(A), which are substantially similar, within the context of the rule?

R.C.M. 1001(c)(5)(A) currently reads: A victim may provide an unsworn victim impact statement.

Draft change to R.C.M. 1001(c)(5)(A)

DAC-IPAD Comments and Questions:

The draft change adds a sentence stating that the crime victim's unsworn statement "may be made by the crime victim, by counsel representing the crime victim, or both"; however, 1001(c)(5)(B) includes a limitation "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement."

9g. Did the JSC intentionally retain the “upon good cause shown” clause in subparagraph (B) for a particular reason?

Comment: It seems the draft change was intended to remove this clause and not require the victim to show good cause in order for the victim’s counsel to deliver the victim impact statement.

Recommendation: If this is the case, recommend removing this clause from subparagraph (B).

Summary of DAC-IPAD Comments, Questions and Recommendations:

Topic #1: Preamble

- 1a. What is the purpose of adding language on deterrence and appropriate accountability to the preamble?
- 1b. What is intended by the change and what prompted the change?

Topic #2: OSTC determination to “exercise authority”

- 2a. Can the new R.C.M. 103(12) include a requirement to document or notify designated persons when an STC “exercises authority over” covered, related, or known offenses?
- 2b. If this requirement is better suited in a different rule, please specify.

Topic #3: Communications among convening authorities, staff judge advocates, STC

Comment: The new statutory language creating the OSTC makes no mention of an avenue for SJAs to communicate with STC regarding case disposition for covered, related, and known offenses; however, the legislation specifically emphasizes the independence of OSTC and “without intervening authority.” The DoD Independent Review Commission (DoD IRC) recommended an exception for commanders to communicate with STC, but did not recommend an exception for SJAs in order to safeguard the independence of the OSTC. The new subparagraph R.C.M. 105(c) could undermine the IRC’s recommendation and the Congressional intent to achieve an independent prosecution office.

- 3a. What is the purpose of subparagraph (c)?
- 3b. Can the entire subparagraph (c) be deleted?
- 3c. If subparagraph (c) is retained, can all three R.C.M. 105 subparagraphs (a), (b), and (c), require communications “free from unlawful or unauthorized influence or coercion?”
- 3d. Is there a reason the language “free from unlawful or unauthorized influence or coercion?” does not appear in subparagraphs (a) and (b)?

Topic #4: Reporting an offense

Comment: For consistency within this rule and with related rules, the new subparagraph RCM 301(c) should use the word “reports” instead of “allegations” in the first sentence.

Recommendation: Change first sentence of RCM 301(c) to read: **“All reports of covered offenses shall be forwarded promptly to a special trial counsel.”**

Topic #5: Initial disposition by OSTC

- 5a. Why does the new R.C.M. 306A limit the victim’s right to express a preference as to jurisdiction only for sex-related offenses?
- 5b. What law or policy prevents extending to the victim a right to express a preference as to jurisdiction for all covered offenses?
- 5c. Can this rule be revised to consider the victim’s preference as to jurisdiction when an investigation is initiated upon a report of a sex-related or covered offense?

Topic #6: Preferral of charges by special trial counsel

Comment: The last sentence of R.C.M. 307A should conform with the 2022 NDAA legislation.

Recommendation: Amend the last sentence of RCM 307A to read: **“Any person subject to the UCMJ may prefer charges, however, once the STC asserts jurisdiction over an offense, only the special trial counsel may prefer charges.”**

Topic #7: Disposition of charges by special trial counsel

Comment: Under R.C.M. 401A, the OSTC is allowed to prefer and refer. Thus, the STC can be an accuser and still refer a case – something prohibited in the non-covered offense cases.

7a. What risks does this revision pose to the fairness of the system?

7b. How do the rules address or mitigate any of those risks?

7c. Who has withholding authority as “a superior competent authority” within R.C.M. 401A?

7d. For example, would a Service TJAG be a superior competent authority?

7e. Is there a reason that the rule does not explicitly define who may act as a withholding authority under R.C.M. 401A?

Topic #8: Randomization when selecting panel members

Comment: A proposed change to RCM 911 requires randomization of the panel after the members have been detailed to a court-martial.

8a. What is the purpose of this recommendation?

8b. Did the JSC consider the feasibility and advisability of randomizing the process at an earlier stage, for example, when detailing members under RCM 503?

Topic #9: Victim Impact Statements

Comment: The deleted sentence was added to R.C.M. 1001(c)(2)(D)(i), explicitly stating that in capital cases, the victim impact statement may not include a recommendation of a specific sentence. One of the proposed changes to R.C.M. 1001 in the draft E.O. would remove the prohibition against a victim recommending a specific sentence for the accused in non-capital cases during a victim impact statement.

9a. Is the intent of this proposed change to allow a victim to recommend a specific sentence in their victim impact statement, or is the intent to provide military judges the discretion whether to allow such recommendations?

9b. If the intent is to allow a victim to make a specific sentence recommendation, did the JSC consider making this explicit within the text of R.C.M. 1001(c)(3), similar to how an accused is explicitly permitted to request a specific sentence under R.C.M. 1001(d)(2)(A)?

Comment: Without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation either “victim impact” or “matters in mitigation,” per the language of the rule.

Topic #9: Victim Impact Statements (continued)

Comment: RCM 1001(b)(4), (c)(2)(A), and (c)(2)(B) provide different definitions or descriptions of victim impact. This seems overly complicated and potentially confusing.

9c. Is there a reason that three different definitions or descriptions of victim impact are necessary within R.C.M. 1001?

9d. Is it necessary or is there a simpler way?

For RCM 1001(c)(2)(D)(ii):

9e. Should the victim also have the right to be heard on an objection to the victim impact statement in a capital case when the victim has that right in a non-capital case?

For R.C.M. 1001(c)(5)(A):

Comment: Both current and draft versions provide that the defense may rebut "any statements of fact" in a victim's unsworn statement. R.C.M. 1001(d)(1) states that the defense may rebut "any material presented by...the crime victim," though R.C.M. 1001(d)(2)(A) limits the rebuttal to "statements of fact contained in the crime victim's sworn or unsworn statement."

9f. Is there a reason for the disparity in the language between R.C.M. 1001(d)(1) and 1001(c)(5)(A)/1001(d)(2)(A), which are substantially similar, within the context of the rule?

Comment: The draft change adds a sentence stating that the crime victim's unsworn statement "may be made by the crime victim, by counsel representing the crime victim, or both"; however, 1001(c)(5)(B) includes a limitation "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement."

9g. Did the JSC intentionally retain the "upon good cause shown" clause in subparagraph (B) for a particular reason?

Comment: It seems the draft change was intended to remove this clause and not require the victim to show good cause in order for the victim's counsel to deliver the victim impact statement.

Recommendation: If this is the case, recommend removing this clause from subparagraph (B).

Tab 4
Uniform Code of Military Justice Panel Selection

**Uniform Code of Military Justice Panel Selection
Presenter Biographies**

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

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

Captain Andrew House, Staff Judge Advocate, U.S. Naval Academy, U.S. Navy

Captain Andrew R. House, JAGC, USN, currently serves as the Staff Judge Advocate for the United States Naval Academy. He graduated from the University of North Carolina at Chapel Hill in 1993 with a bachelor of arts degree in political science. He received his juris doctor degree from UNC-Chapel Hill in 1997. He was commissioned as an Ensign in the United States Navy JAG Corps in 1997. Prior to commissioning, he served as an enlisted soldier in the U.S. Army and the North Carolina National Guard. Following commissioning and completion of Naval Justice School, CAPT House reported to Naval Legal Service Office Central, Branch Office Corpus Christi for service as both Legal Assistance and Defense Attorney from January 1998 to March 2000. In March 2000, he reported to Pearl Harbor, Hawaii for duty as Assistant Staff Judge Advocate for Commander, Navy Region Hawaii. In March 2002, he transferred to Brunswick, Maine as Station Judge Advocate for Naval Air Station Brunswick. This tour was followed by assignment as Officer in Charge of Naval Legal Service Office Pacific, Detachment Guam in October 2003. In May 2005, CAPT House transferred to USS Enterprise (CVN 65) for duty as Command Judge Advocate.

After completion of a seven-month combat deployment, he reported to Commander, Naval Air Force Atlantic in February 2007 for duty as Deputy Force Judge Advocate. In July 2008, he assumed duty as Executive Officer for Naval Legal Service Office Central in Pensacola, Florida, and then served as Commanding Officer of NLSO Central from March 2009 until July 2011. He served as Deputy Assistant Judge Advocate General for Legal Assistance (Division Director, Code 16) from August 2011 through September 2013. He then served as the inaugural Deputy Chief of Staff for the Navy Victims' Legal Counsel Program from October 2013 until July 2015. He then served as the Staff Judge Advocate for Navy Region Mid-Atlantic in Norfolk, VA from July 2015 to August 2016. This was followed by a tour as the Division Director for the Navy-Marine Corps Appellate Defense Division (Code 45) in Washington, D.C. from August 2016 to January 2019. Prior to assuming his current duties, he served as the Commanding Officer of Defense Service Office North onboard the Washington Navy Yard from January 2019 to June 2021.

Colonel Shannon Sherwin, Staff Judge Advocate, Air Education and Training Command, U.S. Air Force

Colonel Shannon L. Sherwin is the Staff Judge Advocate, Headquarters Air Education and Training Command (AETC), Joint Base San Antonio-Randolph, TX. AETC is responsible for the recruiting, training, and education of Air Force personnel. The Office of the Staff Judge Advocate establishes policy oversight for 14 legal offices, including six general court-martial jurisdictions, which provide legal services to over 62,000 active duty, Reserve, and Guard personnel.

Col Sherwin received a direct commission as an Air Force judge advocate in November 1997 and entered active duty in January 1998. She has served as a headquarter director; an installation, deployed, and Numbered Air Force staff judge advocate; an installation and Major Command deputy staff judge advocate; legal advisor to the Combat Operations Division at the Combined Air and Space Operations Center and legal advisor to the 603rd Air and Space Operations Center. She is admitted to practice law before the United States Supreme Court, United States Court of Appeals for the Armed Forces, and the Supreme Court of the State of Colorado. Prior to her current position, Col Sherwin was the Director and Chief Information Officer, Legal Information Services Directorate, Headquarters Air Force, Maxwell, Air Force Base Alabama.

She received her Juris Doctor from the University of Denver College of Law and a Masters of Law, Military Law w/ International Law Specialty from TJAGLCS.

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

Commander Kismet R. Wunder currently serves as the Executive Officer for the Legal Service Command in Norfolk, Virginia. He is responsible for the delivery of the full spectrum of legal services to more than 65 Mission Support Commands and military justice and court-martial support for the entire Coast Guard.

Prior to this assignment, he served as the Deputy Staff Judge Advocate for the Ninth Coast Guard District in Cleveland, Ohio and was a collateral duty Military Judge. CDR Wunder's prior Coast Guard tours include: Health, Safety and Work-Life (HSWL) Regional Practice Manager and the Base Cleveland HSWL Department Head from July 2012 to July 2016, Staff attorney for the Fifth Coast Guard District from July 2010 to July 2012, and in the Military Justice Division of the Maintenance and Logistics Command Atlantic/Legal Service Command from May 2008 to July 2010.

Commander Wunder received his commission from the University of Dayton Army ROTC program in 1997. He earned his Juris Doctor from the Cleveland-Marshall College of Law in 2000. He is licensed to practice law in the State of Ohio. He served on active duty as an Army Judge Advocate from 2001-2005 and is a veteran of Operations Enduring and Iraqi Freedom. In 2005, Commander Wunder left military service and entered private practice, where his focus was business litigation, contract disputes, and employment law. In 2008, Commander Wunder joined the Coast Guard as a Direct Commission Lawyer.

DAC-IPAD Proposed Questions for SJA Panel Selection Panel

Training

1. What training do SJAs and convening authorities receive about the panel selection process? Who provides the training? Do Special and General Courts-Martial convening authorities receive the same training?
2. Does a command member nominating potential panel members receive any training on the panel selection process? If so, please describe the training, who provides it, and when the training is provided.

Consideration of race and gender in nominations and selections

3. If an SJA or convening authority determines that a slate of members available for selection is racially imbalanced, what are the SJA/CA's options to ensure the selected panel is drawn from a racially representative population of eligible members?
4. What can an SJA do to ensure race and gender are factors for inclusion in the panel selection process?
5. What can an SJA do to ensure race and gender factors are not excluding in the panel selection process?

Standing Panels

6. Does your Service have standing panels? Why or why not? If so, what is the typical length of time for a panel?

Nominating potential panel members

7. What criteria is used to develop the pool of potential panel members (geographic location, assignment, etc.)? Who establishes this criteria?
8. Is a selective nomination process necessary in your Service? Why or why not?
9. Could a random selection process from the designated pool of available members be used to develop panel member nominees? What are the likely effects of randomizing nominee selection?
10. Who nominates potential panel members? Grade/position.
11. Who generally provides legal advice to the command member(s) nominating potential panel members? What type of advice is provided?
12. What information about a potential panel member is available to the command member(s) nominating potential panel members?

Convening Authority Panel Member Selection

13. What advice does the SJA provide to the Convening Authority on selecting panel members, in addition to the selection memorandum?

14. Are questionnaires completed by the panel nominees prior to CA selection?

15. Does a CA review completed questionnaires before selecting panel members?

Delegated Authority

16. What authority is normally delegated to the SJA? Excusals, etc.

17. What limitations, if any, are placed on the discretionary exercise of delegated authority?

Information Paper

UCMJ, Article 39 Sessions and Sidebars

I. Current Practice

Article 39, UCMJ,¹ and Rule for Courts-Martial (RCM) 803² describe the requirements and procedures for on-the-record court sessions called by the military judge either before the members are impaneled, or after the trial has begun, outside the presence of members (“Article 39(a) sessions”). Article 39(a) sessions include motions and evidentiary hearings, arraignments, pleas, sentencing hearings, and other matters that may be performed by the military judge outside the presence of the members of the court. When an Article 39(a) session is called by the military judge, the panel members are excused from the courtroom. Article 39(b) and RCM 803 require such hearings to be conducted in the presence of the accused, the defense counsel, and the trial counsel and to be made a part of the record.

Sidebar conferences, in contrast, are quiet discussions held between the judge and counsel outside the earshot of the jury, but without absenting the jury from the courtroom. The use of sidebar conferences is routine in civilian courts; however, they are prohibited by regulation in three of the five military Services—the Army, Air Force, and Coast Guard.³ These Services’ rules for practice specify that if matters should be discussed out of the presence of the court members, an Article 39(a) session must be used. The Navy and Marine Corps do not explicitly prohibit the use of sidebars in their rules for practice.⁴

II. Historical Background

While current court-martial practice does not typically involve the use of sidebar conferences, they were used routinely in the past, leading to litigation over the issue of whether such conferences should be recorded verbatim. In 1979, in *United States v. Gray*, the Court of Military Appeals held that “[n]ot every sidebar conference must be recorded verbatim, but one involving a ruling by the judge affecting rights of the accused at trial must be fully recorded if the transcript is to be verbatim.”⁵ In *Gray*, the court found that the omission of the transcript of a sidebar conversation between the military judge and counsel involving a ruling by the military judge was a substantial omission that rendered the record of trial non-verbatim within the meaning of Article 54, UCMJ. By contrast, in *United States v. Richardson* in 1972, the same court held that an unrecorded sidebar conference prior to sentencing arguments did not prejudice the accused when the military judge merely asked counsel whether they requested special and limiting instructions after findings.⁶

III. Future Considerations

Although research for this paper revealed no scholarship explaining why three Services prohibit sidebars in court-martial practice, it appears that the 1970s litigation and concern for potential omissions from a verbatim transcript may have been an impetus behind the prohibition of their use. The DAC-IPAD may want to consider whether this prohibition is still necessary, given the disruption Article 39(a) sessions often cause during trial. The Committee could consider matters appropriate for sidebars and require all sidebar conferences to be included in verbatim transcripts⁷ using advancements in technology used in civilian courts, such as audio-masking systems for jurors and sidebar microphone amplifiers for court reporters, to ensure sidebars are private and recorded accurately.

¹ Article 39, UCMJ.

§839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

- (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
- (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;
- (3) holding the arraignment and receiving the pleas of the accused; (4) conducting a sentencing proceeding and sentencing the accused; and sentencing the accused under section 853(b)(1) of this title (article 53(b)(1)); and
- (5) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

(b) Proceedings under subsection (a) shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29). If authorized by regulations of the Secretary concerned, and if at least one defense counsel is physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology (such as video conferencing technology). [(c) – (d) omitted].

² Manual for Courts-Martial (2019 ed.), Rule for Courts-Martial 803.

Rule 803. Court-martial sessions without members under Article 39(a)

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in these rules, after adjournment and before entry of the judgment in the record. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 804 and 805, and shall be made a part of the record.

³ Rules of Practice Before Army Courts-Martial (Feb. 1, 2022), Rule 19.7 (Sidebar Conferences) (“Sidebar conferences will not be used. If matters should be discussed out of the presence of the court members, counsel must request an Article 39(a) session.”); Uniform Rules of Practice Before Air Force Courts-Martial (2015), Rule 4.7 (Sidebar Conferences) (“Sidebar conferences will not be used. If matters must be discussed outside the presence of court members, an Article 39(a) session will be used.”); Court Rules of Practice and Procedure Before Coast Guard Courts-Martial (Jan. 2019), Rule 19.7 (exact same as Army rule 19.7).

⁴ See Uniform Rules of Practice Before Navy and Marine Corps Courts-Martial (Sept. 27, 2021). There is no reference to sidebars (use of or prohibition) in the Navy and Marine Corps Rules of Practice.

⁵ 7 M.J. 296 (C.M.A. 1979). The Court of Military Appeals was the predecessor court to the Court of Appeals for the Armed Forces.

⁶ 45 C.M.R. 157 (C.M.A. 1972).

⁷ The 2016 edition of the Manual for Courts-Martial addressed the issue of sidebar conferences, stating that they should be recorded and included in verbatim transcripts. See Manual for Courts-Martial (2016 ed.), Rule for Courts-Martial 808 (Discussion), Rule for Courts-Martial 1103 (Discussion). However, all references to sidebar conferences were deleted in the 2019 edition of the Manual.

Random Jury Selection

I. U.S. Constitution (Article I, Section 8, Clause 14¹ and the Sixth Amendment²):

Under its power to make rules for the government and regulation of the armed forces, Congress established the Uniform Code of Military Justice (UCMJ) a system of criminal law binding on all Service members that encompasses substantive laws, including punitive provisions, and provides military courts with specific rules and procedures, and an appeals process separate, for the most part, from civilian courts.³

The Sixth Amendment guarantee of the right to a trial by an impartial jury, applicable in both state and federal court,⁴ has a two-part requirement for impartiality: (1) the jury must be selected from a jury panel or venire that represents a fair cross-section of the community⁵ (the fair cross-section requirement applies to the pool from which petit juries are chosen and not to the composition of the juries themselves),⁶ and (2) the jurors must be unbiased (willing to decide the case on the basis of the evidence presented).⁷

II. Uniform Code of Military Justice

Military members do not have a Sixth Amendment right to a trial by petit jury;⁸ however, jury selection and panel members' conduct and actions during the court-martial are reviewed to ensure impartiality.⁹ Within the UCMJ, Congress created the statutory framework for trial by members and the process to select and detail members to such panels.¹⁰

In part, UCMJ, Article 25(e)(2)¹¹ states: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

Although the Sixth Amendment language of "impartial jury" is not reflected in Article 25, the Rules for Courts-Martial (R.C.M.) address the issue of bias by providing for the examination / voir dire of the members at court-martial (R.C.M. 912(d))¹² and allow for the removal of a member for cause in numerous scenarios (R.C.M. 912(f)(1)):¹³

A member shall be excused for cause whenever it appears that the member:
(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged; and
(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.¹⁴

Article 25 and the R.C.M. do not require a "fair cross-section" of the community; however, the Court of Appeals for the Armed Forces (CAAF) held that an accused must be provided both a fair panel . . . and the appearance of a fair panel.¹⁵ Additionally, CAAF stated, "Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process, while maintaining the basic fairness of the military justice system."¹⁶

III. Military Justice Review Group (MJRG)

In its study of the UCMJ,¹⁷ the MJRG examined Article 25 and its relationship to federal civilian practice. For the jury venire to represent a fair cross-section of the local community where the court convenes, each federal district must “devise and implement a written plan for random selection of jurors that does not exclude potential jurors on the basis of race, color, religion, sex, national origin, or economic status.”¹⁸ For the military justice system, the MJRP stated:

The military justice system must be able to operate in deployed and operational environments in which large numbers of potential court-members are engaged in vital national security activities. As a consequence, it has not been considered practicable to adopt the civilian random jury selection model for use in courts-martial on a system-wide basis. Although court-martial panel members are not considered to be jurors under the Sixth Amendment, a well-developed body of case law addresses the need for assembled court members to be objective and impartial.¹⁹

IV. Joint Service Committee on Military Justice (JSC) draft Executive Order (E.O.)

In October 2022, the JSC’s draft E.O proposed various changes to the Manual for Courts-Martial, including changes to R.C.M. 503 “Detailing members, military judge, and counsel, and designating military magistrates”²⁰ and R.C.M. 911 “Assembly of the court-martial” that are specific to the issue of random jury selection.

The R.C.M. 503(a)(1)(C) proposed change requires the convening authority to: “provide a list of the detailed members to the military judge to randomize in accordance with R.C.M. 911.”

The proposed amendment to R.C.M. 911 is as follows:

R.C.M. 911. Randomization and assembly of the court-martial panel

- (a) Prior to assembly of the court-martial, at an open session of the court-martial, the military judge, or a designee thereof, shall randomly assign numbers to the members detailed by the convening authority.
- (b) The military judge shall determine, after accounting for any excusals by the convening authority or designee, how many members detailed by the convening authority must be present at the initial session for which members are required. The required number of members shall be present, according to the randomly assigned order determined in subparagraph (a) of this rule. The military judge may temporarily excuse any member who has been detailed but is not present.
- (c) At the initial session for which members are required, the military judge shall cause the members who are present to be sworn, account on the record for any members who are temporarily excused, and then announce assembly of the court-martial.
- (d) The military judge shall ensure any additional member is sworn at the first court session at which the member is present.

V. Conclusion

Although the proposed amendments introduce an element of randomization through the rules for courts-martial, they do not directly address the underlying member selection process. Unless the statutory language is changed, a convening authority will detail military members, who, in their opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament without further restriction or explanation.²¹

¹ *The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval Forces ...*

² *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

³ 10 USC §§ 801 et seq.

⁴ *Taylor v. Louisiana*, 419 U.S. 522, 526–528 (1975).

⁵ *Id.* at 530.

⁶ *Holland v. Illinois*, 493 U.S. 474, 480–81 (1990).

⁷ See *id.*

⁸ *Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942) (dicta).

⁹ *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001).

¹⁰ *United States v. Witham*, 47 M.J. 297, 301 (1997).

¹¹ 10 U.S.C. § 825.

¹² R.C.M. 912(d) (Examination of members. The military judge may permit the parties to conduct examination of members or may personally conduct examination).

¹³ R.C.M. 912 (f)(1) (Grounds. A member shall be excused for cause...)

¹⁴ *Id.*

¹⁵ *United States v. Ward*, 74 M.J. 225, 228 (C.A.A.F. 2015).

¹⁶ *United States v. Bartlett*, 66 M.J. 426, 429 (C.A.A.F. 2008).

¹⁷ Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Military Justice Review Group (Dec. 22, 2015).

¹⁸ *Id.* at 253.

¹⁹ *Id.* at 253-54 (citations omitted).

²⁰ (aa) R.C.M. 503 is amended as follows:

(a) *Members.*

(1) *In general.* The convening authority shall –

(A) detail qualified persons as members for courts-martial in accordance with the criteria described in Article 25, UCMJ;

(B) state whether the military judge is –

(i) authorized to impanel a specified number of alternate members; or

(ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain; and

(C) provide a list of the detailed members to the military judge to randomize in accordance with R.C.M. 911.

²¹ See generally *United States v. Barte*, 76 M.J. 141 (C.A.A.F. 2017) (consideration of Article 25 criteria by the convening authority may overcome appearance of improprieties); *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020) (fact that a court-martial panel fails to include minority representation violates neither Fifth Amendment nor the prohibition against unlawful command influence.); *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018) (where selection of members on an impermissible basis is raised by the evidence, absent affirmative evidence of benign intent ... the ready inference and legal consequence is [of] unlawful command influence.).

Tab 5
Pretrial/Panel Selection Materials

OPORD 22-XX (Courts-Martial Panel Member Selection) (U).

(U) References: None

Time Zone Used Throughout the OPORD: QUEBEC (Local).

(U) Task Organization: No change.

1. (U) SITUATION. New court-martial panel members must be selected on an annual basis or as needed. In accordance with Article 25, Uniform Code of Military Justice, (UMCJ), nominees will be personnel “best qualified” by reason of age, education, training, experience, length of service, and judicial temperament.

2. (U) MISSION. All subordinate and tenant commanders submit nominees for consideration by the Commanding General of XX Division required in ANNEX A. All nominees must be screened IAW criteria in Article 25, UCMJ, prior to submission to the XXX OSJA NLT 26 1600 August 2022 to the XX Division Staff Judge Advocate POC.

3. (U) EXECUTION.

a. (U) Commander's Intent. Nominate prospective courts-martial panel members and screen them IAW the criteria in Article 25, UCMJ, and my instructions in Annex A.

b. (U) Concept of Operations. No change.

c. (U) Tasks to Subordinate Units.

(1) (U) 1 BCT, 2 BCT, CAB, DSB, DIVARTY, and HHBN.

(a) (U) Identify and recommend nominees IAW Article 25 criteria and ANNEX A.

Submit a list of nominees using Annex D, with SRBs for each nominee, and certifying memorandum (Annex B) to POC NLT 26 1600 August 2022.

d. (U) Tasks to Staff.

(1) (U) Office of the Staff Judge Advocate (SJA).

(a) (U) Receive and compile all nominees for final selection NLT 26 1600 August 2022.

(2) (U) G-1

(a) (U) Provide an AAA-162 (Alpha Roster) to POC NLT 26 1600 August 2022. Alpha Roster will reflect manning as of 1 August 2022.

e. (U) Tasks to Garrison Command.

(1) (U) USAG.

(a) (U) Identify and recommend nominees based on Article 25 Criteria and IAW ANNEX A. Submit a list of nominees using Annex D, color SRBs for each nominee, and certifying memorandum (Annex B), to POC NLT 26 1600 August 2022.

f. (U) Tasks to Tenant Units.

(1) (U) MEDDAC, DENTAC

(a) (U) Identify and recommend nominees based on Article 25 Criteria and IAW ANNEX A. Submit a list of nominees using Annex D, color SRBs for each nominee, and certifying memorandum (Annex B), to POC NLT 26 1600 August 2022.

g. (U) Coordinating Instructions.

(1) (U) List the identified personnel in the spreadsheet enclosed in ANNEX D. Font will be size 10, Arial, and using all capital letters. The unit need only be specified to BCT level with no spaces. Personnel will be listed in date of rank order, highest ranking first.

(2) (U) Nominees must not be scheduled to deploy, PCS, ETS, REFRAD, retire or otherwise depart the command or the Fort XXXXXX area for at least six months from the date of nomination.

(3) (U) Commanders must include nominees who are currently deployed but will redeploy prior to 1 December 2021 and are not barred from nomination, IAW paragraph 3(g)(2).

(4) (U) Each commander will sign a memo stating whether he or she met the qualitative and quantitative requirements of this order and if not, the reason why the commander could not comply. Sample memorandum is included at Annex C.

(5) (U) Include a digital copy of each nominee's SRB.

(6) (U) All nominees will be submitted through the unit's servicing legal office to the XX Division Office of the Staff Judge Advocate POC.

4. (U) SUSTAINMENT. No change.

5. (U) COMMAND AND SIGNAL.

a. (U) POC for this FRAGO is Senior Military Justice Operations NCO, at NIPR: XXXXXXX@mail.mil or SSG XXXXX, at NIPR XXXXX.mil@mail.mil.

b. (U) In the event a tasking suspense detailed in this OPORD is not met, it is this POC's responsibility to contact one the following:

(1) MSE G3, Current Operations, Operations Specialist, Mr. XXXX at NIPR XXXXXXXXX.civ@mail.mil or DSN: xxx-xxxx.

(2) MSE G3, Current Operations, Tasking Analyst, Mr. XXXXX at NIPR: XXXXXXXXX.civ@mail.mil or DSN: xxx-xxxx.

ACKNOWLEDGE:

XXXXX MG
COMMANDING

OFFICIAL:

XXXXX, COL
G3

ANNEXES:

- A- Courts-Martial Panel Selection Memo
- B- Sample Memo All Personnel Met
- C- Sample Memo All Personnel Not Met
- D- Spreadsheet

DISTRIBUTION:

CDR, 1 BCT
CDR, 2 BCT
CDR, CAB
CDR, DSB
CDR, DIVARTY

CDR, MEDDAC
CDR, DENTAC
CDR, GARRISON
CDR, HHB



DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT XXXXX
FORT XXXXX

AFX-SC

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Courts-Martial Panel Selection

1. I will soon be selecting primary and alternate members for Special and General Courts-Martial panel duties. Submit your nominees, reviewed personally by you, to this Headquarters, through the Office of the Staff Judge Advocate, Military Justice Division, no later than **26 1600 August 2022**.

2. In accordance with Article 25, Uniform Code of Military Justice, nominees will be personnel "best qualified" by reason of age, education, training, experience, length of service, and judicial temperament.

3. Commanders will provide the nominations as follows (please note that all officers in the grades of O-6 and O-5, and noncommissioned officers in the grade E-9, will be nominated):

Unit	O6	O5	O4	O3	O2-01	CW5-WO1	E9	E8	E7-E6	E5-E1
1ST BCT	All	All	4	8	6	4	All	6	6	3
2D BCT	All	All	4	8	6	4	All	6	6	3
DSB	All	All	4	8	6	4	All	6	6	3
HHBN	All	All	4	4	2	2	All	6	6	3
CAB	All	All	4	8	6	10	All	6	6	3
USAG	All	All	1	1	1	0	All	1	1	3
MEDDAC	All	All	3	2	2	1	All	3	3	3
DENTAC	All	All	1	2	1	1	All	1	1	3
DIVARTY	All	All	1	2	1	1	All	1	1	3

4. If the requested number of personnel are not provided, submit a memorandum justifying the reason for the deficiency. The memorandum should accompany the list of nominated personnel provided.

5. **Nominees must not be scheduled to deploy, PCS, ETS, REFRAD, retire, or otherwise depart this command or the Fort XXXX area for at least twelve (12) months from the date of nomination.**

6. **IMPORTANT NOTE:** Officers whose basic branch is MC, DC, VC, CH, JA, or who are detailed as IGs are no longer disqualified from this duty. Your nominations should not be limited by branch, corps, or occupational specialty.

AFDR-SC
Courts-Martial Panel Selection

7. All nominations will be accompanied by a copy of the ORB for officers and the ERB for enlisted Soldiers. Your list of nominees must include the social security number, unit address, two letter basic branch abbreviation for officers, MOS code for enlisted Soldiers, date of rank, duty position, telephone number, ETS/PCS date of each nominee, as well as any other date the nominee may be scheduled to depart from Fort XXX. Submit your nominations to the OSJA, Military Justice Division, NLT 26 1100 August 2022. Submit a copy of one ORB or ERB for each nominee.

8. POC for this action is MSG XXXXXX, Senior Military Justice Operations NCO, at (315) 772-XXXX or XXXXXXXXX.mil@mail.mil, or SSG XXXXXX, Senior Litigation NCO, at 315-772-XXXX or XXXXXXXXX.mil@mail.mil.

XXXXXXXXXXXXXXXXXXXXX
Major General, USA
Commanding

DISTRIBUTION:
SJA
CDR, 1ST BCT
CDR, 2D BCT
CDR, DSB
CDR, HHBN
CDR, CAB
CDR, USAG
CDR, MEDDAC
CDR, DENTAC
CDR, DIVARTY



DEPARTMENT OF THE ARMY
LETTERHEAD
FORT XXXXXXXXX

OFFICE-SYMBOL

MEMORANDUM FOR Commander, Fort XXXX, Fort XXXXX,

SUBJECT: Courts-Martial Panel Selection

1. I have personally selected the attached courts-martial panel member nominees. I have selected these nominees using the criteria outlined in Article 25 of the Uniform Code of Military Justice. They are best qualified for panel duty by reason of age, education, training, experience, length of service, and judicial temperament.
2. Point of contact for this memorandum is the undersigned at DSN 772-xxxx.

Encl

SIGNATURE BLOCK
COL, IN
Commanding



DEPARTMENT OF THE ARMY
LETTERHEAD
FORT XXXXXXX XXXXX-5000

OFFICE-SYMBOL

MEMORANDUM FOR Commander, Fort XXXX,

SUBJECT: Courts-Martial Panel Selection

1. I have personally selected the attached courts-martial panel member nominees. I have selected these nominees using the criteria outlined in Article 25 of the Uniform Code of Military Justice. They are best qualified for panel duty by reason of age, education, training, experience, length of service, and judicial temperament.
2. Due to the unavailability of personnel, nominees have not been provided in the grades listed below. For the reasons given, I request that this command not be required to provide nominees in the specified grades.
 - a. O-5. The only two persons of this grade assigned to my command are both scheduled to PCS in the summer.
 - b. O-4. There is currently only one person of this grade assigned to my command and he has been nominated.
3. Point of contact for this memorandum is the undersigned at DSN 772-1234.

Encl

SIGNATURE BLOCK
COL, IN
Commanding



DEPARTMENT OF THE ARMY

MEMORANDUM FOR Commander, Headquarters, XXXXXXXX Division and Fort XXXX

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019 *[one panel for GCM and one for SPCM; with substitutes (so panel lasts one year); no alternates authorized]*

1. It is necessary to select new court-martial panel members for cases referred on or after 1 January 2019. The current court-martial panels have been sitting since **DATE**. I recommend that you detail one new court-martial panel for special courts-martial and another for general courts-martial.

2. In accordance with Article 25(e)(2), Uniform Code of Military Justice (UCMJ), and R.C.M. 502(a)(1), you must detail those persons who are best qualified for this duty by reason of age, education, training, experience, length of service, and judicial temperament. Race, rank, gender, duty position, or any other factor may not be used to exclude otherwise qualified persons for court-martial membership.

a. Enclosed for your review is a list of nominees for court-martial duty, submitted by the subordinate commanders, along with nominee Officer and Enlisted Record Briefs.

b. You are not limited to the names appearing on the list of nominees. A roster of all available personnel assigned to your GCMCA is attached for your consideration. You may detail anyone assigned to your command who meets the Article 25, UCMJ, criteria.

c. All personnel on the list of nominees and within your command should be considered in light of the above Article 25(d)(2), UCMJ, factors and those factors only. You may detail to the new court-martial panels any or all of those personnel that you personally selected to serve on the current court-martial panels.

3. Panel configuration.

a. General. The members you select will be detailed on orders for courts-martial duty until they are permanently excused or until you select a new court-martial panel. I recommend that you select substitute members who may be detailed in place of members who are temporarily or permanently excused from service. Under recent changes to the UCMJ, any Soldier may serve on the court-martial panel of any other Soldier, subject only to the requirement, when it can be avoided, that no Soldier will be tried by a panel member junior to them. I recommend that the new "default" panel be composed of at least one-third enlisted members, recognizing that the majority of court-

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

martial cases involve an enlisted accused, and a significant number of those cases involve an election of at least one-third enlisted members.

b. Panel selection.

(1) Selection of officer members. I recommend that you select **22 officer members** to serve on courts-martial by placing your initials beside their names in the column marked "Officer Members."

(2) Selection of enlisted members. I recommend that you select **22 enlisted members** by placing your initials beside their names in the column marked "Enlisted Members."

c. The members you select will be ordered by seniority as shown on the panel selection documents, by date of rank, for the purpose of detailing them as indicated below. I recommend you detail the members you select as follows:

(1) detail the first six available officers and the first eight available enlisted members to general courts-martial where the enlisted accused does not make an election pursuant to Article 25(c)(2)(A) (this panel must have at least one-third enlisted members if the accused makes an election pursuant to Article 25(c)(2)(B));

(2) detail the first 14 available officers to general courts-martial in which the accused is either an officer or an enlisted member has elected trial by a court-martial composed of all officer members pursuant to Article 25(c)(2)(A);

(3) detail the first five available officers and the first five available enlisted members to special courts-martial where an enlisted accused does not make an election pursuant to Article 25(c)(2)(A) (this panel must have at least one-third enlisted members if the accused make an election pursuant to Article 25(c)(2)(B));

(4) detail the first ten available officers to special courts-martial in which the accused is either an officer or an enlisted member who has elected trial by a court-martial composed of all officer members pursuant to Article 25(c)(2)(A); and

(5) designate all other panel members selected for court-martial duty but not detailed under this paragraph to serve as substitute members for any court-martial referred to the panel concerned.

4. Substitution of members prior to assembly. I recommend you adopt the following procedures for excusal and replacement of members prior to assembly:

a. Excusal authority. Prior to assembly, you may excuse any member, with or without cause.

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

b. Replacement of members excused prior to assembly. A member excused prior to assembly will be replaced for the period of the excusal by the next available substitute member in the order shown on the convening order, except that, in all cases, excused officer members will be replaced with officer member substitutes, and excused enlisted members will be replaced with enlisted member substitutes.

c. Panel exhaustion. If there are insufficient available substitute members to replace an excused member, then the panel nomination and selection process described in this memorandum will be repeated.

d. Delegation of excusal authority. I recommend that you delegate to the staff judge advocate (SJA), or the acting SJA, in the SJA's absence, the authority to excuse individual members from a court-martial prior to assembly, without cause shown, pursuant to R.C.M. 505(c)(1)(B). This authority shall be limited so that no more than one-third of the total members detailed to a particular court-martial may be excused pursuant to this delegation.

e. Automatic excusal criteria. I recommend that members meeting one or more of the below criteria be excused automatically from a court-martial, without any further action by you, if, prior to assembly, it has been determined that:

(1) the member is a witness in the case;

(2) the member has acted as accuser or has forwarded, investigated, or made a recommendation as to the disposition of the accused's case; or

(3) the member does not outrank the accused.

5. Alternate and substitute members. Alternate members have the same duties as members; however, an alternate member shall not vote or participate in deliberations on findings or sentencing unless the alternate member has become a member by replacing a member who was excused after impanelment. If you authorize alternate members, they will be determined and impaneled according to the rules for courts-martial and this advice. A general court-martial may lose two members after impanelment without requiring new (or alternate) members. A special court-martial must maintain the required four members both at and after impanelment.

a. I recommend that you state in the convening order that alternates are not authorized.

b. If insufficient members remain after challenges to satisfy the numerical requirements as set forth in R.C.M. 501, I recommend that substitute members be detailed automatically in accordance with paragraph 6 below.

6. Automatic replacement procedures after assembly and challenges, and before impanelment.

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

a. In general courts-martial in which the accused has elected trial by a court-martial composed of all officer members, if the number of members falls below eight, the next available officer members by seniority will be detailed to increase the total number of members to 12.

b. In all other general courts-martial, if the number of members falls below eight, the next available enlisted members by seniority will be detailed to increase the total number of members to 12.

c. In special courts-martial in which the accused has elected trial by a court-martial composed of all officer members, if, after challenges, the number of members falls below four, the next available officer members by seniority will be detailed to increase the total number of members to eight.

d. In all other special courts-martial with members, if the number of members falls below four, the next available enlisted members by seniority will be detailed to increase the total number of members to eight.

7. Automatic replacement procedures after impanelment. If, after impanelment, the excusal of any member(s) results in less than the number of members required under the Rules for Courts-Martial for the type of court-martial involved, then I recommend that the procedures in paragraph 6 above shall apply.

8. Issuance of court-martial convening orders.

a. I recommend that you issue court-martial convening orders (CMCO) that detail members you selected for court-martial duty as follows:

(1) the new CMCO 1 will detail members for general courts-martial and will list substitute members for automatic detailing in accordance with paragraphs 6 and 7, above;

(2) the new CMCO 2 will detail members for special courts-martial and will list substitute members for automatic detailing in accordance with paragraphs 6 and 7, above.

b. For all cases referred on or after 1 January 2019, I recommend that you refer general courts-martial cases to the court-martial created by CMCO 1 and special courts-martial cases to the court-martial created by CMCO 2.

c. I recommend that both panels serve from the date of this memorandum until you or your successor select new court-martial panels.

9. The point of contact is the undersigned.

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

5 encls

1. Panel Nominee Selection Sheet
2. Panel Nominee ORB/ERBs
3. Notification Memo to Panel Members
4. AAA-162 Duty Roster (electronic)
5. FRAGO – Panel Nominations

XXXXXXXXXXXX

COL, JA

Staff Judge Advocate

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

DIRECTION OF THE CONVENING AUTHORITY:

1. The recommendations of the Staff Judge Advocate are (approved) / (disapproved).
2. My selections are noted on Enclosure 1.

XXXXXXXXXXXXXXXXX
Major General, USA
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXX DIVISION AND FORT XXXXXXXXX
FORT XXXXX

AFX-CG

MEMORANDUM FOR Courts-Martial Panel Members

SUBJECT: Duties of Courts-Martial Members

1. I have personally selected you to be a primary or substitute courts-martial panel member based on my determination that you are the best qualified by reason of age, education, training, experience, length of service, and judicial temperament.
2. Your selection for this duty is an honor and is of the utmost importance to the fair administration of military justice. This duty takes precedence over all other duties, to include TDY and exercises, unless I specifically excuse you.
3. Neither you nor your chain of command may schedule absences that would conflict with your courts-martial duty. Only I, or the Acting Commander in my absence, may excuse members from courts-martial duty.
4. The Office of the Staff Judge Advocate, Military Justice Division, will give you as much notice as possible regarding the date, time, place, and uniform when your service is required. However, due to the nature of judicial proceedings, last minute changes often occur which may necessitate your service on very short notice. Courts-martial may convene early, beyond duty hours, and when necessary, extend into weekends and holidays. I expect members to be patient, flexible, and understanding when such circumstances arise.
5. Excusals. As stated above, this duty takes precedence over all duties, including field duty, TDY, leave, and pass. Thus, when informed that your service as a panel member is required, I expect you to be available.
 - a. Requests for excusal from duty will only be approved if you have demonstrated good cause for the excusal. I am providing you this information now so that you can, to the extent possible, plan any absence (e.g., pass, leave, training exercises, temporary duty, etc.) around your service as a courts-martial panel member.
 - b. You are required to send all requests for excusal in memorandum format, by the suspense dates you will be provided, to the Military Justice Division, attention Mrs. XXXXXXXXX, at XXXXXXXXXX.civ@army.mil. It is your sole responsibility as a courts-martial panel member to submit excusal requests in a timely manner.

AFBL-CG

SUBJECT: Duties of Courts-Martial Members

c. All excusal requests MUST be accompanied by supporting documentation (e.g., leave form, orders, etc.). Failure to submit supporting documentation, or to submit requests by the required time, may result in my automatic denial of your request.

d. You are required to be present at the time and place of which you have been notified until such a time you are properly excused in writing from duty by me, the Acting Commander, or the Military Judge.

6. Verification. Upon receiving a copy of this memorandum, you must contact Mrs. XXXXX via email to acknowledge receipt of this notification and duty. Members of this panel are personally accountable and obligated to keep the Military Justice Division abreast of your duty status during the duration of your term of service.

7. Any questions regarding your duties as a court-martial panel member should be directed to Major XXXXXXXXX, Chief, Military Justice, at (XXX) XXX-XXXX.

8. I hope that you will find this duty professionally and personally rewarding.

XXXXXXXXXXXXXXXXXXXXX
Major General, USA
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXXXX DIVISION AND FORT XXXXX

AFVB-XY-Z

1 September 2022

MEMORANDUM FOR Office of the Staff Judge Advocate, Fort XXXXXX

SUBJECT: Excusal Request - Court-Martial Duty

1. This is a request for excusal from court-martial duty:

Name: LTC John Doe

Unit: HHC, X Bn, Y Regt

Reason for request: TDY to MCAS Miramar, CA. Squadron Commanders are required by Department of Army to attend the Senior Leader Training and Development on advanced pilot training programs and upcoming changes to aircraft OPTEMPO. Use or lose leave.

Date(s) of excusal: 5-10 OCT 2017 (TDY)
15-29 NOV 2017 (Use or lose leave)

2. Point of Contact is the undersigned at 915-744-1234.

JOE DOE
COL, AV
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXX DIVISION AND FORT XXXXXX

AFX-CG

MEMORANDUM FOR RECORD

SUBJECT: Request for Temporary Excusal from Court-Martial Duty

1. The following requests for temporary excusal from court-martial duty pertaining to the below-listed individuals are approved unless otherwise indicated.

	NAME	DATE/CASE	REASON(S)	DISAPPROVE
1	COL DOE, John	25-28 Oct 2022	TDY 18 Sep-11 Nov 22	
2	COL ROE, Jane	25-28 Oct 2022	Leave 28 Oct 22	

2. The point of contact for this action is MAJ XXXXXXXXXXXX, Chief, Military Justice, at (XXX) XXX-XXXX.

XXXXXXXXXXXXXX
Major General, USA
Commanding

Court-Martial Convening Order X was the last of the series for 2018

DEPARTMENT OF THE ARMY
GCMCA

COURT-MARTIAL CONVENING ORDER
NUMBER 1

1 January 2019

A general court-martial is hereby convened by this order. The following primary members are permanently detailed to this court-martial. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, 42nd Fires Brigade
CPT XXXXXXXXXXXX, USAG
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Brigade
CSM XXXXXXXXXXXX, MEDDAC
CSM XXXXXXXXXXXX, 54th Infantry Division
1SG XXXXXXXXXXXX, 2nd Brigade
1SG XXXXXXXXXXXX, DENTAC

In the event the accused is an officer, or an enlisted accused submits a request pursuant to Article 25(c)(2)(A), UCMJ, the court will be composed of the following officer members. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
LTC XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, DENTAC
LTC XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, 2nd Brigade
MAJ XXXXXXXXXXXX, 3rd Brigade
MAJ XXXXXXXXXXXX, 603rd Training Division
MAJ XXXXXXXXXXXX, 42nd Fires Brigade
MAJ XXXXXXXXXXXX, USAG
CPT XXXXXXXXXXXX, USAG

CONTINUATION SHEET: Court-Martial Convening Order #1, dated 1 January 2019,
Headquarters, GCMCA

The following members will serve as substitutes in the order they are listed here (officers will replace officers, and enlisted will replace enlisted) when any of the members listed above are temporarily or permanently excused.

COL XXXXXXXXXXXX, 42nd Fires Brigade
COL XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, USAG
LTC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
MAJ XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, MEDDAC
MAJ XXXXXXXXXXXX, 3rd Brigade
MAJ XXXXXXXXXXXX, USAG
CSM XXXXXXXXXXXX, DENTAC
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
1SG XXXXXXXXXXXX, 2nd Brigade
1SG XXXXXXXXXXXX, 4th Brigade
1SG XXXXXXXXXXXX, 54th Infantry Division
1SG XXXXXXXXXXXX, DENTAC
MSG XXXXXXXXXXXX, 54th Infantry Division
MSG XXXXXXXXXXXX, MEDDAC
MSG XXXXXXXXXXXX, 3rd Brigade
SFC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
SFC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
SFC XXXXXXXXXXXX, 42nd Fires Brigade

BY COMMAND OF MAJOR GENERAL GCMCA:

DISTRIBUTION:

1-MJ, TC, DC, Accused
1-Ea Indiv Concerned
1-Rec Set

FNAME MI LNAME
MSG, USA
Chief Paralegal NCO

Court-Martial Convening Order X was the last of the series for 2018

DEPARTMENT OF THE ARMY
GCMCA

COURT-MARTIAL CONVENING ORDER
NUMBER 2

1 January 2019

A special court-martial is hereby convened by this order. The following primary members are permanently detailed to this court-martial. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX 54th Infantry Division
MAJ XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Brigade
CSM XXXXXXXXXXXX, MEDDAC

In the event the accused is an officer, or an enlisted accused submits a request pursuant to Article 25(c)(2)(A), UCMJ, the court will be composed of the following officer members. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
LTC XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, DENTAC
LTC XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, 2nd Brigade
MAJ XXXXXXXXXXXX, 3rd Brigade

CONTINUATION SHEET: Court Martial Convening Order #2, dated 1 January 2019,
Headquarters, GCMCA

The following members will serve as substitutes in the order they are listed here
(officers will replace officers, and enlisted will replace enlisted) when any of the
members listed above are temporarily or permanently excused.

COL XXXXXXXXXXXX, 42nd Fires Brigade
COL XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, USAG
LTC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
MAJ XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, MEDDAC
MAJ XXXXXXXXXXXX, 3rd Brigade
MAJ XXXXXXXXXXXX, USAG
CSM XXXXXXXXXXXX, DENTAC
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
1SG XXXXXXXXXXXX, 2nd Brigade
1SG XXXXXXXXXXXX, 4th Brigade
1SG XXXXXXXXXXXX, 54th Infantry Division

BY COMMAND OF MAJOR GENERAL GCMCA:

DISTRIBUTION:

1-MJ, TC, DC, Accused
1-Ea Indiv Concerned
1-Rec Set

FNAME MI LNAME
MSG, USA
Chief Paralegal NCO

DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXXX, XXXXXXX

COURT-MARTIAL CONVENING ORDER
NUMBER XX

XX October 2022

The following members are detailed to the general court-martial convened by Court-Martial Convening Order (CMCO) Number XX, this headquarters, dated XX August 2022, as amended by CMCO Number XX, dated XX October 2022, for the case of United States v. Staff Sergeant XXXXXXXXXXXX only, scheduled to be assembled XXX November 2022:

1LT XXXXXXXXXXXXXXX, 1BCT
MSG XXXXXXXXXXXXXXX, Garrison

VICE:

LTC XXXXXXXXXXXXXXX, 2BCT
MSG XXXXXXXXXXXXXXX, CAB

BY COMMAND OF MAJOR GENERAL XXXXXXXXXXXX:

DISTRIBUTION:
Each Record of Trial (1)
Record Set (1)

XXXXXXXXXXXXXXXXXXXX
MSG, USA
Senior Military Justice Operations NCO



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

(DATE)

MEMORANDUM FOR (GCMCA)

FROM: (SJA)

SUBJECT: SAMPLE - Pretrial Advice—*U.S. v. (MEMBER), (UNIT)*

1. (MEMBER), (UNIT), was charged with (X) charge and (X) specification(s) of (offense) in violation of Article (X), Uniform Code of Military Justice (UCMJ). The charge was preferred on (DATE). The preliminary hearing under Article 32, UCMJ, was held on (DATE) (Attachment 2). On (DATE), the Preliminary Hearing Officer (PHO) submitted his report. The PHO found probable cause to believe the accused committed the charge and its specification(s) and recommended trial by General Court-Martial. On (DATE), the (SPCMCA) forwarded the charge and its specifications with a recommendation for trial by General Court-Martial (GCM).

2. Pursuant to R.C.M. 406 and Article 34, UCMJ, I provide you the following advice:

a. The charge and specifications each allege offenses under the UCMJ.

b. There is probable cause to believe the accused committed the offenses in the charge and specifications.

c. The accused is on active duty in the United States Air Force and was on active duty at the time of the alleged offenses. I am satisfied a court-martial would have jurisdiction over the accused and over the charge and its specifications.

3. I recommend you refer the charge and specifications to trial by GCM.

4. If you determine referral to trial by GCM is appropriate, I recommend you do so by selecting at least 16 court-martial members on the proposed 1st Indorsement (Attachment 1). In accordance with Article 25, UCMJ, members detailed to a court-martial shall be those persons who you determine are best qualified by reason of their age, education, training, experience, length of service, and judicial temperament. Neither rank, race, ethnicity, sexual orientation, AFSC, duty position, nor any other factor may be used for the deliberate or systematic exclusion of qualified persons for court-martial membership. Your selection of members is not limited to the individuals listed on Attachment 1; you may select any eligible member in your command, or in another command with concurrence of the commander concerned, not junior in grade to the accused. You may also require additional nominees be submitted for your consideration.

5. Pursuant to R.C.M. 912A, you may authorize the military judge to impanel alternate members. You may either designate a specific number of alternates or specify that alternates may be impaneled only if excess members remain after the exercise of all challenges. Please

indicate on the 1st Indorsement whether you authorize the military judge to impanel alternate members, and, if so, whether you designate a specific number of alternates. I recommend you not authorize the military judge to impanel alternate members.

(NAME), (RANK), USAF
Staff Judge Advocate

2 Attachments:

1. GCMCA 1st Indorsement
2. Article 32 Report

1st Ind to Pretrial Advice, *United States v. (MEMBER), (UNIT)*

From: (GCMCA)

To: (GCMCA/JA)

1. Direction of the Convening Authority: I reviewed the charge sheet, Preliminary Hearing Officer's report and all evidence associated with this case, and considered the advice of my Staff Judge Advocate in the above-named case. I approve the recommendation by the Staff Judge Advocate and direct the charge and specifications be referred to trial by general court-martial.

2. By reason of their age, education, training, experience, length of service, and judicial temperament, under Article 25, UCMJ, I hereby select the following individuals to serve as members in the general court-martial of *U.S. v. (MEMBER), (SSN)*. Selection is made by my placement of a mark in one of the spaces next to the selectees.

	<u>NAME</u>	<u>UNIT</u>	<u>MAJCOM</u>
_____	COL XXXXXXXX	90 MSFS	AFGSC
_____	COL XXXXXXXX	321 MS	AFGSC
_____	LT COL XXXXXXXX	319 MS	AFGSC
_____	LT COL XXXXXXXX	90 MW	AFGSC
_____	LT COL XXXXXXXX	90 CONS	AFGSC
_____	MAJ XXXXXXXX	90 CPTS	AFGSC
_____	MAJ XXXXXXXX	90 MUNS	AFGSC
_____	MAJ XXXXXXXX	90 OMRS	AFGSC
_____	MAJ XXXXXXXX	890 MSFS	AFGSC
_____	CAPT XXXXXXXX	320 MS	AFGSC
_____	CAPT XXXXXXXX	90 OSS	AFGSC
_____	CAPT XXXXXXXX	320 MS	AFGSC
_____	CAPT XXXXXXXX	90 CS	AFGSC
_____	CAPT XXXXXXXX	90 OSS	AFGSC
_____	1ST LT XXXXXXXX	90 MMXS	AFGSC
_____	1ST LT XXXXXXXX	319 MS	AFGSC
_____	1ST LT XXXXXXXX	90 CES	AFGSC
_____	1ST LT XXXXXXXX	319 MS	AFGSC
_____	2ND LT XXXXXXXX	90 SFS	AFGSC
_____	2ND LT XXXXXXXX	321 MS	AFGSC
_____	2ND LT XXXXXXXX	320 MS	AFGSC
_____	2ND LT XXXXXXXX	90 FSS	AFGSC
_____	_____	_____	_____
_____	_____	_____	_____

In accordance with R.C.M. 912A:

_____ I authorize the military judge to impanel _____ alternate members.

_____ I authorize the military judge to impanel alternate members only if, after the exercise of challenges, excess members remain.

_____ Alternate members are not authorized.

3. Prepare an order effecting the appointment of the above-named selectees.

(NAME)
(RANK), [(USAF)(USSF)]
Commander

**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, (GCMCA) (MAJCOM/FLDCOM)
(BASE), (STATE) (ZIP CODE)**

SPECIAL ORDER
A-(X)

(DATE)

Pursuant to authority contained in Special Order G-20-001, Department of the Air Force, dated 5 December 2019, a general court-martial is hereby convened. It may proceed at (BASE), (STATE), to try such persons as may be properly brought before it. The court will be constituted as follows:

MEMBERS	UNIT	MAJCOM	BASE
COL XXXXXX	321 MS	AFGSC	F.E. WARREN AFB
LT COL XXXXXX	319 MS	AFGSC	F.E. WARREN AFB
LT COL XXXXXX	90 MW	AFGSC	F.E. WARREN AFB
MAJ XXXXXX	90 MUNS	AFGSC	F.E. WARREN AFB
MAJ XXXXXX	90 OMRS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	320 MS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	320 MS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	90 CS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	90 OSS	AFGSC	F.E. WARREN AFB
1ST LT XXXXXX	319 MS	AFGSC	F.E. WARREN AFB
1ST LT XXXXXX	90 CES	AFGSC	F.E. WARREN AFB
1ST LT XXXXXX	319 MS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	90 SFS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	321 MS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	320 MS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	90 FSS	AFGSC	F.E. WARREN AFB

The military judge is not authorized to impanel alternate members.

(NAME)
(RANK), [(USAF)(USSF)]
Commander

FOR THE COMMANDER

(NAME), Colonel, USAF
Staff Judge Advocate

Distribution:
1 - Ea Individual
1 - Ea Org
1 - (INSTALLATION LEGAL OFFICE)

SO A-(X)

MEMORANDUM FOR (SJA for GCMCA)

FROM: (GCMCA)

SUBJECT: General Court-Martial of *U.S. v. (MEMBER)*

1. The following individuals were previously selected to serve as members of a general court-martial convened by Special Order A-(X), dated (DATE), to hear the case of *U.S. v. (MEMBER)*. The individuals denoted by my initials are relieved as court-martial members in this case:

MEMBERS	UNIT	MAJCOM
_____ COL XXXXXXXXXXXX	321 MS	AFGSC
_____ LT COL XXXXXXXXXXXX	319 MS	AFGSC
_____ LT COL XXXXXXXXXXXX	90 MW	AFGSC
_____ MAJ XXXXXXXXXXXX	90 MUNS	AFGSC
_____ MAJ XXXXXXXXXXXX	90 OMRS	AFGSC
_____ CAPT XXXXXXXXXXXX	320 MS	AFGSC
_____ CAPT XXXXXXXXXXXX	320 MS	AFGSC
_____ CAPT XXXXXXXXXXXX	90 CS	AFGSC
_____ CAPT XXXXXXXXXXXX	90 OSS	AFGSC
_____ 1ST LT XXXXXXXXXXXX	319 MS	AFGSC
_____ 1ST LT XXXXXXXXXXXX	90 CES	AFGSC
_____ 1ST LT XXXXXXXXXXXX	319 MS	AFGSC
_____ 2ND LT XXXXXXXXXXXX	90 SFS	AFGSC
_____ 2ND LT XXXXXXXXXXXX	321 MS	AFGSC
_____ 2ND LT XXXXXXXXXXXX	320 MS	AFGSC
_____ 2ND LT XXXXXXXXXXXX	90 FSS	AFGSC

2. I hereby select the following individuals, denoted by my initials, as court-martial members in this case:

_____ COL XXXXXXXXXXXX	90 OMRS	AFGSC
_____ LT COL XXXXXXXXXXXX	90 OSS	AFGSC
_____ MAJ XXXXXXXXXXXX	90 HCOS	AFGSC
_____ MAJ XXXXXXXXXXXX	321 MS	AFGSC
_____ CAPT XXXXXXXXXXXX	90 OSX	AFGSC
_____ 1ST LT XXXXXXXXXXXX	90 LRS	AFGSC
_____ CMSGT XXXXXXXXXXXX	90 CES	AFGSC
_____ CMSGT XXXXXXXXXXXX	90 LRS	AFGSC
_____ SMSGT XXXXXXXXXXXX	790 MXS	AFGSC
_____ MSGT XXXXXXXXXXXX	90 FSS	AFGSC

_____	MSGT JACK A. XXXXXXXXXXXX	90 MDG	AFGSC
_____	MSGT XXXXXXXXXXXX	90 LRS	AFGSC
_____	TSGT XXXXXXXXXXXX	90 CS	AFGSC
_____	TSGT XXXXXXXXXXXX	90 CES	AFGSC
_____	TSGT XXXXXXXXXXXX	90 MW	AFGSC
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

In accordance with R.C.M. 912A:

_____ I authorize the military judge to impanel _____ alternate members.

_____ I authorize the military judge to impanel alternate members only if, after the exercise of challenges, excess members remain.

_____ Alternate members are not authorized.

3. Prepare a new convening order reflecting the appointment of the members selected and relieving the individuals named above.

(NAME)
 (RANK), [(USAF)(USSF)]
 Commander

**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, (GCMCA) (MAJCOM/FLDCOM)
(BASE), (STATE) (ZIP CODE)**

SPECIAL ORDER
A-(X)

(DATE)

The following members are detailed to the general court-martial convened by Special Order A-(X), this headquarters, dated (DATE), vice LT COL XXXXXXXX, LT COL XXXXXXXX, MAJ XXXXXXXX, CAPT XXXXXXXX, 1ST LT XXXXXXXX, and 2ND LT XXXXXXXX, relieved.

MEMBERS	UNIT	MAJCOM	BASE
CMSGT XXXXXXXXXXXX	90 CES	AFGSC	F.E. WARREN AFB
CMSGT XXXXXXXXXXXX	90 LRS	AFGSC	F.E. WARREN AFB
SMSGT XXXXXXXXXXXX	790 MXS	AFGSC	F.E. WARREN AFB
MSGT XXXXXXXXXXXX	90 FSS	AFGSC	F.E. WARREN AFB
MSGT XXXXXXXXXXXX	90 MDG	AFGSC	F.E. WARREN AFB
MSGT XXXXXXXXXXXX	90 LRS	AFGSC	F.E. WARREN AFB

The military judge is not authorized to impanel alternate members.

(NAME)
(RANK), [(USAF)(USSF)]
Commander

FOR THE COMMANDER

(NAME), Colonel, USAF
Staff Judge Advocate

DISTRIBUTION:
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**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

MEMORANDUM FOR (SUBORDINATE SPCMCA_s)

FROM: (GCMCA)
(ADDRESS LINE 1)
(ADDRESS LINE 2)

SUBJECT: Duty as a Court-Martial Member

1. As commander of (UNIT), I have the responsibility to serve as general court-martial convening authority for this command. The military justice system remains vital to the Department of the Air Force mission and the maintenance of morale, good order, and discipline. Likewise, faithful and attentive service as a court-martial panel member has proven indispensable for military justice to function properly.
2. I view the duty of court-martial panel member as one of the most important duties any officer or enlisted person can be called upon to perform. Following guidelines set out in the Uniform Code of Military Justice, for general courts-martial, I personally review the background data of each member nominated for service. Further, I select only those who I believe are best qualified for this duty by reason of their age, education, training, experience, length of service, and judicial temperament.
3. Because of the critical importance of service as a court-martial member, once an individual is selected to serve, that person should serve unless a compelling reason arises. Service as a court member becomes an individual's primary duty during the period of the trial. Additionally, subordinate commanders should nominate their best personnel for this duty, regardless of AFSC.

(NAME)
(RANK), USAF
Commander

cc:
(SUBORDINATE SPCMCA LEGAL OFFICES)



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

(DATE)

MEMORANDUM FOR (GCMCA)

FROM: UNIT/OFFICE SYMBOL

SUBJECT: Excusal from Court Member Duty

I, (NAME), respectfully request that I be excused from the court-martial scheduled to begin on (DATE). I am unavailable to fulfill these duties due to (REASON).

(NAME), [(USAF)(USSF)]
Duty Title

1st Ind, [(SQ/CC) (or equivalent)]

I concur/do not concur.

(NAME), [(USAF)(USSF)]
Commander, (UNIT)

2nd Ind, [(GROUP/CC) (or equivalent)]

I concur/do not concur.

(NAME), [(USAF)(USSF)]
Commander, (UNIT)



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

(DATE)

MEMORANDUM FOR (PANEL MEMBER'S COMMANDER)

FROM: (GCMCA/SJA)

SUBJECT: Excusal from Court Member Duty

On (DATE), I received your request to excuse (NAME), (RANK) from court- martial duty for the general court-martial scheduled to convene on (DATE). Pursuant to the delegated authority from (GCMCA), I hereby excuse (NAME) from court-martial duty.

(NAME), Colonel, USAF
Staff Judge Advocate

cc:
Court-martial Member (NAME)
(INSTALLATION LEGAL OFFICE)



DEPARTMENT OF THE NAVY
NAVAL DISTRICT WASHINGTON
1343 DAHLGREN AVE SE
WASHINGTON NAVY YARD DC 20374-5161

31 Jan 22

GENERAL COURT-MARTIAL CONVENING ORDER 1-22

Pursuant to authority contained in Article 22, Uniform Code of Military Justice, and paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7G of 15 January 2021, a general court-martial is convened with the following members:

Captain [REDACTED], U.S. Navy
Captain [REDACTED], U.S. Navy
Captain [REDACTED], U.S. Navy
Commander [REDACTED], U.S. Navy
Commander [REDACTED], U.S. Navy
Commander [REDACTED], Medical Service Corps, U.S. Navy
Lieutenant Commander [REDACTED], U.S. Navy
Lieutenant Commander [REDACTED], U.S. Navy
Lieutenant Commander [REDACTED], U.S. Navy
Lieutenant [REDACTED], U.S. Navy

Alternative members are not authorized.



Rear Admiral, U.S. Navy
Commandant, Naval District Washington

Certified as a true and complete copy.
[REDACTED]
31 Jan 2022

CDR [REDACTED] JAGC, USN
Staff Judge Advocate
Notary Public
Under the Authority of 10 U.S.C. 1044a
Commission Expires: Indefinite



23 May 22

GENERAL COURT-MARTIAL CONVENING ORDER 1A-22

The following members are detailed to the General Court-Martial convened by Commandant, Naval District Washington General Court-Martial convening order 1-22 dated 31 January 2022 for the trial of *United States v. CTRSA [REDACTED]* USN:

- Commander [REDACTED], Dental Corps, U.S. Navy
- Lieutenant Commander [REDACTED], U.S. Navy
- Lieutenant Commander [REDACTED], U.S. Navy
- Lieutenant Junior Grade [REDACTED], U.S. Navy
- Lieutenant Junior Grade [REDACTED], U.S. Navy
- Ensign [REDACTED], U.S. Navy
- Master Chief Petty Officer [REDACTED], U.S. Navy
- Senior Chief Petty Officer [REDACTED], U.S. Navy
- Chief Petty Officer [REDACTED], U.S. Navy
- Petty Officer First Class [REDACTED], U.S. Navy
- Petty Officer Second Class [REDACTED], U.S. Navy
- Petty Officer Second Class [REDACTED], U.S. Navy
- Petty Officer Third Class [REDACTED], U.S. Navy

All members previously detailed to the General Court-Martial convened by Commandant Naval District Washington General Court-Martial convening order 1-22 dated 31 January 2022 are relieved for the trial of *United States v. CTRSA [REDACTED]* USN.



Rear Admiral, U.S. Navy
Commandant



28 Jun 22

GENERAL COURT-MARTIAL CONVENING ORDER 1B-22

The following members are excused from the General Court-Martial convened by Commandant, Naval District Washington General Court-Martial convening order 1-22 dated 31 January 2022 and amended by convening order 1A-22 of 23 May 2022 for the trial of *United States v. CTRSA [REDACTED]*, USN:

Commander [REDACTED], Dental Corps, U.S. Navy
Lieutenant Commander [REDACTED] U.S. Navy
Lieutenant [REDACTED], U.S. Navy
Lieutenant [REDACTED], U.S. Navy
Ensign [REDACTED] U.S. Navy
Master Chief Petty Officer [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer Second Class [REDACTED] U.S. Navy

The following additional members are detailed for the trial of *United States v. CTRSA [REDACTED]*
[REDACTED] USN:

Commander [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy

GENERAL COURT-MARTIAL CONVENING ORDER 1B-22

The Court-Martial, as amended and relieved, for the trial of *United States v. CTRSA* [REDACTED]
[REDACTED] USN is comprised of:

Commander [REDACTED] U.S. Navy
Lieutenant Commander [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] Medical Service Corps, U.S. Navy
Lieutenant Junior Grade [REDACTED] U.S. Navy
Lieutenant Junior Grade [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED], U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer Second Class [REDACTED] U.S. Navy
Petty Officer Third Class [REDACTED] U.S. Navy

No alternate members are authorized.

[REDACTED]

Rear Admiral, U.S. Navy
Commandant



UNITED STATES MARINE CORPS
MARINE CORPS AIR STATION NEW RIVER
PSC BOX 21001
JACKSONVILLE, NC 28545-1001

5000-82
CO
Ser: 1-20
DEC 11 2019

GENERAL COURT-MARTIAL CONVENING ORDER 1-20

Pursuant to the authority in Article 22(a) of the Uniform Code of Military Justice, Rule for Court-Martial 504, and Section 0120a of the Manual of the Judge Advocate General, a standing court panel for a General Court-Martial is hereby convened. It may try such persons as may be properly brought before it. The court shall meet at Marine Corps Air Station New River, unless otherwise directed. The court will be constituted as follows:

MEMBERS

- Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
- Commander [REDACTED] U.S. Navy, Member;
- Major [REDACTED] U.S. Marine Corps, Member;
- Captain [REDACTED] U.S. Marine Corps, Member;
- Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
- Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
- Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member; and
- Warrant Officer [REDACTED] U.S. Marine Corps, Member.





UNITED STATES MARINE CORPS
MARINE CORPS AIR STATION NEW RIVER
PSC BOX 21001
JACKSONVILLE, NC 28545-1001

5811
CO
7 Jun 21

GENERAL COURT-MARTIAL CONVENING ORDER 1A-20

General Court-Martial Convening Order 1-20 dated 11 December 2019 is hereby modified for the case of United States vs. [REDACTED] U.S. Marine Corps. The court shall meet at Marine Corps Air Station New River, unless otherwise directed. I authorize the military judge to impanel alternates if excess members are available after identification of the primary panel members:

MEMBERS

Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
Commander [REDACTED] U.S. Navy, Member;
Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Warrant Officer [REDACTED] U.S. Marine Corps, Member;

DELETE

Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Warrant Officer [REDACTED] U.S. Marine Corps, Member;

ADD

Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Master Sergeant [REDACTED] U.S. Marine Corps, Member;



GENERAL COURT-MARTIAL CONVENING ORDER IA-20

Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;

The General Court-Martial is hereby constituted as follows:

Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
Commander [REDACTED], U.S. Navy, Member;
Major [REDACTED], U.S. Marine Corps, Member;
Captain [REDACTED], U.S. Marine Corps, Member;
Captain [REDACTED], U.S. Marine Corps, Member;
Captain [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED], U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Master Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member; and Gunnery
Sergeant [REDACTED], U.S. Marine Corps, Member.
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;

[REDACTED]
Colonel
U.S. Marine Corps
Commanding Officer



UNITED STATES MARINE CORPS
MARINE CORPS AIR STATION NEW RIVER
PSC BOX 21001
JACKSONVILLE, NC 28545-1001

5811
CO
8 Jun 21

GENERAL COURT-MARTIAL CONVENING ORDER 1B-20

General Court-Martial Convening Order 1A-20 dated 7 June 2021 is hereby modified for the case of United States vs. [REDACTED] U.S. Marine Corps. The court shall meet at Marine Corps Air Station New River, unless otherwise directed. I authorize the military judge to impanel alternates if excess members are available after identification of the primary panel members:

MEMBERS

Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
Commander [REDACTED] U.S. Navy, Member;
Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Master Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member; and
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member.

DELETE

Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member; and
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member.

ADD

Captain [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member; and
Staff Sergeant [REDACTED] U.S. Marine Corps, Member.



GENERAL COURT-MARTIAL CONVENING ORDER 1B-20

The General Court-Martial is hereby constituted as follows:

Lieutenant Colonel [REDACTED] U.S. Marine Corps, President;
Commander [REDACTED] U.S. Navy, Member;
Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Master Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member; and
Staff Sergeant [REDACTED] U.S. Marine Corps, Member.

[REDACTED]

Colonel
U.S. Marine Corps
Commanding Officer

[REDACTED]



5817
12 Apr 2021

MEMORANDUM

From: [REDACTED]
Deputy Staff Judge Advocate
CG Legal Service Command

Reply to
Attn of: [REDACTED]

To: [REDACTED] CDR
CG Base Alameda (cd)

Subj: NOMINATION OF COURTS-MARTIAL PANEL MEMBERS FOR POOL

Ref: (a) Article 25, UCMJ, Manual for Courts-Martial (2019 ed.)
(b) Rules for Court-Martial 501-505, Manual for Courts-Martial (2019 ed.)

1. It is necessary to select new court-martial panel members for cases referred on or after 1 January 2021. The convening authorities for DOL, CG Base Alameda, or other convening authorities must personally select the members for courts-martial that they convene and to which they refers particular matters. It is necessary that you as the acting Executive Officer of Base Alameda nominate potential court-martial panel members to assist in their selection.
2. Several courts-martial are anticipated for the coming year. Your nominations would create a pool from which convening authorities may select panel members for each of these courts-martial. A larger number than the required number of members is normally selected to allow for any necessary excusals, i.e. illness, military exigencies, etc., and for legal challenges to the members.
3. The convening authorities are free to select anyone whom they feel is "best qualified" to serve on the court-martial panels. However, throughout the selection process, any person involved in nominating potential panel members must follow the guidance as to the qualifications of panel members as detailed in references (a) and (b). **Specifically, individuals nominated by you or ultimately selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. All selected members must be senior to the accused.**
4. You may use only the criteria listed in paragraph (3) in deciding whether to nominate someone. Military grade by itself is not a permissible criteria for selection of court-martial panel members. It is not appropriate to select members to achieve a particular result on findings or sentence.
5. You must nominate potential panel members that are "best qualified" following the criteria in references (a) and (b) which is also summarized in paragraph 3. All personnel should be given equal consideration in light of the above factors and those factors only. If you desire more information to determine an individual's qualifications, please notify me so I may advise you.
6. I recommend that you take the following action:

Subj: NOMINATION OF COURTS-MARTIAL PANEL MEMBERS FOR
POOL

5817
12 Apr 2021

a. To potentially serve as a court-martial panel members, personally nominate at least eighty (80) officers and fifty-six (56) enlisted personnel within 50 miles of Base Alameda. A roster is provided in Enclosure (1). You may nominate more.

b. Record your nominations in Enclosure (2), provide the list to Legal Service Command, and wait for next steps.

#

Enclosure: (1) Alpha Roster of Officers and Enlisted within 50 miles
(2) List of Nominated Officers and Enlisted

Copy: 
CG Base Alameda (cd)

Excerpt of excel spreadsheet. Sample truncated for audience.

EMPLID	LAST NAME	FIRST NAME	EMPL CLASS	PYGD	RATE	SAL ADMIN PLAN	SEX	AGE	TIME IN SERVICE	HIGHEST_EDUC_LVL	EDUCATION LEVEL	POSITION_NBR	CG_EXP_AD_TERM_DT	CG_EXP_LOSS_DT	CG_AD_BASE_DT	PAY BASE DT	RANK DT	ROTATE DT	MBS DEPTID	MBS S ATU	MBS OFFAC	MBS DEPT NAME	CITY	STATE	POSTAL
AD	06	CAPT	OFF	M	9			26	0	G-Bachelo 's Level Deg ee		30-JUN-24	30-JUN-24	18-MAY-94	18-MAY-94	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	CDR	OFF	M	1			19	0	G-Bachelo 's Level Deg ee		30-MAY-31	30-MAY-31	23-MAY-01	23-MAY-01	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	W2	AV3	WAR	M	9			23	0	C-HS G aduate o Equ valent		31-OCT-27	31-OCT-27	25-AUG-97	25-AUG-97	01-JUN-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	CDR	OFF	M	0			17	0	G-Bachelo 's Level Deg ee		30-MAY-33	30-MAY-33	21-MAY-03	21-MAY-03	01-JUL-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	41			21	0	C-HS G aduate o Equ valent		30-JUN-40	30-JUN-40	27-SEP-90	27-SEP-90	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	36			18	0	D-Some College		30-JUN-40	30-JUN-40	21-OCT-02	21-OCT-02	01-AUG-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	3			2	0	C-HS G aduate o Equ valent		30-MAY-35	30-MAY-35	21-MAY-08	21-MAY-08	01-OCT-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	CDR	OFF	M	1			2	0	G-Bachelo 's Level Deg ee		30-JUN-41	30-JUN-41	01-JUN-96	01-JUN-96	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03E	LT	OFF	M	38			1	1	I-Maste 's Level Deg ee		30-JUN-42	30-JUN-42	25-JUL-06	25-JUL-06	11-MAY-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	32			9	0	C-HS G aduate o Equ valent		17-MAY-41	17-MAY-41	18-MAY-11	18-MAY-11	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	2			20	0	G-Bachelo 's Level Deg ee		30-JUN-39	30-JUN-39	31-DEC-00	28-SEP-96	01-JUL-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	29			7	0	C-HS G aduate o Equ valent		30-JUN-44	30-JUN-44	17-JUN-13	17-JUN-13	21-MAY-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	36			16	0	G-Bachelo 's Level Deg ee		30-JUN-40	30-JUN-40	16-NOV-04	16-NOV-04	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	F	6			21	0	G-Bachelo 's Level Deg ee		30-JUN-40	30-JUN-40	29-SEP-99	19-AUG-92	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	F	28			6	0	C-HS G aduate o Equ valent		20-MAY-44	20-MAY-44	21-MAY-14	21-MAY-14	21-MAY-14	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	27			3	0	C-HS G aduate o Equ valent		20-MAY-44	20-MAY-44	21-MAY-14	21-MAY-14	21-MAY-14	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	A	A-Not Ind cated		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	C	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	F	26			3	C	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	27			3	0	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	31			6	0	G-Bachelo 's Level Deg ee		30-JUN-47	30-JUN-47	09-DEC-14	22-NOV-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128		
AD	03	LT	OFF	M	30			5	1	I-Maste 's Level Deg ee		30-JUN-46	30-JUN-46	21-APR-15	24-NOV-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128		
AD	03	LT	OFF	M	3			0	0	G-Bachelo 's Level Deg ee		30-JUN-47	30-JUN-47	26-JUL-16	26-JUL-16	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	06	CAPT	OFF	M	3			5	1	I-Maste 's Level Deg ee		30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-JUL-19	01-JUL-23	000503	37	51290	CEU OCEANO-PRODUCT LINE	OAKLAND	CA	94632	
AD	W4	INV4	WAR	M	52			28	0	C-HS G aduate o Equ valent		30-JUN-22	30-JUN-22	14-SEP-87	01-JAN-17	01-JUL-23	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501		
AD	W3	INV3	WAR	M	8			21	0	D-Some College		30-SEP-29	30-SEP-29	20-JUL-99	01-JUN-18	01-JUL-24	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501		
AD	W2	INV2	WAR	M	38			18	0	C-HS G aduate o Equ valent		30-SEP-32	30-SEP-32	16-JUL-02	16-JUL-02	01-JUN-20	01-JUL-24	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501	
AD	W2	INV2	WAR	M	3			19	0	C-HS G aduate o Equ valent		31-OCT-37	31-OCT-37	23-OCT-97	23-OCT-97	01-JUL-19	01-JUL-23	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501	
AD	06	CAPT	OFF	M	0			23	0	G-Bachelo 's Level Deg ee		30-JUN-27	30-JUN-27	21-MAY-97	21-MAY-97	01-JUL-19	01-JUL-22	002368	74	61200	TRACEN PET CMD STAFF	PETALUMA	CA	94952	
AD	05	CDR	OFF	M	3			21	0	G-Bachelo 's Level Deg ee		30-JUN-30	30-JUN-30	14-JAN-00	14-JAN-00	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMD STAFF	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	2			2	0	K-Docto ate (P rfecto onal)		30-JUN-41	30-JUN-41	12-JUL-10	12-JUL-10	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMD STAFF	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	6			23	0	G-Bachelo 's Level Deg ee		31-AUG-27	31-AUG-27	26-AUG-96	26-AUG-96	01-MAY-20	01-JUL-22	002370	74	61200	TRACEN PET CUST SPT SERVICES	PETALUMA	CA	94952	
AD	W2	PER2	WAR	M	33			15	0	C-HS G aduate o Equ valent		31-AUG-35	31-AUG-35	12-JUL-05	01-JUN-18	01-JUL-24	002370	74	61200	TRACEN PET CUST SPT SERVICES	PETALUMA	CA	94952		
AD	03E	LT	OFF	M	38			19	0	C-HS G aduate o Equ valent		30-SEP-31	30-SEP-31	10-JUL-01	10-JUL-01	01-MAY-19	01-JUL-23	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	38			15	0	C-HS G aduate o Equ valent		31-AUG-36	31-AUG-36	11-JUL-05	11-JUL-05	01-JUL-17	01-JUL-22	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952	
AD	05	CDR	OFF	M	1			18	0	G-Bachelo 's Level Deg ee		30-MAY-32	30-MAY-32	22-MAY-02	22-MAY-02	01-JUL-18	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	W4	MATA	WAR	M	51			28	0	C-HS G aduate o Equ valent		31-AUG-22	31-AUG-22	05-JUN-92	16-SEP-91	01-JUN-13	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	F	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	27			12	0	C-HS G aduate o Equ valent		17-MAY-46	17-MAY-46	18-MAY-16	18-MAY-16	01-JUN-19	01-JUL-23	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUN-24	003491	74	61200	TC PET PERFS SYS DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	1			1	A	A-Not Ind cated		30-JUN-37	30-JUN-37	04-OCT-06	04-OCT-06	01-SEP-17	01-JUL-22	003491	74	61200	TC PET PERFS SYS DIV	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	39			15	0	C-HS G aduate o Equ valent		30-JUN-40	30-JUN-40	26-SEP-05	26-SEP-05	10-JAN-20	01-JUL-22	003493	74	61200	TC PET OPS TRNG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	2			23	0	D-Some College		30-JUN-40	30-JUN-40	24-JUN-97	24-JUN-97	01-AUG-20	01-JUL-23	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	W4	ELC4	WAR	M	9			29	0	C-HS G aduate o Equ valent		31-MAR-22	31-MAR-22	06-JAN-92	06-JAN-92	01-JUN-18	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	35			11	0	I-Maste 's Level Deg ee		30-JUN-46	30-JUN-46	13-JUN-06	07-DEC-19	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952		
AD	W3	ISM3	WAR	M	52			27	0	C-HS G aduate o Equ valent		31-JUL-23	31-JUL-23	31-MAY-93	31-MAY-93	01-JUN-18	01-JUL-22	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952	
AD	03	LT	OFF	F	31			9	0	G-Bachelo 's Level Deg ee		17-MAY-43	17-MAY-43	18-MAY-11	18-MAY-11	01-MAY-15	01-JUL-23	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952	
AD	06	CAPT	OFF	F	31			9	0	G-Bachelo 's Level Deg ee		30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-OCT-20	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DL)	ALAMEDA	CA	94501	
AD	05	CDR	OFF	M	9			19	0	K-Docto ate (P rfecto onal)		30-JUN-30	30-JUN-30	12-OCT-01	09-OCT-01	01-SEP-18	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DL)	ALAMEDA	CA	94501	
EAD	03E																								

Enclosure (2) – Nominations

Officers

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56.

I nominated the above persons based off the advice provided to me in the [REDACTED] memo 5817 of 12 April 2021.

Signature: _____

Date: _____

[REDACTED]

From: [REDACTED]
Sent: Tuesday, May 10, 2022 6:34 PM
Cc: [REDACTED]
Subject: Please Read: Notification as Potential Panel Member for GCM (Questionnaire due: 24 May 22)
Attachments: Court-Martial Members Questionnaire - M5810_1G.pdf
Importance: High

Good Afternoon Sir, Ma'am

You have been nominated to potentially serve as a panel member of a General Court-Martial in Alameda, CA. As part of your nomination, please complete the attached questionnaire pursuant to the Uniform Code of Military Justice. This questionnaire will be used in evaluating your qualifications for potential court-martial duty in the near future. Persons ultimately selected serve based upon a "best qualified" standard.

We are respectfully requesting for the questionnaire to be signed and returned to [REDACTED] [REDACTED] by close of business, Tuesday, 24 May 2022.

Your cooperation and service, should be selected, is greatly appreciated in advance. If you have any questions, please contact CDR [REDACTED].

V/R
[REDACTED]
Paralegal Specialist

[REDACTED]
Alameda, CA 94501
[REDACTED]

COURT-MARTIAL MEMBER QUESTIONNAIRE

You have been nominated to serve as a member of a court-martial. Accordingly, this questionnaire is submitted to you under Rule for Courts-Martial 912, Manual for Courts- Martial. **This questionnaire should be completed, signed and returned as soon as possible.** Entries may be either typed or written if printed out. Instead of writing in your assignment history, you may include your CG Member Information Summary Sheet. However, it is not required.

PRIVACY ACT STATEMENT

1. **AUTHORITY:** 10 U.S.C. §§ 825, 841

2. **PRINCIPAL PURPOSE:** The information solicited is intended principally for use in the administration of military justice.

3. **ROUTINE USES:**
 - a. To assist the court-martial convening authority in evaluating your qualifications for court-martial duty.
 - b. To assist counsel in the exercise of statutory rights to challenge members of court-martial and to assist the military judge in ruling on such challenges. By requesting this information on a one-time basis before you actually serve as a member, repetitive questions and unnecessary delay can be avoided.
 - c. To assist reviewing authorities in resolving issues relating to your qualifications for court-martial duty.

4. **DISCLOSURE MANDATORY/VOLUNTARY, CONSEQUENCES OF REFUSAL TO DISCLOSE:** Disclosure is mandatory and failure to provide the information solicited may result in disciplinary action or criminal proceedings.

COURT-MARTIAL MEMBER QUESTIONNAIRE

1. Full Name (Last, First, Middle): _____

2. Rate/Rank/Designator: _____

3. Date of Rank: _____

4. Branch of Service: _____

5. (For Officers Only) Source of Commission: _____

6. Place of Birth: _____

7. Marital Status: Never Married Married Separated
 Divorced in _____ Widow/Widower since _____

8. If currently married:

Spouse's Occupation: _

Spouse's Place of Work: _

Spouse's Job Description: _

Years Spouse has been at Current Job: _____

9. Contact Information:

Office Telephone: _____

Cell Phone Number: _____

Email: _____

18. Have you ever served as a Summary Court-Martial Officer?

Yes/ No, if "yes", indicate the following:

Number of times: _____

Dates (year only): _____

19. Have you ever imposed Non-Judicial Punishment (NJP) Yes/ No

Number of times: _____

Dates (year only): _____

20. Have you ever been appointed as a member of a General (GCM) or Special Court-Martial (SPCM)?

Yes/ No, if "yes", indicate the following:

	Number Served	Year(s) Served
SPCM		
GCM		

21. Have you ever served on an Administrative Separation Board or on a Board of Inquiry?

Yes/ No, if "yes", indicate the following:

When did you serve? _____

What was the charge or reason for separation? _____

What did the board determine? _____

22. Have you ever served as a juror in a civil or criminal civilian trial (state or federal)? Yes/ No, if "yes", indicate the following:

When did you serve? _____

What was the nature of the case? _____

What did the jury determine? _____

23. Have you ever appeared as a witness in military or civilian court?

Yes/ No, if “yes”, indicate the following:

When did you appear? _____

For which side did you appear? _____

24. Have you had any specialized law enforcement training, civilian or military (either before or after entering the military service)? Examples include civilian police academy, courses at FLETC, MLEA, and Coast-Guard specific courses like boarding officer school.

Yes/ No, if “yes,” describe:

25. Have you worked in any capacity as law enforcement? Examples include civilian police officer, reserve police officer, military police or shore patrol, boarding officer or team member, etc.

Yes/ No, if “yes”, explain:

26. Are you taking any medications that might affect your ability to devote your undivided attention to the court-martial proceedings? Yes/ No

27. Have you or anyone close to you ever been arrested?

Yes/ No, if “yes”, explain:

28. Have you or anyone else close to you ever been charged with a crime?

Yes/ No, if “yes”, explain:

29. Have you ever had to call the police or have the police been called on you or anyone close to you? Yes/ No, if “yes”, explain:

30. Have you or anyone close to you ever been the victim of any crime? Yes/ No, if “yes”, indicate the following:

Person’s relationship to you: _

Incident: _____

31. Have you or anyone close to you ever been involved in any of the following areas: crime prevention (police, detective, etc); health care (doctor, nurse, pharmacist); or law (attorney/paralegal)? If "yes," please describe briefly:

32. Please list any social, professional, civic, victim- advocacy, or civil-liberties organizations that you or your spouse are a member of:

33. Have you ever served as a victim advocate or received any training in the field of sexual assault or victim advocacy (e.g. Victim Advocate, SAVI, SARC, CIT)?

Yes/ No if "yes", when, what role or training, and what type of cases were involved:

34. Have you ever served as a member of a member of a Family Advocacy Program (FAP) board or committee? Yes/ No, if "yes", when, what role, and what type of cases were involved:

35. Other than General Military Training (e.g. Learning Portal), have you ever served or received any training in the field of alcohol and substance abuse? For example, training to be a civilian bartender, collateral duty drug or alcohol program coordinator training, or university psychology classes dealing with substance abuse. Yes/ No, if "yes", when and please describe:

36. Please describe the sexual assault awareness training, education, counseling, or indoctrination you have been exposed to within the last 24 months (written communications, “all hands,” social media, informal discussions, viewing posters or videos, etc.)
37. Have you, or someone close to you, ever delivered sexual assault awareness or prevention training, education, indoctrination, counseling, etc. – or worked as a counselor, support person, advocate, medical provider, or in some other capacity in a case involving sexual assault? If yes, describe.
38. Have you ever served in any capacity in a command or service sponsored urinalysis program? Yes/No, if “yes”, when and please describe:
39. If you were sitting at the defense table as the accused, would you be satisfied to have your guilt or innocence and sentence determined by a court member who was in your present state of mind? Yes/No
40. Is there anything in your background or experience that might affect your ability to be a fair and impartial decision-maker? Yes/No

[Continued Next Page]



5817
22 Sep 2021

MEMORANDUM

From: [REDACTED] CAPT
Legal Service Command (CG LSC)

Reply to [REDACTED] CDR
Attn of: [REDACTED]

To: [REDACTED] RDML
Director of Operational Logistics (CG DOL)

Subj: SELECTION OF MEMBERS FOR STANDING GCM PANEL IN ALAMEDA, CA

Ref: (a) Article 25, UCMJ, Manual for Courts-Martial (2019 ed.)
(b) Rules for Court-Martial 501-505, Manual for Courts-Martial (2019 ed.)

1. This memorandum provides advice to you, as a Convening Authority, concerning selection of members for a standing panel pursuant to references (a) and (b) for general courts-martial referred on or after 1 January 2021 that will meet in Alameda, California.¹ I respectfully request you indicate your selections using the draft endorsement prepared at Enclosure (1). I also request to personally brief you on the requirements and answer any questions you may have before you actually select members.

2. As the Director of Operational Logistics (DOL), you must personally select the members for general courts-martial that you convene and to which you refer particular matters. General courts-martial are anticipated for the coming year stemming from DOL units located in Pacific Area's area of responsibility. Your selections would create a standing panel for general courts-martial to convene in Alameda, California.

3. In accordance with changes in the 2019 edition of the Manual for Courts-Martial, general courts-martial require eight (8) members. A larger number than the required number of members is normally selected to allow for any necessary excusals, i.e. illness, military exigencies, etc., and for legal challenges to the members. In addition, with the changes to the Uniform Code of Military Justice (UCMJ) that became effective on 1 January 2019, you may authorize alternate members. These are members of the court-martial who hear the case, and can substitute for any primary members who become unavailable during trial, for example, become ill and cannot continue, without the need to appoint new members to the court-martial. You are not required to authorize alternate members, you may authorize up to three alternate members, or you may leave the appointment of alternate members to the discretion of the military judge. An enlisted accused may request that the membership of the court-martial to which that accused's case has been referred be comprised of at least one-third enlisted members. Under the changes to the UCMJ, you may select enlisted members for a court-martial that tries an enlisted accused whether or not the accused has already requested enlisted members.

4. You are free to select anyone whom you feel is "best qualified" to serve on court-martial panels. However, throughout the selection process you must follow the guidance as to the

¹ A separate convening order will govern courts-martial to be held in the Norfolk, Virginia area.

qualifications of panel members as detailed in references (a) and (b). Specifically, individuals selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Military grade by itself is not a permissible criteria for selection of court-martial panel members. However, all selected members must be senior to the accused. It is not appropriate to select members to achieve a particular result on findings or sentence.

5. To assist you in selecting panel members, I am providing a list of officers and enlisted stationed in the Alameda, California area in Enclosure (2). Enclosure (3) encompasses a list of officer and enlisted members who have been nominated as potential panel members by CDR [REDACTED] the then-Acting Executive Officer of [REDACTED]. He was advised to nominate individuals based on the same "best qualified" criteria provided herein.

6. For nominated members as indicated in Enclosure (3), a completed court-martial questionnaire can be found on [CGPortal](https://cglink.uscg.mil/alamedaquestionnaires) at <https://cglink.uscg.mil/alamedaquestionnaires>.² These documents are provided only to assist you in exercising your independent discretion as Convening Authority. You are free to select anyone whom you feel is "best qualified" to serve on the court-martial panels. All personnel should be given equal consideration in light of the above factors and those factors only. You may select members from your own command if you feel they meet these qualifications.

7. Additionally, you may select members that are not included in the provided enclosures if you believe they meet the criteria set forth in references (a) and (b). If you desire more information to determine an individual's qualifications, please notify me so that I may assist you.

8. I recommend that you take the following actions:

a. Personally select any forty (40) officers (twenty-five primary and fifteen alternates) and twenty-five (25) enlisted personnel (fifteen primary and ten alternates) within 50 miles of Base Alameda. You may nominate more.

b. Delegate your authority to excuse individual members from a court-martial without cause shown, pursuant to reference (b), R.C.M. 505(c)(1)(B), to me as your Staff Judge Advocate. This authority shall be limited so no more than one-third of the total members detailed may be excused by me in any one court-martial.

c. Indicate your decision to authorize or not authorize alternate members, and if authorized, how many alternate members the military judge shall impanel.

9. I have drafted an endorsement to assist you in documenting your selections at Enclosure (1).

#

Enclosure: (1) First Endorsement on CG LSC memo 5817: Selection of Members for Standing GCM Panel in Alameda, CA
(2) List of Alameda AOR Officers and Enlisted
(3) Nominated Roster of Officers and Enlisted within 50 miles

² Permission to this folder is strictly restricted to those who need access. Please contact [REDACTED] on my staff for permission issues.

FIRST ENDORSEMENT on CG LSC memo 5817 of 22 Sep 2021

From: [REDACTED], RDML
Director of Operational Logistics (CG DOL)

To: [REDACTED] CAPT
Legal Service Command (CG-LSC)

Subj: SELECTION OF MEMBERS FOR STANDING GCM PANEL IN ALAMEDA, CA

1. As the Director of Operational Logistics, I have personally selected the members listed below to serve as a standing panel of general courts-martial members on CG DOL General Court Martial Convening Order No. 01-21.

2. In selecting those panel members, I used the criteria articulated in references (a) and (b) of the memorandum. I acknowledge your advice concerning these criteria provided verbally by you and via your memo. I selected panel members who were, in my opinion, best qualified for the duty based on their age, education, training, experience, length of service, and judicial temperament, and used no other criteria.

3. Pursuant to reference (b), R.C.M. 505(c)(1)(B), the recommended delegation of authority to excuse members without cause to Staff Judge Advocate, Legal Service Command is:

Approved

Denied

4. Pursuant to reference (b), R.C.M. 503(a)(1)(C), with regard to alternate members,

I do not authorize the use of alternate members;

the military judge shall impanel one (1) alternate member;

the military judge shall impanel two (2) alternate members;

the military judge shall impanel three (3) alternate members; or

the military judge may impanel alternate members at his or her discretion only if, after the exercise of all challenges, excess members remain.

5. I select the following twenty-five (25) officers to serve as members:

1. _____
2. _____
3. _____
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22. _____

23. _____

24. _____

25. _____

6. If an enlisted accused requests enlisted representation pursuant to Article 25(c)(2)(B), UCMJ, an appropriate number of the following fifteen (15) enlisted persons in the priority order listed below will replace the requisite number of lowest priority ordered officers in paragraph 5 such that the panel is composed of one-third enlisted members. The officers replaced shall become alternate members.

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____

10. _____

11. _____

12. _____

13. _____

14. _____

15. _____

7. I select the following fifteen (15) officers to serve as alternate members in the order listed below:

1. _____

- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____
- 11. _____
- 12. _____
- 13. _____
- 14. _____
- 15. _____

8. I select the following ten (10) enlisted persons to serve as alternate members in the order listed below:

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____

8. _____

9. _____

10. _____

#

Nominated Roster of Officers and Enlisted within 50 miles

Excerpt of list for audience.

NOMINATED MEMBERS (OFFICERS)								
Last Name	First Name	Rank	Date of Rank	Unit	Rotation Date	Education Level	Questionnaire	Comments
		CAPT		D11 PREVENTION DIV (DP)	01-JUL-22	I-Master's Level Degree	Y	Frocked
		CDR		D11 INSP & INVEST BR (DPI)	01-JUL-24	G-Bachelor's Level Degree	Y	
		CDR		OL-SFLC LRE ENG-ALAMEDA	01-JUL-22	G-Bachelor's Level Degree	Y	
		EBR		BASE ALAM FAC ENG DEPT (F)	01-JUL-22		N/A	XO
		CDR		ASSET LINE MANAGEMENT BRANCH	01-JUL-22		N/A	PCS
		CDR		PACAREA (PAC-13)	01-JUL-23	G-Bachelor's Level Degree	Y	
		CDR		TRACEN PET HEALTH SVCS BR	01-JUL-22	G-Bachelor's Level Degree	Y	
		CDR		PACAREA (PAC-3MF)	01-JUL-23	D-Some College	Y	
		LCDR		DD-MIFC PAC	01-JUL-23	G-Bachelor's Level Degree	Y	Old Form
		LCDR		PACAREA (PAC-3MF)	01-JUL-24	G-Bachelor's Level Degree	Y	Old Form
		LCDR		DOL-43	01-JUL-23	D-Some College	Y	
		LCDR		SEC SAN FRAN ENFORCEMENT DIV	01-JUL-22	G-Bachelor's Level Degree	Y	
		LCDR		PACAREA (PAC-543)	01-JUL-24	G-Bachelor's Level Degree	Y	
		LCDR		OL-SFLC IBCT PDM-ALAMEDA	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LCDR		D11 INCIDENT MGMT BR (DRM)	01-JUL-23	A-Not Indicated	Y	
		LCDR		PACAREA (PAC-092)	01-JUL-22	G-Bachelor's Level Degree	Y	AKA Scott
		LCDR		SEC SAN FRAN INSPECTIONS DIV	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LCDR		PSU 312 LOGISTICS DEPT	01-JUL-22	A-Not Indicated	Y	
		LCDR		MIFC PAC COLLECTION MGMT BR	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LCDR		D11 EXT AFFAIRS STAFF (DE)	01-JUN-24	C-HS Graduate or Equivalent	Y	Maternity Leave until 1 Aug 21
		LT		CIVIL RIGHTS DET REGION 3	01-JUL-23		N/A	DCMS Directive N/A
		LT		PACAREA (PAC-3MF)	01-JUL-23	C-HS Graduate or Equivalent	Y	Old Form
		LT		D11 WATERWAYS MGMT BR (DPW)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		BASE ALAM HEALTH SVC DIV (HH)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-3SF)	01-JUL-22	D-Some College	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		SEC SAN FRAN CP/RDNS STF	01-JUL-23	A-Not Indicated	Y	
		LT		SEC SAN FRAN CP/RDNS STF	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LT		COMMANDANT (CG-LMA-A-OL WEST)	01-JUL-22	G-Bachelor's Level Degree	Y	
		LT		OL-CSISC DSF & AVIATN PLAT-OAK	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-094)	01-JUL-22	K-Doctorate (Professional)	Y	
		LT		TRACEN PET COMPROLLER DIV	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-57)	01-JUL-23	G-Bachelor's Level Degree	Y	
		LT		PACAREA (PAC-3MF)	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LT		ASSET LINE MGMT SECTION	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-55)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		AIRSTA SAN FRANCISCO	01-JUL-23	I-Master's Level Degree	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-22	G-Bachelor's Level Degree	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-22	F-2-Year College Degree	Y	
		LT		MSST SF OPS SPRT DEPT	01-JUN-22	C-HS Graduate or Equivalent	Y	
		LT		MIFC PAC TRANSNATL CRIME SEC	01-JUL-24	C-HS Graduate or Equivalent	Y	
		LT		OL-SFLC IBCT APM2-ALAMEDA	01-JUL-24	C-HS Graduate or Equivalent	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-23	G-Bachelor's Level Degree	Y	
		LT		PACAREA (PAC-3MF)	01-JUL-22	I-Master's Level Degree	Y	
		LTJG		D11 COMMAND CENTER (DRMC)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LTJG		AIRSTA SAN FRANCISCO	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LTJG		OL-SFLC SBPL AMS3-ALAMEDA	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LTJG		OL-SFLC LRE SES1-ALAMEDA	01-JUL-22		N/A	PCS to FL on 14 May 21
		LTJG		OL-SFLC-ALAMEDA CA	01-JUL-22	C-HS Graduate or Equivalent	Y	

Note: this is an excerpt of a list shown for example purposes.

EMPLID	LAST NAME	FIRST NAME	EMPL CLASS	PGVD	RATE	SAL ADMIN PLAN	SEX	AGE	TIME IN SERVICE	HIGHEST_EDUC_LVL	EDUCATION LEVEL	POSITION_NBR	CG_EXP_AD_TERM_DT	CG_EXP_LOSS_DT	CG_AD_BASE_DT	PAY BASE DT	RANK DT	ROTATE DT	MBS DEPTID	MBS S ATU	MBS OFFAC	MBS DEPT NAME	CITY	STATE	POSTAL
AD	06	CAPT	OFF	M	9			26	0	G-Bachelo 's Level Deg ee		30-JUN-24	30-JUN-24	18-MAY-94	18-MAY-94	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	CDR	OFF	M	1			19	0	G-Bachelo 's Level Deg ee		30-MAR-31	30-MAR-31	23-MAY-01	23-MAY-01	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	W2	AV3	WAR	M	1			19	0	C-HS G aduate o Equ valent		31-OCT-27	31-OCT-27	25-AUG-97	25-AUG-97	01-JUN-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	CDR	OFF	M	0			17	0	G-Bachelo 's Level Deg ee		30-MAY-33	30-MAY-33	21-MAY-03	21-MAY-03	01-JUL-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	21			21	0	C-HS G aduate o Equ valent		30-JUN-44	30-JUN-44	27-SEP-90	27-SEP-90	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	36			18	0	D-Some College		30-JUN-40	30-JUN-40	21-OCT-02	21-OCT-02	01-AUG-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	3			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-OCT-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	CDR	OFF	M	7			2	0	G-Bachelo 's Level Deg ee		30-JUN-42	30-JUN-42	01-JUN-96	01-JUN-96	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03E	LT	OFF	M	38			1	1	I-Maste 's Level Deg ee		30-JUN-42	30-JUN-42	25-JUL-06	25-JUL-06	11-MAY-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	32			9	0	C-HS G aduate o Equ valent		17-MAY-41	17-MAY-41	18-MAY-11	18-MAY-11	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	2			20	0	G-Bachelo 's Level Deg ee		30-JUN-39	30-JUN-39	31-DEC-00	28-SEP-96	01-JUL-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	29			7	0	C-HS G aduate o Equ valent		30-JUN-44	30-JUN-44	17-JUN-13	17-JUN-13	21-MAY-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	36			16	0	G-Bachelo 's Level Deg ee		30-JUN-40	30-JUN-40	16-NOV-04	16-NOV-04	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	F	6			21	0	G-Bachelo 's Level Deg ee		30-JUN-40	30-JUN-40	29-SEP-99	19-AUG-92	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	F	28			6	0	C-HS G aduate o Equ valent		20-MAY-44	20-MAY-44	21-MAY-14	21-MAY-14	21-MAY-14	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	27			3	0	A-Not Ind cated		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	A-Not Ind cated		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	31			6	0	G-Bachelo 's Level Deg ee		30-JUN-47	30-JUN-47	09-DEC-14	09-DEC-14	22-NOV-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	30			5	1	I-Maste 's Level Deg ee		30-JUN-46	30-JUN-46	21-APR-15	21-APR-15	24-NOV-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	3			0	0	G-Bachelo 's Level Deg ee		30-JUN-47	30-JUN-47	26-JUL-16	26-JUL-16	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	06	CAPT	OFF	M	3			21	0	I-Maste 's Level Deg ee		30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-JUL-19	01-JUL-23	000503	37	51290	CEU OAKLAND-PRODUCT LINE	OAKLAND	CA	94652	
AD	W4	INV4	WAR	M	52			28	0	C-HS G aduate o Equ valent		30-JUN-22	30-JUN-22	14-SEP-87	14-SEP-87	01-JAN-17	01-JUL-23	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501	
AD	W3	INV3	WAR	M	8			21	0	D-Some College		30-SEP-29	30-SEP-29	20-JUL-99	20-JUL-99	01-JUN-18	01-JUL-24	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501	
AD	W2	INV2	WAR	M	38			18	0	C-HS G aduate o Equ valent		30-SEP-32	30-SEP-32	16-JUL-02	16-JUL-02	01-JUN-20	01-JUL-24	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501	
AD	W2	INV2	WAR	M	38			15	0	C-HS G aduate o Equ valent		30-SEP-32	30-SEP-32	16-JUL-02	16-JUL-02	01-JUN-20	01-JUL-24	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501	
AD	06	CAPT	OFF	M	0			23	0	G-Bachelo 's Level Deg ee		30-JUN-27	30-JUN-27	23-OCT-37	23-OCT-37	21-MAY-97	01-JUL-19	01-JUL-22	002368	74	61200	TRACEN PET CMO STAFF	PETALUMA	CA	94952
AD	05	CDR	OFF	M	3			21	0	G-Bachelo 's Level Deg ee		30-JUN-30	30-JUN-30	14-JAN-00	14-JAN-00	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMO STAFF	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	2			2	0	K-Docto ate (P rffes onal)		30-JUN-41	30-JUN-41	12-JUL-10	12-JUL-10	01-JUL-17	01-JUL-22	002368	74	61200	TRACEN PET CMO STAFF	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	6			23	0	G-Bachelo 's Level Deg ee		31-AUG-27	31-AUG-27	19-JUN-97	19-JUN-97	26-AUG-96	01-MAY-20	01-JUL-22	002370	74	61200	TRACEN PET CUST SPT SERVICES	PETALUMA	CA	94952
AD	W2	PER2	WAR	M	33			15	0	C-HS G aduate o Equ valent		30-SEP-35	30-SEP-35	12-JUL-05	12-JUL-05	01-JUN-18	01-JUL-24	002370	74	61200	TRACEN PET CUST SPT SERVICES	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	38			19	0	C-HS G aduate o Equ valent		30-SEP-31	30-SEP-31	10-JUL-01	10-JUL-01	01-MAY-19	01-JUL-23	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	38			15	0	C-HS G aduate o Equ valent		30-MAY-36	30-MAY-36	11-JUL-05	11-JUL-05	01-JUL-17	01-JUL-22	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952	
AD	05	CDR	OFF	M	1			18	0	G-Bachelo 's Level Deg ee		30-MAY-32	30-MAY-32	22-MAY-02	22-MAY-02	01-JUL-18	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	W4	MATA	WAR	M	51			26	0	C-HS G aduate o Equ valent		31-AUG-22	31-AUG-22	05-JUN-92	16-SEP-91	01-JUN-13	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	F	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	27			12	0	C-HS G aduate o Equ valent		17-MAY-46	17-MAY-46	18-MAY-16	18-MAY-16	01-JUN-19	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUN-24	003491	74	61200	TC PET PERFS SYS DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	1			1	0	A-Not Ind cated		30-JUN-37	30-JUN-37	04-OCT-06	04-OCT-06	01-SEP-17	01-JUL-22	003491	74	61200	TC PET PERFS SYS DIV	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	39			15	0	C-HS G aduate o Equ valent		30-JUN-40	30-JUN-40	26-SEP-05	26-SEP-05	10-JAN-20	01-JUL-22	003493	74	61200	TC PET OPS TRNG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	2			23	0	D-Some College		30-JUN-40	30-JUN-40	24-JUN-97	24-JUN-97	01-AUG-20	01-JUL-23	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	W4	ELC4	WAR	M	9			29	0	C-HS G aduate o Equ valent		31-MAR-22	31-MAR-22	06-JAN-92	06-JAN-92	01-JUN-18	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	35			11	0	I-Maste 's Level Deg ee		30-JUN-46	30-JUN-46	13-JUN-06	07-DEC-19	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952		
AD	W3	ISM3	WAR	M	52			27	0	C-HS G aduate o Equ valent		31-JUL-23	31-JUL-23	31-MAY-93	31-MAY-93	01-JUN-18	01-JUL-22	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952	
AD	03	LT	OFF	F	31			9	0	G-Bachelo 's Level Deg ee		17-MAY-45	17-MAY-45	18-MAY-11	18-MAY-11	01-MAY-15	01-JUL-23	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952	
AD	06	CAPT	OFF	F	31			9	0	G-Bachelo 's Level Deg ee		30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-OCT-20	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DL)	ALAMEDA	CA	94501	
AD	05	CDR	OFF	M	9			19	0	K-Docto ate (P rffes onal)		30-JUN-40	30-JUN-40	09-OCT-01	01-SEP-18	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DL)	ALAMEDA	CA	94501		
EAD	03E	LT	OFF	M	33			10	0	C-HS G aduate o Equ valent		17-JUN-13	17-JUN-13	09-APR-10	19-JUN-07	16-APR-16	01-JUL-2								



5810
6 Apr 2022

MEMORANDUM

From: [REDACTED]
Convening Authority, Staff Judge Advocate

To: File

Subj: GRANT OF EXCUSAL FOR MEMBERS FOR 04 APR – 15 APR 2022 FOR
UNITED STATES V. [REDACTED]

Ref: (a) Article 25, Uniform Code of Military Justice
(b) Rule for Courts-Martial 505, Manual for Courts-Martial (2019 Ed.)
(c) DOL GCM Convening Order 01-19 Amendment No. 1
(d) DOL GCM Convening Order 01-19 Amendment No. 4
(e) DOL GCM Convening Order 01-19 Amendment No. 5

1. Pursuant to references (a) and (b), the following person is excused as a detailed member in the case of United States v. [REDACTED] during the time period 04 Apr 2022 to 15 Apr 2022:

[REDACTED]

2. The excusal is for a medical reason which was related by telephone by the aforementioned member to [REDACTED] of the LSC on 6 Apr 2022.

3. This excusal is pursuant to the Convening Authority's delegation to me to excuse individual members from the court-martial as recognized in references (b) through (e).

4. Should the subject trial be continued to a later time, the aforementioned excused member will be available to serve as a panel member as prescribed in references (b) through (e).

#

SPECIAL COURT-MARTIAL

) COMMANDING OFFICER
)
)
) CG SMTC
) CAMP JEJUNE, NORTH CAROLINA
)
)
)
)
)
)
)

CONVENING ORDER
NO. 1-20

Date: 15 September 2020

COMMANDING OFFICER
SPECIAL MISSIONS TRAINING CENTER

1. A special court-martial is hereby convened. It may try such persons as may properly be brought before it, and shall meet at Norfolk, Virginia unless otherwise directed. Designation of this convening authority is Secretarial and pursuant to Article 23, UCMJ.

2. The court-martial will be detailed with the following members:

Commander [REDACTED]
Commander [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant Junior Grade [REDACTED]
Chief Warrant Officer [REDACTED]

3. In all cases in which the accused submits a request pursuant to Article 25(c)(2), UCMJ, that enlisted members serve on the court-martial panel, the court-martial will be detailed with the following members:

Commander [REDACTED]
Commander [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
YNCM [REDACTED]
AETCM [REDACTED]
GMC [REDACTED]
SKC [REDACTED]
HSC [REDACTED]

4. Should any officer in paragraph two (2) or in the officer portion of paragraph three (3) be properly excused prior to assembly, that member will be replaced with an officer listed below, in the order listed below. [Please note that the first three (3) names listed below apply only if the accused submits a request for enlisted members to serve on the panel pursuant to Article 25(c)(2), UCMJ].

Lieutenant [REDACTED]
Lieutenant [REDACTED] ned
Chief Warrant Officer [REDACTED]
Commander [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Chief Warrant Officer [REDACTED]
Chief Warrant Officer [REDACTED]
Chief Warrant Officer [REDACTED]

5. Should any enlisted members in paragraph three (3) be properly excused prior to assembly, that member will be replaced with an enlisted member below, in the order listed:

MKC [REDACTED] tin
DCC [REDACTED]
SKCS [REDACTED]
SKC [REDACTED]

6. After identification of primary members, if excess members remain, the military judge may impanel alternate members at his or her discretion.

[REDACTED]
Captain, U. S. Coast Guard
Commanding Officer
Coast Guard Special Missions Training Center

GENERAL COURT-MARTIAL) United Stated Coast Guard
) Director of Operational Logistics
)
) Norfolk, Virginia
CONVENING ORDER)
NO. 01-19)
AMENDMENT NO. 5) Date: 29 March 2022
_____)

UNITED STATES COAST GUARD, DIRECTOR OF OPERATIONAL LOGISTICS

1. I excuse the following member related to DOL General Court-Martial Convening Order No. 01-19, Amendment No. 04, dated 8 March 2022, in the case of United States v. [REDACTED] a
USCG:

CDR [REDACTED]

2. In the event the number of members is reduced below the number required under R.C.M. 501(a) in the aforementioned case, the following officers shall be detailed to this court-martial in the following order:

LCDR [REDACTED]

LCDR [REDACTED]

LT [REDACTED]

BOSN3 [REDACTED]

WEPS2 [REDACTED]

3. In the event the number of enlisted members is reduced below one-third of the total membership in the aforementioned case, the following enlisted members shall be detailed to this court-martial in the following order:

MEC [REDACTED]

GMC [REDACTED]

YNC [REDACTED]

EM1 [REDACTED]

ET1 [REDACTED]

4. I hereby delegate to my Staff Judge Advocate the authority to excuse individual members from this court-martial. This delegated authority shall be limited so that no more than one-third of the total members detailed to a court-martial may be excused.

5. After the identification of primary members, the military judge may impanel alternate members at his or her discretion.



Captain, U.S. Coast Guard
Acting Director of Operational Logistics

Tab 6
Survivors United

**Survivors United
Presenter Biographies**

Ms. Adrian Perry, Victim Advocate

Adrian Perry is a professional educator, victim advocate, and spouse of a retired Marine. After completing her Bachelor of Science Degree in Criminal Justice from Radford University, she married her husband Breck Perry and they moved to Quantico, Virginia in 2002.

In 2003, the Perry's received orders to Oahu, Hawaii. While in Hawaii, Adrian served as the Director of a Preschool in Honolulu. In 2005, their first child was born and Adrian became a dedicated mother of three girls over the last thirteen years and eight duty-stations across the United States and Japan. Throughout that time, Adrian has served as a long-term substitute teacher, volunteer reading instructor, and volunteer children's ministry teacher. She is the co-founder of Survivors United, Inc., a Non-Profit for sexual assault survivors in the military. Survivors United connects survivors of sexual assault with critical resources and support, while elevating the voice of the Survivor.

Adrian testified before the Senate Armed Services Committee on Sexual Assault in the Military in order to shine light on current legislative inadequacies for sexual assault survivors, while recommending the necessary changes to ensure justice is served for sexual assault survivors and their families. In 2020, Adrian became a Nationally Credentialed Victim Advocate, and has worked multiple cases in support of justice for sexual assault and domestic violence survivors. Adrian is currently living in Virginia with her family where she worked as a Victim Witness Assistant Director for a local county. During her time working for the Victim and Witness Program, she was able to support multiple survivors throughout the criminal process. She has been able to observe many Victim Impact Statements be delivered at sentencing. Last year, she completed her Master's Degree in Criminal Justice with an Emphasis in Legal Studies. Adrian is a Doctoral Student pursuing a Doctoral Degree in Community Counseling and Traumatology.

Dr. Breck Perry, Victim Advocate

Dr. Breck Perry currently serves as the Director of Operations for Covan Group, LLC, an Adjunct Professor of Qualitative Research at the Liberty University School of Education, and is a retired Marine Corps infantry officer. While in the Marines, Breck served in various command and staff positions across the globe in support of combat, humanitarian, and crisis response operations. As a young Captain, Breck discovered his passion for teaching and writing, and served for six years as a non-resident Expeditionary Warfare School and Command and Staff College adjunct faculty instructor, earning the Thomas S. Jones Instructor of the Year Award in 2015, 2016, and 2020. Upon retirement from active duty in the spring of 2022, Breck completed his Ph.D. in Educational Leadership and currently focuses on improving public and private sector education. Breck is a certified Sexual Assault Victim Advocate and serves as a member of the Survivor's United Board of Advisors.

Mr. Ryan Guilds, Special Victim Counsel

Ryan Guilds' is Counsel at Arnold & Porter LLP, a nationally recognized Law Firm, with offices throughout the United States. His commercial practice focuses on complex products liability litigation, white collar criminal defense, and internal corporate compliance. Mr. Guilds is a recognized national victims' rights expert who represents survivors of crime in connection with the investigation and prosecution of their assailants. Under his leadership, Arnold & Porter has represented sexual assault survivors in both civilian and military proceedings pro bono for over a decade. He is on the board of the National Crime Victim Law Institute, the honorary board of Protect Our Defenders, and is the former board chair of the Network for Victim Recovery of DC.

**DAC-IPAD Proposed Questions for Adrian and Breck Perry (Survivors United)
and Ryan Guilds**

For Adrian and Breck Perry:

1. From a crime victim's perspective, what would you like the Committee to know regarding how limitations on victim impact statements effect how victims deliver them?
2. Based on your experience, what are the benefits to a victim when they provide an impact statement at sentencing?

For Ryan Guilds:

1. In an FY 2020 Joint Explanatory Statement, Congress asked the DAC-IPAD to review the issue of whether military judges are interpreting Rule for Courts-Martial 1001 too narrowly and restricting what crime victims can say in their impact statement. What changes have you seen since 2020?
 - 2a. In your experience working with victims, what have you learned or observed regarding military judges allowing victims to speak freely without limiting the impact statement?
 - 2b. Have you seen a difference between judge alone sentencing and member sentencing cases?
3. Have you seen military judges limit victims speaking directly to the accused during their impact statements?
4. What have you observed regarding parents or others providing an impact statement when they are not the named victim in the convicted offenses?
5. What is the most frequent victim complaint regarding victim impact statements?
6. You are familiar with the JSC's proposed changes to RCM 1001 in the draft executive order. Do you believe the proposed changes to RCM 1001 will alleviate some of the objections with victim impact statements, such as the ability to recommend a specific sentence?
7. Do you have any recommendations for additional changes to RCM 1001?

Topic #9: Victim Impact Statements

R.C.M. 1001(c)(3) currently reads: “Contents of statement. The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence.”

Draft change to R.C.M. 1001(c)(3): “Contents of statement. The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. [the sentence stating “The statement may not include a recommendation of a specific sentence.” has been removed.]

DAC-IPAD Comments and Questions:

The deleted sentence was added to R.C.M. 1001(c)(2)(D)(i), explicitly stating that in capital cases, the victim impact statement may not include a recommendation of a specific sentence. One of the proposed changes to R.C.M. 1001 in the draft E.O. would remove the prohibition against a victim recommending a specific sentence for the accused in non-capital cases during a victim impact statement.

Questions:

9a. Is the intent of this proposed change to allow a victim to recommend a specific sentence in their victim impact statement, or is the intent to provide military judges the discretion whether to allow such recommendations?

9b. If the intent is to allow a victim to make a specific sentence recommendation, did the JSC consider making this explicit within the text of R.C.M. 1001(c)(3), similar to how an accused is explicitly permitted to request a specific sentence under R.C.M. 1001(d)(2)(A)?

Comment: Without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation either “victim impact” or “matters in mitigation,” per the language of the rule.

Current and draft R.C.M. 1001:

- VIS-related standards for aggravation (1001(b)(4))--"evidence of financial, social, psychological, and medical impact on or cost to....),
- Crime victim definition (R.C.M. 1001(c)(2)(A))—“direct physical, emotional, or pecuniary harm,” and
- Victim impact definition (R.C.M. 1001(c)(2)(B))—“any financial, social, psychological, or medical impact...directly relating to or arising from....”

DAC-IPAD Comments and Questions:

Both provide different definitions or descriptions of victim impact. This seems overly complicated and potentially confusing.

9c. Is there a reason that three different definitions or descriptions of victim impact are necessary within R.C.M. 1001?

9d. Is it necessary or is there a simpler way?

Topic #9: Victim Impact Statements (continued)

R.C.M. 1001(c)(2)(D)(ii) currently reads: “In noncapital cases, for purposes of this subsection, the “right to be reasonably heard” means the right to make a sworn statement, an unsworn statement, or both.”

Draft change to R.C.M. 1001(c)(2)(D)(ii): Adds the following sentence “This right includes the right to be heard on any objection to any unsworn statement.”

DAC-IPAD Question:

9e. Should the victim also have the right to be heard on an objection to the victim impact statement in a capital case when the victim has that right in a non-capital case?

Current and draft R.C.M. 1001(c)(5)(A)

DAC-IPAD Comments and Question:

Both provide that the defense may rebut "any statements of fact" in a victim's unsworn statement. R.C.M. 1001(d)(1) states that the defense may rebut “any material presented by...the crime victim,” though R.C.M. 1001(d)(2)(A) limits the rebuttal to “statements of fact contained in the crime victim’s sworn or unsworn statement.”

9f. Is there a reason for the disparity in the language between R.C.M. 1001(d)(1) and 1001(c)(5)(A)/1001(d)(2)(A), which are substantially similar, within the context of the rule?

R.C.M. 1001(c)(5)(A) currently reads: A victim may provide an unsworn victim impact statement.

Draft change to R.C.M. 1001(c)(5)(A)

DAC-IPAD Comments and Questions:

The draft change adds a sentence stating that the crime victim's unsworn statement "may be made by the crime victim, by counsel representing the crime victim, or both"; however, 1001(c)(5)(B) includes a limitation "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement."

9g. Did the JSC intentionally retain the “upon good cause shown” clause in subparagraph (B) for a particular reason?

Comment: It seems the draft change was intended to remove this clause and not require the victim to show good cause in order for the victim’s counsel to deliver the victim impact statement.

Recommendation: If this is the case, recommend removing this clause from subparagraph (B).

Tab 7
Special Victims' Counsel/
Victims' Legal Counsel Panel

**Special Victims' Counsel/Victims' Legal Counsel Panel
Presenter Biographies**

Colonel Carol A. Brewer, Chief, Special Victims' Counsel Program, U.S. Army

Colonel (COL) Carol A. Brewer assumed her current duties as Chief of the U.S. Army's Special Victims' Counsel Program in July 2021. She has served for 21 years in the Army in its Judge Advocate General's Corps. She was the Staff Judge Advocate (SJA) for the 19th Expeditionary Sustainment Command, Daegu, Korea from 2019 – 2021. She served as Special Victim Prosecutor in the Military District of Washington from 2016 – 2019. COL Brewer also served as a Deputy SJA, Chief, Administrative and Civil Law, Senior Trial Defense Counsel, Brigade Judge Advocate, Chief, Operations and Training, and Trial Counsel. COL Brewer has an LL.M., Military Law from The Judge Advocate General's Legal Center & School. She earned her Juris Doctorate from Rutgers School of Law and her B.A. in Politics and Education. She completed the Army's Basic Officer Leadership Course, extensive training regarding victim behavior and litigation and the Army and Air Force Special Victims' Counsel Certification Courses. She's a member of the Pennsylvania and New Jersey Bars, admitted to practice before the U.S. Supreme Court, the Army Court of Criminal Appeals, and the New Jersey Supreme Court. Her military awards include the Bronze Star, the Army's Meritorious Service Medal, the Parachutist Badge, the Air Assault Badge, and campaign medals for service in Iraq.

Captain Daniel Cimmino, Chief, Victims' Legal Counsel Program, U.S. Navy

Captain Cimmino has been the Chief, Navy Victims' Legal Counsel Program since October 2021. Prior to this position, he served in several positions within the Navy's JAG Corps including Chief of Staff, Defense Service Offices; Commanding Officer, Defense Service Office West; and Executive Assistant and Special Counsel to the General Counsel of the Department of the Navy. Captain Cimmino received his law degree from Rutgers University School of Law-Newark, and his LL.M. with a certificate in national security, from Georgetown University. He also received his MSM from Troy University and his MA from the Naval War College. He is admitted to practice law in New Jersey and before the Court of Appeals for the Armed Forces.

Colonel Tracy Park, Chief, Victims' Legal Counsel Program, U.S. Air Force

Colonel Tracy A. Park is the Chief, Victims' Counsel Division, Military Justice and Discipline Domain, Joint Base Andrews, Maryland. In this capacity, she is responsible for developing policies and procedures for the Victims' Counsel program, and providing professional oversight for 60 judge advocates, 52 paralegals, and one civilian appellate counsel at 49 locations worldwide. Victims' Counsel and Victims' Paralegals are detailed to represent victims of sexual assault and domestic violence crimes before military courts-martial and in administrative legal matters, and provide confidential legal advice to victims of interpersonal violence. Colonel Park entered the Air Force in February 2004 through the Direct Appointment Program. She has served as a Staff Judge Advocate, Deputy Staff Judge Advocate, Chief Legal Advisor, and Instructor, as well as deployed to Iraq, Kuwait, and Bosnia & Herzegovina. Prior to her current position, Colonel Park was the Section Commander for the Air Force Judge Advocate General's Corps Headquarters and Field Operating Agency, supporting more than 1,200 personnel worldwide. Colonel Park is admitted to practice law in California. She received a Bachelor of Arts in English Literature from Washington University and her Juris Doctor from George Washington University Law School.

Lieutenant Colonel Iain D. Pedden, Chief, Victims' Legal Counsel Program, U.S. Marine Corps

Lieutenant Colonel Pedden currently serves as the Chief Victims' Legal Counsel (CVLC) of the Marine Corps and Officer in Charge of the Victims' Legal Counsel Organization (VLCO). Prior to serving in the Marine Corps, LtCol Pedden clerked in the chambers of a state court trial judge. From 2001–2003 he clerked in the Criminal Appeals Division of the Illinois Attorney General's Office drafting briefs for the Illinois and federal courts, and representing the state in collateral and clemency proceedings death penalty cases.

Lieutenant Colonel Pedden has served in several military justice billets related to victims and the statements they provide during courts-martial, including service as Senior Defense Counsel, Chief Trial Counsel, and Military Justice Officer. From 2014–2017 he served on the faculty of the U.S. Army Judge Advocate General's Legal Center and School as Associate Professor of Criminal Law, teaching evidence and constitutional law. He also managed the Intermediate Trial Advocacy Course, and provided both lectures and advocacy training during the Special Victims Counsel (SVC) and Child SVC certification courses. During this tour, he was certified as an SVC, Child SVC, and Victim's Legal Counsel (VLC), and was certified and sworn as a military judge.

From 2017 to 2019, LtCol Pedden served as Branch Head of Military Justice at Headquarters Marine Corps in the Pentagon. In that capacity, he advised the Staff Judge Advocate to the Commandant on all military justice matters, assisted in policy development, and developed and implemented a uniform training curriculum and plan for Marine judge advocates following the Military Justice Act of 2016. He went on to additional advanced education in 2019, a command tour from 2020–2022, and reported for his current duties in August 2022.

Ms. Elizabeth Marotta, Chief, Special Victims' Counsel Program, U.S. Coast Guard

Elizabeth Marotta is the Chief, Office of Member Advocacy. In this capacity, she is responsible for the Coast Guard's Special Victims' Counsel Program and the Disability Attorney function. Prior to the Coast Guard, Ms. Marotta served 25 years in the Army and retired in the rank of Colonel. While in the Army, Ms. Marotta most recently served as the Chief, Defense Appellate Division and the Program Manager, Special Victims' Counsel. She also served in numerous other position including Staff Judge Advocate, Deputy of Government Appellate Division, Chief of Justice, and Trial Counsel.

DAC-IPAD Proposed Questions for SVC/VLC Panel

Victim Impact Statements

1. What training do victims' counsel receive regarding victim impact statements?
2. What advice do you and other SVC/VLC provide clients when preparing impact statements?
3. How involved are SVC/VLC in preparing impact statements?
4. Do SVC/VLC generally coordinate with trial and defense counsel prior to sentencing to determine potential objections to material in impact statements?
5. What are the most common objections you hear regarding information in impact statements?
6. In your experience, do military judges allow victims to speak freely without limiting the impact statement? Does this differ between judge alone sentencing and member sentencing cases?
7. Have you observed military judges limit victims speaking directly to the accused during their impact statements?
8. What is the most frequent victim complaint regarding victim impact statements?
9. You are familiar with the JSC's proposed changes to RCM 1001 in the draft executive order. Do you believe the proposed changes to RCM 1001 will alleviate some of the objections with victim impact statements, such as the ability to recommend a specific sentence?
10. Do you have any recommendations for additional changes to RCM 1001?

Appellate Practice

11. What training do SVC/VLC receive regarding appellate rights for victims?
12. Do you communicate and/or coordinate with appellate government or defense counsel regarding appellate positions and filings?
13. What is your experience filing matters with appellate courts? Have appellate courts been willing to consider the merits of SVC/VLC motions, and to grant the requested relief?

Restorative Justice

14. Congress asked the DAC-IPAD to review alternative justice programs, such as mediation or restorative engagement, as a means to aid victims and alleged offenders, particularly in cases in which the evidence is insufficient for prosecution or nonjudicial punishment.

Please share your thoughts on whether such programs would be beneficial in cases involving sexual assault allegations.

15. Canada and Australia offer military victims of sexual assault an opportunity to speak with senior military officials in a facilitated meeting to share their experience of trauma.

Please share your thoughts on whether military victims would benefit from the creation of a facilitated restorative engagement program unrelated to the court-martial process?

Tab 8
Office of Special Trial Counsel Panel

**Office of Special Trial Counsel Panel
Presenter Biographies**

Honorable Carrie F. Ricci, General Counsel, Department of the Army

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

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

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

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

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

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

Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army

Lieutenant General Risch is a native of Orange/West Orange, NJ, was initially commissioned a Second Lieutenant in the Field Artillery in 1984. He served as a Platoon Leader, Executive Officer, and Company Commander in the 78th Infantry Division, U.S. Army Reserve, while attending law school. He entered active duty and the Judge Advocate General's Corps in 1988.

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

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

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

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

Honorable John P. Coffey, General Counsel, Department of the Navy

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

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

After returning home to New York, Mr. Coffey continued to serve in the Navy Reserve for eighteen years. Among other things, he flew anti-submarine missions in the North Atlantic and Mediterranean, counter-narcotics missions in the Caribbean, and armed missions in support of the blockade of the former Yugoslavia. Mr. Coffey was selected to serve as commanding officer both of a reserve P-3C squadron (VP-92) and the reserve component of the Enterprise carrier battle group staff (CCDG-12), and served as a staff officer in the Office of the Secretary of Defense (Reserve Affairs). Mr. Coffey retired at the rank of captain in 2004.

Vice Admiral Darse E. "Del" Crandall, The Judge Advocate General, U.S. Navy

Vice Admiral Crandall is a native of Elgin, Illinois. He was commissioned in 1984 through the Naval Reserve Officers Training Corps Program at Northwestern University, where he received a bachelor of arts degree in Economics. As a midshipman he earned silver "Dolphins," the enlisted submarine warfare qualification, on USS Woodrow Wilson (SSBN 624 GOLD). His first tour of duty was as communications officer and anti-submarine warfare officer on USS Lockwood (FF 1064), homeported in Yokosuka, Japan, where he earned his surface warfare officer qualification. While serving as administrative assistant and aide to the Deputy Chief of Naval Operations (Naval Warfare), Crandall was selected for the law education program. In 1992, he graduated from Georgetown University Law Center, cum laude. In 1999, he received a masters of law degree in international law from The George Washington University, with highest honors.

Major General David J. Bligh, Staff Judge Advocate to the Commandant to the Marine Corps, U.S. Marine Corps

Major General Bligh was raised in Athens, Pennsylvania. He is a 1988 graduate of Indiana University of Pennsylvania and a 1997 graduate of the University of Georgia School of Law. Major General Bligh was commissioned through the Platoon Leaders Course program in 1988. He initially served as a Platoon Commander and Company Commander at 2d Assault Amphibian Battalion, Camp Lejeune, North Carolina. He later served as a Series Commander at Marine Corps Recruit Depot, Parris Island, South Carolina.

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

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

Honorable Peter J. Beshar, General Counsel, Department of the Air Force

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

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

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

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

Lieutenant General Charles L. Plummer, The Judge Advocate General, U. S. Air Force

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

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

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

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

DAC-IPAD Questions for OSTC Panel

1. The Committee understands that your respective OSTC Training and Education plans will be issued this month (no later than December 31, 2022). Through the staff, can you please provide the committee your training and education plans once published.

At this time, can you please give us a general description of the additional training requirements for judge advocates and paralegals selected to serve in the OSTC?

2. As you are aware, some committee members attended training courses for the Air Force at Maxwell AFB and at the Army Advocacy Center – thank you for those invitations and the members appreciated the professionalism of your course facilitators and were impressed with the training.

What upcoming courses do you anticipate in 2023 and will there be opportunities for Committee members to attend and based on the members' experience and expertise perhaps be active participants in the exchange with the students.

3. How will training be specialized for the 11 covered offenses (including murder and manslaughter in addition to rape and sexual assault) as opposed to generalized litigation training?

4. How will training provide the skills needed to develop the investigation of a covered offense?

5. What role do the OSTC civilian attorneys have in the training and education of special trial counsel, paralegals, and other support staff?

6. When an STC exercises exclusive authority to determine whether a reported offense is a covered, how will that determination be documented and who will be notified of that determination?

7. How will your OSTC will coordinate and communicate with your respective Special Victim's Counsel programs?

8. How will you ensure STC communications with SJAs and convening authorities or commanders remain free from unlawful or unauthorized influence?

9. Have you established test sites using OSTC processes and procedures to capture lessons learned?

9a. Please describe the test sites and how lessons learned are incorporated into policy and training materials.

9b. How are these lessons shared with the other Services?

Tab 9
Race & Ethnicity Disparities Reports

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



**REPORT ON RACIAL AND ETHNIC DATA RELATING
TO DISPARITIES IN THE INVESTIGATION,
PROSECUTION, AND CONVICTION OF
SEXUAL OFFENSES IN THE MILITARY**

December 2020

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



**REPORT ON RACIAL AND ETHNIC DATA RELATING TO
DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND
CONVICTION OF SEXUAL OFFENSES IN THE MILITARY**

December 2020



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

December 15, 2020

The Honorable James Inhofe
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Adam Smith
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Mac Thornberry
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Christopher C. Miller
Acting Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with the *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military* prepared by the Defense Advisory Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces (the Committee or DAC-IPAD) as required by section 540I of the National Defense Authorization Act for Fiscal Year 2020. This important project was undertaken at a time of heightened focus on racial discrimination in the United States, including within the military justice system.

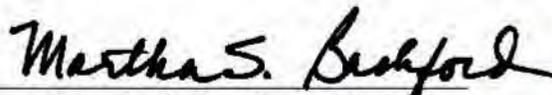
The Committee reviewed race and ethnicity data for (1) Service members *accused* of a penetrative or contact sexual offense, (2) Service members against whom such charges were *preferred*, and (3) Service members *convicted* of a penetrative or contact sexual offense for all cases completed in fiscal year 2019 (FY19). The Committee's assessment of the FY19 data was limited by the current inadequacies in data collection within the Department of Defense.

Inadequate data collection is a persistent problem. The single consistent finding from every review of racial and ethnic disparities in the military justice system over the past 50 years is the inadequacy of the Military Services' data collection on race and ethnicity. Accurate, thorough, and complete data is necessary to achieve a greater understanding of any racial disparities in the investigation, prosecution, and defense of sexual assault in the military. The Committee commends the Department of Defense and Military Services for steps taken to adopt the data collection changes required by Article 140a of the Uniform Code of Military Justice and makes eight recommendations for continued improvement.

Despite limitations in the data, the Committee's strong view is that comprehensive studies of race and ethnicity in the military justice system generally, and studies involving sexual offenses specifically, are critically important. Analysis of sexual offenses may reveal unique racial and ethnic disparities that either are not present or that present differently in other crimes. The DAC-IPAD believes that implementation of the recommendations in this report will generate positive and lasting change in the administration of justice in the military.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

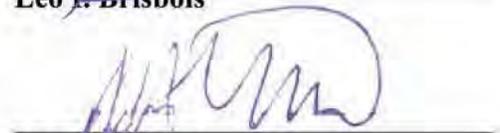
Respectfully submitted,

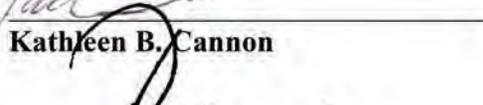

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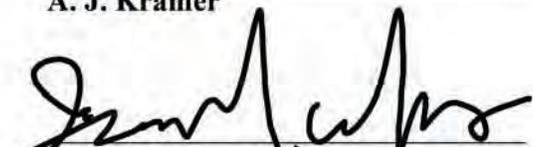

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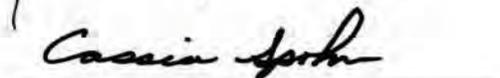

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EXECUTIVE SUMMARY

In December 2019, Congress directed the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (the Committee or DAC-IPAD) to review and assess racial disparities in the investigation and prosecution of penetrative and contact sexual offenses.¹ This important project was undertaken at a time of heightened focus on racial discrimination in the United States, including within the military justice system. As the Staff Judge Advocate to the Commandant of the Marine Corps testified to Congress, “Only as a unified force, free from discrimination, racial inequality, and prejudice, can we fully demonstrate our core values and serve as the elite warfighting organization America requires and expects us to be.”²

Based on the congressional tasking, the Committee requested, and each Military Service reported to the DAC-IPAD, the race and ethnicity of (1) Service members *accused* of a penetrative or contact sexual offense, (2) Service members against whom such charges were *preferred*, and (3) Service members *convicted* of a penetrative or contact sexual offense for all cases completed in fiscal year 2019 (FY19).³ The Committee notes the importance of studying such disparities in sexual offense cases independently from other studies involving military justice offenses because of the intimate nature of these types of crimes. Analysis of sexual offenses may reveal unique racial and ethnic disparities that either are not present or that present differently in other crimes.

This report reviews race and ethnicity data provided by the Military Services for all adult-victim cases involving penetrative and contact sexual offenses completed in fiscal year 2019. The DAC-IPAD found more questions raised by the Military Services’ FY19 data responses than answers provided by them, owing to the current inadequacies of race and ethnicity data collection in the Department of Defense (DoD). For this report, the Military Services collected information from their military criminal investigative organizations and military justice databases. The DAC-IPAD did not request source documents and thus did not independently validate the information it received. The Committee’s assessment of FY19 data for this report was further hampered by inconsistencies across the Military Services in reporting demographic data for Service members accused of sexual misconduct. For example, the Air Force reported 20 categories for race, whereas the Navy reported 6 categories for race. Because the Military Services do not report race and ethnicity in standardized categories, the Committee was unable to make comparisons across the Military Services or assess the Armed Forces as a whole. In addition, no Military Service consistently records the race and ethnicity of victims of a sexual offense. Civilian criminologists consider the victim’s demographic information a critical component of any assessment of racial disparities in a criminal justice system.

Given the existing limitations on data collection in the Department of Defense, and thus on the Committee’s ability to analyze that data, it was not necessary for the Committee to collect more than the most recent year’s data to make its findings and recommendations. Accordingly, this report does not offer the type of comprehensive assessment on racial disparities that the Committee believes is essential to identify possible areas of racial and ethnic discrimination in the

1 The DAC-IPAD is a federal advisory committee established under section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 546, 128 Stat. 3292 (2014) [FY15 NDAA]. *See also* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 535, 133 Stat. 1198 (2019) [FY20 NDAA] (extending the DAC-IPAD’s term from 5 to 10 years).

2 *Racial Disparity in the Military Justice System—How to Fix the Culture: Hearing before the House Armed Services Committee Subcommittee on Military Personnel*, 116th Cong. (2020) (statement of MajGen. Daniel J. Lecce, Staff Judge Advocate to the Commandant of the Marine Corps); *see also* Message from the Commandant of the Marine Corps and the Sergeant Major of the Marine Corps (June 3, 2020), *available at* <https://www.marines.mil/News/Press-Releases/Press-Release-Display/Article/2207572/message-from-the-commandant-of-the-marine-corps-and-the-sergeant-major-of-the-m/>.

3 FY20 NDAA, *supra* note 1, § 540I. For purposes of this report, the terms “subject” and “accused” may be used interchangeably; they refer to the member of the Armed Forces identified as a suspect in a reported case, against whom charges were preferred, or who was convicted of a penetrative or contact sexual offense.

military justice system. The Committee's strong view is that comprehensive studies of race and ethnicity in the military justice system generally, and studies involving sexual offenses specifically, are critically important but will be possible only when the Department of Defense has fully implemented the uniform standards and criteria for military justice data collection in accordance with Article 140a of the Uniform Code of Military Justice (UCMJ) and has adopted the recommendations in this report.

Previous Findings on Racial Disparities in the Military Justice System

Despite the current challenges with data collection in the Military Services, several recent studies have documented racial disparities in the administration of military justice. A 2017 study by the nonprofit group Protect Our Defenders concluded that Black Service members were substantially more likely than white Service members to face military justice or disciplinary action for an offense under the UCMJ.⁴ A May 2019 study by the U.S. Government Accountability Office (GAO) of all offenses under the UCMJ found that Black and Hispanic Service members were more likely than white Service members to be the subjects of recorded investigations in all of the Military Services and were more likely to be tried in general and special courts-martial in the Army, Navy, Marine Corps, and Air Force.⁵ An October 2020 report issued by the DAC-IPAD reviewed 1,904 cases documenting investigations of adult penetrative sexual offenses completed in fiscal year 2017. The FY17 data suggest that Black Service members are disproportionately affected by allegations of sexual offenses at the investigative stage.⁶ All three studies described how the limitations of the Military Services' data on race and ethnicity make it difficult to undertake meaningful comprehensive assessments.

Recommendations for Comprehensive and Consistent Data Collection

The single consistent finding from every review of racial and ethnic disparities in the military justice system over the past 50 years is the inadequacy of the Military Services' data collection on race and ethnicity. In its May 2019 report to Congress, the GAO determined that the Military Services "do not collect and maintain consistent information about race and ethnicity in their investigations, military justice, and personnel databases," adding: "This limits the military services' ability to collectively or comparatively assess these demographic data to identify any racial or ethnic disparities in the military justice system within and across the services."⁷

Prefiguring the GAO findings, in a September 2018 letter the DAC-IPAD advised the Secretary of Defense on the need to develop uniform standards and criteria for data collection, across the Military Services, at every stage of the military justice system. The Committee explained then, and reiterates now, that the lack of comprehensive and meaningful information about the military justice response to sexual assault in the Armed Forces is a matter of great concern. Racial and ethnic disparities in these cases cannot be adequately understood until DoD adopts a uniform process for the collection and analysis of demographic data on victims and subjects.

Accurate, thorough, and complete data are necessary to achieve a greater understanding of racial disparities in the investigation, prosecution, and defense of sexual assault in the military. Although progress is under way as the Military

4 PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE i (2017).

5 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 38 (May 2019) [2019 GAO REPORT], *available at* <https://www.gao.gov/assets/700/699380.pdf>.

6 SEE DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 [DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS] 76 n.148 and Appendix F (Oct. 2020).

7 2019 GAO REPORT, *supra* note 5, at 22.

Services adopt the data collection changes required by Article 140a, UCMJ, more must be done. In this report, the DAC-IPAD makes eight recommendations for continued improvement, including these key reforms:

- The military personnel system should be the primary data system in DoD for the collection of demographic data such as race and ethnicity. The military criminal investigative system and the military justice system should obtain the demographic information that they report on military personnel from the military personnel system.
- The Military Services should record and report race and ethnicity using the same categories in military criminal investigative organization databases, military justice databases, and military personnel databases.
- DoD should record and track the race and ethnicity, among other demographics, of the victim and the accused throughout the entire military justice process, beginning when an investigation is initiated by military law enforcement and ending with the final disposition of the case.
- DoD should record and track the race and ethnicity of the individuals involved 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 court judges. This demographic data can be used by organizations including the DAC-IPAD and the newly established Military Justice Review Panel for future research on racial disparities in the military justice system.
- The newly established Military Justice Review Panel should 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.

Once the Department of Defense implements new data collection processes as recommended in this report and as required pursuant to Article 140a, UCMJ, the DAC-IPAD will incorporate studies on racial and ethnic disparities into future reports on sexual misconduct in the Armed Forces. Specifically, DAC-IPAD research into the military justice response to sexual assault will include bivariate and multivariate analyses of race/ethnicity at the various stages of the military justice process, including analysis of the accused and victim dyad, or pair.

Conclusion

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the Armed Forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.⁸ This purpose can be achieved only if the system is fair and just and is recognized as such both by Service members and by the American public.⁹ Any racial or ethnic disparities in the administration of military justice undermine faith in the system. While data alone cannot solve the problem, the collection of comprehensive and consistent data is a necessary first step in understanding the causes of these disparities and finding solutions to the problem.

The DAC-IPAD believes that much more research and analysis is needed to address the causes of racial disparities and identify solutions to improve the fairness of the military justice system. The Committee recognizes that this report's

8 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) Preamble I-1; *see also Parker v. Levy*, 417 U.S. 733, 763–64 (1974) (Blackmun, J., concurring) (“[C]ommanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.”).

9 MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 16 (Dec. 22, 2015), *available at* http://ogc.osd.mil/images/report_part1.pdf.

assessment of FY19 data was limited by the current inadequacies in data collection within the Department of Defense. However, the Committee also acknowledges that even these limited statistics, understood in the context of other studies' findings on racial disparities, call for immediate action. The DAC-IPAD believes that implementation of the recommendations in this report will generate positive and lasting change in the administration of justice in the military.

FINDINGS AND RECOMMENDATIONS

*Findings**

Finding 135: For the past 50 years, studies of racial and ethnic disparities in the military justice system have consistently recommended that the DoD establish uniformity in the collection of statistical information, by race, ethnic group, and sex, in order to improve studies and monitoring efforts.

Finding 136: Despite these consistent recommendations, the current data collection processes in the Military Services' investigation and military justice organizations with respect to the race and ethnicity of subjects and victims of criminal offenses are inadequate, incomplete, and inconsistent.

Finding 137: Decades of studies have identified varying degrees of racial disparities in the administration of military justice, despite the incomplete and inconsistent race and ethnicity data collection in the military justice system.

Finding 138: Although DoD has several policy initiatives under way to improve data collection on race and ethnicity beginning in fiscal year 2020, significant gaps remain, including the lack of a DoD-wide requirement to collect information on the race and ethnicity of the victim at any time before the initiation of a court-martial.

Finding 139: In the context of sexual offense cases, it is important to track the race and ethnicity of the victim, in addition to the accused, for every investigation initiated by military law enforcement in which a Service member is identified as a subject through its final disposition within the military justice system.

*Recommendations***

Recommendation 33: The Secretary of Defense designate the military personnel system as the primary data system in the DoD for the collection of demographic information such as race and ethnicity. All other DoD 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.

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: *American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, More Than One Race/Other*, and *White*, and to report ethnicity using the following two categories: *Hispanic or Latino* and *Not Hispanic or Latino*.

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.

* Findings 1–134 were included in previous DAC-IPAD reports, *available at* <https://www.dacipad.whs.mil>.

** Recommendations 1–32 were included in previous DAC-IPAD reports, *available at* <https://www.dacipad.whs.mil>; they are also reproduced in Appendix E.

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.

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.

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.

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.

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.

I. INTRODUCTION

A. Overview of the Race and Ethnicity Report

The mission of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (the Committee or DAC-IPAD) is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, sexual assault, and other sexual misconduct involving members of the Armed Forces against adult victims.¹⁰ In December 2019, Congress directed the DAC-IPAD to review and assess, by fiscal year, the race and ethnicity of (1) Service members *accused* of a penetrative or contact sexual offense, (2) Service members against whom such charges were *preferred*, and (3) Service members *convicted* of a penetrative or contact sexual offense.¹¹

This report provides the DAC-IPAD's review of race and ethnicity data for unrestricted reports, preferred charges, and convictions of penetrative and contact sexual offenses completed in fiscal year 2019—the most recent year for which this information was available. This report also summarizes the bivariate and multivariate analyses of race and ethnicity data from the DAC-IPAD's *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017* released in October 2020.

Based on these reviews, the Committee makes five findings and eight recommendations to improve the Department of Defense's understanding of potential racial and ethnic inequities in the military justice system.

The Committee's strong view is that comprehensive studies of race and ethnicity in the military justice system generally, and sexual offenses specifically, are essential but should be undertaken only after the Department of Defense (DoD) fully implements new processes for complete, reliable, and accurate data collection. The DAC-IPAD's ability to review and assess race and ethnicity data for FY19 was hampered by inconsistencies across the Military Services in collecting and maintaining this information. As a direct result, neither this report using the FY19 data nor the DAC-IPAD's earlier review of FY17 investigative case files involving military adult penetrative sexual offense cases can be taken as a definitive study on racial disparities in the military justice system. However, both projects demonstrate the need for uniformity and accuracy in race and ethnicity data collection within DoD. Once the Department of Defense implements new data collection processes as recommended in this report and as required pursuant to Article 140a, Uniform Code of Military Justice (UCMJ), the DAC-IPAD will incorporate studies on racial and ethnic disparities into its future reports on sexual misconduct in the Armed Forces.

B. Historical and Contemporary Studies on Racial Disparities in the Military Justice System

Section II of this report summarizes previous studies of racial disparities in the military justice system. Section II also describes changes under way in DoD to standardize the collection of information pursuant to Article 140a, UCMJ, and other congressional and DoD directives. In its review of these directives, the Committee identifies critical shortfalls in the collection of data on victims as well as gaps in how the investigative and military justice databases manage demographic data on race and ethnicity generally.

The problem of racial disparities in the military justice system has been studied for decades by DoD, the U.S. Government Accountability Office (GAO), and other civilian organizations. Multiple reports over the years have found

¹⁰ FY15 NDAA, *supra* note 1, § 546.

¹¹ FY20 NDAA, *supra* note 1, § 540I.

varying degrees of racial disparities in the administration of military justice. A 2017 study by the nonprofit group Protect Our Defenders concluded that Black Service members were substantially more likely than white Service members to face military justice or disciplinary action.¹² In a 2019 study, the GAO determined that while race was not a statistically significant factor in the likelihood of conviction in general and special courts-martial, racial disparities existed in the military criminal investigation and charging processes.¹³ A 2020 report by the DAC-IPAD reviewed 1,904 cases documenting investigations of adult penetrative sexual offenses from fiscal year 2017. The data published there may suggest that Blacks are disproportionately affected by allegations of sexual offenses at the investigative stage.¹⁴

The single consistent finding in 50 years of studies is that data collection and reporting on race and ethnicity in the military are inadequate. As recently as May 2019, the GAO found that the Military Services “do not collect and maintain consistent information about race and ethnicity in their investigations, military justice, and personnel databases,” adding: “This limits the military services’ ability to collectively or comparatively assess these demographic data to identify any racial or ethnic disparities in the military justice system within and across the services.”¹⁵

The long-standing problem of inadequate data on race and ethnicity is being addressed within DoD. Beginning in 2020, the Military Services will be required, pursuant to a memorandum from the DoD General Counsel, to maintain a record of the race, ethnicity, and gender¹⁶ of the victim and the accused for each court-martial conducted by a Military Service.¹⁷ In addition, each Military Service must adhere to the uniform standards and criteria prescribed by the Secretary of Defense pursuant to Article 140a, UCMJ, to track and report 155 data points in their case management systems, including the race and ethnicity of subjects.

However, the Committee observes a critical shortcoming of these DoD directives: they do not require the Military Services to collect information on the race and ethnicity of the victim at the reporting, investigative, preferral, or referral stage of the military justice process prior to a court-martial. These preliminary stages of the military justice process represent the overwhelming majority of sexual offense allegations. Indeed, the DAC-IPAD’s 2020 in-depth study of penetrative sexual offense cases completed in fiscal year 2017 found that only 27.2% of completed investigations resulted in a preferred charge of a penetrative sexual offense.¹⁸ It would be a major policy failure not to collect race and ethnicity data of victims at these initial stages of the military justice process. Studies from the civilian sector suggest that criminal justice responses to sexual offenses differ depending on the victim/accused racial/ethnic dyad, or pair, so data on the race and ethnicity of the victim are essential components of any analysis and must be recorded at the time a report is made to law enforcement and tracked throughout the process.

In addition, the Committee highlights the need for the Military Services to expressly limit the possible classifications to the five categories for race and two categories for ethnicity set forth as minimum categories for collection in the 1997 Office of Management and Budget Statistical Policy Directive No. 15, *Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (OMB Directive 15).¹⁹ The Committee also recommends that the Military Services include a

12 PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE, *supra* note 4.

13 2019 GAO REPORT, *supra* note 5, at 38–39.

14 See DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 6, at 76 n.148.

15 2019 GAO REPORT, *supra* note 5, at 22.

16 Generally, the term “sex” refers to biological characteristics, whereas “gender” refers to social construction and expression. In this report, “gender” is usually employed as an overarching term, following the practice of the DoD General Counsel memorandum.

17 General Counsel of the Department of Defense, *Memorandum for the Secretaries of the Military Departments: Recording Court-Martial Demographic Information* (June 8, 2020) [GC DoD 2020 memorandum].

18 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 6, at 38.

19 See Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct.

sixth category for race, *More Than One Race/Other*. It is important to expressly define the categories that must be reported by the Military Services, because OMB Directive 15 provides only the minimum classifications for race and ethnicity that must be collected and encourages federal agencies to collect more detailed classifications as they choose. Allowing a range of options for collecting these data enables widely differing interpretations and methods for collecting and reporting race and ethnicity across the Military Services. Expressly defined and standardized categories for race and ethnicity are essential to establish consistent data throughout the Department of Defense. Finally, although the Services must follow OMB Directive 15 for the reporting of race and ethnicity data in their military justice databases, these same categories are not mandated in the Services' criminal investigation databases. Unless the military criminal investigation, the military justice, and the military personnel databases report race and ethnicity in the same categories, the challenges of studying racial disparities will remain.

C. Methodology and Data Observations

Section III of this report explains the Committee's methodology for obtaining race and ethnicity data from the Military Services for all unrestricted reports, preferred charges, and convictions of penetrative and contact sexual offenses that were completed in FY19.²⁰ Section III also presents the Committee's analysis of the FY19 race and ethnicity data.

For this report, the DAC-IPAD relied on the Services to provide race and ethnicity data for the cases completed in FY19, but did not independently verify the Services' responses. Thus, the DAC-IPAD does not assert that the data in this report represent all cases completed in FY19 throughout the Armed Forces in which a penetrative or contact sexual offense was reported, a sexual offense charge was preferred, or a sexual offense conviction was obtained at court-martial. Each Service collected the requested information from its own criminal investigative organization databases and military justice databases. Accordingly, each Service's race and ethnicity data for FY19 sexual offenses are presented independently. Given the disparities in the way the Services collected and reported these data, cross-Service comparisons would not be productive, nor was it possible to consolidate the data to present a single result for the Armed Forces in FY19.

To provide context for the FY19 data on race and ethnicity, Section III of the report provides baseline demographic data for the Armed Forces and the Military Services. The most current demographic data was published by DoD for FY18. Accordingly, because of the potential differences between the FY18 and FY19 data, the comparison is offered only for illustrative purposes.

30, 1997) [OMB Directive 15]. In 2016, OMB proposed revising the standards. *See Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67,398 (Sept. 30, 2016). As of December 2020, OMB had not issued the revised standards.

20 The National Defense Authorization Act for Fiscal Year 2014 mandated that every commander who receives a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer must immediately forward the report to the appropriate MCIO. *See National Defense Authorization Act for Fiscal Year 2014*, Pub. L. 113-66, § 1742, 127 Stat. 672 (2013).

II. STUDIES ON RACIAL DISPARITIES IN THE MILITARY JUSTICE SYSTEM

A. Early Studies

In 1972, in response to increasing concern about racial discrimination in the military justice system,²¹ then Secretary of Defense Melvin Laird established the Task Force on the Administration of Military Justice in the Armed Forces. The Task Force was charged with

- (1) Determining the nature and extent of racial discrimination in the administration of military justice;
- (2) Assessing the impact of factors contributing to disparate punishment;
- (3) Judging the impact of racially related practices on the administration of military justice and respect for law; and
- (4) Recommending ways to strengthen the military justice system and enhance the opportunity for equal justice for every American Service man and woman.²²

The Task Force released a four-volume report which concluded that the military justice system discriminates against its members on the basis of race and ethnicity—including through policies and practices that appear neutral but disproportionately affect minority groups.²³ The Task Force found a “clearly discernible disparity in disciplinary rates between black and white servicemen” but, significantly, noted that its analysis was “hampered by the inadequacy or unavailability of statistical information regarding race and ethnicity as it is kept by the services.”²⁴ Accordingly, among its many recommendations was a proposal that DoD update its racial and ethnic codes and “establish a uniform system for the collection of statistical information, by race, ethnic group and sex, in order to establish a common data base for studies and monitoring efforts.”²⁵

In spite of the Task Force’s findings, a “steady stream” of research over the next two decades presented conflicting information about the existence of racial disparities in the administration of military justice.²⁶ A report from GAO noted that studies from the 1970s and 1980s “showed no disparities in discipline rates between blacks and whites and found no evidence that minority groups received courts-martial or nonjudicial punishments out of proportion to certain types of violations.”²⁷ The Defense Equal Opportunity Management Institute (DEOMI) reinforced this observation, writing that

21 See DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES vol. 1, 2 (Nov. 30, 1972) (referencing DoD’s own studies on racial disparities in punishment rates in the military, the National Association for the Advancement of Colored People’s 1971 report titled *The Search for Military Justice: Report of an NAACP Inquiry into the Problem of the Negro Serviceman in West Germany*, and a March 1970 meeting between the Congressional Black Caucus and the President). The Task Force was chaired by C. E. Hutchin, Jr., First Army Commander, and Nathaniel R. Jones, General Counsel of the NAACP.

22 *Id.* at 3.

23 *Id.* at 17.

24 *Id.* at 24–25.

25 *Id.* at 117. Other recommendations included (1) adding a specific punitive article to the UCMJ proscribing discriminatory acts and practices “in order to provide a more visible focus on detection and elimination of discrimination”; (2) codifying offenses tried under the first two clauses of Article 134 as specific punitive articles, in order to reduce vagueness and the potential for abuse; and (3) abolishing summary courts-martial, given their inadequate procedural protections of the rights of the accused. *Id.* at 112–27.

26 See DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE (DEOMI), PHASE I REPORT: AN INVESTIGATION INTO THE DISPARITY OF JUDICIAL AND NON-JUDICIAL PUNISHMENT RATES FOR BLACK MALES IN THE ARMED SERVICES 2 (Apr. 21, 1992) [DEOMI REPORT].

27 UNITED STATES GENERAL ACCOUNTING OFFICE (GAO), EQUAL OPPORTUNITY: DoD STUDIES ON DISCRIMINATION IN THE MILITARY 5 (Apr. 1995)

“[a]t least two military studies [from this time] . . . opined that there is no evidence that the UCMJ system itself is unfair, and most Service researchers tend to agree.”²⁸ Nevertheless, many researchers continued to emphasize the inadequacy of existing data on race and ethnicity in the military, which inhibited their ability to perform a Service-wide review.²⁹

Despite the studies from the 1970s and 1980s showing no disparities, DEOMI’s study published in 1992 found that Black males in the military were 2.2 times more likely to receive courts-martial convictions than white males and were 1.7 times more likely to receive nonjudicial punishment than white males.³⁰ DEOMI recommended that “if [the Office of the Assistant Secretary of Defense] decides that it is important to find the causes of the disparity in punishment rates between blacks and whites in the military, then research should continue.”³¹ Outlining a research procedure for future phases of the study, DEOMI added that “this is a doable project.”³² Three years later, however, GAO reported that DoD could not provide any information on the status of this recommendation.³³

B. Recent Studies

In 2017, the nonprofit group Protect Our Defenders released a report that concluded, based on data from 2006 to 2015, that “for every year reported and across all service branches, black service members were substantially more likely than white service members to face military justice or disciplinary action.”³⁴ Depending on the Military Service and type of action taken, Protect Our Defenders found that in an average year, the disparities ranged from 1.29 times more likely to 2.61 times more likely.³⁵ In order to conduct its analysis, Protect Our Defenders submitted requests under the Freedom of Information Act to each Service, seeking information on how many Service members within a certain demographic group had military justice or other disciplinary involvement per every 1,000 Service members of that demographic group.³⁶ Protect Our Defenders noted significant inconsistencies across the data it received, including in how the Services categorized racial groups and whether they treated “Hispanic” as a race or an ethnicity.³⁷ Accordingly, one of Protect Our Defenders’ recommendations was that each Service collect and publish consistent racial and ethnic data regarding military justice involvement and outcomes, including data for victims of crimes.³⁸

Two years later, in 2019, GAO released a report to the House Committee on Armed Services on racial and ethnic disparities in the military. For this report, GAO conducted multivariate regression analyses to test the association between characteristics such as race and ethnicity and the odds of military justice action, while holding constant other attributes such as grade and education.³⁹ Relying on available data from fiscal years 2013 through 2017, GAO found that Black and

[1995 GAO REPORT].

28 DEOMI REPORT, *supra* note 26, at 2 (referencing PETER G. NORDLIE ET AL., A RESEARCH REPORT ON A STUDY OF RACIAL FACTORS IN THE ARMY’S JUSTICE AND DISCHARGE SYSTEMS (1979), and G. E. HORNE, EQUITY IN DISCIPLINARY RATES (1988)).

29 *See, e.g.*, DEOMI REPORT, *supra* note 26, at Appendix A (referencing the third annual DoD military equal opportunity conference in June 1989, which found that no DoD-wide standardized system of reporting and retrieving information existed to determine the basis for disparities in military disciplinary rates).

30 *Id.* at 2.

31 *Id.* at 7.

32 *Id.*

33 1995 GAO REPORT, *supra* note 27, at 43.

34 PROTECT OUR DEFENDERS, RACIAL DISPARITIES IN MILITARY JUSTICE, *supra* note 4, at i.

35 *Id.*

36 *Id.* at 1.

37 *Id.* at A1.

38 *Id.* at 16.

39 2019 GAO REPORT, *supra* note 5, at 5–6.

Hispanic Service members were more likely than white Service members to be the subjects of recorded investigations in all of the Services and were more likely to be tried in general and special courts-martial in the Army, Navy, Marine Corps, and Air Force.⁴⁰ GAO identified fewer statistically significant racial disparities in case outcomes, finding that race was not a statistically significant factor in the likelihood of conviction in general and special courts-martial in the Army, Navy, Marine Corps, and Air Force.⁴¹

Echoing the 1972 Task Force report—released almost 50 years earlier—and many of the other studies conducted in the intervening decades, GAO emphasized that the Military Services “do not collect and maintain consistent information about race and ethnicity in their investigations, military justice, and personnel databases,” adding: “This limits the military services’ ability to collectively or comparatively assess these demographic data to identify any racial or ethnic disparities in the military justice system within and across the services.”⁴² As one example of the problems with the military data, GAO noted that the number of potential responses for race and ethnicity across the Military Services’ databases ranges from 5 to 32 options for race and 2 to 25 options for ethnicity.⁴³

GAO made 11 recommendations to DoD, the Services, and the Department of Homeland Security, including that they (1) present Service members’ race and ethnicity data in each of the Military Services’ respective investigations and personnel databases, using the same categories of race and ethnicity established for their military justice databases; (2) consider an amendment to the UCMJ’s annual military justice reporting requirements to require the Military Services to include demographic information for all types of courts-martial;⁴⁴ and (3) consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases.⁴⁵ GAO also recommended that the Secretary of Defense conduct an evaluation to identify the causes of any racial or gender disparities in the military justice system and, if necessary, take remedial steps to address the causes of these disparities.⁴⁶ DoD concurred with the content of all of GAO’s recommendations.⁴⁷

C. The DAC-IPAD’s Previous Assessment of Race and Ethnicity

Every year, the DAC-IPAD collects and analyzes military case adjudication statistical data for adult-victim sexual assault cases in which charges were preferred.⁴⁸ To conduct this project, the Committee requests that the Services provide documents, utilizing their military justice databases, for cases involving a preferred charge of sexual assault completed in a particular fiscal year.⁴⁹ These case documents include charge sheets, Article 32 reports, and Results of Trial forms. Because the Military Services do not record information about race or ethnicity on any of these case documents, the Committee has been unable to assess race or ethnicity as part of its annual case adjudication data project.

40 *Id.* at 38.

41 *Id.* at 39.

42 *Id.* at 22.

43 *Id.* at 28.

44 *See infra* Section II.E for discussion of FY20 NDAA requirements for the collection of data on race and ethnicity, which were based on these GAO recommendations.

45 2019 GAO REPORT, *supra* note 5, at 68–70.

46 *Id.* at 70.

47 *Id.* at 71–72.

48 *See, e.g.,* DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT (Nov. 2019) [DAC-IPAD COURT-MARTIAL ADJUDICATION DATA REPORT].

49 In providing documents, the Services have also relied on their criminal investigation databases.

In October 2020, the DAC-IPAD released its *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*.⁵⁰ In contrast to the case adjudication data project—which relies on the Military Services to provide certain case documents—this report was based on a nearly three-year project for which the DAC-IPAD’s Case Review Subcommittee members and professional staff received entire investigative case files and performed in-depth reviews of the source documents contained within the files. The Subcommittee and professional staff reviewed a total of 1,904 cases, documenting investigations of adult penetrative sexual offenses closed in fiscal year 2017. As part of the 231 data points gathered during the review of each investigative file, the Committee collected information about the race and ethnicity of the subject and victim of each investigation—where available—and recorded it on a data collection checklist using one of nine categories.⁵¹

The Committee found that information on race and ethnicity was often incomplete in the investigative case files and that the Services record this information differently, if at all. Race and ethnicity often were not included in the section on the first page of the investigative file where the subject’s and victim’s identifying information is located (commonly referred to as the “title block”). Therefore, to collect this information some reviewers relied on other documents in the investigative file—such as a prior arrest report, the interview data sheet, or the FBI fingerprint card—while other reviewers recorded this information only if it was documented in the title block.⁵² As a result, information on race and ethnicity was not recorded consistently.

According to the information that was available, the Committee found that the majority of both subjects (66.5%) and victims (72.1%) in the 1,904 investigations were recorded as white. About one-quarter of subjects (26.0%) were recorded as Black, and 15.5% of victims were recorded as Black.⁵³ These data, taken together with overall demographic data indicating that the active duty force in 2017 was 68.7% white and 17.3% Black or African American, may suggest that Black Service members are disproportionately affected by allegations of sexual offenses at the investigative stage.⁵⁴

The Committee’s criminologist, Dr. William Wells, reported the following findings in the overall analysis of all the Services:

- The race of the subject was not associated with the decision to prefer a penetrative sexual offense charge;⁵⁵
- Bivariate analysis indicated that cases involving white victims were more likely to be preferred than cases involving non-white victims: nearly 30% of cases with white victims were preferred, compared to nearly 25% of cases with non-white victims;⁵⁶
- The race of the victim affected the decision to prefer charges in the bivariate analysis, but when other variables were introduced, race was not significant in the multivariate analysis;⁵⁷ and
- The race of the victim or subject was not related to court-martial outcomes.⁵⁸

50 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 6.

51 The categories were American Indian or Alaska Native; Asian; Black or African American; Hispanic, Latino, or Spanish origin; Middle Eastern or North African; Native Hawaiian or Other Pacific Islander; White; Some other race, ethnicity, or origin; and Unknown.

52 *Id.* at 76.

53 *Id.*

54 *Id.* at 76 n.148; *see also* U.S. DEP’T OF DEF., 2017 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 23, *available at* <https://download.militaryonesource.mil/12038/MOS/Reports/2017-demographics-report.pdf>. The review encompassed every investigation conducted by the Services’ military criminal investigative organizations and closed in fiscal year 2017 that involved an allegation that a Service member on active duty committed a penetrative sexual offense against an adult victim. The review was limited to unrestricted reports; thus the demographics of restricted reports or those who did not file a report are unknown.

55 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 6, at Appendix F-22.

56 *Id.* at Appendix F-20.

57 *Id.* at Appendix F-20, F-34, F-35.

58 *Id.* at Appendix F-25, F-28, F-37.

D. Civilian Studies

Making comparisons between military and civilian data can be difficult. Most sexual offenses outside of the military are tried in state courts, rather than federal court. As a result, no comprehensive national data exist on civilian sexual offense adjudications. In addition, although the military and civilian justice systems are similar in many respects, there are significant differences between the two that complicate a comparative study. Nevertheless, the collection and analysis of military data can be informed by the body of academic literature that examines the intersection of race and the civilian criminal justice response to sexual offenses.

A 2019 article in the *American Journal of Community Psychology* presented a systematic review of all prior research on race and the criminal justice response to sexual assault. Its purpose was to examine how race had been “conceptualized, theorized, measured, and discussed.”⁵⁹ The authors identified 13 different theories that were used in prior research to inform the empirical investigations of race.⁶⁰

The framework most frequently used by earlier researchers was conflict theory. On this account, one “would expect to see ‘Black’ crime victims devalued relative to ‘White’ victims, leading to harsher penalties for those who harm ‘Whites’ and more lenient sentences for those who harm ‘Blacks.’ Not only are less powerful groups expected to be afforded less protection when they are victimized, but also to be more severely punished when suspected of perpetrating crimes.”⁶¹

The second most frequently used approach rested on the sexual stratification hypothesis. Building on conflict theory, it requires an examination of the racial composition of the victim/perpetrator dyad, rather than the race of the victim or perpetrator alone. This theory “suggests that ‘blacks who sexually assault whites’ will receive the most robust [criminal justice system] response (e.g., harsher sentences), ‘followed by whites who assault whites, blacks who assault blacks, and white (sic) who assault blacks.’”⁶²

The sexual stratification hypothesis has been tested in civilian studies examining different stages of the criminal justice response. Using quantitative data on 655 sexual assault complaints that were reported to the Los Angeles County Sheriff’s Department and the Los Angeles Police Department in 2008, a 2016 study examined the effect of the victim/suspect racial/ethnic dyad on the decision to arrest. This study’s findings suggest that police do consider the victim/suspect racial/ethnic dyad when deciding to make an arrest.⁶³

E. The Future of Race and Ethnicity Data Collection in the Military Justice System

1. Article 140a, UCMJ

As part of the Military Justice Act of 2016, Congress established a new Article 140a, UCMJ, which directed the Secretary of Defense to prescribe uniform standards and criteria across the Services for the collection and analysis of military

59 Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. COMMUNITY PSYCHOL. 256, 257 (2019).

60 *Id.* at 257–59.

61 *Id.* at 266 (references omitted).

62 *Id.* at 266–67 (quoting Anthony Walsh, *The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race*, 25 CRIMINOLOGY 153, 155 (1987)).

63 Eryn Nicole O’Neal, Laura O. Beckman, and Cassia Spohn, *The Sexual Stratification Hypothesis: Is the Decision to Arrest Influenced by the Victim/Suspect Racial/Ethnic Dyad?* 34 J. OF INTERPERSONAL VIOLENCE 1287 (2016).

justice data and records.⁶⁴ Article 140a was implemented on the recommendation of the Military Justice Review Group, a Department of Defense–established committee of military justice experts, which noted that the Service-specific case management, data access, and data collection practices make it difficult to collect and analyze military justice data within and across the Services.⁶⁵

In September 2018, the DAC-IPAD provided the Secretary of Defense with its analysis and recommendations for implementing Article 140a.⁶⁶ Among other things, the Committee recommended that the Services transition toward operating one uniform case management system across all Services, and that they collect case data from standardized source documents. The Committee emphasized that the information collected pursuant to Article 140a 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), and should include demographic data pertaining to each victim and accused—including race.⁶⁷ In response to the DAC-IPAD’s recommendation, the Department of Defense determined that it would be inadvisable to adopt a centralized, document-based military justice data collection system without first conducting a pilot program.⁶⁸ DoD noted that the sentencing data that the new Military Justice Review Panel is required to collect may provide an opportunity to assess on a smaller scale the demands of a system similar to the one proposed by the DAC-IPAD.⁶⁹

In a memorandum dated December 17, 2018, the DoD General Counsel officially promulgated the Department’s uniform standards and criteria for the collection and analysis of military justice data and records, to be implemented no later than December 23, 2020.⁷⁰ The new DoD standards direct each Service to maintain and operate a military justice case processing and management system that will track 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. Each case processing and management system must be capable of collecting 155 specific data points. Notably, while the Services are required to collect information on the race and ethnicity of the subject/accused as two of these data points, there is no similar requirement to collect information on the race and ethnicity of the victim.⁷¹

The DoD General Counsel memorandum also directs the Services to apply the definitions of race and ethnicity set forth in the 1997 Office of Management and Budget Statistical Policy Directive No. 15, *Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, which established the following five minimum categories for the classification of federal data on race: *American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander*, and *White*. It also established two categories for data on ethnicity: *Hispanic or Latino* and *Not Hispanic or*

64 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

65 MILITARY JUSTICE REVIEW GROUP, REPORT, *supra* note 9, at 1012–13.

66 Letter from DAC-IPAD to the Secretary of Defense Regarding Article 140a, Uniform Code of Military Justice (Sept. 13, 2018), *available at* https://dacipad.whs.mil/images/Public/08-Reports/03_DACIPAD_InterimReport_Article140a_20180913_Final.pdf.

67 *Id.* at 2–3.

68 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, THIRD ANNUAL REPORT Appendix K (Mar. 2019).

69 The Military Justice Review Group recommended the establishment of the Military Justice Review Panel, a blue-ribbon panel of experts to conduct a periodic evaluation of military justice practices and procedures. *See* MILITARY JUSTICE REVIEW GROUP, REPORT, *supra* note 9, at 1021; *see also* 10 U.S.C. § 946 (Art. 146, UCMJ).

70 General Counsel of the Department of Defense, *Memorandum for the Secretaries of the Military Departments: Uniform Standards and Criteria Required by Article 140a, Uniform Code of Military Justice (UCMJ)* (Dec. 17, 2018).

71 *Id.* at Appendix A.

Latino.⁷² Although the Services are directed to apply these definitions, OMB Directive 15 gives federal agencies flexibility regarding how they categorize race and ethnicity, beyond the minimum required.

Furthermore, as noted in the 2019 GAO report, although the Article 140a uniform standards apply to the Services' military justice databases, they do not apply to the criminal investigation and personnel databases, as those do not fall under the charter of the DoD General Counsel. Therefore, even though the Services must standardize the reporting of race and ethnicity data in their military justice databases using the categories prescribed in OMB Directive 15, these same categories are not mandated in the Services' criminal investigation databases.⁷³

2. Fiscal Year 2020 National Defense Authorization Act

Based on the recommendations of the 2019 GAO report, Congress included additional requirements for the collection of data on race and ethnicity in the FY20 National Defense Authorization Act (NDAA). Specifically, Congress directed each military Service to record the race and ethnicity of the victim and the accused for every court-martial it conducts and to include these data in its annual military justice report.⁷⁴ Congress further directed the Secretary of Defense to conduct an evaluation to identify the causes of any racial and ethnic disparities identified in the military justice system and to take steps to address the causes of any such disparities.⁷⁵

Accordingly, Mr. Paul Ney, General Counsel of the Department of Defense, issued a memorandum instructing each Service to record the race and ethnicity of the victim and the accused for each court-martial conducted by a military Service convened on or after June 17, 2020, applying the definitions of race and ethnicity established in OMB Directive 15.⁷⁶ Although this latest General Counsel memorandum does address the failure of the December 17, 2018, memorandum on uniform standards and criteria to require collection of information on the race and ethnicity of the victim, it also leaves a notable gap, because it does not include any requirement that the Services collect race and ethnicity data for cases that do not reach the court-martial stage of the military justice process.

F. DAC-IPAD Analysis and Findings

Since 1972, different entities—both inside and outside of the Department of Defense—have examined the issue of racial and ethnic disparities in the military. While many of these studies have found varying degrees of racial disparities in the administration of military justice, the inadequacy and inconsistency of the data maintained by the Services hamper analysts' ability to fully identify disparities and make Service-wide comparisons. Indeed, the 1972 Task Force report recommended that DoD establish a uniform system for the collection of statistical information, by race, ethnic group, and sex. Almost 50 years later, this recommendation has not been implemented.

In recent years, the Department of Defense has attempted to address the problems with data collection on race and ethnicity in the Services. Despite these initiatives, significant gaps remain. The Article 140a, UCMJ, standards and criteria promulgated by the Secretary of Defense require only that the Services collect information about the race and ethnicity of the accused, and not the victim. The June 2020 memorandum issued by the DoD General Counsel

72 OMB Directive 15, *supra* note 19.

73 2019 GAO REPORT, *supra* note 5, at 32–33. See also *supra* note 44 and accompanying text discussing the GAO recommendation to present Service members' race and ethnicity data in each of the military Services' respective investigations and personnel databases, using the same categories of race and ethnicity as in their military justice databases.

74 FY20 NDAA, *supra* note 1, § 540I.

75 *Id.*

76 GC DoD 2020 memorandum, *supra* n. 17.

requires only that the Services collect information on the race and ethnicity of the subject and victim if a court-martial is conducted. Thus, these DoD policies do not require collection of any data on the race and ethnicity of the victim for cases that do not go to court-martial. This is a critical omission in data collection, as the majority of military cases do not reach that stage. Moreover, studies on race from the civilian sector suggest that criminal justice responses to sexual offenses differ depending on the victim/accused racial/ethnic dyad—and research indicates that these differences might begin to occur early in the criminal justice process.

In addition to addressing this gap in victim data, the Department of Defense directives to the Military Services should expressly define the five categories for race and two categories for ethnicity set forth as minimum categories in OMB Directive 15 and should include an added category for race, *More Than One Race/Other*. OMB Directive 15 provides only the minimum classifications for race and ethnicity that must be collected, and encourages federal agencies to collect more detailed classifications as they choose. Allowing a range of options for reporting these data enables widely differing interpretations and methods for assessing race and ethnicity across the Military Services.

Finally, although the Services must follow OMB Directive 15 for reporting race and ethnicity data in their military justice databases, these same racial and ethnic categories are not mandated for the Services' criminal investigation databases. Using different standards across different databases increases the chances for inconsistent and inaccurate data collection.

Finding 135: For the past 50 years, studies of racial and ethnic disparities in the military justice system have consistently recommended that the DoD establish uniformity in the collection of statistical information, by race, ethnic group, and sex, in order to improve studies and monitoring efforts.

Finding 136: Despite these consistent recommendations, the current data collection processes in the Military Services' investigation and military justice organizations with respect to the race and ethnicity of subjects and victims of criminal offenses are inadequate, incomplete, and inconsistent.

Finding 137: Decades of studies have identified varying degrees of racial disparities in the administration of military justice, despite the incomplete and inconsistent race and ethnicity data collection in the military justice system.

Finding 138: Although DoD has several policy initiatives under way to improve data collection on race and ethnicity beginning in fiscal year 2020, significant gaps remain, including the lack of a DoD-wide requirement to collect information on the race and ethnicity of the victim at any time before the initiation of a court-martial.

Finding 139: In the context of sexual offense cases, it is important to track the race and ethnicity of the victim, in addition to the accused, for every investigation initiated by military law enforcement in which a Service member is identified as a subject through its final disposition within the military justice system.

III. METHODOLOGY AND DATA RESULTS

A. Congressional Tasking and Requests for Information

In the FY20 NDAA, Congress tasked the DAC-IPAD with a review and assessment of race and ethnicity in the military justice system, with a particular focus on sexual offenses. Specifically, the DAC-IPAD was directed to review and assess, by fiscal year, the race and ethnicity of

- (1) members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed;
- (2) members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed; and
- (3) members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.⁷⁷

Congress defined the terms “case,” “completed,” “penetrative sexual assault offense,” and “contact sexual assault offense” in the statute.⁷⁸ The DAC-IPAD used those definitions and included them in subsequent requests for information (RFIs)⁷⁹ as part of its review and assessment of cases completed in FY19.⁸⁰

The RFI requested that each Service provide responsive data in an Excel workbook, with a worksheet for each area identified by Congress: unrestricted reports, preferred charges, and convictions. The congressional tasking was narrowly focused on the race and ethnicity of the Service member. A review and assessment of race and ethnicity in sexual assault offenses should require examination not only of the subjects but of the victims as well. Failure to include data on the victim’s race and ethnicity may limit the usefulness of any observations. Therefore, the DAC-IPAD, consistent with its

77 FY20 NDAA, *supra* note 1, § 540I. The term “Armed Forces” is defined at 10 U.S.C. 101(4) to mean the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard. However, the Space Force was founded on December 21, 2019, and was not included in the FY19 data request.

78 The RFI adopted the statutory definitions set forth in section 540I of the FY20 NDAA (Subsection (A) was omitted from the following excerpt because it defined the DAC-IPAD):

(B) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.

(C) The term “completed,” with respect to a case, means that the case was tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.

(D) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.

(E) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

79 See Appendix F for DAC-IPAD Request for Information Set 18 (June 17, 2020) [RFI 18] and DAC-IPAD Request for Information Set 18A (Aug. 7, 2020) [RFI 18A]. For the purposes of this report, the term “RFI” will refer to both RFI 18 and RFI 18A, which expanded on RFI 18 and extended its deadline.

80 The Committee focused its review and assessment on FY19 cases because that was the most recent fiscal year completed and would reflect the current state of recording and reporting race and ethnicity in the Armed Forces.

past practices and standards, expanded the requested data to include descriptive demographic data (e.g., age, sex, pay grade) of the subject, as well as the race, ethnicity, and descriptive demographic data of victims. In addition, the Services were asked to provide various data, including date of report, date of referral, and date of verdict, to ensure that the information was responsive to the request, to eliminate duplicate or incomplete submissions, and to provide necessary context for the analysis.

The goal for this project was to assess a cohort of cases as they moved through the military justice system. Thus, it was expected that the first and largest category would comprise all unrestricted reports; a smaller number of cases would have charges preferred; and the third and smallest category would be those cases with a conviction.

B. Limitations to Analysis

Typically, in all of its projects the DAC-IPAD maintains quality control standards for data collection, analysis, and reporting. The primary basis of DAC-IPAD studies is document-based verification.⁸¹ Each year, the case adjudication project has been structured on a request to the Services, response of initial data from each Service, verification by the DAC-IPAD of responses through documents, and analysis and reporting of results. Likewise, the case review project for penetrative sexual offense cases closed in fiscal year 2017 involved in-depth reviews of entire investigative files. This report is different from other reports of the DAC-IPAD because the observations and analysis are based on data provided by the Services without an opportunity to review and verify the source documents.

This report also differs from previous DAC-IPAD reports in that it lacks bivariate and multivariate statistical analyses. Because of questions regarding the completeness, validity, and scale of the Service responses to the RFI, a comprehensive analysis of the FY19 data is impossible. Therefore, the data provided by the Services are simply reported as observed, and the DAC-IPAD makes no attempt to explain them or any apparent trends.⁸² Finally, this report aggregates contact and penetrative sexual offenses because Congress directed that these two different types of offenses be considered together. However, for future research, the DAC-IPAD recommends studying contact sexual offenses separately from penetrative sexual offenses because there may be differences in the data that lead to different conclusions.

The DAC-IPAD has experience with the current limitations of data collection in the military justice system. For example, as discussed in Section II, in its October 2020 report on investigative case file reviews for penetrative sexual assault offenses closed in fiscal year 2017, the Committee found it difficult to assess demographic data—such as race and ethnicity—because this information was often missing from the investigative files and, when present, was recorded differently across the Services.⁸³

Finally, as stated above, the RFI requested data from FY19. To provide additional context, each Service's response is reported against baseline demographic data for the Military Services and for that specific Service. However, the most current Service demographic data published by DoD and the Coast Guard are for FY18.⁸⁴ Because of the potential differences between the data for FY18 and for FY19, the comparison is only illustrative.

81 For example, the most recent case adjudication report published by the DAC-IPAD classified 25.8% of the cases reported by the Services as “non-responsive” after review by the DAC-IPAD staff, and they were not included in the analysis. DAC-IPAD COURT-MARTIAL ADJUDICATION DATA REPORT, *supra* note 48, at 5. Reasons for a case's being “non-responsive” include being a non-qualifying non-sex offense, being a child-victim sex offense, being an instance of duplicate reporting, and falling into another fiscal year.

82 Each Service provided a narrative explanation of the process employed to compile the data; those narratives may be found in Appendix G.

83 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 6, at 76.

84 Fiscal year 2018 data were obtained from 2018 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY, *available at* <https://www.militaryonesource.mil/data-research-and-statistics/military-community-demographics/2018-demographics-profile>.

C. Overview of Total Cases Received⁸⁵

The DAC-IPAD relied on the Services to report cases meeting the criteria specified in the RFI. Data tables for each Service’s response, provided in Appendix G, informed the presentation of data that follows. The Committee could not independently verify the Services’ responses, and therefore does not assert that it has the complete universe of cases throughout the Military Services in which a penetrative or contact sexual offense was reported, sexual offense charges were preferred, or a sexual offense conviction was obtained at court-martial.

In addition, given the limitations in the FY19 race and ethnicity responses provided by the Military Services, this report presents only the raw numbers for Service members investigated, charged, and convicted of a contact or penetrative sexual offense. The report does not undertake advanced statistical analyses and cannot explain why racial and ethnic disparities may appear in these statistics. Likewise, the report cannot provide a single picture of the FY19 data in the Armed Forces as a whole, because of the differences in how the Services reported the data to the DAC-IPAD. Instead, observations drawn from these FY19 statistics indicate that there may be racial and ethnic disparities at various stages of the military justice process that require more comprehensive analyses once the DoD collects consistent and comprehensive race and ethnicity data for subjects and victims.

TABLE 1. SERVICE RESPONSE TO RFI

	Sexual Offense Unrestricted Report	Sexual Offense Charge(s) Preferred	Sexual Offense Conviction at Court-Martial
Army	1,164	173	72
Navy	610	104	9
Marine Corps	487	84	16
Air Force	440	117	31
Coast Guard	127	22	1
Total	2,828	500	129

The first and largest category comprised all unrestricted reports with identified subjects completed in FY19 (2,828 subjects). From that pool of unrestricted reports, a smaller number of cases had charges preferred for a penetrative or contact sexual offense (500 subjects). The third and smallest category of cases was those with a conviction for a penetrative or contact sexual offense (129 subjects).

It is important to note that unlike some terms in the statute, Congress did not define, nor direct the DAC-IPAD to define, race and ethnicity for its review and assessment. Race and ethnicity are separate and distinct concepts. Race is generally viewed as a social definition and not as an attempt to define an individual biologically, anthropologically, or genetically. Ethnicity is viewed as a cultural or ancestral characteristic, regardless of race. Moreover, individuals self-report or self-identify their racial and ethnic categories.⁸⁶

85 In the following tables and figures, percentages may not total 100, owing to rounding errors or missing data. Also, cadets/midshipmen and warrant officers are included with “officers.”

86 OMB Directive 15, *supra* note 19.

TABLE 2. RACIAL AND ETHNIC CATEGORIES FOR ALL SERVICES USED FOR THIS REPORT

Race	Ethnicity
American Indian/ Alaskan Native	Hispanic or Latino
Asian/Native Hawaiian/ Pacific Islander	Not Hispanic or Latino
Black/African American	Unknown
Two or more/Other	
White	
Unknown	

For more than 40 years, OMB Directive 15 has provided racial and ethnic categories for agencies' statistical and administrative reporting.⁸⁷ In 1977, the racial categories were *American Indian or Alaskan Native*, *Asian or Pacific Islander*, *Black*, or *White*; the ethnic categories, *Hispanic Origin* and *Not of Hispanic Origin*. In 1997, OMB Directive 15 was revised to make the racial categories *American Indian or Alaska Native*, *Asian*, *Black or African American*, *Native Hawaiian or Other Pacific Islander*, or *White*; the ethnic categories, *Hispanic or Latino* and *Not Hispanic or Latino*. The directive requires respondents to be offered the option of selecting one or more racial designations with the instruction "Mark one or more" or "Select one or more."

OMB Directive 15 merely establishes minimum categories and allows federal agencies to adopt a different way of asking race and ethnicity questions. Accordingly, agencies within the Military Services currently use different racial and ethnic categories and the Services reported different responses to the RFI, often with inconsistencies between their military criminal investigative case tracking system and military justice case tracking system. The DAC-IPAD examined the Service responses and, following the guidance of OMB Directive 15, established one set of categories for race and ethnicity, to which it reconciled all the Service responses for this report.

For example, the Army, Navy, and Marine Corps all used the category *Mixed*; the Air Force reported multiple categories representing more than one race, as well as a category called *TWOOR* representing two or more races selected without identifying the specific categories; and the Coast Guard used the category *Some other race*. Because of these differences, for purposes of this report the DAC-IPAD created the category *Two or more/Other*, encompassing all the different responses above. In addition, the Navy and Marine Corps are using the 1977 OMB Directive 15 category *Asian or Pacific Islander*. Because it could not separate those responses into the current OMB categories *Asian* and *Native Hawaiian or Other Pacific Islander*, the DAC-IPAD aggregated the other Service responses—essentially reverting to the 1977 standard, though with the label *Asian/Native Hawaiian/Pacific Islander*—so that the Services could be compared.

87 *Id.*

FIGURE 1. RACIAL COMPOSITION (FY 2018)

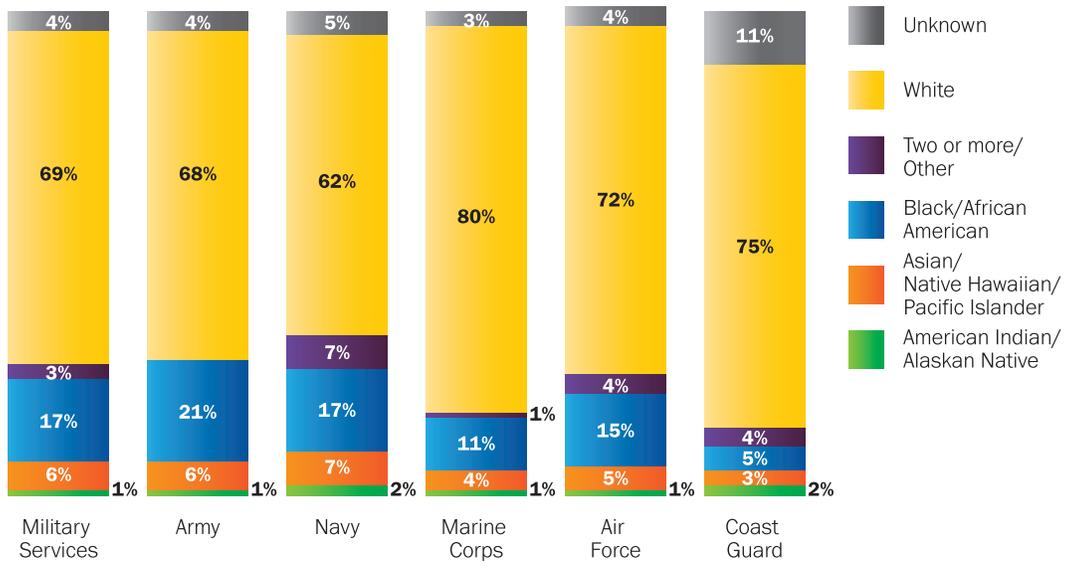
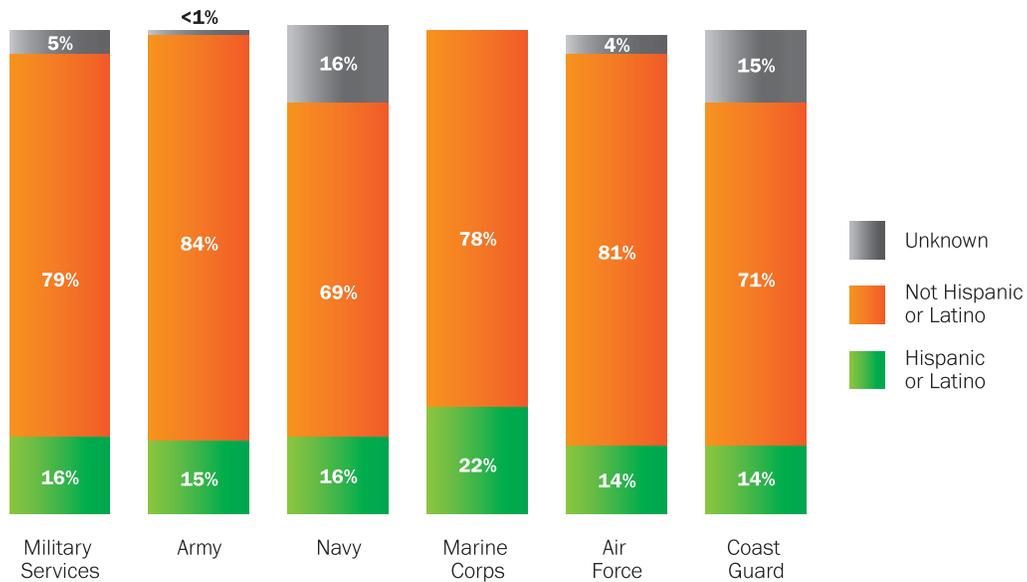


FIGURE 2. ETHNIC COMPOSITION (FY 2018)



In Figures 1 and 2, above, the racial and ethnic composition of the Military Services in FY18 is presented along with the racial and ethnic composition of each Service in FY18.

In the sections that follow, each Service’s response to the RFI is presented independently. Each section illustrates how that Service’s racial and ethnic categories were aligned with the set of categories adopted for this report. Next, the FY18 racial and ethnic composition of the Service is presented. Finally, the Service’s FY19 data response quantifying the race and ethnicity of the subject is presented graphically and with a narrative explanation.

Army

TABLE 3. ARMY: RACE CATEGORIES

Race Categories: RFI Response		Race Categories
American Indian or Alaskan Native	→	American Indian or Alaskan Native
Asian	↘	Asian/Native Hawaiian/ Pacific Islander
Asian/Pacific Islander	→	
Native Hawaiian or Other Pacific Islander	↗	
Black or African American	→	Black/African American
Mixed	↘	Two or more/Other
Other	↗	
White	→	White
Unknown	→	Unknown

The Army response to the RFI used nine possible race categories. The DAC-IPAD combined the categories as follows:

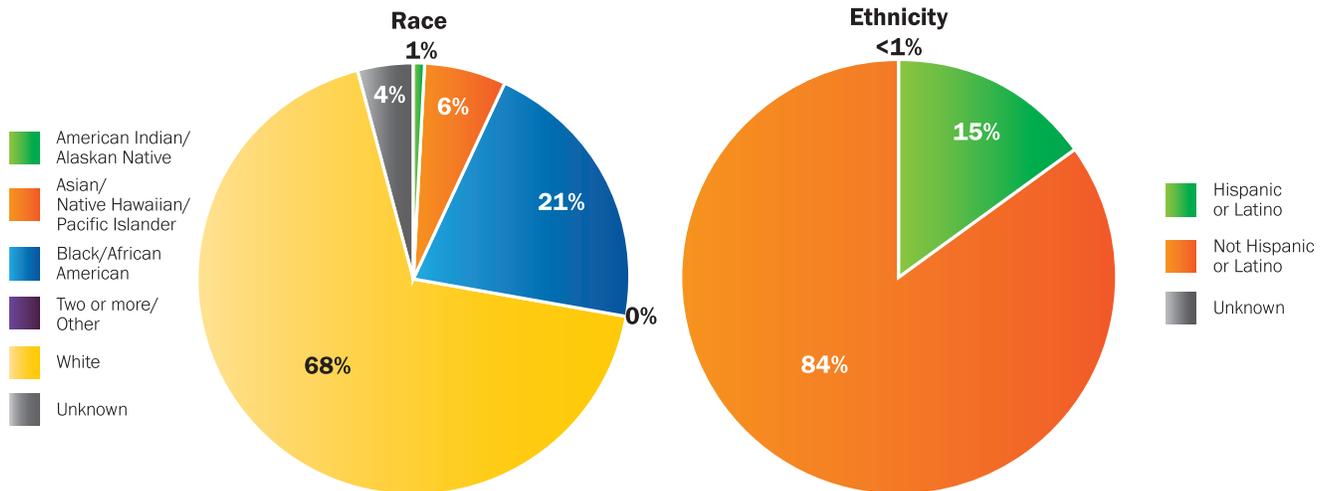
- *Asian, Asian/Pacific Islander, and Native Hawaiian or Other Pacific Islander* became *Asian/Native Hawaiian/Pacific Islander*; and
- *Mixed and Other* became *Two or more/Other*.

TABLE 4. ARMY: ETHNICITY CATEGORIES

Ethnicity Categories: RFI Response		Ethnicity Categories
Hispanic or Latino	→	Hispanic or Latino
Not Hispanic or Latino	→	Not Hispanic or Latino
Not of Hispanic Origin	→	
Unknown	→	Unknown

With respect to ethnicity, the Army response to the RFI used four possible ethnicity categories. To make them conform to the standardized language, *Not Hispanic or Latino* and *Not of Hispanic Origin* were combined to become *Not Hispanic or Latino*.

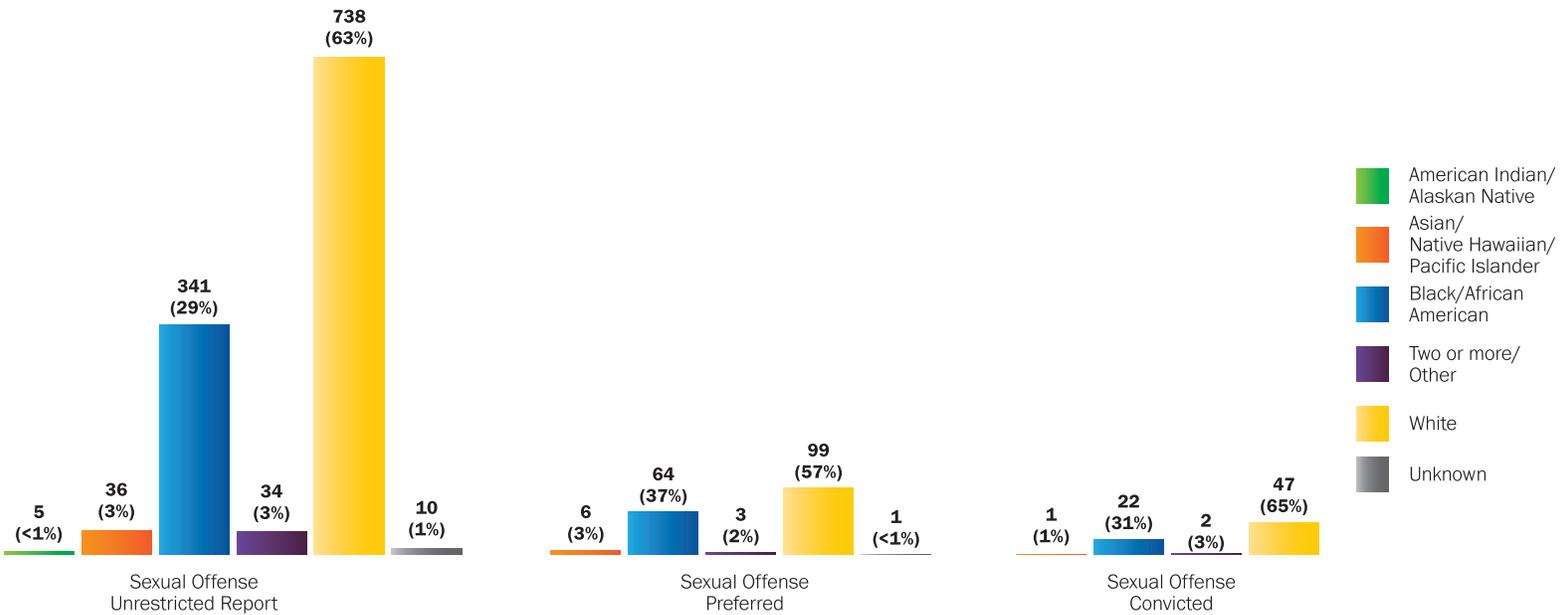
FIGURE 3. ARMY: RACIAL AND ETHNIC COMPOSITION (FY 2018)



In FY18, the Army’s racial composition reflected that of the overall Military Services with two differences. First, Black/African American members were reported as 21% of the Army total population, slightly higher than the 17% for the Military Services. Second, the Army did not report any members from the category Two or more/Other, who made up 3% of the Military Services’ total population.

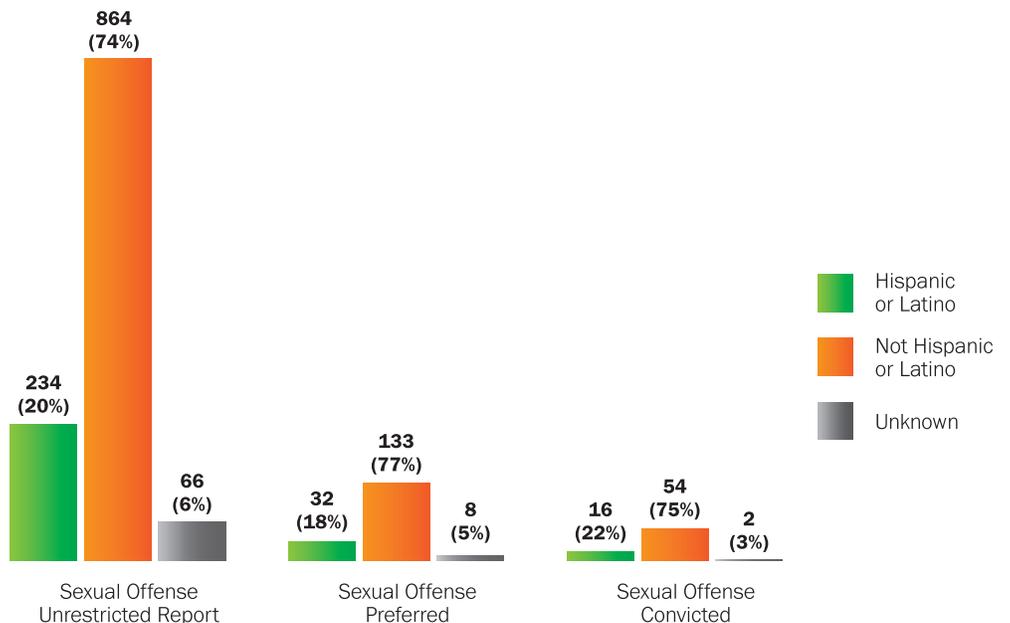
In FY18, the Army’s ethnic composition was similar to that of the overall Military Services with two differences. First, the Army reported a larger proportion of Not Hispanic or Latino members (84%) than were in the Military Services population (79%). Second, unlike the Military Services as a whole, the Army did not report any members of unknown ethnicity.

FIGURE 4. ARMY: RACE OF THE SUBJECT (RFI - FY 2019)



The first and largest category comprised all unrestricted reports completed in FY19 (1,164 subjects). From that pool of unrestricted reports, a smaller number of cases had charges preferred for a penetrative or contact sexual offense (173 subjects). The third and smallest category of cases was those with a conviction for a penetrative or contact sexual offense (72 subjects). White subjects accounted for 63% of the documented unrestricted reports of a sexual offense, 57% of the total cases in which charges were preferred, and 65% of the cases with a conviction. In comparison, Black/African American subjects accounted for 29% of the reported sexual offense cases, 37% of the preferred cases, and 31% of the conviction cases.

FIGURE 5. ARMY: ETHNICITY OF THE SUBJECT (RFI - FY 2019)



The Army reported a lower proportion of Not Hispanic or Latino (74%) for cases involving a reported sexual offense than in its overall population (84%). Finally, the Army reported that 6% of the reported cases in FY19 involved subjects of unknown ethnicity; DoD demographic data for FY18 indicated that the Army had less than 1% members of unknown ethnicity.

Navy

TABLE 5. NAVY: RACE CATEGORIES

Race Categories: RFI Response		Race Categories
American Indian or Alaskan Native	→	American Indian or Alaskan Native
Asian/Pacific Islander	→	Asian/Native Hawaiian/Pacific Islander
Black	→	Black
Mixed	→	Two or more/Other
White	→	White
Unknown	→	Unknown

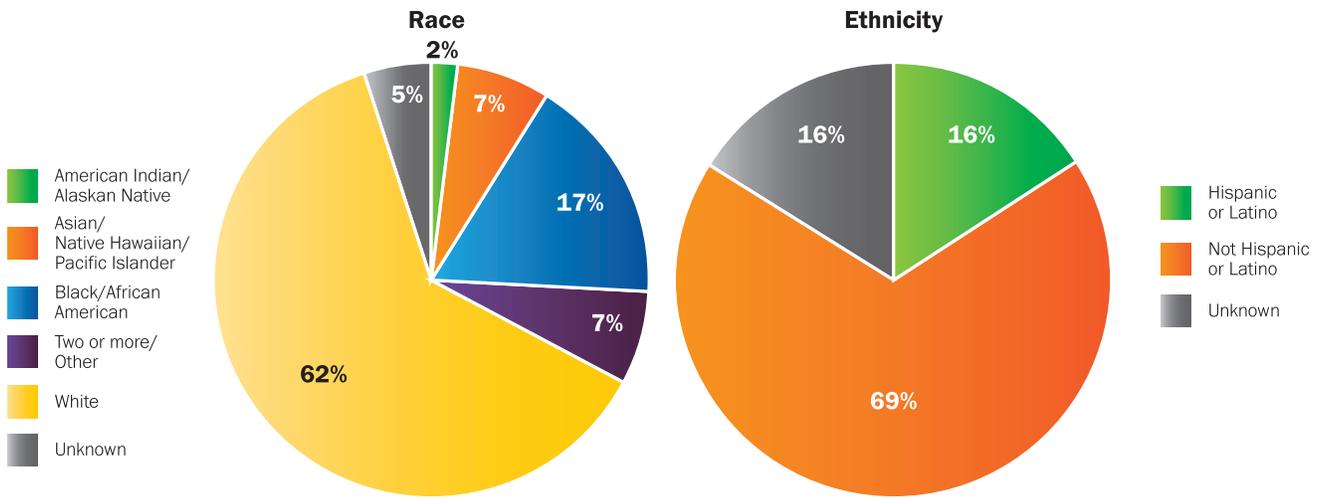
The Navy’s response to the RFI used six race categories. The DAC-IPAD, assuming that Service members of Native Hawaiian descent were included in *Asian/Pacific Islander*, renamed that category *Asian/Native Hawaiian/Pacific Islander*. In addition, *Mixed* became *Two or more/Other*.

TABLE 6. NAVY: ETHNICITY CATEGORIES

Ethnicity Categories: RFI Response		Ethnicity Categories
Hispanic	→	Hispanic or Latino
Not Hispanic	→	Not Hispanic or Latino
Unknown	→	Unknown

With respect to ethnicity, the Navy’s response to the RFI and the common classification adopted by the DAC-IPAD for its analysis used the same categories.

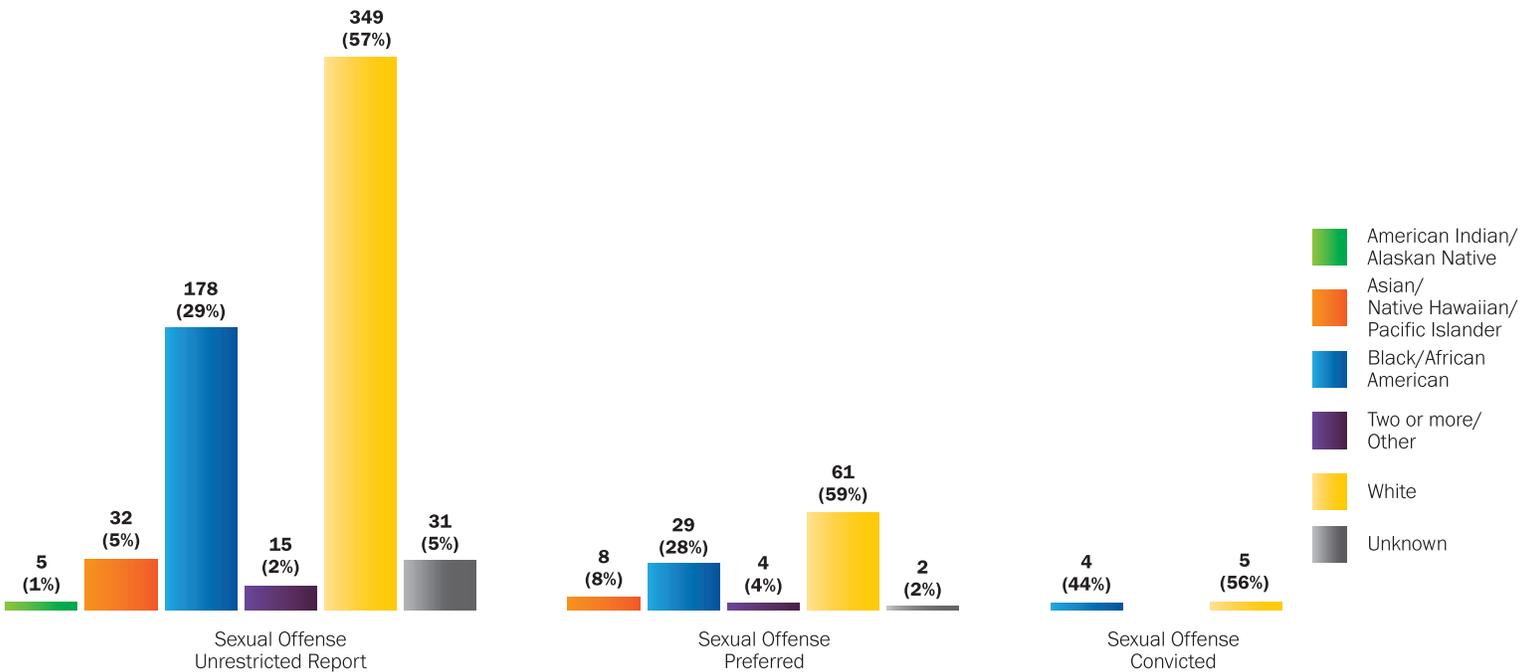
FIGURE 6. NAVY: RACIAL AND ETHNIC COMPOSITION (FY 2018)



In FY18, the Navy’s racial composition reflected that of the overall Military Services with two differences. First, white members were reported as 62% of the Navy total population, lower than the 69% for the Military Services. Second, the Navy reported Two or more/Other members at 7%—a larger proportion than the 3% in the Military Services total population.

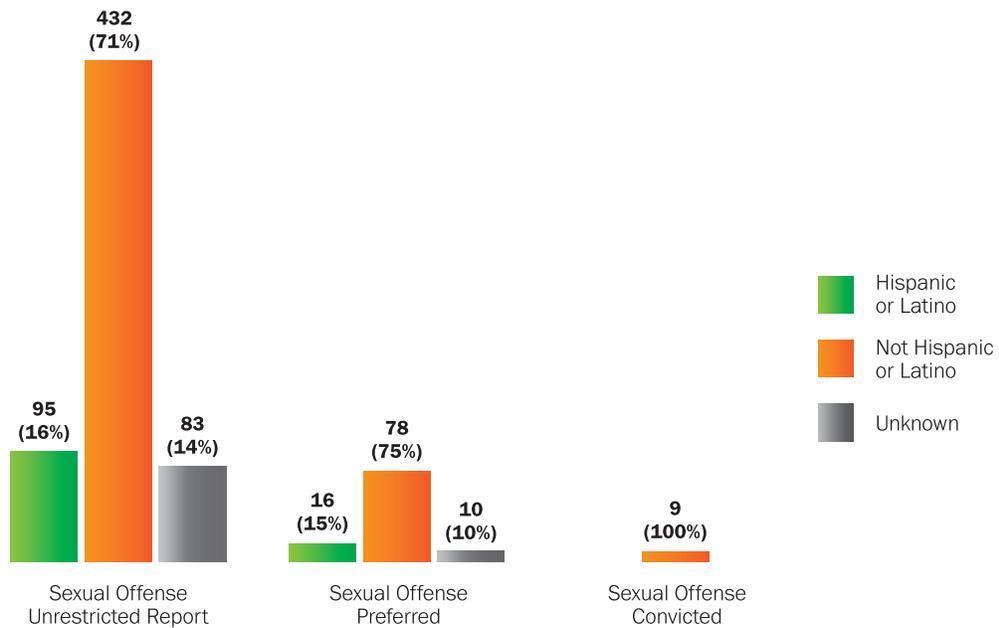
The Navy’s Hispanic population reflected that of the Military Services at 16%. The Navy reported a larger proportion of members with unknown ethnicity (16%) than did the Military Services (5%).

FIGURE 7. NAVY: RACE OF THE SUBJECT (RFI - FY 2019)



The first and largest category comprised all unrestricted reports completed in FY19 (610 subjects). From that pool of unrestricted reports, a smaller number of cases had charges preferred for a penetrative or contact sexual offense (104 subjects). The third and smallest category of cases was those with a conviction for a penetrative or contact sexual offense (9 subjects). Black/African American subjects accounted for 29% of the documented unrestricted reports of a sexual offense, 28% of the total cases in which charges were preferred, and 44% of the cases with a conviction. In comparison, white subjects accounted for 57% of the reported sexual offense cases, 59% of the preferred cases, and 56% of the conviction cases.

FIGURE 8. NAVY: ETHNICITY OF THE SUBJECT (FY – 2019)



The ethnic composition of the reported cases and the preferred cases was similar. However, no members who were Hispanic or Latino or of unknown ethnicity were convicted.

Marine Corps

TABLE 7. MARINE CORPS: RACE CATEGORIES

Race Categories: RFI Response		Race Categories
American Indian/ Alaskan Native	→	American Indian/ Alaskan Native
Asian/Pacific Islander	→	Asian/Native Hawaiian/ Pacific Islander
Black	→	Black
Mixed	→	Two or more/Other
White	→	White
Unknown	→	Unknown

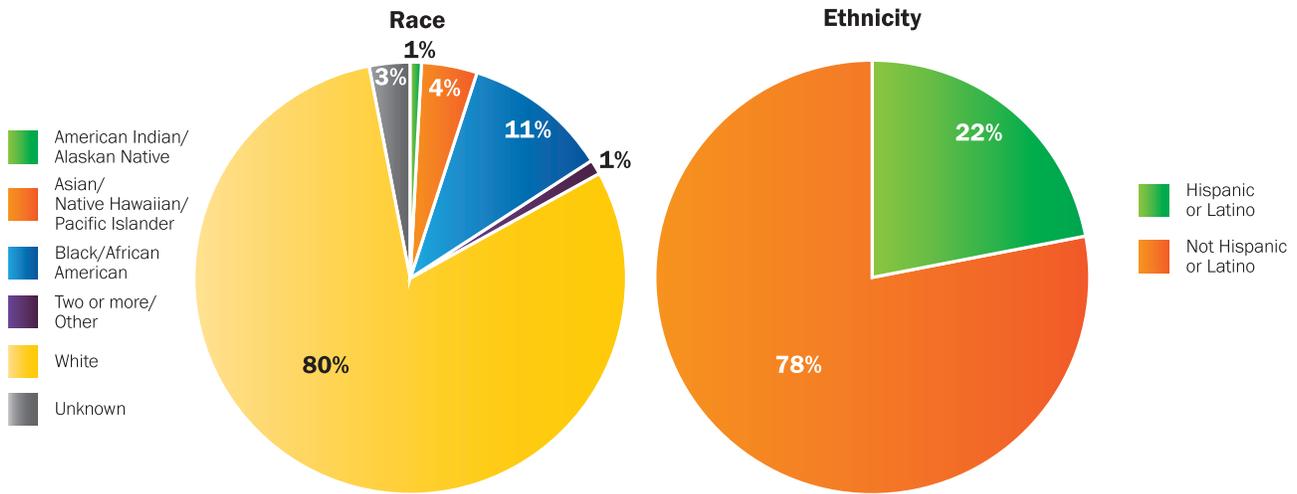
The Marine Corps, like the Navy, used six race categories. The DAC-IPAD, assuming that Service members of Native Hawaiian descent were included in *Asian/Pacific Islander*, renamed the category *Asian/Native Hawaiian/Pacific Islander*. In addition, *Mixed* became *Two or more/Other*.

TABLE 8. MARINE CORPS: ETHNICITY CATEGORIES

Ethnicity Categories: RFI Response		Ethnicity Categories
Hispanic	→	Hispanic or Latino
Not Hispanic	→	Not Hispanic or Latino
Unknown	→	Unknown

As was the case with race, the Marine Corps used the same ethnicity categories as the Navy. The ethnicity classification used in the RFI response matched the common classification adopted by the DAC-IPAD for its analysis.

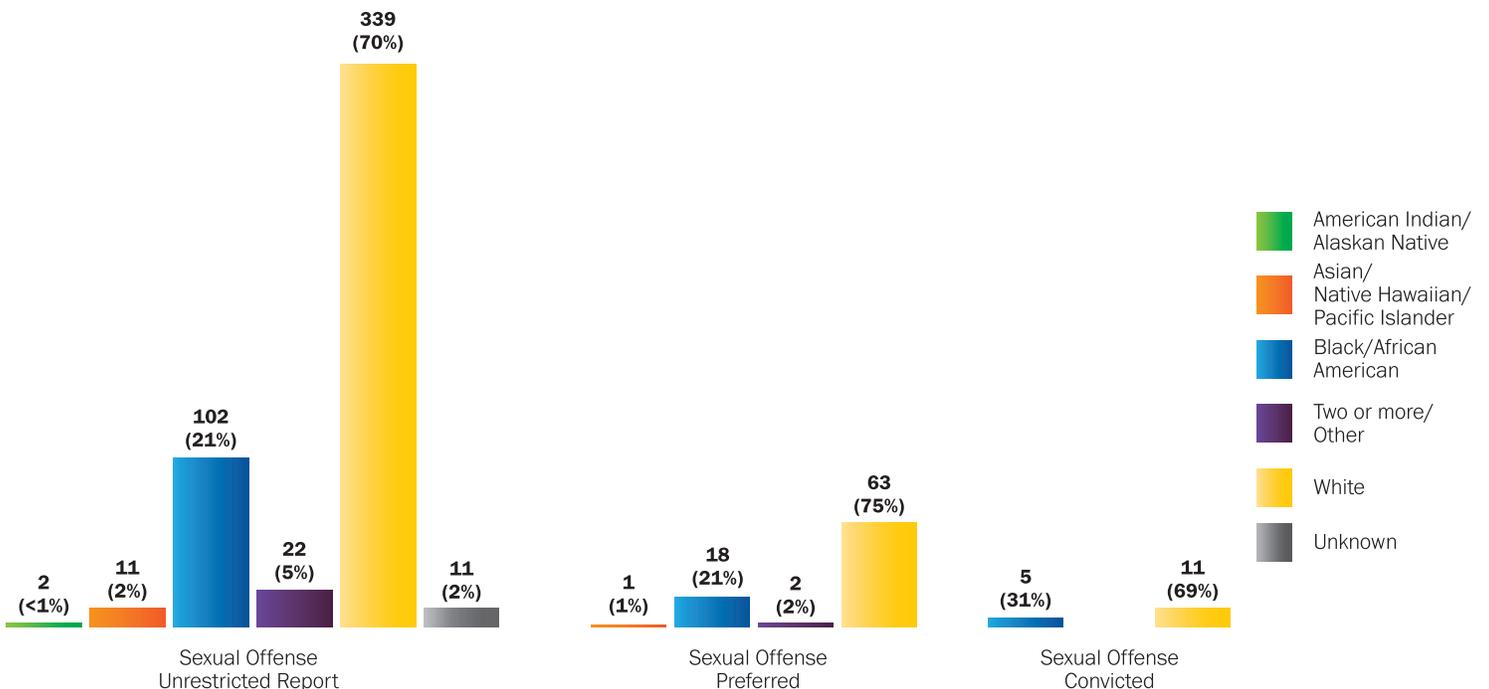
FIGURE 9. MARINE CORPS: RACIAL AND ETHNIC COMPOSITION (FY 2018)



In FY18, the Marine Corps’ racial composition reflected that of the overall Military Services with two differences. First, white members were reported as 80% of the Marine Corps total population, higher than the 69% for the Military Services. Second, the Marine Corps reported Black/African American members at 11%—a smaller proportion than the 17% in the Military Services’ total population.

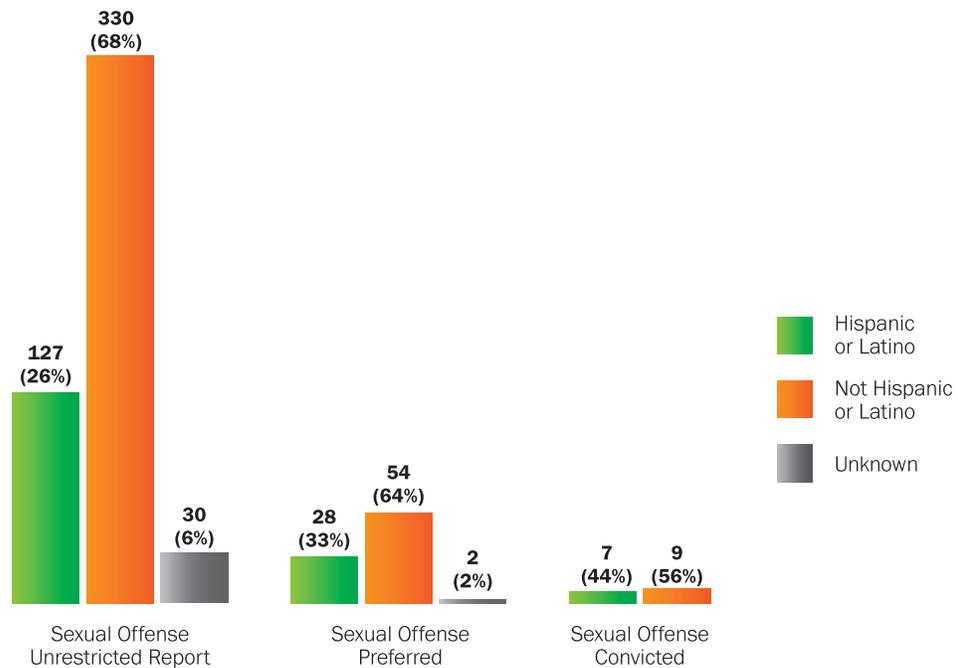
The Marine Corps’ Not Hispanic or Latino population reflected that of the Military Services at nearly 80%. The Hispanic or Latino population was higher for the Marine Corps (22%) than for the Military Services (16%).

FIGURE 10. MARINE CORPS: RACE OF THE SUBJECT (RFI – FY 2019)



The first and largest category comprised all unrestricted reports completed in FY19 (487 subjects). From that pool of unrestricted reports, a smaller number of cases had charges preferred for a penetrative or contact sexual offense (84 subjects). The third and smallest category of cases was those with a conviction for a penetrative or contact sexual offense (16 subjects). Black/African American subjects accounted for 21% of the documented unrestricted reports of a sexual offense, 21% of the total cases in which charges were preferred, and 31% of the cases with a conviction. In comparison, white subjects accounted for 70% of the reported sexual offense cases, 75% of the preferred cases, and 69% of the conviction cases.

FIGURE 11. MARINE CORPS: ETHNICITY OF THE SUBJECT (RFI – FY 2019)



The ethnic composition of the cases diverged markedly across the three categories. The Hispanic or Latino proportion rose from 26% for reported cases to 33% for preferred cases and 44% for conviction cases. The Not Hispanic or Latino proportion fell from 68% of the reported cases to 64% of the preferred cases and 56% of the conviction cases.

Air Force

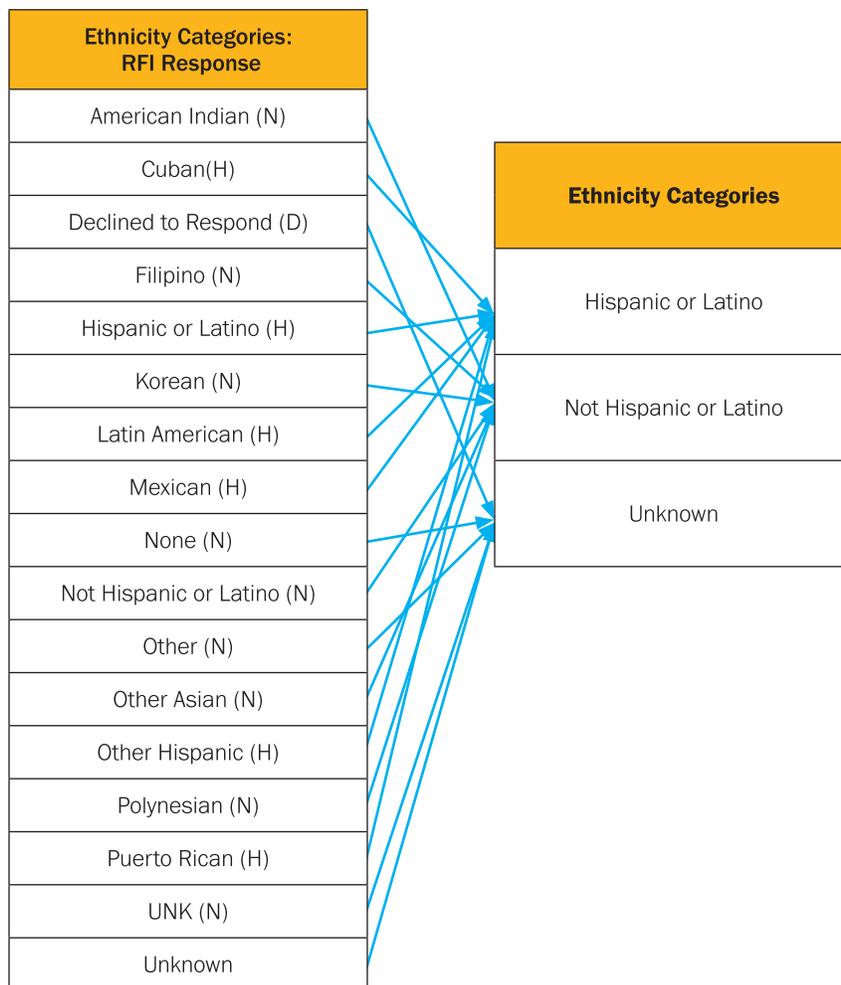
TABLE 9. AIR FORCE: RACE CATEGORIES



The Air Force response to the RFI was the most complex of all the Services, using 20 possible race categories. The DAC-IPAD made the assumption that AMIND is an acronym for American Indian; DECLI is an acronym for Declined to Respond; TWOOR is an acronym for two or more; and UNK is Unknown. In order to impose conformity to the common classification terminology, the DAC-IPAD made the following reassignments:

- *American Indian/Alaskan Native and AMIND to American Indian/Alaskan Native.*
- *Asian, HAWAI, and Native Hawaiian or other Pacific Islander to Asian/Native Hawaiian/Pacific Islander;*
- *BLACK and Black or African American to Black/African American;*
- *American Indian/Alaskan Native, Asian, Black or African American, Native Hawaiian or other Pacific Islander, White, American Indian/Alaskan Native, Black or African American, American Indian/Alaskan Native, Black or African American, White, Asian, Black or African American, Asian, White, Black or African American, White, Native Hawaiian or other Pacific Islander, White, and TWOOR to Two or more/Other; and*
- *DECLI, Declined to respond, and UNK to Unknown.*

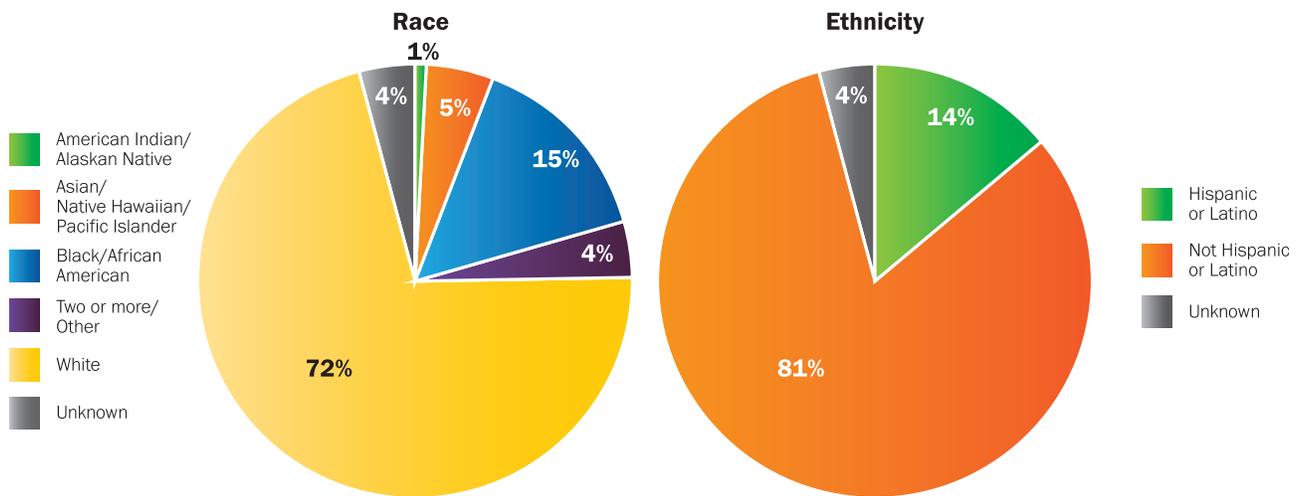
TABLE 10. AIR FORCE: ETHNICITY CATEGORIES



With respect to ethnicity, the Air Force’s response to the RFI was again considerably more complex than those of the other Services, using 17 possible categories. In order to impose conformity to the common classification terminology, the DAC-IPAD made the following reassignments:

- *Cuban (H), Hispanic or Latino (H), Latin America (H), Mexican (H), Other Hispanic (H), and Puerto Rican (H) to Hispanic;*
- *American Indian (N), Filipino (N), Korean (N), Not Hispanic or Latino (N), Other (N), Other Asian (N), and Polynesian (N) to Not Hispanic;* and
- *Declined to Respond (D), None (N), Other (N), UNK (N), and Unknown to Unknown*

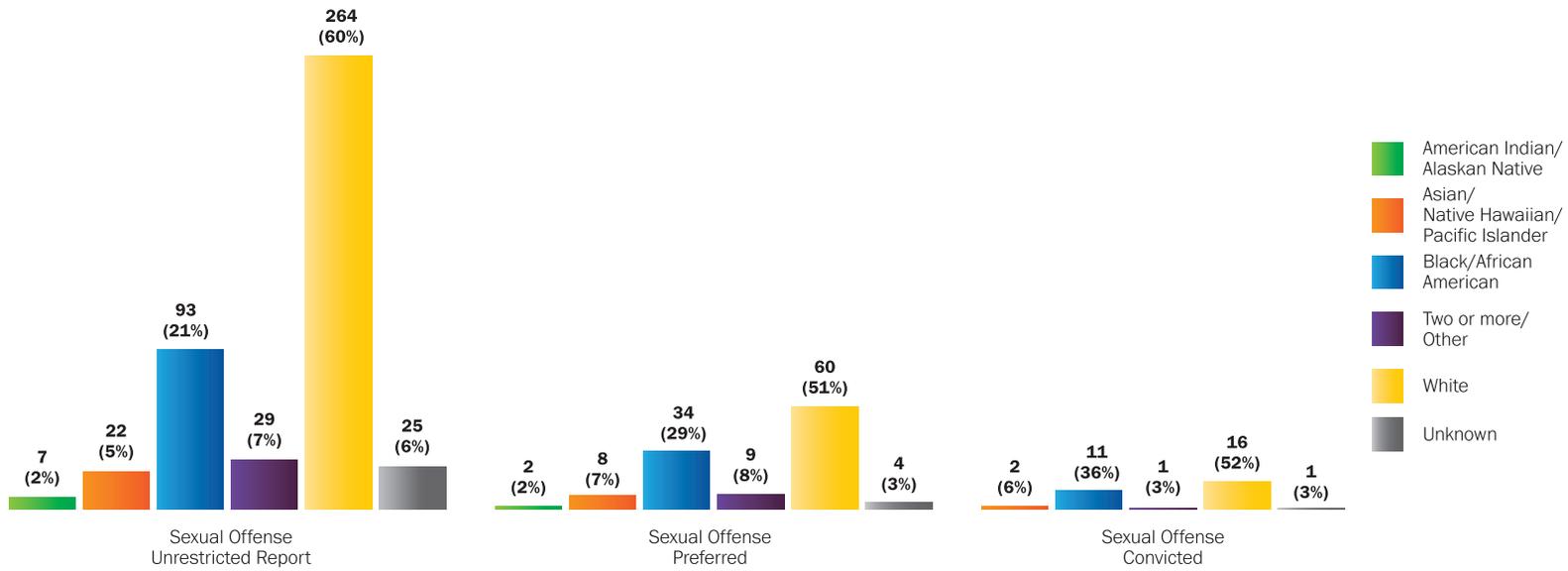
FIGURE 12. AIR FORCE: RACIAL AND ETHNIC COMPOSITION (FY 2018)



In FY18, the Air Force’s racial composition reflected that of the overall Military Services with two differences. First, white members were reported as 72% of the Air Force total population, higher than the 69% for the Military Services. Second, the Air Force reported Black/African American members at 15%—a smaller proportion than the 17% in the Military Services.

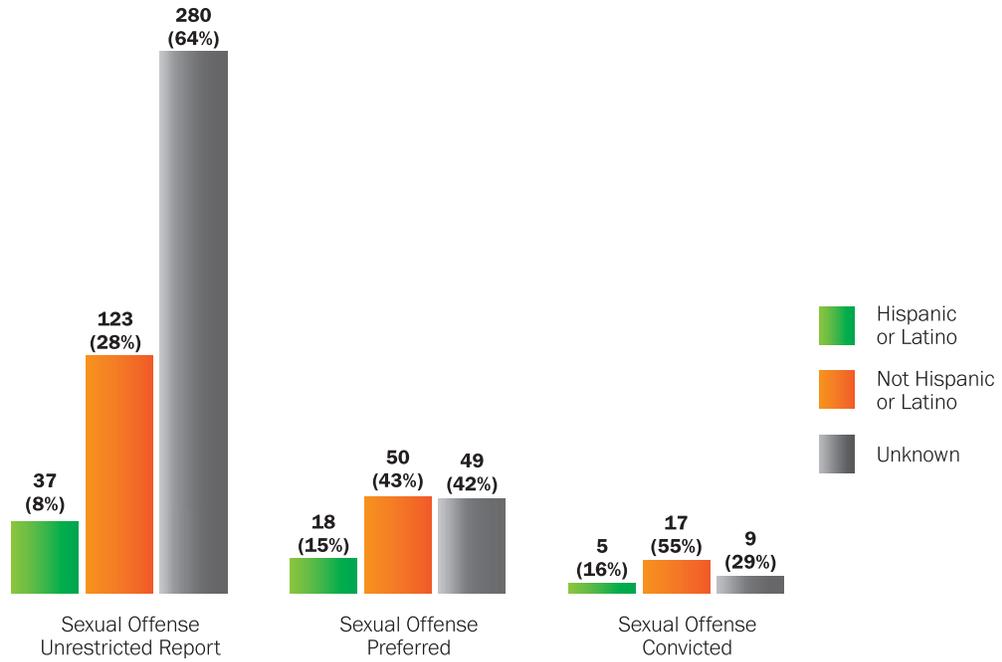
The Air Force’s ethnic populations were similar to those of the Military Services, within a percentage point or two.

FIGURE 13. AIR FORCE: RACE OF THE SUBJECT (RFI - FY 2019)



The first and largest category comprised all unrestricted reports closed in FY19 (440 subjects). From that pool of unrestricted reports, a smaller number of cases had charges preferred for a penetrative or contact sexual offense (117 subjects). The third and smallest category of cases was those with a conviction for a penetrative or contact sexual offense (31 subjects). Black/African American subjects accounted for 21% of the documented unrestricted reports of a sexual offense, 29% of the total cases in which charges were preferred, and 35% of the cases with a conviction. In comparison, white subjects accounted for 60% of the reported sexual offense cases, 51% of the preferred cases, and 52% of the conviction cases.

FIGURE 14. AIR FORCE: ETHNICITY OF THE SUBJECT (RFI - FY 2019)



In a sizable majority—64%—of the unrestricted reported sexual offense cases, the subject was of unknown ethnicity. This proportion fell to 42% for preferred cases and 29% for cases with a conviction. Conversely, the Not Hispanic or Latino proportion rose from 28% of the reported cases to 43% of the preferred cases and 55% of the conviction cases.

Coast Guard

TABLE 11. COAST GUARD: RACE CATEGORIES

Race Categories: RFI Response		Race Categories
American Indian/ Alaskan Native	→	American Indian/ Alaskan Native
Asian	→	Asian/Native Hawaiian/ Pacific Islander
Black or African American	→	Black or African American
Native Hawaiian or Pacific Islander	→	Two or more/Other
Some Other Race	→	White
White	→	Unknown
Unknown	→	

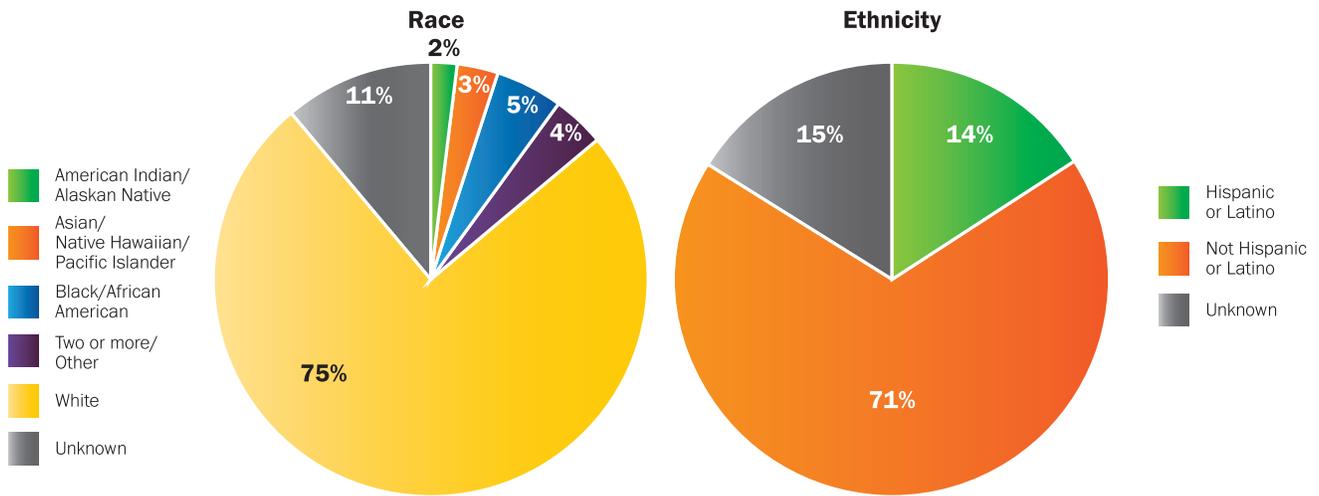
The Coast Guard response to the RFI used seven possible race categories. The DAC-IPAD combined *Asian* and *Native Hawaiian or Other Pacific Islander* into the common classification *Asian/Native Hawaiian/Pacific Islander*, and assigned *Some Other Race* to *Two or more/Other*.

TABLE 12. COAST GUARD: ETHNICITY CATEGORIES

Ethnicity Categories: RFI Response		Ethnicity Categories
American Indian or Alaskan Native	→	Hispanic or Latino
Hispanic or Latino	→	Not Hispanic or Latino
Non-Hispanic	→	Unknown
Non-Hispanic or Latino	→	
Unknown	→	

With respect to ethnicity, the Coast Guard reported five possible categories. In order to impose conformity to the common classification terminology, the DAC-IPAD reassigned *American Indian or Alaskan Native, Non-Hispanic*, and *Non-Hispanic or Latino* to *Not Hispanic or Latino*.

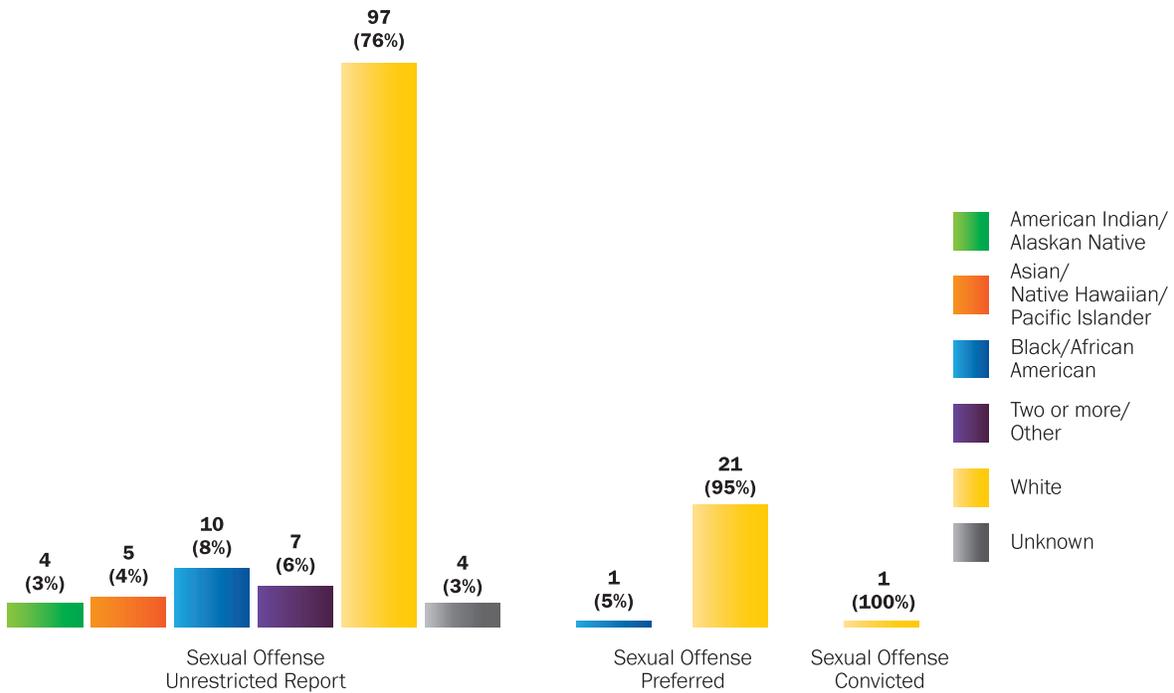
FIGURE 15. COAST GUARD: RACIAL AND ETHNIC COMPOSITION (FY 2018)



In FY18, the Coast Guard’s composition reflected that of the overall Military Services with three differences. First, white members were reported as 75% of the Coast Guard total population, slightly higher than the 69% for the Military Services. Second, the Coast Guard reported a proportion of Black/African American members at 5%—a smaller proportion than the 17% in the Military Services. Third, the Coast Guard reported a larger proportion of members of unknown race (11%) than did the Military Services (4%).

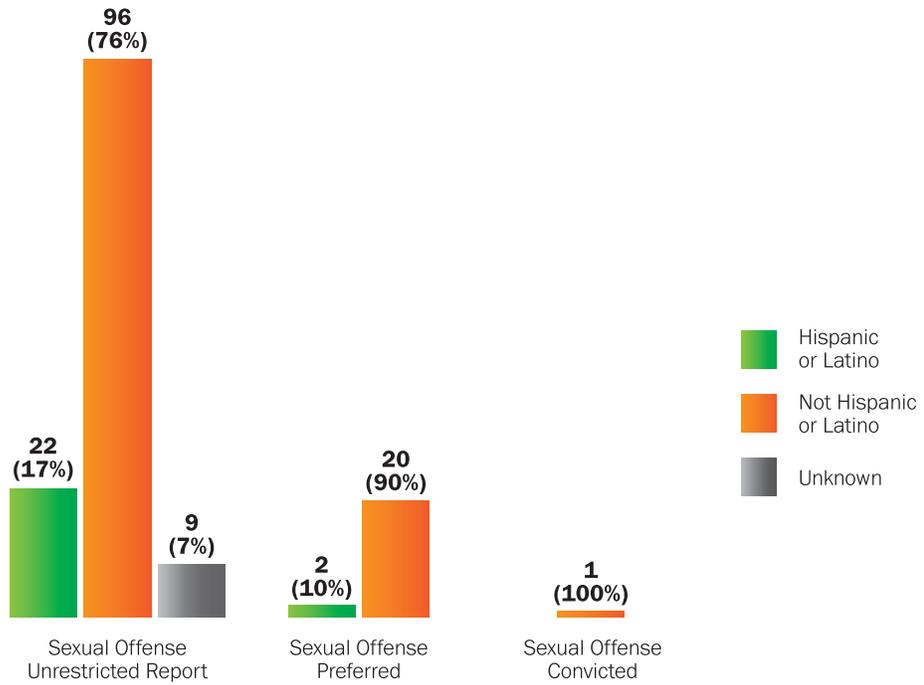
The Coast Guard reported a larger proportion of members of unknown ethnicity (15%) than did the Military Services (5%). In addition, the Not Hispanic or Latino proportion (71%) was smaller than in the Military Services (79%).

FIGURE 16. COAST GUARD: RACE OF THE SUBJECT (RFI – 2019)



The first and largest category comprised all unrestricted reports closed in FY19 (127 subjects). From that pool of unrestricted reports, a smaller number of cases had charges preferred for a penetrative or contact sexual offense (22 subjects). The third and smallest category of cases was those with a conviction for a penetrative or contact sexual offense (1 subject). White subjects accounted for 76% of the reported cases, 95% of the preferred cases, and the only conviction in FY19.

FIGURE 17. COAST GUARD: ETHNICITY OF THE SUBJECT (RFI - FY 2019)



Not Hispanic or Latino subjects represented 76% of the Coast Guard reported cases, 90% of the preferred cases, and the only conviction in FY19.

IV. CONCLUSION

The DAC-IPAD's review of FY19 race and ethnicity data from investigations, prosecutions, and convictions of Service members for sexual offenses involving adult victims in the military justice system raises many questions for future research. Although the Committee believes that more comprehensive studies of racial and ethnic disparities in the military justice system are essential, DoD must first improve its data collection processes. Most importantly, the Military Services must standardize categories for race and ethnicity for both the accused and the victim, beginning with every investigation of a criminal allegation and continuing throughout the entire military justice process. Once the Services obtain accurate, thorough, and complete data on race and ethnicity, DoD can address any disparities and work toward a military justice system that is fair and just for everyone.

After DoD implements new data collection processes as recommended in this report and as required pursuant to Article 140a, UCMJ, the DAC-IPAD will incorporate studies on racial and ethnic disparities into future reports on sexual misconduct in the Armed Forces. Specifically, DAC-IPAD research into the military justice response to sexual assault will include the following types of bivariate and multivariate analyses:

- a. For investigations by military criminal investigative organizations:
 - i. Analysis of the race/ethnicity of the accused and victim
 - ii. Analysis of the race/ethnicity of the military police and criminal investigators involved with the case
- b. For cases with preferred charges:
 - i. Analysis of the race/ethnicity of the accused and victim
 - ii. Analysis of the race/ethnicity of the accused and the offense type (whether penetrative or contact sexual offense or both)
 - iii. Analysis of the race/ethnicity of the accused and the court type
 - iv. Analysis of the race/ethnicity of the accused and the use of alternative disposition
- c. For courts-martial:
 - i. Analysis of the race/ethnicity of the accused and victim
 - ii. Analysis of the race/ethnicity of the accused and the offense type (whether penetrative or contact sexual offense or both)
 - iii. Analysis of the race/ethnicity of the accused and pleas (whether guilty or not guilty)
 - iv. Analysis of the race/ethnicity of the accused and convictions (whether penetrative or contact sexual offense or both)
 - v. Analysis of the race/ethnicity of the accused and acquittals (whether penetrative or contact sexual offense or both)
 - vi. Analysis of the race/ethnicity of the accused and the sentence at court-martial
 - vii. Analysis of the race/ethnicity of the accused and the sentence approved by convening authority

- viii. Analysis of the race/ethnicity of the accused and the characterization of discharge
- ix. Analysis of the racial composition of the panel members and judges
- x. Analysis of convictions by race and the hiring of civilian defense counsel vs. the use of assigned military trial defense counsel
- xi. Analysis of the race/ethnicity of the 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

Finally, the DAC-IPAD makes the following recommendations:

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.

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: *American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, More Than One Race/Other*, and *White*, and to report ethnicity using the following two categories: *Hispanic or Latino* and *Not Hispanic or Latino*.

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.

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.

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.

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.

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.

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.

APPENDIX A. COMMITTEE AUTHORIZING STATUTE, AMENDMENTS, AND DUTIES

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SECTION 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES. (PUBLIC LAW 113-291; 128 STAT. 3374; 10 U.S.C. 1561 NOTE)

(a) ESTABLISHMENT REQUIRED.—

(1) IN GENERAL.—The Secretary of Defense shall establish and maintain within the Department of Defense an advisory committee to be known as the “Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces” (in this section referred to as the “Advisory Committee”).

(2) DEADLINE FOR ESTABLISHMENT.—The Secretary shall establish the Advisory Committee not later than 30 days before the termination date of the independent panel established by the Secretary under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1758), known as the “judicial proceedings panel”.

(b) MEMBERSHIP.—The Advisory Committee shall consist of not more than 20 members, to be appointed by the Secretary of Defense, who have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Advisory Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as a member of the Advisory Committee.

(c) DUTIES.—

(1) IN GENERAL.—The Advisory Committee shall advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

(2) BASIS FOR PROVISION OF ADVICE.—For purposes of providing advice to the Secretary pursuant to this subsection, the Advisory Committee shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in paragraph (1).

(d) ANNUAL REPORTS.—Not later than March 30 each year, the Advisory Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives a report describing the results of the activities of the Advisory Committee pursuant to this section during the preceding year.

(e) TERMINATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), the Advisory Committee shall terminate on the date that is five years after the date of the establishment of the Advisory Committee pursuant to subsection (a).

(2) CONTINUATION.—The Secretary of Defense may continue the Advisory Committee after the termination date applicable under paragraph (1) if the Secretary determines that continuation of the Advisory Committee after that date is advisable and appropriate. If the Secretary determines to continue the Advisory Committee after that date, the Secretary shall submit to the President and the congressional committees specified in subsection (d) a report describing the reasons for that determination and specifying the new termination date for the Advisory Committee.

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL.—Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually thereafter” after “reports”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

SECTION 537. MODIFICATION OF DEADLINE FOR ESTABLISHMENT OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546(a)(2) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291; 128 Stat. 3374; 10 U.S.C. 1561 note) is amended by striking “not later than” and all that follows and inserting “not later than 90 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016.”

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019

SEC. 533. AUTHORITIES OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

SECTION 546 OF THE CARL LEVIN AND HOWARD P. “BUCK” MCKEON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015 (10 U.S.C. 1561 NOTE) IS AMENDED—

(1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

“(d) AUTHORITIES.—

“(1) HEARINGS.—The Advisory Committee may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the committee considers appropriate to carry out its duties under this section.

“(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of the Advisory Committee, a department or agency of the Federal Government shall provide information that the Advisory Committee considers necessary to carry out its duties under this section. In carrying out this paragraph, the department or agency shall take steps to prevent the unauthorized disclosure of personally identifiable information.”

SEC. 547. REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS.

- (a) REPORT.—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
 - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
 - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).
- (b) COVERED INDIVIDUAL DEFINED.—In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

SEC. 535. EXTENSION OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546(f)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended by striking “five” and inserting “ten”.

Joint Explanatory Statement:

The conferees request the DAC-IPAD review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim’s case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.

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

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

SEC. 540I. ASSESSMENT OF RACIAL, ETHNIC, AND GENDER DISPARITIES IN THE MILITARY JUSTICE SYSTEM.

- (a) **IN GENERAL.**—The Secretary of Defense shall provide for the carrying out of the activities described in subsections (b) and (c) in order to improve the ability of the Department of Defense to detect and address racial, ethnic, and gender disparities in the military justice system.
- (b) **SECRETARY OF DEFENSE AND RELATED ACTIVITIES.**—The activities described in this subsection are the following, to be commenced or carried out (as applicable) by not later than 180 days after the date of the enactment of this Act:
- (1) For each court-martial carried out by an Armed Force after the date of the enactment of this Act, the Secretary of Defense shall require the head of the Armed Force concerned—
 - (A) to record the race, ethnicity, and gender of the victim and the accused, and such other demographic information about the victim and the accused as the Secretary considers appropriate;
 - (B) to include data based on the information described in subparagraph (A) in the annual military justice reports of the Armed Force.
 - (2) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall issue guidance that—
 - (A) establishes criteria to determine when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed; and
 - (B) describes how such a review should be conducted.
 - (3) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall—
 - (A) conduct an evaluation to identify the causes of any racial, ethnic, or gender disparities in the military justice system;
 - (B) take steps to address the causes of such disparities, as appropriate.
- (c) **DAC-IPAD ACTIVITIES.**—
- (1) **IN GENERAL.**—The activities described in this subsection are the following, to be conducted by the independent committee DAC-IPAD:
 - (A) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year addressed.
 - (B) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative

sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

- (C) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

(2) INFORMATION FROM FEDERAL AGENCIES.—

- (A) IN GENERAL.—Upon request by the chair of the committee, a department or agency of the Federal Government shall provide information that the committee considers necessary to conduct reviews and assessments required by paragraph (1), including military criminal investigative files, charge sheets, records of trial, and personnel records.

- (B) HANDLING, STORAGE, AND RETURN.—The committee shall handle and store all records received and reviewed under this subsection in accordance with applicable privacy laws and Department of Defense policy, and shall return all records so received in a timely manner.

- (3) REPORT.—Not later than one year after the date of the enactment of this Act, the committee shall submit to the Secretary of Defense, and to the Committees on Armed Services of the Senate and the House of representatives, a report setting forth the results of the reviews and assessments required by paragraph (1). The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

(4) DEFINITIONS.—In this subsection:

- (A) The term “independent committee DAC-IPAD” means the independent committee established by the Secretary of Defense under section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374), commonly known as the “DAC-IPAD”.
- (B) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.
- (C) The term “completed”, with respect to a case, means that the case was tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.
- (D) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.
- (E) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

H. Rept. 116-120 on H.R. 2500

**TITLE V—MILITARY PERSONNEL POLICY
ITEMS OF SPECIAL INTEREST**

Appointment of Guardian ad Litem for Minor Victims

The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

APPENDIX B. COMMITTEE CHARTER AND BALANCE PLAN

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

1. Committee's Official Designation: The committee shall be known as the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("the Committee").
2. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("the FY 2015 NDAA") (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 C.F.R. § 102-3.50(a), established this non-discretionary advisory committee.
3. Objectives and Scope of Activities: The Committee, pursuant to section 546(c)(1) of the FY 2015 NDAA, will advise the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
4. Description of Duties: Pursuant to section 546(c)(2) and (d) of the FY 2015 NDAA, the Committee, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel for the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and House of Representatives, a report describing the results of the activities of the Committee pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The Committee will review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
Pursuant to Section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Committee, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
 - (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
 - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
 - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

The term "covered individual" means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

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Pursuant to section 540I(c) of the of the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92), not later than December 20, 2020, the Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives a report setting forth:

- (1) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed.
- (2) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.
- (3) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

The report shall include such recommendations for legislative or administrative action as the Committee considers appropriate in light of such results.

Pursuant to section 540K(d) of the FY 2020 NDAA, the Secretary of Defense shall consult with the Committee on a report to be submitted by the Secretary to the Committees on Armed Services of the Senate and House of Representatives not later than June 17, 2020, making findings and recommendations on the feasibility and advisability of a policy for the Department of Defense that would permit a victim of a sexual assault, that is or may be investigated as a result of a communication described in 540k(b), which victim is a member of the Armed Forces or an adult dependent of a member of the Armed Forces, to have the reporting on the sexual assault be treated as a restricted report without regard to the party initiating or receiving such communication.

5. Agency or Official to Whom the Committee Reports: The Committee will report to the Secretary and Deputy Secretary of Defense, through the GC DoD.
6. Support: The DoD, through the GC DoD, the Washington Headquarters Services, and the DoD Components, provides support for the Committee and ensures compliance with requirements of the FACA, the Government in the Sunshine Act of 1976 (“the Sunshine Act”) (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.
7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating costs, to include travel, meetings, and contract support, are approximately \$2,810,500. The estimated annual personnel cost to the DoD is 15.0 full-time equivalents.

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8. Designated Federal Officer: The Committee's Designated Federal Officer (DFO) shall be a full-time or permanent part-time DoD civilian officer or employee or member of the Armed Forces, designated in accordance with established DoD policy and procedures.
The Committee's DFO is required to attend all Committee and subcommittee meetings for the entire duration of each and every meeting. However, in the absence of the Committee's DFO, a properly approved Alternate DFO, duly designated to the Committee in accordance with DoD policy and procedures, shall attend the entire duration of all of the Committee or subcommittee meetings.
The DFO, or the Alternate DFO, approves and calls all Committee and subcommittee meetings; prepares and approves all meeting agendas; and adjourns any meeting when the DFO, or the Alternate DFO, determines adjournment to be in the public's interest or required by governing regulations or DoD policy and procedures.
9. Estimated Number and Frequency of Meetings: The Committee shall meet at the call of the Committee's DFO, in consultation with the Committee's Chair and the GC DoD. The Committee will meet at a minimum of once per year.
10. Duration: The need for this advisory function is on a continuing basis; however, this charter is subject to renewal every two years.
11. Termination: In accordance with sections 546(e)(1) and (2) of the FY 2015 NDAA, as modified by section 535 of the FY 2020 NDAA, the Committee will terminate on February 28, 2026, ten years after the Committee was established, unless the Secretary of Defense determines that continuation of the Committee after that date is advisable and appropriate. If the Secretary of Defense determines to continue the Committee after that date, the Secretary of Defense will submit to the President and the Committees on Armed Services of the Senate and House of Representatives a report describing the reasons for that determination and specifying the new termination date for the Committee.
12. Membership and Designation: Pursuant to section 546(b) of the FY 2015 NDAA, the Committee will be composed of no more than 20 members. Committee members selected will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as members of the Committee.
The appointment of Committee members will be approved by the Secretary of Defense, the Deputy Secretary of Defense, or the Chief Management Office of the Department of Defense (CMO) ("the DoD Appointing Authorities"), for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authorities, may serve more than two consecutive terms of service on the Committee, to include its subcommittees, or serve on more than two DoD Federal advisory committees at one time.

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Committee members who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. Committee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members.

Committee members are appointed to provide advice on the basis of his or her best judgment without representing any particular points of view and in a manner that is free from conflict of interest.

The DoD Appointing Authorities shall appoint the Committee's Chair from among the membership previously approved, in accordance with DoD policy and procedures, for a one-to-two year term of service, with annual renewal, which shall not exceed the member's approved Committee appointment.

Except for reimbursement of official Committee-related travel and per diem, Committee members serve without compensation.

13. Subcommittees: The DoD, when necessary and consistent with the Committee's mission and DoD policy and procedures, may establish subcommittees, task forces, or working groups to support the Committee. Establishment of subcommittees shall be based upon a written determination, to include terms of reference, by the DoD Appointing Authorities or the GC DoD, as the DoD Sponsor. All subcommittees operate under the provisions of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures.

Subcommittees shall not work independently of the Committee and shall report all their advice and recommendations solely to the Committee for its thorough discussion and deliberation at a properly noticed and open meeting, subject to the Sunshine Act. Subcommittees have no authority to make decisions or recommendations, verbally or in writing, on behalf of the Committee. No subcommittee nor any of its members may provide updates or report, verbally or in writing, directly to the DoD or to any Federal officers or employees. If a majority of Committee members are appointed to a particular subcommittee, then that subcommittee may be required to operate pursuant to the same FACA notice and openness requirements governing the Committee's operations.

Individual appointments to serve on these subcommittees shall be approved by the DoD Appointing Authorities for a term of service of one-to-four years, subject to annual renewals, in accordance with DoD policy and procedures. No member shall serve more than two consecutive terms of service on the subcommittee without prior approval from the DoD Appointing Authorities. Subcommittee members who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or

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members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as RGE members.

The DoD Appointing Authorities shall appoint the subcommittee leadership from among the membership previously appointed to serve on the subcommittee in accordance with DoD policy and procedures, for a one-to-two year term of service, with annual renewal, which shall not exceed the member's approved term of service.

Each subcommittee member is appointed to provide advice on behalf of his or her best judgment without representing any particular point of view and in a manner that is free from conflicts of interest.

With the exception of reimbursement for travel and per diem as it pertains to official travel related to the Committee or its subcommittees, subcommittee members shall serve without compensation.

Currently, the GC DoD has approved three subcommittees to the Committee. All work performed by these subcommittee will be sent to the Committee for its thorough deliberation and discussion at a properly noticed and open meeting, subject to the Sunshine act.

- 1) Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.
 - 2) Data Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its collection and analysis of data from cases involving such allegations.
 - 3) Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of Department of Defense policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to such allegations.
14. Recordkeeping: The records of the Committee and its subcommittees will be handled in accordance with Section 2, General Record Schedule 6.2, and governing DoD policies and

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procedures. These records will be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: February 16, 2020

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

Agency: Department of Defense (DoD)

1. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (“the FY 2015 NDAA”) (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 C.F.R. § 102-3.50(a), established the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee”), a non-discretionary advisory committee.
2. Mission/Function: The Committee, pursuant to section 546(c)(1) of the FY 2015 NDAA, will advise the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
3. Pursuant to section 546(c)(2) and (d) of the FY 2015 NDAA, the Committee, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel for the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and House of Representatives, a report describing the results of the activities of the Committee pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The Committee will review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
 Pursuant to Section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Committee, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
 - (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
 - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
 - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).
 The term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

Pursuant to section 540I(c) of the of the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92), not later than December 20, 2020, the Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives a report setting forth:

Membership Balance Plan
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Sexual Assault in the Armed Forces

- (1) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed.
- (2) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.
- (3) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

The report shall include such recommendations for legislative or administrative action as the Committee considers appropriate in light of such results.

Pursuant to section 540K(d) of the FY 2020 NDAA, the Committee shall be consulted by the Secretary of Defense on a report to be submitted by the Secretary to the Committees on Armed Services of the Senate and House of Representatives not later than June 17, 2020, making findings and recommendations on the feasibility and advisability of a policy for the Department of Defense that would permit a victim of a sexual assault, that is or may be investigated as a result of a communication described in 540k(b), which victim is a member of the Armed Forces or an adult dependent of a member of the Armed Forces, to have the reporting on the sexual assault be treated as a restricted report without regard to the party initiating or receiving such communication.

3. Points of View: Pursuant to section 546(b) of the FY 2015 NDAA, the Committee will be composed of no more than 20 members. Committee members selected will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as members of the Committee.

Committee members who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109, to serve as special government employee (SGE) members. Committee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members.

All Committee members are appointed to provide advice on the basis of their best judgment without representing any particular points of view and in a manner that is free from conflict of interest.

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

4. Other Balance Factors: N/A

5. Candidate Identification Process: The DoD, in selecting potential candidates for the Committee, reviews the educational and professional credentials of individuals with extensive professional experience in the points of view described above. Potential candidates may be gathered and identified by the General Council of the Department of Defense (GC DoD) and the Committee's staff.

Once potential candidates are identified, the Committee's Designated Federal Officer (DFO), working with the various stakeholders to include senior DoD officers and employees, reviews the credentials of each individual and narrows the list of potential candidates before forwarding the list to the GC DoD for review. During his or her review, the GC DoD strives to achieve a balance between the professional credentials of the individuals and the near-term subject matters that shall be reviewed by the Committee to achieve expertise in points of view regarding anticipated topics.

Once the GC DoD has narrowed the list of candidates and before formal nomination to the DoD Appointing Authorities, the list of potential candidates undergoes a review by the DoD Office of General Counsel and the Office of the Advisory Committee Management Officer (ACMO) to ensure compliance with federal and DoD governance requirements, including compliance with the Committee's statute, charter, and membership balance plan. Following this review, the GC DoD forwards to the list of nominees to the ACMO for approval by the DoD Appointing Authorities.

Following approval by the DoD Appointing Authorities, the candidates are required to complete the necessary appointment paperwork, to include meeting ethics requirements stipulated by the Office of Government Ethics for advisory committee members.

All Committee appointments are for a one-to-four year term of service, with annual renewals. No member, unless approved in a policy deviation by the DoD Appointing Authorities, may serve more than two consecutive terms of service on the Committee, including its subcommittees, or serve on more than two DoD Federal Advisory committees at one time.

Committee membership vacancies will be filled in the same manner as described above. Individuals being considered for appointment to the Committee, or any subcommittee, may not participate in any Committee or subcommittee work until his or her appointment has been approved by the DoD Appointment Authorities and the individual concerned is on-boarded in accordance with DoD policy and procedures.

6. Subcommittee Balance: The DoD, when necessary and consistent with the Committee's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Committee.

Currently, the DoD has approved three subcommittees to the Committee. Subcommittee members will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses.

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

- 1) Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.
- 2) Data Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its collection and analysis of data from cases involving such allegations.
- 3) Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of Department of Defense policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to such allegations.

Individuals considered for appointment to any subcommittee of the Committee may come from members of the Committee or from new nominees, as recommended by the GC DoD and based upon the subject matters under consideration. Pursuant to DoD policy and procedures, the GC DoD shall follow the same procedures used for selecting and nominating individuals for appointment consideration by the DoD Appointing Authorities. Individuals being considered for appointment to any subcommittee of the Committee cannot participate in any Committee or subcommittee work until his or her appointment has been approved by the DoD Appointment Authorities, and the individual concerned is on-boarded according to DoD policy and procedures.

Subcommittee members shall be appointed for a term of service of one-to-four years, subject to annual renewals; however, no member shall serve more than two consecutive terms of service on the subcommittee, without prior approval by the Appointing Authorities. Subcommittee members, if not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 10-3.130(a) to serve as RGE members.

7. Other: As nominees are considered for appointment to the Committee, the DoD adheres to the Office of Management and Budget's Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions (79 FR 47482; August 13, 2014) and the rules and regulations issued by the Office of Government Ethics.
8. Date Prepared: February 16, 2020

APPENDIX C. COMMITTEE MEMBERS

Ms. Martha S. Bashford, Chair



Martha Bashford was for 40 years the chief of the New York County District Attorney's Office Sex Crimes Unit, which was the first of its kind in the country. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI's Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (*summa cum laude*) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.

Major General Marcia M. Anderson, U.S. Army, Retired



Marcia Anderson was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin from 1998 to 2019, where she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy Commanding General of the Army's Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of \$8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.

The Honorable Leo I. Brisbois



Leo I. Brisbois has been a U.S. Magistrate Judge for the District of Minnesota chambered in Duluth, Minnesota, since 2010. Prior to his appointment to the bench, Judge Brisbois served as an Assistant Staff Judge Advocate, U.S. Army, from 1987 through 1998, both on active duty and then in the Reserves; his active duty service included work as a trial counsel and as an administrative law officer, both while serving in Germany. From 1991 to 2010, Judge Brisbois was in private practice with the Minneapolis, Minnesota, firm of Stich, Angell, Kreidler, Dodge & Unke, where his practice included all aspects of litigation and appeals involving the defense of civil claims in state and federal courts. Judge Brisbois has also previously served on the Civil Rules and Racial Fairness in the Courts advisory committees established by the Minnesota State Supreme Court, and he has served on the Minnesota Commission on Judicial Selection. From 2009 to 2010, Judge Brisbois was the first person of known Native American heritage to serve as President of the more than 16,000-member Minnesota State Bar Association.

Ms. Kathleen B. Cannon



Kathleen Cannon is a criminal defense attorney in Vista, California, specializing in serious felony and high-profile cases. Prior to entering private practice in 2011, Ms. Cannon was a public defender for over 30 years, in Los Angeles and San Diego Counties. Over the course of her career, Ms. Cannon supervised branch operations and training programs within the offices and handled thousands of criminal cases. She has completed hundreds of jury trials, including those involving violent sexual assault and capital murder with special circumstances. Since 1994, Ms. Cannon has taught trial advocacy as an adjunct professor of law at California Western School of Law in San Diego, and has been on the faculty of the National Institute of Trial Advocacy as a team leader and teacher. She is past-President and current Training Coordinator for the California Public Defenders' Association, providing educational seminars for criminal defense attorneys throughout the state of California. Ms. Cannon has lectured on battered women syndrome evidence at the Marine Corps World Wide Training Conference at Marine Corps Recruit Depot (MCRD), San Diego, and was a small-group facilitator for the Naval Justice School course "Defending Sexual Assault Cases" in San Diego. Ms. Cannon has received numerous awards, including Top Ten Criminal Defense Attorney in San Diego, Lawyer of the Year from the North County Bar Association, and Attorney of the Year from the San Diego County Public Defender's Office.

Ms. Margaret A. Garvin



Margaret "Meg" Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar Association's Criminal Justice Section Victims Committee, as co-chair of the Oregon Attorney General's Crime Victims' Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General's Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.

The Honorable Paul W. Grimm



Paul W. Grimm serves as a U.S. District Judge for the District of Maryland. Previously, he served as a U.S. Magistrate Judge and as Chief Magistrate Judge for the District of Maryland. In 2009, the Chief Justice of the United States appointed Judge Grimm to serve as a member of the Civil Rules Advisory Committee, where he served for six years and chaired the Discovery Subcommittee. Before his appointment to the court, Judge Grimm was in private practice for 13 years, handling commercial litigation. Prior to that, he served as an Assistant Attorney General for Maryland, an Assistant States Attorney for Baltimore County, Maryland, and an active duty and Reserve Army Judge Advocate General's Corps officer, retiring as a lieutenant colonel in 2001. Judge Grimm has served as an adjunct professor of law at the University of Maryland School of Law and at the University of Baltimore School of Law, and has published many articles on evidence and civil procedure.

Mr. A. J. Kramer

A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr. Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers and a member of the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement. He was a member of the Courts of the Judicial Conference of the United States' Advisory Committee on Evidence Rules from 2013 to 2019. In July 2019, he received the American Inns of Court Award for Professionalism for the D.C. Circuit. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.

Ms. Jennifer Gentile Long

Jennifer Gentile Long (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.

Mr. James P. Markey

Jim Markey has over 30 years of law enforcement experience with the Phoenix Police Department. Serving in a variety of positions, Mr. Markey was recognized with more than 30 commendations and awards. For over 14 years he directly supervised the sexual assault unit, which is part of a multidisciplinary sexual assault response team co-located in the City of Phoenix Family Advocacy Center. Mr. Markey oversaw the investigation of more than 7,000 sexual assaults, including more than 150 serial rape cases. In 2000, he was able to secure Violence Against Women grant funding to design, develop, and supervise a first-of-its-kind sexual assault cold case team with the City of Phoenix. This team has been successful in reviewing nearly 4,000 unsolved sexual assault cases dating back over 25 years. For the past 15 years Mr. Markey has been a certified and nationally recognized trainer, delivering in-person and online webinar training for numerous criminal justice organizations on sexual assault investigations and response. Currently, he is employed with the Research Triangle Institute (RTI) located in Durham North as a Senior Law Enforcement Specialist. His work in the Applied Justice Research Unit includes assistance for the DOJ Bureau of Justice Assistance Sexual Assault Kit Initiative (SAKI), providing technical assistance and training to 54 SAKI grantees across the United States. He also developed and directs the SAKI – Sexual Assault Unit Assessment (SAUA) Team; this team has conducted independent

and comprehensive reviews for four major police agencies, assessing a range of areas in their response to sexual assault. In addition to the DAC-IPAD, Mr. Markey currently serves as a member of the National Institute of Justice (NIJ) Sexual Assault Forensic Evidence Reporting (SAFER) Working Group and Editorial Team, NIJ Cold Case Working Group, Arizona Commission on Victims in the Courts (COVIC), Arizona Forensic Science Advisory Committee, and Massage Envy Franchising's Safety Advisory Council. Jim continues to work as a trainer and facilitator in the area of sexual violence for the International Association of Chiefs of Police (IACP) and the International Association of College Law Enforcement Administrators (IACLEA).

Dr. Jenifer Markowitz



Jenifer Markowitz is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a national protocol and training standards for sexual assault medical-forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.

Chief Master Sergeant of the Air Force Rodney J. McKinley, U.S. Air Force, Retired



Chief Master Sergeant of the Air Force Rodney J. McKinley represented the highest enlisted level of leadership and, as such, provided direction for the enlisted corps and represented their interests, as appropriate, to the American public and to those in all levels of government. He served as the personal advisor to the Chief of Staff and the Secretary of the Air Force on all issues regarding the welfare, readiness, morale, and proper utilization and progress of the enlisted force. Chief McKinley is the 15th chief master sergeant appointed to the highest noncommissioned officer position. His background includes various duties in medical and aircraft maintenance, and he served 10 years as a first sergeant. He also served as a command chief master sergeant at wing, numbered Air Force, and major command levels. He is currently the co-chair of the Air Force Retiree Council and frequently is a guest speaker at bases across the Air Force. He is an honors graduate of St. Leo College, Florida, and received his master's degree in human relations from the University of Oklahoma.

Brigadier General James A. Schwenk, U.S. Marine Corps, Retired

BGen Schwenk was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of “don’t ask, don’t tell,” for the provision of benefits to same-sex spouses of military personnel, in the review of the murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.

Dr. Cassia C. Spohn

Cassia Spohn is a Regents Professor and Director of the School of Criminology and Criminal Justice at Arizona State University. She received a Ph.D. in political science from the University of Nebraska–Lincoln. Prior to joining the ASU faculty in 2006, she was a faculty member in the School of Criminology and Criminal Justice at the University of Nebraska at Omaha for 28 years. She is the author or co-author of eight books, including *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System* and *How Do Judges Decide? The Search for Fairness and Equity in Sentencing*. Her research interests include prosecutorial and judicial decision making; the intersections of race, ethnicity, crime, and justice; and sexual assault case processing decisions. In 2013, she received ASU’s Award for Leading Edge Research in the Social Sciences and was selected as a Fellow of the American Society of Criminology.

Ms. Meghan A. Tokash



Meghan Tokash is an Assistant United States Attorney (AUSA) at the U.S. Department of Justice serving the Western District of New York in the violent crimes unit. For eight years she served as a judge advocate in the U.S. Army Judge Advocate General's Corps, where she prosecuted a wide range of cases relating to homicide, rape, sexual assault, domestic violence, and child abuse. AUSA Tokash was selected by the Judge Advocate General of the U.S. Army to serve as one of 15 Special Victim Prosecutors; she worked in the Army's first Special Victim Unit at the Fort Hood Criminal Investigation Division Office and U.S. Army Europe/Central Command. Previously, AUSA Tokash served as an Army trial defense counsel and as a civilian victim-witness liaison officer for the Department of the Army. AUSA Tokash clerked for the United States Court of Appeals for the Armed Forces. She is a graduate of the Catholic University Columbus School of Law. She earned her master of laws degree in trial advocacy from the Beasley School of Law at Temple University, where at graduation she received the program's Faculty Award.

The Honorable Reggie B. Walton



Judge Walton was born in Donora, Pennsylvania. In 1971 he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission's recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary's Criminal Law Committee, on which he served until 2011. In 2007 Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

APPENDIX D. COMMITTEE PROFESSIONAL STAFF

Committee Staff

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Mr. Dale L. Trexler, Chief of Staff

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Ms. Nalini Gupta, Attorney-Advisor

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Mr. David J. Gruber
Associate Deputy General Counsel for
Military Personnel, Readiness, and Voting
U.S. Department of Defense
Alternate Designated Federal Officer

APPENDIX E. COMMITTEE RECOMMENDATIONS TO DATE

DAC-IPAD Recommendation 1 – (March 2018) The Secretary of Defense, the Secretary of Homeland Security, and the Services 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.

DAC-IPAD Recommendation 2 – (March 2018) 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.

DAC-IPAD Recommendation 3 – (March 2018) The DoD-level 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 Recommendation 4 – (March 2018) 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.

DAC-IPAD Recommendation 5 – (March 2019) In developing a uniform command action form in accordance with section 535 of the FY19 National Defense Authorization Act (NDAA), 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 establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

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.

DAC-IPAD Recommendation 6 – (March 2019) 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.

DAC-IPAD Recommendation 7 – (March 2019) 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.

DAC-IPAD Recommendation 8 – (March 2019) 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:

- a. 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.

- b. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD.
- c. 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.
- d. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible.
- e. 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.

DAC-IPAD Recommendation 9 – (March 2019) 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.

DAC-IPAD Recommendation 10 – (March 2019) 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.

DAC-IPAD Recommendation 11 – (March 2019) 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)):

- a. 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;
- b. Whether an unrestricted report of sexual assault originated as a restricted report;
- c. Demographic data pertaining to each victim and accused, including race and sex;
- d. The nature of any relationship between the accused and the victim(s);
- 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;
- f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;
- g. Whether a victim declined to participate at any point in the military justice process;
- 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
- i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.

DAC-IPAD Recommendation 12 – (March 2019) The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that

- 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
- 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.

DAC-IPAD Recommendation 13 – (March 2019) 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) 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:

- 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.

DAC-IPAD Recommendation 14 – (March 2019) 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:

- a. The victim be required to meet with an SVC or 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.
- b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.
- 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.
- d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.
- 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.

DAC-IPAD Recommendation 15 – (March 2019) 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:

- 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."

DAC-IPAD Recommendation 16 – (March 2019) 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.

DAC-IPAD Recommendation 17 – (March 2019) The Services track and report the following data in order to best evaluate the expedited transfer program:

- a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex 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.
- 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.
- c. Data on victim participation in investigation/prosecution before and after an expedited transfer.
- 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.
- e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.
- 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.
- 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.

- h. Data on victim satisfaction with the expedited transfer program.
- i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.

DAC-IPAD Recommendation 18 – (March 2019) 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.

DAC-IPAD Recommendation 19 – (March 2020) 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:

a. Definition of “sexual offense”:

- The definition of “sexual offense” for purposes of reporting collateral misconduct should include
 - Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
 - Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
 - Attempts, conspiracies, and solicitations of all of the above.
- The definition of sexual offense should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child); Article 120c, UCMJ (Other sexual misconduct); Article 130, UCMJ (Stalking); or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual offense incident.”¹
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should read as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual offense, and directly related to the incident that formed the basis of the sexual offense allegation. The collateral misconduct must have been discovered as a direct result of the report of the sexual offense and/or the ensuing investigation into the sexual offense.”
- Collateral misconduct includes (but is not limited to) the following situations:
 - The victim was in an unprofessional or adulterous relationship with the accused at the time of the assault.²

1 Dep’t of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Glossary (March 28, 2013, Incorporating Change 3, May 24, 2017), 117.

2 For purposes of this report, an “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.

- The victim was drinking underage or using illicit substances at the time of the assault.
 - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
 - To ensure consistency across the Military Services, collateral misconduct, for purposes of this report, should not include the following situations (the list is not exhaustive):
 - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of a sexual offense.
 - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
 - The victim engaged in misconduct after reporting the sexual offense.
 - The victim had previously engaged in an unprofessional or adulterous relationship with the subject, but had terminated the relationship prior to the assault.
 - The victim engaged in misconduct that is not close in time to the sexual offense, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
 - The victim is suspected of making a false allegation of a sexual offense.
 - The victim engaged in misconduct during the reporting or investigation of the sexual offense (such as making false official statements during the course of the investigation).
- c. Methodology for identifying sexual offense cases and victims:**
- To identify sexual offense cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the MCIOs.
 - A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.³
 - Each Military Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Military Service’s MCIO.
- d. Time frame for collection of data:**
- The Military Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and should include only closed cases as defined above. For example, the Department’s report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.
- e. Definition of “covered individual”:**
- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual offense in the case files of a military criminal investigative organization.” This definition should be

3 This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group.

clarified as follows: “an individual identified in the case files of an MCIO as a victim of a sexual offense while in title 10 status.”

- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

f. Replacement of the term “accused”:

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term “suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.⁴
- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:
 - The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - Another witness in the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - In the course of the sexual offense investigation, an analysis of the victim’s phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- This definition of “suspected of” does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions has occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
 - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

g. Definition of “adverse action”:

- The term “adverse action” applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.
- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
 - Letter of reprimand (or Military Service equivalent) or written record of individual counseling in official personnel file;
 - Imposition of nonjudicial punishment;

⁴ *Cf. United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article 31(b) prior to interrogation “is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense”) (internal citations omitted).

- Preferral of charges; or
- Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Military Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Military Service equivalent), or reclassification.

h. Methodology for counting “number of instances”:

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse action, under the most serious collateral misconduct identified in the adverse action.
- For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

DAC-IPAD Recommendation 20 – (March 2020) Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.

DAC-IPAD Recommendation 21 – (March 2020) For purposes of the third statistical data element required by section 547, 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.

DAC-IPAD Recommendation 22 – (March 2020) 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.

DAC-IPAD Recommendation 23 – (March 2020) To facilitate production of the future collateral misconduct reports required by section 547, 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.

DAC-IPAD Recommendation 24 – (June 2020) 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) 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.

DAC-IPAD Recommendation 25 – (June 2020) 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.

DAC-IPAD Recommendation 26 – (June 2020) The Department of Defense Office of the Inspector General and 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) assess whether the MCIOs and FAPs 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.

DAC-IPAD Recommendation 27 – (June 2020) 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.

DAC-IPAD Recommendation 28 – (June 2020) 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.

DAC-IPAD Recommendation 29 – (June 2020) The Secretary of Defense and 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) 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.

DAC-IPAD Recommendation 30 – (June 2020) 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.

DAC-IPAD Recommendation 31 – (June 2020) 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.

DAC-IPAD Recommendation 32 – (October 2020) 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.

APPENDIX F. REQUESTS FOR INFORMATION SETS 18 & 18A

Request for Information RFI Set 18, Questions 1–3

Topic: Assessment of Racial and Ethnic Disparities in the Military Justice System

Date of Request: June 17, 2020

I. Purpose

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- C. The DAC-IPAD requests the below information to facilitate its required assessment of racial and ethnic disparities in the military justice system.

II. Requested Response Date

Suspense	Question(s)	Proponent
20 July 20	1–3	Military Services – Provide an Excel workbook with three (3) worksheets: (1) Unrestricted Report SA FY19; (2) Preferred SA FY19; and (3) Convicted SA FY19.

III. Assessment of Racial and Ethnic Disparities in the Military Justice System

Question 1: The DAC-IPAD requests the Military Services use information from the Services’ case management systems to identify the race and ethnicity of members of the Armed Forces who were the subject of a penetrative sexual assault offense or contact sexual assault offense allegation in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in fiscal year 2019.

Question 2: The DAC-IPAD requests the Military Services use information from the Services’ case management systems to identify the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in fiscal year 2019.

Question 3: The DAC-IPAD requests the Military Services use information from the Services’ case management systems to identify the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in fiscal year 2019.

Please provide completed Excel workbook to the DAC-IPAD by July 20, 2020.

III. Assessment of Racial and Ethnic Disparities in the Military Justice System (cont.)

Additional information concerning Military Services' submission. The Excel workbook consists of three worksheets titled: (1) Unrestricted Report SA FY19; (2) Preferred SA FY19; and (3) Convicted SA FY19.

Each worksheet should include the following columns, populated with information responsive to the column headings for each case:

1. DoD_ID#
2. Name_Last
3. Name_First
4. M. I.
5. Gender
6. Race
7. Ethnicity
8. Service
9. Pay_Grade
10. Command
11. Court_Type (GCM, SPCM, SCM, Non-BDC JA-SPCM)
12. Date_Report_SA (date of unrestricted report of sexual assault offense)
13. Date_Preferral (date charges preferred)
14. Date_Referral (date charges referred)
15. Verdict_Date (date of findings)
16. Composition (MJ alone, Members, Officer/Enlisted)
17. AltDisbo_Y/N
18. AltDispo_Type (NJP, Separation in Lieu, Resignation in Lieu, Withdrawn)
19. AltDisbo_Date (date of alternative disposition)
20. Disposition_Type (conviction/acquittal)
21. Date_Disposition (date of disposition)
22. Offense_Charged (list of all charges/specifications on charge sheet)
23. Offense_Type (penetrative/contact sex assault offense)
24. Pleas_Findings (pleas/findings for each charge/specification)
25. Discharge (BCD, DD, Dismissal)
26. Sentence (sentence at court-martial, by charge (if applicable))
27. CA_Sentence (sentence approved by convening authority)

IV. Definitions

- (A) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.
- (B) The term “completed,” with respect to a case, means that the case was tried to verdict, dismissed without further action, dismissed and then resolved by nonjudicial or administrative proceedings, or no legal action taken at all.
- (C) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.
- (D) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

Request for Information
RFI Set 18A, Questions 1–3
Topic: Assessment of Racial and Ethnic Disparities in the Military Justice System
Date of Request: August 7, 2020

I. Purpose

- D. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- E. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- F. The DAC-IPAD requests the below information to facilitate its required assessment of racial and ethnic disparities in the military justice system pursuant to section 540I of the National Defense Authorization Act of 2020.

II. Requested Response Date

Suspense	Question(s)	Proponent
7 Sep 20	1–3	Military Services – Provide an Excel workbook with three (3) worksheets: (1) Unrestricted Report SA FY19; (2) Preferred SA FY19; and (3) Convicted SA FY19.

III. Assessment of Racial and Ethnic Disparities in the Military Justice System

Question 1: The DAC-IPAD requests the Military Services use information from the Services’ case management systems to identify the race and ethnicity of members of the Armed Forces who were the subject of a penetrative sexual assault offense or contact sexual assault offense allegation in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in fiscal year 2019; the DAC-IPAD also requests the race and ethnicity of the victims of these offenses.

Question 2: The DAC-IPAD requests the Military Services use information from the Services’ case management systems to identify the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in fiscal year 2019; the DAC-IPAD also requests the race and ethnicity of the victims of these offenses.

Question 3: The DAC-IPAD requests the Military Services use information from the Services’ case management systems to identify the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in fiscal year 2019; the DAC-IPAD also requests the race and ethnicity of the victim of the offense.

Please provide completed Excel workbook to the DAC-IPAD by September 7, 2020.

IV. Assessment of Racial and Ethnic Disparities in the Military Justice System (cont.)

Additional information concerning Military Services' submission. The Excel workbook consists of three worksheets titled: (1) Unrestricted Report SA FY19; (2) Preferred SA FY19; and (3) Convicted SA FY19.

Each worksheet should include the following columns, populated with information responsive to the column headings for each case. Note that items 1-27 were requested in RFI 18; items 28-33 address the six additional data points requested in this updated RFI 18A:

28. DoD_ID#
29. Name_Last
30. Name_First
31. M. I.
32. Gender
33. Race
34. Ethnicity
35. Service
36. Pay_Grade
37. Command
38. Court_Type (GCM, SPCM, SCM, Non-BDC JA-SPCM)
39. Date_Report_SA (date of unrestricted report of sexual assault offense)
40. Date_Preferral (date charges preferred)
41. Date_Referral (date charges referred)
42. Verdict_Date (date of findings)
43. Composition (MJ alone, Members, Officer/Enlisted)
44. AltDisbo_Y/N
45. AltDispo_Type (NJP, Separation in Lieu, Resignation in Lieu, Withdrawn)
46. AltDisbo_Date (date of alternative disposition)
47. Disposition_Type (conviction/acquittal)
48. Date_Disposition (date of disposition)
49. Offense_Charged (list of all charges/specifications on charge sheet)
50. Offense_Type (penetrative/contact sex assault offense)
51. Pleas_Findings (pleas/findings for each charge/specification)
52. Discharge (BCD, DD, Dismissal)
53. Sentence (sentence at court-martial, by charge (if applicable))
54. CA Sentence (sentence approved by convening authority)
55. Age of the subject at the time of the alleged offense
56. Age of the victim at the time of the alleged offense
57. Race of the victim
58. Ethnicity of the victim
59. Gender of the victim
60. Military rank of the victim or indicate if a civilian

V. Definitions

- (A) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.
- (B) The term “completed,” with respect to a case, means that the case was tried to verdict, dismissed without further action, dismissed and then resolved by nonjudicial or administrative proceedings, or no legal action taken at all.
- (C) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.
- (D) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

APPENDIX G. SERVICE RESPONSES TO THE RACE AND ETHNICITY REQUEST FOR INFORMATION SET 18A

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) was established by the Secretary of Defense in February 2016 pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015, as amended. The Committee is tasked by its authorizing statute to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, drawing on its review of such cases on an ongoing basis.

In the FY20 NDAA, Congress tasked the DAC-IPAD with a review and assessment of race and ethnicity in the military justice system, with a particular focus on sexual offenses. Specifically, the DAC-IPAD was directed to review and assess, by fiscal year, the race and ethnicity of:

- (1) members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed;
- (2) members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed; and
- (3) members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

This appendix is in three parts: (1) each Services' narrative explanation on the process utilized to respond to the DAC-IPAD request for information concerning race and ethnicity in the Military Services; (2) each Services' data provided in response to RFI 18A in table format; and (3) a graphical representation of observed data pertaining to the subject and victim from the Services' data provided in response to RFI 18A. The DAC-IPAD relied on the Services to report cases meeting the criteria specified. The Committee could not independently verify the Services' responses, and therefore does not assert that it has the complete universe of cases throughout the Military Services in which a penetrative or contact sexual offense was reported, sexual offense charges were preferred, or a sexual offense conviction was obtained at court-martial. In the data that follows: percentages may not total 100, owing to rounding errors or missing data; and Cadets/Midshipmen and warrant officers are included with "officers" in tables and figures.

Section I: Services' Narrative Explanation

Although the DAC-IPAD requested the same data from each Service, the responses varied. This was not surprising, because the Military Services maintain their own unique case management databases in their respective criminal investigative organizations and as part of their military justice systems. Also, because the DAC-IPAD was not able to independently verify the accuracy of the Services' responses, it does not assert that it has all cases meeting the congressional criteria.

Army Response

The Army used three databases to compile its data responses to the RFI. First, the Army Criminal Investigative Division (CID) searched the Army Law Enforcement Tracking System (ALERTS) for every sexual assault report closed in FY19. A case was considered "closed" upon receipt of the DA Form 4833, Commander's Report of Disciplinary Action. Cases on this list may have been reported in an earlier fiscal year, but they were included if the DA Form 4833 was received in FY19. Next, the Social Security numbers of all the FY19 closed cases from the ALERTS system were run through the Army Court-Martial Information System (ACMIS) and Military Justice Online (MJO) to capture the disposition of the cases. The Army uses ACMIS for all general courts-martial and special courts-martial with at least one Article 39a, UCMJ, session. The MJO database includes all nonjudicial punishments and all courts-martial beginning at prefferal of charges.

Based on these data pulls, the Army provided two separate responses to the RFI. In August 2020, the Army first provided a response with cases closed in FY19. In September 2020, the Army provided a second response with additional cases. However, the August and September responses could not be reconciled to confirm a single universe of FY19 cases. Thus, for this report the DAC-IPAD analyzed only the initial August response, which was more comprehensive; but in doing so, it used additional data for victims that were provided only in the September response. The Army's race and ethnicity data, may have originated from a range of sources, including self-reported data during intake interviews and data from personnel files.

Navy Response

The Navy organized its race and ethnicity data into the three categories requested in the RFI: unrestricted reports, preferred charges, and convictions. The Naval Criminal Investigative Service (NCIS) provided the data for each investigation of a named military Service member subject completed in FY19. NCIS pulled these cases from its Consolidated Law Enforcement Operations Center (CLEOC) database. By policy, NCIS does not close investigations that involve more than one subject until the cases of all the subjects involved in an investigation are complete. Thus, the Navy also pulled data from the Navy-Marine Corps Case Management System (CMS) for all cases involving sexual offenses closed in CMS during FY19. Finally, the Navy compared the list of cases received from NCIS with the list of cases pulled from CMS and identified an additional 23 cases.

NCIS gathered the race and ethnicity data from various sources. In many cases, race and ethnicity may be self-reported by the subject or victim during an investigation. In some cases, NCIS may obtain race and ethnicity data from the Defense Enrollment Eligibility Reporting System (DEERS) or the National Crime Information Center (NCIC). In other cases, race and ethnicity data may be obtained from the subject's or victim's Official Military Personnel File (OMPF) or Service Record Book (SRB).

Marine Corps Response

The Marine Corps used the same methodology as the Navy. The Marine Corps obtained the requested FY19 data for unrestricted reports of penetrative and contact sexual offenses against adult victims from NCIS. NCIS pulled the race and ethnicity data for both the subject and the victim from the CLEOC. Next, the Marine Corps used CMS to identify the cases with preferred charges and convictions for penetrative and contact sexual offenses.

Air Force Response

The Air Force organized its data differently. In the first requested category, the Air Force provided cases involving penetrative and contact sexual offenses investigated in FY19 that were closed with no charges preferred. In the second requested category, the Air Force provided cases involving penetrative and contact sexual offenses investigated in FY19 in which charges were preferred but no conviction was obtained. In the requested third category, the Air Force provided cases involving penetrative and contact sexual offenses investigated in FY19 that resulted in a conviction for at least one charged offense—but in some cases that conviction was not for a sexual offense.

The Air Force limited its data search to relevant records in the Air Force Automated Military Justice Analysis and Management System (AMJAMS) database; it did not seek information from the case management systems of the Air Force Office of Special Investigations (AFOSI). The Air Force reported that demographic data, including race and ethnicity, are automatically populated into AMJAMS from either the Air Force Personnel Center (AFPC) database or the Air Reserve Personnel Center (ARPC) database. The AMJAMS database has five options for reporting race: White, Black or African American, Asian, Native Hawaiian or Other Pacific Islander, and American Indian/Alaskan Native. The AMJAMS options for reporting ethnicity are Not Hispanic or Latino, Hispanic or Latino, and Decline to Respond. The demographic data reflected in accession paperwork are self-reported by individuals when they enter the Air Force. For cases closed in FY19, the Air Force did not collect data relating to the race, ethnicity, and gender of the victim; thus, this information was not provided to the DAC-IPAD.

Coast Guard Response

The Coast Guard used three databases to compile its data responses for the RFI. First, the Coast Guard Investigative Service's (CGIS) database that tracks each investigation, called the Field Activity Case Tracking System (FACTS), contains race and ethnicity data on both the subjects of investigations and the victims. Second, the Coast Guard utilized their personnel database, Direct Access. Direct Access captures race and ethnicity data, other demographic data, and personnel data related to nonjudicial punishment and administrative separations. Third, the Coast Guard Judge Advocate General has a military justice case management system called Law Manager, which tracks all cases in which charges have been preferred. Law Manager was recently updated to allow the manual entry of race and ethnicity data. However, the cases relevant to RFI 18A were entered into Law Manager prior to that update. Consequently, cases listed in Law Manager had to be cross-referenced with Direct Access, FACTS, or both to determine subject race and ethnicity data.

The primary source for race and ethnicity data is Direct Access, from which the data are transcribed into FACTS and, after FY19, into Law Manager. DEERS was not consulted for this study. When Direct Access lacks them, the race and ethnicity data can be provided by CGIS, which asks the member for that information at the beginning of an interview and records it in the interview log. Coast Guard members also self-report their race and ethnicity on a standard form, the Coast Guard's Ethnicity and Race Self-Reporting Worksheet (Form CG-5200). In addition, every member has the ability to log into Direct Access, and may use a drop-down menu to change their race and ethnicity identification at any time. Coast Guard race and ethnicity categories match the Office of Management and Budget (OMB) standards for collecting, maintaining, and presenting these data, although members may decline to respond or may pick a combination of categories.

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**TABLE 1:
 ARMY: RACE AND ETHNICITY OF THE SUBJECT**

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 1,164)		(N = 173)		(N = 72)	
American Indian/ Alaskan Native	5	0.4	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	36	3.1	6	3.5	1	1.4
Black/African American	341	29.3	64	37.0	22	30.6
Two or more/Other	34	2.9	3	1.7	2	2.8
White	738	63.4	99	57.2	47	65.3
Unknown	10	0.9	1	0.6	0	0.0
Ethnicity	(N = 1,164)		(N = 173)		(N = 72)	
Hispanic or Latino	234	20.1	32	18.5	16	22.2
Not Hispanic or Latino	864	74.2	133	76.9	54	75.0
Unknown	66	5.7	8	4.6	2	2.8

**TABLE 2:
ARMY: SEX, STATUS, AND PAY GRADE OF THE SUBJECT**

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 1,164)		(N = 173)		(N = 72)	
Male	1,129	97.0	173	100.0	72	100.0
Female	35	3.0	0	0.0	0	0.0
Unknown	0	0.0	0	0.0	0	0.0
Status	(N = 1,164)		(N = 173)		(N = 72)	
Officer	88	7.6	13	7.5	9	12.5
Enlisted	1,076	92.4	160	92.5	63	87.5
Unknown	0	0.0	0	0.0	0	0.0
Pay Grade	(N = 1,076)		(N = 160)		(N = 63)	
Enlisted	(N = 1,076)		(N = 160)		(N = 63)	
E-1	86	8.0	7	4.4	2	3.2
E-2	111	10.3	19	11.9	10	15.9
E-3	181	16.8	23	14.4	8	12.7
E-4	315	29.3	57	35.6	24	38.1
E-5	167	15.5	30	18.8	11	17.5
E-6	139	12.9	12	7.5	6	9.5
E-7	57	5.3	7	4.4	1	1.6
E-8	15	1.4	3	1.9	0	0.0
E-9	5	0.5	2	1.3	1	1.6
Officer^a	(N = 88)		(N = 13)		(N = 9)	
W-1	1	1.1	0	0.0	0	0.0
W-2	3	3.4	0	0.0	0	0.0
W-3	5	5.7	2	15.4	2	22.2
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
Cadet	18	20.5	0	0.0	0	0.0
O-1	7	8.0	1	7.7	1	11.1
O-2	9	10.2	1	7.7	1	11.1
O-3	28	31.8	6	46.2	4	44.4
O-4	9	10.2	2	15.4	1	11.1
O-5	7	8.0	1	7.7	0	0.0
O-6	1	1.1	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no subjects documented by the DAC-IPAD, they are omitted from this table.

REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN
THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY

**TABLE 3:
ARMY: AGE OF THE SUBJECT**

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 1,164)		(N = 173)		(N = 72)	
17	1	0.1	0	0.0	0	0.0
18	20	1.7	0	0.0	0	0.0
19	48	4.1	1	0.6	1	1.4
20	51	4.4	2	1.2	1	1.4
21	51	4.4	0	0.0	0	0.0
22	37	3.2	1	0.6	0	0.0
23	32	2.7	1	0.6	0	0.0
24	24	2.1	0	0.0	0	0.0
25	23	2.0	1	0.6	1	1.4
26	24	2.1	0	0.0	0	0.0
27	21	1.8	0	0.0	0	0.0
28	23	2.0	0	0.0	0	0.0
29	14	1.2	0	0.0	0	0.0
30	15	1.3	0	0.0	0	0.0
31	11	0.9	0	0.0	0	0.0
32	9	0.8	0	0.0	0	0.0
33	10	0.9	2	1.2	0	0.0
34	13	1.1	0	0.0	0	0.0
35	12	1.0	0	0.0	0	0.0
36	11	0.9	0	0.0	0	0.0
37	14	1.2	0	0.0	0	0.0
38	9	0.8	0	0.0	0	0.0
39	3	0.3	0	0.0	0	0.0
40	3	0.3	0	0.0	0	0.0
41	4	0.3	0	0.0	0	0.0
42	5	0.4	0	0.0	0	0.0
43	0	0.0	0	0.0	0	0.0
44	3	0.3	0	0.0	0	0.0
45	1	0.1	0	0.0	0	0.0
46	1	0.1	0	0.0	0	0.0
47	0	0.0	0	0.0	0	0.0
48	1	0.1	0	0.0	0	0.0
49	2	0.2	0	0.0	0	0.0
50	1	0.1	0	0.0	0	0.0
53	2	0.2	0	0.0	0	0.0
55	1	0.1	0	0.0	0	0.0
56	0	0.0	0	0.0	0	0.0
Unknown	664	57.0	165	95.4	69	95.8

TABLE 4
ARMY: RACE AND ETHNICITY OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 1,164)		(N = 173)		(N = 72)	
American Indian/ Alaskan Native	6	0.5	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	23	2.0	0	0.0	0	0.0
Black/African American	92	7.9	2	1.2		0.0
Two or more/Other	14	1.2	1	0.6	1	1.4
White	335	28.8	5	2.9	2	2.8
Unknown	694	59.6	165	95.4	69	95.8
Ethnicity	(N = 1,164)		(N = 173)		(N = 72)	
Hispanic or Latino	81	7.0	1	0.6	1	1.4
Not Hispanic or Latino	385	33.1	7	4.0	2	2.8
Unknown	698	60.0	165	95.4	69	95.8

REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN
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TABLE 5
ARMY: SEX, STATUS, AND PAY GRADE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 1,164)		(N = 173)		(N = 72)	
Male	50	4.3	5	2.9	1	1.4
Female	441	37.9	3	1.7	2	2.8
Unknown	673	57.8	165	95.4	69	95.8
Status	(N = 1,164)		(N = 173)		(N = 72)	
Military	277	23.8	5	2.9	2	2.8
Civilian	214	18.4	3	1.7	1	1.4
Unknown	673	57.8	165	95.4	69	95.8
Pay Grade	(N = 251)		(N = 5)		(N = 2)	
Enlisted	(N = 251)		(N = 5)		(N = 2)	
E-1	36	14.3	1	20.0	1	50.0
E-2	44	17.5	0	0.0	0	0.0
E-3	63	25.1	3	60.0	1	50.0
E-4	74	29.5	0	0.0	0	0.0
E-5	15	6.0	0	0.0	0	0.0
E-6	14	5.6	0	0.0	0	0.0
E-7	3	1.2	1	20.0	0	0.0
E-8	2	0.8	0	0.0	0	0.0
E-9	0	0.0	0	0.0	0	0.0
Officer^a	(N = 26)		(N = 0)		(N = 0)	
W-1	0	0.0	0	0.0	0	0.0
W-2	1	3.8	0	0.0	0	0.0
W-3	0	0.0	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
Cadet	9	34.6	0	0.0	0	0.0
O-1	7	26.9	0	0.0	0	0.0
O-2	4	15.4	0	0.0	0	0.0
O-3	4	15.4	0	0.0	0	0.0
O-4	1	3.8	0	0.0	0	0.0
O-5	0	0.0	0	0.0	0	0.0
O-6	0	0.0	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no victims documented by the DAC-IPAD, they are omitted from this table.

TABLE 6
ARMY: AGE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 1,164)		(N = 173)		(N = 72)	
< 17	33	2.8	0	0.0	0	0.0
17	10	0.9	0	0.0	0	0.0
18	48	4.1	0	0.0	0	0.0
19	69	5.9	0	0.0	0	0.0
20	57	4.9	1	0.6	0	0.0
21	47	4.0	2	1.2	1	1.4
22	37	3.2	1	0.6	0	0.0
23	26	2.2	0	0.0	0	0.0
24	24	2.1	0	0.0	0	0.0
25	15	1.3	1	0.6	1	1.4
26	30	2.6	1	0.6	1	1.4
27	15	1.3	0	0.0	0	0.0
28	8	0.7	0	0.0	0	0.0
29	9	0.8	0	0.0	0	0.0
30	13	1.1	1	0.6	0	0.0
31	5	0.4	0	0.0	0	0.0
32	2	0.2	0	0.0	0	0.0
33	5	0.4	0	0.0	0	0.0
34	5	0.4	0	0.0	0	0.0
35	7	0.6	0	0.0	0	0.0
36	5	0.4	0	0.0	0	0.0
37	4	0.3	0	0.0	0	0.0
38	6	0.5	0	0.0	0	0.0
39	3	0.3	0	0.0	0	0.0
40	2	0.2	0	0.0	0	0.0
41	0	0.0	0	0.0	0	0.0
42	1	0.1	0	0.0	0	0.0
43	0	0.0	0	0.0	0	0.0
44	1	0.1	1	0.6	0	0.0
45	1	0.1	0	0.0	0	0.0
53	1	0.1	0	0.0	0	0.0
54	1	0.1	0	0.0	0	0.0
Unknown	674	57.9	165	95.4	69	95.8

TABLE 7
NAVY: RACE AND ETHNICITY OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 1,164)		(N = 104)		(N = 9)	
American Indian/ Alaskan Native	5	0.8	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	32	5.2	8	7.7	0	0.0
Black/African American	178	29.2	29	27.9	4	44.4
Two or more/Other	15	2.5	4	3.8	0	0.0
White	349	57.2	61	58.7	5	55.6
Unknown	31	5.1	2	1.9	0	0.0
Ethnicity	(N = 610)		(N = 104)		(N = 9)	
Hispanic or Latino	95	15.6	16	15.4	0	0.0
Not Hispanic or Latino	432	70.8	78	75.0	9	100.0
Unknown	83	13.6	10	9.6	0	0.0

TABLE 8
NAVY: SEX, STATUS, AND PAY GRADE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 610)		(N = 104)		(N = 9)	
Male	589	96.6	104	100.0	9	100.0
Female	20	3.3	0	0.0	0	0.0
Unknown	1	0.2	0	0.0	0	0.0
Status	(N = 610)		(N = 104)		(N = 9)	
Officer	36	5.9	7	6.7	0	0.0
Enlisted	574	94.1	97	93.3	9	100.0
Unknown	0	0.0	0	0.0	0	0.0
Pay Grade						
Enlisted	(N = 574)		(N = 97)		(N = 9)	
E-1	40	7.0	5	5.2	1	11.1
E-2	39	6.8	8	8.2	2	22.2
E-3	128	22.3	19	19.6	2	22.2
E-4	119	20.7	22	22.7	0	0.0
E-5	122	21.3	21	21.6	1	11.1
E-6	82	14.3	14	14.4	1	11.1
E-7	37	6.4	7	7.2	2	22.2
E-8	6	1.0	0	0.0	0	0.0
E-9	1	0.2	1	1.0	0	0.0
Officer^a	(N = 36)		(N = 7)		(N = 0)	
W-1	0	0.0	0	0.0	0	0.0
W-2	1	2.8	0	0.0	0	0.0
W-3	0	0.0	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	1	2.8	0	0.0	0	0.0
MIDN	5	13.9	1	14.3	0	0.0
O-1	2	5.6	1	14.3	0	0.0
O-2	6	16.7	3	42.9	0	0.0
O-3	11	30.6	0	0.0	0	0.0
O-4	4	11.1	0	0.0	0	0.0
O-5	5	13.9	2	28.6	0	0.0
O-6	1	2.8	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no subjects documented by the DAC-IPAD, they are omitted from this table.

REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN
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TABLE 9
NAVY: AGE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 610)		(N = 104)		(N = 9)	
17	2	0.3	0	0.0	0	0.0
18	17	2.8	1	1.0	0	0.0
19	44	7.2	5	4.8	1	11.1
20	45	7.4	8	7.7	0	0.0
21	47	7.7	7	6.7	1	11.1
22	51	8.4	7	6.7	0	0.0
23	51	8.4	9	8.7	1	11.1
24	33	5.4	7	6.7	0	0.0
25	30	4.9	5	4.8	1	11.1
26	33	5.4	6	5.8	0	0.0
27	27	4.4	6	5.8	1	11.1
28	24	3.9	8	7.7	0	0.0
29	22	3.6	6	5.8	2	22.2
30	32	5.2	8	7.7	0	0.0
31	16	2.6	1	1.0	0	0.0
32	14	2.3	1	1.0	0	0.0
33	7	1.1	1	1.0	0	0.0
34	6	1.0	1	1.0	0	0.0
35	14	2.3	3	2.9	0	0.0
36	15	2.5	1	1.0	0	0.0
37	6	1.0	1	1.0	0	0.0
38	11	1.8	2	1.9	2	22.2
39	9	1.5	3	2.9	0	0.0
40	5	0.8	0	0.0	0	0.0
41	5	0.8	0	0.0	0	0.0
42	3	0.5	1	1.0	0	0.0
43	1	0.2	0	0.0	0	0.0
44	5	0.8	1	1.0	0	0.0
45	3	0.5	1	1.0	0	0.0
46	1	0.2	0	0.0	0	0.0
47	1	0.2	0	0.0	0	0.0
48	0	0.0	0	0.0	0	0.0
49	2	0.3	0	0.0	0	0.0
50	1	0.2	0	0.0	0	0.0
51	3	0.5	1	1.0	0	0.0
52	2	0.3	0	0.0	0	0.0
56	1	0.2	0	0.0	0	0.0
Unknown	21	3.4	3	2.9	0	0.0

TABLE 10
NAVY: RACE AND ETHNICITY OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 734)		(N = 130)		(N = 18)	
American Indian/ Alaskan Native	9	1.2	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	42	5.7	11	8.5	1	5.6
Black/African American	108	14.7	17	13.1	5	27.8
Two or more/Other	24	3.3	3	2.3	0	0.0
White	510	69.5	94	72.3	12	66.7
Unknown	41	5.6	5	3.8	0	0.0
Ethnicity	(N = 734)		(N = 130)		(N = 18)	
Hispanic or Latino	126	17.2	21	16.2	3	16.7
Not Hispanic or Latino	516	70.3	88	67.7	14	77.8
Unknown	92	12.5	21	16.2	1	5.6

TABLE 11
NAVY: SEX, STATUS, AND PAY GRADE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 734)		(N = 130)		(N = 18)	
Male	109	14.9	21	16.2	10	55.6
Female	624	85.0	108	83.1	8	44.4
Unknown	1	0.1	1	0.8	0	0.0
Status	(N = 734)		(N = 130)		(N = 18)	
Military	559	76.2	102	78.5	16	88.9
Civilian	123	16.8	20	15.4	2	11.1
Unknown	52	7.1	8	6.2	0	0.0
Pay Grade						
Enlisted	(N = 535)		(N = 101)		(N = 16)	
E-1	62	11.6	9	8.9	0	0.0
E-2	79	14.8	15	14.9	0	0.0
E-3	169	31.6	26	25.7	6	37.5
E-4	125	23.4	30	29.7	8	50.0
E-5	77	14.4	15	14.9	2	12.5
E-6	18	3.4	4	4.0	0	0.0
E-7	5	0.9	2	2.0	0	0.0
E-8	0	0.0	0	0.0	0	0.0
E-9	0	0.0	0	0.0	0	0.0
Officer^a	(N = 24)		(N = 1)		(N = 0)	
W-1	0	0.0	0	0.0	0	0.0
W-2	0	0.0	0	0.0	0	0.0
W-3	0	0.0	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
MIDN	7	29.2	0	0.0	0	0.0
O-1	4	16.7	0	0.0	0	0.0
O-2	3	12.5	0	0.0	0	0.0
O-3	6	25.0	1	100.0	0	0.0
O-4	2	8.3	0	0.0	0	0.0
O-5	2	8.3	0	0.0	0	0.0
O-6	0	0.0	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no victims documented by the DAC-IPAD, they are omitted from this table.

TABLE 12
NAVY: AGE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 734)		(N = 130)		(N = 18)	
< 17	3	0.4	0	0.0	0	0.0
17	7	1.0	0	0.0	0	0.0
18	69	9.4	15	11.5	0	0.0
19	110	15.0	19	14.6	3	16.7
20	102	13.9	20	15.4	5	27.8
21	87	11.9	15	11.5	3	16.7
22	67	9.1	16	12.3	4	22.2
23	50	6.8	9	6.9	0	0.0
24	38	5.2	8	6.2	0	0.0
25	28	3.8	5	3.8	2	11.1
26	32	4.4	5	3.8	0	0.0
27	16	2.2	2	1.5	1	5.6
28	22	3.0	5	3.8	0	0.0
29	9	1.2	2	1.5	0	0.0
30	12	1.6	4	3.1	0	0.0
31	5	0.7	0	0.0	0	0.0
32	6	0.8	0	0.0	0	0.0
33	5	0.7	2	1.5	0	0.0
34	8	1.1	2	1.5	0	0.0
35	2	0.3	0	0.0	0	0.0
36	13	1.8	0	0.0	0	0.0
37	6	0.8	0	0.0	0	0.0
38	4	0.5	0	0.0	0	0.0
39	1	0.1	0	0.0	0	0.0
40	3	0.4	0	0.0	0	0.0
41	3	0.4	0	0.0	0	0.0
42	3	0.4	0	0.0	0	0.0
43	0	0.0	0	0.0	0	0.0
44	1	0.1	0	0.0	0	0.0
45	0	0.0	0	0.0	0	0.0
46	1	0.1	0	0.0	0	0.0
47	2	0.3	0	0.0	0	0.0
48	3	0.4	0	0.0	0	0.0
49	3	0.4	0	0.0	0	0.0
50	1	0.1	0	0.0	0	0.0
51	1	0.1	0	0.0	0	0.0
52	2	0.3	0	0.0	0	0.0
53	1	0.1	0	0.0	0	0.0
66	1	0.1	0	0.0	0	0.0
Unknown	7	1.0	1	0.8	0	0.0

TABLE 13
MARINE CORPS: RACE AND ETHNICITY OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 487)		(N = 84)		(N = 16)	
American Indian/ Alaskan Native	2	0.4	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	11	2.3	1	1.2	0	0.0
Black/African American	102	20.9	18	21.4	5	31.3
Two or more/Other	22	4.5	2	2.4	0	0.0
White	339	69.6	63	75.0	11	68.8
Unknown	11	2.3	0	0.0	0	0.0
Ethnicity	(N = 487)		(N = 84)		(N = 16)	
Hispanic or Latino	127	26.1	28	33.3	7	43.8
Not Hispanic or Latino	330	67.8	54	64.3	9	56.3
Unknown	30	6.2	2	2.4	0	0.0

TABLE 14
MARINE CORPS: SEX, STATUS, AND PAY GRADE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 487)		(N = 84)		(N = 16)	
Male	476	97.7	83	98.8	16	100.0
Female	11	2.3	1	1.2	0	0.0
Unknown	0	0.0	0	0.0	0	0.0
Status	(N = 487)		(N = 84)		(N = 16)	
Officer	16	3.3	1	1.2	0	0.0
Enlisted	471	96.7	83	98.8	16	100.0
Unknown	0	0.0	0	0.0	0	0.0
Pay Grade						
Enlisted	(N = 471)		(N = 83)		(N = 16)	
E-1	16	3.4	7	8.4	1	6.3
E-2	61	13.0	12	14.5	1	6.3
E-3	137	29.1	19	22.9	5	31.3
E-4	117	24.8	26	31.3	6	37.5
E-5	85	18.0	11	13.3	2	12.5
E-6	36	7.6	5	6.0	1	6.3
E-7	13	2.8	1	1.2	0	0.0
E-8	4	0.8	1	1.2	0	0.0
E-9	2	0.4	1	1.2	0	0.0
Officer^a	(N = 16)		(N = 1)		(N = 0)	
W-1	0	0.0	0	0.0	0	0.0
W-2	0	0.0	0	0.0	0	0.0
W-3	1	6.3	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
O-1	2	12.5	1	100.0	0	0.0
O-2	2	12.5	0	0.0	0	0.0
O-3	4	25.0	0	0.0	0	0.0
O-4	5	31.3	0	0.0	0	0.0
O-5	1	6.3	0	0.0	0	0.0
O-6	1	6.3	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no subjects documented by the DAC-IPAD, they are omitted from this table.

TABLE 15
MARINE CORPS: AGE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 487)		(N = 84)		(N = 16)	
17	3	0.6	0	0.0	0	0.0
18	22	4.5	3	3.6	0	0.0
19	51	10.5	9	10.7	1	6.3
20	62	12.7	6	7.1	1	6.3
21	77	15.8	13	15.5	5	31.3
22	62	12.7	15	17.9	3	18.8
23	42	8.6	8	9.5	1	6.3
24	26	5.3	8	9.5	1	6.3
25	29	6.0	4	4.8	1	6.3
26	24	4.9	5	6.0	1	6.3
27	11	2.3	1	1.2	1	6.3
28	9	1.8	1	1.2	0	0.0
29	12	2.5	3	3.6	0	0.0
30	8	1.6	1	1.2	0	0.0
31	7	1.4	0	0.0	0	0.0
32	5	1.0	1	1.2	0	0.0
33	6	1.2	0	0.0	0	0.0
34	4	0.8	1	1.2	0	0.0
35	4	0.8	0	0.0	0	0.0
36	5	1.0	1	1.2	0	0.0
37	6	1.2	3	3.6	1	6.3
38	1	0.2	0	0.0	0	0.0
39	2	0.4	0	0.0	0	0.0
40	3	0.6	0	0.0	0	0.0
41	1	0.2	0	0.0	0	0.0
42	0	0.0	0	0.0	0	0.0
43	2	0.4	1	1.2	0	0.0
44	2	0.4	0	0.0	0	0.0
45	0	0.0	0	0.0	0	0.0
46	0	0.0	0	0.0	0	0.0
47	0	0.0	0	0.0	0	0.0
48	0	0.0	0	0.0	0	0.0
49	1	0.2	0	0.0	0	0.0

TABLE 16
MARINE CORPS: RACE AND ETHNICITY OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 563)		(N = 133)		(N = 21)	
American Indian/ Alaskan Native	2	0.4	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	33	5.9	6	4.5	1	4.8
Black/African American	47	8.3	10	7.5	1	4.8
Two or more/Other	27	4.8	5	3.8	0	0.0
White	433	76.9	111	83.5	19	90.5
Unknown	21	3.7	1	0.8	0	0.0
Ethnicity	(N = 563)		(N = 133)		(N = 21)	
Hispanic or Latino	131	23.3	31	23.3	6	28.6
Not Hispanic or Latino	387	68.7	92	69.2	13	61.9
Unknown	45	8.0	10	7.5	2	9.5

TABLE 17
MARINE CORPS: SEX, STATUS, AND PAY GRADE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 563)		(N = 133)		(N = 21)	
Male	59	10.5	23	17.3	6	28.6
Female	496	88.1	109	82.0	15	71.4
Unknown	8	1.4	1	0.8	0	0.0
Status	(N = 563)		(N = 133)		(N = 21)	
Military	332	59.0	92	69.2	14	66.7
Civilian	215	38.2	40	30.1	7	33.3
Unknown	16	2.8	1	0.8	0	0.0
Pay Grade						
Enlisted	(N = 328)		(N = 92)		(N = 14)	
E-1	23	7.0	7	7.6	0	0.0
E-2	70	21.3	23	25.0	2	14.3
E-3	138	42.1	33	35.9	4	28.6
E-4	64	19.5	19	20.7	3	21.4
E-5	29	8.8	9	9.8	4	28.6
E-6	3	0.9	1	1.1	1	7.1
E-7	1	0.3	0	0.0	0	0.0
E-8	0	0.0	0	0.0	0	0.0
E-9	0	0.0	0	0.0	0	0.0
Officer^a	(N = 4)		(N = 0)		(N = 0)	
W-1	0	0.0	0	0.0	0	0.0
W-2	0	0.0	0	0.0	0	0.0
W-3	0	0.0	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
O-1	1	25.0	0	0.0	0	0.0
O-2	2	50.0	0	0.0	0	0.0
O-3	1	25.0	0	0.0	0	0.0
O-4	0	0.0	0	0.0	0	0.0
O-5	0	0.0	0	0.0	0	0.0
O-6	0	0.0	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no victims documented by the DAC-IPAD, they are omitted from this table.

TABLE 18
MARINE CORPS: AGE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 563)		(N = 133)		(N = 21)	
17	14	2.5	4	3.0	2	9.5
18	66	11.7	16	12.0	1	4.8
19	97	17.2	21	15.8	3	14.3
20	92	16.3	19	14.3	1	4.8
21	80	14.2	21	15.8	4	19.0
22	58	10.3	19	14.3	3	14.3
23	39	6.9	11	8.3	0	0.0
24	23	4.1	4	3.0	2	9.5
25	17	3.0	6	4.5	2	9.5
26	9	1.6	3	2.3	1	4.8
27	13	2.3	4	3.0	1	4.8
28	10	1.8	2	1.5	0	0.0
29	3	0.5	0	0.0	0	0.0
30	5	0.9	0	0.0	0	0.0
31	1	0.2	0	0.0	0	0.0
32	3	0.5	0	0.0	0	0.0
33	2	0.4	0	0.0	0	0.0
34	1	0.2	0	0.0	0	0.0
35	3	0.5	0	0.0	0	0.0
36	5	0.9	1	0.8	1	4.8
37	1	0.2	0	0.0	0	0.0
38	0	0.0	0	0.0	0	0.0
39	0	0.0	0	0.0	0	0.0
40	2	0.4	0	0.0	0	0.0
41	4	0.7	0	0.0	0	0.0
42	0	0.0	0	0.0	0	0.0
43	1	0.2	0	0.0	0	0.0
44	1	0.2	0	0.0	0	0.0
45	0	0.0	0	0.0	0	0.0
46	1	0.2	0	0.0	0	0.0
47	1	0.2	0	0.0	0	0.0
Unknown	11	2.0	2	1.5	0	0.0

TABLE 19
AIR FORCE: RACE AND ETHNICITY OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 440)		(N = 117)		(N = 31)	
American Indian/ Alaskan Native	7	1.6	2	1.7	0	0.0
Asian/Native Hawaiian/ Pacific Islander	22	5.0	8	6.8	2	6.5
Black/African American	93	21.1	34	29.1	11	35.5
Two or more/Other	29	6.6	9	7.7	1	3.2
White	264	60.0	60	51.3	16	51.6
Unknown	25	5.7	4	3.4	1	3.2
Ethnicity	(N = 440)		(N = 117)		(N = 31)	
Hispanic or Latino	37	8.4	18	15.4	5	16.1
Not Hispanic or Latino	123	28.0	50	42.7	17	54.8
Unknown	280	63.6	49	41.9	9	29.0

TABLE 20
AIR FORCE: SEX, STATUS, AND PAY GRADE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 440)		(N = 117)		(N = 31)	
Male	398	90.5	114	97.4	30	96.8
Female	40	9.1	2	1.7	1	3.2
Unknown	2	0.5	1	0.9	0	0.0
Status	(N = 440)		(N = 117)		(N = 31)	
Officer	42	9.5	9	7.7	5	16.1
Enlisted	398	90.5	108	92.3	26	83.9
Unknown	0	0.0	0	0.0	0	0.0
Pay Grade						
Enlisted	(N = 398)		(N = 108)		(N = 26)	
E-1	20	5.0	5	4.6	2	7.7
E-2	23	5.8	7	6.5	2	7.7
E-3	121	30.4	36	33.3	5	19.2
E-4	94	23.6	33	30.6	7	26.9
E-5	63	15.8	13	12.0	4	15.4
E-6	47	11.8	11	10.2	3	11.5
E-7	22	5.5	3	2.8	3	11.5
E-8	2	0.5	0	0.0	0	0.0
E-9	6	1.5	0	0.0	0	0.0
Officer^a	(N = 42)		(N = 9)		(N = 5)	
Cadet	4	9.5	2	22.2	1	20.0
O-1	6	14.3	1	11.1	1	20.0
O-2	4	9.5	1	11.1	1	20.0
O-3	15	35.7	2	22.2	0	0.0
O-4	5	11.9	1	11.1	0	0.0
O-5	6	14.3	1	11.1	1	20.0
O-6	2	4.8	1	11.1	1	20.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no subjects documented by the DAC-IPAD, they are omitted from this table.

TABLE 21
AIR FORCE: AGE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 440)		(N = 117)		(N = 31)	
18	5	1.1	0	0.0	0	0.0
19	27	6.1	8	6.8	3	9.7
20	37	8.4	16	13.7	2	6.5
21	52	11.8	21	17.9	4	12.9
22	34	7.7	9	7.7	1	3.2
23	29	6.6	9	7.7	0	0.0
24	31	7.0	10	8.5	4	12.9
25	22	5.0	6	5.1	4	12.9
26	19	4.3	6	5.1	2	6.5
27	21	4.8	2	1.7	0	0.0
28	21	4.8	4	3.4	0	0.0
29	24	5.5	9	7.7	3	9.7
30	12	2.7	4	3.4	1	3.2
31	12	2.7	2	1.7	1	3.2
32	8	1.8	2	1.7	1	3.2
33	13	3.0	1	0.9	1	3.2
34	10	2.3	2	1.7	1	3.2
35	8	1.8	0	0.0	0	0.0
36	8	1.8	0	0.0	0	0.0
37	7	1.6	1	0.9	0	0.0
38	8	1.8	0	0.0	0	0.0
39	7	1.6	1	0.9	1	3.2
40	6	1.4	2	1.7	1	3.2
41	6	1.4	1	0.9	0	0.0
42	1	0.2	0	0.0	0	0.0
43	2	0.5	0	0.0	0	0.0
44	3	0.7	0	0.0	0	0.0
45	2	0.5	0	0.0	0	0.0
46	1	0.2	0	0.0	0	0.0
50	1	0.2	0	0.0	0	0.0
54	1	0.2	1	0.9	1	3.2
56	1	0.2	0	0.0	0	0.0
Unknown	1	0.2	0	0.0	0	0.0

TABLE 22
AIR FORCE: RACE AND ETHNICITY OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 440)		(N = 117)		(N = 31)	
American Indian/ Alaskan Native	0	0.0	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	0	0.0	0	0.0	0	0.0
Black/African American	0	0.0	0	0.0	0	0.0
Two or more/Other	0	0.0	0	0.0	0	0.0
White	0	0.0	0	0.0	0	0.0
Unknown	440	100.0	117	100.0	31	100.0
Ethnicity	(N = 440)		(N = 117)		(N = 31)	
Hispanic or Latino	0	0.0	0	0.0	0	0.0
Not Hispanic or Latino	0	0.0	0	0.0	0	0.0
Unknown	440	100.0	117	100.0	31	100.0

TABLE 23
AIR FORCE: SEX, STATUS, AND PAY GRADE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 440)		(N = 117)		(N = 31)	
Male	4	0.9	4	3.4	0	0.0
Female	6	1.4	6	5.1	0	0.0
Unknown	430	97.7	107	91.5	31	100.0
Status	(N = 440)		(N = 117)		(N = 31)	
Military	0	0.0	0	0.0	0	0.0
Civilian	0	0.0	0	0.0	0	0.0
Unknown	440	100.0	117	100.0	31	100.0
Pay Grade						
Enlisted	(N = 0)		(N = 0)		(N = 0)	
E-1	0	0.0	0	0.0	0	0.0
E-2	0	0.0	0	0.0	0	0.0
E-3	0	0.0	0	0.0	0	0.0
E-4	0	0.0	0	0.0	0	0.0
E-5	0	0.0	0	0.0	0	0.0
E-6	0	0.0	0	0.0	0	0.0
E-7	0	0.0	0	0.0	0	0.0
E-8	0	0.0	0	0.0	0	0.0
E-9	0	0.0	0	0.0	0	0.0
Officer^a	(N = 0)		(N = 0)		(N = 0)	
Cadet	0	0.0	0	0.0	0	0.0
O-1	0	0.0	0	0.0	0	0.0
O-2	0	0.0	0	0.0	0	0.0
O-3	0	0.0	0	0.0	0	0.0
O-4	0	0.0	0	0.0	0	0.0
O-5	0	0.0	0	0.0	0	0.0
O-6	0	0.0	0	0.0	0	0.0
Unknown	(N = 440)		(N = 117)		(N = 31)	
Unknown	440	100.0	117	100.0	31	100.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no victims documented by the DAC-IPAD, they are omitted from this table.

TABLE 24
AIR FORCE: AGE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 563)		(N = 133)		(N = 21)	
18	0	0.0	0	0.0	0	0.0
19	0	0.0	0	0.0	0	0.0
20	0	0.0	0	0.0	0	0.0
21	0	0.0	0	0.0	0	0.0
22	0	0.0	0	0.0	0	0.0
23	0	0.0	0	0.0	0	0.0
24	0	0.0	0	0.0	0	0.0
25	0	0.0	0	0.0	0	0.0
26	0	0.0	0	0.0	0	0.0
27	0	0.0	0	0.0	0	0.0
28	0	0.0	0	0.0	0	0.0
29	0	0.0	0	0.0	0	0.0
30	0	0.0	0	0.0	0	0.0
31	0	0.0	0	0.0	0	0.0
32	0	0.0	0	0.0	0	0.0
33	0	0.0	0	0.0	0	0.0
34	0	0.0	0	0.0	0	0.0
35	0	0.0	0	0.0	0	0.0
36	0	0.0	0	0.0	0	0.0
37	0	0.0	0	0.0	0	0.0
38	0	0.0	0	0.0	0	0.0
39	0	0.0	0	0.0	0	0.0
40	0	0.0	0	0.0	0	0.0
41	0	0.0	0	0.0	0	0.0
42	0	0.0	0	0.0	0	0.0
43	0	0.0	0	0.0	0	0.0
44	0	0.0	0	0.0	0	0.0
45	0	0.0	0	0.0	0	0.0
50	0	0.0	0	0.0	0	0.0
Unknown	440	100.0	117	100.0	31	100.0

TABLE 25
COAST GUARD: RACE AND ETHNICITY OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 127)		(N = 22)		(N = 1)	
American Indian/ Alaskan Native	4	3.1	0	0.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	5	3.9	0	0.0	0	0.0
Black/African American	10	7.9	1	4.5	0	0.0
Two or more/Other	7	5.5	0	0.0	0	0.0
White	97	76.4	21	95.5	1	100.0
Unknown	4	3.1	0	0.0	0	0.0
Ethnicity	(N = 127)		(N = 22)		(N = 1)	
Hispanic or Latino	22	17.3	2	9.1	0	0.0
Not Hispanic or Latino	96	75.6	20	90.9	1	100.0
Unknown	9	7.1	0	0.0	0	0.0

TABLE 26
COAST GUARD: SEX, STATUS, AND PAY GRADE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 127)		(N = 22)		(N = 1)	
Male	120	94.5	22	100.0	1	100.0
Female	6	4.7	0	0.0	0	0.0
Unknown	1	0.8	0	0.0	0	0.0
Status	(N = 127)		(N = 22)		(N = 1)	
Officer	12	9.4	3	13.6	0	0.0
Enlisted	111	87.4	19	86.4	1	100.0
Unknown	4	3.1	0	0.0	0	0.0
Pay Grade						
Enlisted	(N = 111)		(N = 19)		(N = 1)	
E-1	6	5.4	0	0.0	0	0.0
E-2	8	7.2	1	5.3	0	0.0
E-3	22	19.8	3	15.8	0	0.0
E-4	33	29.7	5	26.3	1	100.0
E-5	17	15.3	6	31.6	0	0.0
E-6	17	15.3	3	15.8	0	0.0
E-7	6	5.4	0	0.0	0	0.0
E-8	0	0.0	0	0.0	0	0.0
E-9	2	1.8	1	5.3	0	0.0
Officer^a	(N = 12)		(N = 3)		(N = 0)	
W-1	0	0.0	0	0.0	0	0.0
W-2	2	16.7	0	0.0	0	0.0
W-3	1	8.3	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
Cadet	0	0.0	0	0.0	0	0.0
O-1	3	25.0	1	33.3	0	0.0
O-2	1	8.3	0	0.0	0	0.0
O-3	2	16.7	1	33.3	0	0.0
O-4	3	25.0	1	33.3	0	0.0
O-5	0	0.0	0	0.0	0	0.0
O-6	0	0.0	0	0.0	0	0.0
Unknown	4		0		0	

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no victims documented by the DAC-IPAD, they are omitted from this table.

TABLE 27
COAST GUARD: AGE OF THE SUBJECT

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 127)		(N = 22)		(N = 1)	
18	3	2.4	0	0.0	0	0.0
19	9	7.1	0	0.0	0	0.0
20	5	3.9	0	0.0	0	0.0
21	9	7.1	3	13.6	1	100.0
22	12	9.4	3	13.6	0	0.0
23	8	6.3	3	13.6	0	0.0
24	7	5.5	2	9.1	0	0.0
25	7	5.5	0	0.0	0	0.0
26	8	6.3	0	0.0	0	0.0
27	5	3.9	1	4.5	0	0.0
28	4	3.1	0	0.0	0	0.0
29	4	3.1	1	4.5	0	0.0
30	2	1.6	0	0.0	0	0.0
31	4	3.1	1	4.5	0	0.0
32	8	6.3	1	4.5	0	0.0
33	6	4.7	2	9.1	0	0.0
34	0	0.0	0	0.0	0	0.0
35	2	1.6	1	4.5	0	0.0
36	4	3.1	1	4.5	0	0.0
37	2	1.6	0	0.0	0	0.0
38	3	2.4	0	0.0	0	0.0
39	2	1.6	0	0.0	0	0.0
40	1	0.8	0	0.0	0	0.0
41	3	2.4	2	9.1	0	0.0
42	0	0.0	0	0.0	0	0.0
43	3	2.4	0	0.0	0	0.0
44	0	0.0	0	0.0	0	0.0
45	3	2.4	1	4.5	0	0.0
Unknown	3	2.4	0	0.0	0	0.0

TABLE 28
COAST GUARD: RACE AND ETHNICITY OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Race	(N = 137)		(N = 25)		(N = 1)	
American Indian/ Alaskan Native	2	1.5	1	4.0	0	0.0
Asian/Native Hawaiian/ Pacific Islander	6	4.4	0	0.0	0	0.0
Black/African American	5	3.6	1	4.0	0	0.0
Two or more/Other	4	2.9	0	0.0	0	0.0
White	115	83.9	23	92.0	1	100.0
Unknown	5	3.6	0	0.0	0	0.0
Ethnicity	(N = 137)		(N = 25)		(N = 1)	
Hispanic or Latino	13	9.5	0	0.0	0	0.0
Not Hispanic or Latino	115	83.9	24	96.0	1	100.0
Unknown	9	6.6	1	4.0	0	0.0

TABLE 29
COAST GUARD: SEX, STATUS, AND PAY GRADE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Sex	(N = 137)		(N = 25)		(N = 1)	
Male	24	17.5	3	12.0	0	0.0
Female	113	82.5	22	88.0	1	100.0
Unknown	0	0.0	0	0.0	0	0.0
Status	(N = 137)		(N = 25)		(N = 1)	
Military	94	68.6	19	76.0	1	100.0
Civilian	39	28.5	6	24.0	0	0.0
Unknown	4	2.9	0	0.0	0	0.0
Pay Grade						
Enlisted	(N = 79)		(N = 15)		(N = 0)	
E-1	8	9.9	1	6.7	0	0.0
E-2	11	13.6	0	0.0	0	0.0
E-3	23	28.4	6	40.0	0	0.0
E-4	24	29.6	8	53.3	0	0.0
E-5	9	11.1	0	0.0	0	0.0
E-6	5	6.2	0	0.0	0	0.0
E-7	1	1.2	0	0.0	0	0.0
E-8	0	0.0	0	0.0	0	0.0
E-9	0	0.0	0	0.0	0	0.0
Officer^a	(N = 15)		(N = 4)		(N = 1)	
W-1	0	0.0	0	0.0	0	0.0
W-2	0	0.0	0	0.0	0	0.0
W-3	0	0.0	0	0.0	0	0.0
W-4	0	0.0	0	0.0	0	0.0
W-5	0	0.0	0	0.0	0	0.0
Cadet	3	23.1	1	25.0	0	0.0
O-1	6	46.2	1	25.0	1	100.0
O-2	4	30.8	2	50.0	0	0.0
O-3	0	0.0	0	0.0	0	0.0
O-4	0	0.0	0	0.0	0	0.0
O-5	0	0.0	0	0.0	0	0.0
O-6	0	0.0	0	0.0	0	0.0

^a Because the pay grades of O-7, O-8, O-9, and O-10 had no victims documented by the DAC-IPAD, they are omitted from this table.

TABLE 30
COAST GUARD: AGE OF THE VICTIM

	Sexual Offense Unrestricted Report		Sexual Offense Charge(s) Preferred		Sexual Offense Conviction at Court-Martial	
	n	%	n	%	n	%
Age	(N = 137)		(N = 25)		(N = 1)	
17	1	0.7	0	0.0	0	0.0
18	8	5.8	2	8.0	0	0.0
19	22	16.1	2	8.0	0	0.0
20	9	6.6	3	12.0	0	0.0
21	14	10.2	2	8.0	0	0.0
22	15	10.9	3	12.0	0	0.0
23	8	5.8	2	8.0	0	0.0
24	12	8.8	3	12.0	0	0.0
25	4	2.9	0	0.0	0	0.0
26	7	5.1	0	0.0	0	0.0
27	5	3.6	3	12.0	0	0.0
28	3	2.2	1	4.0	0	0.0
29	4	2.9	2	8.0	1	100.0
30	0	0.0	0	0.0	0	0.0
31	1	0.7	0	0.0	0	0.0
32	0	0.0	0	0.0	0	0.0
33	0	0.0	0	0.0	0	0.0
34	3	2.2	0	0.0	0	0.0
35	3	2.2	0	0.0	0	0.0
36	4	2.9	1	4.0	0	0.0
37	3	2.2	0	0.0	0	0.0
38	1	0.7	0	0.0	0	0.0
39	3	2.2	1	4.0	0	0.0
40	1	0.7	0	0.0	0	0.0
41	1	0.7	0	0.0	0	0.0
42	0	0.0	0	0.0	0	0.0
43	1	0.7	0	0.0	0	0.0
Unknown	4	2.9	0	0.0	0	0.0

Section III: Services' RFI Response Graphical Observations

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FIGURE 1. ARMY: RACE OF THE SUBJECT

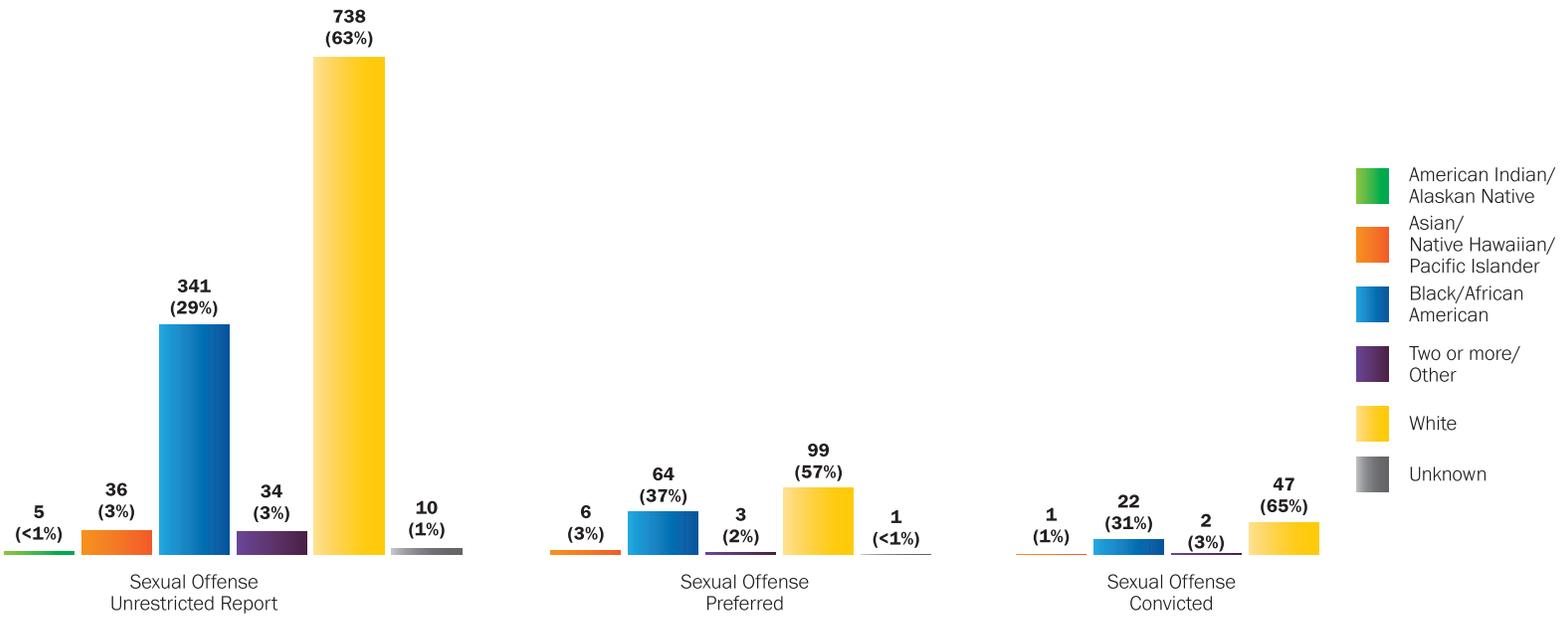


FIGURE 2. ARMY: RACE OF THE VICTIM

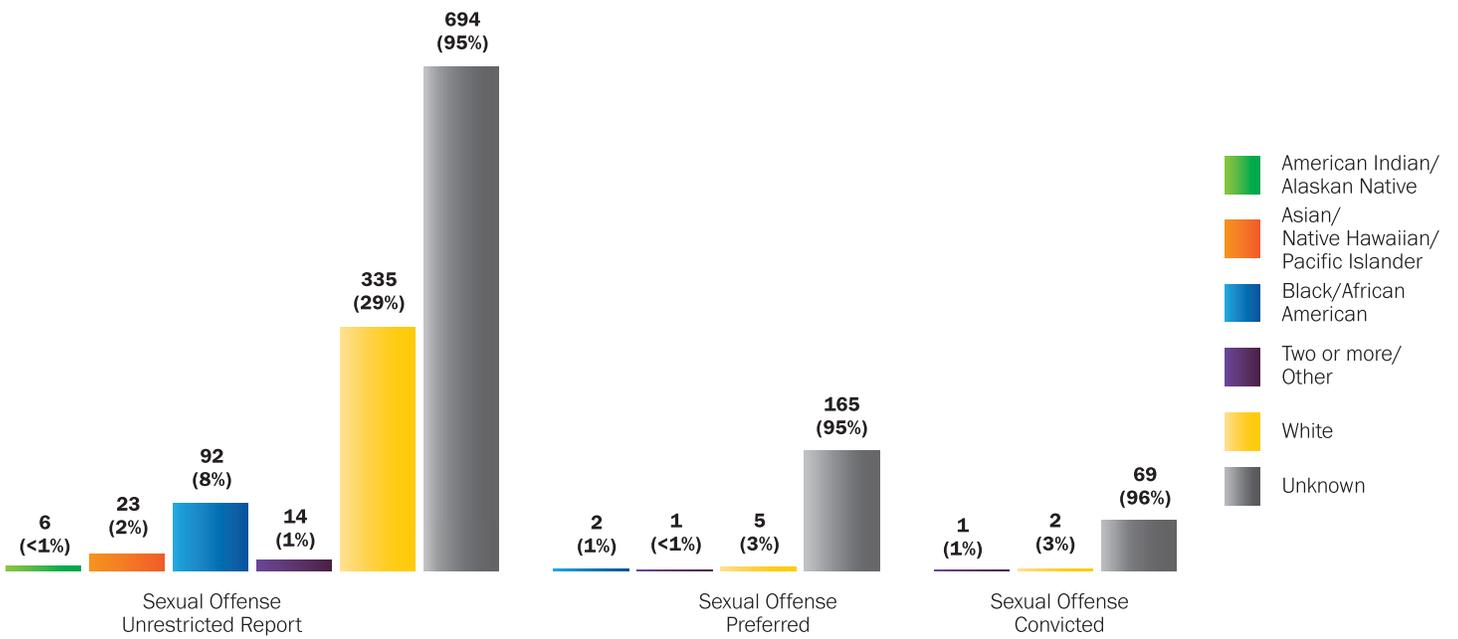


FIGURE 3. ARMY: ETHNICITY OF THE SUBJECT

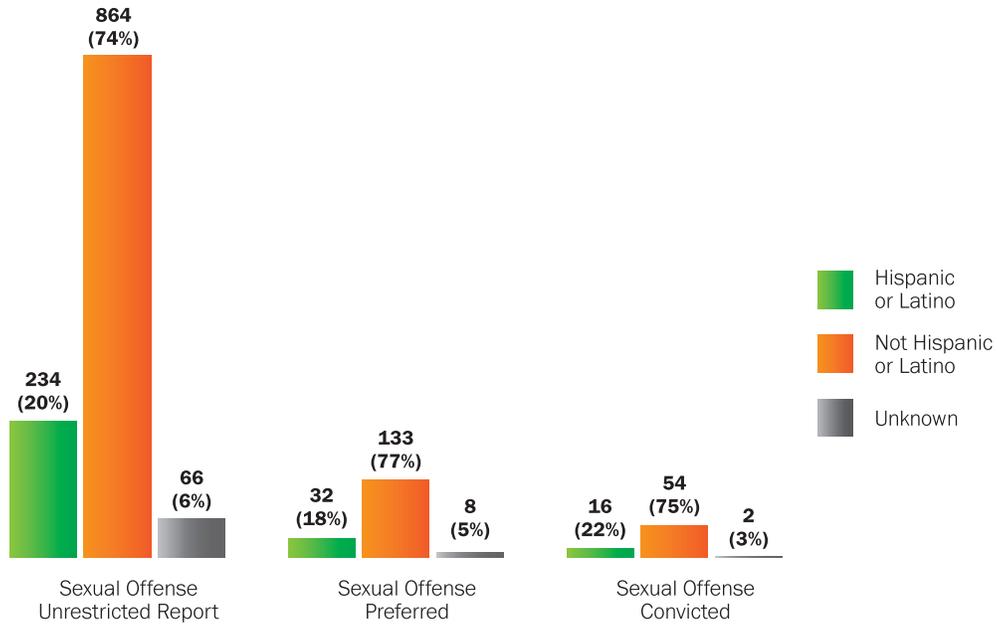


FIGURE 4. ARMY: ETHNICITY OF THE VICTIM

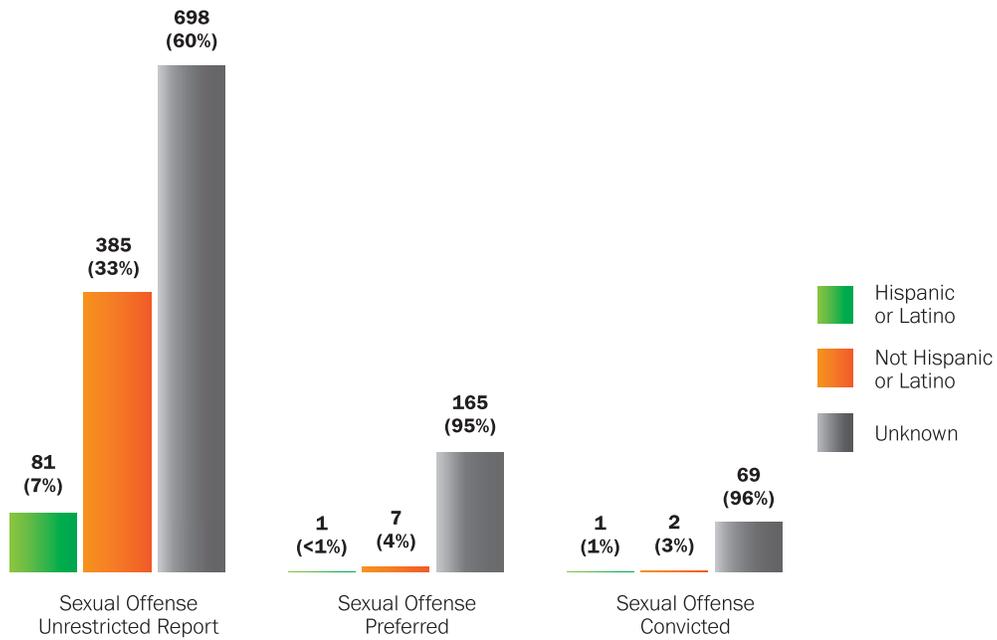


FIGURE 5. ARMY: SEX OF THE SUBJECT

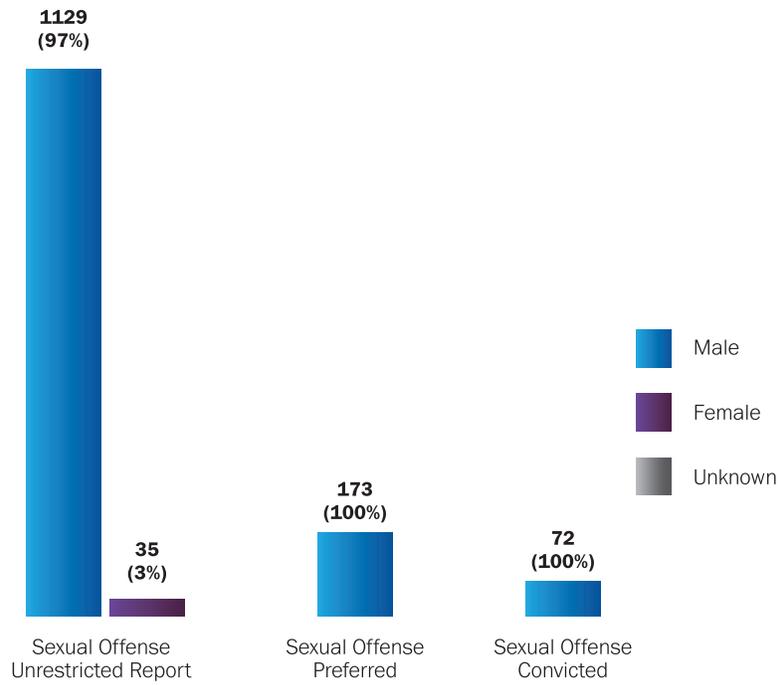


FIGURE 6. ARMY: SEX OF THE VICTIM

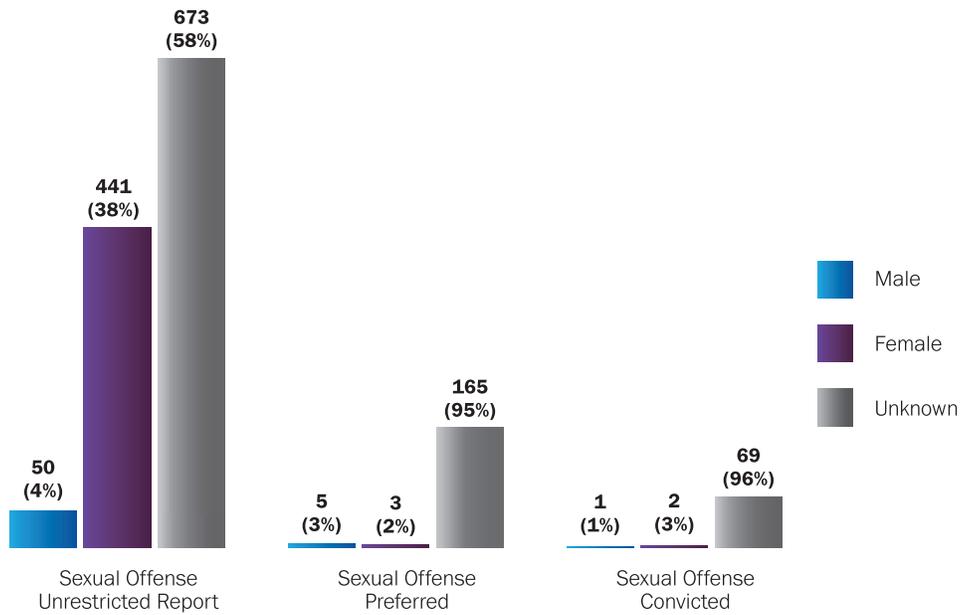


FIGURE 7. ARMY: STATUS OF THE SUBJECT

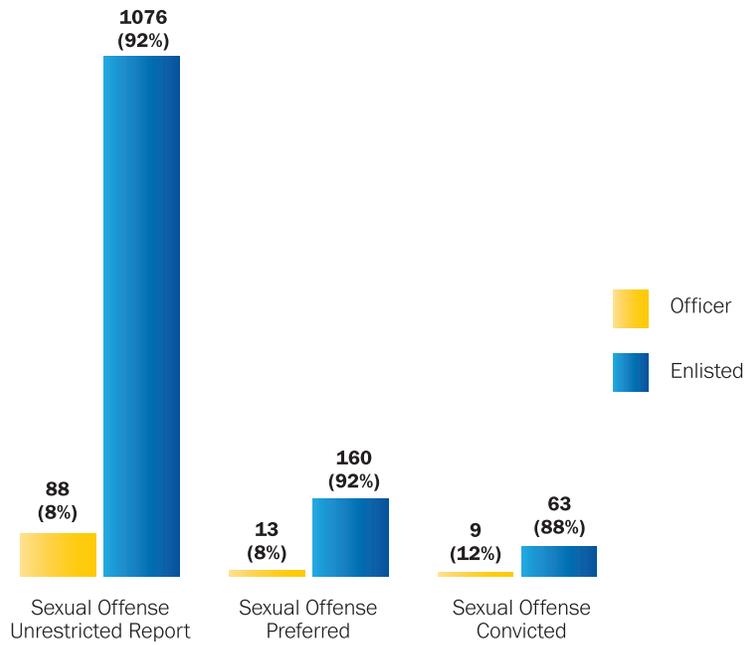


FIGURE 8. ARMY: STATUS OF THE VICTIM

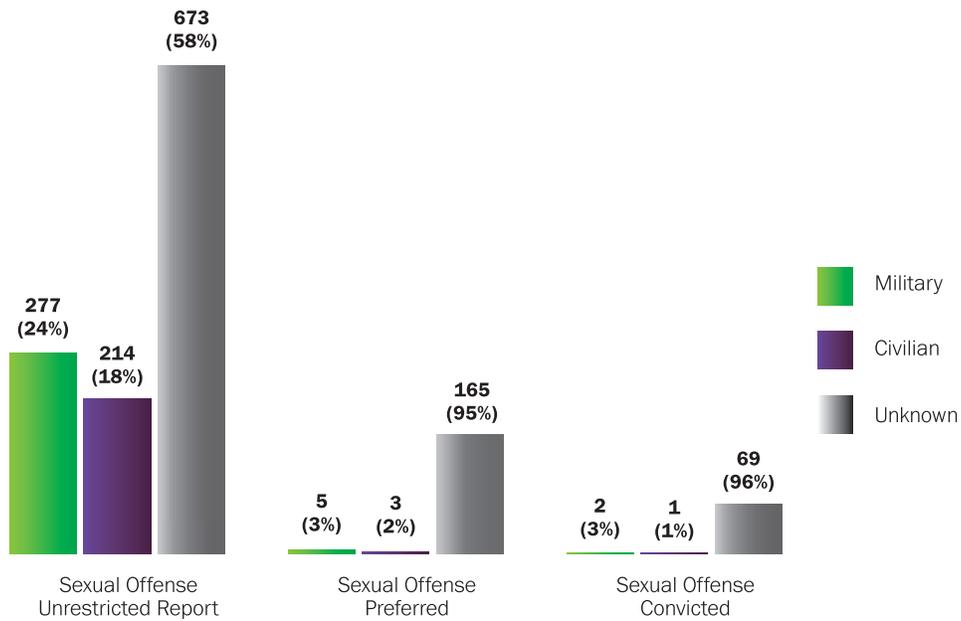


FIGURE 9. ARMY: PAY GRADE OF THE SUBJECT

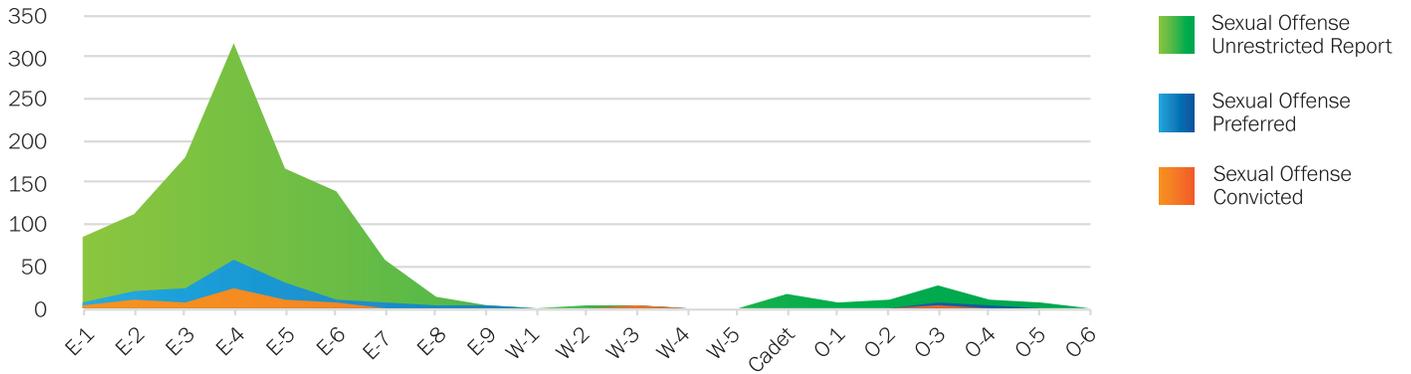


FIGURE 10. ARMY: PAY GRADE OF THE VICTIM

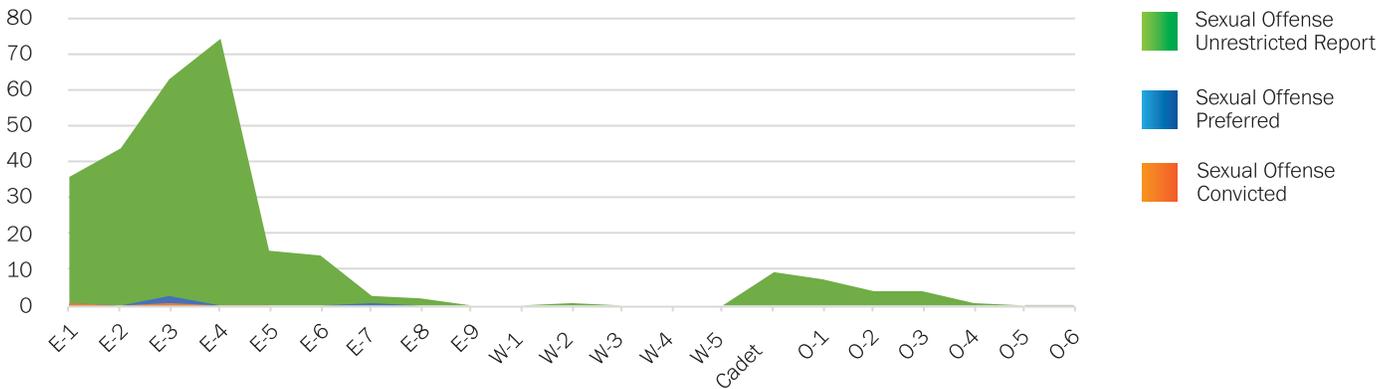


FIGURE 11. ARMY: AGE OF THE SUBJECT

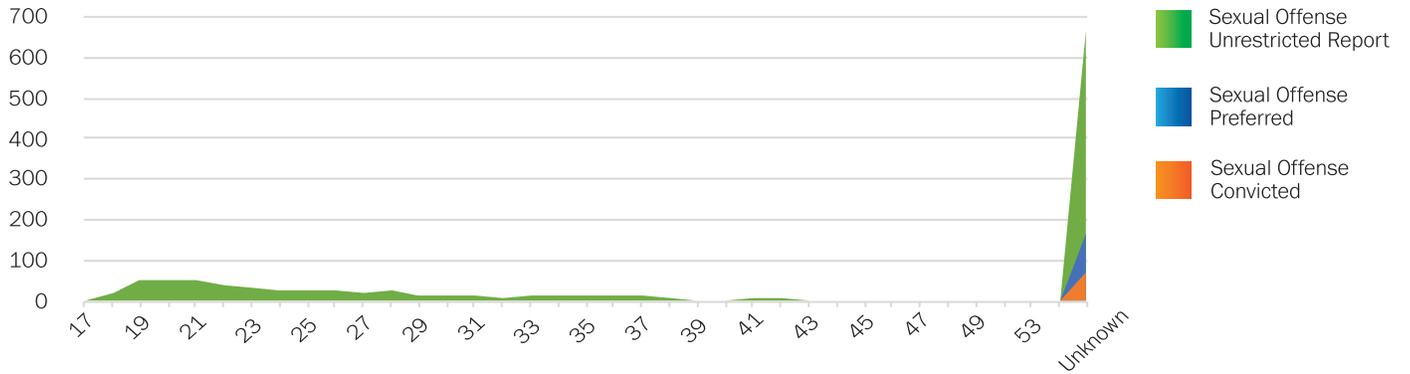


FIGURE 12. ARMY: AGE OF THE VICTIM

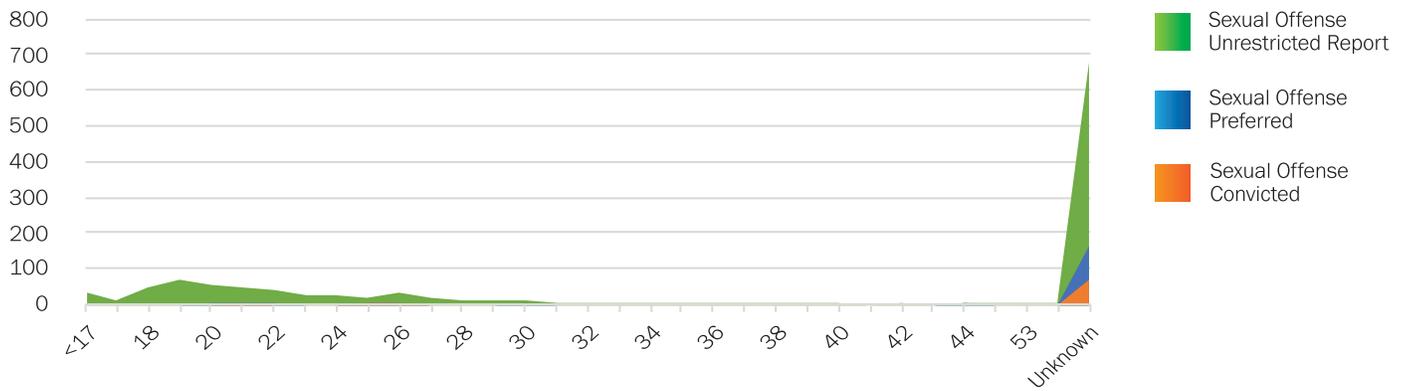


FIGURE 13. NAVY: RACE OF THE SUBJECT

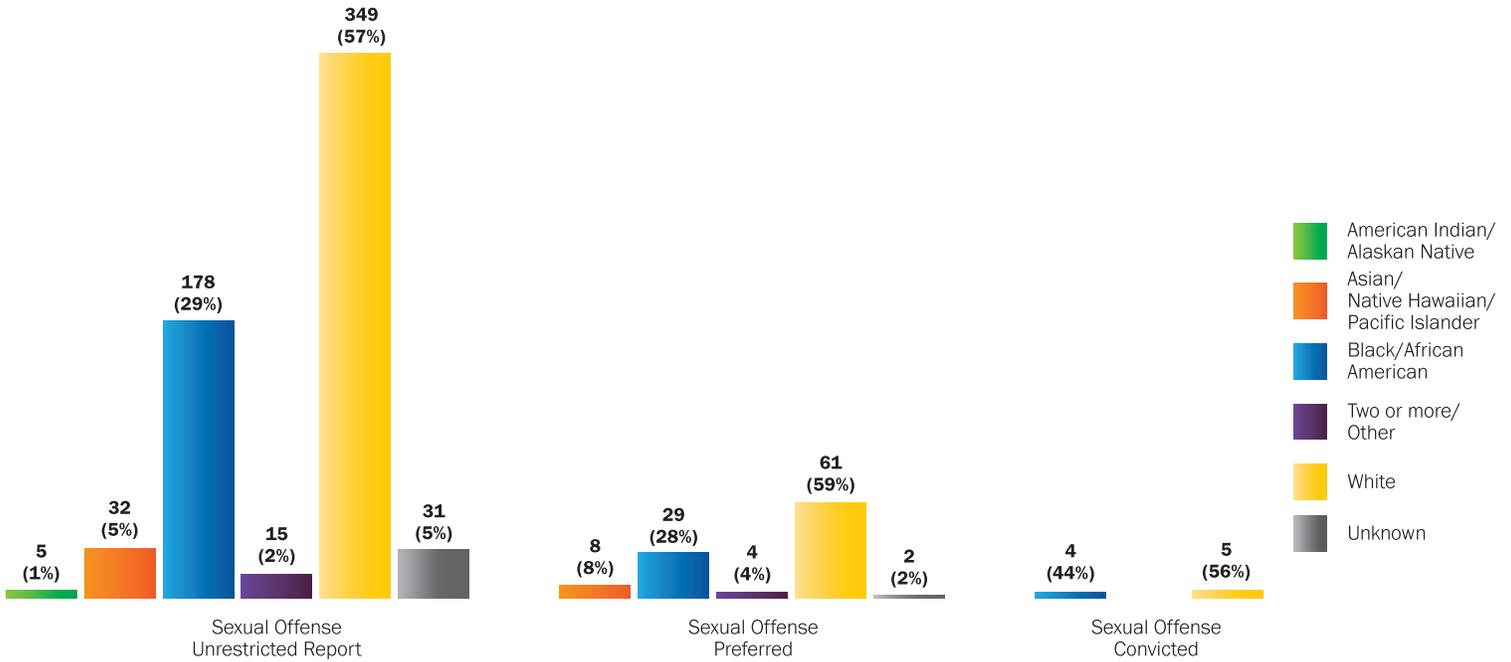


FIGURE 14. NAVY: RACE OF THE VICTIM

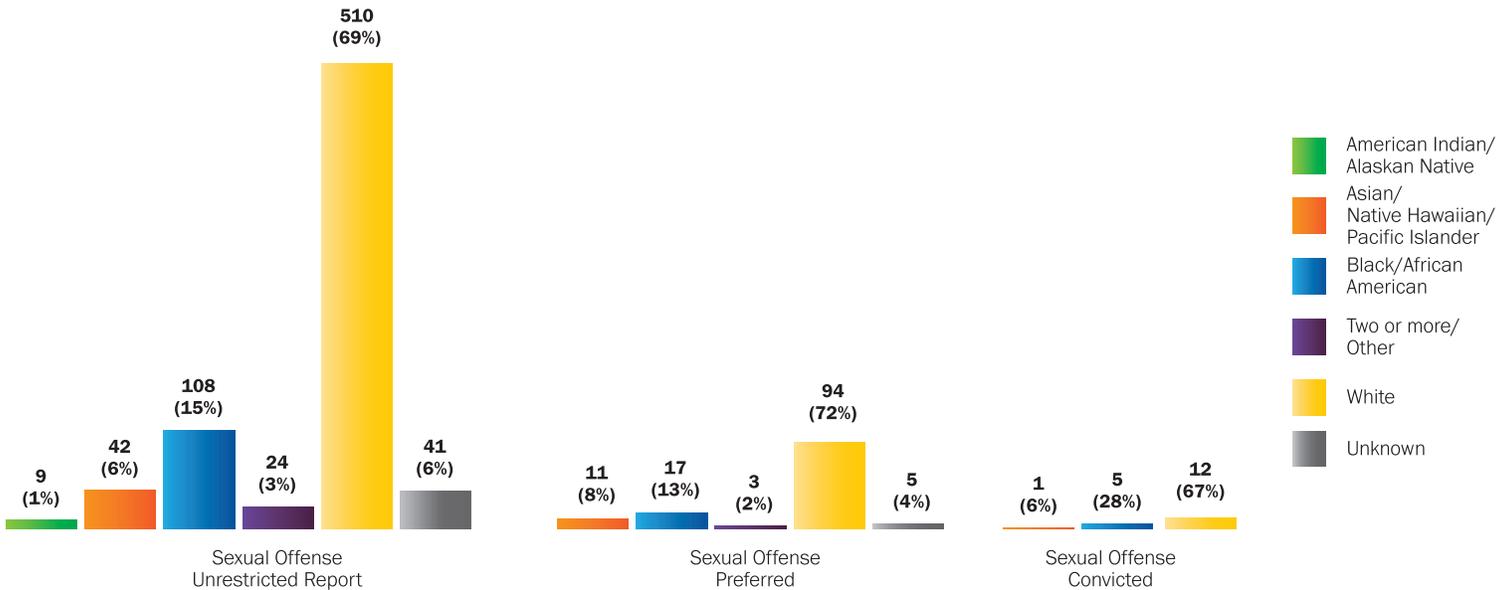


FIGURE 15. NAVY: ETHNICITY OF THE SUBJECT

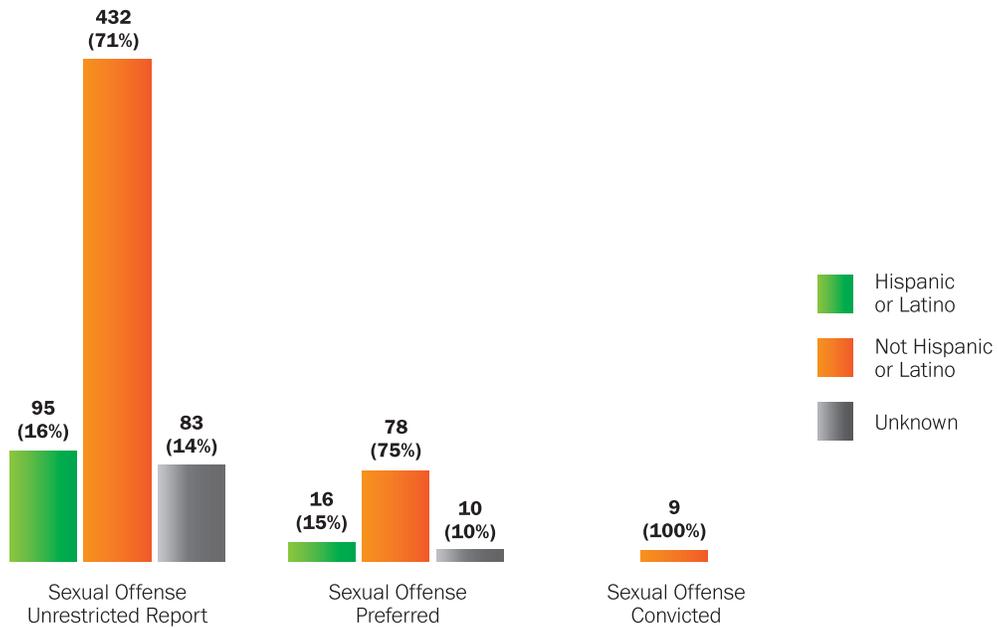


FIGURE 16. NAVY: ETHNICITY OF THE VICTIM

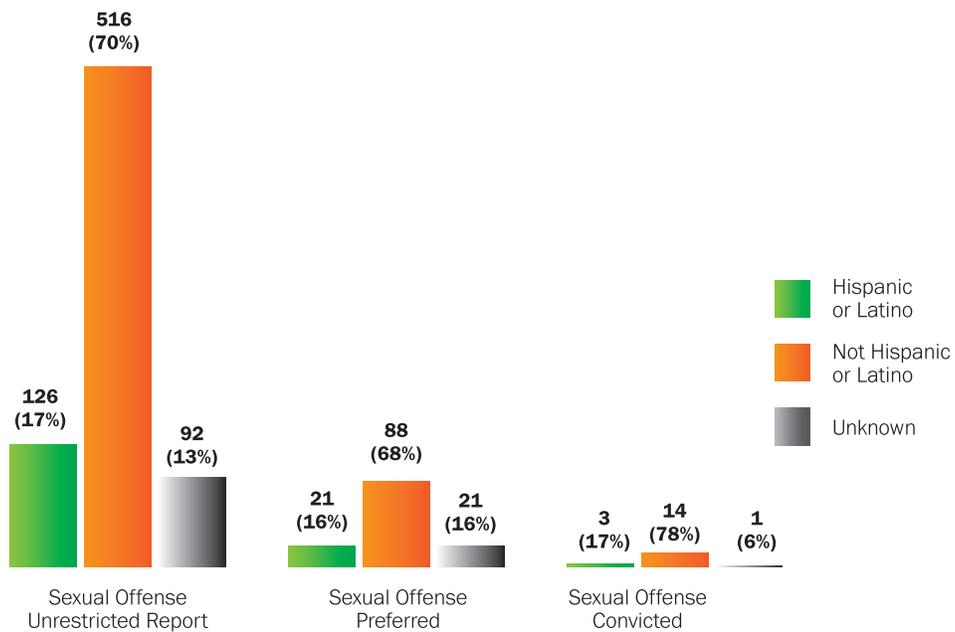


FIGURE 17. NAVY: SEX OF THE SUBJECT

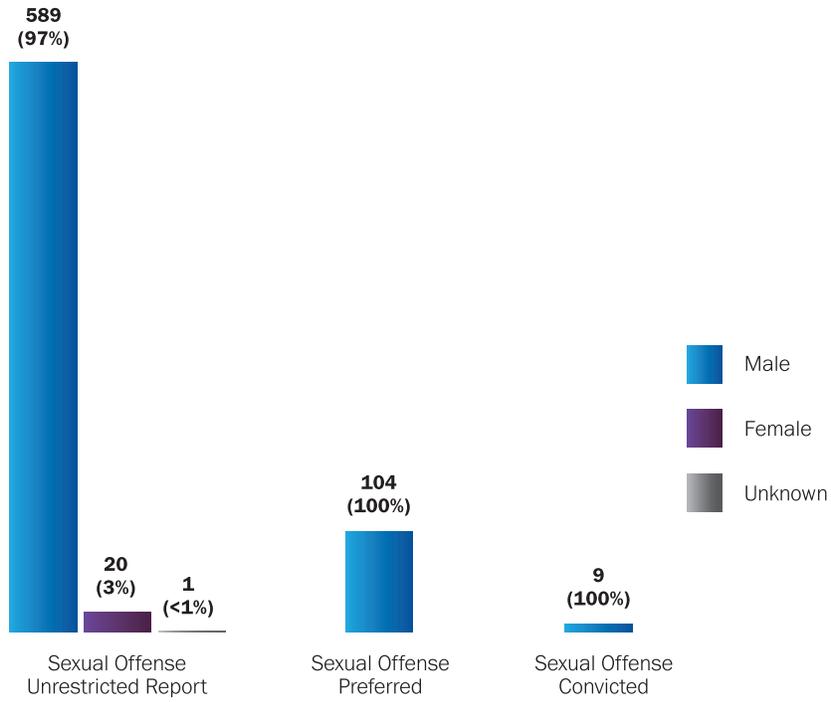


FIGURE 18. NAVY: SEX OF THE VICTIM

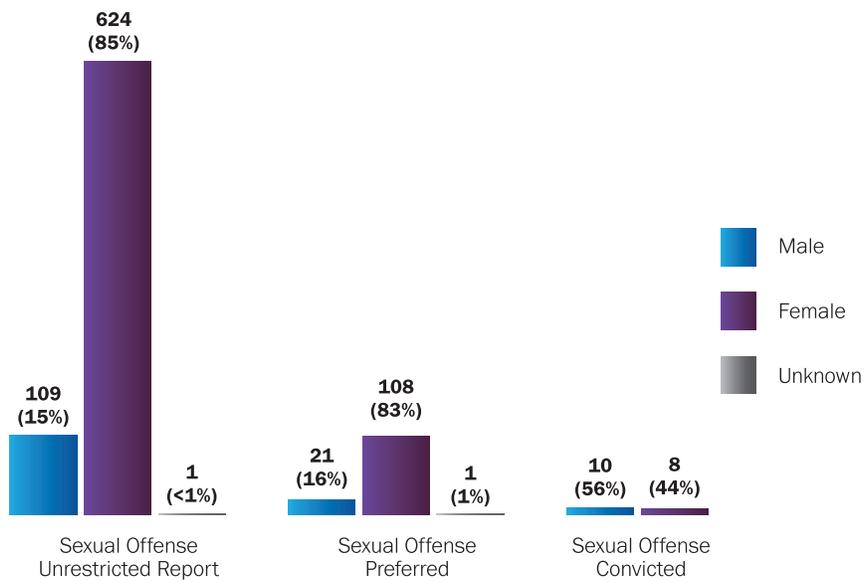


FIGURE 19. NAVY: STATUS OF THE SUBJECT

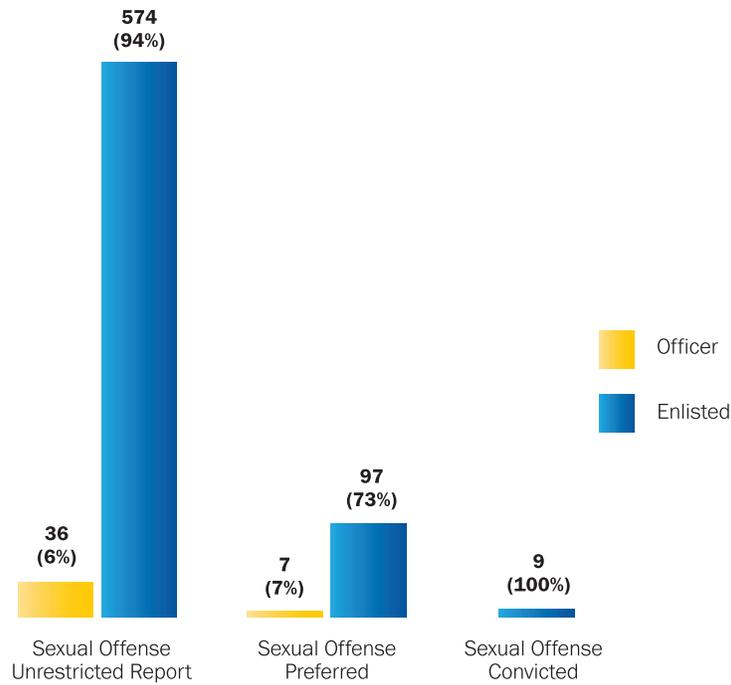


FIGURE 20. NAVY: STATUS OF THE VICTIM

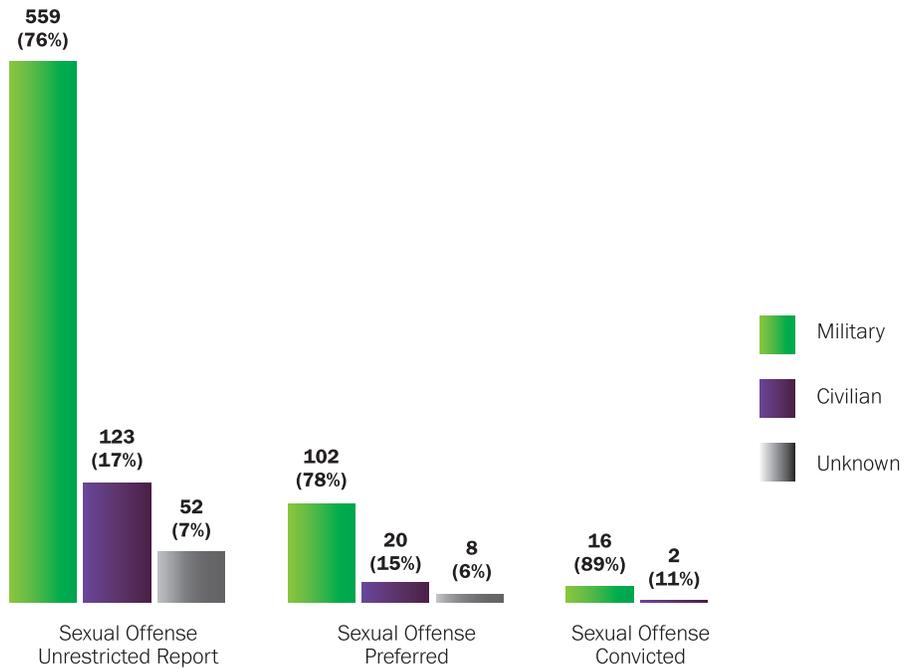


FIGURE 21. NAVY: PAY GRADE OF THE SUBJECT

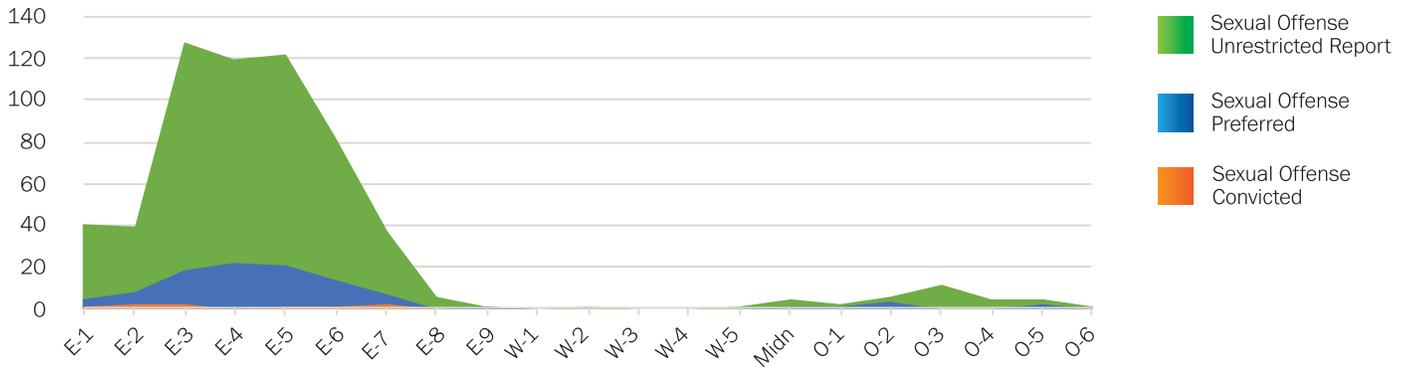


FIGURE 22. NAVY: PAY GRADE OF THE VICTIM

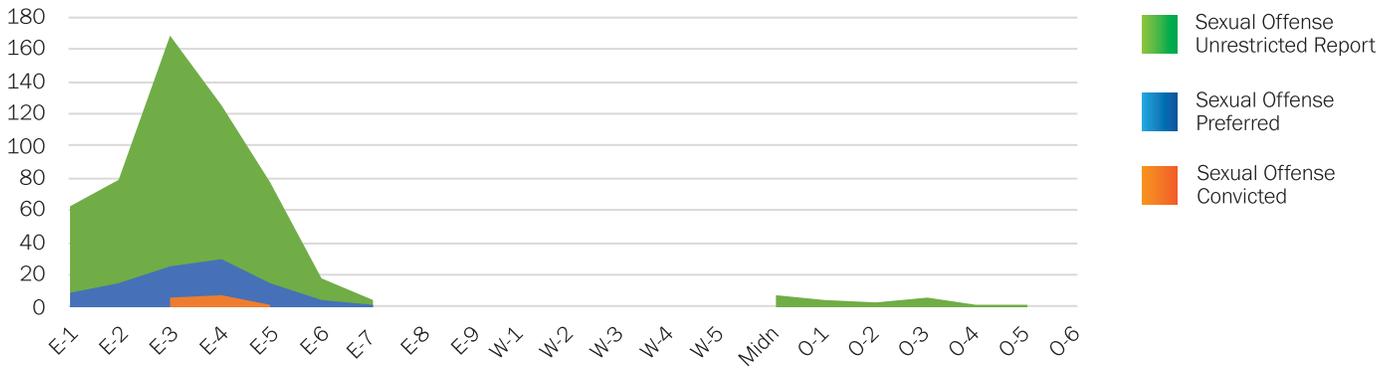


FIGURE 23. NAVY: AGE OF THE SUBJECT

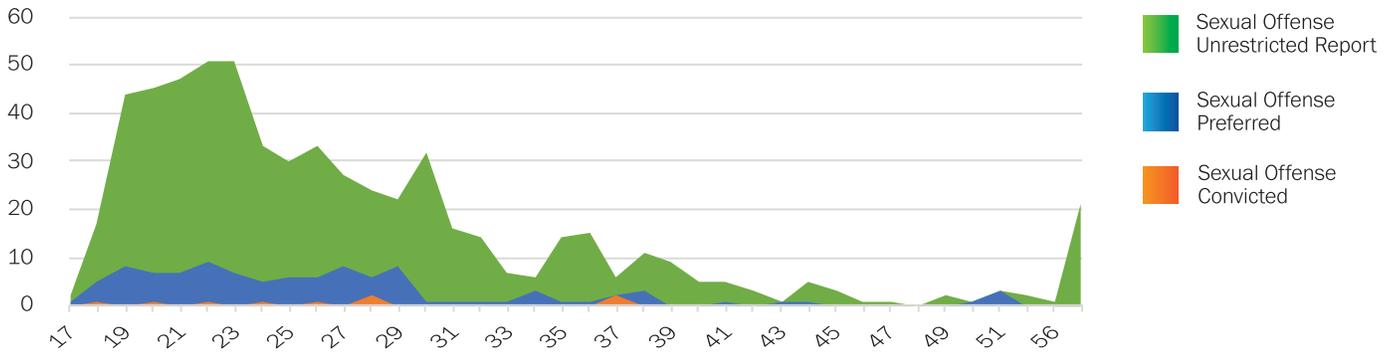


FIGURE 24. NAVY: AGE OF THE VICTIM

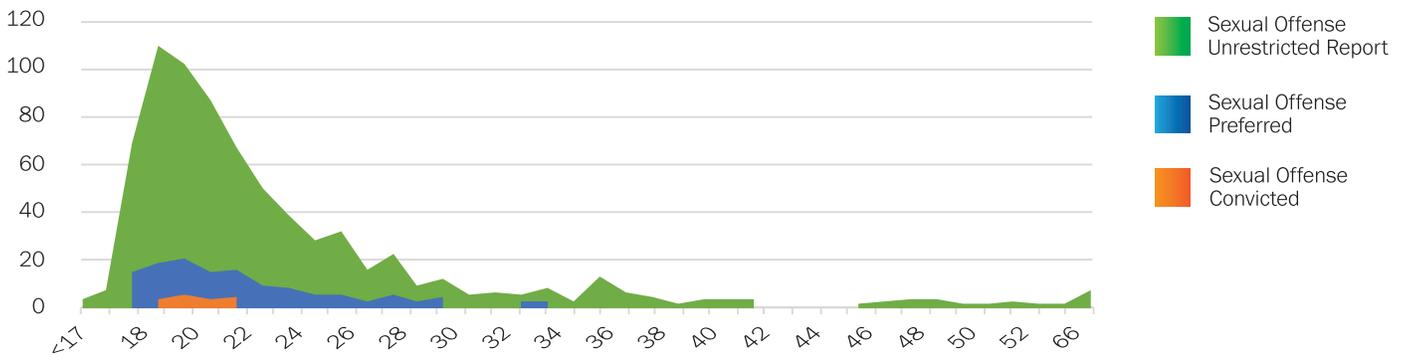


FIGURE 25. MARINE CORPS: RACE OF THE SUBJECT

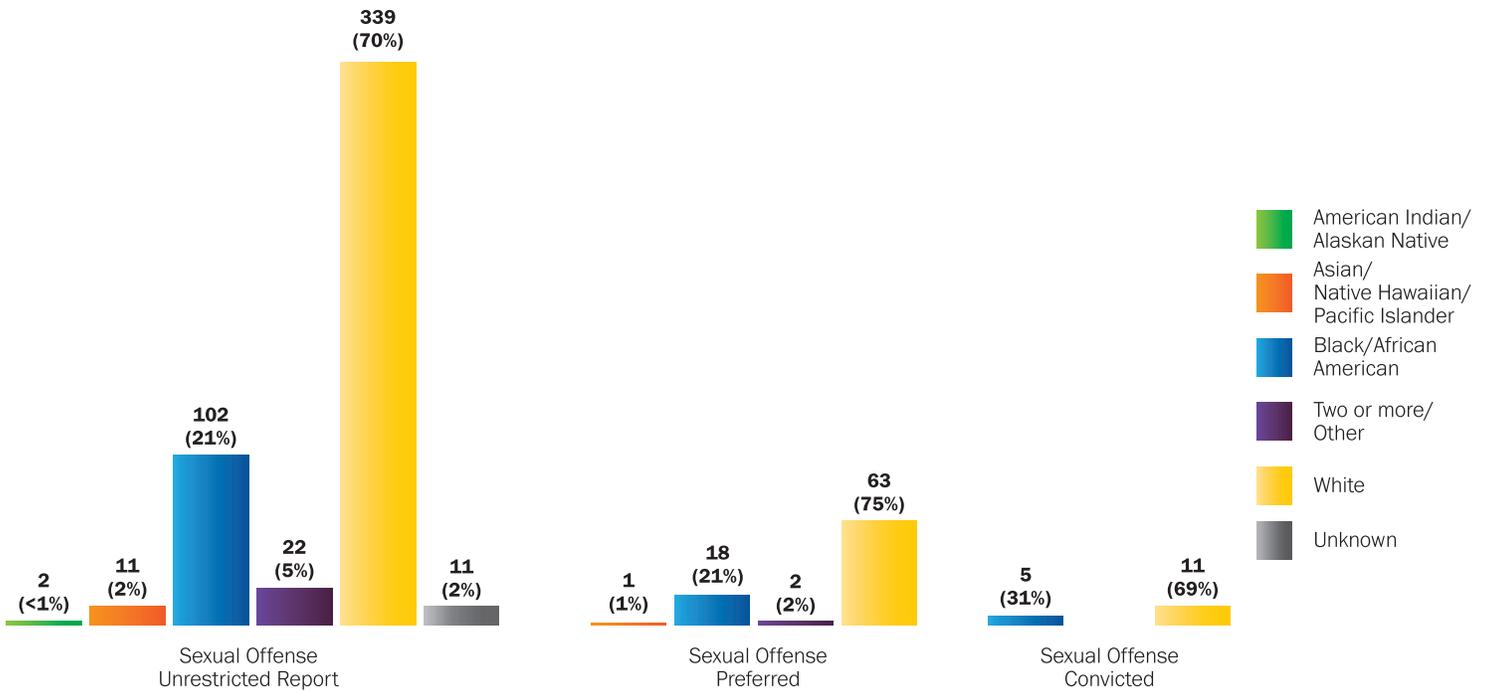


FIGURE 26. MARINE CORPS: RACE OF THE VICTIM

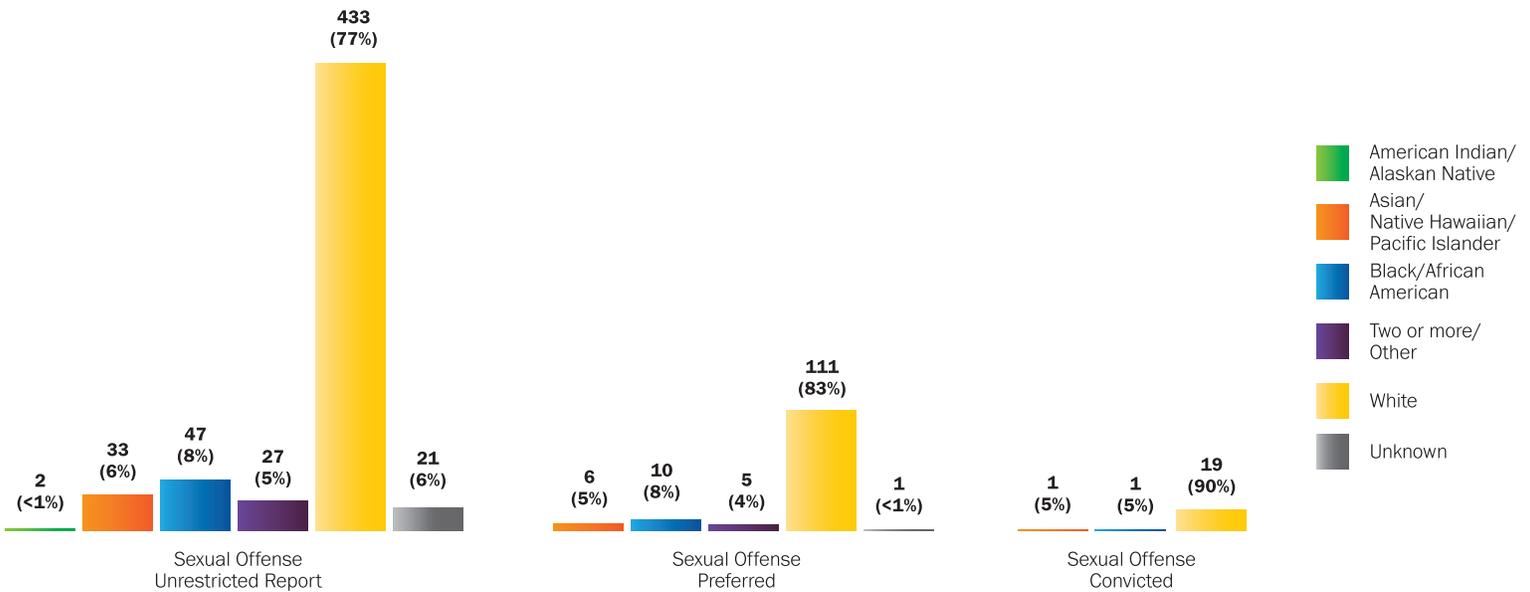


FIGURE 27. MARINE CORPS: ETHNICITY OF THE SUBJECT

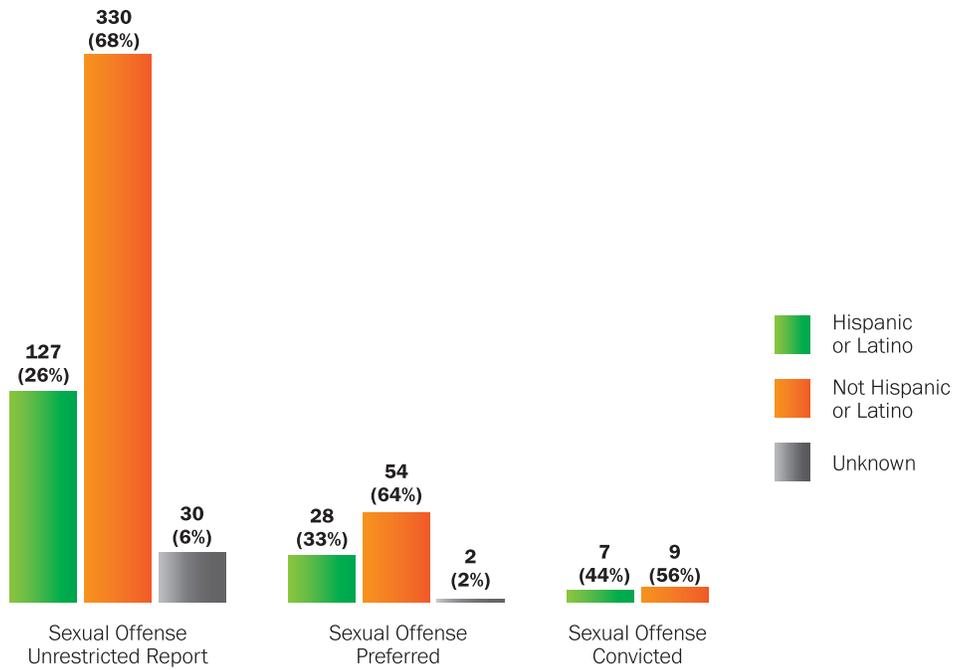


FIGURE 28. MARINE CORPS: ETHNICITY OF THE VICTIM

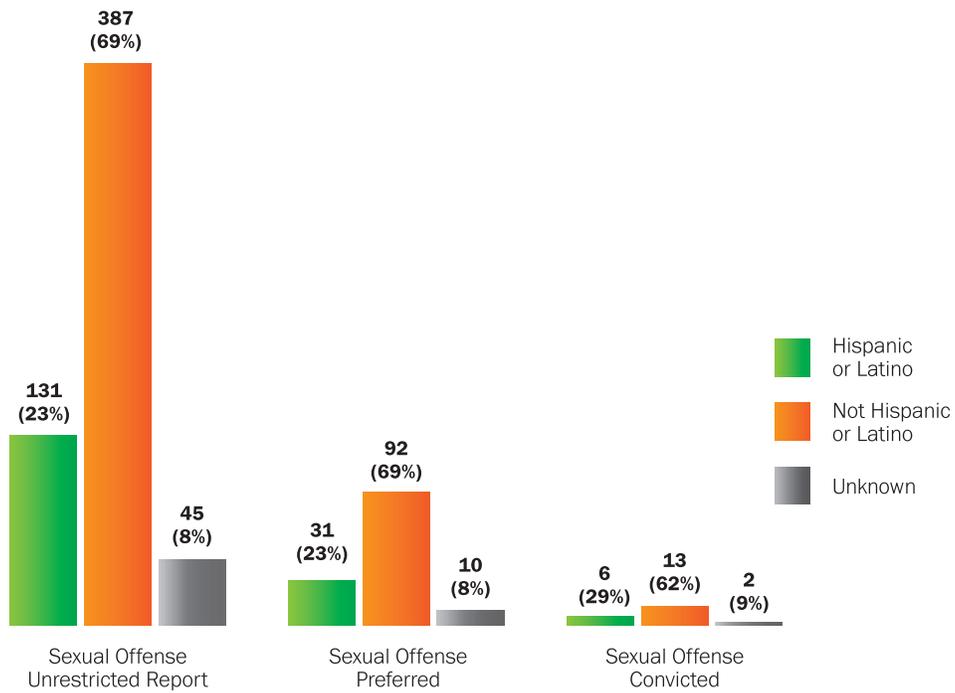


FIGURE 29. MARINE CORPS: SEX OF THE SUBJECT

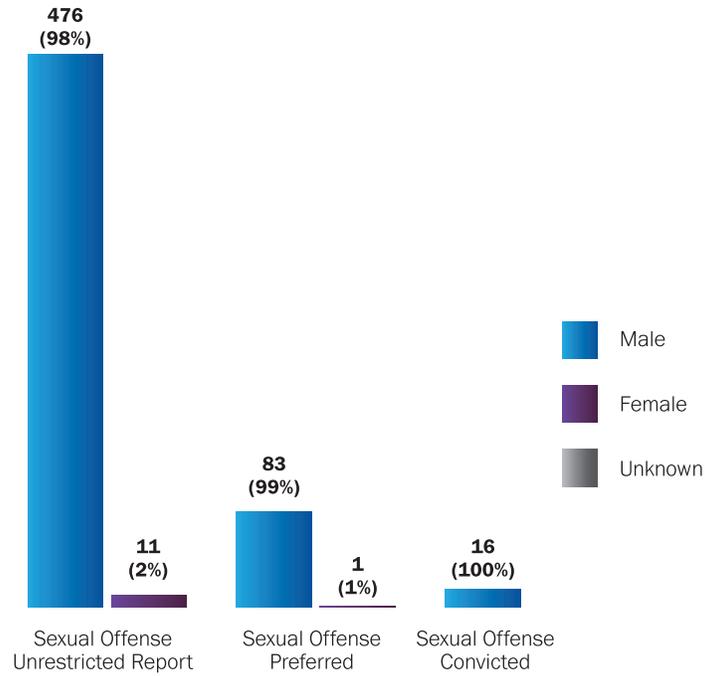


FIGURE 30. MARINE CORPS: SEX OF THE VICTIM

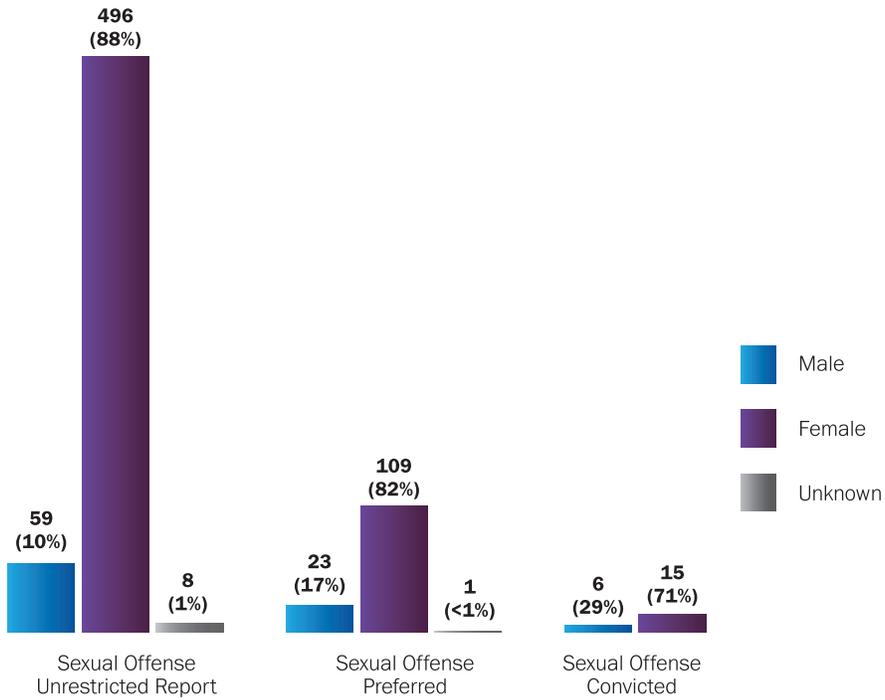


FIGURE 31. MARINE CORPS: STATUS OF THE SUBJECT

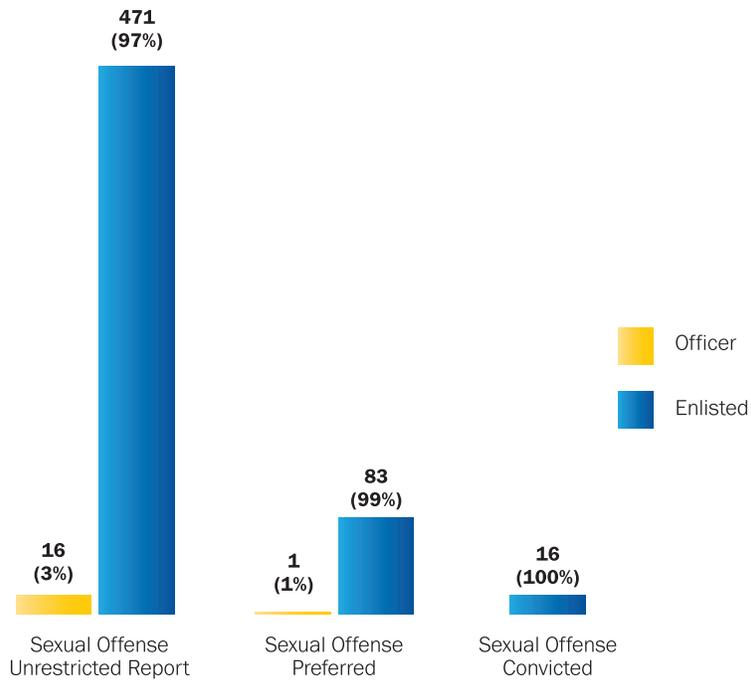


FIGURE 32. MARINE CORPS: STATUS OF THE VICTIM

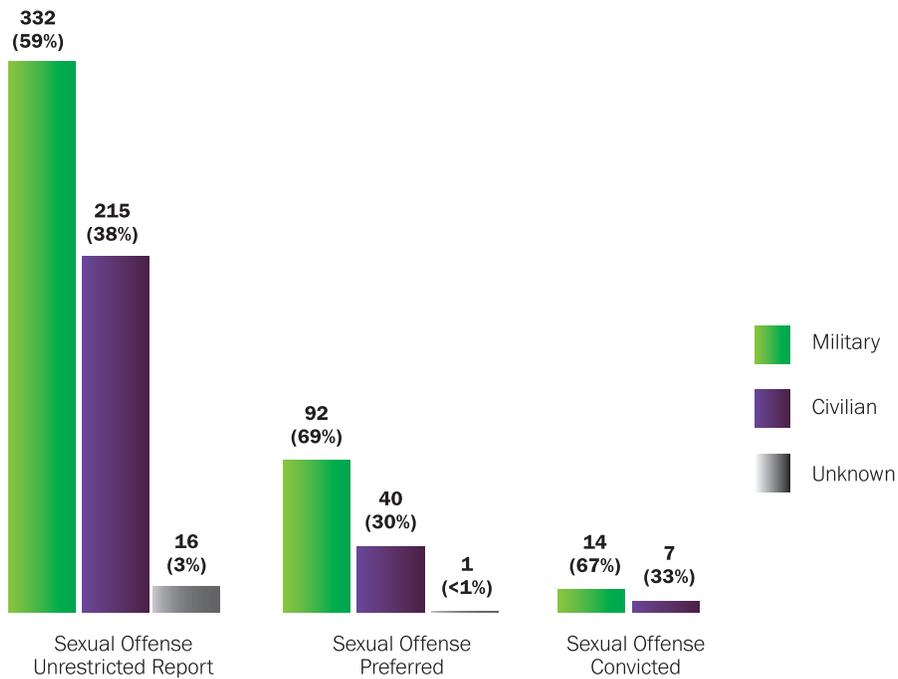


FIGURE 33. MARINE CORPS: PAY GRADE OF THE SUBJECT

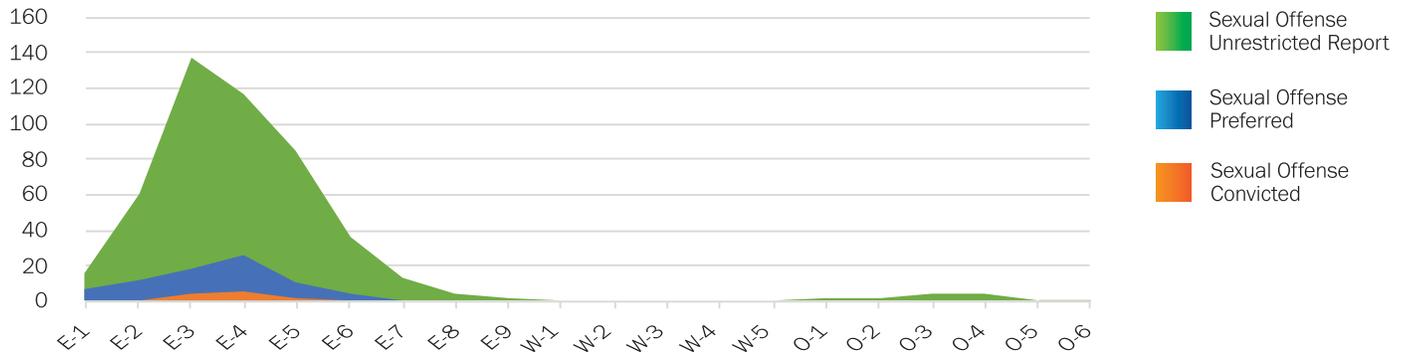


FIGURE 34. MARINE CORPS: PAY GRADE OF THE VICTIM

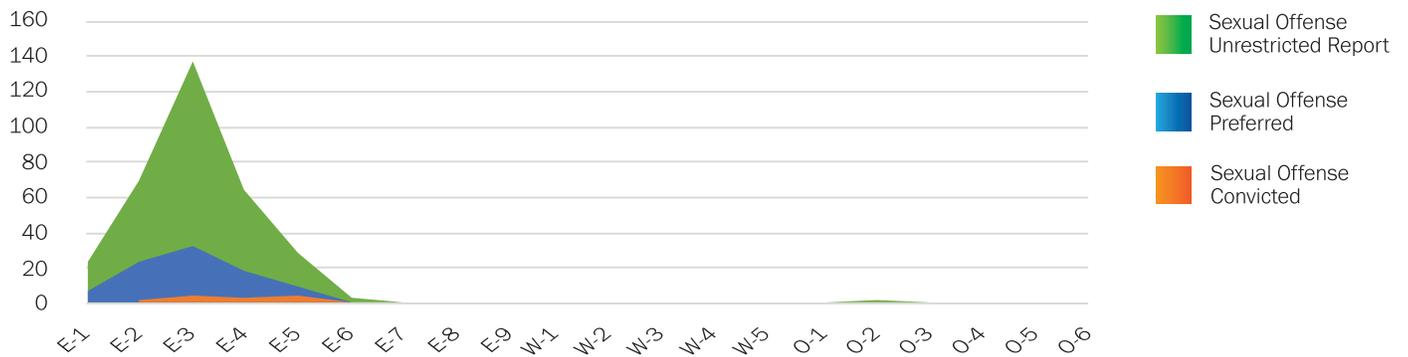


FIGURE 35. MARINE CORPS: AGE OF THE SUBJECT

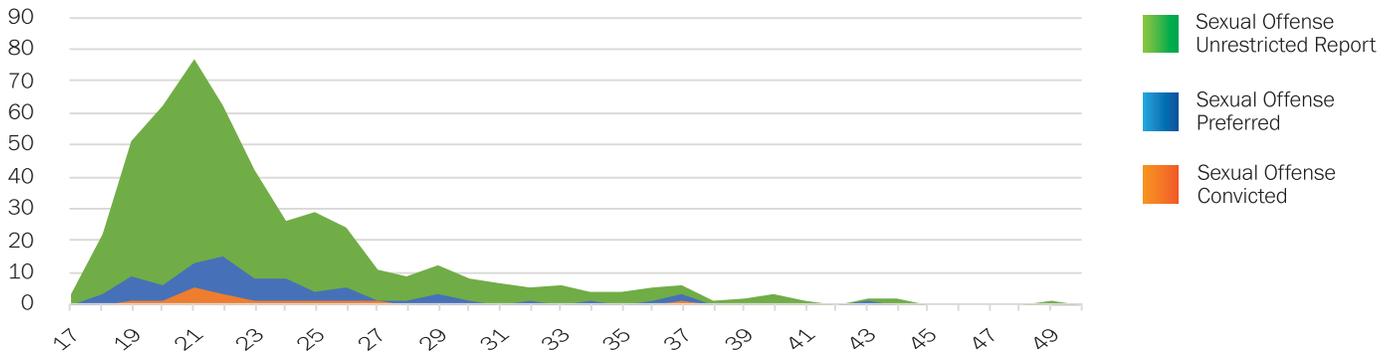


FIGURE 36. MARINE CORPS: AGE OF THE VICTIM

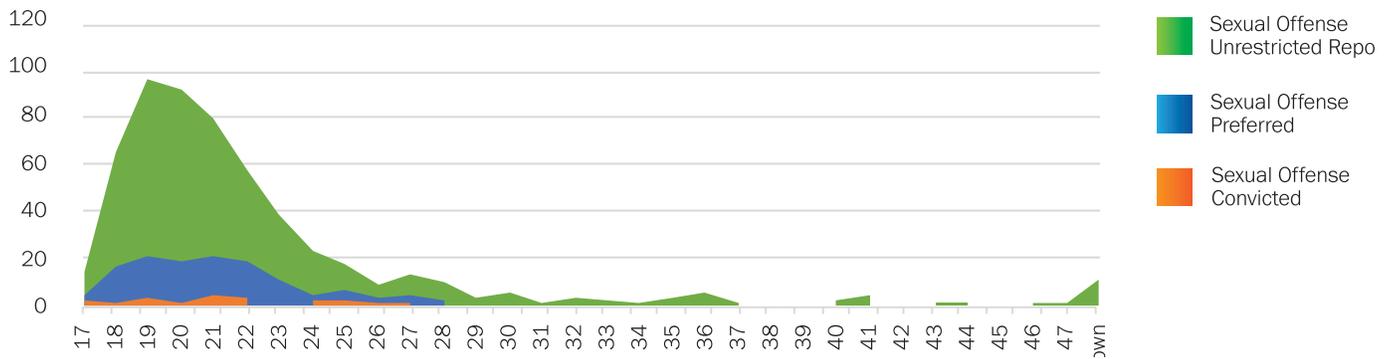


FIGURE 37. AIR FORCE: RACE OF THE SUBJECT

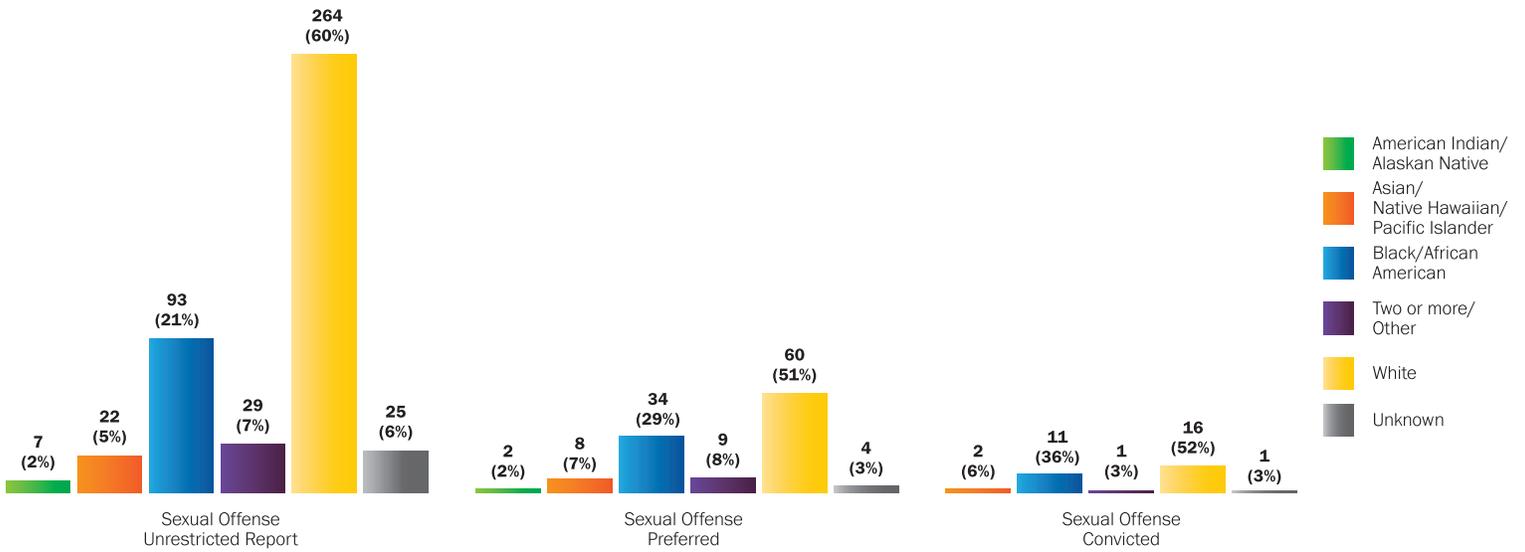


FIGURE 38. AIR FORCE: RACE OF THE VICTIM

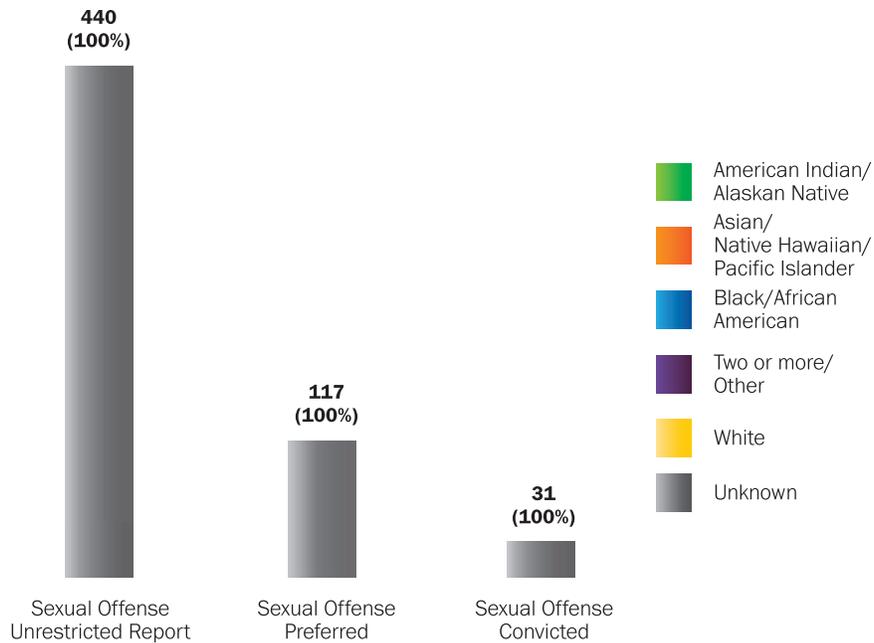


FIGURE 39. AIR FORCE: ETHNICITY OF THE SUBJECT

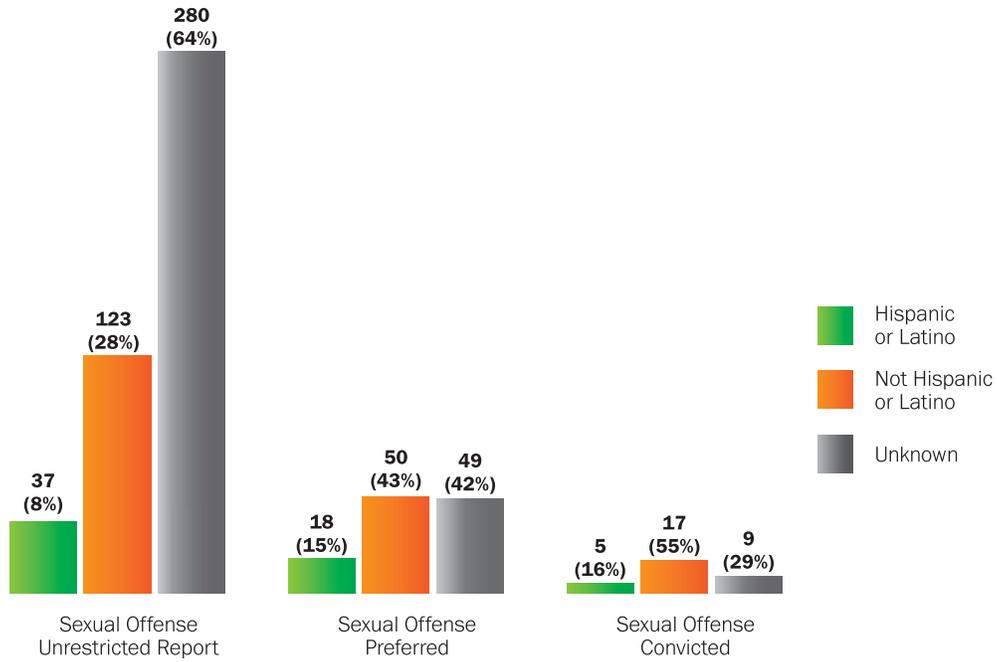


FIGURE 40. AIR FORCE: ETHNICITY OF THE VICTIM

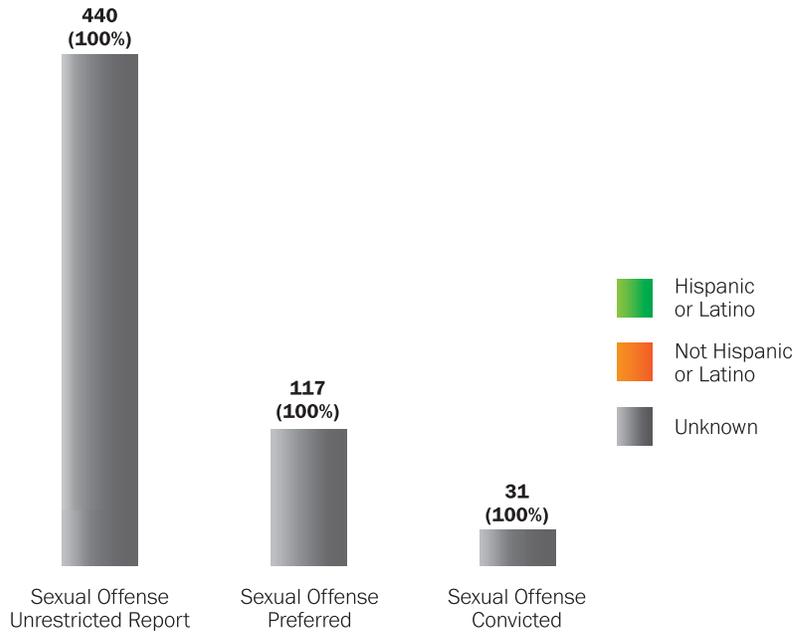


FIGURE 41. AIR FORCE: SEX OF THE SUBJECT

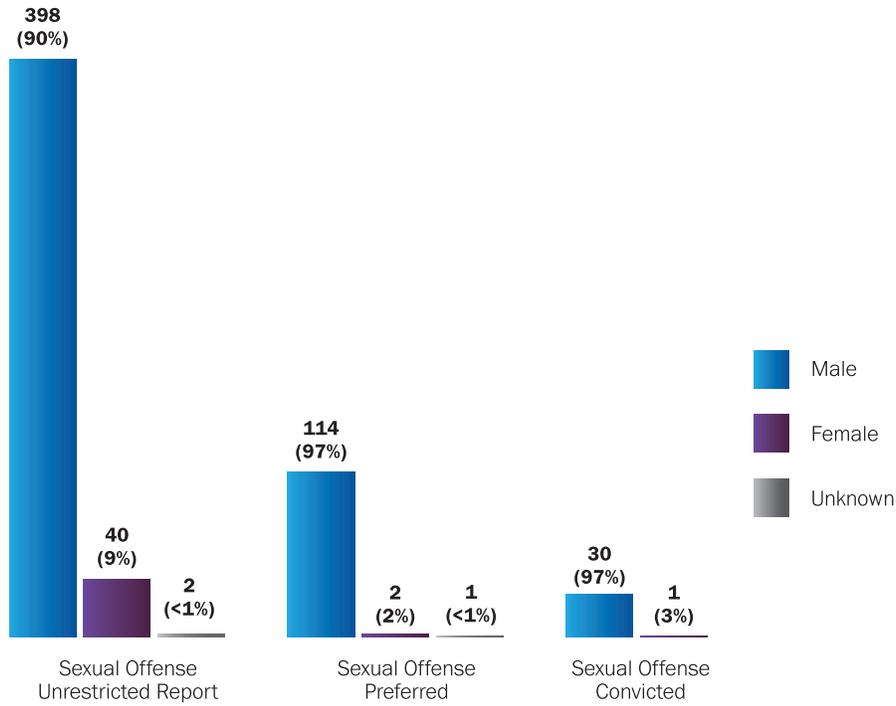


FIGURE 42: AIR FORCE: SEX OF THE VICTIM

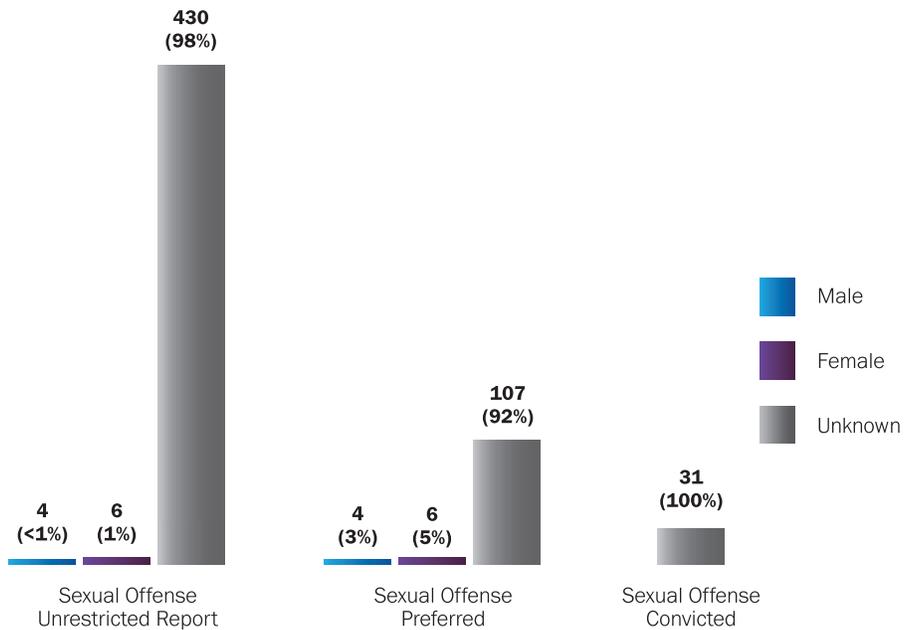


FIGURE 43: AIR FORCE: STATUS OF THE SUBJECT

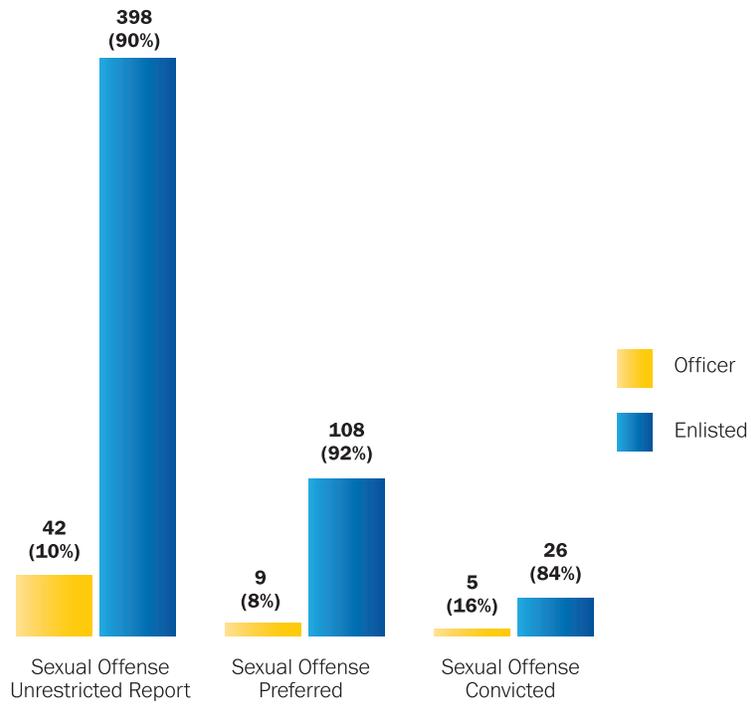


FIGURE 44. AIR FORCE: STATUS OF THE VICTIM

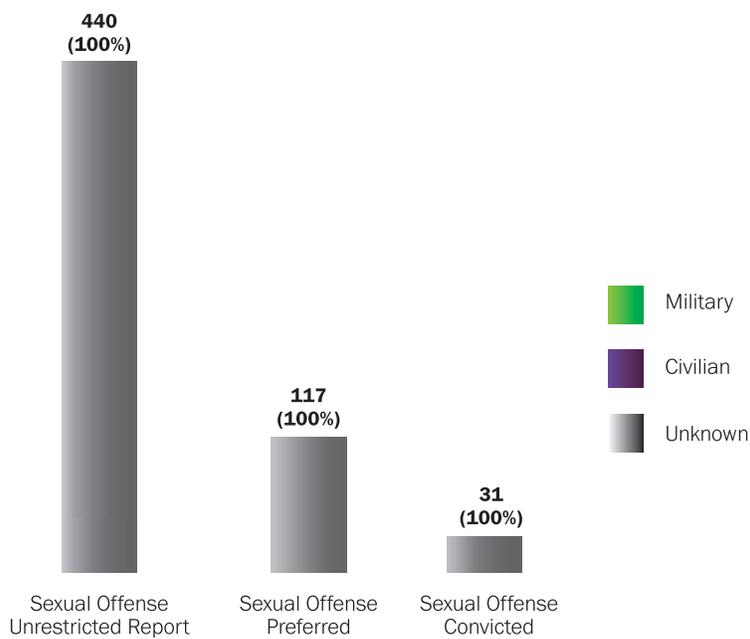


FIGURE 45. AIR FORCE: PAY GRADE OF THE SUBJECT

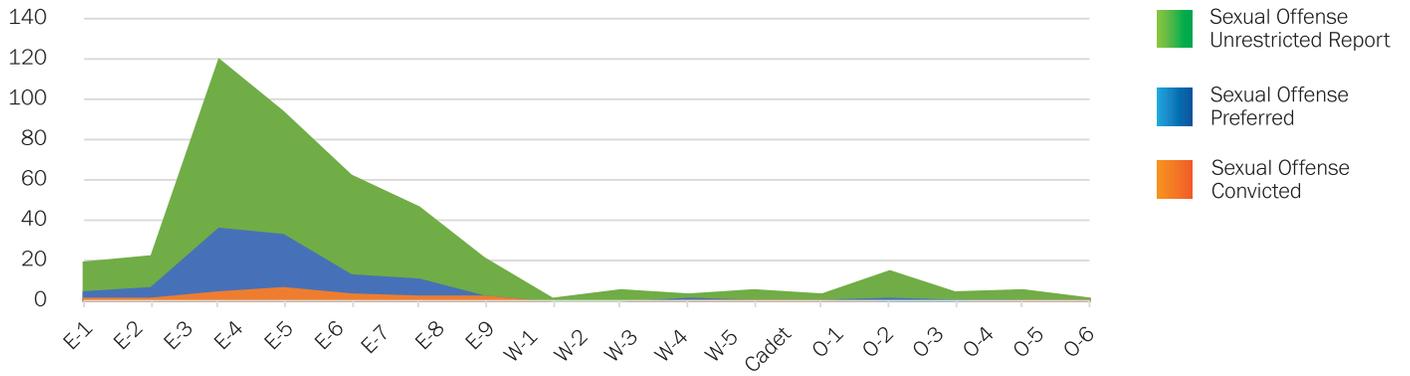


FIGURE 46. AIR FORCE: PAY GRADE OF THE VICTIM

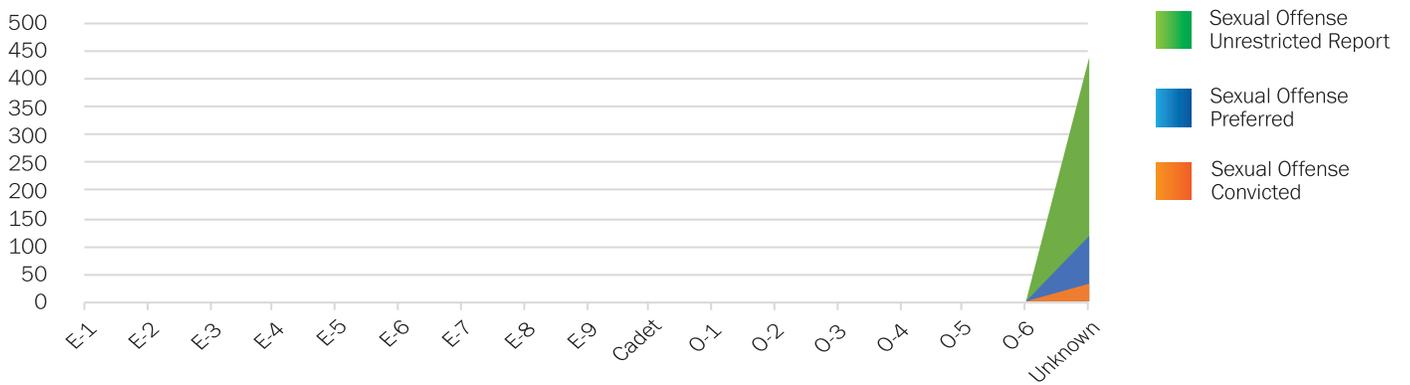


FIGURE 47. AIR FORCE: AGE OF THE SUBJECT

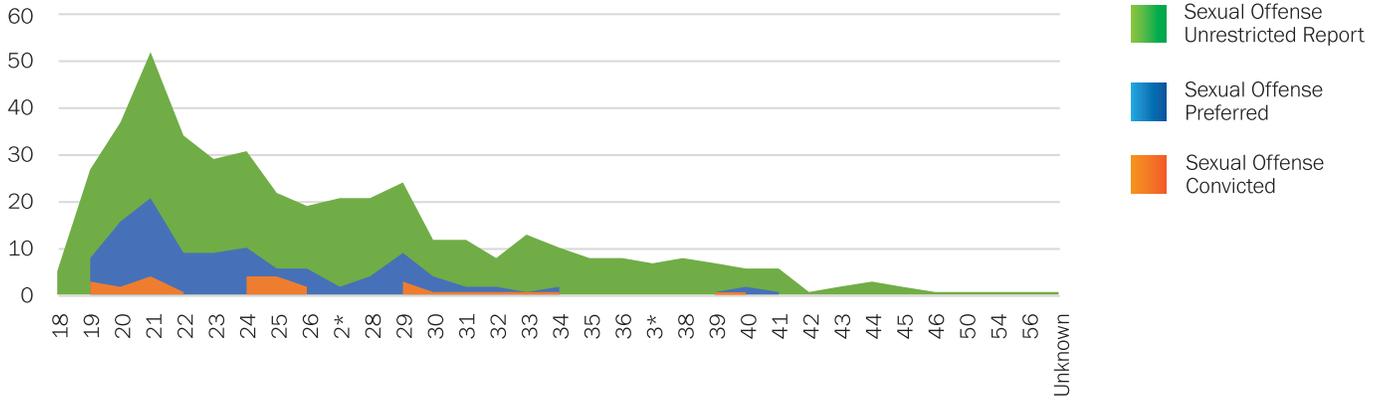


FIGURE 48. AIR FORCE: AGE OF THE VICTIM

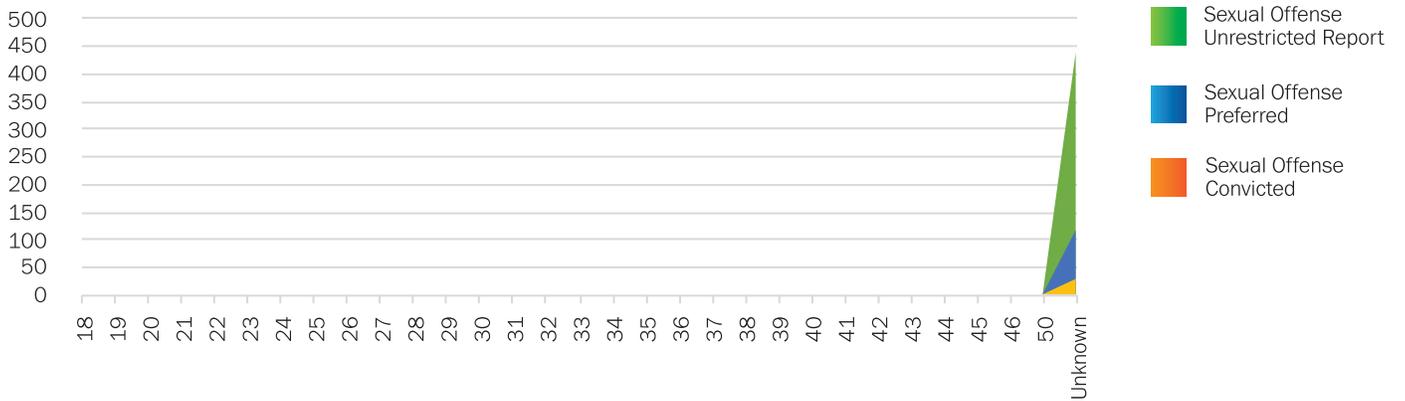


FIGURE 49. COAST GUARD: RACE OF THE SUBJECT

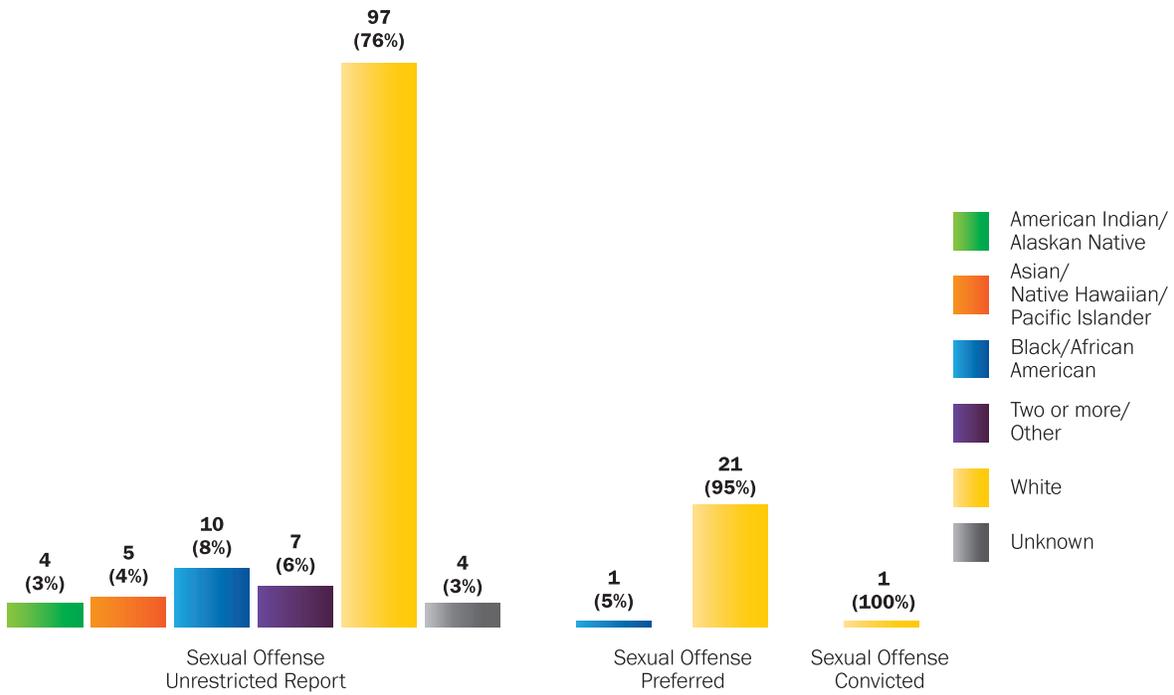


FIGURE 50. COAST GUARD: RACE OF THE VICTIM

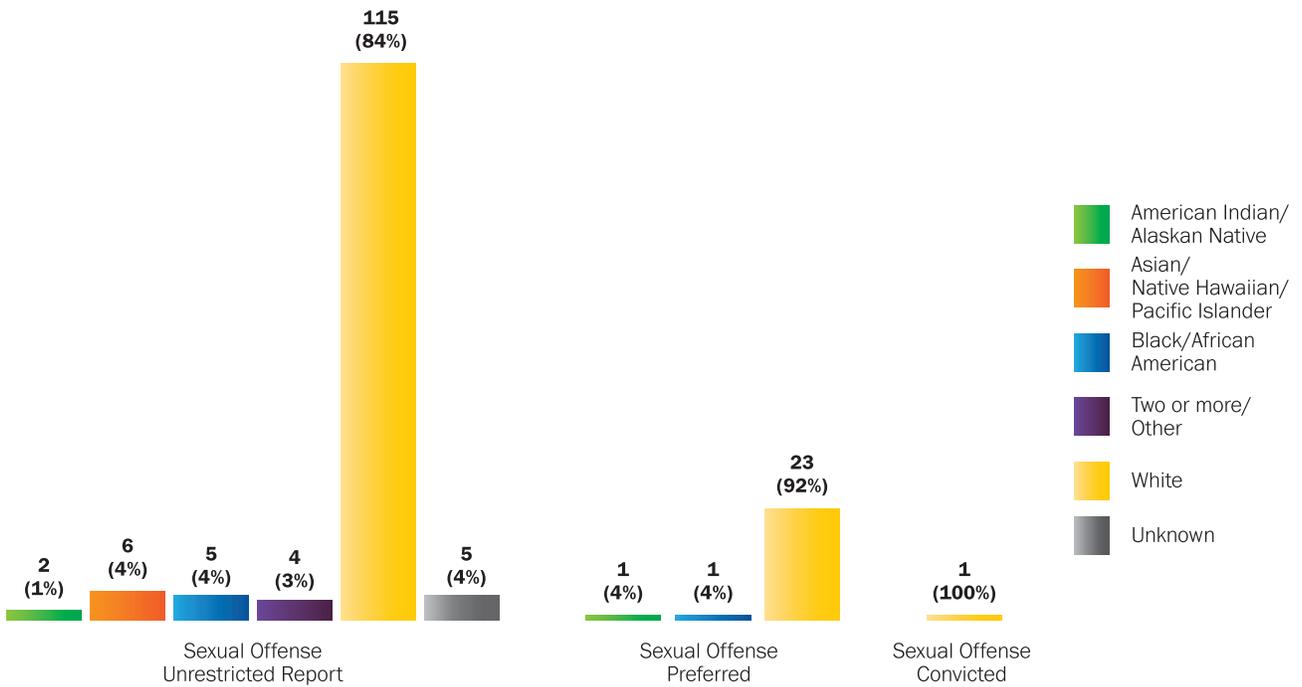


FIGURE 51. COAST GUARD: ETHNICITY OF THE SUBJECT

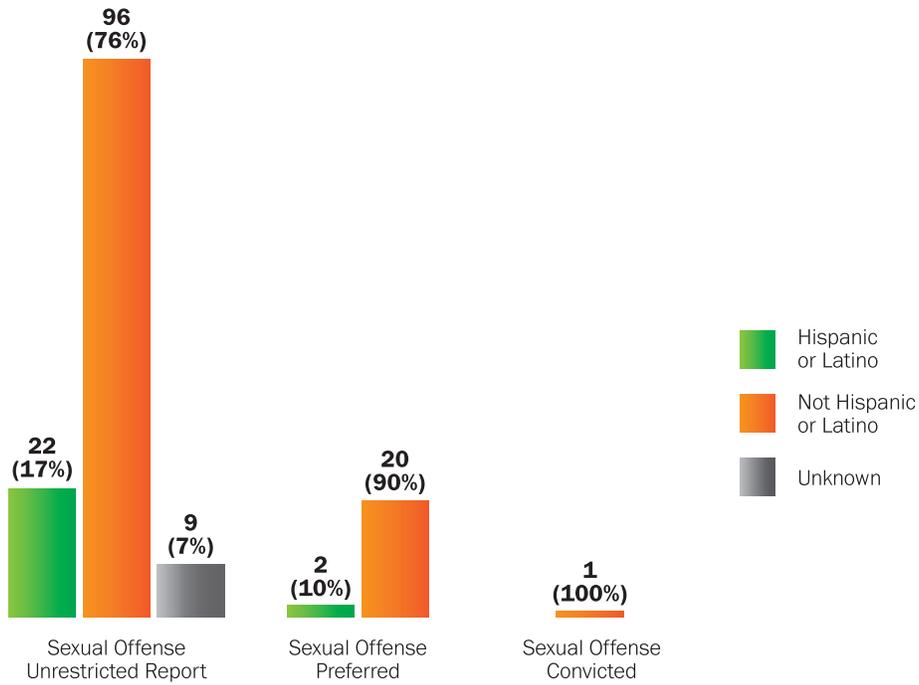


FIGURE 52. COAST GUARD: ETHNICITY OF THE VICTIM

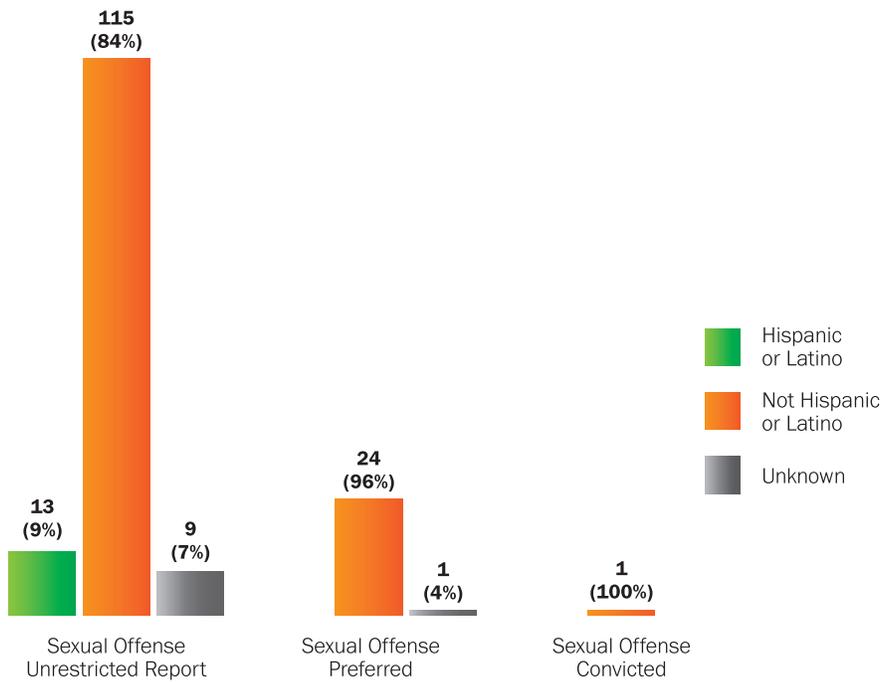


FIGURE 53. COAST GUARD: SEX OF THE SUBJECT

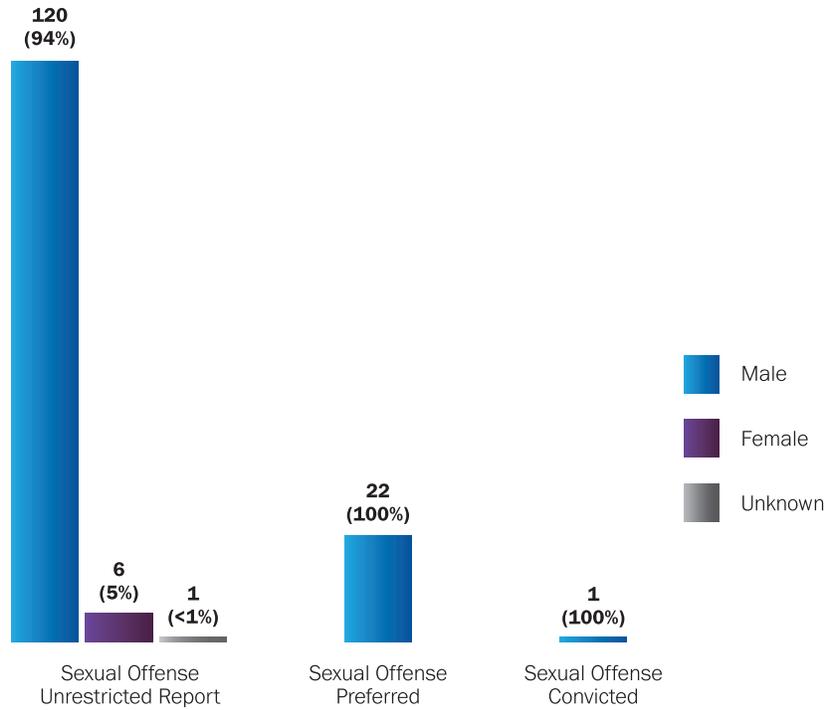


FIGURE 54. COAST GUARD: SEX OF THE VICTIM

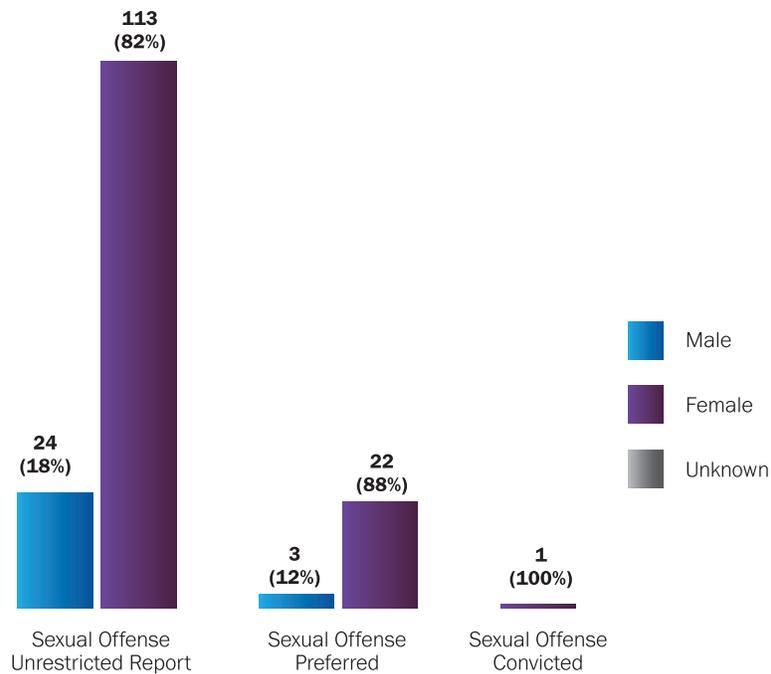


FIGURE 55. COAST GUARD: STATUS OF THE SUBJECT

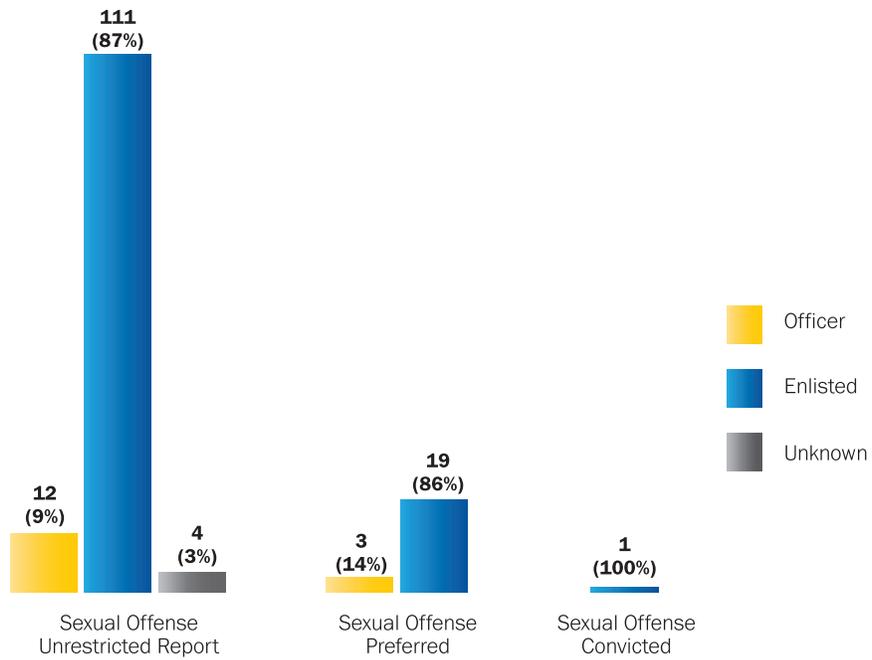


FIGURE 56. COAST GUARD: STATUS OF THE VICTIM

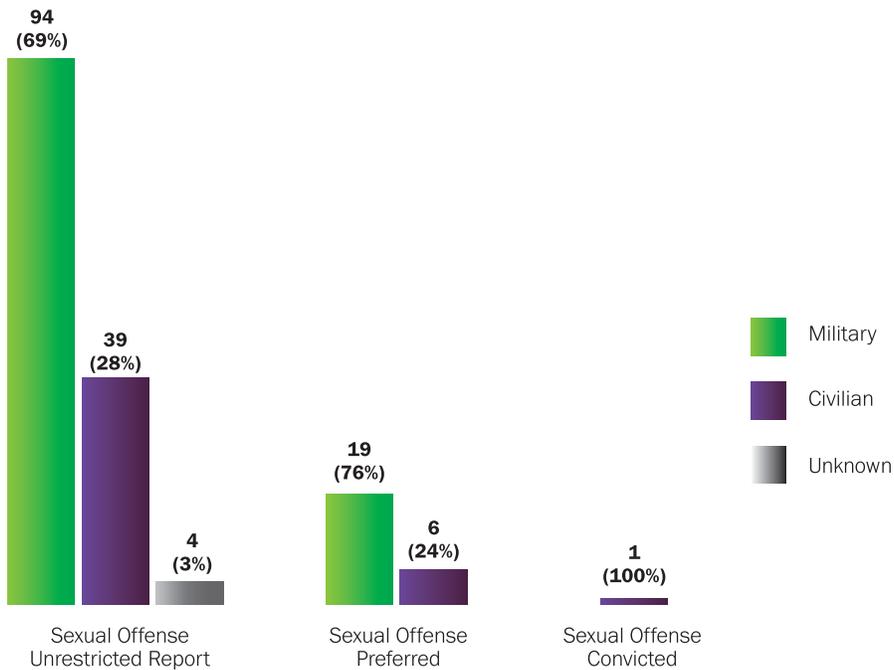


FIGURE 57. COAST GUARD: PAY GRADE OF THE SUBJECT

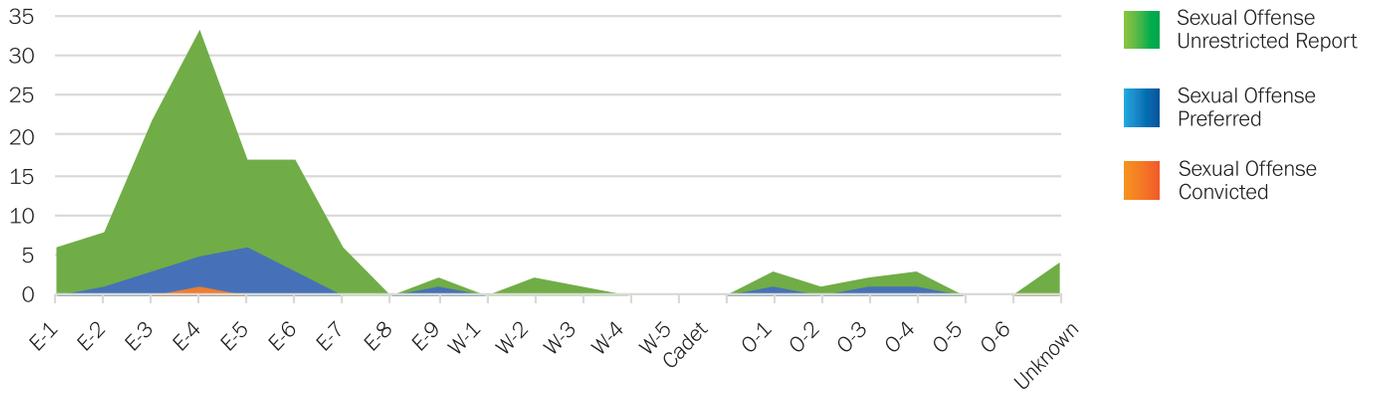


FIGURE 58. COAST GUARD: PAY GRADE OF THE VICTIM

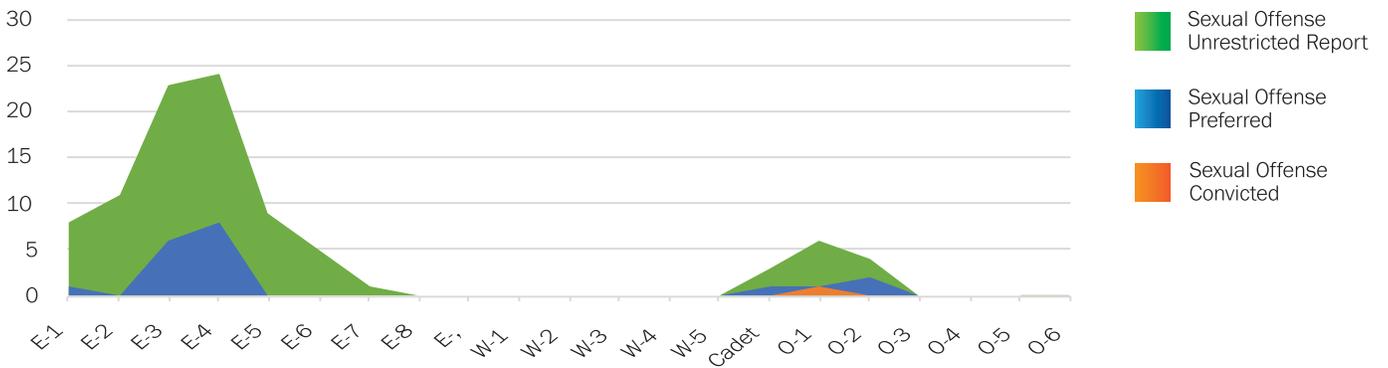


FIGURE 59. COAST GUARD: AGE OF THE SUBJECT

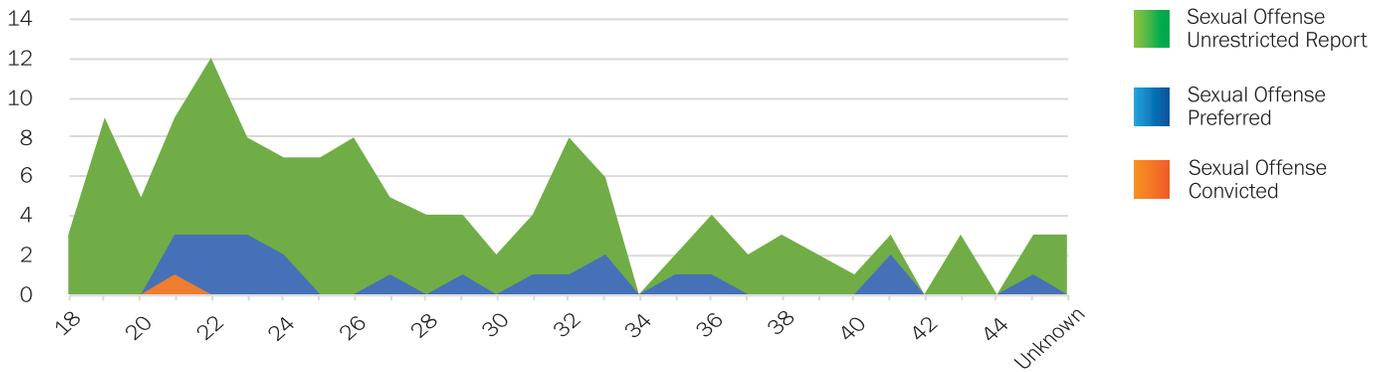
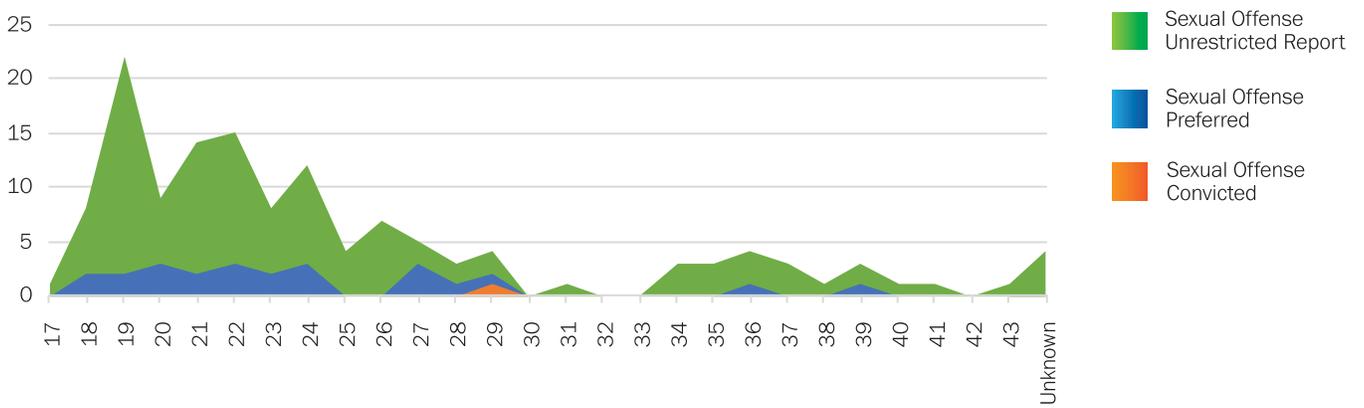


FIGURE 60. COAST GUARD: AGE OF THE VICTIM



APPENDIX H. COMMITTEE PUBLIC MEETINGS, PREPARATORY SESSIONS, AND PRESENTERS

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
<p>DAC-IPAD PUBLIC MEETING 18</p> <p>August 21, 2020</p> <p>Teleconference</p>	<p>Status of the Committee’s Review and Assessment of Racial and Ethnic Disparities in the Investigation, Prosecution, and Conviction of Service Members for Sexual Offenses Involving Adult Victims within the Military Justice System as Required by Section 540I of the National Defense Authorization Act for Fiscal Year 2020</p>
<p>DAC-IPAD PUBLIC MEETING 19</p> <p>October 23, 2020</p> <p>Teleconference</p>	<p>DAC-IPAD Staff Presentation on the Data Results Collected from RFI 18 and RFI 18A for the Race and Ethnicity Report</p> <p>DAC-IPAD Staff Presentation on the Contents of the Draft Race and Ethnicity Report</p>
<p>DAC-IPAD PUBLIC MEETING 20</p> <p>November 6, 2020</p> <p>Teleconference</p>	<p>DAC-IPAD Committee Deliberations on the Draft Race and Ethnicity Report</p>
<p>DAC-IPAD PUBLIC MEETING 21</p> <p>December 4, 2020</p> <p>Teleconference</p>	<p>Committee Vote on the Final Draft DAC-IPAD Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military</p>

DATA SUBCOMMITTEE MEETINGS AND DAC-IPAD PREPARATORY SESSION	
SESSION DATE AND LOCATION	TOPICS AND PRESENTERS
<p>Data Subcommittee Preparatory Session 1</p> <p>September 28, 2020</p> <p>Teleconference</p>	<p>Data Subcommittee discussion on the development of the Race and Ethnicity Report.</p>
<p>Data Subcommittee Preparatory Session 2</p> <p>October 30, 2020</p> <p>Teleconference</p>	<p>Data Subcommittee discussion on the proposed observations, findings, and recommendations for the Race and Ethnicity Report.</p> <p>Data Subcommittee discussion on various data analyses for inclusion in the data portion of the Race and Ethnicity Report.</p>
<p>DAC-IPAD Preparatory Session</p> <p>November 5, 2020</p> <p>Teleconference</p>	<p>Briefing from the DAC-IPAD staff and discussion of the draft Race and Ethnicity Report.</p>

APPENDIX I. ACRONYMS AND ABBREVIATIONS

DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DEOMI	Defense Equal Opportunity Management Institute
DoD	Department of Defense
DoDI	Department of Defense Instruction
FY	fiscal year
GAO	U.S. Government Accountability Office
GC DoD	General Counsel for the Department of Defense
MCIO	military criminal investigative organization
NAACP	National Association for the Advancement of Colored People
NDAA	National Defense Authorization Act
OMB	Office of Management and Budget
RFI	request for information
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code

APPENDIX J. SOURCES CONSULTED

1. Legislative Sources

5 U.S.C. App. §§ 1–16 (Federal Advisory Committee Act)

10 U.S.C. §§ 801–946a (Uniform Code of Military Justice) (2019)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3374 (2014)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019)

2. Judicial Decisions

Parker v. Levy, 417 U.S. 733 (1974)

3. Rules and Regulations

Manual for Courts-Martial, United States (2019 edition)

4. Military and Civilian Federal Policy

a. Department of Defense

General Counsel of the Department of Defense, *Memorandum for the Secretaries of the Military Departments: Uniform Standards and Criteria Required by Article 140a, Uniform Code of Military Justice (UCMJ)* (December 17, 2018)

General Counsel of the Department of Defense, *Memorandum for the Secretaries of the Military Departments: Recording Court-Martial Demographic Information* (June 8, 2020)

b. Office of Management and Budget

Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (October 30, 1997)

5. Official Reports

a. DoD and DoD Agency Reports

Defense Equal Opportunity Management Institute (DEOMI), *Phase I Report: An Investigation into the Disparity of Judicial and Non-Judicial Punishment Rates for Black Males in the Armed Services* (April 21, 1992)

Department of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (November 30, 1972)

Department of Defense, 2017 *Demographics: Profile of the Military Community*

Department of Defense, 2018 *Demographics: Profile of the Military Community*

Military Justice Review Group, *Report of the Military Justice Review Group, Part I: UCMJ Recommendations* (December 22, 2015)

b. Other Government Reports

General Accounting Office, *Equal Opportunity: DoD Studies on Discrimination in the Military* (April 1995)

Government Accountability Office, *DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities* (May 2019)

c. Nonprofit Reports

Protect Our Defenders, *Racial Disparities in Military Justice* (2017)

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

Letter from DAC-IPAD to the Secretary of Defense Regarding Article 140a, Uniform Code of Military Justice (September 13, 2018)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Third Annual Report* (March 2019)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Court-Martial Adjudication Data Report* (November 2019)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017* (October 2020)

6. DAC-IPAD Requests for Information and Responses

DAC-IPAD Request for Information Set 18 (June 17, 2020)

DAC-IPAD Request for Information Set 18A (August 7, 2020)

7. Scholarly Articles

Eryn Nicole O’Neal, Laura O. Beckman, and Cassia Spohn, *The Sexual Stratification Hypothesis: Is the Decision to Arrest Influenced by the Victim/Suspect Racial/Ethnic Dyad?* 34 *Journal of Interpersonal Violence* 1287 (2016)

Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 *American Journal of Community Psychology* 256 (2019)

Anthony Walsh, *The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race*, 25 *Criminology* 153 (1987)

8. Testimony

Statement of Major General Daniel J. Lecce, Staff Judge Advocate to the Commandant of the Marine Corps, *Racial Disparity in the Military Justice System—How to Fix the Culture: Hearing before the House Armed Services Committee Subcommittee on Military Personnel* (June 16, 2020)

441 G St. N.W.
Washington, DC 20548

August 30, 2021

The Honorable Jack Reed
Chairman
The Honorable James M. Inhofe
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Adam Smith
Chairman
The Honorable Mike Rogers
Ranking Member
Committee on Armed Services
House of Representatives

MILITARY JUSTICE: DOD and Coast Guard Improved Collection and Reporting of Demographic and Nonjudicial Punishment Data, but Need to Study Causes of Disparities

In May 2019, we issued a report on whether there are racial, ethnic, or gender disparities in the military justice system.¹ Among other things, we found that:

- The military services did not collect consistent information about race, ethnicity, and gender in their investigations, military justice, and personnel databases, which limited their ability to identify disparities.²
- Our analysis of available data found that Black, Hispanic, and male servicemembers were more likely than White or female servicemembers to be the subjects of investigations recorded in databases used by the military criminal investigative

¹GAO, *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, [GAO-19-344](#) (Washington, D.C.: May 30, 2019) (hereafter referred to as our “May 2019 report”). We issued this report in response to a provision in House Report 115-200, accompanying a bill for the National Defense Authorization Act for Fiscal Year 2018. The scope of our review included five military services: the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard. Although the Coast Guard is part of the Department of Homeland Security, it is a military service and a branch of the armed forces at all times. For the purposes of this report, the term “military services” refers to all five of these military services. The United States Space Force was not included in this review because it was not established as a military service within the Department of Defense (DOD) until December 20, 2019, in the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92.

²For purposes of this report, we use the term “disparities” to describe instances in which a racial or gender group was overrepresented among the servicemembers who were investigated or disciplined for violations of the Uniform Code of Military Justice (UCMJ).

organizations, and to be tried in general and special courts-martial in all of the military services when controlling for attributes such as rank and education.³

- Race and gender were not statistically significant factors in the likelihood of a conviction in general and special courts-martial for most military services, and minority servicemembers were either less likely to receive a more severe punishment than White servicemembers or there was no difference among racial groups.
- The Department of Defense (DOD) had taken some steps to study disparities, but had not comprehensively evaluated the causes of racial or gender disparities in the military justice system.

We made 11 recommendations as a result of our findings, three of which were enacted into law in section 540I(b) of the National Defense Authorization Act (NDAA) for Fiscal Year 2020.⁴ Section 547 of the William M. (Mac) Thornberry NDAA for Fiscal Year 2021 included a provision for us to review the actions that DOD and the military services have taken to implement the statutory requirements from section 540I(b) of the NDAA for Fiscal Year 2020 and the recommendations from our May 2019 report.⁵ This correspondence summarizes the results of our assessment of the actions DOD and the military services have taken, or plan to take, to implement the recommendations from our May 2019 report and the requirements of section 540I(b) from the NDAA for Fiscal Year 2020, and whether any actions taken met the intended objectives.

To assess actions taken in response to recommendations from our May 2019 report and the requirements of section 540I(b) from the NDAA for Fiscal Year 2020, we reviewed documentation from the military services demonstrating their actions to implement our recommendations. Specifically, we reviewed military service guidance, user manuals, and other documentation related to the databases to determine the types of data officials are required to collect and maintain as well as internal procedures the military services follow to enter information about race, ethnicity, and gender into their investigations, military justice, and personnel databases. For example, we determined what categories were used to enter into and record race and ethnicity information in each database.

We also interviewed agency officials to help determine which field in each database tracks race, ethnicity, and gender; how these data are entered in the databases; and the actions their respective military service took to implement our recommendations. For actions taken in response to recommendations related to DOD studying the causes of disparities within the military justice system and whether these actions met their intended objectives, we reviewed issued reports or information about the scope and methodology of planned or ongoing reports from the military services on disparities within their respective military justice systems. We also

³Our findings of racial and gender disparities, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information and supporting statistics. To ensure that we had consistent profiles for the race, ethnicity, and gender of servicemembers for our analysis, we treated the personnel databases as the authoritative sources for servicemembers' demographic data. We then consolidated the various race and ethnicity values in the military service personnel databases to the five groups for race and the two groups for ethnicity established by the Office of Management and Budget standards for maintaining, collecting, and presenting data on race and ethnicity for federal reporting purposes. Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct. 30, 1997). We grouped individuals of Hispanic ethnicity together, regardless of their racial identification, so that we could compare those of Hispanic ethnicity to other racial groups.

⁴Pub. L. No. 116-92, § 540I(b) (2019).

⁵Pub. L. No. 116-283, § 547 (2021).

interviewed DOD and military service officials to discuss any studies that were being planned or conducted to further assess disparities or causes of disparities in the military justice system.

We conducted this performance audit from February 2021 to August 2021 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Overview of the Military Justice System

The Uniform Code of Military Justice (UCMJ) was established to provide the statutory framework of the military criminal justice system.⁶ The UCMJ contains articles that punish traditional crimes such as unlawful drug use and assault as well as unique military offenses including desertion, failure to obey orders or regulations, and misbehavior before the enemy, among others. In creating the military justice system, Congress established three types of military courts, called courts-martial: summary, special, and general. Each of these types respectively is intended to deal with progressively more serious offenses, and each court-martial type may adjudicate more severe maximum punishments as prescribed under the UCMJ.⁷ In addition, an accused servicemember can receive a nonjudicial punishment under Article 15 of the UCMJ, by which a commander can punish a servicemember without going through the court-martial process. Nonjudicial punishments are used to discipline minor offenses committed by enlisted servicemembers or officers.

Data Collection Standards and Definitions of Race, Ethnicity, and Gender

The Military Justice Act of 2016 directed the Secretary of Defense to prescribe uniform standards and criteria pertaining to case management, data collection, and accessibility of information in the military justice system.⁸ On December 17, 2018, the DOD General Counsel issued uniform standards and criteria, which directed that each military justice case processing and management system be capable of collecting uniform data concerning race and ethnicity (hereafter referred to as the 2018 uniform standards).⁹

These 2018 uniform standards for military justice databases specify that data concerning race and ethnicity should be collected according to the definitions established in the Office of Management and Budget (OMB) Statistical Policy Directive No. 15 (hereafter referred to as the OMB standards). The OMB standards establish the following five categories of race: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific

⁶10 U.S.C. §§801-946a.

⁷In addition to the maximum punishments that may be adjudicated by each type of court-martial, various relevant executive orders prescribe a maximum punishment for each offense.

⁸Pub. L. No. 114-328 §5504 (2016) (*codified at* 10 U.S.C. §940a). This section is also known as Article 140a of the UCMJ.

⁹General Counsel of the Department of Defense Memorandum, *Uniform Standards and Criteria Required by Article 140a Uniform Code of Military Justice* (Dec. 17, 2018) (hereafter referred to as the 2018 uniform standards).

Islander; and White.¹⁰ The OMB standards also establish two categories of ethnicity: Hispanic or Latino and not Hispanic or Latino.¹¹

DOD guidance provides that information collected on a servicemember's gender is based on reproductive function.¹² Specifically, this guidance provides that there are three options that can be selected when entering a servicemember's gender: male, female, or unknown. In addition, the 2018 uniform standards for military justice databases specify that gender data should be collected with options for male and female.¹³

Military Services Have Implemented Most of GAO's Recommendations, but DOD Needs to Take Further Action

The military services have implemented 8 of our 11 recommendations aimed at improving their ability to collect and report consistent demographic and nonjudicial punishment data, as shown in figure 1. However, DOD has not identified when disparities should be further reviewed or studied the causes of disparities in the military justice system.

¹⁰American Indian or Alaska Native is defined as a person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment. Asian is defined as a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. Black or African American is defined as a person having origins in any of the black racial groups in Africa. Native Hawaiian or Other Pacific Islander is defined as a person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. White is defined as a person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

¹¹Hispanic or Latino is defined as a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. Not Hispanic or Latino is defined as a person not having the attributes defined in the Hispanic or Latino category.

¹²DOD Instruction 1336.05, *Automated Extract of Active Duty Military Personnel Records* (July 28, 2009) (incorporating Change 2, effective Mar. 31, 2015).

¹³In April 2021, DOD issued guidance that establishes procedures for changing a servicemember's gender within the Defense Enrollment Eligibility Reporting System database. DOD Instruction 1300.28, *In-Service Transition for Transgender Service Members* paragraphs 3.4 and 4.4.d (Apr. 30, 2021). The policy states that gender identity is a personal and private matter, and thus requires that the military services receive written approval from the Under Secretary of Defense for Personnel and Readiness to collect transgender and transgender related data or to release publicly such data.

Figure 1: Status of Department of Defense and Coast Guard Actions on GAO Recommendations to Address Racial and Gender Disparities, as of June 2021

Recommendation	Implementing agency	Implemented?
1 Coast Guard modify its military justice database to query and report on gender information	Coast Guard	✓
2 Army develop the capability to present race and ethnicity data in its investigations and personnel databases using the categories established for the military justice databases	Army	✓
3 Air Force develop the capability to present race and ethnicity data in its investigations and personnel databases using the categories established for the military justice databases	Air Force	✗
4 Navy develop the capability to present race and ethnicity data in its investigations and personnel databases using the categories established for the military justice databases	Navy	✓
5 Coast Guard develop the capability to present race and ethnicity data in its investigations and personnel databases using the categories established for the military justice databases	Coast Guard	✓
6 Secretary of Defense consider an amendment to annual military justice reporting requirements to require the military services to include demographic information	Department of Defense	✓
7 Secretary of Defense issue guidance that establishes criteria to specify when possible demographic disparities in the military justice process should be further reviewed, and that describes the steps to conduct such a review	Department of Defense	✗
8 Army consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases	Army	✓
9 Navy consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases	Navy	✓
10 Coast Guard consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases	Coast Guard	✓
11 Secretary of Defense conduct an evaluation to identify the causes of any disparities in the military justice system, and take steps to address them as appropriate	Department of Defense	✗

Source: GAO analysis. | GAO-21-105000

Note: For the report and its recommendations, see GAO, *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, [GAO-19-344](#) (Washington, D.C.: May 30, 2019).

Military Services Implemented Eight Recommendations to Improve Ability to Collect and Report Consistent Demographic and Nonjudicial Punishment Data in Military Justice System

All of the eight recommendations we have closed as implemented are about collection and reporting of consistent demographic and nonjudicial punishment data, as follows:

- Coast Guard has developed the capability to report gender information in its military justice database. (Recommendation 1)
- The Army, the Navy, and the Coast Guard have taken key steps to collect and maintain consistent data for race and ethnicity since our May 2019 report. (Recommendations 2, 4, and 5)
- The military services have begun reporting demographic data in annual reports that could provide greater visibility into potential racial, ethnic, or gender disparities. (Recommendation 6)
- The Army, the Navy, the Marine Corps, and the Coast Guard have started to collect complete nonjudicial punishment data. (Recommendations 8, 9, and 10)

For additional information about the recommendations that have been closed as implemented, see enclosure I. Agency actions taken thus far to address the three remaining recommendations that have not yet been implemented are described in greater detail below.

The Air Force Has Developed the Capability to Present Consistent Race and Ethnicity Data in Its Personnel Database but Not for Its Investigations Database

Status of May 2019 Recommendation to Air Force about Race and Ethnicity Data

The Secretary of the Air Force should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Air Force's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Air Force. (Recommendation 3) (Not implemented)

Source: GAO. | GAO-21-105000

The Air Force has developed the capability to present race and ethnicity data in its personnel database consistent with the 2018 uniform standards, but has not yet done so for its investigations database, so this recommendation has not been fully implemented. The Air Force uses more values than those required by the 2018 uniform standards to collect and maintain race and ethnicity information in its personnel database, and has developed the capability to aggregate race and ethnicity information into the categories specified in the 2018 uniform standards. According to Air Force officials, the current Air Force investigations database cannot present data in accordance with the 2018 uniform standards. The Air Force is currently developing a new case management system that will replace its existing investigations database.¹⁴ Air Force officials told us that the Air Force is scheduled to replace this database either in fiscal year 2021 or fiscal year 2022. However, we were unable to

determine how the new investigations database will collect and maintain race and ethnicity information, as the system is still under development.

DOD Has Not Issued Guidance to Identify When Disparities Should Be Examined Further

Status of May 2019 Recommendation to DOD about Determining When to Further Review Disparities

The Secretary of Defense, in collaboration with the Secretaries of the military services and the Secretary of Homeland Security, should issue guidance that establishes criteria to specify when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed, and that describes the steps that should be taken to conduct such a review. (Recommendation 7) (Not implemented)

Source: GAO. | GAO-21-105000

DOD has not identified when any possible racial, ethnic, or gender disparities in the military justice system should be examined further, so this recommendation has not been implemented. In our May 2019 report, we found that DOD had not issued guidance that established criteria to specify when any data indicating possible demographic disparities in the military justice system should be further reviewed, and to describe what steps should be taken to conduct such a review. As a result, we recommended that DOD develop guidance on this matter. Following this, section 5401(b)(2) of the NDAA for Fiscal Year 2020 included a provision directing the Secretary of Defense to issue guidance in accordance with this recommendation.

As of June 2021, DOD has not issued guidance that would address this recommendation. Officials from DOD's Office for Diversity, Equity, and Inclusion (ODEI)

said that DOD had approved funding to have the Center for Naval Analyses, a nonprofit

¹⁴In addition, Air Force officials told us that the Air Force is also replacing its military justice database with the development phase of its new Disciplinary Case Management System, expected to be completed by the end of fiscal year 2021. An Air Force official said that over the long term, they plan for the new system to have on-demand access to data from the Air Force personnel database.

research and analysis organization, conduct a study to identify further disparities in the military justice system. ODEI officials said that they plan to use the findings and recommendations from this study to develop guidance that establishes criteria and steps that will be taken to conduct a review on disparities, as described in our recommendation. ODEI officials told us that the study should be completed around June 2022, but the exact timeframe for completion will depend on when the study formally begins.

DOD Is Beginning to Comprehensively Study the Extent and Causes of Disparities in the Military Justice System, but Has Not Identified Causes or Taken Steps to Address Disparities

Status of May 2019 Recommendation to DOD about Studying Causes of Disparities

The Secretary of Defense, in collaboration with the Secretaries of the military services and the Secretary of Homeland Security, should conduct an evaluation to identify the causes of any disparities in the military justice system, and take steps to address the causes of these disparities as appropriate. (Recommendation 11) (Not implemented)

Source: GAO. | GAO-21-105000

DOD and the military services have some assessments of military justice system disparities completed or underway, in which they are beginning to comprehensively study the extent and causes of any disparities. However, DOD has not identified causes or taken steps to address disparities, so our recommendation has not been implemented.

In our May 2019 report, we recommended that the Secretary of Defense conduct an evaluation to identify the causes of any disparities in the military justice system, and take steps to address the causes of these disparities. DOD partially concurred with this recommendation, agreeing with the content, but requesting that we modify the recommendation to direct it to more appropriate entities. We made that change before the report was issued. In December 2019, the NDAA for Fiscal Year 2020 included a provision directing

the Secretary of Defense to conduct an evaluation consistent with our recommendation.¹⁵ DOD was directed to commence or carry out these activities by June 2020.

In October 2019, prior to the enactment of the NDAA for Fiscal Year 2020, DOD officials told us that the department was exploring the feasibility of conducting an internal research project to delve into the differences in military justice data to inform the implementation of this recommendation. At that time, they estimated that this research might be concluded in March 2021. ODEI subsequently developed a research proposal for a study to be conducted by a nonprofit research and analysis organization, which ODEI officials said would provide a more independent assessment than a study conducted using internal DOD capabilities. According to ODEI officials, as of May 13, 2021, the department had approved funding for the ODEI research proposal. ODEI officials said that they plan to use the findings and recommendations from this study to identify the causes and steps to take to address those causes as noted in our recommendation. As of June 2021, ODEI officials stated that the study should be completed around June 2022, but the exact timeframe for completion will depend on when the study formally begins.

In addition to the ODEI study, four of the military services are also conducting studies about disparities. Each of these studies are discussed in more detail in enclosure II. We believe that conducting comprehensive analyses into the causes of disparities in the military justice system would better position DOD and the military services to identify actions to address disparities,

¹⁵Pub. L. No. 116-92, §540l(b)(3).

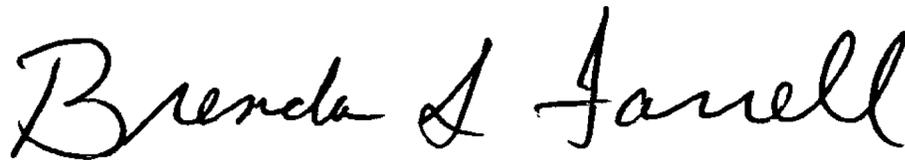
and thus help ensure that the military justice system is fair and just, a key principle of the UCMJ. While the military service studies will provide helpful insights, we continue to believe that it is important for DOD to initiate and complete the department-wide study that we recommended, so that they can identify any department-wide concerns and take appropriate corrective actions.

Agency Comments

We provided a draft of this report to DOD and the Department of Homeland Security for review and comment. DOD and the Department of Homeland Security provided technical comments, which we have incorporated as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Secretary of Defense, the Secretary of Homeland Security, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3604 or farrellb@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in enclosure III.

A handwritten signature in black ink that reads "Brenda S. Farrell". The signature is written in a cursive, flowing style.

Brenda S. Farrell
Director, Defense Capabilities and Management

Enclosures—3

Enclosure I: Recommendations from GAO-19-344 That Have Been Implemented

DOD has implemented eight recommendations from our May 2019 report, so we have closed those recommendations as implemented. Agency actions taken to address these eight implemented recommendations are described below.

Coast Guard Has Developed the Capability to Report Gender Information in Its Military Justice Database

Status of May 2019 Recommendation to Coast Guard about Gender Information

The Secretary of Homeland Security should ensure that the Commandant of the Coast Guard modifies the Coast Guard's military justice database so that it can query and report on gender information. (Recommendation 1) (Implemented)

Source: GAO. | GAO-21-105000

In our May 2019 report, we found that the Coast Guard was unable to determine the gender of servicemembers prosecuted for UCMJ violations without merging data from multiple databases, which can be labor intensive and time consuming. As a result, we recommended that the Coast Guard modify its military justice database to be able to report and query gender information. As of October 2019, the Coast Guard implemented modifications to its military justice database so that it now supports queries and reporting for gender information. Specifically, the Coast Guard has now made gender a required field in its military justice database, and gender now appears as a field on the database's search screen. We closed this

recommendation as implemented in 2020, as we believe that the actions taken by the Coast Guard meet the intent of our recommendation.

Army, Navy, Marine Corps, and Coast Guard Developed Capabilities to Present Race and Ethnicity Data in Accordance with 2018 Uniform Standards

As of June 2021, the Army, the Navy, the Marine Corps, and the Coast Guard have developed the capability to present race and ethnicity data consistent with the 2018 uniform standards in their respective personnel and investigations databases, while the Air Force is still working to develop these capabilities. As a result, recommendations 2, 4, and 5 have been implemented. As discussed above, recommendation 3 has not been implemented, and will not be discussed again below.

In our May 2019 report, we found, among other things, that the military services were not collecting and maintaining consistent information regarding race and ethnicity in their investigations, military justice, and personnel databases. In December 2018, the DOD General Counsel issued uniform standards and criteria required by article 140a of the UCMJ. The 2018 uniform standards directed the military services to collect data related to race and ethnicity in their military justice databases, and use specific categories to collect racial and ethnic data in separate data fields. The military services were to implement the 2018 uniform standards in their military justice databases no later than December 23, 2020. However, the 2018 uniform standards only applied to the military services' military justice databases and not to their personnel and investigations databases. As a result of these findings, we made four recommendations that the Army, the Air Force, the Navy, and the Coast Guard, respectively, develop the capability to present servicemembers' race and ethnicity data in their investigations and personnel databases using the same categories of race and ethnicity established by the 2018 uniform standards. DOD and the Department of Homeland Security concurred with these recommendations, and as of June 2021, have implemented three of the four recommendations.

Since our May 2019 report, the military services have taken key steps to collect and maintain consistent data for race and ethnicity information. Table 1 summarizes whether the databases used by the military services collect servicemembers' race and ethnicity data in accordance with the 2018 uniform standards, and which method they use to collect the data as of June 2021. The first method defined in the standards for collecting race and ethnicity data is the "Two Question Format," in which race is reported using five categories, and ethnicity is reported using two categories.¹⁶ The second is the "Combined Format," in which race and ethnicity are reported together using six categories.¹⁷

Table 1: Race and Ethnicity Data Collection in Military Services' Investigations and Personnel Databases as of June 2021

Service	Database name	Ability to present in accordance with the 2018 uniform standards for military justice databases		
		Reporting method	Race	Ethnicity
Army	Army Law Enforcement Reporting and Tracking System (I)	Two Question	Yes	Yes
	Total Army Personnel Database (P)	Two Question	Yes	Yes
Navy and Marine Corps Shared	Consolidated Law Enforcement Operations Center (I)	Two Question	Yes	Yes
Navy	Navy Personnel Database (P)	Two Question	Yes	Yes
Marine Corps	Marine Corps Total Force System (P)	Two Question	Yes	Yes
Air Force	Investigative Information Management System (I)	Two Question	No	No
	Military Personnel Data System (P)	Two Question	Yes	Yes
Coast Guard	Field Activity Case Tracking System (I)	Two Question	Yes	Yes
	Direct Access (P)	Combined	Yes	Yes

Legend: (I)=investigations database; (P)=personnel database

Source: GAO analysis of each military service's investigations and personnel database information. | GAO-21-105000

¹⁶The five race categories in the "Two Question Format" are: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. The two ethnicity categories in this method are: Hispanic or Latino, and not Hispanic or Latino.

¹⁷The six race and ethnicity categories in the "Combined Format" are: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander, and White.

Army Can Present Consistent Race and Ethnicity Data in Its Investigations and Personnel Databases

Status of May 2019 Recommendation to Army about Race and Ethnicity Information

The Secretary of the Army should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Army's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Army. (Recommendation 2) (Implemented)

Source: GAO. | GAO-21-105000

The Army has developed the capability to present race and ethnicity data in its investigations and personnel databases consistent with the 2018 uniform standards. In July 2019, the Army updated the race and ethnicity categories in its investigations database to be consistent with those in the 2018 uniform standards. In its personnel database, the Army uses different values than those required by the 2018 uniform standards to collect and maintain race and ethnicity information, but has developed a process to use its detailed ethnicity data to separate certain combined race categories and present the race data in accordance with the 2018 uniform standards. The Army also has provided documentation that it has the capability to collect 23 types of ethnicity, and is able to aggregate those ethnicities into the Hispanic and non-Hispanic categories established in the 2018 uniform standards. Army officials stated that, although they have a method for aggregating their ethnicity data into the categories defined in the standards, the aggregation is conducted manually. Although this manual process could be time-consuming and labor-intensive, this method does provide the capability to aggregate in a method

consistent with our recommendation. As a result, we believe that the actions taken by the Army meet the intent of our recommendation, and we have closed the recommendation as implemented.

Navy and Marine Corps Can Present Consistent Race and Ethnicity Data in Personnel and Investigations Databases

Status of May 2019 Recommendation to Navy about Race and Ethnicity Information

The Secretary of the Navy should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Navy's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Navy. (Recommendation 4) (Implemented)

Source: GAO. | GAO-21-105000

Both the Navy and the Marine Corps have developed the capability to present consistent race and ethnicity data in their respective personnel databases, and the Navy has developed this capability in its investigations database, which also serves as the investigations database for the Marine Corps. Navy officials stated that the Navy updated its personnel database in August 2020 to collect and present race and ethnicity data in accordance with the 2018 uniform standards. The Navy has provided documentation that it has the capability to collect data on 23 categories of ethnicity, and is able to aggregate those ethnicities into the Hispanic and non-Hispanic categories established in the 2018 uniform standards. The Marine Corps personnel database has the capability to present race and ethnicity data in accordance with the categories of race and ethnicity defined in the uniform standards. Similar to the Navy, the Marine Corps has the capability to collect more than 20 different ethnicity categories, and has the capability to aggregate ethnicity into the Hispanic and non-Hispanic categories specified in the 2018 uniform standards. In June 2021, the Navy completed updates to its investigations database, which collects

investigations data for both Navy and Marine Corps cases. The Navy can now collect race and ethnicity data in categories consistent with the 2018 uniform standards as a result of a policy update.¹⁸ By implementing our recommendation, we believe the Navy will be better positioned to analyze consistent demographic data. We believe that the actions taken by the Navy meet the intent of our recommendation, and we have closed the recommendation as implemented.

¹⁸Naval Criminal Investigative Service Policy Document 21-2, *Updated Values for Sex, Race, and Ethnicity* (June 7, 2021).

Coast Guard Can Present Consistent Race and Ethnicity Data in Its Investigations and Personnel Databases

Status of May 2019 Recommendation to Coast Guard about Race and Ethnicity Information

The Secretary of Homeland Security should ensure that the Commandant of the Coast Guard develops the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Coast Guard's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Coast Guard. (Recommendation 5) (Implemented)

Source: GAO. | GAO-21-105000

The Coast Guard has the capability to collect and present race and ethnicity data in its investigations and personnel databases consistent with the 2018 uniform standards. Specifically, race and ethnicity are collected in separate fields in the Coast Guard's investigations database, and the categories currently used for both fields are consistent with the standards. Coast Guard officials told us that the Coast Guard updated its investigations database to use categories consistent with those required by the 2018 uniform standards. In its personnel database, the Coast Guard collects race and ethnicity data using the combined categories of race and ethnicity permitted by the 2018 uniform standards, and the combined race and ethnicity categories currently used in the Coast Guard's personnel database are consistent with the 2018 uniform standards. Coast Guard servicemembers have the option to update their race and ethnicity within their respective personnel profiles using a self-service feature. Coast Guard officials said that they adjusted the options within that feature to ensure the data collected is consistent with the standards. By implementing our recommendation, the Coast Guard is better positioned to analyze consistent demographic

data. We believe that the actions taken by the Coast Guard meet the intent of our recommendation, and we have closed the recommendation as implemented.

The Military Services Have Begun Reporting Data That Could Provide Greater Visibility into Disparities

The military services have begun reporting demographic data in annual reports that could provide greater visibility into racial, ethnic, or gender disparities in the military justice system. The UCMJ directs each of the military services to submit annual reports on the military justice system to the Congressional Armed Services Committees. In our May 2019 report, we found that these annual reports did not include demographic information about servicemembers who experienced a military justice action. As a result, we recommended that DOD consider an amendment to the UCMJ reporting requirement that would require the military services to include data about race, ethnicity, and gender in the annual reports about military justice actions.

Status of May 2019 Recommendation to DOD about Reporting Demographic Information

The Secretary of Defense should ensure that the Joint Service Committee on Military Justice, in its annual review of the UCMJ, considers an amendment to the UCMJ's annual military justice reporting requirements to require the military services to include demographic information, including race, ethnicity, and gender, for all types of courts-martial. (Recommendation 6) (Implemented)

Source: GAO. | GAO-21-105000

In September 2019, DOD's Joint Service Committee on Military Justice proposed an action item on this recommendation as part of its annual review. Specifically, the committee was considering an amendment to the UCMJ's annual military justice reporting requirements to require the military services to include demographic information, including race, ethnicity, and gender, for all types of courts-martial. Following this, section 540I(b)(1) of the NDAA for Fiscal Year 2020 included a provision directing the Secretary of Defense to include this demographic information for both victims and the accused in the annual military justice reports.¹⁹ The DOD General Counsel issued a memorandum on June 8, 2020, instructing the military services to record race, ethnicity, and gender data of both the victim and accused parties to all courts-martial convened on or after June 17, 2020.²⁰

In the fiscal year 2020 annual military justice reports to Congress, all of the military services reported race, ethnicity, and gender information for both victims and accused parties in accordance with the memo and the statutory requirements. Specifically, in their respective 2020 annual reports, the Navy, the Marine Corps, the Air Force, and the Coast Guard all reported race and ethnicity as separate fields, with five distinct race categories and two ethnicity categories. The Army reported race and ethnicity as one combined field, with six categories. Although these differences could pose a challenge for future cross-service analyses on disparities, both reporting options are allowed under the OMB standards. As a result, we believe that the actions taken by DOD and the military services meet the intent of our recommendation, and we have closed the recommendation as implemented.

Army, Navy, Marine Corps, and Coast Guard Have Begun Collecting Complete Nonjudicial Punishment Data

The Army, the Navy, the Marine Corps, and the Coast Guard have begun collecting complete nonjudicial punishment data. As a result, we have closed three recommendations as implemented, one for each of these military services. In our May 2019 report, we found that there was inconsistent collection of data related to nonjudicial punishments across the military services.²¹ Specifically, we could not determine whether disparities existed among servicemembers subject to nonjudicial punishments in the Army, the Navy, and the Coast Guard because they did not collect complete nonjudicial punishment data in their investigations, military justice, or personnel databases. Army and Navy officials told us that they did not record nonjudicial punishment information in part because nonjudicial punishments are not meant to follow servicemembers throughout their careers, while Coast Guard officials stated concerns that recording nonjudicial punishment data might inhibit the rehabilitative component of nonjudicial punishments. The military justice databases for these three military services did contain records of nonjudicial punishments in which there was legal involvement by the Judge

¹⁹Pub. L. No. 116-92, §540I(b)(1) (2019).

²⁰General Counsel of the Department of Defense Memorandum, *Recording Court-Martial Demographic Information* (June 8, 2020).

²¹Commanding officers decide nonjudicial punishments, and use them to discipline minor offenses committed by enlisted servicemembers or officers.

Advocate General's Corps in the case. At the time of our May 2019 report, Army, Navy, and Coast Guard officials all expressed concerns about the feasibility of collecting and maintaining data on all nonjudicial punishments.

As a result, we made three separate recommendations to the Army, the Navy, and the Department of Homeland Security for the Coast Guard to consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the military service's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. The Army, the Navy, and the Department of Homeland Security concurred with these recommendations. We believe that the actions taken meet the intent of our recommendations, and we have closed the recommendations as implemented.

Army Collects Nonjudicial Punishment Data on All Cases

Status of May 2019 Recommendation about Army Nonjudicial Punishment Data

The Secretary of the Army should consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the Army's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. (Recommendation 8) (Implemented)

Source: GAO. | GAO-21-105000

The Army maintains gender, race, ethnicity, offense, and punishment data for nonjudicial punishments in its military justice database; however, at the time of our May 2019 report, only 65 percent of their reported nonjudicial punishment cases were maintained in their military justice database. In December 2017, the Army Deputy Judge Advocate General issued guidance identifying the Army's military justice database as the single tool for creating, processing, and managing nonjudicial punishments, among other things.²² In 2020, the Army updated its guidance on collecting nonjudicial punishment data, to require that all nonjudicial punishments will be recorded on a form that is to be transmitted by the servicing legal office through the Army's military justice database.²³ According to Army officials, after publication of this guidance, they expect that the Army's military justice database is now

collecting 100 percent of these actions, in part because they require the use of new forms that can only be generated in the database. By implementing our recommendation, the Army will improve its ability to assess or identify disparities among populations subject to this type of punishment. We believe that the actions taken by the Army meet the intent of our recommendation, and we have closed the recommendation as implemented.

²²Department of the Army, Deputy Judge Advocate General Memorandum, *The Judge Advocate General's Corps Enterprise Applications—DJAG Policy Memorandum 18-02* (Dec. 19, 2017).

²³Army Regulation 27-10, *Military Justice* (Nov. 20, 2020).

Navy and Marine Corps Collect Nonjudicial Punishment Data on All Cases

Status of May 2019 Recommendation about Navy and Marine Corps Nonjudicial Punishment Data

The Secretary of the Navy should consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the Navy's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. (Recommendation 9) (Implemented)

Source: GAO. | GAO-21-105000

The Navy and the Marine Corps have begun collecting data on all nonjudicial punishment cases.²⁴ Specifically, in October 2020, the Navy Judge Advocate General issued guidance, which provided that all Navy and Marine Corps officers performing military justice functions must report on a quarterly basis the results of all summary courts-martial and nonjudicial punishments completed by their command.²⁵ The Navy and Marine Corps collect nonjudicial punishment data including offender and victim race, ethnicity, and gender data, as well as offense and punishment imposed using an Excel form that was included in the guidance. Navy officials stated that collecting this information through Excel was an interim solution. For a permanent solution, the officials said that they expect to collect this information through their personnel database by October 31, 2022. Marine Corps officials stated that

they expect to collect this information through their personnel database by October 31, 2021. By implementing our recommendation, the Navy and the Marine Corps will improve their ability to assess or identify disparities among populations subject to this type of punishment. We believe that the actions taken by the Navy and the Marine Corps meet the intent of our recommendation, and we have closed the recommendation as implemented.

Coast Guard Collects Nonjudicial Punishment Data for Most Cases

Status of May 2019 Recommendation about Coast Guard Nonjudicial Punishment Data

The Secretary of Homeland Security should ensure that the Commandant of the Coast Guard considers the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the Coast Guard's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. (Recommendation 10) (Implemented)

Source: GAO. | GAO-21-105000

The Coast Guard has now begun collecting more complete data on nonjudicial punishment cases. Specifically, in January 2021, the Coast Guard issued guidance which stated that nonjudicial punishment results should be entered into the Coast Guard's personnel database, except when the charges are dismissed or dismissed with a warning. As a result, the Coast Guard currently collects nonjudicial punishment data including offender race, ethnicity, and gender data, as well as punishment imposed. By implementing our recommendation, the Coast Guard will improve its ability to assess or identify disparities among populations subject to this type of punishment. We believe that the actions taken by the Coast Guard meet the intent of our recommendation, and we have closed the recommendation as implemented.

²⁴At the time of our May 2019 report, Marine Corps officials said that commanders fill out a form for all executed administrative actions, nonjudicial punishments, and all types of courts-martial, and information from those forms were then recorded in the personnel database.

²⁵Department of the Navy JAG Instruction 5800.9E, *Quarterly Criminal Activity, Disciplinary Infractions and Courts-Martial Report (QCAR)* (Oct. 19, 2020).

Enclosure II: Military Service Studies about Racial and Gender Disparities in the Military Justice System

Some of the military services are conducting studies about disparities in the military justice system, as shown in table 2.

Table 2: Overview of Military Service Studies about Racial and Gender Disparities in the Military Justice System

Organization and study name/title	Topic/scope	Complete	Completion date	Disparities found	Confirms GAO findings
<i>Army</i>					
Holistic Evaluation and Assessment of Racial Disparity (HEARD)	Collection of racial and ethnicity data on 15 points along the military justice timeline, including: accessions waivers, drug testing, family advocacy reporting, sexual assault reporting, law enforcement investigations, administrative separations, nonjudicial punishment, courts-martial, defense appellate issue identification, appellate court relief, professional responsibility complaints, Army Corrections Command data, and Army Clemency and Parole Board data. HEARD also includes a qualitative study.	No	October 2021 (estimated)	N/A	N/A
Office of Economic and Manpower Analysis (OEMA) Review of GAO-19-344 Report	Replicated GAO's 2019 Army-related findings and controlled for additional demographic variables to further investigate specific key findings	Yes	December 5, 2020 ^a	Yes	Partial ^b
OEMA Examination of Racial Disparities in Army Urinalysis Drug Testing	Investigated the prevalence of random drug testing and drug testing suspicion among Black, Hispanic, and White servicemembers using drug test and personnel data between 2018 and 2019	Yes	December 1, 2020 ^a	Yes	N/A ^c
OEMA Extension of Holistic Evaluation and Assessment of Racial Disparity Data Collection and Analysis	Extension of the initial data collection that controls for age, rank, education, gender, years of service, Armed Forces Qualification Test score, military occupational specialty, and installation	No	February 10, 2021 ^a	N/A	N/A
<i>Navy and Marine Corps</i>					
Gender Differences in and Costs of Misbehavior among [Department] of Navy Enlisted Personnel ^d	Investigated gender disparities in misbehavior rates among enlisted Marines and Sailors from fiscal year 1999 to fiscal year 2015	Yes	April 2019	Yes	Yes

Organization and study name/title	Topic/scope	Complete	Completion date	Disparities found	Confirms GAO findings
Race Differences in Misbehavior among Navy Enlisted Personnel ^d	Investigated racial disparities in misbehavior rates among enlisted sailors from fiscal year 1999 to fiscal year 2019	Yes	June 25, 2020	Yes	Yes
Understanding Sexual Assault in the Marine Corps	Examines how health, sociodemographic (e.g., race), behavioral, or career factors explain the risk of being a subject ^e or victim of sexual assault. The study will also examine how disciplinary actions affect the careers of subjects ^e and victims, and if disciplinary actions vary by race, gender, rank, and sexual assault accusation or conviction	No	2024 (estimated)	N/A	N/A
Examining Diversity and Inclusion in the Marine Corps	Will examine racial, ethnic, and/or gender disparities across career trajectories, including milestones (such as board selection), separation, as well as criminal incidences (e.g., sexual assault)	No	Ongoing	N/A	N/A
<i>Air Force</i>					
Independent Racial Disparity Review	Racial disparity in military discipline processes and personnel development and career opportunity as they pertain to black airmen and space professionals	Yes	December 2020	Yes	Yes
Follow-on Study to Independent Racial Disparity Review ^f	Expands scope of the first study to look at disparities for non-Black minority servicemembers across genders in three race categories (Asian, American Indian or Alaskan Native, and Native Hawaiian or Pacific Islander) and one ethnicity category (Hispanic/Latinx)	No	Summer 2021 (estimated)	N/A	N/A
Military Discipline Disparity Study ^g	Identify potential causes of military justice disparities	No	Late fiscal year 2021 (estimated)	N/A	N/A

Legend: N/A=Not applicable

Source: GAO analysis of military service documents and information from military service officials. | GAO-21-105000

^aWhile this study has been completed, it has not yet been published. Army officials told us that the Army will publish this report as part of a larger initiative.

^bThe study was consistent with GAO analyses with respect to associations between race and trials in general and special courts-martial, convictions, and punishment severity in its replication of our study. There were discrepancies in the number of servicemembers and courts-martial with and without investigations. However, associations in our study and their analyses for these courts-martial remained statistically significant. After correspondence with Army officials, discrepancies in the number of servicemembers can be attributed to: (1) our use of monthly snapshots, which included any servicemember who served in the Army at any point throughout the year, compared to Army's use of end-of-fiscal-year annual panels that only included servicemembers who served in the Army at the end of the fiscal year; (2) lag time between investigations and court-martial cases, which contributes to the higher number of court-

martial cases with investigations in the Army's data pull in 2020 compared to our data pull from 2018. OEMA also uses both the GAO investigation window (2013-2017) and a larger window (2001-2017) to estimate its results. In addition, discrepancies in the association between race and general and special court-martial trials, with and without investigations, arose because the Army analysis was not comparable to ours; specifically, the control variables and reference groups were different between our respective analyses.

^cThis study confirmed the presence of disparities that were not within the scope of our May 2019 report.

^dConducted by the Center for Naval Analyses on behalf of the Department of the Navy.

^eAccording to a Marine Corps official, Marine subjects of sexual assault refers to any person under investigation for sexual assault or any person convicted (perpetrator) of sexual assault.

^fConducted by the Inspector General for the Department of the Air Force at the direction of the Secretary of the Air Force, the Chief of Staff of the Air Force, and the Chief of Space Operations.

^gConducted by The RAND Corporation on behalf of the Department of the Air Force.

Overview of Army Studies

Army officials told us that, in response to our May 2019 report, the Secretary of the Army directed a holistic assessment of the Army's investigation and disciplinary systems that would evaluate and assess the sources of any racial disparities, and make specific recommendations for improvements to these systems. Army officials said that this assessment is included as a separate line of effort within a larger Army effort to study racial disparities called "Project Inclusion".²⁶ The officials said that the working group, composed of multiple stakeholders, collected race and ethnicity data from fiscal years 2017 to 2019 from 15 points along a broadly defined military justice timeline.²⁷ The officials explained that the intent of the initial data collection was to examine, through regression analysis, the data we analyzed in our May 2019 report to identify where racial disparities existed, where racial disparities were exacerbated, and where racial disparities were alleviated.

According to Army officials, after submitting an interim progress report in November 2020 and briefing Army senior leaders in December 2020, the Director of Army Staff directed The Judge Advocate General and the Provost Marshal General to work with the Office of Economic and Manpower Analysis (OEMA) to conduct additional multivariate analysis to further study causation of the identified disparities and completion of the ongoing qualitative study. As a result, Army officials said that The Judge Advocate General of the Army and OEMA jointly developed three research lines of effort to support the larger HEARD research initiative.

The first study, completed in December 2020, sought to replicate our review, while also controlling for additional variables and using more data than those we examined to further investigate our findings.²⁸ The study was able to replicate and confirm our key Army-related findings with respect to associations between race and trials in general and special courts-

²⁶The assessment is called "Holistic Evaluation and Assessment of Racial Disparity" (HEARD). Army officials told us that HEARD also initiated a qualitative study by the Behavioral Science Education and Training Department at the United States Military Police School consisting of phenomenological analyses of 130 semi-structured interviews conducted with military justice and non-military justice personnel and 24 sensing sessions across the Army specifically discussing racial disparities in military justice.

²⁷According to Army officials, these 15 points along the military justice timeline include: accessions waivers, crime trends, military justice actors, drug testing, family advocacy reporting, sexual assault reporting, law enforcement investigations, administrative separations, nonjudicial punishment, courts-martial, defense appellate issue identification, court-martial appellate court outcomes, professional responsibility complaints, Army Corrections Command data, and Army Clemency and Parole Board data. The officials told us that HEARD also includes a qualitative study.

²⁸R. Patterson and K. Greenberg, "OEMA Review of the GAO-19-344 Report to the Committee on Armed Service, House of Representatives 'Military Justice DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities'" (OEMA, Dec. 5, 2020, forthcoming).

martial, convictions, and punishment severity. In addition, the Army found racial disparities persist when controlling for additional demographic measures, such as servicemembers' Armed Forces Qualification Test, home state of record, and military occupational specialty.

However, there were discrepancies between our findings and theirs in the number of servicemembers and courts-martial with and without investigations. Specifically, our analyses and the Army's study both found statistically significant disparities for Black servicemembers in general and special courts-martial that were and were not preceded by a recorded investigation. However, our analyses found that this association differed by the presence or absence of an investigation, while the Army's associations were consistent regardless of investigation. After controlling for other attributes, the Army's study found that Black servicemembers were 2.19 times more likely than White servicemembers to be tried in general and special courts-martial following a recorded investigation, compared to our analysis where Black servicemembers were 1.16 times more likely. The Army's study also found that Black servicemembers were 2.00 times more likely than White servicemembers to be tried in general and special courts-martial without a recorded investigation, compared to our analysis where Black servicemembers were 1.85 times more likely.²⁹ These discrepancies can be attributed to the use of different control variables specified in the model, different reference groups in our respective analyses, and lag times between investigations and court-martial cases.³⁰

The second study, also completed in December 2020, examined urinalysis data for the possibility of racial disparities in drug testing within the Army.³¹ The study investigated the prevalence of random drug testing and drug testing suspicion among Black, Hispanic, and White servicemembers, and whether any disparities in the Army's drug testing are consistent with racial bias in testing practices. The study found that (1) random drug testing occurs more regularly in occupations with more Black and Hispanic servicemembers; and (2) Black servicemembers are drug tested under suspicion at higher rates.

Army officials told us that the third study, which was completed in February 2021, is an extension of the initial HEARD data collection and analysis that controls for age, rank, education, gender, years of service, home of record, military occupational specialty, and installation. According to Army officials, these three studies are expected to be published as

²⁹The Army's study also performed additional analyses that controlled for attributes not considered in our review, such as Armed Forces Qualification test score, home state of record, and military occupational specialty. Their analyses found that the inclusion of these characteristics attenuated the likelihood of trial in general and special courts-martial for Black and Hispanic servicemembers compared to White servicemembers, but these racial differences were still statistically significant.

³⁰GAO's analysis controlled for gender, rank, race, and age. The Army's analysis controlled for gender, rank, race, and education. For our analyses assessing the likelihood of: (1) general and special court-martial trials with investigations, and (2) general and special court-martial trials without investigations, our analyses used distinct and corresponding reference groups of: (1) servicemembers with investigations, and (2) servicemembers without investigations, respectively. However, the Army used the same reference group of all servicemembers for both of these analyses. In addition, our investigations data was pulled in 2018, while the Army's data was pulled in 2020, which contributes to the higher number of court-martial cases with investigations in the Army's data. OEMA also uses both the GAO investigation window (2013-2017) and a larger window (2001-2017) to estimate its results. According to Army OEMA officials, merging investigations from a larger date range (2001-2017) facilitates linking courts-martial to investigations started prior to 2013 (due to either lengthy investigation times or the associated courts-martial were in the early part of the 2013 to 2017 window).

³¹R. Patterson and K. Greenberg, "Examination of Racial Disparities in Army Urinalysis Drug Testing," (OEMA, Dec. 1, 2020, forthcoming). The study used drug test results pulled from the Drug and Alcohol Testing Management Information System and linked to Army personnel data at the individual level from 2018 and 2019.

chapters in the larger Holistic Evaluation and Assessment of Racial Disparity study, which has an estimated completion date of October 2021.

Overview of Navy and Marine Corps Studies

The Navy has conducted two studies on racial and gender disparities. The first study identified gender disparities in misbehavior rates among enlisted Marines and Sailors from fiscal year 1999 to fiscal year 2015.³² The misbehaviors studied for Marines in the first study included nonjudicial punishments, courts-martial, demotions, and misconduct-related separations.³³ Misbehaviors studied for Sailors in both studies included placement in a disciplinary status, demotions, and misconduct related separations. The first study found that over this entire time period, women had lower rates of misbehavior than men in all categories. The second study identified racial disparities in misbehavior rates among enlisted Sailors from fiscal year 1999 to fiscal year 2019.³⁴ The second study found that Black and American Indian/Alaskan Native enlisted Sailors were placed in disciplinary status at a higher rate and typically had higher rates of demotion and misconduct-related separation than White and Asian/Pacific Islander enlisted Sailors. This study also found that these disparities for Black enlisted Sailors existed for all but one year of the approximately 21-year period reviewed.

In addition, the Marine Corps Directorate of Analytics and Performance Optimization is conducting two studies relevant to diversity. The first study examines whether and how health, sociodemographic (e.g., race), behavioral, or career factors explain the risk of being a Marine subject of sexual assault and/or a victim of sexual assault.³⁵ The study will also examine how disciplinary actions, or lack thereof, affect the career of Marine subjects and victims, and if disciplinary actions vary by race, gender, rank, and sexual assault accusation/conviction. The Directorate will partner with the Marine & Family Programs and Military Justice – Judge Advocate Division to inform analyses, interpret results, and provide actionable

³²A. Kraus, *et al.*, *Gender Differences in and Costs of Misbehavior among DON Enlisted Personnel*, DRM-2019-U-019345-Final (Arlington, VA: CNA, April 2019). For purposes of this study, misbehavior was defined as offenses covered by the punitive articles of the UCMJ, which can range from minor disciplinary infractions to serious criminal offenses. Misbehavior is measured by certain events recorded in personnel records. For Sailors this included placement in a disciplinary status, demotions, and misconduct-related separations as indicators of misbehavior. For Marines this included nonjudicial punishments, courts-martial, demotions, and misconduct-related separations. The study reviewed personnel record data from active-duty Navy and Marine Corps servicemembers from fiscal years 1999 to 2015 and used the misbehavior indicators to compute rates of misbehavior by gender. The study also reviewed research literature and Navy policies and budgets to develop a list of types of costs to the Navy related to misbehavior: (1) directly generated by misbehavior (e.g., missed workdays); (2) response-related (e.g., leadership time spent on the matter); and (3) outcome-related (e.g., administrative separations, which were not included in the scope of our May 2019 report). The study then captured existing per-incident dollar estimates or calculated estimates themselves using available budget data. Using these estimations, the study calculated an annualized approximation of the extra financial costs to the Navy and Marine Corps of male misbehavior in fiscal year 2015.

³³In this study, misconduct-related separations include: (1) administrative separations (general discharge and other-than-honorable discharge); (2) punitive separations (bad conduct discharge and dishonorable discharge); and (3) mandatory misconduct separation for misbehaviors that include, but are not limited to, sexual misconduct and supremacist or extremist conduct. Administrative separations were not included in the scope of our May 2019 report.

³⁴D. Lien, *Race Differences in Misbehavior among USN Enlisted Personnel*, DSA-2020-U-027471-2REV (Arlington, VA: CNA, June 25, 2020). This study used the same framework of personnel indicators as Kraus et al. to identify racial differences in Navy personnel records for enlisted personnel from the Navy's Enlisted Tracking File (ETF) from September 1998 to December 2018. The study divided the data into longitudinal files to focus the analysis on career occurrences: (1) pre-Fleet student, (2) full duty at sea, and (3) full duty at shore. The study did not report data for a year in which it observed less than 5 cases nor data categorized as combined or unknown.

³⁵According to a Marine Corps official, Marine subjects of sexual assault refers to any person under investigation for sexual assault or any person convicted (perpetrator) of sexual assault.

recommendations. Marine Corps officials told us that analyses for this study began in September 2020 and will conclude in 2024. A Marine Corps official said that annual, preliminary results are pending final approval and distribution.³⁶

The second study will examine racial, ethnic, and/or gender disparities or inclusion indicators across Marine career trajectories. These include milestones, such as board selection, and separation, as well as criminal incidences (e.g., sexual assault). Analyses began in March 2021 and will be ongoing, given the exploratory nature of the research questions.³⁷

Overview of Air Force Studies

In December 2020, the Air Force Inspector General published a review that confirmed racial disparities for Black servicemembers across several areas in military discipline processes, personnel development, and career opportunity.³⁸ For example, the report found that, among other things, enlisted Black servicemembers were 72 percent more likely than enlisted White servicemembers to receive nonjudicial punishments, and 57 percent more likely than White servicemembers to face courts-martial. These findings are consistent with those in our May 2019 report.³⁹ While the review focused on the existence of racial disparities, it did not assess the causes of those disparities.

In February 2021, the Air Force directed the Air Force Inspector General to conduct a follow-on study that expands the scope of the first study to look at disparities faced by non-Black minority servicemembers across genders in three additional race categories (Asian, American Indian or Alaskan Native, and Native Hawaiian or Pacific Islander) and one additional ethnicity category (Hispanic/Latino). The officials told us that the report is scheduled to be released in the summer of 2021. In a press release announcing the second review, the Air Force said it will release the findings of the report in conjunction with the results of a 6-month assessment of actions taken in response to the initial racial disparity review.

³⁶U.S. Marine Corps Directorate of Analytics and Performance Optimization, *Understanding Sexual Assault in the Marine Corps* (forthcoming). Data sampled for the study include administrative/personnel data, destructive behavior data (e.g., suicide and inter-partner violence), medical data, Marine & Family Programs (MF) Sexual Assault Response Coordinator Defense Sexual Assault Incident Database (DSAID) and DSAID Legal Officer data. Data is inclusive of fiscal years 2014 to 2020.

³⁷U.S. Marine Corps Directorate of Analytics and Performance Optimization, *Examining Diversity and Inclusion in the Marine Corps* (forthcoming). Upon approval of data share agreement for medical data, the study will examine health outcomes across various sociodemographic groups. The Directorate will partner with the Judge Advocate Division among other potential stakeholders.

³⁸The Inspector General for the Department of the Air Force, *Independent Racial Disparity Review*, Report of Inquiry, S8918P (December 2020). The Air Force Inspector General employed a mixed methodology of qualitative and quantitative analyses to conduct its review. The Air Force Inspector General anonymously surveyed over 123,000 Air Force servicemembers; conducted small-group discussions with more than 1,300 Air Force and Space professionals; explored key themes in an additional 138 in-person group discussions; and reviewed over 27,000 pages of free-text comments from Air Force servicemembers and civilians. The study also examined Air Force military justice data dating back to fiscal year 2012; reviewed career development and opportunity data involving civilian, enlisted, and officer ranks; reviewed all pertinent Air Force Instructions and related publications; re-examined 23 past studies and reports involving race and demographics in the military; and examined other information and data.

³⁹The Air Force Inspector General review identified disparities in career opportunity and professional development that were not included in the scope of our May 2019 report. For example, disparities found in the review included underrepresentation of Black servicemembers in promotions to E-5 through E-7 and O-4 through O-6, and Definitely Promote allocations for O-5 and O-6. Additionally, the review found Black, permanent, full-time civilians are underrepresented in GS-13 through Senior Executive Service grades. However, the review also revealed no consistent disparity in retention rates by race.

Additionally, a senior Air Force official told us that the Air Force is currently in the early stages of a collaboration with the RAND Corporation to conduct a Military Discipline Disparity Study. The official stated that the focus of the study is to identify potential causes of military justice disparities. As of June 2021, the official told us they were working with RAND on the scope of the review, and anticipate that the study will be finished by the end of fiscal year 2021.

We believe that conducting comprehensive analyses into the causes of disparities in the military justice system would better position DOD and the military services to identify actions to address disparities, and thus help ensure that the military justice system is fair and just, a key principle of the UCMJ. While the respective military service studies will provide helpful insights, we continue to believe that it is important for DOD to initiate and complete the department-wide study that we recommended, so that they can identify any department-wide concerns, and take appropriate corrective actions.

Enclosure III: GAO Contact and Staff Acknowledgments

GAO Contact

Brenda S. Farrell, (202) 512-3604 or farrellb@gao.gov.

Staff Acknowledgments

In addition to the contact named above, Kimberly C. Seay, Assistant Director; Renee S. Brown; Vincent M. Buquicchio; Christopher Gezon; Won Lee; Serena C. Lo; Molly Miller; Benjamin L. Moser; Dae B. Park; Samuel J. Portnow; and Clarice Ransom made key contributions to this report.

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May 2019

MILITARY JUSTICE

DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities

GAO Highlights

Highlights of [GAO-19-344](#), a report to the Committee on Armed Services, House of Representatives

Why GAO Did This Study

The Uniform Code of Military Justice (UCMJ) was established to provide a statutory framework that promotes fair administration of military justice. Every active-duty servicemember is subject to the UCMJ, with more than 258,000 individuals disciplined from fiscal years 2013-2017, out of more than 2.3 million unique active-duty servicemembers. A key principle of the UCMJ is that a fair and just system of military law can foster a highly disciplined force.

House Report 115-200, accompanying a bill for the National Defense Authorization Act for Fiscal Year 2018, included a provision for GAO to assess the extent that disparities may exist in the military justice system. This report assesses the extent to which (1) the military services collect and maintain consistent race, ethnicity, and gender information for servicemembers investigated and disciplined for UCMJ violations that can be used to assess disparities, and (2) there are racial and gender disparities in the military justice system, and whether disparities have been studied by DOD. GAO analyzed data from the investigations, military justice, and personnel databases from the military services, including the Coast Guard, from fiscal years 2013-2017 and interviewed agency officials.

What GAO Recommends

GAO is making 11 recommendations, including that the services develop the capability to present consistent race and ethnicity data, and DOD include demographic information in military justice annual reports and evaluates the causes of disparities in the military justice system. DOD and the Coast Guard generally concurred with GAO's recommendations.

View [GAO-19-344](#). For more information, contact Brenda S. Farrell at (202) 512-3604 or farrellb@gao.gov.

May 2019

MILITARY JUSTICE

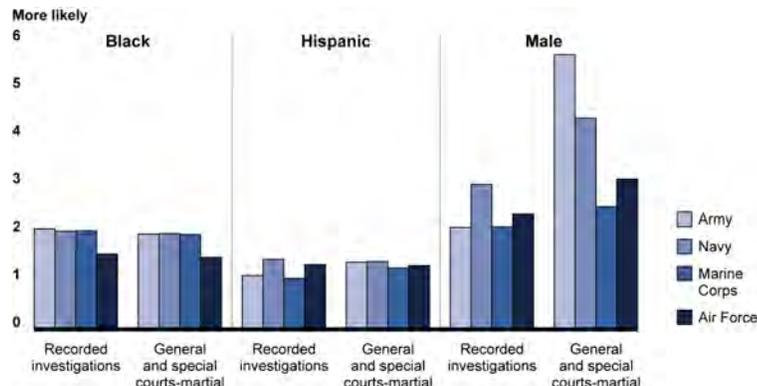
DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities

What GAO Found

The military services collect gender information, but they do not collect and maintain consistent information about race and ethnicity in their investigations, military justice, and personnel databases. This limits their ability to collectively or comparatively assess these data to identify any disparities (i.e., instances in which a racial, ethnic, or gender group was overrepresented) in the military justice system within and across the services. For example, the number of potential responses for race and ethnicity across the military services' databases ranges from five to 32 options for race and two to 25 options for ethnicity, which can complicate cross-service assessments. The services also are not required to and, thus, do not report demographic information in their annual military justice reports—information that would provide greater visibility into potential disparities.

GAO's analysis of available data found that Black, Hispanic, and male servicemembers were more likely than White or female members to be the subjects of investigations recorded in databases used by the military criminal investigative organizations, and to be tried in general and special courts-martial in all of the military services when controlling for attributes such as rank and education. GAO also found that race and gender were not statistically significant factors in the likelihood of conviction in general and special courts-martial for most services, and minority servicemembers were either less likely to receive a more severe punishment than White servicemembers or there was no difference among racial groups; thus, disparities may be limited to particular stages of the process. The Department of Defense (DOD) has taken some steps to study disparities, but has not comprehensively evaluated the causes of racial or gender disparities in the military justice system. Doing so would better position DOD to identify actions to address disparities and help ensure the military justice system is fair and just.

Likelihood that Servicemembers Were Subjects of Recorded Investigations and Tried in General and Special Courts-Martial, Fiscal Years 2013-2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These multivariate regression analysis results estimate whether a racial or gender group is more likely or less likely to be the subject of an investigation or a trial in general or special courts-martial after controlling for race, gender, rank, and education, and in the Air Force, years of service. GAO made all racial comparisons to White servicemembers and all gender comparisons to females. GAO grouped individuals of Hispanic ethnicity together, regardless of race.

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Abbreviations

DOD	Department of Defense
MCIO	military criminal investigative organization
ODEI	Office of Diversity, Equity and Inclusion
OMB	Office of Management and Budget
UCMJ	Uniform Code of Military Justice

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May 30, 2019

The Honorable Adam Smith
Chairman
The Honorable Mac Thornberry
Ranking Member
Committee on Armed Services
House of Representatives

The Uniform Code of Military Justice (UCMJ) provides the statutory framework of the military justice system and establishes the complete code of military criminal law.¹ It also outlines the jurisdiction and basic procedure of the military justice system, and provides the legal framework for conducting investigations and prosecutions of allegations of misconduct by servicemembers. Every active-duty member of the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard is subject to the UCMJ. According to the *Manual for Courts-Martial*, the purpose of military law is to promote justice, assist in maintaining good order and discipline in the armed forces, promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States.² The Military Justice Review Group elaborated on this purpose, stating that the current structure and practice of the UCMJ embodies a single overarching principle: a system of military law can foster a highly disciplined force if it is fair and just, and is recognized as such by both members of the armed forces and by the American public.³

The military justice system has rules, proceedings, and consequences that are different from the rights and obligations in the civilian criminal

¹10 U.S.C. §§801-946a.

²The President has implemented the UCMJ through the *Manual for Courts-Martial*, which became effective on May 31, 1951, and was initially prescribed by Executive Order 10214 (Feb. 8, 1951). The *Manual for Courts-Martial* contains the Rules for Courts-Martial, the Military Rules of Evidence, and the UCMJ. Each military service may supplement the *Manual for Courts-Martial* with its own guidance to meet the service's needs when authorized to do so by the President.

³Military Justice Review Group, *Report of the Military Justice Review Group Part I: UCMJ Recommendations*, at 16 (Dec. 22, 2015). The Military Justice Review Group was established at the direction of the Secretary of Defense to conduct a comprehensive review of the UCMJ and the military justice system.

court system.⁴ In addition to articles that punish traditional crimes such as unlawful drug use and assault, the UCMJ includes unique military offenses including desertion, failure to obey orders or regulations, and misbehavior before the enemy, among others. These unique military offenses are specifically proscribed in the military context because of their deleterious effect on morale and mission accomplishment.

In 1995, we reported that studies conducted in the 1970s and 1980s showed no disparities—instances in which a racial, ethnic, or gender group was overrepresented—in discipline rates between Black and White servicemembers⁵ and found no evidence that minority groups received courts-martial or nonjudicial punishments out of proportion to certain types of violations.⁶ In that same report, however, we found that studies published in the 1990s by the Navy and the Defense Equal Opportunity Management Institute showed that Black servicemembers were overrepresented in the number of servicemembers receiving judicial and nonjudicial punishments. In 2017, a non-profit organization reported that Black servicemembers were substantially more likely than White servicemembers to face military justice action.⁷

House Report 115-200, accompanying a bill for the National Defense Authorization Act for Fiscal Year 2018, included a provision for us to review differences in the way that the military services collect and maintain information about the race and gender of servicemembers convicted of violations of the UCMJ and to assess the extent that

⁴Article III of the Constitution of the United States governs the federal judiciary, but does not give it any explicit role in the military. Military courts, referred to as courts-martial, are not considered to be Article III courts and thus are not subject to all of the rules that apply in federal courts. For example, the U.S. Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment, from which the Supreme Court has inferred that there is no right to a civil jury in courts-martial. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Military courts are established pursuant to Article I of the U.S. Constitution and as a result are of limited jurisdiction.

⁵For purposes of this report, we use the term disparities to describe instances in which a racial or gender group was overrepresented among the servicemembers who were investigated or disciplined for violations of the UCMJ.

⁶GAO, *Equal Opportunity: DOD Studies on Discrimination in the Military*, [GAO/NSIAD-95-103](#) (Washington, D.C.: Apr. 7, 1995).

⁷Protect Our Defenders, *Racial Disparities in Military Justice* (May 2017).

disparities may exist in the military justice system.⁸ This report assesses the extent to which (1) the military services collect and maintain information about the race, ethnicity, and gender of servicemembers investigated and disciplined for violations of the UCMJ that can be used to assess disparities; and (2) there are racial or gender disparities in investigations, disciplinary actions, and case outcomes in the military justice system, and whether the Department of Defense (DOD) and the military services have taken steps to study any identified disparities.

For our first objective, we reviewed service guidance, user manuals, and other documentation to determine the types of data officials are required to collect and maintain as well as internal procedures the services follow to input information about race, ethnicity, and gender into their investigations, military justice, and personnel databases. For example, we determined whether the collection of this information was mandatory, and how this information was entered into and recorded in each database. We also interviewed agency officials who manage and use the databases to determine which fields in each database track the race, ethnicity, and gender of the accused; how these data are input in the databases; and their insights regarding the reliability of these data. We also analyzed the data we received from the investigations, military justice, and personnel databases to determine the completeness of the race, ethnicity, and gender information that was recorded in each of the databases. We assessed service systems and procedures for collecting data against DOD and service guidance and relevant federal internal control standards.⁹

For our second objective, we analyzed military justice actions initiated and recorded in service investigations and military justice databases between fiscal years 2013 through 2017—the most recent data available at the time of our review—as well as record-level data from each of the military services’ personnel, investigations, and military justice databases.¹⁰ To prepare the data for our analyses and ensure that we

⁸The scope of our review included all five military services: the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard. Although the Coast Guard is part of the Department of Homeland Security, the Coast Guard is a military service and a branch of the armed forces at all times.

⁹GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

¹⁰We chose this time period because it provided the most recent history of available military justice data.

had consistent profiles for the race, ethnicity, and gender of the servicemembers, we merged records using unique identifiers, such as social security number or DOD employee identification number, that were common among a particular service's databases. Based on discussions with service officials, we treated the personnel databases as the authoritative sources for servicemembers' demographic and administrative data. In addition, as part of our data preparation, we consolidated the various race and ethnicity values in the service personnel databases to the five groups for race and the two groups for ethnicity established by the Office of Management and Budget (OMB) standards for maintaining, collecting, and presenting data on race and ethnicity for federal reporting purposes.¹¹ When military service personnel databases included different or additional possible options for race and ethnicity than the groups established by the OMB standards, we consolidated the options in accordance with the definitions for each race and ethnicity option listed in the OMB standards. We grouped individuals of Hispanic ethnicity together, regardless of their racial identification, so that we could compare those of Hispanic ethnicity to other racial groups. Throughout this objective in our report, we refer to the combined race and ethnicity values as race.

We analyzed data from the military services' investigations, military justice, and personnel databases to determine the extent to which racial and gender groups were the subjects of recorded investigations, tried in courts-martial, and subject to nonjudicial punishments at higher or lower rates than each racial and gender group's proportion of the overall service

¹¹Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct. 30, 1997). In 2016, the Office of Management and Budget issued a proposed revision to the standards. See, *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67,398 (Sept. 30, 2016). As of May 2019, the Office of Management and Budget had not issued the revised standards.

population.¹² We analyzed data for trials in general and special courts-martial separately from trials in summary courts-martial because general and special courts-martial result in a criminal conviction if the servicemember is found guilty, while summary courts-martial are not a criminal forum and do not result in a criminal conviction.¹³ Our analyses only counted cases that were ultimately tried at general, special, or summary courts-martial, and excluded those cases where charges were dismissed, withdrawn, or subject to some alternate resolution.

We also conducted bivariate analyses to estimate the association between select attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format.¹⁴ We reviewed relevant literature and interviewed agency officials to determine which demographic attributes would be most appropriate to include in our analyses. Our bivariate analyses examined attributes such as race, gender, age, rank, years of service, education, and offense. We then conducted multivariate regression analyses to test the association between servicemember characteristics, such as race and gender, and the odds of a military justice action, while holding other servicemember

¹²We reviewed investigation data from the military criminal investigative organizations' databases where the subject of the investigation was an active-duty servicemember. We analyzed investigation information from the databases used by the Army's Criminal Investigation Command, which included cases investigated by military police and Criminal Investigation Command; by the Navy and Marine Corps' Naval Criminal Investigative Service, which included cases investigated by the Naval Criminal Investigative Service and military police; by the Air Force's Office of Special Investigations, which included only Office of Special Investigations cases; and by the Coast Guard Investigative Service, which included only Coast Guard Investigative Service cases. This analysis does not include investigations that were recorded in databases that were not used by the military criminal investigative organizations, or investigations performed by other military law enforcement entities or command investigations.

¹³For this review, we used the preferral date, or the date when an accused servicemember was first charged with a violation, to count the number of courts-martial that occurred in a given fiscal year. However, each military service uses the date in which the court-martial judgment was given when reporting the number of each type of court-martial in their annual reports to the Court of Appeals for the Armed Forces. As a result, the number of court-martial cases in a given year analyzed for our review differs from what was reported in the annual reports to the Court of Appeals for the Armed Forces. However, this variation in determining the year in which a case occurred does not impact the findings of racial and gender disparities.

¹⁴For additional explanation of how we conducted our bivariate analyses, see Appendix I, and see Appendix II for all of our bivariate analyses results.

attributes constant, such as gender, rank, and education.¹⁵ Our multivariate regression analyses controlled for attributes such as race, gender, rank, years of service, and education.¹⁶ We conducted data reliability assessments on the datasets we received from the databases in our review. We examined the documentation related to the databases, conducted electronic tests on the data we received, and discussed data reliability with database managers. Based on these actions, for the purposes of our analysis, we found the variables we ultimately reported on to be sufficiently reliable. Our analyses of these data, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information along with supporting statistics. Further, we did not identify the causes of any racial or gender disparities, and the results of our work alone should not be used to make conclusions about the military justice process. We also reviewed publications about disparities in the military justice system and the civilian justice system and summarized them in order to enhance our understanding of the complexities of the issues, including how others have attempted to measure disparities. A more detailed description of our scope and methodology appears in appendix I.

We conducted this performance audit from November 2017 to May 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹⁵A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. For the purposes of consistency, in our multivariate analyses, we made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. See Appendix I for a full explanation of the attributes we used in each service multivariate regression model, and Appendixes IV through VIII for the demographic breakdowns of each of those attributes in each of the military services.

¹⁶We could not include education in our multivariate models for the Army due to variability and overlapping values in the data, which resulted in a data reliability problem, but we were able to control for age.

Background

Overview of the Military Justice System

According to the 2015 report ordered by the Secretary of Defense and issued by the Military Justice Review Group, the military justice system is designed to ensure discipline and order in the armed forces, since crimes committed by servicemembers have the potential to destroy the bonds of trust, seriously damage unit cohesion, and compromise military operations.¹⁷ The jurisdiction of the UCMJ extends to all places and applies to all active-duty servicemembers. UCMJ jurisdiction applies to other individuals as well, such as members of the National Guard or reserves who are performing active-duty service; retired members who are entitled to pay or are receiving hospitalization in a military hospital; prisoners of war in custody of the armed forces; persons serving with or accompanying the armed forces in the field in time of declared war or contingency operations, such as contractors; and members of organizations such as the National Oceanic and Atmospheric Administration and the Public Health Service when assigned to and serving with the armed forces.¹⁸

In creating the military justice system, Congress established three types of military courts, called courts-martial: summary, special, and general. Each of these types respectively is intended to deal with progressively more serious offenses, and each court-martial type may adjudicate more severe maximum punishments as prescribed under the UCMJ.¹⁹ In addition, an accused servicemember can receive nonjudicial punishment under Article 15 of the UCMJ, by which a commander can punish a servicemember without going through the court-martial process. Table 1 provides an overview of nonjudicial punishments and the three different types of courts-martial.

¹⁷Military Justice Review Group, *Report of the Military Justice Review Group Part I: UCMJ Recommendations*, at 17 (Dec. 22, 2015).

¹⁸The phrase “in the field” regarding the jurisdiction of the UCMJ over civilians and contractors has been interpreted to mean an area of actual fighting. *See, e.g., United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F. 2012), *cert. denied*, 569 U.S. 972 (2013).

¹⁹In addition to the maximum punishments that may be adjudicated by each type of court-martial, various relevant executive orders prescribe a maximum punishment for each offense.

Table 1: Overview of Nonjudicial Punishment and Different Types of Courts-Martial

	Nonjudicial punishment	Summary court-martial	Special court-martial	General court-martial
Purpose	Discipline minor offenses committed by enlisted servicemembers or officers	Adjudicate noncapital offenses committed by enlisted servicemembers Not a criminal forum, so a guilty finding is not a criminal conviction	Adjudicate any noncapital and some capital offenses ^a committed by enlisted servicemembers or officers	Adjudicate any offenses committed by enlisted servicemembers or officers, including capital offenses
Right to counsel	None, but the accused is generally entitled to be accompanied by a spokesperson The accused may demand a court-martial in lieu of nonjudicial punishment (unless serving on a vessel)	None, but the accused must consent to the proceedings, and will generally be allowed to have civilian counsel represent the accused if funded by the accused and counsel's appearance will not delay proceedings	The accused is entitled to an appointed military attorney, a military counsel of his or her own selection (if reasonably available), or may hire civilian counsel	The accused is entitled to an appointed military attorney, a military counsel of his or her own selection (if reasonably available), or may hire civilian counsel
Decided by	Commanding officer (or, for the Coast Guard, officers-in-charge)	One commissioned officer	One military judge and four members on a panel; or, one military judge sitting alone if (1) the accused requests a military judge sitting alone, or (2) the case is referred to a military judge sitting alone (which decreases maximum possible punishment). (If case is referred to military judge sitting alone, and parties consent, military judge may designate a military magistrate to preside.) If a panel, at least 3/4 of members must agree on a guilty verdict ^b	One military judge and eight members on a panel; or, by request of the accused, one military judge sitting alone Panels require twelve members for all capital cases and eight members for all noncapital cases If a panel, at least 3/4 of members must agree on a guilty verdict; capital verdicts must be unanimous ^c

	Nonjudicial punishment	Summary court-martial	Special court-martial	General court-martial
Maximum possible punishments	Depending on the grade of the commander imposing the punishment and of the member being punished, maximum punishments range widely; for example: Officer: Reprimand, restrictions with or without suspension from duties for up to 30 days; arrest in quarters for up to 30 days, forfeiture of one-half month's pay for two months, etc. Enlisted: Reprimand, correctional custody or forfeiture of pay for up to 30 days; reduction in grade; extra duties for up to 14 days; etc. ^d	Confinement for up to 30 days; hard labor without confinement for up to 45 days; forfeiture of 2/3 pay for 1 month; reduction to a lower pay grade	If referred to a court-martial consisting of military judge and panel: Confinement for up to 1 year; hard labor without confinement for up to 3 months; forfeiture of 2/3 pay for up to 1 year; reduction to a lower pay grade; bad conduct discharge ^e If referred to a court-martial consisting of military judge alone: Confinement for up to 6 months; hard labor without confinement for up to 3 months; forfeiture of 2/3 pay for up to 6 months; reduction to a lower pay grade. ^f	Any punishment within the limits prescribed by the <i>Manual for Courts-Martial</i> for the offenses of which the accused is found guilty, including the death penalty for certain offenses

Source: GAO analysis of Uniform Code of Military Justice and Rules for Courts-Martial. | GAO-19-344

Note: The Uniform Code of Military Justice overview provided in this table reflects the changes to the rules as of January 1, 2019. Since the scope of this report covers periods prior to these enacted changes, the table notes explain the rules that were in effect during the period of our review.

^aA capital offense means an offense for which death is an authorized punishment under the UCMJ and the *Manual for Courts-Martial*. A capital offense may be referred to special-court martial if and only if a mandatory punishment is not prescribed that is beyond the punitive power of a special court-martial.

^bPrior to changes effective on January 1, 2019, under the Military Justice Act of 2016, special courts-martial were decided by one military judge and not less than three members on a panel; a panel of not less than three members; or (with the consent of the accused) one military judge sitting alone. Furthermore, in special courts-martial decided by panel members, 2/3 of the panel members were required to agree on a guilty verdict.

^cPrior to changes effective on January 1, 2019, under the Military Justice Act of 2016, general courts-martial were decided by one military judge and not less than five members on a panel; or (with the consent of the accused) one military judge sitting alone. General courts-martial decided by a panel in a capital case were to consist of "not less than" 12 members and required 2/3 of the panel members to agree on a guilty verdict for offenses that did not carry a mandatory capital sentence; offenses with mandatory capital sentences required unanimous verdicts.

^dPrior to changes effective on January 1, 2019, under the Military Justice Act of 2016, one possible nonjudicial punishment was diminished rations of bread and water for 3 days or less, if serving aboard a vessel.

^ePrior to changes effective on January 1, 2019, under the Military Justice Act of 2016, the maximum punishment available to a special court-martial—regardless of its composition—was confinement for up to 1 year; hard labor without confinement for up to 3 months; forfeiture of 2/3 pay for up to 1 year; reduction to a lower pay grade; bad conduct discharge.

^fPrior to changes effective on January 1, 2019, under the Military Justice Act of 2016, cases were not referred to a special court-martial consisting of a military judge sitting alone and, consequently, there was no related requirement for reduced maximum punishments under such circumstances.

The Military Justice Act of 2016 enacted significant reforms to the UCMJ, most of the provisions of which became effective on January 1, 2019.²⁰ These reforms included changes such as limitations on the types of punishments permitted with nonjudicial punishments,²¹ changes to required size of the panel, or jury,²² and changes to what judicial outcomes are subject to automatic appeal.²³ There are some areas where individual services supplement but remain consistent with the UCMJ. For example, the Air Force provides a right to counsel in certain forums where the services are not required to do so.

In addition to the reforms affecting the UCMJ, the Military Justice Act of 2016 also directed changes to military justice data collection and accessibility.²⁴ Specifically, section 5504 of the Military Justice Act of 2016 directed the Secretary of Defense to prescribe uniform standards and criteria pertaining to case management, data collection, and accessibility of information in the military justice system.²⁵ As a result, the DOD Office of General Counsel authorized the establishment of the Article 140A Implementation Subcommittee of the Joint Service Committee on Military Justice to, among other things, assess each service's case management system, recommend what data fields the services should collect, propose uniform definitions for the data fields the services should collect, and recommend standardized methods and data field definitions to improve the collection of data concerning race and

²⁰Military Justice Act of 2016, passed as part of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 §§5001-5542 (Dec. 23, 2016).

²¹For example, Section 5141 of the Military Justice Act of 2016 removes the authority to restrict a servicemember's diet to bread and water or to diminish rations during confinement as a potential nonjudicial punishment.

²²The number of panel members, or jurors, required for special courts-martial, general courts-martial with noncapital offenses, and general courts-martial with capital offenses were set at 4, 8, and 12 members respectively. A capital offense means an offense for which death is an authorized punishment under the UCMJ and the *Manual for Courts-Martial*.

²³Where the sentence does not also include death, dismissal, dishonorable discharge, or a bad conduct discharge, automatic appellate review is now limited to those cases that result in a sentence of confinement of two years or more, instead of the previous one-year minimum confinement requirement.

²⁴Military Justice Act of 2016, passed as part of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 §§5001-5542 (Dec. 23, 2016).

²⁵Pub. L. No. 114-328 §5504 (*codified* at 10 U.S.C. §940a). This section is also known as Article 140a of the UCMJ.

ethnicity of individuals involved in the military justice system.²⁶ The subcommittee conducted a study and submitted its recommendations to the Joint Service Committee Voting Group on July 2, 2018, and the Voting Group submitted a report and its agreed upon recommendations to the DOD Office of General Counsel on August 24, 2018.²⁷ The Military Justice Act of 2016 provides that the Secretary of Defense was to carry out this mandate by December 23, 2018, and that the Secretary's decisions shall take effect no later than December 23, 2020. On December 17, 2018, the General Counsel of the Department of Defense issued uniform standards and criteria, which directed that each military justice case processing and management system be capable of collecting uniform data concerning race and ethnicity.

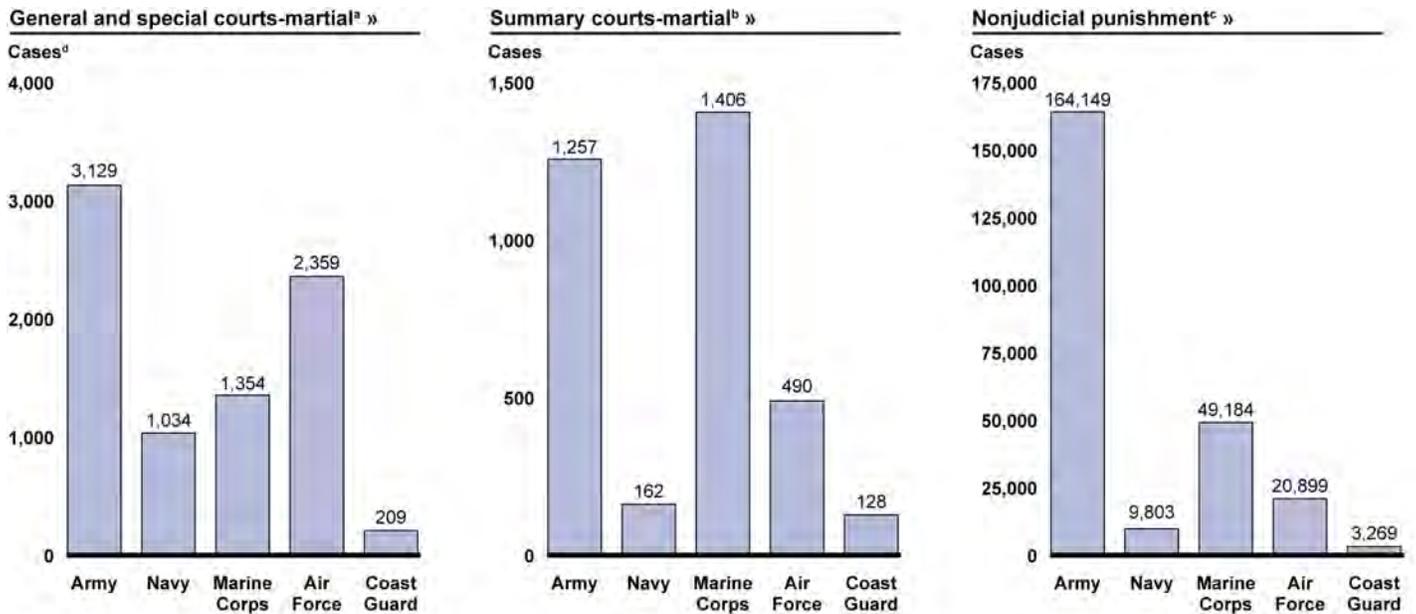
Military Justice Process

From fiscal years 2013 through 2017, more than 258,000 active-duty servicemembers were disciplined for a violation of the UCMJ, out of more than 2.3 million unique active-duty servicemembers who served across all of the military services during this period. Figure 1 shows the number of cases of each type of court-martial and of nonjudicial punishments in each of the military services.

²⁶The Joint Service Committee conducts an annual review of the *Manual for Courts Martial*; prepares proposed amendments to the *Manual for Courts-Martial* and, as appropriate, the UCMJ; and carries out other tasks related to the military justice system as assigned by the Office of the General Counsel of the Department of Defense. The Article 140A Implementation Subcommittee of the Joint Service Committee was comprised of legal and information technology experts from each service branch.

²⁷The Joint Service Committee Voting Group assesses recommendations and proposed amendments to the *Manual for Courts-Martial* during periods of review and presents recommendations to the DOD Office of General Counsel. Among other roles, the Office of General Counsel advises the Secretary of Defense regarding all legal matters and services performed within or involving DOD, including all military justice matters requiring the attention of the Secretary of Defense; oversees the annual review of the *Manual for Courts-Martial*; provides legal advice to DOD organizations and other DOD components; and oversees, as appropriate, legal services performed within DOD. The Deputy General Counsel of Personnel and Health Policy received the recommendations and forwarded them to the General Counsel of the Department of Defense for action.

Figure 1: Servicemembers Disciplined for Uniform Code of Military Justice Violations during Fiscal Years 2013–2017



Total number of servicemembers^d

Army: 886,563
 Navy: 552,388
 Marine Corps: 352,793
 Air Force: 484,466
 Coast Guard: 66,704

Source: GAO analysis of services military justice databases and Court of Appeals for the Armed Forces annual reports for fiscal years 2013-2017. | GAO-19-344

Note: The number of summary courts-martial tried in the Army and the Navy, and the number of nonjudicial punishments in the Army, the Navy, and the Coast Guard were computed using information from the annual reports of the Court of Appeals for the Armed Forces. Nonjudicial punishments are reported as a combined number for the Navy and the Marine Corps in the Court of Appeals for the Armed Forces annual reports. To calculate this reported figure for the Navy, we subtracted the number of Marine Corps nonjudicial punishment cases we identified in the Marine Corps personnel database from the reported totals. All other disciplinary action totals were from GAO's analysis of the services' military justice and personnel databases.

^aGeneral courts-martial are used to adjudicate any offenses committed by enlisted servicemembers or officers, including capital offenses. Special courts-martial are used to adjudicate any noncapital and some capital offenses committed by enlisted servicemembers or officers. A capital offense means an offense for which death is an authorized punishment under the UCMJ and the *Manual for Courts-Martial*.

^bSummary courts-martial are a non-criminal forum used to adjudicate noncapital offenses committed by enlisted servicemembers.

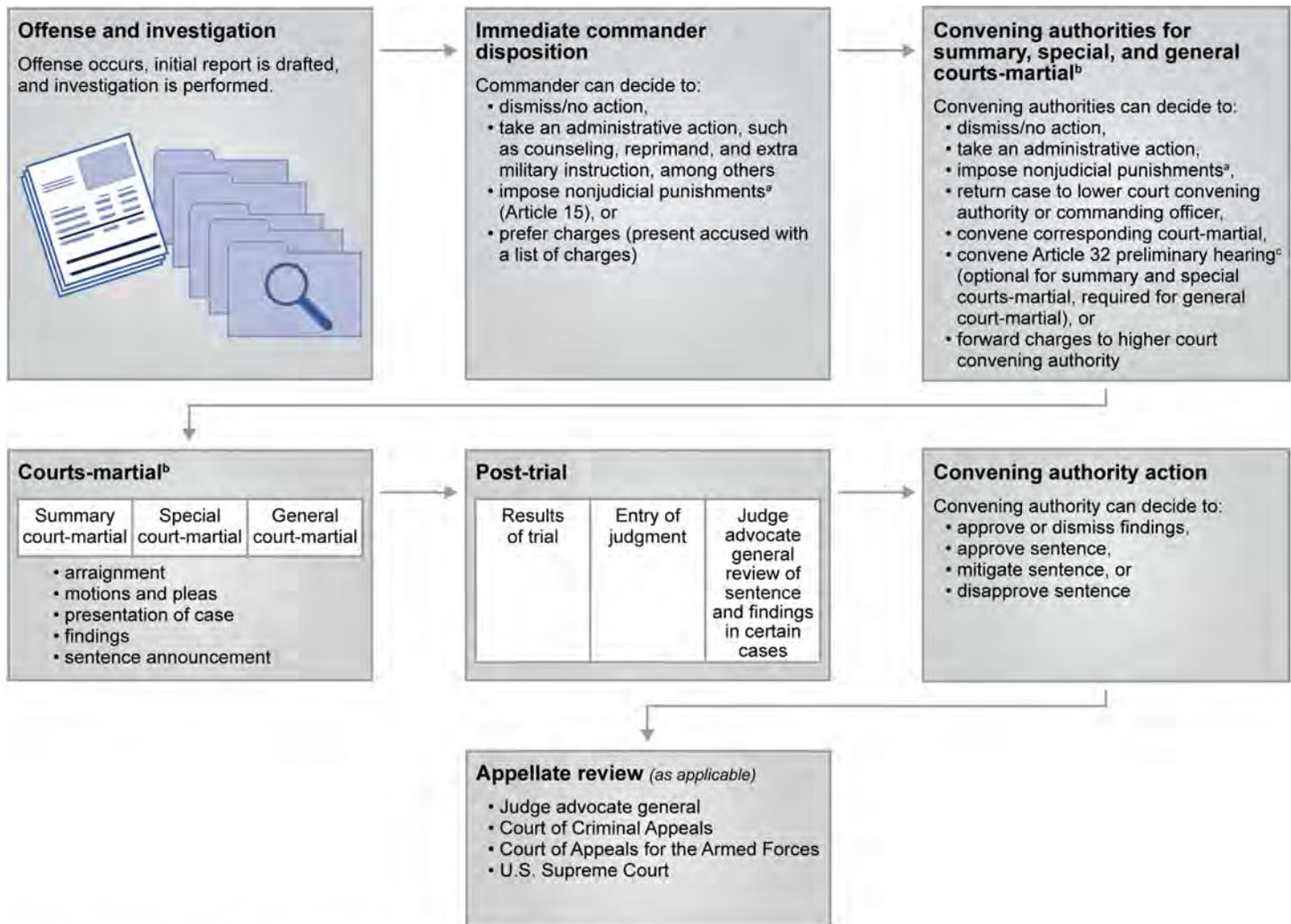
^cNonjudicial punishments are used to discipline minor offenses committed by enlisted servicemembers or officers.

^dThe same servicemember could be involved in multiple cases.

^eThe total number of servicemembers presented in this figure represents the number of unique active-duty servicemembers who served during fiscal years 2013 through 2017.

There are several steps in the discipline of a servicemember who allegedly commits a crime under the UCMJ, which are summarized in figure 2 below.

Figure 2: Overview of the Typical Military Justice Process



Source: GAO analysis of the Rules for Courts-Martial and Manual for Courts-Martial. | GAO-19-344

^aNonjudicial punishments are used to discipline minor offenses committed by enlisted servicemembers or officers.

^bSummary courts-martial are a non-criminal forum used to adjudicate noncapital offenses committed by enlisted servicemembers. Special courts-martial are used to adjudicate any noncapital and some capital offenses committed by enlisted servicemembers or officers. General courts-martial are used to adjudicate any offenses committed by enlisted servicemembers or officers, including capital offenses. A capital offense means an offense for which death is an authorized punishment under the UCMJ and the *Manual for Courts-Martial*.

^cA preliminary hearing is required before referral of charges to a general court-martial, unless waived by the accused, and is intended to determine issues such as whether there is probable cause to believe that the accused committed the offense charged.

The military justice process begins once an offense is alleged and an initial report is made, typically to law enforcement, an investigative entity, or the suspect's chain of command. Policies for initiating criminal investigations by military criminal investigative organizations (MCIO) and procedures for investigating criminal allegations are set forth in DOD and service guidance.²⁸ At this time, the commanding officer or law enforcement will conduct an inquiry or investigation into the accusations and gather all reasonably available evidence. MCIOs have the authority and independent discretion to assume investigative jurisdiction, and do not require approval from any authority outside of the MCIO to conduct such an investigation—commanders outside of the organization are not to impede or interfere with such decisions or investigations by the MCIO. If an MCIO is involved in the inquiry, the investigative entity is to gather all reasonably available evidence and provide the commanding officer with unbiased findings that reflect impartiality as required by DOD instruction.²⁹ According to service officials, during the conduct of the criminal investigation, the subject of the investigation has the right to obtain legal counsel at any time.³⁰

²⁸MCIOs conduct criminal investigations in cases with a DOD nexus, such as if a crime occurred on a DOD installation, or the subject of the investigation is currently affiliated with DOD or was subject to the UCMJ at the time of the offense. The DOD service specific MCIOs are the Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations. In addition, the Coast Guard criminal investigative organization is the Coast Guard Investigative Service. For purposes of this report, we refer to all four of these entities as MCIOs. Instruction and guidance related to initiating an investigation include DOD Instruction 5505.03, *Initiation of Investigations by Defense Criminal Investigative Organizations* (Mar. 24, 2011) (incorporating Change 2, Feb. 13, 2017); Army Regulation 195-2, *Criminal Investigation Activities* (June 9, 2014); Secretary of the Navy Instruction 5430.107, *Mission and Functions of the Naval Criminal Investigative Service* (Dec. 28, 2005); Air Force Instruction 71-101, Vol. 1, *Criminal Investigations Program* (Oct. 8, 2015) (certified current, Dec. 7, 2017); Commandant Instruction 5520.5F, *Coast Guard Investigative Service Roles and Responsibilities* (Nov. 30, 2011).

²⁹DOD Instruction 5505.03, *Initiation of Investigations by Defense Criminal Investigative Organizations* (Mar. 24, 2011) (incorporating change 2, Feb. 13, 2017).

³⁰According to the Rules for Courts-Martial, in cases of pre-trial confinement the accused has the right to retain civilian counsel at no cost to the government, and may request to be assigned military counsel for representation during pretrial confinement proceedings, which must be honored.

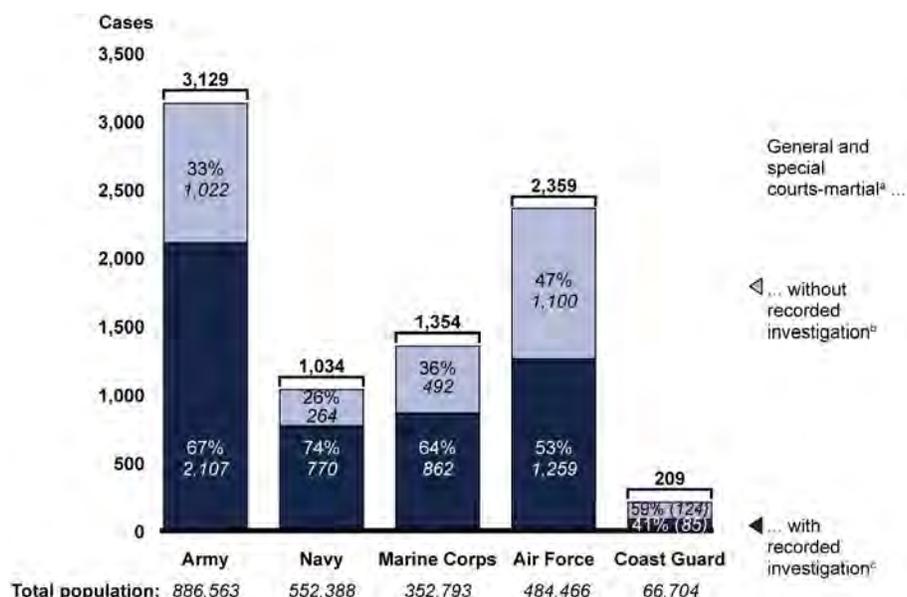
After an investigation, the first step toward initiation of a court-martial is when the accused is presented with a list of charges signed by the accuser under oath, which is called preferral of charges; the accuser who prefers the charges may be anyone subject to the UCMJ. After charges are preferred, the charges are forwarded to an officer with sufficient legal authority to convene a court-martial, also known as the “convening authority.” The convening authority in receipt of preferred charges may, among other actions and depending on the nature of the charges and the level of the convening authority, refer the case to its own court or forward the case to a superior commander for disposition, for example, to a general court-martial convening authority. The general court-martial convening authority would have similar options: to dismiss the charges, refer them to a general or special court-martial, or take some lesser action. Before any case is referred to a general court-martial, the case must proceed through a preliminary hearing under Article 32 of the UCMJ, unless waived by the accused. The Article 32 hearing is presided over by an impartial judge advocate, or another individual with statutory authority, who is appointed by the convening authority and makes a recommendation to the convening authority.

We analyzed general and special courts-martial that were preceded by investigations recorded in databases maintained by MCIOs, which we refer to as recorded investigations, and general and special courts-martial that did not have a record within an MCIO database.³¹ As shown in figure 3 below, the majority of general and special courts-martial, ranging from 53 percent to 74 percent across the services, had a recorded investigation, while the remaining cases would have been investigated by other sources, such as local civilian law enforcement, command

³¹Investigations are recorded in the MCIO databases when a servicemember is the subject of a criminal allegation; for purposes of this report, we say the servicemember had a “recorded investigation” to describe these cases. To conduct our analyses, we used data from the databases used by the Army’s Criminal Investigation Command, which included cases investigated by military police and Criminal Investigation Command; by the Navy and Marine Corps Naval Criminal Investigative Service, which included cases investigated by the Naval Criminal Investigative Service and military police; by the Air Force’s Office of Special Investigations, which included only Office of Special Investigations cases; and by the Coast Guard Investigative Service, which included only Coast Guard Investigative Service cases.

investigations, or in the case of the Air Force, their military law enforcement forces.³²

Figure 3: Number and Percent of General and Special Court-Martial Cases, with and without Recorded Investigations by Service, Fiscal Years 2013–2017



Source: GAO analysis of military services' investigations and military justice databases. | GAO-19-344

^aGeneral courts-martial are used to adjudicate any offenses committed by enlisted servicemembers or officers, including capital offenses. Special courts-martial are used to adjudicate any noncapital and some capital offenses committed by enlisted servicemembers or officers. A capital offense means an offense for which death is an authorized punishment under the UCMJ and the *Manual for Courts-Martial*.

^bGeneral and special courts-martial without a recorded investigation are cases where the servicemember was not the subject of an investigation recorded in the military criminal investigative organization (MCIO) databases; these cases would have been investigated by other entities, such as civilian law enforcement or command investigations.

^cGeneral and special courts-martial with a recorded investigation are cases where the servicemember was the subject of an investigation recorded in an MCIO database.

³²Our analysis of recorded investigations data did not include investigations conducted by a servicemember's command, because those investigations are not recorded in the MCIO databases. Command investigations are included in our analysis of general and special courts-martial cases without a recorded investigation.

Once referred to a general or special court-martial, an accused servicemember may be tried by a military judge alone or by a military judge with a military jury, referred to as members of the court-martial.³³ If the accused servicemember is tried by a military jury, the members of the court-martial determine whether the accused is proven guilty and, if the accused requests sentencing by the members, adjudicate a sentence. Otherwise, the military judge adjudicates the sentence. If the accused is tried by a military judge alone, the judge determines guilt and any sentence. In a summary court-martial, a single commissioned officer who is not a military judge adjudicates minor offenses and a sentence.

Convictions at the general and special court-martial level are subject to a post-trial process and may be appealed to higher courts in cases where the sentence reaches a certain threshold. For example, depending on the forum and the adjudged sentence, the accused may be entitled to appellate review by the service Court of Criminal Appeals, and may be able to request or waive assignment of appellate defense counsel, or waive appellate review entirely. Depending, again, on forum and sentence, some cases that do not qualify for appellate review will receive review by a judge advocate to, among other things, determine that the court had jurisdiction and that the sentence was lawful. Some cases may then be further reviewed by the Court of Appeals for the Armed Forces, as well as by the U.S. Supreme Court at their discretion, if the case was reviewed by the Court of Appeals for the Armed Forces.

The military justice system, like the civilian criminal justice system, provides avenues for accused servicemembers to raise allegations of discrimination, improprieties in investigations, improprieties in disposition, and improprieties in the selection of panel members at the court-martial proceeding, before a military judge and on appellate review. The Military Justice Act of 2016 requires that legal training be provided to all officers,

³³Members may be commissioned officers in all cases, warrant officers in all cases except when the accused is a commissioned officer, or enlisted members when the accused is an enlisted member. If an enlisted accused so requests, at least one-third of the members must be enlisted members.

with additional training for commanders with authority to take disciplinary actions under the UCMJ.³⁴

Definitions of Race, Ethnicity, and Gender

The Office of Management and Budget (OMB) has established standards for collecting, maintaining, and presenting data on race and ethnicity for all federal reporting purposes.³⁵ These standards were developed in cooperation with federal agencies to provide consistent data on race and ethnicity throughout the federal government.³⁶ OMB standards establish the following five categories of race:

- **American Indian or Alaska Native:** A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.
- **Asian:** A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- **Black or African American:** A person having origins in any of the black racial groups in Africa.

³⁴Specifically, the Military Justice Act of 2016 included a provision that requires that the UCMJ be carefully explained to each officer at the time of or within six months after initial entrance of the officer on active duty, or the initial commissioning of the officer in a reserve component. The act further requires officers with the authority to convene courts-martial or impose nonjudicial punishment to receive periodic training regarding the purpose and administration of the UCMJ. Military Justice Act of 2016, passed as part of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §5503 (Dec. 23, 2016) (*codified at* 10 U.S.C. §937).

³⁵Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct. 30, 1997). In 2016, the Office of Management and Budget issued a proposed revision to the standards. See *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67,398 (Sept. 30, 2016). As of May 2019, the Office of Management and Budget had not issued the revised standards.

³⁶According to officials from all of the military services, the racial and ethnic information in their databases is self-reported, and so servicemembers may not follow these definitions when they identify their race and ethnicity. We used these definitions in our analyses so that we could group the various racial and ethnic categories in the services' personnel databases into consistent categories across all of the military services.

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- **Native Hawaiian or Other Pacific Islander:** A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
 - **White:** A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

The OMB standards also establish two categories of ethnicity.

- **Hispanic or Latino:** A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.
- **Not Hispanic or Latino:** A person not having the above attributes.

In addition to defining race and ethnicity for federal administrative reporting and record keeping requirements, OMB standards provide two methods for federal agencies to follow regarding the collection of data on race and ethnicity.

1. Separate questions shall be used for collecting information about race and ethnicity wherever feasible. In this case, there are 5 categories of race noted above which individuals can select, and individuals can identify with more than one category of race. In addition to race, individuals can select one of the two ethnicity categories above.
2. If necessary, a single question or combined format can be used to collect information about race and ethnicity, where the following categories are provided for individuals: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or other Pacific Islander, and White. In this instance, individuals can also select more than one category.

Information collected on servicemembers' gender is governed by DOD guidance. DOD Instruction 1336.05 provides that information collected on a servicemember's gender is based on reproductive function.³⁷ It provides that there are three options that can be selected when inputting a servicemember's gender: male, female, or unknown.

³⁷DOD Instruction 1336.05, *Automated Extract of Active Duty Military Personnel Records* (July 28, 2009) (incorporating Change 2, effective Mar. 31, 2015).

Racial and Gender Disparities in the Civilian Justice System

Racial and gender disparities in the civilian criminal justice system have been the subject of several studies in the past decade. While the civilian and military justice systems differ from each other, we reviewed information about racial and gender disparities in the civilian criminal justice system to enhance our understanding of the complexities of the issues, including how others had attempted to measure disparities. Some studies have assessed the rates at which minority groups are policed. For example, a Department of Justice study of data from the Bureau of Justice Statistics' 2011 Police-Public Contact survey found that Black drivers were more likely than White or Hispanic drivers to be pulled over in a traffic stop; specifically, the study found that 10 percent of White drivers and 10 percent of Hispanic drivers were pulled over in a traffic stop, compared to 13 percent of Black drivers.³⁸ This study also found that Black and Hispanic drivers were more likely to be searched once they were pulled over by the police; specifically, the study found that 2 percent of White drivers stopped by police were searched, compared to 6 percent of Black drivers and 7 percent of Hispanic drivers.

In addition, U.S. government data shows that racial disparities exist among individuals who are arrested. For example, data from the Federal Bureau of Investigation's Uniform Crime Reporting Program, which compiles data from law enforcement agencies across the country, indicates that in 2016, Black individuals represented 26.9 percent of total arrests nationwide, but comprised 13.4 percent of the U.S. population according to U.S. census data estimates as of July 1, 2017.³⁹ This data also shows that 69.6 percent of all arrested individuals were White, while White individuals comprised 76.6 percent of the U.S. population.

Studies have also identified racial and gender disparities in civilian justice sentencing. In 2010 and 2017, the U.S. Sentencing Commission reported that Black male offenders received longer sentences than similarly situated White male offenders.⁴⁰ Specifically, in 2017, the Commission analyzed federal sentencing data and reported that Black male offenders

³⁸U.S. Department of Justice, Bureau of Justice Statistics, *Police Behavior during Traffic and Street Stops* (September 2013).

³⁹U.S. Department of Justice, Uniform Crime Report, *Crime in the United States 2016*, Table 21; U.S. Census Bureau, *Quick Facts*, population estimates as of July 1, 2017.

⁴⁰U.S. Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (November 2017); U.S. Sentencing Commission, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis* (March 2010).

received sentences that on average were 19.1 percent longer than similarly situated White males for fiscal years 2012 to 2016. This analysis controlled for factors such as type of offense, race, gender, citizenship, age, education level, and criminal history. This study also found that female offenders of all races received shorter sentences than White male offenders. Similarly, the Commission's 2010 report found that Black offenders received sentences that were 10 percent longer than those imposed on White offenders from December 2007 through September 2009, and male offenders received sentences that were 17.7 percent longer than female offenders, after controlling for the same factors as noted for the 2017 study, among others.

Finally, racial and gender disparities have been identified among incarcerated populations. According to data from the Bureau of Justice Statistics, for prisoners with sentences of 1 year or more under the jurisdiction of state or federal correctional officials in 2016, Black males were six times more likely to be imprisoned than White males, and Hispanic males were 2.7 times more likely to be imprisoned than White males.⁴¹ The racial disparities were more pronounced for younger males, where Black males aged 18 to 19 were approximately 11.8 times more likely than White males of the same age to be imprisoned. The Bureau also reported that Black females were imprisoned at approximately twice the rate of White females. We did not assess the methodologies used in any of these studies or the reliability of the data cited in the studies; these studies are discussed here to provide broader context for the discussion about racial and gender disparities in the military justice system.⁴²

⁴¹U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2016* (January 2018).

⁴²The findings in these studies, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information along with supporting statistics.

The Military Services Collect and Maintain Gender Information, but Do Not Collect and Maintain Consistent Information about Race and Ethnicity, Limiting Their Ability to Collectively or Comparatively Assess Data to Identify Any Disparities

The military services collect and maintain gender information, but they do not collect and maintain consistent information about race and ethnicity in their investigations, military justice, and personnel databases. This limits the military services' ability to collectively or comparatively assess these demographic data to identify any racial or ethnic disparities in the military justice system within and across the services. The military services use different databases to collect and maintain information for investigations, courts-martial, and nonjudicial punishments. All of the databases collect and maintain gender information, but the Coast Guard's military justice database does not have the capability to query or report on gender data. While the military services' databases collect and maintain complete data for race and ethnicity, the information collected and maintained about race and ethnicity is not consistent among the different databases within and across the services. Moreover, the Coast Guard, the Navy, and the Marine Corps do not collect and maintain complete and consistent servicemember identification data, such as social security number or employee identification number, in their respective military justice databases, although DOD leadership recently directed improvements in this area. Finally, the military services do not report data that provides visibility into disparities in the military justice system, and DOD and the services lack guidance about when potential racial, ethnic, or gender disparities should be further reviewed, and what steps should be taken to conduct such a review if needed.

The Military Services Use Different Databases to Collect and Maintain Information for Investigations, Courts-Martial, and Nonjudicial Punishments

Each military service uses a different database to collect and maintain information on investigations and courts-martials, and, in some services, nonjudicial punishments, as shown in figure 4. For three of the military services—the Army, the Navy, and the Coast Guard—the databases listed in figure 4 include information about some, but not all, of their nonjudicial punishment cases.

Figure 4: Military Services' Investigations, Courts-Martial, and Nonjudicial Punishment Databases

Military service	Investigations databases	Courts-martial databases	Nonjudicial punishment databases
Army	ALERTS	ACMIS MJO	MJO
Navy	CLEOC	CMS	CMS
Marine Corps	CLEOC	CMS MCTFS	CMS MCTFS
Air Force	I2MS	AMJAMS	AMJAMS
Coast Guard	FACTS	Law Manager	Direct Access Law Manager

ACMIS	Army Courts-Martial Information System	CMS	Case Management System
ALERTS	Army Law Enforcement Reporting and Tracking System	FACTS	Field Activity Case Tracking System
AMJAMS	Automated Military Justice Analysis and Management System	I2MS	Investigative Information Management Systems
CLEOC	Consolidated Law Enforcement Operations Center	MCTFS	Marine Corps Total Force System
		MJO	Military Justice Online

Source: GAO analysis of each military service's personnel, investigation, and military justice database information. | GAO-19-344

Note: Depending on the military service, information about nonjudicial punishments can be found in the military justice or the personnel database. The databases listed for nonjudicial punishments collect and maintain information about some but not all nonjudicial punishments, with the exception of AMJAMS and MCTFS, which collect information about all nonjudicial punishments according to Air Force and Marine Corps officials.

Additionally, the nature of the information collected by each of the services' databases varies, as noted below.

Army

- Investigations.** The Army collects and maintains information on investigations conducted by the Army Criminal Investigation Command in the Army Law Enforcement Reporting and Tracking System database.⁴³ According to Army officials, the Office of the Provost Marshal General and the Army Criminal Investigation Command developed this database to replace a 2003 system, the Army Criminal Investigation and Intelligence System, and a significant

⁴³ According to Army officials, the Army started using an automated system, the Army Criminal Investigative Reporting System (ACIRS), for felony investigations in 1989.

part of the military police's 2002 system, the Centralized Operations Police Suite. The officials said that the Army Law Enforcement Reporting and Tracking System has been operational since 2015, and has become the primary case management system for all Army law enforcement professionals. However, Army officials said that cases involving commander-led investigations are unlikely to be recorded in this database.

- **Courts-martial and nonjudicial punishments.** The Army uses Military Justice Online and the Army Courts-Martial Information System to collect data on court-martial cases. According to Army officials, Military Justice Online, created in 2008, is a document-generating system that primarily is used by the Army's judge advocate general corps and promotes uniformity in case processing among the Army's staff judge advocate offices. Military Justice Online includes information about courts-martial, some nonjudicial punishments, administrative separations, and administrative reprimands of servicemembers. Army officials said that the Army Courts-Martial Information System, which has been used since 1989, serves as the Army trial judiciary's case tracking system and is used by the Army's trial judiciary to track court-martial cases.

Air Force

- **Investigations.** The Air Force military criminal investigative organization, the Office of Special Investigations, uses a system called the Investigative Information Management System to collect and maintain information related to investigations. According to Air Force officials, the Investigative Information Management System has been in use since 2001.
- **Courts-martial and nonjudicial punishments.** The Air Force uses the Automated Military Justice Analysis and Management System, which is designed to be a case management system to collect comprehensive information for both court-martial cases and nonjudicial punishments. According to Air Force officials, the Automated Military Justice Analysis and Management System has been in use since 1974.

Navy and Marine Corps

- **Investigations.** According to Navy officials, the Navy and Marine Corps' joint system for maintaining and collecting information related to investigations is the Consolidated Law Enforcement Operations

Center, which has been in use since 2004. Navy officials said that this database initially contained information regarding Navy and Marine Corps law enforcement incidents and criminal investigations, but began to include investigations conducted by the Naval Criminal Investigative Service in 2012.

- **Courts-martial.** The Navy and the Marine Corps both use the Case Management System to collect and maintain information about military justice matters with involvement by a Navy or Marine Corps legal office, including special and general court-martial cases. This system was initially developed by the Marine Corps to track information about legal services provided by their legal offices. According to Navy and Marine Corps officials, the system has been in use by the Marine Corps since 2010 and by the Navy since 2013. Officials from the Marine Corps said that although the Case Management System has been in use since 2010, the system was not widely used until 2012.
- **Nonjudicial punishments.** The Marine Corps Total Force System, the Marine Corps personnel database, collects and maintains information on summary courts-martial and nonjudicial punishments for cases where there was a conviction or punishment. According to Marine Corps officials, this system has been in use since 1995. Navy officials said that their personnel database records information about nonjudicial punishments if the punishment involved a change in pay or grade. The services' military justice Case Management System includes information on some nonjudicial punishment cases in the Navy and the Marine Corps, which Navy and Marine Corps officials said was for those cases that had involvement by their legal offices.

Coast Guard

- **Investigations.** The Coast Guard Investigative Service uses the Field Activity Case Tracking System to collect and maintain information on servicemembers investigated for violations of the UCMJ. According to Coast Guard officials, this system has been in use since July 2014.
- **Courts-martial.** According to Coast Guard officials, the Coast Guard uses Law Manager to collect and maintain administrative information on court-martial cases. Law Manager has been in use since 2000, but was not used for court-martial data until 2003.
- **Nonjudicial punishments.** Coast Guard officials said that their military justice database contains records of nonjudicial punishments if a case involved their legal offices. In addition, according to Coast

Guard officials, Direct Access, the Coast Guard's personnel database, also collects and maintains information about some court-martial cases and nonjudicial punishments if the punishment resulted in a change in rank or pay or an administrative action against the accused servicemember.

The Military Services Collect and Maintain Gender Data, but the Coast Guard Can Not Query or Report on Gender Data from its Military Justice Database

All of the military services collect and maintain gender information in their investigations, military justice, and personnel databases, but are inconsistent in whether they allow an unknown or unspecified gender, and the Coast Guard's military justice database does not allow Coast Guard officials to query or report on gender data. Table 2 below summarizes how data regarding the servicemember's gender is entered into the services' databases and the number of potential gender options.⁴⁴ Each database identifies at least two potential options—male and female—for data related to the servicemember's gender, while about half of the databases (8 of 15) provide a third option to indicate that the gender is either unknown or not specified.⁴⁵ Each of the military services' investigations, military justice, and personnel databases maintained gender data for almost 100 percent of servicemembers, except we were unable to determine this completion rate for the Coast Guard's military justice database. We could not determine the completeness of the Coast Guard's gender data in its military justice database because, as

⁴⁴The collection and maintenance of information pertaining to the gender identity of transgender servicemembers within the armed forces has changed during the time period of the data collected for our review. The Secretary of Defense released a memorandum in 2015 lifting service restrictions placed on servicemembers based on their gender identity. Secretary of Defense Memorandum, *Transgender Service Members* (July 28, 2015). In October 2016, DOD issued an instruction to establish a process for servicemembers to transition during service and change their gender status within the Defense Enrollment Eligibility Reporting System. DOD Instruction 1300.28, *In-Service Transition for Transgender Service Members* (Oct. 1, 2016). In August 2017, the President issued a memorandum directing DOD to reverse the policy changes regarding transgender servicemembers. Memorandum for the Secretary of Defense and the Secretary of Homeland Security, *Military Service by Transgender Individuals*, 82 Fed. Reg. 41,319 (Aug. 30, 2017). The provisions outlined in the memorandum became effective on January 1, 2018.

⁴⁵One database (the Navy and Marine Corps shared Consolidated Law Enforcement Operations Center database) provides a fourth option—indeterminate. According to Army officials, the criminal investigations databases collect information about gender to support reporting requirements of 3 options associated with the Defense Incident-Based Reporting System, which is a central database used by DOD to provide military crime statistics to the Department of Justice.

previously noted, its military justice database does not have the capability to query on gender data.⁴⁶

Table 2: Collection of Data on Servicemembers’ Gender in Military Services’ Investigations, Military Justice, and Personnel Databases

Service	Database	Gender information	
		Entry method	Number of potential gender options
Army	Army Law Enforcement Reporting and Tracking System (I)	Manual input (drop down)	3 options
	Military Justice Online (MJ)	Auto-populated from Total Army Personnel Database	2 options
	Army Courts-Martial Information System (MJ)	Manual input (drop down)	3 options
	Total Army Personnel Database (P)	Manual input (drop down)	3 options
Navy and Marine Corps Shared	Consolidated Law Enforcement Operations Center (I)	Manual input (drop down)	4 options ^a
Navy	Case Management System (MJ)	Manual input (drop down)	3 options
	Navy Personnel Database (P)	Manual input (drop down)	2 options
Marine Corps	Case Management System (MJ)	Manual input (drop down)	3 options
	Marine Corps Total Force System (P)	Manual input (drop down)	2 options
Air Force	Investigative Information Management System (I)	Auto-populated from Defense Enrollment Eligibility Reporting System	3 options
	Automated Military Justice Analysis and Management System (MJ)	Auto-populated from Military Personnel Data System	2 options
	Military Personnel Data System (P)	Manual input (drop down)	2 options
Coast Guard	Field Activity Case Tracking System (I)	Manual input (drop down)	3 options
	Law Manager (MJ)	Manual input (drop down)	2 options
	Direct Access (P)	Manual input (drop down)	2 options

Legend: (I)=Investigations database; (MJ)=military justice database; (P)=personnel database.

Source: GAO analysis of each military service’s investigations, military justice, and personnel database information. | GAO-19-344

Note: Each database identifies at least two potential options—male and female—for data related to the servicemember’s gender, while about half of the databases provide a third option to indicate that the gender is either unknown or not specified.

^aGender options in the Consolidated Law Enforcement Operations Center database are male, female, unknown, and indeterminate.

⁴⁶The military services differ regarding whether their databases require the collection of information about gender.

Standards for Internal Control in the Federal Government states that management should use quality information and obtain data on a timely basis so they can be used for effective monitoring.⁴⁷ However, the Coast Guard does not have visibility over the gender of servicemembers prosecuted for UCMJ violations without merging data from multiple databases, which can be a labor-intensive and time-consuming process. According to Coast Guard officials, information regarding the gender of servicemembers prosecuted for UCMJ violations can be recorded in its military justice database, but gender is not a field that can be searched on or included in the reports they run using information from their military justice database, because of the way the military justice module in the database was designed. Coast Guard officials told us that the military justice database—Law Manager—was designed to determine the status of court-martial cases, and captures attributes that are generated by relevant UCMJ documents. Those official documents do not require the annotation of demographics such as gender, so this information is not used in Law Manager. A Coast Guard official indicated that it would be feasible to modify Law Manager to make it easier to run reports and queries that include gender information. The ability to query and report on the gender of servicemembers in its military justice database would provide the Coast Guard with more readily available data to identify or assess any gender disparities that may exist in the investigation and trial of military justice cases.

The Military Services Do Not Collect and Maintain Consistent Data for Race and Ethnicity

Each of the military services' databases collect and maintain complete data for race and ethnicity, but the military services do not collect and maintain consistent information regarding race and ethnicity in their investigations, military justice, and personnel databases. Additionally, the military services have not developed a mechanism to aggregate the data into consistent categories of race and ethnicity to allow for efficient analysis and reporting of consistent demographic data. The number of potential responses for race and ethnicity within the 15 databases across the military services ranges from 5 to 32 options for race and 2 to 25 options for ethnicity, which can complicate cross-service assessments. For example, the Army's personnel database maintains 6 options for race

⁴⁷GAO-14-704G.

and 23 options for ethnicity,⁴⁸ whereas the Coast Guard’s personnel database maintains 7 options for race and 3 for ethnicity.⁴⁹ Table 3 summarizes how the databases used by the military services vary in how the servicemember’s race is entered and the number of potential race options.⁵⁰

Table 3: Collection of Data on Servicemembers’ Race in Military Services’ Investigations, Military Justice, and Personnel Databases

Service	Database	Race information	
		Entry method	Number of potential race options
Army	Army Law Enforcement Reporting and Tracking System (I)	Manual input (drop down)	8 options
	Military Justice Online (MJ)	Auto-populated from Total Army Personnel Database	6 options
	Army Courts-Martial Information System (MJ)	Manual input (drop down)	8 options
	Total Army Personnel Database (P)	Manual input (drop down)	6 options
Navy and Marine Corps Shared	Consolidated Law Enforcement Operations Center (I)	Manual input (drop down)	6 options
Navy	Case Management System (MJ)	Manual input (drop down)	7 options
	Navy Personnel Database (P)	Manual input (drop down)	32 options
Marine Corps	Case Management System (MJ)	Manual input (drop down)	7 options
	Marine Corps Total Force System (P)	Manual input (drop down)	6 options

⁴⁸The six options for race available within the Army’s personnel database include American Indian or Alaska Native, Asian/Pacific Islander, Black, Other, Unknown, and White. The options for ethnicity include Aleut, Chinese, Cuban, Eskimo, Filipino, Guamanian, Indian, Japanese, Korean, Latin American with Hispanic Descent, Melanesian, Mexican, Micronesian, None, Other, Other Asian Descent, Other Hispanic Descent, Other Pacific Island Descent, Polynesian, Puerto Rican, United States/Canadian Indian Tribes, Unknown, and Vietnamese.

⁴⁹The options for race in the Coast Guard’s personnel database include American Indian/Alaska Native, Asian, Black or African American, Declined to Respond, Native Hawaiian/Pacific Islander, White, and every potential mixed racial group from the provided races. Additionally, the database has three options for ethnicity: declined to respond, Hispanic or Latino, and Not Hispanic or Latino.

⁵⁰According to Army officials, the criminal investigations databases collect information about race to support reporting requirements of 6 options associated with the Defense Incident-Based Reporting System, which is a central database used by DOD to provide military crime statistics to the Department of Justice. For example, Army officials said that the 8 race options in their investigations database are converted to support the 6 options in the DOD system.

Service	Database	Race information	
		Entry method	Number of potential race options
Air Force	Investigative Information Management System (I)	Auto-populated from Defense Enrollment Eligibility Reporting System	7 options
	Automated Military Justice Analysis and Management System (MJ)	Auto-populated from Military Personnel Data System	5 options
	Military Personnel Data System (P)	Manual input (drop down)	7 options
Coast Guard	Field Activity Case Tracking System (I)	Manual input (drop down)	6 options
	Law Manager (MJ)	N/A; does not track race	N/A; does not track race
	Direct Access (P)	Manual input (drop down)	7 options

Legend: (I)=investigations database; (MJ)=military justice database; (P)=personnel database; N/A= not available.

Source: GAO analysis of each military service's investigations, military justice, and personnel database information. | GAO-19-344

Table 4 shows that the military services' databases also vary in how information about servicemembers' ethnicity is entered into the databases and the number of potential ethnicity options that are collected.⁵¹

Table 4: Collection of Data on Servicemembers' Ethnicity in Military Services' Investigations, Military Justice, and Personnel Databases

Service	Database	Ethnicity information	
		Entry method	Number of potential ethnicity options
Army	Army Law Enforcement Reporting and Tracking System (I)	Manual input (drop down)	3 options
	Military Justice Online (MJ)	N/A; collected as part of race field	N/A
	Army Courts-Martial Information System (MJ)	N/A; collected as part of race field	N/A
	Total Army Personnel Database (P)	Manual input (drop down)	23 options
Navy and Marine Corps Shared	Consolidated Law Enforcement Operations Center (I)	Manual input (drop down)	3 options
Navy	Case Management System (MJ)	N/A; collected as part of race field	N/A
	Navy Personnel Database (P)	Manual input (drop down)	23 options
Marine Corps	Case Management System (MJ)	N/A; collected as part of race field	N/A
	Marine Corps Total Force System (P)	Manual input (drop down)	25 options

⁵¹ According to Army officials, the criminal investigations databases collect information about ethnicity to support reporting requirements of 3 options associated with the Defense Incident-Based Reporting System, which is a central database used by DOD to provide military crime statistics to the Department of Justice.

Service	Database	Ethnicity information	
		Entry method	Number of potential ethnicity options
Air Force	Investigative Information Management System (I)	Manual input (drop down)	3 options
	Automated Military Justice Analysis and Management System (MJ)	Auto-populated from Military Personnel Data System	3 options
	Military Personnel Data System (P)	Manual input (drop down)	23 options
Coast Guard	Field Activity Case Tracking System (I)	Manual input (drop down)	2 options
	Law Manager (MJ)	N/A; does not track ethnicity	N/A
	Direct Access (P)	Manual input (drop down)	3 options

Legend: (I)=Investigations database; (MJ)=military justice database; (P)=personnel database; N/A= not available.

Source: GAO analysis of each military service's investigations, military justice, and personnel database information. | GAO-19-344

Although the data collected and maintained was not consistent within and across the military services, each of the military services' databases maintained race and ethnicity data for at least 99 percent of the servicemembers, with the exception of the Coast Guard.⁵² The Coast Guard does not track information about race or ethnicity in its military justice database.⁵³ Coast Guard officials stated that this is because Law Manager was designed to determine the status of court-martial cases, and captures attributes that are needed to generate relevant UCMJ documents, such as court pleadings. Demographic information such as race and ethnicity is not included in these official documents, so this information is not input into Law Manager. Further, four of the databases we reviewed—including both of the Army's military justice databases, and the Navy and the Marine Corps' military justice databases—collect information on race and ethnicity in a combined data field as shown in table 4, whereas the other databases collect and maintain race and ethnicity information in two separate fields.

Standards for Internal Control in the Federal Government states that management should use quality information to achieve the entity's objectives.⁵⁴ Among other things, attributes of this internal control

⁵²According to officials from all of the military services, the information about race and ethnicity in their databases is self-reported by individual servicemembers, and there is no way to verify whether the reported information is accurate.

⁵³The military services differ regarding whether their databases require the collection of information about race and ethnicity.

⁵⁴[GAO-14-704G](#).

principle call for management to identify information requirements; obtain relevant data from reliable sources that are reasonably free from error; ensure that the data it receives is timely and reliable; and process the data obtained into quality information— information that is appropriate, current, complete, and accurate. In addition, federal internal control standards call for management to design the entity's information system and related control activities to achieve objectives and respond to risks, thereby enabling information to become available to the entity on a timelier basis. Further, the Military Justice Act of 2016 required the Secretary of Defense to prescribe uniform standards and criteria for various items, including data collection and analysis for case management at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, by December 2018.⁵⁵

On December 17, 2018, the General Counsel of the Department of Defense issued the uniform standards and criteria required by article 140a of the Military Justice Act of 2016.⁵⁶ As part of these uniform standards, the services were directed to collect data related to race and ethnicity in their military justice databases, and to collect racial and ethnic data in separate data fields. The standards provide that the services may have their military justice databases capture expanded ethnic or racial categories; however, for reporting purposes, expanded categories will aggregate to those categories listed in the standards. For race, the services will choose from six designations: (1) American Indian/Alaska Native, (2) Asian, (3) Black or African American, (4) Native Hawaiian or Other Pacific Islander, (5) White, or (6) Other. For ethnicity, the services will choose from two options: (1) Hispanic or Latino, or (2) Not Hispanic or Latino. These categories are consistent with the OMB standards for collecting and presenting such data. The military services are to implement the Secretary's direction no later than December 23, 2020.

However, DOD has applied these newly issued standards only to the military justice databases and not to the investigations and personnel databases. DOD officials stated that the investigations and personnel databases do not fall under the charter of the DOD General Counsel,

⁵⁵Military Justice Act of 2016, passed as part of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§5001-5542 (Dec. 23, 2016).

⁵⁶The Coast Guard is a voting member of the Joint Service Committee on Military Justice, and participated in the Joint Service Committee's subcommittee that developed the recommendations leading to the issuance of these standards. Coast Guard officials told us that they consider these standards to be binding on the Coast Guard.

which issued the standards for the military justice databases. Hence, these uniform standards do not apply to the military services' investigations and personnel databases. We were able to analyze data across the investigations, military justice, and personnel databases by merging data from these databases, but this took multiple, detailed steps and would not be an efficient approach for routine analyses. Taking steps to develop the capability to present the race and ethnicity data in the military services' personnel and investigations databases using the same categories included in the December 2018 standards for the military justice databases would allow for more efficient analysis of consistent demographic data. This could be done through either collecting and maintaining race and ethnicity data in the investigations and personnel databases using the December 2018 uniform standards or developing a capability to aggregate the data into the race and ethnicity categories included in the standards.

The Navy, the Marine Corps, and the Coast Guard Did Not Collect and Maintain Complete Servicemember Identification Data, but Improved Collection Has Been Directed

The Navy, the Marine Corps, and the Coast Guard did not collect and maintain complete servicemember identification data, such as social security number or employee identification number, in their military justice or investigations databases; however, DOD recently directed them to do so.⁵⁷ In the course of conducting our analysis, in some instances, we could not match personnel records with military justice records because the social security number or employee identification number in the military justice database did not match the information in the personnel database. In other instances, we could not match personnel records with military justice records because the military justice records did not contain a social security number or employee identification number to match with information found in their personnel record. As shown in table 5, we initially were unable to match 5 percent of Navy military justice cases, 12 percent of Marine Corps military justice cases, 18 percent of Coast Guard investigation cases, and 6 percent of Coast Guard military justice cases.

⁵⁷While the data we received from the Army and the Air Force did not have servicemember identification numbers for 100 percent of their cases, their data were sufficiently complete for our purposes. The DOD employee identification number is known as the electronic data interchange personal identifier (EDIPI). To conduct our disparities analyses, we merged an accused servicemember's personnel database records with their investigations or military justice database records, to ensure that we had consistent profiles for the race, ethnicity, and gender of servicemembers investigated, prosecuted, and charged with a violation of the UCMJ. We merged the records by matching a servicemember's unique identifiers, such as social security number or employee identification number, in the personnel databases with their social security number or employee identification number in the investigations or military justice database records.

Table 5: Overview of Unmatched Military Justice Cases by Military Service and Database

Military service/database	Total number of cases	Number of unmatched cases	Missing rate	Number of unmatched cases after manual lookup	Missing rate after manual lookup
Navy military justice database	4,809	246	5%	216	4%
Marine Corps military justice database	6,875	848	12%	188	3%
Coast Guard investigative database	1,428	250	18%	23	2%
Coast Guard military justice database	289	16	6%	2	1%

Source: GAO analysis of services' personnel, investigations, and military justice data. | GAO-19-344

Note: We provided the services with lists of our unmatched cases, and service officials manually looked up these data so that we could increase our match rates and complete our analyses.

On December 17, 2018, the General Counsel of the Department of Defense issued the uniform standards and criteria required by article 140a of the Military Justice Act of 2016.⁵⁸ As part of these uniform standards, the services were directed to collect either the social security number or DOD identification number in their military justice databases. The military services are to implement the Secretary's direction no later than December 23, 2020.

The Military Services Do Not Consistently Report Data that Provides Visibility into Any Disparities, and DOD Has Not Identified When Disparities Should Be Examined Further

Although some military services report demographic information about the subjects of military justice actions internally, the military services do not externally report data that provides visibility into, or would enable an analysis of, the extent of racial, ethnic, or gender disparities in the military justice system. Service officials from all of the military services told us that they compile internal quarterly or monthly staff judge advocate reports, which include the total number of each type of court-martial handled by their legal offices and of nonjudicial punishments. According to service officials, in the Air Force and the Army these reports include demographic information about servicemembers involved in these cases, such as the total number of each type of case broken out by the subject's race, ethnicity, or gender, but the Navy, Marine Corps, and Coast Guard

⁵⁸The Coast Guard is a voting member of the Joint Service Committee on Military Justice, and participated in the Joint Service Committee's subcommittee that developed the recommendations leading to the issuance of these standards. Coast Guard officials told us that they consider these standards to be binding for the Coast Guard.

reports do not include this demographic information, and there is no requirement to do so.

Regarding external reporting, the UCMJ directs the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps to submit annual reports on the military justice system to the Congressional Armed Services Committees, the Secretary of Defense, the secretaries of the military departments, and the Secretary of Homeland Security.⁵⁹ These reports are to include information on the number and status of pending cases handled in the preceding fiscal year, among other information. The annual reports include the total number of cases each service handled for each type of court-martial and for nonjudicial punishments. However, these annual reports do not include demographic information about servicemembers who experienced a military justice action, such as breakdowns by race or gender, because the reporting requirement does not direct the services to include such information. A DOD official expressed concern about expanding the reporting requirement to have public dissemination of race, ethnicity, and gender information due to the potential for misinterpretation, but stated that such reporting requirements for internal use would be beneficial. However, Congress and members of the public have expressed an interest in this information.

Standards for Internal Control in the Federal Government state that management should externally communicate the necessary quality information to achieve the entity's objectives.⁶⁰ Furthermore, these standards state that management should use quality information to make informed decisions and evaluate the entity's performance. According to DOD guidance, the Joint Service Committee on Military Justice, a committee comprised of representatives from each service's legal office, is responsible for reviewing the *Manual for Courts-Martial* and the UCMJ on an annual basis. The Joint Service Committee can consider suggested changes to the UCMJ or the *Manual for Courts-Martial* or its

⁵⁹The reporting requirement for information about the number and status of pending cases is in UCMJ Article 146a, and requires different reports from each of the services. The Military Justice Act of 2016 amended this reporting requirement as of June 8, 2018. The previous requirement, which had been in UCMJ Article 146 required one combined annual report. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps are the senior officials within each service responsible for the overall supervision and administration of military justice within their respective services.

⁶⁰[GAO-14-704G](#).

supplementary materials from the services or from the general public. The Joint Service Committee then determines whether to propose any desired amendments to the UCMJ, or the *Manual for Courts-Martial* or its supplementary materials.⁶¹ If the Joint Service Committee finds that an amendment to either the *Manual for Courts-Martial* or the UCMJ is required, the committee will provide the General Counsel of DOD with a draft executive order containing the recommended amendments or will forward a legislative proposal to amend the UCMJ. While it is unclear whether the committee has ever considered or proposed an amendment to the UCMJ or *Manual for Courts-Martial* that would require the external reporting on an annual basis of demographic information about the race, ethnicity, and gender of servicemembers charged with violations of the UCMJ, no such change has been made. Reporting this information would provide servicemembers and the public with greater visibility into potential disparities and help build confidence that DOD is committed to a military justice system that is fair and just.

Furthermore, DOD has not issued guidance that establishes criteria to specify when any data indicating possible racial, ethnic, or gender disparities in the investigations, trials, or outcomes of cases in the military justice system should be further reviewed, and to describe what steps should be taken to conduct such a review if it were needed. GAO's *Standards for Internal Control in the Federal Government* provides that an agency needs to establish a baseline in order to perform monitoring activities.⁶² The baseline helps the agency understand and address deficiencies in its operations.

While equal employment opportunity enforcement is a very different context than the military justice system, other federal agencies have developed such criteria in the equal employment opportunity context that can indicate when disparities should be examined further. For example, the Department of Justice, the Department of Labor, the Equal Employment Opportunity Commission, and the Office of Personnel Management use a "four-fifths" test to determine when differences between subgroups in the selection rates for hiring, promotion, or other

⁶¹DOD Instruction 5500.17, *Role and Responsibilities of the Joint Service Committee on Military Justice (JSC)* (Feb. 21, 2018).

⁶²[GAO-14-704G](#).

employment decisions are significant.⁶³ These criteria, though inexact, provide an example of the type of criteria that DOD could consider using as a basis for determining when disparities among racial or gender groups in the military justice process could require further review or analysis. By issuing guidance that establishes criteria for determining when data indicating possible racial and gender disparities in the investigations, trials, or outcomes of cases in the military justice system should be further examined, and describes the steps that should be taken to conduct such further examination, DOD and the services would be better positioned to monitor the military justice system to help ensure that it is fair and just, a key principle of the UCMJ.

⁶³According to the Equal Employment Opportunity Commission, under the four-fifths test, a selection rate for any race, sex, or ethnic group that is less than four-fifths or 80 percent of the rate for the group with the highest selection rate will be regarded as substantially different. This is considered a rule of thumb and not a legal definition, but is considered a practical means of keeping the attention of enforcement agencies on discrepancies. It establishes a numerical basis for drawing an initial inference and requiring additional information. Equal Employment Opportunity Commission, *Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11,996 (Mar. 2, 1979).

Racial and Gender Disparities Exist in Military Justice Investigations, Disciplinary Actions, and Case Outcomes, but Have Not Been Comprehensively Studied to Identify Causes

Racial and gender disparities exist in investigations, disciplinary actions, and punishment of servicemembers in the military justice system, and gender disparities exist in convictions in the Marine Corps. Our analysis of available data from fiscal years 2013 through 2017, which controlled for attributes such as race, gender, rank, education, and years of service, found racial and gender disparities were more likely in actions that first brought servicemembers into the military justice system.⁶⁴ Specifically, we found that:

- Black, Hispanic, and male servicemembers were more likely than White and female servicemembers to be the subjects of recorded investigations in all of the military services, and were more likely to be tried in general and special courts-martial in the Army, the Navy, the Marine Corps, and the Air Force.⁶⁵
- There were fewer statistically significant racial and gender disparities in most military services in general and special courts-martial that were preceded by a recorded investigation than in general and special courts-martial overall. We also found that statistically significant racial

⁶⁴Our findings of racial and gender disparities, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information along with supporting statistics. We conducted multivariate regression analyses, which analyzed the degree to which one racial or gender group was more likely or less likely than another racial or gender group to be the subject of recorded investigations while controlling for race, gender, rank, and education. In the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4) at the request of Air Force officials. In the Army, we could not control for education, but we were able to control for age. A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. A multivariate regression analysis allows us to test the association between a servicemember's race and the odds of a particular military justice action, while holding other servicemember attributes, such as rank, education, and gender, constant. For the purposes of consistency, in our multivariate regression analyses, we made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. For purposes of this report, we use the term "likelihood" when discussing the odds ratios from the results of our regression analyses. Odds ratios that are statistically significant and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to a particular military justice action. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendix II for the summary statistics and bivariate regression analyses for the racial and gender groups in each of the services, and Appendixes IV through VIII for the demographic breakdowns of the modeled attributes in each of the military services.

⁶⁵We did not analyze general and special courts-martial in the Coast Guard due to the small number of cases adjudicated from fiscal years 2013 through 2017.

and gender disparities in general and special courts-martial that did not follow a recorded investigation were similar to those we identified for general and special courts-martial overall.

- Black and male servicemembers were more likely than White and female servicemembers to be tried in summary courts-martial and to be subjects of nonjudicial punishment in the Air Force and the Marine Corps. The Army and the Navy did not maintain complete data, and the Coast Guard had too few summary courts-martial for us to analyze, and did not maintain complete nonjudicial punishment data.

We identified fewer statistically significant racial or gender disparities in case outcomes—convictions and punishment severity. Specifically:

- Race was not a statistically significant factor in the likelihood of conviction in general and special courts-martial in the Army, the Navy, the Marine Corps, and the Air Force, but gender was a statistically significant factor in the Marine Corps.
- Black servicemembers were less likely to receive a more severe punishment in general and special courts-martial compared to White servicemembers in the Navy but there was no statistically significant difference for Black servicemembers in the Marine Corps, the Army, and the Air Force. Additionally, there were no statistically significant differences for Hispanic servicemembers in the Navy, the Marine Corps, the Army, or the Air Force; and males were more likely than females to receive a more severe punishment in the Marine Corps, the Army, and the Air Force.

Finally, DOD and the military services have taken some steps to study racial and gender disparities in the military justice system over the last several decades, but they have not comprehensively studied the extent or causes of any disparities.

Black, Hispanic, and Male Servicemembers Were More Likely to Be Subjects of Recorded Investigations and Tried in General and Special Courts-Martial

Black, Hispanic, and Male Servicemembers Were More Likely to Be Subjects of Recorded Investigations in All of the Military Services

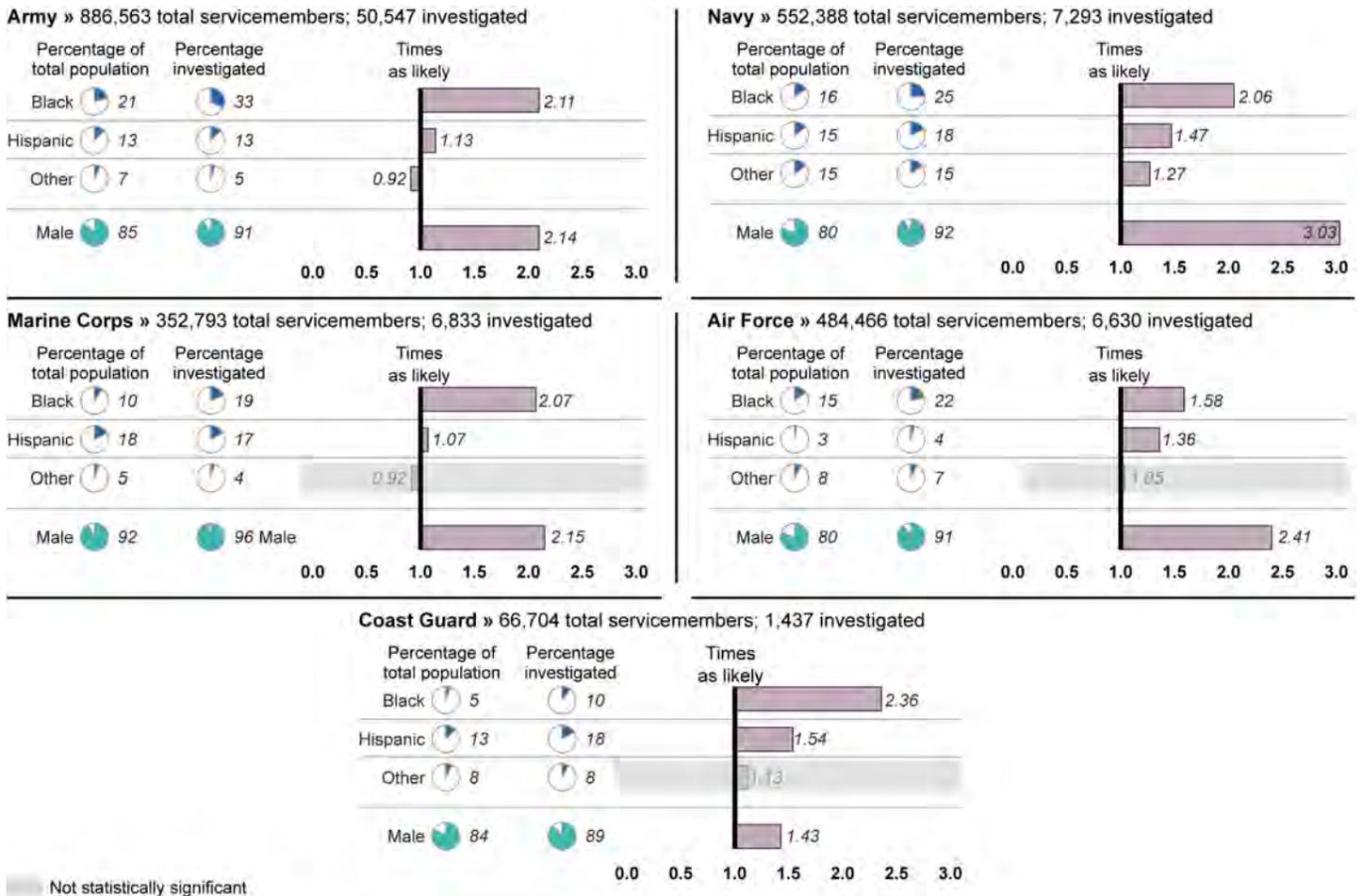
Black, Hispanic, and male servicemembers were more likely than White or female servicemembers to be the subjects of recorded investigations in all of the military services, after controlling for other attributes, as shown in figure 5.⁶⁶ Servicemembers in the Other race category were more likely than White servicemembers to be the subjects of recorded investigations in the Navy, but were less likely in the Army.⁶⁷ Our analyses did not identify any statistically significant differences for servicemembers in the Other race category from the Air Force, the Marine Corps, or the Coast Guard.⁶⁸

⁶⁶These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Our analysis focused on violations of the UCMJ that were recorded in databases used by service-specific investigative entities known as military criminal investigative organizations (MCIO). MCIOs conduct criminal investigations in cases with a DOD nexus, such as if a crime occurred on a DOD installation, or the subject of the investigation is currently affiliated with DOD or was subject to the UCMJ at the time of the offense. Investigations are recorded in the MCIO databases when a servicemember is the subject of a criminal allegation made by another; for purposes of this report, we say the servicemember had a “recorded investigation” to describe these cases. We used data from the databases used by the Army’s Criminal Investigation Command, which included cases investigated by military police and Criminal Investigation Command; by the Navy and Marine Corps Naval Criminal Investigative Service, which included cases investigated by the Naval Criminal Investigative Service and military police; by the Air Force’s Office of Special Investigations, which included only Office of Special Investigations cases; and by the Coast Guard Investigative Service, which included only Coast Guard Investigative Service cases. This analysis does not include investigations that were recorded in databases that were not used by the MCIOs, or other investigations conducted within the military, such as command investigations. When we merged the military services’ investigation data with their personnel information, we found the data to be sufficiently reliable for assessing gender and racial disparities. See Appendix III for information regarding recorded investigations of drug and sexual assault offenses.

⁶⁷The Other race category includes servicemembers that identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

⁶⁸Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, a recorded investigation.

Figure 5: Likelihood of Recorded Investigations for Alleged Uniform Code of Military Justice Violations by Race and Gender, After Controlling for Rank and Education, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and investigation data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be the subject of an investigation recorded in the services' military criminal investigative organizations databases for alleged violations of the Uniform Code of Military Justice after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. In the Army, we could not control for age, but we were able to control for age. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be the subject of a recorded investigation. Not statistically significant means that we could not conclude there was an association between race and the likelihood of a recorded investigation. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure may

Black, Hispanic, and Male Servicemembers Were More Likely to Be Tried in General and Special Courts-Martial

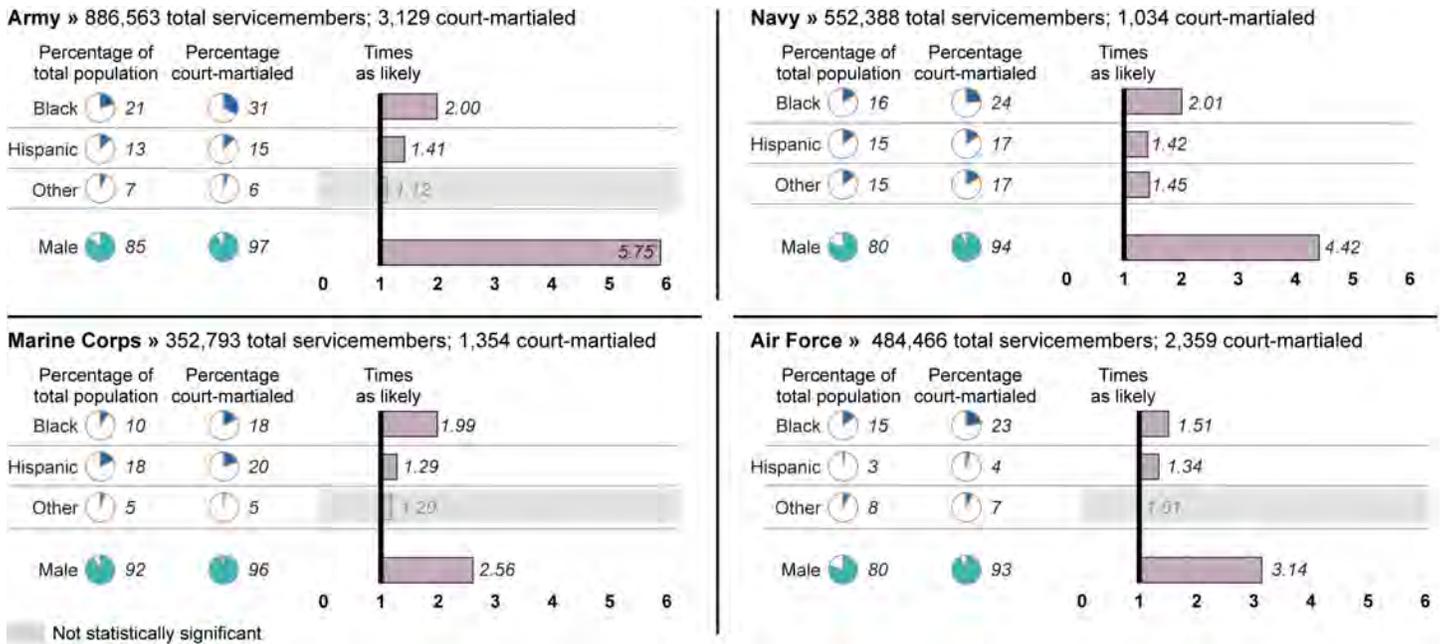
not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

For the Army, the Navy, the Marine Corps, and the Air Force, Black, Hispanic, and male servicemembers were more likely than White and female servicemembers to be tried in general and special courts-martial after controlling for other attributes, as shown in figure 6 below.⁶⁹ Servicemembers in the Other race category were more likely than White servicemembers to be tried in general and special courts-martial in the Navy, but we found no statistically significant differences in the likelihood of servicemembers in the Other race category in the Army, the Marine Corps, and the Air Force to be tried in general and special courts-martial compared to White servicemembers.⁷⁰ We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

⁶⁹These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. When we merged the military services' military justice data with their personnel information, we found the data to be sufficiently reliable for assessing gender and racial disparities. General and special courts-martial are used to adjudicate more serious violations of the UCMJ, and therefore have the potential for more severe judicial punishment. We conducted multivariate regression analyses, which analyzed the degree to which one racial, ethnic, or gender group was more likely or less likely than another racial, ethnic, or gender group to be tried in general and special courts-martial while controlling for race, gender, rank, and education. In the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4). In the Army, we could not control for education, but we were able to control for age. A multivariate regression analysis examines several variables to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendix II for the summary statistics and bivariate regression analyses for the racial and gender groups in each of the services, and see Appendixes IV through VIII for the demographic breakdowns of the modeled attributes in each of the military services. See Appendix III for information regarding general and special courts-martial of drug and sexual assault offenses.

⁷⁰Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, trial in general and special courts-martial.

Figure 6: Likelihood of Trial in General and Special Courts-Martial by Race and Gender, After Controlling for Rank and Education, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be tried in general and special courts-martial after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. In the Army, we could not control for education, but we were able to control for age. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in general or special courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in general and special courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure may not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

More Statistically Significant Racial and Gender Disparities Found in General and Special Courts-Martial Cases without a Recorded Investigation than with a Recorded Investigation

When separating general and special court-martial cases into those that either were or were not preceded by an investigation recorded in an MCIO database, we found fewer statistically significant racial and gender disparities in most of the military services in general and special courts-martial that were preceded by a recorded investigation.⁷¹ However, statistically significant racial and gender disparities were also present in general and special courts-martial that did not follow a recorded investigation in all services included in this analysis, which would include cases where the investigation was performed by the servicemember's command.

Specifically, as shown in figure 7 below, we found that Black, Hispanic, Other, and male servicemembers in the Army, Hispanic servicemembers in the Marine Corps, and males in the Air Force were more likely than White or female servicemembers to be tried in general and special courts-martial following a recorded investigation, after controlling for other attributes.⁷² We found no statistically significant differences in the likelihood of any other racial or gender groups to be tried in general and special courts-martial following a recorded investigation in any other services.⁷³ Our analyses of general and special courts-martial with a

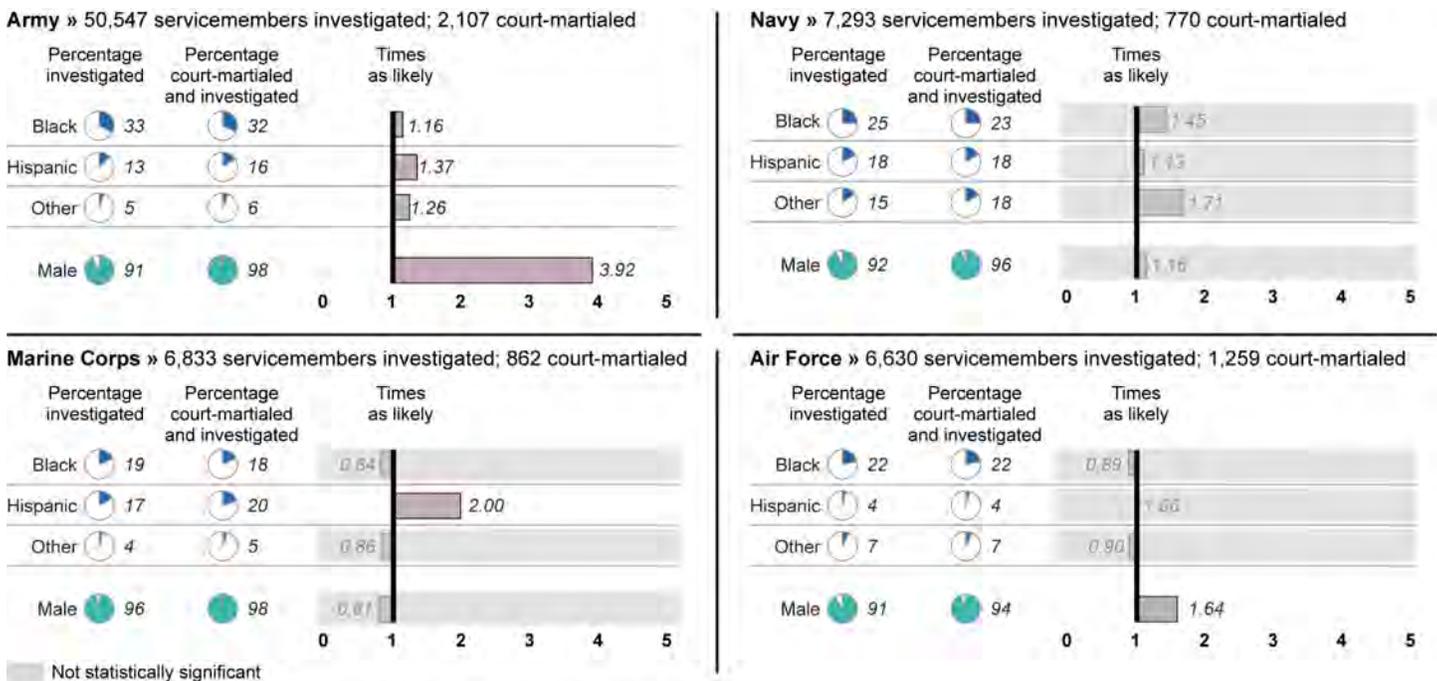
⁷¹Investigations are recorded in the MCIO databases when a servicemember is the subject of a criminal allegation made by another; for purposes of this report, we say the servicemember had a "recorded investigation" to describe these cases. For additional explanation of the databases we used to analyze investigations, please see appendix I. As discussed in the background section above, and in figure 3, the majority of general and special courts-martial, ranging from 53 percent to 74 percent, had a recorded investigation, while the remaining general and special courts-martial cases, ranging from 26 percent to 47 percent, would have been investigated by other sources, such as local civilian law enforcement, command investigations, or in the case of the Air Force, their military law enforcement forces.

⁷²We conducted multivariate regression analyses, which analyzed the degree to which one racial, ethnic, or gender group was more likely or less likely than another racial, ethnic, or gender group to be tried in general and special courts-martial that followed a recorded investigation while controlling for race, gender, rank, and education. In the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4). In the Army, we could not control for education, but we were able to control for age. A multivariate regression analysis examines several variables to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendixes II through VI for the demographic breakdowns of the modeled attributes in each of the military services.

⁷³Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, trial in general and special courts-martial following a recorded investigation.

recorded investigation generally found fewer statistically significant differences compared to the results of our analyses for all special and general courts martial.

Figure 7: Likelihood of Trial in General and Special Courts-Martial Following a Recorded Investigation by Race and Gender, After Controlling for Rank and Education, Fiscal Years 2013–2017

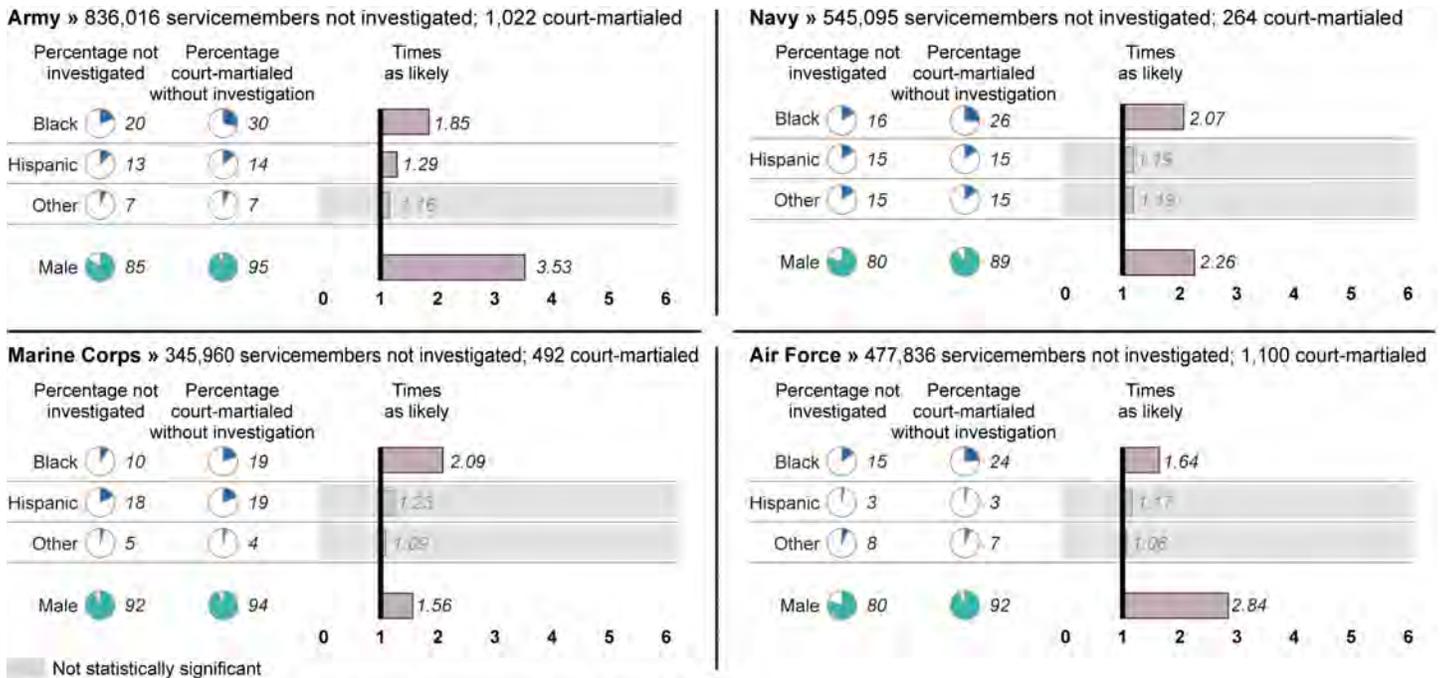


Source: GAO analysis of service personnel, investigations, and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be tried in general and special courts-martial following an investigation recorded in the services' military criminal investigative organizations databases after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. In the Army, we could not control for education, but we were able to control for age and investigative entity. In the Navy and the Marine Corps, we also controlled for type of offense, investigative entity, and composition of the deciding panel. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in general and special courts-martial following a recorded investigation. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in general and special courts-martial following a recorded investigation. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure may not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

We also found that Black and male servicemembers in all of the military services were more likely than White and female servicemembers to be tried in general and special courts-martial without a recorded investigation after controlling for other attributes, as shown in figure 8 below. Further, Hispanic servicemembers in the Army were more likely than White servicemembers to be tried in general and special courts-martial without a recorded investigation, but we found no statistically significant differences in the likelihood of Hispanic servicemembers to be tried in general and special courts-martial without a recorded investigation in the Marine Corps, the Navy, or the Air Force. We found no statistically significant differences in the likelihood of servicemembers in the Other race category to be tried in general and special courts-martial compared to White servicemembers in all of the military services. Our findings of racial and gender disparities in general and special courts-martial without a recorded investigation found statistically significant differences for Black and male servicemembers consistent with the differences we identified for general and special courts-martial overall, as shown in figure 6 above.

Figure 8: Likelihood of Trial in General and Special Courts-Martial without a Recorded Investigation by Race and Gender, After Controlling for Rank and Education, Fiscal Years 2013–2017



Source: GAO analysis of service personnel, investigations, and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be tried in general and special courts-martial without an investigation recorded in the services' military criminal investigative organizations databases after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. In the Army, we could not control for education, but we were able to control for age. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in general and special courts-martial without a recorded investigation. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in general and special courts-martial without a recorded investigation. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure may not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

Black and Male
Servicemembers Were
More Likely to Be Subject
to Summary Courts-
Martial and Nonjudicial
Punishment in the Air
Force and Marine Corps,
and the Other Services
Lack Data

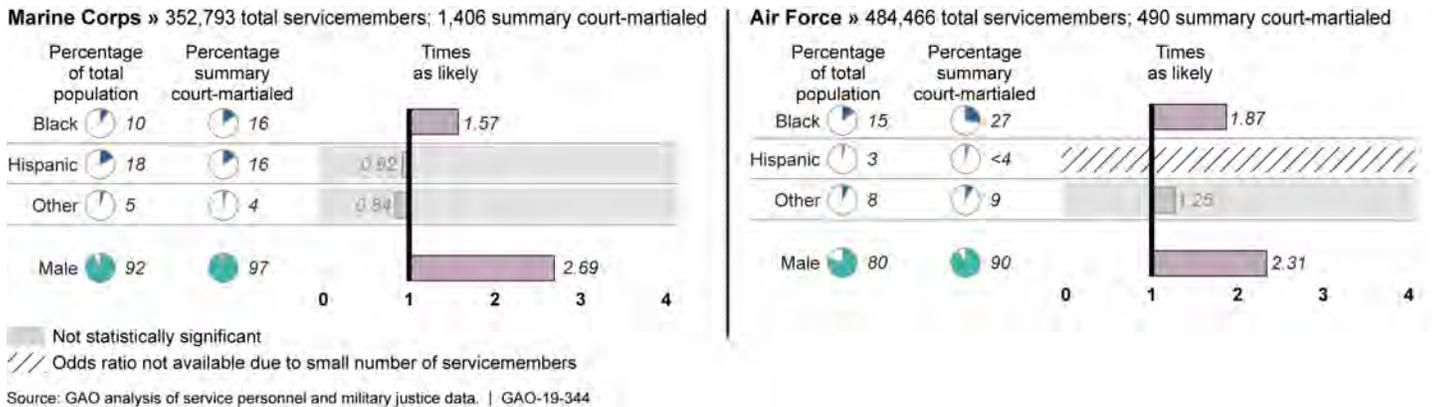
Black and Male
Servicemembers Were More
Likely to Be Tried in Summary
Courts-Martial in the Air Force
and Marine Corps, and the
Army and Navy Lack Data

Black and male servicemembers were more likely than White or female servicemembers to be tried in summary courts-martial in the Air Force and the Marine Corps after controlling for other attributes, as shown in figure 9 below.⁷⁴ We did not identify any statistically significant differences in summary courts-martial rates for servicemembers who identified as Hispanic or in the Other race category in either the Air Force or the Marine Corps.⁷⁵ We could not determine whether there were racial or gender disparities for summary courts-martial in the Army, the Navy, and the Coast Guard due to data limitations.

⁷⁴These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. When we merged the military services' military justice data with their personnel information, we found the data to be sufficiently reliable for assessing gender and racial disparities. We conducted multivariate regression analyses, which analyzed the degree to which one racial or gender group was more likely or less likely than another racial or gender group to be tried in summary courts-martial while controlling for race, gender, rank, and education. In the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4). A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendix II for the summary statistics and bivariate regression analyses for the racial and gender groups in each of the services, and see Appendixes VI and VII for the demographic breakdowns of each of those attributes in the Marine Corps and the Air Force, respectively.

⁷⁵Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, trial in summary courts-martial. The Other race category includes servicemembers who identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Figure 9: Likelihood of Trial in Summary Courts-Martial in the Air Force and the Marine Corps by Race and Gender, After Controlling for Rank and Education, Fiscal Years 2013–2017



Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be tried in summary courts-martial after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in summary courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in summary courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure may not sum to 100 percent due to rounding and because we excluded from this figure data for White servicemembers and those whose race was unknown.

We could not analyze Coast Guard cases due to the small number of summary courts-martial adjudicated in the Coast Guard from 2013 through 2017. We could not determine whether disparities existed among servicemembers tried in summary courts-martial in the Army and the Navy because the Army and the Navy did not collect complete summary courts-martial data in their investigations, military justice, or personnel databases. Specifically, as part of our data reliability checks, we identified the total number of summary courts-martial that the Army and the Navy reported in the Court of Appeals for the Armed Forces annual reports for fiscal years 2013 through 2017, and compared these totals to the number

of cases we identified in their military justice databases.⁷⁶ While our comparisons are not exact, due to differences in the dates we used to count the number of cases, we found that approximately 60 percent of the Army's reported summary courts-martial cases and less than 50 percent of the Navy's reported summary courts-martial cases were included in their military justice databases.⁷⁷

Army and Navy officials cited several reasons why complete summary courts-martial information was not collected. First, they said that the services are not required to collect and maintain complete data on summary courts-martial because these cases result in non-criminal convictions under the UCMJ. Summary courts-martial are typically used for minor offenses, and the accused is not guaranteed the right to be represented by a military attorney. As a result, military attorneys may not be involved in summary courts-martial. Army and Navy officials said that if military attorneys are not involved in the case, there is not likely to be a record of the case in their service's military justice database. In contrast, Air Force officials said that they provide a military attorney to represent the accused in summary courts-martial; as a result, Air Force officials said their attorneys create records for these cases in the Air Force's military justice database. The Marine Corps does not maintain summary court-martial data in its military justice database but tracks summary courts-martial in its personnel database.

Officials in the Navy and the Army told us that the lack of complete summary court-martial data in their military justice databases is also in part because these systems were not designed to serve as repositories for complete military justice data. Instead, the officials said that the military justice databases were primarily created to assist attorneys in

⁷⁶According to Army and Navy officials, the total numbers of summary courts-martial included in the Court of Appeals for the Armed Forces annual reports are taken from their internal monthly and quarterly staff judge advocate reports that were discussed earlier in this report.

⁷⁷We could not compare the total number of cases that we identified in the military justice databases precisely against the reported number of cases because we counted cases based on the date of referral, whereas the cases reported in the Court of Appeals for the Armed Forces annual report are based on the judgment date. However, we combined the total number of cases over a 5-year period, which made differences in which particular fiscal year a case was counted less important for these purposes. We found that while the total number of cases were different, the totals we computed provided a basis for comparison that allowed us to confirm that the military justice databases did not have complete data about summary courts-martial, as Army and Navy officials had told us.

generating trial documents, meeting timeframes, and other aspects of case management. Nevertheless, Army officials said they plan to start collecting more complete summary court-martial information. Specifically, Army officials said that the Army is encouraging their judge advocate general staff to create records for all summary courts-martial in the service's military justice database.

The absence of complete summary court-martial data in the military justice databases of the Army and the Navy limits these services' visibility into any disparities that may exist among servicemembers involved in these types of military justice proceedings. On December 17, 2018, the General Counsel of the Department of Defense issued the uniform standards and criteria required by article 140A of the Military Justice Act of 2016. As part of these uniform standards, the services were directed to collect certain information about all cases in their military justice databases, which a DOD official said includes summary courts-martial cases. The military services are to implement the Secretary's direction no later than December 23, 2020.

Black and Male
Servicemembers Were More
Likely to Be Subject to
Nonjudicial Punishments in the
Air Force and the Marine
Corps, and the Army, Navy,
and Coast Guard Lack Data

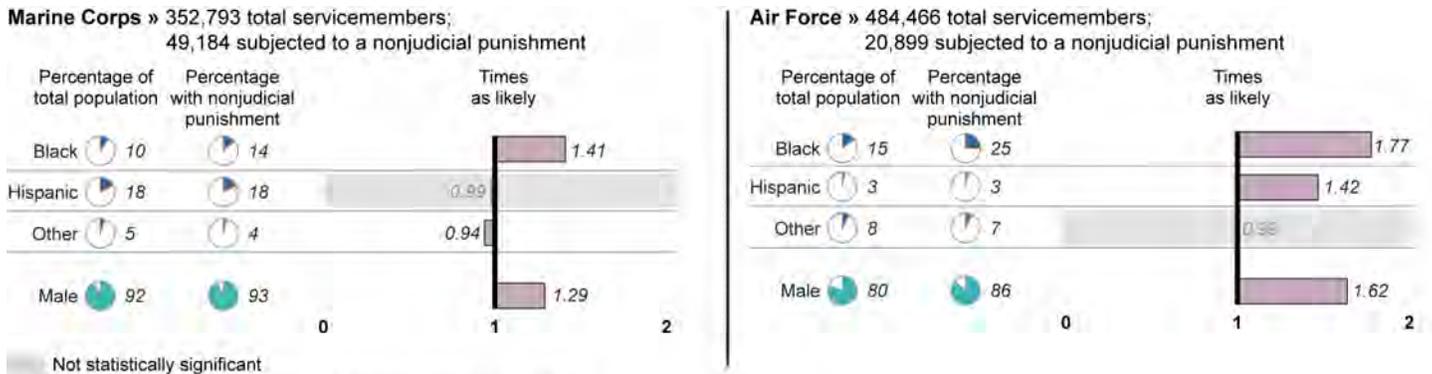
Black and male servicemembers were more likely than White or female servicemembers to be subject to nonjudicial punishments in the Air Force and the Marine Corps, after controlling for other attributes, as shown in figure 10 below.⁷⁸ In the Air Force, we found that Hispanic servicemembers were more likely than White servicemembers to receive nonjudicial punishments, while we observed no statistically significant differences in nonjudicial punishment rates for Hispanic servicemembers in the Marine Corps.⁷⁹ Servicemembers in the Other race category in the Marine Corps were less likely to receive nonjudicial punishments, but we observed no statistically significant differences in nonjudicial punishment rates for servicemembers in the Other race category in the Air Force.⁸⁰

⁷⁸These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. When we merged the military services' military justice data with their personnel information, we found the data to be sufficiently reliable for assessing gender and racial disparities. We conducted multivariate regression analyses, which analyzed the degree to which one racial or gender group was more likely or less likely than another racial or gender group to receive nonjudicial punishments while controlling for race, gender, rank, and education. In the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4). A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendix II for the summary statistics and bivariate regression analyses for the racial and gender groups in each of the services, and see Appendixes VI and VII for the demographic breakdowns of each of those attributes in the Marine Corps and the Air Force, respectively.

⁷⁹Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, nonjudicial punishment.

⁸⁰The Other race category includes servicemembers who identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Figure 10: Likelihood of Nonjudicial Punishments in the Air Force and the Marine Corps by Race and Gender, After Controlling for Rank and Education, Fiscal Years 2013–2017



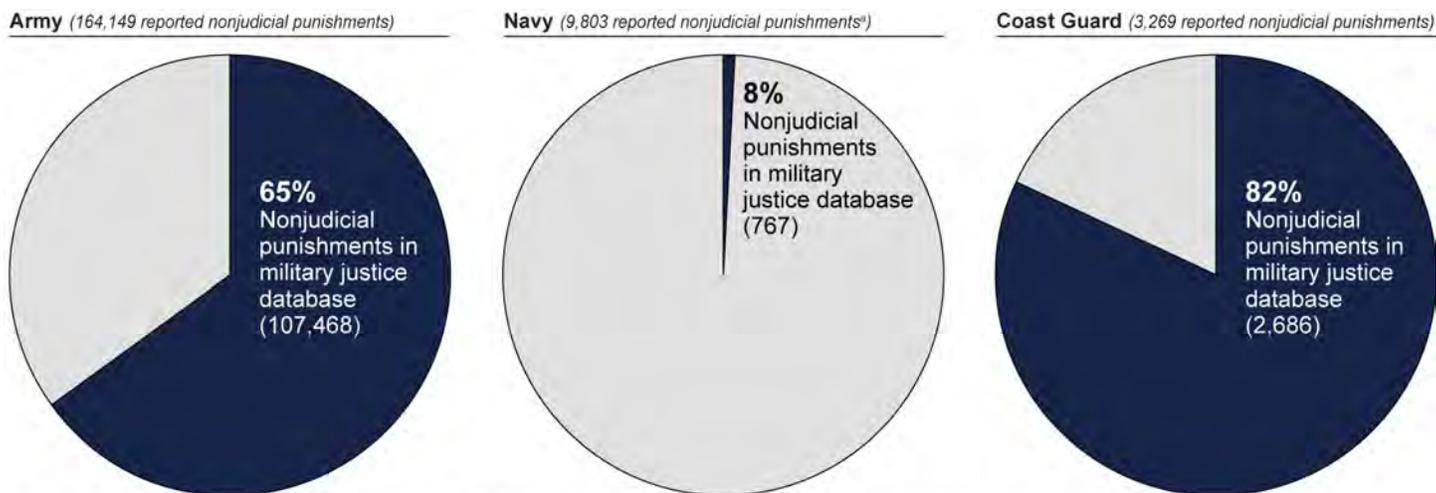
Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be subject to nonjudicial punishments after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to nonjudicial punishment. Not statistically significant means that we could not conclude there was an association between race and the likelihood of nonjudicial punishment. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure may not sum to 100 percent due to rounding and because we excluded from this figure data for White servicemembers and those whose race was unknown.

However, we could not determine whether there were racial or gender disparities among servicemembers subject to nonjudicial punishments in the Army, the Navy, and the Coast Guard because these services do not collect complete nonjudicial punishment data, such as data on the servicemember's race, ethnicity, gender, offense, and punishment, in any of their databases. As part of our data reliability checks, we identified the total number of nonjudicial punishments that the Army, the Navy, and the Coast Guard reported in the Court of Appeals for the Armed Forces annual reports for fiscal years 2013 through 2017, and compared these totals to the number of cases we identified in their military justice and

personnel databases.⁸¹ As shown in figure 11 below, we found that 65 percent of the Army's reported nonjudicial punishments, 8 percent of the Navy's reported nonjudicial punishments, and 82 percent of the Coast Guard's reported nonjudicial punishments were recorded in their military justice databases.

Figure 11: Army, Navy, and Coast Guard Reported Nonjudicial Punishments Compared to Nonjudicial Punishments in Military Justice Databases, Fiscal Years 2013–2017



Source: GAO analysis of Court of Appeals for the Armed Forces annual reports for fiscal years 2013-2017 and Army, Navy, and Coast Guard military justice databases. | GAO-19-344

Note: Nonjudicial punishments are reported as a combined number for the Navy and the Marine Corps in the Court of Appeals for the Armed Forces annual reports. To calculate this reported figure for the Navy, we subtracted the number of Marine Corps nonjudicial punishment cases we identified in the Marine Corps personnel database from the reported totals.

Officials from these services cited several reasons why they did not have complete information about all nonjudicial punishments. First, they said that the services are not required to track nonjudicial punishment cases because they are non-criminal punishments that are typically imposed for less serious offenses. Army and Navy officials noted that complete records of these punishments are not recorded at least in part because

⁸¹ Nonjudicial punishments are reported as a combined total for the Navy and the Marine Corps in the Court of Appeals for the Armed Forces annual reports. As a result, to calculate this reported figure for the Navy, we subtracted the number of Marine Corps nonjudicial punishment cases that we had identified in the Marine Corps personnel database from the reported totals.

nonjudicial punishments are not meant to follow servicemembers throughout their career, but instead are intended to incentivize servicemembers to correct their behavior. Because nonjudicial punishments are not criminal punishments, the process afforded to servicemembers in nonjudicial punishment proceedings differs as well. For example, the servicemember is not guaranteed the right to representation by a military attorney. Army and Navy officials noted that their military justice databases contain records of nonjudicial punishments if there was legal involvement by the Judge Advocate General's Corps in the case. Similarly, Coast Guard officials said that their military justice database contains records of nonjudicial punishment if a case originated as a criminal case involving a judge advocate, for example, if charges were preferred. According to Air Force and Marine Corps officials, the Air Force maintains complete nonjudicial punishment data in its military justice database, and the Marine Corps maintains complete nonjudicial punishment data in its personnel database.⁸²

Standards for Internal Control in the Federal Government state that management should use quality information to achieve an entity's objectives. Additionally, management should identify information requirements; ensure that the data it receives are timely and reliable; and process the data obtained into quality information.⁸³ Officials from the Army, the Navy, and the Coast Guard expressed concerns regarding the feasibility of collecting and maintaining information about all nonjudicial punishments. Army officials stated that the collection and maintenance of all nonjudicial punishment data would be a substantial administrative burden due to the number of nonjudicial punishments awarded to servicemembers every week. Navy officials also stated that it would be a significant challenge to collect and maintain information about all nonjudicial punishments in either the Navy's military justice database or its personnel database. They stated that there are few individuals who have access and can input data into the military justice database, and to expand the scope of criminal justice data collected in that manner, more people would have to be hired or assigned to assist with data entry. Similarly, Coast Guard officials said that tracking all nonjudicial punishment cases would be a difficult addition to their current data

⁸²Marine Corps officials said that commanders fill out a form for all executed administrative actions, nonjudicial punishments, and all types of courts-martial, and information from those forms are then recorded in the personnel database.

⁸³[GAO-14-704G](#).

collection and maintenance workload. Coast Guard officials further stated that in addition to providing commanders with an essential means of providing good order and discipline, nonjudicial punishment also may promote positive change. Some Coast Guard officials stated concerns that recording all nonjudicial punishments in a database may inhibit the rehabilitative component of nonjudicial punishment.

While the Army, Navy, and Coast Guard officials expressed these concerns, none of these military services had formally assessed the feasibility of collecting data on nonjudicial punishments. The absence of complete nonjudicial punishment data limits the military services' visibility into the vast majority of legal punishments imposed on servicemembers under the UCMJ every year. Without such data, these three services will remain limited in their ability to assess or identify disparities among populations subject to this type of punishment.

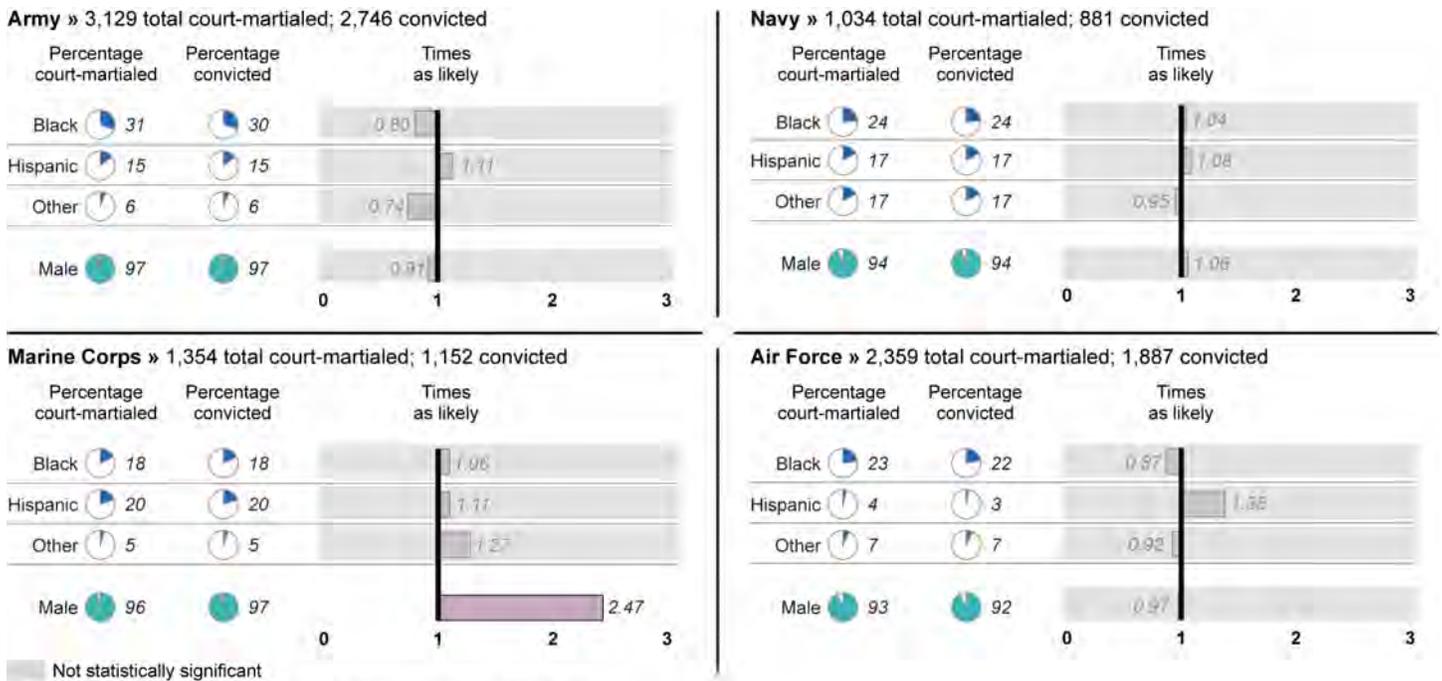
Few Statistically Significant Racial or Gender Disparities Exist in Likelihood of Conviction or Severity of Punishment, but the Coast Guard Does Not Collect and Maintain Complete Data

Race Was Not a Statistically Significant Factor in Convictions in General and Special Courts-Martial, but Gender Was in the Marine Corps

Among the servicemembers convicted in general and special courts-martials, we found no statistically significant differences regarding the likelihood of conviction among racial groups in the Army, the Navy, the Marine Corps, and the Air Force, while controlling for other attributes, as shown in figure 12 below.⁸⁴ In the Marine Corps, male servicemembers were more likely to be convicted compared to female servicemembers. We found no statistically significant differences in the likelihood of convictions between males and females in the Army, the Air Force, and the Navy.

⁸⁴We conducted multivariate regression analyses, which analyzed the degree to which one racial or gender group was more likely or less likely than another racial or gender group to be convicted in general and special courts-martial, while controlling for race, gender, education, rank, and offense type. In the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4) and composition of the deciding panel. In the Army, we could not control for education, but we were able to control for age and composition of the deciding panel. A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. Not identifying any statistically significant findings means that we could not conclude there was an association between race or gender and the likelihood of an outcome, in this case, conviction in general and special courts-martial. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendix II for the summary statistics and bivariate regression analyses for the racial and gender groups in each of the services, and see Appendixes IV through VII for the demographic breakdowns of the modeled attributes in each of the military services.

Figure 12: Likelihood of Conviction in General and Special Courts-Martial by Race and Gender, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be convicted in general and special courts-martial after controlling for race, gender, rank, education, and offense type. We also controlled for years of service among the lower enlisted ranks (E1-E4) and composition of the deciding panel in the Air Force. In the Army, we could not control for education, but we were able to control for age and composition of the deciding panel. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be convicted in general and special courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of conviction in general and special courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure do not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

Minority Servicemembers Were Either Less Likely to Receive a More Severe Punishment or There Were No Differences Among Racial Groups, but Punishment Severity Varied by Gender Among the Services

In the military services that maintained complete punishment data—the Army, the Navy, the Marine Corps, and the Air Force—we found that minority servicemembers were either less likely to receive a more severe punishment in general and special courts-martial compared to White servicemembers, or there were no statistically significant differences in punishments among racial groups.⁸⁵ Our findings regarding gender varied among the services. Male servicemembers were more likely to receive a more severe punishment compared to females in the Marine Corps, the Army, and the Air Force; for the Navy, we found there were no statistically significant differences in punishments between males and females.⁸⁶

Navy and Marine Corps: Among servicemembers that were convicted in general and special courts-martial in the Marine Corps, we found no statistically significant differences regarding minority servicemembers being more likely or less likely to receive a dismissal or discharge punishment versus some other punishment, while controlling for other attributes, as shown in figure 13 below.⁸⁷ In the Navy, among servicemembers that were convicted in general and special courts-martial, Black servicemembers were less likely than White servicemembers to receive a discharge or dismissal. We found no statistically significant differences regarding Hispanic servicemembers or those of Other races in the Navy. In the Marine Corps, among servicemembers that were convicted in general and special courts-

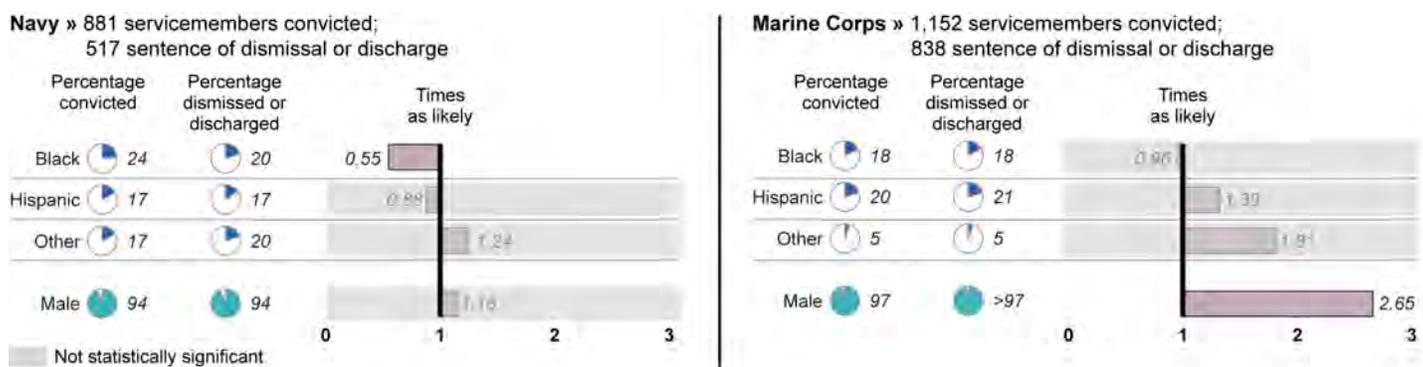
⁸⁵Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, punishment severity.

⁸⁶We measured the severity of punishments in two groups for the Navy and the Marine Corps, and in three groups for the Air Force and the Army, which are defined in Appendix I. We could not create a third punishment group for confinement without dismissal or discharge for the Navy and the Marine Corps because of the small number of cases with confinement that did not also include some sort of discharge. Based on discussions with service officials, we determined that a sentence resulting in a dismissal or discharge was the most severe punishment outcome.

⁸⁷We conducted multivariate regression analyses to analyze the degree to which one racial, ethnic, or gender group was more likely or less likely than another group to receive a more severe punishment in general and special courts-martial while controlling for race, gender, education, rank, and offense type. A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendix II for the summary statistics and bivariate regression analyses for the racial and gender groups in each of the services, and see Appendixes V and VI for the demographic breakdowns of the modeled attributes in the Navy and the Marine Corps.

martial, male servicemembers were more likely than female servicemembers to receive a discharge or dismissal. In the Navy, there were no statistically significant differences in punishments between males and females.

Figure 13: Likelihood of Dismissal or Discharge in General and Special Courts-Martial by Race and Gender in the Navy and the Marine Corps, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to be to be dismissed or discharged after conviction in general and special courts-martial after controlling for race, gender, rank, education, and offense type. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be dismissed or discharged after conviction in general and special courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of dismissal or discharge after conviction in general and special courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure do not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

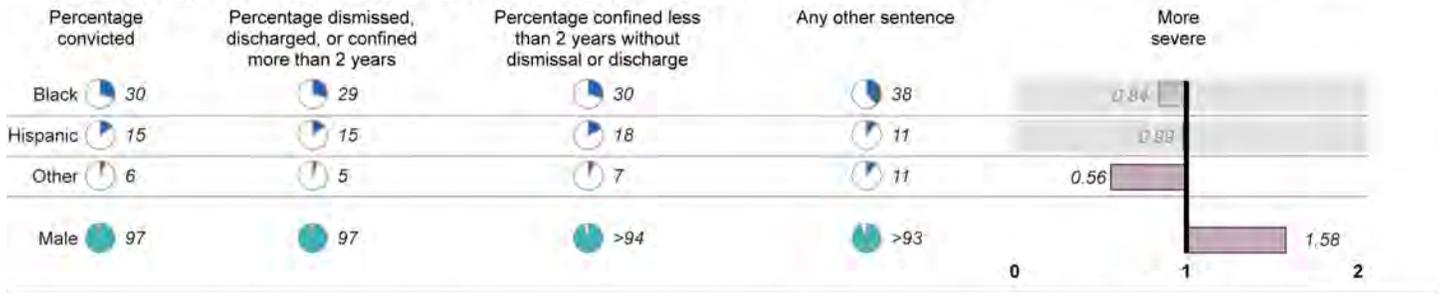
Army and Air Force: We found no statistically significant differences regarding Black or Hispanic servicemembers being more likely or less likely to receive a more severe punishment in the Air Force or the Army,

while controlling for other attributes, as shown in figure 14 below.⁸⁸ We also found that servicemembers in the Other race group were less likely to receive a more severe punishment compared to White servicemembers in the Army, but punishment results for servicemembers in the Other race group in the Air Force were not statistically significant. Additionally, we found that male servicemembers were more likely to receive a more severe punishment compared to female servicemembers in the Army and the Air Force.

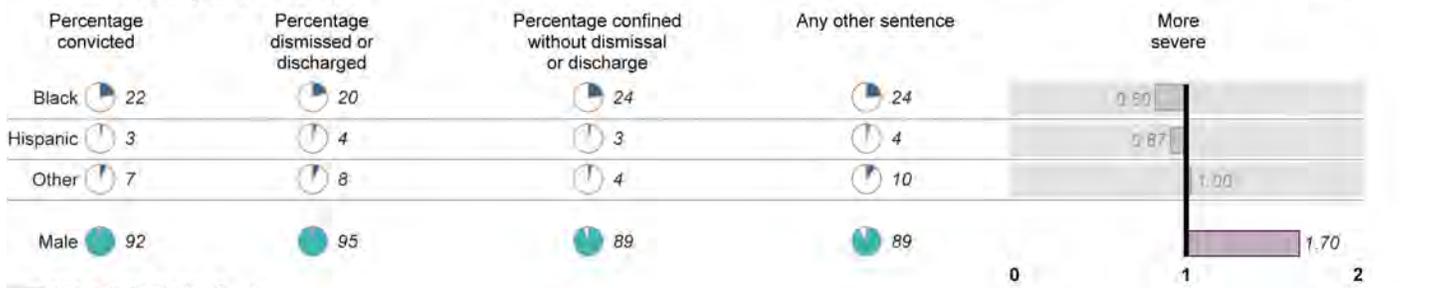
⁸⁸We conducted ordered logistic regression analyses to analyze the degree to which one racial, ethnic, or gender group was more likely or less likely than another group to receive a more severe outcome in general and special courts-martial, while controlling for race, gender, education, rank, composition of the deciding panel, and offense type. In the Air Force, we controlled for years of service among the lower enlisted ranks (E1-E4). In the Army, we could not control for education, but we were able to control for age. Using the three punishment groups listed in table 8 in Appendix I, based on discussions with service officials, we determined that a sentence resulting in a dismissal or discharge was the most severe punishment outcome. An ordered logistic regression is an extension of the logistic regression model that applies to dependent variables where there are more than two response categories. See Appendix I for a more detailed explanation of how we conducted our ordered logistic regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendixes IV and VII for the demographic breakdowns of the modeled attributes in the Army and the Air Force.

Figure 14: Likelihood of More Severe Punishment in General and Special Courts-Martial by Race and Gender in the Army and the Air Force, Fiscal Years 2013–2017

Army » 2,746 servicemembers convicted; 2,079 sentence of dismissal, discharge, or confinement more than 2 years; 365 sentence of confinement less than 2 years without dismissal or discharge; 302 any other sentence



Air Force » 1,887 servicemembers convicted; 992 sentence of dismissal or discharge; 656 sentence of confinement without dismissal or discharge; 239 any other sentence



Not statistically significant

Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial ordered logistic regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than the reference category to receive a more severe punishment after conviction in general and special courts-martial after controlling for race, gender, offense type, and composition of the deciding panel. We also controlled for education and years of service among the lower enlisted ranks (E1-E4) in the Air Force. In the Army, we also controlled for age and rank. We made all racial comparisons with White servicemembers and all gender comparisons with female servicemembers as the reference categories. Odds ratios that are statistically significant ($p < 0.05$) and greater than 1.00 or lower than 1.00 indicate the likelihood that individuals with that characteristic would receive a more severe or less severe punishment, respectively, than the reference category. Not statistically significant means that we could not conclude there was an association between race and the likelihood of a more severe punishment after conviction in general and special courts-martial. Punishment severity in the Air Force, ordered from most to least severe, was (3) any type of dismissal or discharge (regardless of any confinement); (2) confinement without dismissal or discharge, and (1) all other possible sentencing options. In the Army, it was (3) any type of dismissal or discharge or confinement of more than 2 years, (2) confinement of less than 2 years without dismissal or discharge, and (1) all other possible sentencing options. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The racial breakdowns in this figure do not sum to 100 percent because we excluded from this figure data for White servicemembers and those whose race was unknown.

Coast Guard Did Not Collect
and Maintain Complete Case
Outcome Data

We could not determine disparities in case outcomes—convictions and punishment severity—in the Coast Guard’s general and special courts-martial for fiscal years 2013 through 2017 because the Coast Guard did not collect and maintain complete conviction and punishment data in its military justice database.⁸⁹ Specifically, 16 percent of all Coast Guard cases were missing conviction and punishment data. When broken down by court-martial type, 20 percent of general court-martial cases, 15 percent of special court-martial cases, and 4 percent of summary court-martial cases were missing conviction and punishment data. Coast Guard officials acknowledged that incomplete conviction and punishment data entry is a consistent problem. They said that data entry had improved recently. On December 17, 2018, the General Counsel of the Department of Defense issued the uniform standards and criteria required by article 140a of the Military Justice Act of 2016.⁹⁰ As part of these uniform standards, the services were directed to collect information about the findings for each offense charged, and the sentence or punishment imposed. The military services are to implement the Secretary’s direction no later than December 23, 2020.

⁸⁹Although we could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017, case outcomes could potentially be analyzed in the Coast Guard using a longer period of time than what we used in our review.

⁹⁰The Coast Guard is a voting member of the Joint Service Committee on Military Justice, and according to Coast Guard officials, they participated in the Joint Service Committee’s subcommittee that developed the recommendations leading to the issuance of these standards. A Coast Guard official told us that they consider these standards to be binding on the Coast Guard.

DOD and the Military Services Have Conducted Some Assessments of Military Justice Disparities, but Have Not Studied the Causes of Disparities

DOD and the military services have conducted some assessments of disparities in the military justice system. We previously reported in 1995 on DOD studies on discrimination and equal opportunity, and found DOD and the services conducted seven reviews of racial disparities in discipline rates between 1974 and 1993.⁹¹ Since our 1995 report through 2016, DOD and service assessments of military justice disparities have been limited. Officials in the Office of Diversity, Equity and Inclusion (ODEI) noted DOD has not conducted any department-wide assessments of racial or gender disparities in military justice during this period. The military services' diversity offices also were not able to identify any service-specific reviews of disparities in military justice.

However, the military services have some initiatives to examine and address disparities in military justice. For example, Air Force officials said that in May 2016, the Air Force conducted a servicewide data call to solicit information about cases involving a challenge to a member of a court-martial based on race or a motion for selective prosecution. The officials said that a thorough review revealed no evidence of selective prosecution in Air Force courts-martial.⁹² In addition, the Air Force has conducted analyses of its own military justice data. Specifically, the Air Force routinely analyzes military justice data using a rates-per-thousand analysis to identify whether certain demographic groups are tried by court-martial or subject to nonjudicial punishments at higher rates than others.⁹³ These Air Force analyses found that Black and male servicemembers were more likely than White and female servicemembers to be subject to courts-martial and nonjudicial punishments from fiscal years 2013 through 2017, which is consistent

⁹¹[GAO/NSIAD-95-103](#). For example, studies conducted in the 1970s and 1980s showed no disparities in discipline rates between Black and White servicemembers and found no evidence that minority groups received courts-martial or nonjudicial punishment out of proportion to certain types of violations. Studies published by the Navy and the Defense Equal Opportunity Management Institute in the 1990s found that Black servicemembers were overrepresented in the populations of servicemembers receiving judicial and nonjudicial punishments. See Appendix I of [GAO/NSIAD-95-103](#) for a summary of each of the studies' findings and recommendations.

⁹²A claim of selective prosecution is one that alleges that the decision to prosecute was based, at least in part, on an unjustifiable standard, such as race, gender, religion, sexual orientation, or other arbitrary classification. See, for example, *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

⁹³A rates-per-thousand analysis computes the number of servicemembers within a demographic group that are subject to a particular military justice action, divided by the total number of servicemembers of that demographic group, multiplied by 1,000.

with what we found.⁹⁴ However, the other services do not routinely conduct such analyses.

Moreover, DOD has conducted climate surveys to address servicemembers' perceptions of bias. In 2013, for example, DOD conducted service-wide equal opportunity surveys that queried servicemembers on whether they believed they received nonjudicial punishment or a court martial they should not have, and whether they believed their race or ethnicity was a factor. The survey responses showed that 1.3 percent of servicemembers indicated experiencing a perceived undue punishment, a result that was unchanged from the 2009 survey.⁹⁵ Minority members were more likely to indicate experiencing perceived undue punishment than White members, but there were no significant differences between racial or ethnic groups who indicated experiencing undue punishment. ODEI officials told us that their office did not make any recommendations related to military justice as a result of these 2013 survey results because the findings were too small to warrant such steps. Moreover, ODEI officials said that while they have not completed their analysis of the 2017 survey data, the question about receiving nonjudicial punishment or court-martial had been removed from the 2017 survey. ODEI officials explained that the question was removed because the perception of unfair punishment was not the goal of the survey, although they said that the question could be reinstated for future surveys if the goals for the survey change.

In June 2017, ODEI initiated a review of the military justice system following the publication of a report by a non-profit organization that found racial disparities in military justice actions.⁹⁶ According to ODEI officials, their review assesses disparities in the military justice system using a similar analysis to that in the non-profit organization's report, which analyzed rates of military justice actions per thousand servicemembers. ODEI officials told us they also observed racial and gender disparities among servicemembers involved in the military justice system in their

⁹⁴In addition, in 2017, the Air Force assembled a working group called the Disciplinary Actions Analysis Team to examine the barriers certain demographic groups face to career success, including barriers to training opportunities, promotion, and retention. The working group is in the early stages of organizing and has not yet published any findings or recommendations for service leadership.

⁹⁵Defense Manpower Data Center, *2013 Workplace and Equal Opportunity Survey of Active Duty Members Overview Report* (October 2014).

⁹⁶Protect Our Defenders, *Racial Disparities in Military Justice* (May 2017).

own analysis of the service data. The officials said that the report on the results of their review will not directly address the issue of whether bias exists in the military justice process or the causes of any disparities, but will serve as a precursor to a future research study that looks more comprehensively into the issue of whether bias exists in the military justice system. ODEI officials said that their report should be issued in 2019.

Standards for Internal Control in the Federal Government state that management uses quality information to make informed decisions and evaluate the entity's performance in achieving key objectives and addressing risks. The standards further provide that management should evaluate issues identified through monitoring activities and determine appropriate corrective actions.⁹⁷ Officials from DOD and the military services acknowledged that they do not know the cause of the racial and gender disparities that have been identified in the military justice system. This is because they have not conducted a comprehensive evaluation to identify potential causes of these disparities and make recommendations about any appropriate corrective actions to remediate the cause(s) of the disparities. By conducting a comprehensive analysis into the causes of disparities in the military justice system, DOD and the military services would be better positioned to identify actions to address disparities, and thus help ensure that the military justice system is fair and just, a key principle of the UCMJ.

Conclusions

The single overarching principle of the UCMJ is that a system of military law can foster a highly disciplined force if it is fair and just, and is recognized as such by both members of the armed forces and by the American public. DOD and the military services collect and maintain data on the race, ethnicity, and gender of all servicemembers. However, these data vary within and across the services, limiting the ability to collectively or comparatively assess military justice data to identify any disparities. DOD has recently taken steps to address this issue by directing the military services to, no later than December 23, 2020: collect uniform race and ethnicity data in their military justice databases, or aggregate any expanded ethnic or racial categories to the categories listed in the standards; collect either the social security number or DOD identification number in their military justice databases; and collect complete summary

⁹⁷[GAO-14-704G](#).

courts-martial information. It will be important for the military services to complete these actions to allow for efficient analysis and reporting of consistent military justice data.

However, the newly issued standards apply only to the military justice databases and not to the investigations and personnel databases. The ability to query and report on the gender of servicemembers in its military justice database would provide the Coast Guard with more readily available data to identify or assess any gender disparities that may exist in the investigation and trial of military justice cases without merging data from multiple databases. Moreover, taking steps to develop the capability to present the race and ethnicity data from the military services' personnel and investigations databases using the same categories included in the December 2018 standards for the military justice databases would enable DOD and the military services to more easily and efficiently assess the extent to which there are any racial or ethnic disparities throughout the military justice process.

Further, DOD's annual reports about the number and status of pending military justice cases do not include demographic information, such as breakdowns by race or gender, about servicemembers who experienced a military justice action. Reporting this information would provide servicemembers and the public with greater visibility into potential disparities and help build confidence that DOD is committed to a military justice system that is fair and just. Moreover, DOD does not have guidance that establishes criteria to determine when data indicating possible disparities among racial, ethnic, or gender groups in the investigations, trials, or outcomes of cases in the military justice system should be further reviewed, or describes the steps that should be taken to conduct such further review. By establishing such criteria, DOD and the services would be better positioned to monitor the military justice system to help ensure that it is fair and just, a key principle of the UCMJ.

Our analysis of available data identified racial and gender disparities in all of the military services for servicemembers with recorded investigations, and for four of the military services for trials in special and general courts-martial, but these disparities generally were not present in the convictions or punishments of cases.⁹⁸ These findings suggest disparities may be

⁹⁸Our findings of racial and gender disparities, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information along with supporting statistics.

limited to particular stages of the military justice process for the period covered by our analysis. However, we were unable to determine whether there were disparities among servicemembers subject to nonjudicial punishments in the Army, the Navy, and the Coast Guard because these services do not collect complete nonjudicial punishment data, such as data on the servicemember's race, ethnicity, gender, offense, and punishment for all nonjudicial punishments, in any of their databases. The absence of complete nonjudicial punishment data in the Army, the Navy, and the Coast Guard limits their visibility into the vast majority of legal punishments imposed on servicemembers under the UCMJ every year. Without such data, these three services will remain limited in their ability to assess or identify disparities among populations subject to this type of punishment.

Finally, DOD recently conducted a study of racial and gender disparities in the military justice system, and expects to complete its report in 2019. However, this study will not assess the causes of the racial and gender disparities identified in the military justice system. Our findings of racial and gender disparities, taken alone, do not establish whether unlawful discrimination has occurred, as that is a legal determination that would involve other corroborating information along with supporting statistics. By conducting a comprehensive evaluation of the causes of these disparities, DOD and the military services would be better positioned to identify actions to address disparities, and thus help ensure that the military justice system is fair and just, a key principle of the UCMJ.

Recommendations for Executive Action

We are making a total of 11 recommendations, including 3 to the Secretary of Homeland Security, 3 to the Secretary of Defense, 2 to the Secretary of the Army, 2 to the Secretary of the Navy, and 1 to the Secretary of the Air Force.

The Secretary of Homeland Security should ensure that the Commandant of the Coast Guard modifies the Coast Guard's military justice database so that it can query and report on gender information. (Recommendation 1)

The Secretary of the Army should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Army's investigations and personnel databases to collect and maintain the data in accordance with

the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Army. (Recommendation 2)

The Secretary of the Air Force should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Air Force's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Air Force. (Recommendation 3)

The Secretary of the Navy should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Navy's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Navy. (Recommendation 4)

The Secretary of Homeland Security should ensure that the Commandant of the Coast Guard develops the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Coast Guard's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Coast Guard. (Recommendation 5)

The Secretary of Defense should ensure that the Joint Service Committee on Military Justice, in its annual review of the UCMJ, considers an amendment to the UCMJ's annual military justice reporting requirements to require the military services to include demographic information,

including race, ethnicity, and gender, for all types of courts-martial. (Recommendation 6)

The Secretary of Defense, in collaboration with the Secretaries of the military services and the Secretary of Homeland Security, should issue guidance that establishes criteria to specify when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed, and that describes the steps that should be taken to conduct such a review. (Recommendation 7)

The Secretary of the Army should consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the Army's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. (Recommendation 8)

The Secretary of the Navy should consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the Navy's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. (Recommendation 9)

The Secretary of Homeland Security should ensure that the Commandant of the Coast Guard considers the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of the Coast Guard's databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed. (Recommendation 10)

The Secretary of Defense, in collaboration with the Secretaries of the military services and the Secretary of Homeland Security, should conduct an evaluation to identify the causes of any disparities in the military justice system, and take steps to address the causes of these disparities as appropriate. (Recommendation 11)

Agency Comments and Our Evaluation

We provided a draft of this report to DOD and the Department of Homeland Security for review and comment. Written comments from DOD and the Department of Homeland Security are reprinted in their entirety in appendixes X and XI, respectively. DOD and the Department of Homeland Security provided additional technical comments, which we incorporated in the report, as appropriate. In written comments, DOD concurred with six recommendations, and partially concurred with two recommendations that were directed to the Secretary of Defense. The Department of Homeland Security concurred with the three recommendations directed to the Secretary of Homeland Security.

DOD concurred with our six recommendations to present servicemembers' race and ethnicity data in each of the military services' respective investigations and personnel databases using the same categories of race and ethnicity established for their military justice databases; consider an amendment to the UCMJ's annual military justice reporting requirements to require the military services to include demographic information for all types of courts-martial; and consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases.

DOD partially concurred with two of our recommendations, agreeing with the content, but requesting that we modify the recommendations to direct them to more appropriate entities. Specifically, DOD concurred with our recommendations that guidance should be issued to establish criteria specifying when data indicating possible racial, ethnic, or gender disparities require further review and the steps that will be taken to conduct the review; and to conduct an evaluation to identify the causes of any racial or gender disparities in the military justice system and, if necessary, take remedial steps to address the causes of these disparities. For both recommendations, DOD suggested that the Secretary of Homeland Security be added, and that we remove the DOD Office for Diversity, Equity and Inclusion and the Commandant of the Coast Guard, as they fall under the Secretary of Defense and the Secretary of Homeland Security, respectively. We agree with DOD's suggestions, and we have modified both recommendations accordingly. In an email correspondence, the Department of Homeland Security and the Coast Guard concurred with the updates.

In its written comments, the Department of Homeland Security concurred with our three recommendations to modify the Coast Guard's military justice database so that it can query and report on gender information, to present servicemembers' race and ethnicity data in its investigations and

personnel databases using the same categories of race and ethnicity established for the military justice database, and to consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases.

We are sending copies of this report to the appropriate congressional committees, the Acting Secretary of Defense, and the Acting Secretary of Homeland Security. In addition, this report will also be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your members of your staff have any questions regarding this report, please contact me at (202) 512-3604 or farrellb@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made significant contributions to this report are listed in Appendix XII.



Brenda S. Farrell
Director
Defense Capabilities and Management

Appendix I: Objectives, Scope, and Methodology

The objectives of this report were to assess the extent to which (1) the military services collect and maintain information about the race, ethnicity, and gender of servicemembers investigated and disciplined for violations of the Uniform Code of Military Justice (UCMJ) that can be used to assess disparities; and (2) there are racial and gender disparities in investigations, disciplinary actions, and case outcomes in the military justice system, and whether the Department of Defense (DOD) and the military services have taken steps to study any identified disparities.

Methods Used to Address Both Objectives

To address both of our objectives, we analyzed data collection, data maintenance, and military justice disciplinary actions involving active-duty servicemembers in the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard. Although the Coast Guard is part of the Department of Homeland Security, the Coast Guard is a military service and a branch of the armed forces at all times.

- We analyzed military justice actions initiated and recorded in service investigations and military justice databases between fiscal years 2013 through 2017. We chose this time period because it provided the most recent history of available military justice data at the time of our review.
- We requested record-level data from each of the military services' personnel, investigations, and military justice databases, which resulted in a total of 15 data requests.

Table 6 below provides an overview of the databases included in our review, broken out by database type.

Table 6: Military Service Personnel, Investigations, and Military Justice Databases

Military service	Personnel database	Investigations database	Military justice database
Army	Total Army Personnel Database (TAPDB)	Army Law Enforcement Reporting and Tracking System (ALERTS)	Army Court-Martial Information System (ACMIS) Military Justice Online (MJO)
Navy	Navy Personnel Database (NPDB)	Consolidated Law Enforcement Operations Center (CLEOC)	Case Management System (CMS)
Marine Corps	Marine Corps Total Force System (MCTFS)	Consolidated Law Enforcement Operations Center (CLEOC)	Case Management System (CMS)
Air Force	Military Personnel Data System (MilPDS)	Investigative Information Management Systems (I2MS)	Automated Military Justice Analysis and Management System (AMJAMS)
Coast Guard	Direct Access	Field Activity Case Tracking System (FACTS)	Law Manager

Source: GAO analysis of DOD and military service database information. | GAO-19-344

We sent individual data requests that were tailored based on our conversations with service officials and our own analysis of the availability of data. In addition to requesting the race, ethnicity, and gender of servicemembers subject to military justice actions, we also requested other demographic and administrative attribute data—such as rank, age, years of service, duty station, and occupation—from the services’ personnel databases to include in our statistical models. We identified these attributes by reviewing relevant literature and interviewing agency officials.

Personnel databases. We requested and received monthly snapshots with record-level data on all active-duty servicemembers in each of the military services from fiscal years 2013 through 2017. Specifically, we requested demographic and administrative data, including race, ethnicity, gender, rank, education, age or date of birth, years of service, occupation, location or duty station, deployed status, administrative or disciplinary actions and dates, character of service separation, and servicemembers’ unique identifiers (social security number and employee identification number).

Investigations databases. We requested and received record-level data on all investigations recorded in a military service military criminal investigative organization (MCIO) database that were initiated from fiscal years 2013 through 2017, where the subject of the investigation was an active-duty servicemember. For each case, we requested certain attribute data on the investigation subject, including race, ethnicity, gender, rank, age or date of birth, service and component, offense(s) investigated, case

initiation date, investigation source, investigating entity, investigation outcome and date, incident location, and the subject's unique identifier, such as social security number or employee identification number. In some services not all of these attributes were available or requested. For example, since the Air Force database only included investigations conducted by the Air Force Office of Special Investigations, we did not request information about the investigating entity. In addition, the Navy Criminal Investigative Service provided us with data about and we analyzed closed cases only, whereas the Army and the Air Force MCIOs provided us with data about and we analyzed all cases in their database during the period of our review.

Military justice databases. We requested and received record-level data on all cases where a servicemember was subject to disciplinary proceedings under the Uniform Code of Military Justice (UCMJ) from fiscal years 2013 through 2017. For each case where charges were preferred against a servicemember during this period, we requested demographic and administrative data on the servicemember as well as key information related to their case, including race, ethnicity, gender, rank, age or date of birth, component, case type and forum, offense(s) charged, case disposition and date, appeals status, case outcome or sentence, disciplinary action taken, date charges were first preferred, and the servicemember's unique identifier, such as social security number or employee identification number.¹ We received general and special courts-martial data from all of the services from their military justice databases. For the Army, in addition to data from their military justice database, Military Justice Online, we also received courts-martial data from a separate database, called the Army Court-Martial Information System (ACMIS), which is used by the service's trial judiciary to track courts-martial.

For summary courts-martial and nonjudicial punishments, the services varied in the extent that and the location where they collected and maintained complete data for these two military justice actions, as is discussed further earlier in this report.

- In the Air Force, summary courts-martial and nonjudicial punishment data is maintained in the service's military justice database, the Automated Military Justice Analysis and Management System.

¹The preferral date is the date when an accused servicemember was first charged with a violation of the UCMJ.

- The Marine Corps did not collect and maintain complete data about summary courts-martial or nonjudicial punishments in its military justice database, however, its personnel database included information about all summary courts-martial and nonjudicial punishments imposed on servicemembers during the period of our review.
- The Army and the Navy did not collect and maintain complete data about summary courts-martial or nonjudicial punishments in their military justice databases, or other databases. In these services, summary courts-martial and nonjudicial punishments were recorded in their military justice databases if these actions had involvement by the services' legal offices. Further, summary courts-martial and nonjudicial punishments were recorded in the personnel databases used by these services only if these actions resulted in an administrative action against the accused, such as a forfeiture of pay or reduction in grade.
- The Coast Guard did not collect and maintain complete data about nonjudicial punishments in its military justice database or other databases; nonjudicial punishments were recorded in its military justice database if a legal office was involved in the action. Further, nonjudicial punishments were recorded in the Coast Guard's personnel database if they resulted in an administrative action against the accused, such as a forfeiture of pay or reduction in grade.

Methods Used to Evaluate Collection and Maintenance of Data

To evaluate the extent to which the military services collect and maintain race, ethnicity, and gender data about servicemembers investigated and disciplined for violations of the UCMJ, we first reviewed service guidance, user manuals, and other documents related to the services' investigations, military justice, and personnel databases. We reviewed these documents to determine:

- the types of data officials are required to collect and maintain; and
- the internal procedures the services follow in inputting information about race, ethnicity, and gender data into each type of database.

For example, we determined whether collection of this information was mandatory, and how this information was entered into and recorded in each database. Specifically, we determined whether information about race, ethnicity, and gender was entered into each database manually, using a drop-down menu, or was auto-populated from another database. Further, we identified the number of possible response options that each database contained for each of these demographic fields.

Second, we interviewed service officials who manage and use the military justice, investigations, and personnel databases to discuss:

- which fields in each database track the race, ethnicity, and gender of servicemembers; and
- how these data are input and their insights regarding the reliability of these data.

Specifically, we interviewed officials from the legal branches of the military services, including the Army Office of the Judge Advocate General, the Navy Judge Advocate General's Corps, the Marine Corps' Judge Advocate Division, the Air Force Judge Advocate General's Corps, and the Coast Guard Office of the Judge Advocate General. In addition, we spoke with officials in the military criminal investigative organizations (MCIO), including the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, and the Coast Guard Investigative Service. We also interviewed officials from the manpower and personnel offices of the services with responsibility for the services' personnel databases, including the Army's Human Resources Command and the Office of the Deputy Chief of Staff; the Navy's Personnel Command; the Marine Corps Manpower and Reserve Affairs Manpower Information Systems Branch; the Air Force Personnel Center; and the Coast Guard's Personnel Service Center.

Finally, we analyzed the data we received from the investigations, military justice, and personnel databases to determine the completeness of the race, ethnicity, and gender information that was recorded in each of the databases. We assessed the military services' systems and procedures for collecting data against DOD and service guidance and relevant federal internal control standards.²

Methods Used to Evaluate Racial, Ethnic, and Gender Disparities

To evaluate the extent to which there are racial, ethnic, and gender disparities in investigations, disciplinary actions, and case outcomes, we analyzed data from the military services' investigations, military justice, and personnel databases to determine summary statistics and we then conducted bivariate and multivariate regression analyses.

²GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

Investigations. We focused on alleged violations of the UCMJ that were recorded in databases used by service-specific MCIOs. Investigations are recorded in the MCIO databases when a servicemember is the subject of a criminal allegation made by another person; for purposes of this report, we say the servicemember had a “recorded investigation” to describe these cases. We analyzed investigation information from the databases used by each of the military services’ MCIOs. Specifically, we analyzed data from the Army’s Criminal Investigation Command, which included cases investigated by military police and Criminal Investigation Command; the Navy and Marine Corps’ Naval Criminal Investigative Service, which included cases investigated by the Naval Criminal Investigative Service and military police; the Air Force’s Office of Special Investigations, which included only Office of Special Investigations cases; and the Coast Guard Investigative Service, which included only Coast Guard Investigative Service cases. Our analysis of recorded investigations data did not include investigations conducted by a servicemember’s command, because those investigations are not recorded in the MCIO databases.

Military Justice Discipline. We included in our definition of servicemembers disciplined for a violation of the UCMJ those servicemembers with cases that resulted in a trial in any type of court-martial (general, special, and summary), or servicemembers who were subject to a nonjudicial punishment from fiscal years 2013 through 2017. We analyzed data for trials in general and special courts-martial separately from trials in summary courts-martial because general and special courts-martial result in a criminal conviction if the servicemember is found guilty, while summary courts-martial are not a criminal forum and do not result in a criminal conviction. We analyzed general and special courts-martial cases together due to the small number of cases for some racial or gender groups. In addition, we also separated general and special courts-martial into cases that either were or were not preceded by an investigation recorded in an MCIO database. Our analysis of general and special courts-martial cases without a recorded investigation included those general and special courts-martial that were investigated by a servicemember’s command or other law enforcement entities.

We used the preferral date, or the date when an accused servicemember was first charged with a violation, to count the number of courts-martial that occurred in a given fiscal year. However, each military service uses the date in which the court-martial judgment was given when reporting the number of each type of court-martial in their annual reports to the Court of Appeals for the Armed Forces. As a result, the number of court-martial

cases in a given year analyzed for our review differs from what was reported in the annual reports. In discussions with officials after we had completed our preliminary analyses, they recommended that we use the referral date instead of the preferral date, so that our total number of cases would be more consistent with the number of cases that they reported. However, changing the date for grouping cases would have required us to request new military justice data from each of the military services, and conduct additional work. Above all, using the preferral date would not impact the findings of racial and gender disparities. In addition, our analyses only counted cases that were ultimately tried at general, special, or summary courts-martial, and excluded those cases where charges were dismissed, withdrawn, or subject to some alternate resolution. For nonjudicial punishments, we used the date that the punishment was imposed.

To prepare the data for our analyses and ensure that we had consistent profiles for the race, ethnicity, and gender of the servicemembers, we merged records from the military services' investigations, military justice, and personnel databases. We merged records using servicemembers' unique identifiers, such as social security number or employee identification number, that were common among a particular service's databases. In some instances—a small proportion of cases—we could not match personnel records with military justice records because the social security number or employee identification number in the military justice database did not match the information in the personnel database. In other instances, we could not match personnel records with military justice records because the military justice records did not contain a social security number or employee identification number to match with information found in their personnel record. We first tried to match these cases using the servicemembers' name and date of birth; however, in some cases we were unable to match personnel records with investigations or military justice cases. As a result, we compiled lists of those cases we were unable to match, and we provided the services with lists of these cases. Service officials manually looked up this data and provided us with the missing social security numbers or employee identification numbers for these cases so that we could complete our analyses. These manual look up efforts increased our match rates so that we had a data set that we determined was sufficiently complete to perform our analyses.

For servicemembers who were the subjects of military justice actions, we used the attribute data that was available in the personnel database at the time an investigation or disciplinary action was initiated (the preferral

date for courts-martial). For our total service populations, which included servicemembers who were not the subject of a military justice action, we used their attribute data from the “median” snapshot of the five fiscal years of personnel data we received. Based on discussions with service officials, we treated the personnel databases as the authoritative sources for servicemembers’ demographic and administrative data. For some services when needed, if we identified a discrepancy in the race or gender value for a servicemember between the data in the personnel and military justice databases, we used the value recorded in the personnel database because service officials had told us that the personnel databases were the official sources for demographic data such as race and gender, and would be more likely to contain more reliable data for these fields than the investigations or military justice databases. For some services where there were cases where an attribute value was missing in the personnel database, we used the military justice or investigative database as a secondary source for this information. In merging the records from the personnel, military justice, and investigations databases, we created a single data file for each service that contained attribute data for all active-duty servicemembers, as well as complete information on the investigation and discipline of servicemembers who were the subject of a military justice action from fiscal years 2013 through 2017.

In using this methodology to merge the records, the total number of servicemembers we use in our report when discussing the total service populations for each service is greater than the total active-duty force end strength of that service in any given fiscal year. This is because our total service populations represent the number of unique individuals who served on active duty from fiscal years 2013 through 2017.

In addition, as part of our data preparation, we consolidated the various race and ethnicity values in the service personnel databases to the five groups for race and the two groups for ethnicity established by Office of Management and Budget (OMB) standards for maintaining, collecting, and presenting data on race and ethnicity for all federal reporting purposes.³ The five race groups in the standards are American Indian or

³Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct. 30, 1997). In 2016, the Office of Management and Budget issued a proposed revision to the standards. See *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67,398 (Sept. 30, 2016). As of May 2019, the Office of Management and Budget had not issued the revised standards.

Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White. The two ethnic groups are Hispanic or Latino and Not Hispanic or Latino. First, we collapsed race and ethnicity data into a single combined field. Specifically, we grouped individuals of Hispanic ethnicity together, regardless of their racial identification, so that we could compare those of Hispanic ethnicity to other racial groups. We did this in part because of the ways in which some of the services record these data in their databases. For example, the Navy's and the Marine Corps' military justice databases do not have separate fields for race and ethnicity; instead, the values are tracked in a single field. Throughout the discussion for objective 2 of this report, we refer to the combined race and ethnicity values as race.

We then consolidated races to the five racial groups in the OMB standards. When military service personnel databases included different or additional possible options for race and ethnicity than the groups established by the OMB standards, we consolidated the options in accordance with the definitions for each race and ethnicity listed in the OMB standards. Given the small number of cases in some racial groups, we collapsed certain racial groups into an "Other" group in order to report statistically reliable results. The "Other" group includes individuals who identified as Asian, Native Hawaiian/Other Pacific Islander, American Indian/Alaska Native, and multiple races.

Summary statistics. We analyzed data from the military services' investigations, military justice, and personnel databases to determine the extent to which racial and gender groups were the subjects of recorded investigations, tried in courts-martial, and subject to nonjudicial punishments (for Army and Marine Corps, services for which we had complete data) at higher rates or lower rates than each racial and gender group's proportion of the overall service populations. Other than our analysis of recorded investigations, we did not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

To conduct this analysis, we used data on all active-duty servicemembers to identify what proportion each racial group (White, Black, Hispanic, and Other) and gender group (male, female) made up of the overall service population from fiscal years 2013 through 2017. We then used data from the services' military justice or personnel databases to calculate the representation of each racial and gender group as a percent of the population subjected to each type of military justice action.

We also examined the rates at which certain racial and gender groups were charged with drug offenses (Article 112a) and sexual assault offenses (Article 120) compared to their proportions of the overall service populations.⁴ See Appendix III for information regarding recorded investigations and general and special courts-martial of drug and sexual assault offenses. We analyzed these two specific UCMJ offenses because officials from some services told us that an investigation into these offenses may frequently be mandatory, and thus could potentially mitigate the risk of bias.⁵ To conduct this analysis, we used offense data from the services' military justice databases to determine each racial and gender group's representation in the population that was the subject of a military justice action for a drug, sexual assault, or other offense type.

Bivariate and Multivariate Regression Analyses. We developed a logistic regression model using the data we received from the services' investigations and military justice databases to determine the extent that certain attributes were associated with higher rates of investigation or discipline of servicemembers. We conducted bivariate logit analyses to estimate the association between select attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format, except for the two offense outcome variables. Table 7 below lists all of the dependent and independent variables we used in our analyses.

⁴The drug offenses we analyzed were charges under UCMJ Article 112a, wrongful use, possession, distribution, etc. of a controlled substance. In addition, the sexual assault offenses we analyzed were any charges under UCMJ Article 120, which includes rape and sexual assault generally, rape and sexual assault of a child, and other sexual misconduct.

⁵Service officials stated that some drug (Article 112a) offenses are initiated as a result of random urinalysis tests, and in those cases a positive result will trigger an investigation regardless of the servicemember's race, ethnicity, or gender. According to Department of Defense Instruction 5505.18, all allegations of adult sexual assault are immediately reported to the appropriate MCIO, and that MCIO will initiate a criminal investigation into that allegation if the offense occurred within its jurisdiction.

Table 7: Independent and Dependent Variables Included in GAO’s Regression Analyses

Independent variables
Age
Education
Gender
Offense
Race/Ethnicity
Rank
Years of service
Outcome (dependent) variables
Recorded investigations
Recorded investigations for drug, sexual assault, and all other offenses
General and special courts-martial
General and special courts-martial for drug, sexual assault, and all other offenses
General and special courts-martial following a recorded investigation
General and special courts-martial without a recorded investigation
Case outcome (conviction or acquittal in general and special courts-martial)
Punishment severity
Summary courts-martial
Nonjudicial punishment

Source: GAO summary of variables analyzed from services’ investigations, military justice, and personnel databases. | GAO-19-344

To conduct our statistical analyses, we created groups for each demographic and administrative attribute (independent variable) that we tested in our regression model. We created these groups based on input and guidance from service officials. While the modeling subgroups we created are largely consistent across services, some values are different for certain services. Table 8 summarizes the modeling groups we constructed for each service for each attribute included in our regression analyses.

Appendix I: Objectives, Scope, and Methodology

Table 8: Modeling Groups Used in Regression Analyses for Each Military Service

Attribute	Army	Navy	Marine Corps	Air Force	Coast Guard	
Race	White	White	White	White	White	
	Black	Black	Black	Black	Black	
	Hispanic	Hispanic	Hispanic	Hispanic	Hispanic	
	Other	Other	Other	Other	Other	
	Unknown	Unknown	Unknown	Unknown	Unknown	
Gender	Male	Male	Male	Male	Male	
	Female	Female	Female	Female	Female	
Age	< 25 years	< 21 years	< 21 years	< 21 years	< 25 years	
	25-30 years	21-25 years	21-25 years	21-25 years	25-30 years	
	30-40 years	26-30 years	26-30 years	26-30 years	30-40 years	
	40 or more years	30-40 years	30-40 years	30-40 years	31-35 years	> 40 years
		> 40 years	> 40 years	> 40 years	> 35 years	
Rank	E1-E4	E1-E4	E1-E4	E1-E4	E1-E4	
	E5-E9	E5-E9	E5-E9	E5-E6	E5-E9	
	Officers	Officers	Officers	E7-E9 Officers	Officers	
Years of service	0-4 years	< 2 years	< 2 years	0-4 years	0-2 years	
	4-8 years	3-4 years	3-4 years	4-6 years	2-4 years	
	8-12 years	5-6 years	5-6 years	> 6 years	4-6 years	
	> 12 years	7-10 years	7-10 years		6-10 years	
		11-15 years	11-15 years	10-15 years		
		> 15 years	> 15 years	> 15 years		
Education	High school or less	High school or less	High school or less	High school and some college	High school or less	
	More than high school	More than high school	More than high school	Associates degree	More than high school	
	Unknown	Unknown	Unknown	Unknown	Bachelor's degree	Unknown
					Post-bachelor's degree Unknown	
Outcome	Conviction	Conviction	Conviction	Conviction		
	Acquittal	Acquittal	Acquittal	Acquittal		
Punishment severity	Any type of dismissal or discharge or confinement > 2 years	Dismissal or any kind of discharge	Dismissal or any kind of discharge	Any type of dismissal or discharge (regardless of any confinement)		
	Confinement < 2 years without dismissal or discharge	All other possible sentencing options	All other possible sentencing options	Confinement without dismissal or discharge		
	All other possible sentencing options			All other possible sentencing options		

Appendix I: Objectives, Scope, and Methodology

Attribute	Army	Navy	Marine Corps	Air Force	Coast Guard
Offenses	Drug offenses (Article 112a) Sexual assault offenses (Article 120) All other offenses	Drug offenses (Article 112a) Sexual assault offenses (Article 120) All other offenses	Drug offenses (Article 112a) Sexual assault offenses (Article 120) All other offenses	Drug offenses (Article 112a) Sexual assault offenses (Article 120) All other offenses	Drug offenses (Article 112a) Sexual assault offenses (Article 120) All other offenses

Source: GAO analysis. | GAO 19-344

When analyzing the severity of punishments, we developed two groups for the Navy and the Marine Corps, and three groups for the Air Force and the Army, as shown in table 9 below. We did not create a third punishment group for confinement without dismissal or discharge for the Navy and the Marine Corps because of the small number of cases with confinement that did not also include some sort of discharge. Based on discussions with service officials, we determined that a sentence resulting in a dismissal or discharge was the most severe punishment outcome.

Table 9: Groups Used to Measure Punishment Severity

Navy and Marine Corps	Army	Air Force
1. dismissal or any kind of discharge	1. any type of dismissal or discharge or confinement of more than 2 years	1. any type of dismissal or discharge (regardless of any confinement)
2. all other possible sentencing options	2. confinement of less than 2 years without dismissal or discharge	2. confinement without dismissal or discharge
	3. all other possible sentencing options	3. all other possible sentencing options

Source: GAO analysis. | GAO-19-344

Typically, a logistic regression model is appropriate when the model outcome is a binary (yes/no) response. Because the punishment groups for the Army and the Air Force were not binary, they could not be analyzed using a multivariate logistic regression. Instead, we used an ordered logit model, also called an ordered logistic regression model, to analyze punishment severity in the Army and the Air Force. An ordered logistic regression is an extension of the logistic regression model that applies to dependent variables where there are more than two response categories. This model allowed us to examine the degree to which a racial or gender group was more likely or less likely than another group to receive a more severe punishment in general and special courts-martial, while controlling for other attributes, such as gender, education, rank, composition of panel, and offense type. To conduct this analysis, we

reviewed outcome data from the services' personnel, investigations, and military justice databases.

Based on our bivariate analyses, we determined which variables were significantly associated with military justice actions, and that appeared to be statistically significant predictors of an individual's likelihood to be subject to a military justice action.⁶ Appendix IX includes a summary of those indicators for each of the services. We also examined correlation matrices of the independent variables to determine where there were high correlations between two variables. Where variables were highly correlated, we chose one variable over the others or created a hybrid variable combining those two variables. Specifically, we excluded age and years of service for most of the military services, due to high correlation with the rank variable. Based on our discussions with service officials, they indicated that rank would be the preferred variable to include in our analyses if selecting only one variable among rank, age, and years of service. However, for the Air Force, based on discussion with Air Force officials, we did control for years of service among the lower enlisted ranks (E1-E4). In addition, we could not include education for the Army due to variability and overlapping values in the data. Further, we chose not to model attributes such as occupation and location due to the great variability in these data and the difficulty in creating groups and reaching agreement about those groups with service officials.

Based on these results, we then conducted a series of multivariate logistic regression models. Multivariate logistic regression modeling is a statistical method that examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. A multivariate regression analysis analyzes the potential influence of each individual factor on the likelihood of a binary outcome (e.g., a specific military justice action) while simultaneously accounting for the potential influence of the other factors. This type of modeling allowed us to test the association between servicemember characteristics, such as race or gender, and the odds of a military justice action (shown as the outcome variables in table 7 above), while holding other servicemember attributes constant (such as gender,

⁶For purposes of this report, we use the term "likelihood" when discussing the odds ratios from the results of our regression analyses. Odds ratios that are statistically significant and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to a particular military justice action.

rank, and education, shown as the independent variables in table 7 above). We conducted a separate regression for each of the military justice actions listed as an outcome variable. We selected this type of model because it could account for the attributes simultaneously. For the purposes of consistency, in our multivariate regression analyses, we made all racial comparisons with White servicemembers as the reference category. Similarly, we made all gender comparisons with female servicemembers as the reference category.

A logistic regression model provides an estimated odds ratio, where a value greater than one indicates a higher or positive association; in this case, between the race, ethnicity, or gender of a servicemember (the independent variables) and the likelihood of being the subject of a military justice action (the dependent, or outcome, variable). An estimated odds ratio less than one indicates lower odds or likelihood of being the subject of a military justice action when a factor—here, a specific demographic or administrative attribute—is present. The statistical significance of the logistic regression model results is determined by a p-value of less than 0.05. As a result, in our report we state that odds ratios that are statistically significant and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be the subject of a particular outcome or military justice action. In cases where the p-value was greater than 0.05, we report that we could not identify any statistically significant differences, which means that we could not conclude that there was an association between race or gender and the likelihood of a military justice action.

We report the results from our regression models as odds ratios. We generally report multivariate results from testing associations between key attributes—including race, ethnicity, gender, rank, and education—on a servicemember’s likelihood of being investigated and disciplined for a UCMJ violation. In the body of this report, we focused on race and gender disparities among servicemembers investigated and disciplined for violations of the UCMJ, while holding other factors constant; however, our analyses of recorded investigations and general and special courts-martial for drug and sexual assault offenses are discussed in Appendix III. In all of these analyses for the Air Force, we also controlled for years of service among the lower enlisted ranks (E1-E4). In the analyses we conducted for the Army, we could not control for education, but we were able to control for age.

All regression models are subject to limitations. For our analyses, the limitations included:

- Results of our analyses are associational and do not imply a causal relationship. We did not identify the causes of any racial or gender disparities, and the results of our work alone should not be used to make conclusions about the military justice process. Our analyses of these data in finding the presence or absence of racial or gender disparities, taken alone, do not establish the presence or absence of unlawful discrimination, as that is a legal determination that would involve other corroborating information along with supporting statistics.
- We could not assess some attributes that potentially could be related to a servicemember's likelihood of facing a military justice action in the data analyzed for this review. For example, a servicemember's socioeconomic background or receipt of a waiver upon entering the service could potentially be related to the likelihood of being investigated, tried in a court-martial, or subject to a nonjudicial punishment. However, we were unable to test these associations because most services indicated they did not have information about socioeconomic status or waivers in the databases that we requested data from. Furthermore, while some other attributes may have been available—such as marital status of the subject or the number of dependent children—we did not include these attributes in our data requests because we prioritized analyzing other demographic factors based on our background research and conversations with service officials.
- As outlined above, we incorporated input from service officials to the extent possible as we prepared our modeling groups for the demographic and administrative attributes we tested, such as rank, education, and years in service. However, this process was necessarily imprecise. Our modeling results may have been impacted by our discretionary decisions to include certain values in the groups we created for these variables.

Data reliability. We conducted data reliability assessments on the datasets we received from the databases in our review. We examined the documentation officials provided to us on each database and conducted electronic tests on the data we received to check for completeness and accuracy. We also sent data reliability questionnaires to database managers about how the data are collected and their appropriate uses, and had discussions with database managers to discuss the reliability of the data in their databases. When we determined that particular fields were not sufficiently reliable, we excluded them from our analysis. For example, we did not use data in our analysis where a substantial number

of values were missing. We also checked to see that the values for variables were internally consistent and that results were not affected unduly by outlier values that might suggest miscoded values. For the purposes of our analysis, we found the variables we ultimately reported on to be sufficiently reliable. Furthermore, due to the sensitivity of the information analyzed in this report, we did not include information in instances where the number of servicemembers subjected to a particular military justice action was fewer than 20, to protect privacy.

Literature review. To assess the extent to which disparities in the military justice system and the civilian justice system had been previously assessed, we conducted a literature review. To identify relevant publications about disparities in the military justice system and the civilian justice system, we performed a literature search of a number of bibliographic databases, including ProQuest Academic, ProQuest Dialog, Scopus, EBSCO, and HeinOnline. We also searched two think tank search engines: Policy File and the Think Tank Search (from the Harvard Kennedy School). We received the following types of publications: scholarly/peer reviewed material, dissertations, and association/think tank/nonprofit publications. To identify publications by DOD and the services related to the military justice system, we reviewed prior GAO reports and asked officials at the DOD Office of Diversity, Equity and Inclusion, and in the services' respective diversity and inclusion offices to identify relevant publications. We concluded our searches in October 2018. We also asked the service Judge Advocate General offices for publications relevant to disparities in military justice. We also identified publications in our own background information search. We reviewed those publications that assessed racial, ethnic, or gender disparities among servicemembers in the military justice system. While the civilian and military justice systems differ from each other, we selected a few nationwide studies examining disparities in the civilian justice system to summarize in the background section of our report, in order to enhance our understanding of the complexities of the issues, including how others have attempted to measure disparities. We did not assess the methodologies used in any of these studies or the reliability of the data cited in the studies; the studies related to the civilian justice system are discussed in our report to provide broader context for the discussion about racial and gender disparities in the military justice system.

We conducted this performance audit from November 2017 to May 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform an audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our

findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Summary Statistics and Bivariate Results for Regression Analyses

This appendix contains several figures that show the underlying data and analyses used throughout the report relating to investigations and military justice disciplinary actions from fiscal years 2013 through 2017. Our analyses of the services' investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination. We could not analyze Coast Guard general, special, and summary courts-martial due to the small number of cases adjudicated in the Coast Guard from fiscal years 2013 through 2017. In addition, we could not analyze nonjudicial punishments in the Army, the Navy, and the Coast Guard because these services do not collect complete nonjudicial punishment information. The following figures and information are included in this appendix:

- Figure 15: Rate and Likelihood of Recorded Investigations for Alleged Violations of the Uniform Code of Military Justice by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017¹
- Figure 16: Rate and Likelihood of Trial in General and Special Courts-Martial by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017
- Figure 17: Rate and Likelihood of Trial in General and Special Courts-Martial Following a Recorded Investigation by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017
- Figure 18: Rate and Likelihood of Trial in General and Special Courts-Martial without a Recorded Investigation by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017
- Figure 19: Rate and Likelihood of Trial in Summary Courts-Martial in the Air Force and the Marine Corps by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017
- Figure 20: Rate and Likelihood of Nonjudicial Punishments in the Air Force and the Marine Corps by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017

¹For purposes of this report, we use the term “likelihood” when discussing the odds ratios from the results of our regression analyses. Odds ratios that are statistically significant and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to a particular military justice action.

- Figure 21: Rate and Likelihood of Conviction in General and Special Courts-Martial by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017
- Figure 22: Rate and Likelihood of Dismissal or Discharge in General and Special Courts-Martial in Navy and Marine Corps by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017
- Figure 23: Rate and Likelihood of More Severe Punishment in General and Special Courts-Martial in Army and Air Force by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017

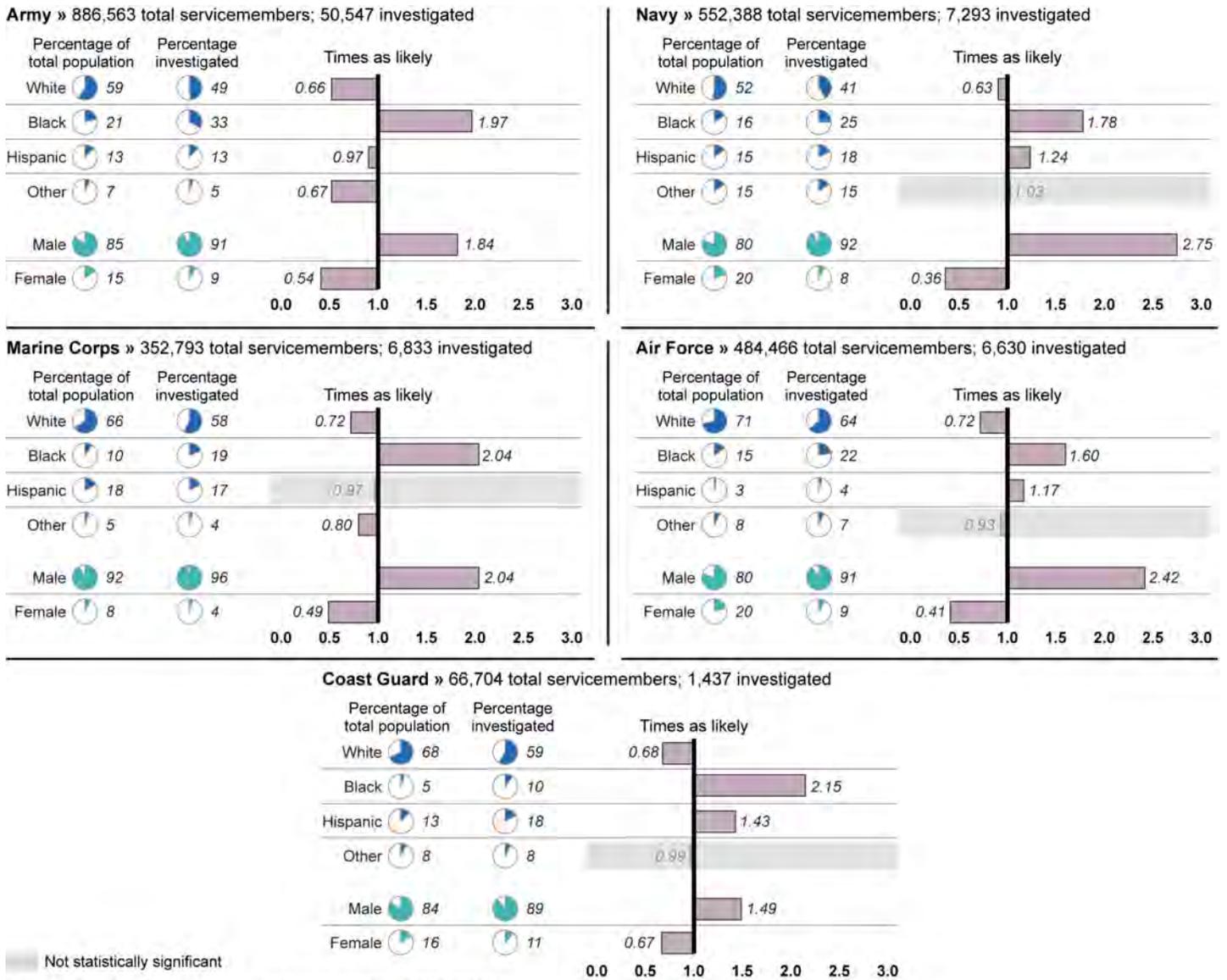
Rate and Likelihood of Recorded Investigations by Race and Gender

As shown in figure 15 below, our analysis of data contained in the military services' military criminal investigations databases found that Black servicemembers were subjects of recorded investigations at a higher rate compared to their proportion of the overall service population in all of the military services.² Hispanic servicemembers were the subjects of recorded investigations at a higher rate compared to their proportion of the overall service population in the Navy and the Air Force, at a lower rate in the Marine Corps, and at the same rate in the Army.³ Additionally, we found that males were the subjects of recorded investigations at higher rates than their share of the general service population in all of the military services.

²Our analysis focused on violations of the UCMJ that were recorded in databases used by service specific investigative entities known as military criminal investigative organizations (MCIO). MCIOs conduct criminal investigations in cases with a DOD nexus, such as if a crime occurred on a DOD installation, or the subject of the investigation is currently affiliated with DOD or was subject to the UCMJ at the time of the offense. Investigations are recorded in the MCIO databases when a servicemember is the subject of a criminal allegation made by another; for purposes of this report, we say the servicemember had a "recorded investigation" to describe these cases.

³The degree to which a racial or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial and gender compositions of those who were the subjects of recorded investigations and the racial and gender compositions of the military services' total populations.

Figure 15: Rate and Likelihood of Recorded Investigations for Alleged Violations of the Uniform Code of Military Justice by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and investigation data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than all other groups to be the subject of an investigation recorded in the services' military criminal investigative organizations databases for alleged violations of the Uniform Code of Military Justice. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be the subject of a recorded investigation. Not statistically significant means that we could not conclude there was an

association between race and the likelihood of a recorded investigation. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

In addition, figure 15 above also shows the results of our bivariate analyses, which calculated the degree to which one racial or gender group was more likely or less likely than another racial or gender group to be the subject of recorded investigations.⁴ Our bivariate analyses found that Black and male servicemembers in all of the military services were statistically significantly more likely to be the subjects of recorded investigations for alleged UCMJ violations than servicemembers of all other races or females. Hispanic servicemembers were statistically significantly more likely in the Navy, the Air Force, and the Coast Guard, and were statistically significantly less likely in the Army to be the subjects of recorded investigations than servicemembers of all other races. Servicemembers in the Other race category were statistically significantly less likely than servicemembers of all other races to be the subjects of recorded investigations in the Army and the Marine Corps. Our bivariate analyses did not show any statistically significant differences for servicemembers in the Other race category in the Navy, the Air Force, or the Coast Guard, or Hispanic servicemembers in the Marine Corps.⁵

Rate and Likelihood of Trial in General and Special Courts-Martial

As shown in figure 16 below, Black, Hispanic, and male servicemembers in all of the military services included in this analysis were represented at a higher rate than their proportions of the overall service population.⁶ White and female servicemembers in all of the military services were represented at a lower rate than their proportions of the overall service population. Servicemembers in the Other race category were represented at a higher rate in the Navy, at a lower rate in the Army and the Air Force,

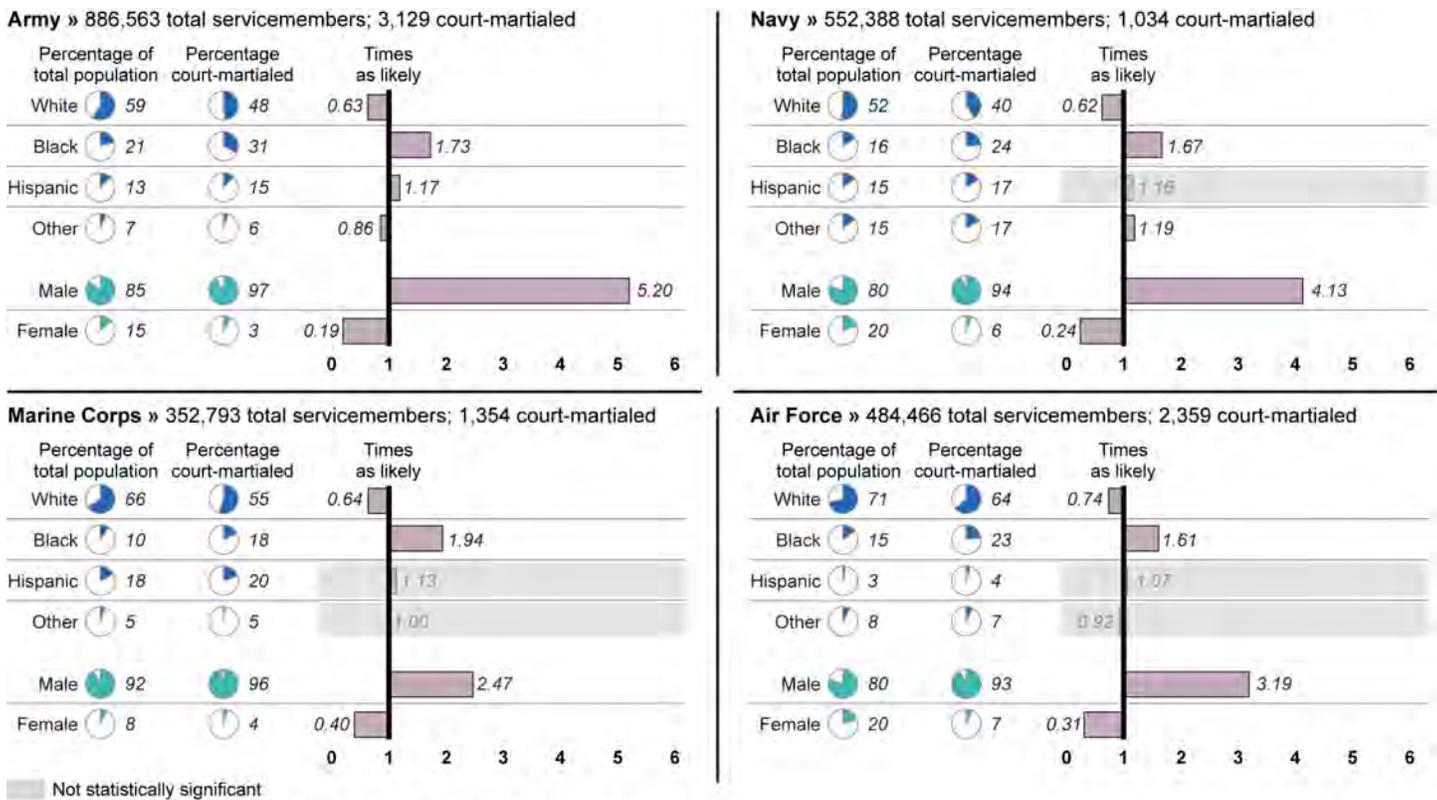
⁴We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

⁵Not identifying any statistically significant findings means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, a recorded investigation.

⁶The degree to which a racial or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial and gender compositions of those tried in general and special courts-martial and the racial and gender compositions of the military services' total populations.

and at the same rate in the Marine Corps compared to their proportion of the overall service population.⁷ We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

Figure 16: Rate and Likelihood of Trial in General and Special Courts-Martial by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than all other groups to be tried in general and special courts-martial. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in general and special courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in general and special courts-martial. The Other race category includes

⁷The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

The bivariate regression analysis results in figure 16 above calculate the degree to which one racial or gender group was more likely or less likely than servicemembers of all other races and genders to be tried in general and special courts-martial.⁸ We found that Black and male servicemembers in all of the military services were more likely to be tried in general and special courts-martial than servicemembers of all other races or females. Our bivariate analyses found that Hispanic servicemembers in the Army were more likely to be tried in general and special courts-martial than servicemembers of all other races. We found no statistically significant differences in the likelihood of Hispanic servicemembers to be tried in general and special courts-martial compared to servicemembers of all other races in the Navy, the Marine Corps, and the Air Force. White and female servicemembers in all of the military services were less likely to be tried in general and special courts-martial than servicemembers of other races or males. Furthermore, servicemembers in the Other race category were more likely in the Navy and less likely in the Army to be tried in general and special courts-martial than servicemembers of other races. We found no statistically significant differences in the likelihood of servicemembers in the Other race category to be tried in general and special courts-martial in the Marine Corps and the Air Force compared to servicemembers of other races.

Rate and Likelihood of Trial in General and Special Courts-Martial Following a Recorded Investigation

As shown in figure 17 below, for trials in general and special courts-martial that followed a recorded investigation, Black servicemembers were represented at a lower rate in the Army, the Navy, and the Marine Corps, and at the same rate in the Air Force compared to their proportions of the service population that had recorded investigations.⁹ Hispanic servicemembers in trials of general and special courts-martial

⁸We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

⁹The degree to which a racial or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial and gender compositions of those tried in general and special courts-martial following a recorded investigation and the racial and gender compositions of the populations with recorded investigations in the military services.

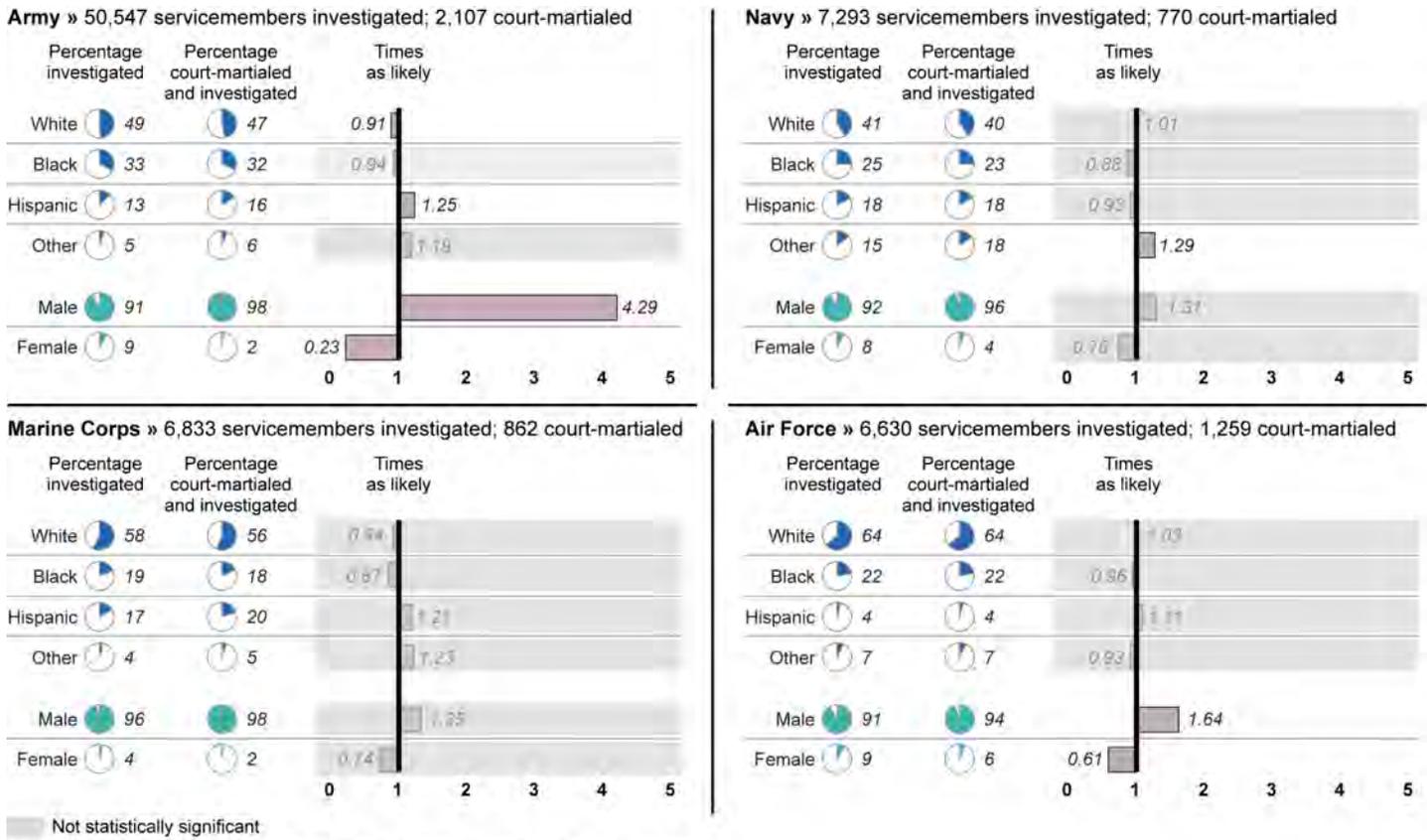
following a recorded investigation were represented at a higher rate than their proportion of the overall service population that had recorded investigations in the Army and the Marine Corps, and at the same rate in the Navy and the Air Force. White servicemembers were represented at a lower rate in the Army, the Navy, and the Marine Corps, and at the same rate in the Air Force compared to their proportions of the service population with recorded investigations. Servicemembers in the Other race category were represented at a higher rate in the Army, the Navy, and the Marine Corps, and at the same rate in the Air Force compared to their proportions of the overall service population with recorded investigations.¹⁰ We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

Male servicemembers with trials in general and special courts-martial that followed a recorded investigation were represented at a higher rate in all of the military services compared to their proportions of the service population that had recorded investigations. Females were represented at a lower rate in all of the military services compared to their proportions of the service population that had recorded investigations.

¹⁰The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Appendix II: Summary Statistics and Bivariate Results for Regression Analyses

Figure 17: Rate and Likelihood of Trial in General and Special Courts-Martial Following a Recorded Investigation by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel, investigations, and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than all other groups to be tried in general and special courts-martial following an investigation recorded in the services' military criminal investigative organizations databases. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in general and special courts-martial following a recorded investigation. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in general and special courts-martial following a recorded investigation. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

As shown in figure 17 above, our bivariate regression analyses showed that, in the Army, White servicemembers were statistically significantly less likely to be tried in general and special courts-martial following a recorded investigation than servicemembers of all other races, whereas Hispanic servicemembers were statistically significantly more likely to be tried following a recorded investigation.¹¹ In the Navy, servicemembers in the Other race category were statistically significantly more likely to be tried in general and special courts-martial following a recorded investigation than servicemembers of all other races. Males were more likely, and females were less likely, to be tried in general and special courts-martial following a recorded investigation in the Army and the Air Force. The remaining odds ratios shown in figure 17 above were not statistically significant.¹²

Rate and Likelihood of Trial in General and Special Courts-Martial without Recorded Investigation

We identified racial and gender disparities in the rate and likelihood of trial in general and special courts-martial in cases without a recorded investigation in all of the military services. Specifically, as shown in figure 18 below, for trials in general and special courts-martial without a recorded investigation, Black and male servicemembers in all of the military services were represented at a higher rate than their proportion of the service population that did not have a recorded investigation.¹³ Hispanic servicemembers were represented at a higher rate in the Army and the Marine Corps, and at the same rate in the Navy and the Air Force compared to their proportions of the service population that did not have a recorded investigation. Servicemembers in the Other race category were represented at a lower rate in the Marine Corps and the Air Force, and at the same rate in the Army and the Navy compared to their proportion of

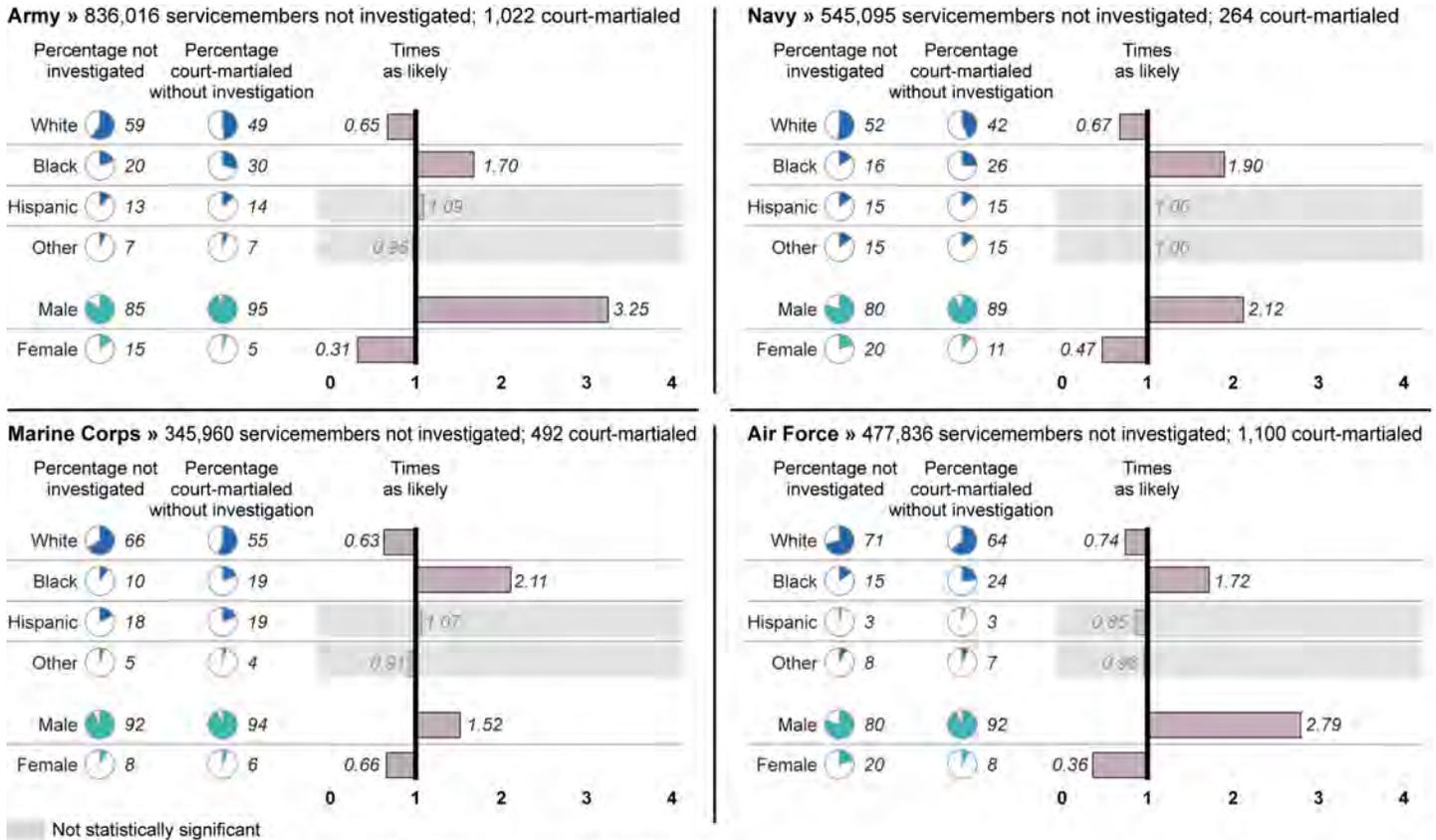
¹¹We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

¹²Not identifying any statistically significant differences means that we could not conclude there was an association between race and the likelihood of an outcome, in this case, trial in general and special courts-martial without a recorded investigation.

¹³The degree to which a racial or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial and gender compositions of those tried in general and special courts-martial without a recorded investigation and the racial and gender compositions of the overall population without recorded investigations in the military services.

the overall service population that did not have a recorded investigation.¹⁴ White and female servicemembers in all of the military services were represented at a lower rate than their proportions of the overall service population without a recorded investigation. We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

Figure 18: Rate and Likelihood of Trial in General and Special Courts-Martial without a Recorded Investigation by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel, investigations, and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than all other

¹⁴The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

groups to be tried in general and special courts-martial without an investigation recorded in the services' military criminal investigative organizations databases. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in general and special courts-martial without a recorded investigation. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in general and special courts-martial without a recorded investigation. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

The bivariate regression analysis results in figure 18 above calculate the degree to which one racial or gender group was more likely or less likely than servicemembers of all other races and genders to be tried in general and special courts-martial without a recorded investigation.¹⁵ We found that Black and male servicemembers in all of the military services were more likely to be tried at special and general courts-martial that were not preceded by a recorded investigation than servicemembers of all other races or females. White and female servicemembers in all of the military services were less likely to be tried at special and general courts-martial that were not preceded by a recorded investigation than servicemembers of all other races and males. We found no statistically significant differences in the likelihood of Hispanic servicemembers or servicemembers in the Other race category in any of the military services being tried in general and special courts-martial without a recorded investigation compared to servicemembers of all other races.

Rate and Likelihood of Trial in Summary Courts- Martial in the Air Force and the Marine Corps

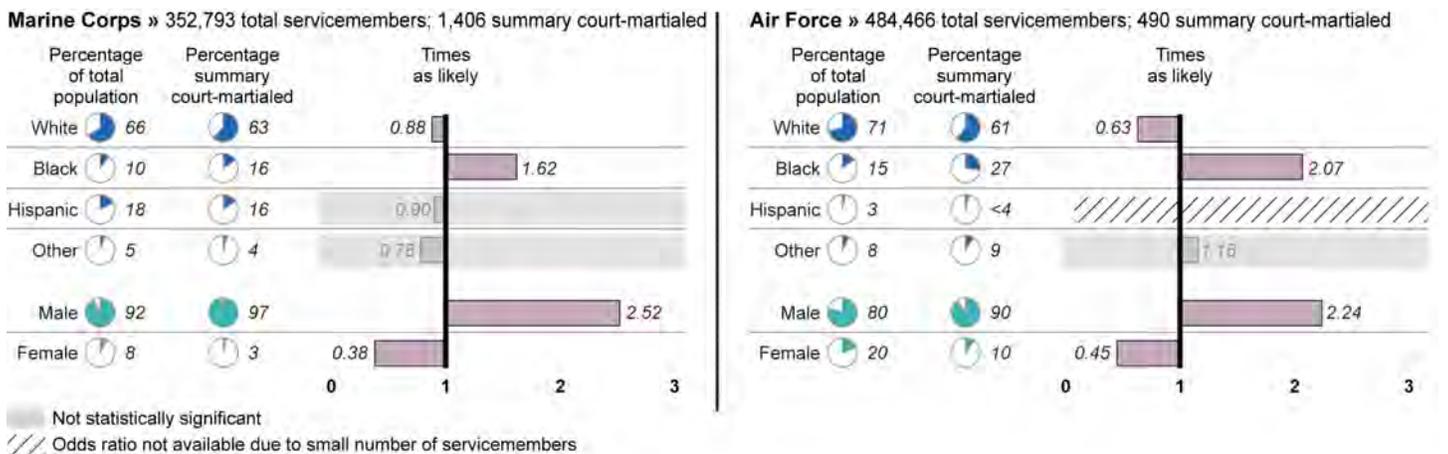
We identified racial and gender disparities in the rate and likelihood of trial in summary courts-martial in the Air Force and the Marine Corps. Specifically, as shown in figure 19 below, Black and male servicemembers were tried in summary courts-martial for UCMJ violations at higher rates than their share of the overall service population in the Air Force and the Marine Corps.¹⁶ White and Hispanic servicemembers were tried in summary courts-martial at lower rates than

¹⁵We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

¹⁶The degree to which a racial, ethnic, or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial, ethnic, and gender compositions of those tried in summary courts-martial and the racial, ethnic, and gender compositions of the military services' total populations.

their share of the overall service population in both services. Servicemembers that were included in the Other race category were tried at higher rates in the Air Force, and at lower rates in the Marine Corps.¹⁷ We could not determine whether there were any racial or gender disparities for summary courts-martial in the Army and the Navy because these services did not collect complete summary court-martial data—information about all summary court-martial cases, to include demographic information about the subject—in their investigative, military justice, or personnel databases, as discussed above in the report. We could not analyze Coast Guard cases due to the small number of summary courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

Figure 19: Rate and Likelihood of Trial in Summary Courts-Martial in the Air Force and the Marine Corps by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than all other groups to be tried in summary courts-martial. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be tried in summary courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of trial in summary courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding, exclusion of data for those with an unknown race, and/or to ensure protection of sensitive statistical information.

¹⁷The Other race category includes servicemembers that identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

The bivariate regression analysis results in figure 19 above calculate the degree to which one racial or gender group was more likely or less likely than servicemembers of all other races and genders to be tried in summary courts-martial.¹⁸ We found that Black servicemembers in the Marine Corps and the Air Force were more likely to be tried in summary courts-martial than servicemembers of all other races. We also found that male servicemembers were more likely than their female counterparts to be tried in summary courts-martial in the Marine Corps and the Air Force. We observed no statistically significant differences in summary court-martial rates for servicemembers in the Other race category in either the Marine Corps or the Air Force, or for Hispanic servicemembers in the Marine Corps.¹⁹

Rate and Likelihood of Nonjudicial Punishments in the Air Force and the Marine Corps

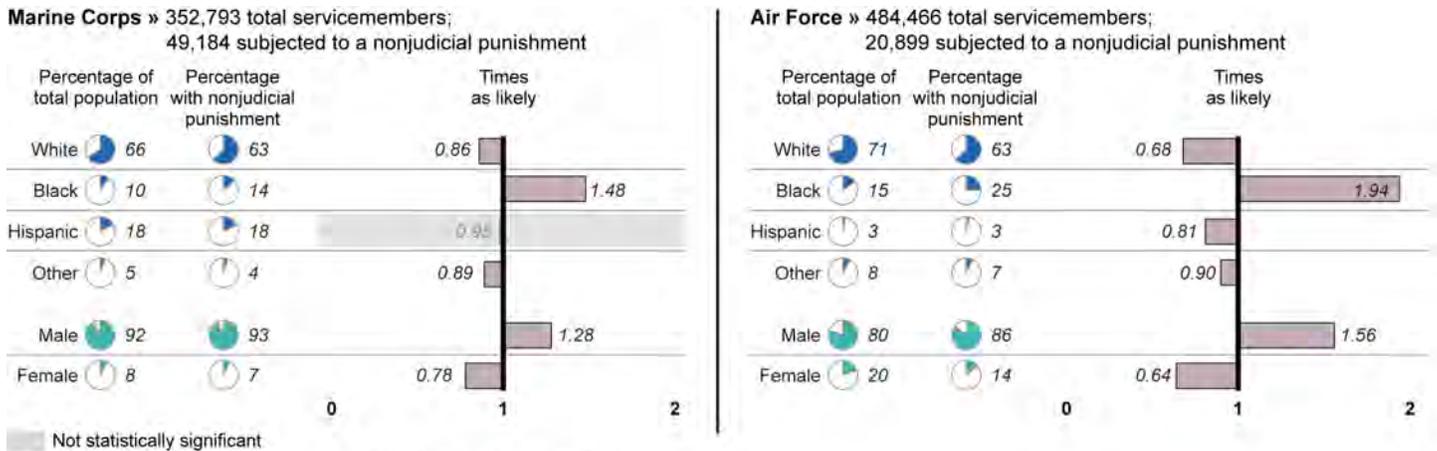
As shown in figure 20 below, we found that Black and male servicemembers were subject to nonjudicial punishment for UCMJ violations at a higher rate than their share of the overall service population in the Marine Corps and the Air Force. White servicemembers were subject to nonjudicial punishments at lower rates than their share of the overall service population in both services, and Hispanic servicemembers were subject to nonjudicial punishments in a proportion equal to their share of the general service population in both services. Servicemembers that were included in the Other race category were subject to nonjudicial punishment at lower rates than their share of the overall service population in the Marine Corps and the Air Force.²⁰ We could not analyze nonjudicial punishments in the Army, the Navy, and the Coast Guard because these services do not collect complete nonjudicial punishment information.

¹⁸We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

¹⁹The Other race category includes servicemembers who identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Statistical insignificance indicates that we could not conclude there was an association between race and the likelihood of an outcome, in this case, trial in summary courts-martial.

²⁰The Other race category includes servicemembers that identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Figure 20: Rate and Likelihood of Nonjudicial Punishments in the Air Force and the Marine Corps by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely than all other groups to be subject to nonjudicial punishments. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to nonjudicial punishment. Not statistically significant means that we could not conclude there was an association between race and the likelihood of nonjudicial punishment. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

The bivariate regression analyses in figure 20 above calculate the degree to which one racial or gender group was more likely or less likely than another racial or gender group to be subject to nonjudicial punishment.²¹ We found that Black and male servicemembers were more likely than servicemembers of all other races or female servicemembers to receive nonjudicial punishments in the Marine Corps and the Air Force. We also found that Hispanic servicemembers in the Air Force were less likely to be subject to nonjudicial punishment, but we observed no statistically significant difference for Hispanic servicemembers in the Marine Corps. Servicemembers in the Other race category were less likely to be subject

²¹We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

to nonjudicial punishment than servicemembers of all other races in the Marine Corps and the Air Force.²²

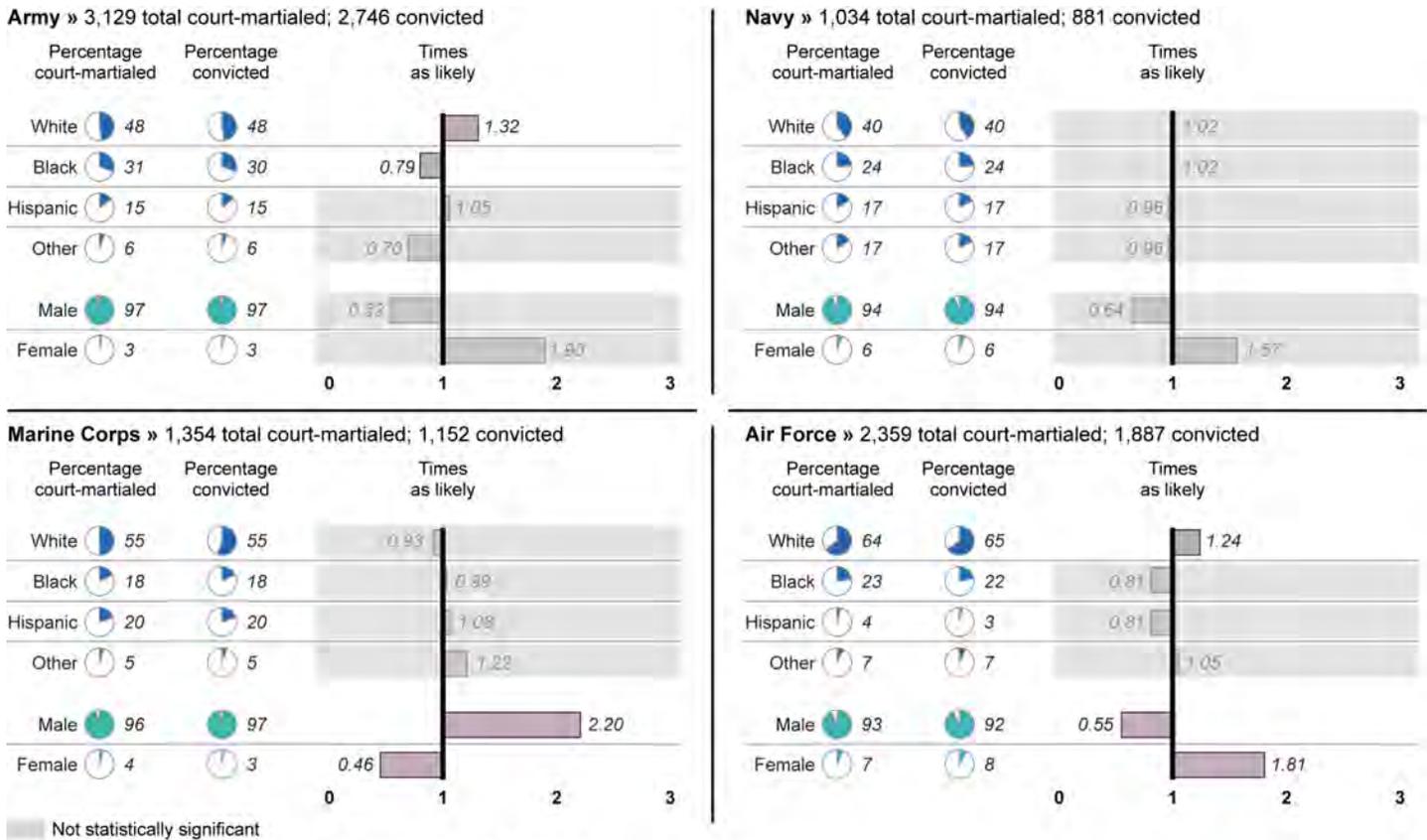
Rate and Likelihood of Conviction in General and Special Courts-Martial

As shown in figure 21 below, we found that Black servicemembers were convicted in general and special courts-martial at a lower rate in the Army and the Air Force, and at an equal rate in the Navy and the Marine Corps compared to their proportion of the overall general and special courts-martial population.²³ In the Army, the Navy, and the Marine Corps, Hispanic servicemembers were convicted in general and special courts-martial at an equal rate compared to their proportion of the overall general and special courts-martial population. Compared to their proportion of the overall general and special courts-martial population, Hispanic servicemembers were convicted at a lower rate in the Air Force. We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

²²The Other race category includes servicemembers that identify as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

²³The degree to which a racial or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial and gender compositions of those convicted in general and special courts-martial and the racial and gender compositions of the service population that were tried in general and special courts-martial.

Figure 21: Rate and Likelihood of Conviction in General and Special Courts-Martial by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely to be convicted in general and special courts-martial compared to all other racial or gender groups. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be convicted in general and special courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of conviction in general and special courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

As shown in figure 21 above, bivariate regression analyses found that, in the Army, White servicemembers were statistically significantly more likely to be convicted, whereas Black servicemembers were statistically

significantly less likely to be convicted in general and special courts-martial compared to all other servicemembers.²⁴ White servicemembers in the Air Force were also statistically significantly more likely to be convicted in general and special courts-martial compared to all other servicemembers. In the Marine Corps, we found that males were more likely to be convicted than females, whereas in the Air Force, males were less likely to be convicted than females. The remaining odds ratios shown in figure 21 above were not statistically significant.²⁵

Rate and Likelihood of More Severe Punishment

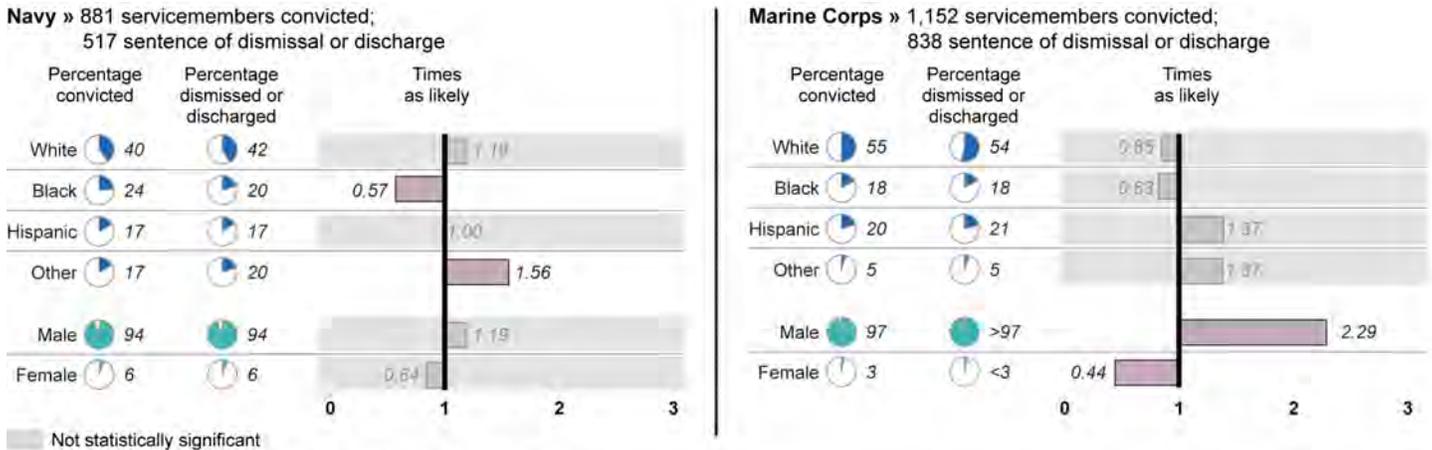
As shown in figures 22 and 23 below, we found that Black servicemembers received a more severe punishment at a lower rate compared to their share of the convicted service population in the Army, the Navy, and the Air Force.²⁶ We also found that Hispanic servicemembers received a more severe punishment at a lower rate compared to their share of the convicted service population in the Air Force, but at a higher rate in the Marine Corps. We found that male servicemembers in the Marine Corps and the Air Force received a more severe punishment at a higher rate, and at the same rate in the Army and the Navy, compared to their share of the convicted service population. Females received a more severe punishment at a lower rate in the Air Force and the Marine Corps, and at the same rate in the Army and the Navy, compared to their share of the convicted service population. We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

²⁴We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

²⁵Not identifying any statistically significant findings means that we could not conclude there was an association between race or gender and the likelihood of an outcome, in this case, conviction in general and special courts-martial.

²⁶We measured the severity of punishments in two groups for the Navy and the Marine Corps, and in three groups for the Air Force and the Army, which are defined in Appendix I. We did not create a third punishment group for confinement without dismissal or discharge for the Navy and the Marine Corps because of the small number of cases with confinement that did not also include some sort of discharge. Based on discussions with service officials, we determined that a sentence resulting in a dismissal or discharge was the most severe punishment outcome.

Figure 22: Rate and Likelihood of Dismissal or Discharge in General and Special Courts-Martial in Navy and Marine Corps by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017



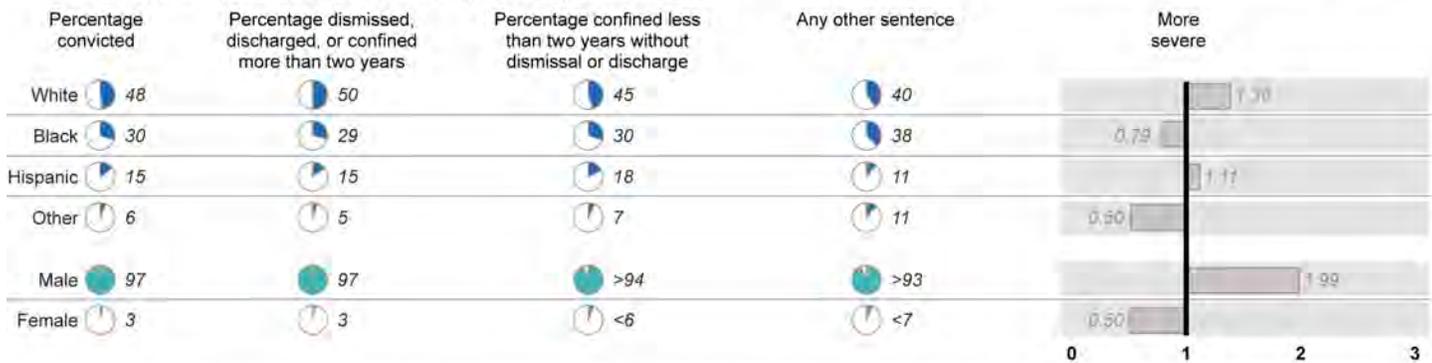
Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These bivariate regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely to be dismissed or discharged after conviction in general and special courts-martial compared to all other racial or gender groups. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be dismissed or discharged after conviction in general and special courts-martial. Not statistically significant means that we could not conclude there was an association between race and the likelihood of dismissal or discharge after conviction in general and special courts-martial. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding, exclusion of data for those with an unknown race, and/or to ensure protection of sensitive statistical information.

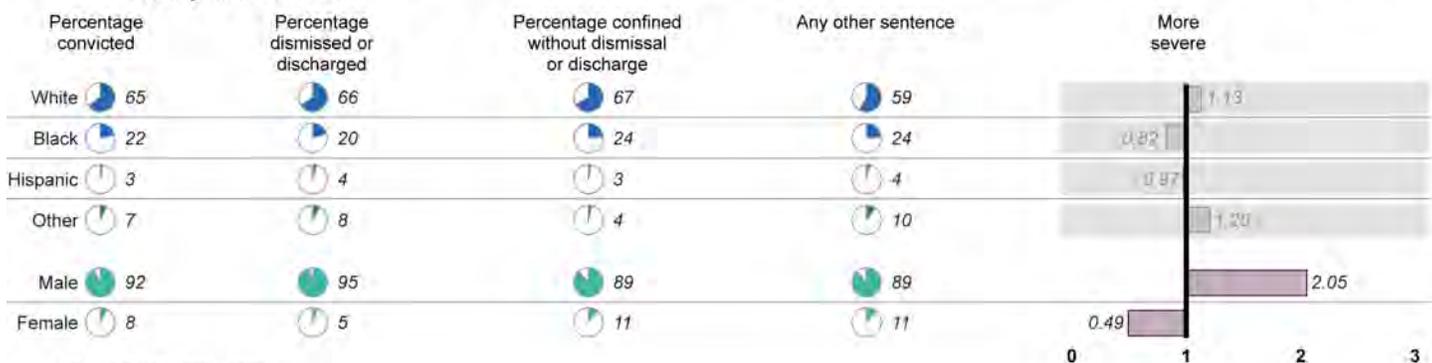
Appendix II: Summary Statistics and Bivariate Results for Regression Analyses

Figure 23: Rate and Likelihood of More Severe Punishment in General and Special Courts-Martial in Army and Air Force by Race and Gender, without Controlling for Any Other Attributes, Fiscal Years 2013–2017

Army » 2,746 servicemembers convicted; 2,079 sentence of dismissal, discharge, or confinement more than 2 years; 365 sentence of confinement less than 2 years without dismissal or discharge; 302 any other sentence



Air Force » 1,887 servicemembers convicted; 992 sentence of dismissal or discharge; 656 sentence of confinement without dismissal or discharge; 239 any other sentence



Not statistically significant

Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These regression analysis results demonstrate the degree to which a racial or gender group is more likely or less likely to receive a more severe punishment after conviction in general and special courts-martial compared to all other racial or gender groups. Because the punishment groups for the Army and the Air Force consisted of 3 outcome categories, we used an ordered logit regression model to analyze punishment severity in the Army and the Air Force. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to receive a more severe punishment. Not statistically significant means that we could not conclude there was an association between race and the likelihood of a more severe punishment. Punishment severity in the Air Force, ordered from most to least severe, was (3) any type of dismissal or discharge (regardless of any confinement); (2) confinement without dismissal or discharge, and (1) all other possible sentencing options. In the Army, it was (3) any type of dismissal or discharge or confinement of more than 2 years, (2) confinement of less than 2 years without dismissal or discharge, and (1) all other possible sentencing options. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to

rounding, exclusion of data for those with an unknown race, and/or to ensure protection of sensitive statistical information.

The bivariate regression analyses in Figures 22 and 23 above calculated the degree to which one racial or gender group was more likely or less likely than another racial or gender group to be dismissed or discharged after a conviction in general and special courts-martial.²⁷ In the Navy, we found that Black servicemembers were statistically significantly less likely to be dismissed or discharged after conviction in general and special courts-martial compared to all other servicemembers. We found no statistically significant differences regarding minority servicemembers being more likely or less likely to be dismissed or discharged after conviction in general and special courts-martial in the Marine Corps, or to receive a more severe punishment in the Army or the Air Force.²⁸ We found that males in the Marine Corps and the Air Force were more likely to be dismissed or discharged or receive a more severe punishment after conviction than females, but we did not find any statistically significant differences regarding male servicemembers in the Army or the Navy.

²⁷We conducted bivariate logit analyses (which we refer to as bivariate analyses) to estimate the association between the attribute factors (or independent variables) and the outcome variables (the dependent variable) in a binary format. For additional explanation of how we conducted our bivariate analyses, see Appendix I.

²⁸Not identifying any statistically significant findings means that we could not conclude there was an association between race or gender and the likelihood of an outcome, in this case, punishment severity.

Appendix III: Analysis of Drug Offenses, Sexual Assault Offenses, and All Other Offenses

This appendix contains several figures that show the underlying data related to drug and sexual assault offenses from fiscal years 2013 through 2017 for the Army, the Navy, the Marine Corps, and the Air Force.¹ Across most military services, Black, Hispanic, and male servicemembers were the subjects of recorded investigations and tried in general and special courts-martial at higher rates than their shares of the overall service population for drug offenses, sexual assault offenses, and all other offenses.² We found that the likelihood of conviction varied among the services for these two offenses.³ We analyzed these two specific Uniform Code of Military Justice (UCMJ) offenses separately from all other offenses because service officials told us that an investigation into these offenses may frequently be mandatory, and thus could potentially mitigate the risk of bias.⁴ We analyzed data for these offenses for recorded investigations, trials in general and special courts-martial, and convictions from fiscal years 2013 through 2017 to assess the extent to which racial and gender disparities may exist.⁵ Our analyses of the

¹We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

²The drug offenses we analyzed were charges under UCMJ Article 112a, wrongful use, possession, or distribution of a controlled substance. In addition, the sexual assault offenses we analyzed were any charges under UCMJ Article 120, which includes rape and sexual assault generally, rape and sexual assault of a child, and other sexual misconduct.

³For purposes of this report, we use the term “likelihood” when discussing the odds ratios from the results of our regression analyses. Odds ratios that are statistically significant and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to a particular military justice action.

⁴Service officials stated that some drug (Article 112a) offenses are initiated as a result of random urinalysis tests, and in those cases a positive result will trigger an investigation regardless of the servicemember’s race, ethnicity, or gender. According to Department of Defense Instruction 5505.18, all allegations of adult sexual assault are immediately reported to the appropriate military criminal investigative organization (MCIO), and that MCIO will initiate a criminal investigation into that allegation if the offense occurred within its jurisdiction.

⁵We were unable to present an analysis of UCMJ offenses tried in summary courts-martial due to data limitations. The Air Force was the only service that maintained offense data for summary courts-martial for fiscal years 2013 through 2017. The data for summary courts-martial in the Marine Corps personnel database did not include information about the offense type. See Appendix VII for our analysis of the Air Force summary courts-martial offense data. Furthermore, all analyses presented in this section examine the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be involved in an investigation or court-martial of a servicemember; if a case involved both a drug offense and a sexual assault offense, it was counted in both groups for purposes of this analysis. See Appendixes II through VI for the demographic breakdowns of each of those offenses in each of the military services.

services' investigation, military justice, and personnel databases, as reflected in these figures, taken alone, do not establish the presence or absence of unlawful discrimination.

The following figures and information are included in this appendix:

- Figure 24: Recorded Investigation Rates for Drug Offenses, Sexual Assault Offenses, and All Other Offenses by Race and Gender, Fiscal Years 2013–2017
- Figure 25: General and Special Courts-Martial Trial Rates for Drug Offenses, Sexual Assault Offenses, and All Other Offenses by Race and Gender, Fiscal Years 2013–2017
- Figure 26: Likelihood that Charges of Drug Offenses and Sexual Assault Offenses Resulted in Convictions in General and Special Courts-Martial, After Controlling for Race, Gender, Rank, and Education, Fiscal Years 2013–2017

Recorded Investigations of Drug and Sexual Assault Offenses

We identified racial and gender differences in recorded investigation rates for drug offenses, sexual assault offenses, and all other offenses compared with the total service populations.⁶ Our analysis focused on alleged UCMJ violations for these offenses that were recorded in the Military Criminal Investigative Organization (MCIO) investigations databases. Other investigations conducted within the military, such as command investigations, were not considered in this analysis. For example, as shown in figure 24 below, Black servicemembers were the subjects of recorded investigations for drug offenses, sexual assault offenses, and all other offenses at a higher rate than their share of the overall service population across all military services.⁷ Hispanic

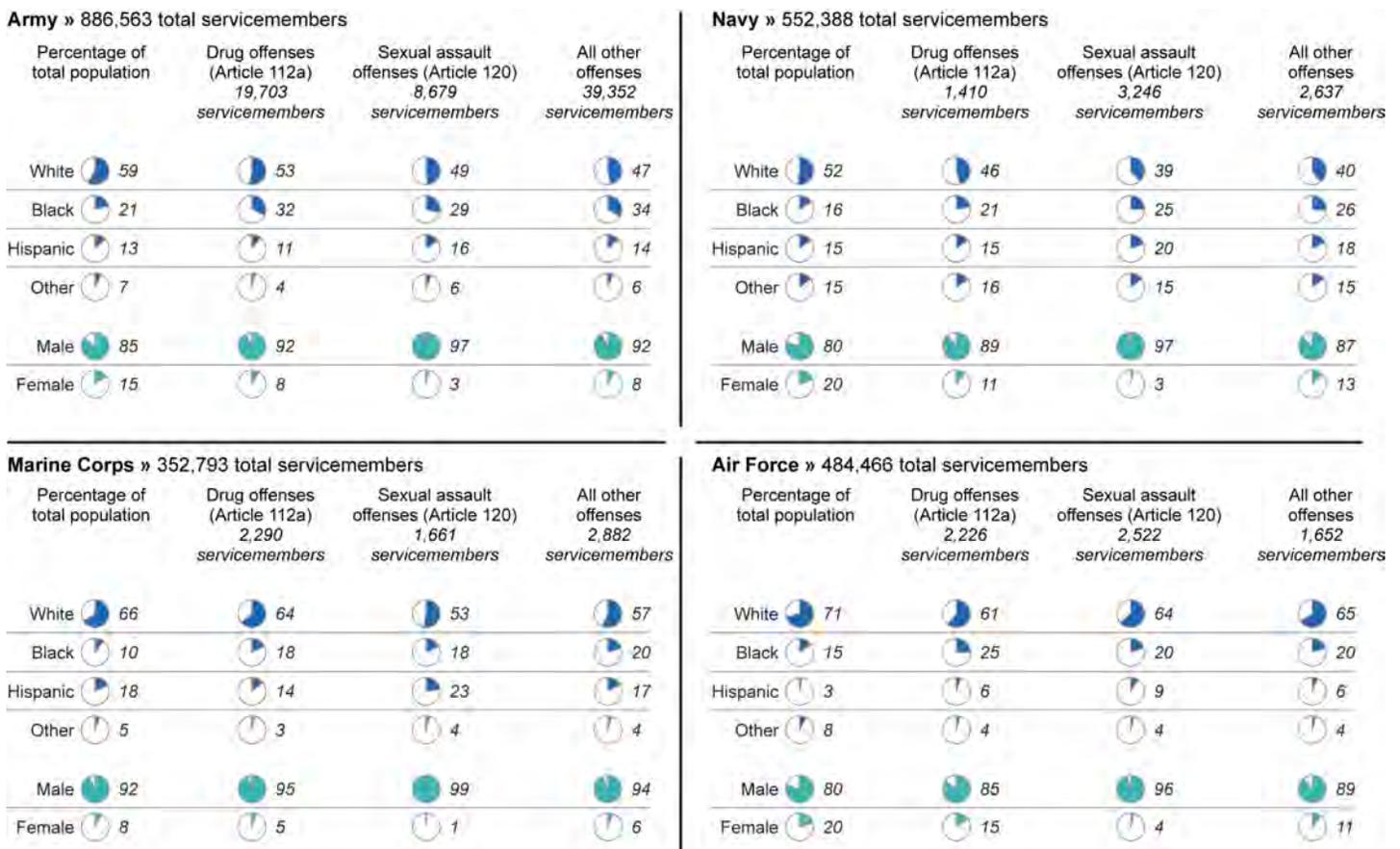
⁶Investigations are recorded in the MCIO databases when a servicemember is the subject of a criminal allegation made by another; for purposes of this report, we say the servicemember had a “recorded investigation” to describe these cases. The remaining general and special courts-martial cases would have been investigated by other sources, such as local civilian law enforcement, command investigations, or in the case of the Air Force, their military law enforcement security forces, and thus would not be recorded in the MCIO databases. For additional explanation of the databases we used to analyze investigations, please see Appendix I.

⁷The degree to which a racial or gender group was determined to have a higher or lower rate was calculated through a comparison between the racial and gender compositions of those investigated for drug or sexual assault offenses and the racial and gender compositions of the military services' total populations.

Appendix III: Analysis of Drug Offenses, Sexual Assault Offenses, and All Other Offenses

servicemembers were the subjects of recorded investigations for drug offenses, sexual assault offenses, and all other offenses at a higher rate than their share of the overall service population in the Air Force, but were the subjects of recorded investigations for drug offenses at a lower rate than their share of the overall service population in both the Army and the Marine Corps. Male servicemembers were the subjects of recorded investigations for drug offenses and sexual assault offenses at a higher rate than their share of the overall service population across all of the military services.

Figure 24: Recorded Investigation Rates for Drug Offenses, Sexual Assault Offenses, and All Other Offenses by Race and Gender, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and investigation data. | GAO-19-344

Note: These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The degree to which the representation of a racial or gender group is determined to be higher or lower in the population subject to an investigation recorded in the

military services' military criminal investigative organizations databases is calculated by subtracting the group's percentage of the military service's total population from the percentage that group represents within the population that was the subject of a recorded investigation. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not sum to 100 percent due to rounding and/or exclusion of data for those with an unknown race.

General and Special Courts-Martial Trials for Drug and Sexual Assault Offenses

We found that White servicemembers were tried for drug offenses, sexual assault offenses, and all other offenses in general and special courts-martial at lower rates than their share of the overall service population across all of the military services. Black servicemembers were tried for drug offenses, sexual assault offenses, and all other offenses in general and special courts-martial at a higher rate than their share of the overall service population in all of the military services. Hispanic servicemembers were tried for drug offenses in general and special courts-martial at a lower rate in the Navy and the Marine Corps, and at a higher rate in the Air Force, compared to their share of the overall service population. Hispanic servicemembers were tried for sexual assault offenses at a higher rate than their proportion of the overall service population in all of the military services. Female servicemembers were tried for drug offenses, sexual assault offenses, and all other offenses in general and special courts-martial at lower rates than their share of the general service population in the Army, the Navy, and the Air Force, and were tried for sexual assault offenses and all other offenses at lower rates than their share of the overall service population in the Marine Corps. Figure 25 below shows the gender and racial composition of general and special court-martial trials for drug offenses, sexual assault offenses, and all other offenses. We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

Appendix III: Analysis of Drug Offenses, Sexual Assault Offenses, and All Other Offenses

Figure 25: General and Special Courts-Martial Trial Rates for Drug Offenses, Sexual Assault Offenses, and All Other Offenses by Race and Gender, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

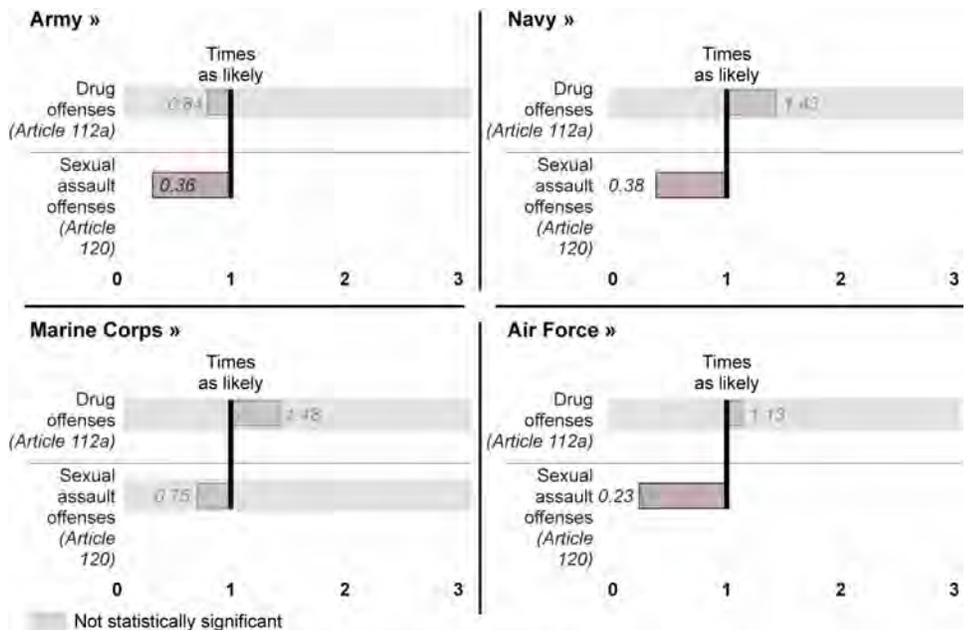
Note: These analyses, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The degree to which the representation of a racial or gender group is determined to be higher or lower in the population tried in special or general courts-martial is calculated by subtracting the group's percentage of the military service's total population from the percentage that group represents within the population tried. The Other race category includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. Percentages in this figure may not add up to 100 percent due to rounding, exclusion of data for those with an unknown race, and/or to protect privacy.

Likelihood of Conviction for Drug and Sexual Assault Offenses

We conducted multivariate regression analyses to calculate the degree to which servicemembers charged with drug offenses and sexual assault offenses were more likely or less likely than a composite variable comprised of all other offenses to be convicted in general and special courts-martial, while controlling for other attributes, such as race, gender,

education, and rank.⁸ As shown in figure 26 below, we did not identify any statistically significant difference in conviction rates for drug offenses compared to all other offenses in the Army, the Navy, the Marine Corps, and the Air Force. Sexual assault offenses were less likely to result in a conviction in the Army, the Navy, and the Air Force, and there was no statistically significant difference for the Marine Corps. We could not analyze Coast Guard cases due to the small number of general and special courts-martial adjudicated in the Coast Guard from fiscal years 2013 through 2017.

Figure 26: Likelihood that Charges of Drug Offenses and Sexual Assault Offenses Resulted in Convictions in General and Special Courts-Martial, After Controlling for Race, Gender, Rank, and Education, Fiscal Years 2013–2017



Source: GAO analysis of service personnel and military justice data. | GAO-19-344

Note: The information presented in this figure, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These partial multivariate regression analysis results demonstrate the degree to which a servicemember was more likely or less likely than

⁸A multivariate regression analysis examines several variables simultaneously to estimate whether each of these variables are more likely or less likely to be associated with a certain outcome. See Appendix I for a more detailed explanation of how we conducted our multivariate regression analysis, and a full explanation of the attributes we used in each service model. In addition, see Appendixes IV through VIII for the demographic breakdowns of the modeled attributes in each of the military services.

**Appendix III: Analysis of Drug Offenses,
Sexual Assault Offenses, and All Other
Offenses**

the reference category to be convicted in general and special courts-martial after being charged with drug offenses or sexual assault offenses after controlling for race, gender, rank, and education. We also controlled for years of service among the lower enlisted ranks (E1-E4) in the Air Force. In the Army, we could not control for education, but we were able to control for age. We made all offense comparisons to a composite variable that contains all other offenses. Odds ratios that are statistically significant (p-value < 0.05) and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be convicted. Not statistically significant means that we could not conclude there was an association between race and the likelihood of a recorded investigation.

Appendix IV: Army Data and Analyses

This appendix contains several tables that show the underlying data and analyses used throughout this report relating to Army personnel and military justice disciplinary actions from fiscal years 2013 through 2017. We did not include populations that contained fewer than 20 servicemembers in the total populations presented in these tables to ensure the protection of sensitive information. As a result, the total populations presented in this appendix may vary among the different tables and may vary from the total populations presented in the body of the report. Our analyses of the Army's investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination.

The following tables and information are included in this appendix:

- Table 10: Total Population of the Army by Race, Fiscal Years 2013–2017
- Table 11: Summary Statistics by Race for Army Military Justice Actions, Fiscal Years 2013–2017
- Table 12: Summary Statistics by Gender for Army Military Justice Actions, Fiscal Years 2013–2017
- Table 13: Summary Statistics by Rank for Army Military Justice Actions, Fiscal Years 2013–2017
- Table 14: Summary Statistics by Age for Army Military Justice Actions, Fiscal Years 2013–2017
- Table 15: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Army Military Justice Actions, Fiscal Years 2013–2017
- Table 16: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Army Military Justice Actions, Fiscal Years 2013–2017
- Table 17: Odds Ratios for Army Multivariate Regression Analyses

Table 10: Total Population of the Army by Race, Fiscal Years 2013–2017

Race	Population	
	Number	Percent
American Indian or Alaskan Native	7,873	1
Asian or Pacific Islander	47,644	5
Black	183,379	21
Hispanic	117,413	13
Other	8,434	1
White	521,820	59
Total population	886,563	100%

Source: GAO analysis of Army personnel data. | GAO-19-344

Note: The total populations presented in this table represent the number of unique active-duty servicemembers who served during fiscal years 2013 through 2017.

Table 11: Summary Statistics by Race for Army Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other	
	N	N	%	N	%	N	%	N	%	
Total population	886,563	521,820	59%	183,379	21%	117,413	13%	63,951	7%	
Recorded investigations	50,547	24,819	49%	16,648	33%	6,547	13%	2,533	5%	
General and special courts-martial	3,129	1,488	48%	972	31%	473	15%	196	6%	
General and special courts-martial with a recorded investigation	2,107	988	47%	668	32%	327	16%	124	6%	
General and special courts-martial without a recorded investigation	1,022	500	49%	304	30%	146	14%	72	7%	
Acquittals (general and special courts-martial)	383	159	42%	136	36%	56	15%	32	8%	
Convictions (general and special courts-martial)	2,746	1,329	48%	836	30%	417	15%	164	6%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The total populations presented in this table represent the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Army's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding.

Table 12: Summary Statistics by Gender for Army Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N	N	%	N	%	
Total population	866,563	755,862	85%	130,701	15%	
Recorded investigations	50,547	46,092	91%	4,455	9%	
General and special courts-martial	3,129	3,028	97%	101	3%	
General and special courts-martial with a recorded investigation	2,107	2,059	98%	48	2%	
General and special courts-martial without a recorded investigation	1,022	969	95%	53	5%	
Convictions (general and special courts-martial)	2,746	2,652	97%	94	3%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total populations presented in this table represent the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Army's military criminal investigative organization's database.

Table 13: Summary Statistics by Rank for Army Military Justice Actions, Fiscal Years 2013–2017

	Population		Rank E1-E4		Rank E5-E9		Officers	
	N	N	%	N	%	N	%	
Total population	866,563	507,498	57%	251,488	28%	127,577	14%	
Recorded investigations	50,547	35,669	71%	12,952	26%	1,926	4%	
General and special courts-martial	3,129	1,777	57%	1,172	37%	180	6%	
General and special courts-martial with a recorded investigation	2,107	1,203	57%	776	37%	128	6%	
General and special courts-martial without a recorded investigation	1,022	574	56%	396	39%	52	5%	
Acquittals (general and special courts-martial)	383	177	46%	174	45%	32	8%	
Convictions (general and special courts-martial)	2,746	1,600	58%	998	36%	148	5%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total populations presented in this table represent the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Army's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding.

Table 14: Summary Statistics by Age for Army Military Justice Actions, Fiscal Years 2013–2017

	Population	< 25 years		25-30 years		30-40 years		> 40 years	
	N	N	%	N	%	N	%	N	%
Total population	866,563	457,494	52%	172,427	19%	178,014	20%	78,628	9%
Recorded investigations	50,547	31,744	63%	9,498	19%	7,646	15%	1,659	3%
General and special courts-martial	3,129	1,330	43%	767	25%	802	26%	230	7%
General and special courts-martial with a recorded investigation	2,107	972	46%	467	22%	533	25%	135	6%
General and special courts-martial without a recorded investigation	1,022	358	35%	300	29%	269	26%	95	9%
Acquittals (general and special courts-martial)	383	145	38%	83	22%	121	32%	34	9%
Convictions (general and special courts-martial)	2,746	1,185	43%	684	25%	681	25%	196	7%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total populations presented in this table represent the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Army's criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding.

Table 15: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Army Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other	
	N		N	%	N	%	N	%	N	%
Recorded investigations for drug offenses (Article 112a)	19,703		10,464	53%	6,401	32%	2,108	11%	730	4%
Recorded investigations for sexual assault offenses (Article 120)	8,679		4,237	49%	2,541	29%	1,398	16%	503	6%
Recorded investigations for all other offenses	39,352		18,503	47%	13,231	34%	5,390	14%	2,228	6%
General and special courts-martial for drug offenses (Article 112a)	404		240	57%	110	26%	54	13%	<20	
General and special courts-martial for sexual assault offenses (Article 120)	1,442		665	46%	410	28%	269	19%	98	7%
General and special courts-martial for all other offenses	1,997		925	46%	693	35%	260	13%	119	6%

Legend: “N” refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. This table summarizes the number of instances in which an offense was investigated or tried in a general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Army’s criminal investigative organization’s database. The summary statistics for servicemembers tried in general and special courts-martial for drug offenses (Article 112a) were omitted from this table to protect privacy because a gender group had fewer than 20 servicemembers. Percentages in this table may not add up to 100 due to rounding.

Table 16: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Army Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N	N	%	N	%	
Recorded investigations for drug offenses (Article 112a)	19,703	18,085	92%	1,618	8%	
Recorded investigations for sexual assault offenses (Article 120)	8,679	8,412	97%	267	3%	
Recorded investigations for all other offenses	1,531	1,401	92%	130	8%	
General and special courts- martial for all other offenses	1,997	1,873	94%	124	6%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. This table summarizes the number of instances in which an offense was investigated or tried in a general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Army's criminal investigative organization's database. The summary statistics for servicemembers tried in general and special courts-martial for drug offenses (Article 112a) and sexual assault offenses (Article 120) were omitted from this table to protect privacy, because a gender group had fewer than 20 servicemembers.

Multivariate Regression Analyses of Army Data

The multivariate results listed below in table 17 show the odds ratios for the multivariate regression analyses of the Army data. We used logistic regression to assess the relationship between the independent variables, such as race, education, rank, or gender, with the probability of being subject to a military justice action. Logistic regression allows for the coefficients to be converted into odds ratios. Odds ratios that are statistically significant and greater than 1.00 indicate that individuals with that characteristic are more likely to be subject to a military justice action. For example, an odds ratio of 1.55 for Black servicemembers would mean that they are 1.55 times more likely to be subject to a military justice action compared to White servicemembers. Odds ratios that are statistically significant and lower than 1.00 indicate that individuals with that characteristic are less likely to be subject to a military justice action. We excluded years of service from the Army analyses due to high correlation with the rank variable.

Table 17: Odds Ratios for Army Multivariate Regression Analyses

	Black	Hispanic	Other	Male	E5-E9	Officers
Likelihood of being subject of recorded investigations	2.11**	1.13**	0.92**	2.14**	0.91**	0.30**
Likelihood of trial in general and special courts-martial	2.00**	1.41**	1.12	5.75**	0.93	0.34**
Likelihood of trial in general and special courts-martial with a recorded investigation	1.16**	1.37**	1.26*	3.92**	1.28**	1.32*
Likelihood of trial in general and special courts-martial without a recorded investigation	1.85**	1.29**	1.16	3.53**	0.74**	0.22**
Likelihood of conviction in general and special courts-martial	0.8	1.11	0.74	0.91	0.76	0.58*
Likelihood of receiving a more severe punishment when convicted in general and special courts-martial	0.84	0.99	0.56**	1.58*	0.34**	0.76

Legend: ** next to the odds ratio indicate that the finding has a strong degree of statistical significance with a p-value less than 0.01.

* next to the odds ratio indicates that the finding is statistically significant with a p-value between 0.01 and 0.05.

If the space next to the odds ratio is blank, then the finding was not statistically significant.

"N" refers to the population size for each group.

Source: GAO analysis of Army investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These multivariate regression analysis results demonstrate the degree to which a racial, gender, or rank group is more likely than the reference category to be subject of a recorded investigation, tried in general and special courts-martial, and convicted in general and special courts-martial. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Army's military criminal investigative organization's database. We used an ordered logistic regression analysis to calculate the likelihood of receiving a more severe punishment as a result of being convicted in general and special courts-martial. All racial categories listed are in reference to White servicemembers, all gender groups listed are in reference to female servicemembers, and all rank groups are in reference to servicemembers between ranks E1-E4. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Appendix V: Navy Data and Analyses

This appendix contains several tables that show the underlying data and analyses used throughout this report relating to Navy personnel and military justice disciplinary actions from fiscal years 2013 through 2017. We did not include populations that contained fewer than 20 servicemembers in the populations presented in these tables to ensure the protection of sensitive information. As a result, the populations presented in this appendix may vary among the different tables and may vary from the populations presented in other places in this report. Our analyses of the Navy's investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination.

The following tables and information are included in this appendix:

- Table 18: Navy Population of the Navy by Race, Fiscal Years 2013–2017
- Table 19: Summary Statistics by Race for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 20: Summary Statistics by Gender for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 21: Summary Statistics by Rank for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 22: Summary Statistics by Education for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 23: Summary Statistics by Age for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 24: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 25: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Navy Military Justice Actions, Fiscal Years 2013–2017
- Table 26: Odds Ratios for Navy Multivariate Regression Analyses

Table 18: Total Population of the Navy by Race, Fiscal Years 2013–2017

Race	Population	
	Number	Percent
American Indian or Alaska Native	11,938	2
Asian	26,780	5
Black or African American	87,415	16
Hispanic	83,609	15
Mixed	38,282	7
Native Hawaiian or Pacific Islander	4,699	1
Unknown	12,571	2
White	287,094	52
Total population	552,388	100

Source: GAO analysis of Navy personnel data. | GAO-19-344

Note: The total populations presented in this table represent the number of unique active-duty servicemembers who served during fiscal years 2013 through 2017.

Table 19: Summary Statistics by Race for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other	
	N	N	Percent	N	Percent	N	Percent	N	Percent	
Total population	539,817	287,094	52%	87,415	16%	83,609	15%	81,699	15%	
Recorded investigations	7,193	2,954	41%	1,816	25%	1,316	18%	1,107	15%	
General and special courts-martial	1,018	417	40%	247	24%	177	17%	177	17%	
General and special courts-martial with a recorded investigation	759	306	40%	178	23%	137	18%	138	18%	
General and special courts-martial without a recorded investigation	259	111	42%	69	26%	40	15%	39	15%	
Acquittals (general and special courts-martial)	151	61	40%	36	24%	27	18%	27	18%	
Convictions (general and special courts-martial)	867	356	40%	211	24%	150	17%	150	17%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with an unknown race, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 20: Summary Statistics by Gender for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N		N	%	N	%
Total population	552,388		442,184	80%	110,204	20%
Recorded investigations	7,293		6,681	92%	612	8%
General and special courts-martial	1,034		975	94%	59	6%
General and special courts-martial with a recorded investigation	770		739	96%	31	4%
General and special courts-martial without a recorded investigation	264		236	89%	28	11%
Convictions (general and special courts-martial)	881		828	94%	53	6%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database.

Table 21: Summary Statistics by Rank for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population		Rank E1-E4		Rank E5-E9 and officers	
	N		N	%	N	%
Total population	552,388		273,247	49%	279,141	51%
Recorded investigations	7,293		4,170	57%	3,123	43%
General and special courts-martial	1,034		523	51%	511	49%
General and special courts-martial with a recorded investigation	770		390	51%	380	49%
General and special courts-martial without a recorded investigation	264		133	50%	131	50%
Acquittals (general and special courts-martial)	153		68	44%	85	56%
Convictions (general and special courts-martial)	881		455	52%	426	48%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database. Although we analyzed officers separately from enlisted servicemembers, for reporting purposes we combined servicemembers in rank categories E5-E9 with officers to protect privacy in instances when the number of servicemembers was fewer than 20.

Table 22: Summary Statistics by Education for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population	High school or less		More than high school		Unknown education	
	N	N	%	N	%	N	%
Total population	552,388	403,581	73%	122,824	22%	25,983	5%
Recorded investigations	7,293	6,221	85%	931	13%	141	2%
General and special courts-martial	1,034	858	83%	152	15%	24	2%
General and special courts-martial with a recorded investigation	754	639	83%	115	15%	<20	
General and special courts-martial without a recorded investigation	256	219	83%	37	14%	<20	
Acquittals (general and special courts-martial)	149	112	73%	37	24%	<20	
Convictions (general and special courts-martial)	881	746	85%	115	13%	20	2%

Legend: <20 refers to education groups that have zero or fewer than 20 servicemembers, to protect privacy.

“N” refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown education level, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal year 2013 through 2017. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy’s military criminal investigative organization’s database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to ensure protection of privacy.

Table 23: Summary Statistics by Age for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population	< 21 Years		21-25 years		26-30 years		> 30 years	
	N	N	%	N	%	N	%	N	%
Total population	552,388	82,562	15%	180,939	33%	115,945	21%	172,869	31%
Recorded investigations	7,293	979	13%	3,041	42%	1,535	21%	1,671	23%
General and special courts-martial	1,034	93	9%	391	38%	220	21%	330	32%
General and special courts-martial with a recorded investigation	770	63	8%	292	38%	170	22%	245	32%

Appendix V: Navy Data and Analyses

	Population	< 21 Years		21-25 years		26-30 years		> 30 years	
General and special courts-martial without a recorded investigation	264	30	11%	99	38%	50	19%	85	32%
Acquittals (general and special courts-martial)	148	<20	—	56	37%	44	29%	48	31%
Convictions (general and special courts-martial)	881	88	10%	335	38%	176	20%	282	32%

Legend: <20 refers to age groups that have zero or fewer than 20 servicemembers

"N" refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers were not included in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database. Although we analyzed age categories of 30-40 years separately from greater than 40 years, for reporting purposes, we combined servicemembers in these two age categories to protect privacy during instances when the number of servicemembers in an age category was fewer than 20. Percentages in this table may not add up to 100 due to rounding or the exclusion of information to ensure protection of privacy.

Table 24: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other	
	N	N	%	N	%	N	%	N	%	
Recorded investigations for drug offenses (Article 112a)	1,394	648	46%	303	21%	213	15%	230	16%	
Recorded investigations for sexual assault offenses (Article 120)	3,196	1,259	39%	816	25%	638	20%	483	15%	
Recorded investigations for all other offenses	2,603	1,047	40%	697	26%	465	18%	394	15%	
General and special courts-martial for drug offenses (Article 112a)	186	79	42%	48	25%	21	11%	38	20%	
General and special courts-martial for sexual assault offenses (Article 120)	451	166	36%	115	25%	89	20%	81	18%	
General and special courts-martial for all other offenses	364	165	44%	83	22%	64	17%	52	14%	

Legend: “N” refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown race, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy’s criminal investigative organization’s database. This table summarizes the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 25: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Navy Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N	N	%	N	%	
Recorded investigations for drug offenses (Article 112a)	1,410	1,257	89%	153	11%	
Recorded investigations for sexual assault offenses (Article 120)	3,246	3,140	97%	106	3%	
Recorded investigations for all other offenses	2,637	2,284	87%	353	13%	
General and special courts-martial for drug offenses (Article 112a)	190	166	87%	24	13%	
General and special courts-martial for all other offenses	371	340	92%	31	8%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Navy's criminal investigative organization's database. This table summarizes the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The summary statistics for servicemembers tried in general and special courts-martial for sexual assault offenses (Article 120) were omitted from this table to protect privacy because a gender group had fewer than 20 servicemembers.

Multivariate Regression Analyses of Navy Data

The multivariate results listed below in table 26 show the odds ratios for the multivariate regression analyses of Navy data. We used logistic regression to assess the relationship between the independent variables, such as race, education, rank, or gender, with the probability of being subject to a military justice action. Logistic regression allows for the coefficients to be converted into odds ratios. Odds ratios that are statistically significant and greater than 1.00 indicate that individuals with that characteristic are more likely to be subject to a military justice action. For example, an odds ratio of 1.55 for Black servicemembers would mean that they are 1.55 times more likely to be subject to a military justice action compared to White servicemembers. Odds ratios that are statistically significant and lower than 1.00 indicate that individuals with that characteristic are less likely to be subject to a military justice action. We excluded age and years of service from the Navy multivariate regression analyses due to high correlation with the rank variable.

Table 26: Odds Ratios for Navy Multivariate Regression Analyses

	Black	Hispanic	Other	Unknown race	Male	High school or less	Unknown education	Rank E1-E4	Officers
Likelihood of being subject of recorded investigations	2.06**	1.47**	1.27**	0.75**	3.03**	1.44**	1.07	1.13**	0.51**
Likelihood of trial in general and special courts-martial	2.01**	1.42**	1.45**	0.91	4.42**	1.23*	1.18	0.88	0.41**
Likelihood of trial in general and special courts-martial with a recorded investigation	1.45	1.13	1.71	1.13	1.16	0.93	1.63	0.97	2.94
Likelihood of trial in general and special courts-martial without a recorded investigation	2.07**	1.19	1.19	1.05	2.26**	1.35	1.6	0.86	0.42*
Likelihood of conviction in general and special courts-martial	1.04	1.08	0.95	1.08	1.06	1.83*	1.58	1.02	0.82
Likelihood of dismissal or discharge when convicted in general and special courts-martial	0.55**	0.88	1.24	0.9	1.16	1.48	0.7	1.21	1.34

Legend: ** next to the odds ratio indicate that the finding has a strong degree of statistical significance with a p-value less than 0.01.

* next to the odds ratio indicates that the finding is statistically significant with a p-value between 0.01 and 0.05.

If the space next to the odds ratio is blank, then the finding was not statistically significant.

Source: GAO analysis of Navy investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These multivariate regression analysis results demonstrate the degree to which a racial, gender, education, or rank group is more likely than the reference category to be subject of a recorded investigation, tried in general and special courts-martial, convicted in general and special courts-martial, and receive a more severe punishment following a conviction. All racial categories listed are in reference to White servicemembers, all gender groups listed are in reference to female servicemembers, all education groups listed are in reference to servicemembers with more than a high school education, and all rank groups are in reference to servicemembers between ranks E5 and E9. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Appendix VI: Marine Corps Data and Analyses

This appendix contains several tables that show the underlying data and analyses used throughout this report relating to Marine Corps personnel and military justice disciplinary actions from fiscal years 2013 through 2017. We did not include populations that contained fewer than 20 servicemembers in the populations presented in these tables to ensure the protection of sensitive information. As a result, the populations presented in this appendix may vary among the different tables and may vary from the populations presented in other places in this report. Our analyses of the Marine Corps investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination.

The following tables and information are included in this appendix:

- Table 27: Total Population of the Marine Corps by Race, Fiscal Years 2013–2017
- Table 28: Summary Statistics by Race for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 29: Summary Statistics by Gender for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 30: Summary Statistics by Rank for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 31: Summary Statistics by Education for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 32: Summary Statistics by Age for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 33: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 34: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Marine Corps Military Justice Actions, Fiscal Years 2013–2017
- Table 35 Odds Ratios for Marine Corps Multivariate Regression Analyses

Table 27: Total Population of the Marine Corps by Race, Fiscal Years 2013–2017

Race	Population	
	Number	Percent
American Indian or Alaska Native	3,451	1%
Asian	9,580	3%
Black or African American	36,529	10%
Hispanic	63,044	18%
Native Hawaiian or Pacific Islander	3,426	1%
Unknown	4,680	1%
White	232,083	66%
Total population	352,793	100%

Source: GAO analysis of Marine Corps personnel data. | GAO-19-344

Note: The total populations presented in this table represent the number of unique active-duty servicemembers who served during fiscal years 2013 through 2017.

Table 28: Summary Statistics by Race for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other		Unknown	
	N	N	%	N	%	N	%	N	%	N	%	
Total population	352,793	232,083	66%	36,529	10%	63,044	18%	16,457	5%	4,680	1%	
Recorded investigations	6,833	3,985	58%	1,286	19%	1,193	17%	258	4%	111	2%	
General and special courts-martial	1,354	749	55%	247	18%	268	20%	63	5%	27	2%	
General and special courts-martial with a recorded investigation	848	479	56%	152	18%	175	20%	42	5%	< 20		
General and special courts-martial without a recorded investigation	479	270	55%	95	19%	93	19%	21	4%	< 20		
Acquittals (general and special courts-martial)	190	115	57%	37	18%	38	19%	< 20		< 20		
Convictions (general and special courts-martial)	1,152	634	55%	210	18%	230	20%	55	5%	23	2%	
Summary courts-martial	1,389	886	63%	221	16%	230	16%	52	4%	< 20		
Nonjudicial punishments	49,184	30,853	63%	6,815	14%	8,656	18%	2,081	4%	779	2%	

Legend: <20 refers to racial groups that have zero or fewer than 20 servicemembers, to protect privacy.

"N" refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown race, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 29: Summary Statistics by Gender for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N	N	%	N	%	
Total population	352,793	323,491	92%	29,302	8%	
Recorded investigations	6,833	6,539	96%	294	4%	
General and special courts-martial	1,354	1,306	96%	48	4%	
General and special courts-martial with a recorded investigation	862	842	98%	20	2%	
General and special courts-martial without a recorded investigation	492	464	94%	28	6%	
Convictions (general and special courts-martial)	1,152	1,117	97%	35	3%	
Summary courts-martial	1,406	1,359	97%	47	3%	
Nonjudicial punishments	49,184	45,828	93%	3,356	7%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database.

Table 30: Summary Statistics by Rank for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population	Rank E1-E4		Rank E5-E9 and officers	
	N	N	%	N	%
Total population	352,800	247,195	70%	105,605	30%
Recorded investigations	6,833	5,127	75%	1,706	25%
General and special courts-martial	1,354	859	63%	495	37%
General and special courts-martial with a recorded investigation	862	568	66%	294	34%
General and special courts-martial without a recorded investigation	492	291	59%	201	41%
Acquittals (general and special courts-martial)	202	110	54%	92	46%
Convictions (general and special courts-martial)	1,152	749	65%	403	35%
Summary courts-martial	1,408	1,098	78%	310	22%
Nonjudicial punishments	49,184	34,362	70%	14,822	30%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database. Although we analyzed officers separately from enlisted servicemembers, for reporting purposes we combined servicemembers in rank categories E5-E9 with officers to protect privacy in those instances when the number of officers was fewer than 20.

Table 31: Summary Statistics by Education for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population		High school or less		More than high school		Unknown education	
	N	N	%	N	%	N	%	
Total population	352,793	307,568	87%	41,678	12%	3,547	1%	
Recorded investigations	6,833	6,452	94%	312	5%	69	1%	
General and special courts-martial	1,342	1,265	93%	77	6%	< 20		
General and special courts-martial with a recorded investigation	853	806	94%	47	5%	< 20		
General and special courts-martial without a recorded investigation	489	459	93%	30	6%	< 20		
Acquittals (general and special courts-martial)	187	187	93%	< 20		< 20		
Convictions (general and special courts-martial)	1,142	1,078	94%	64	6%	< 20		
Summary courts-martial	1,394	1,357	97%	37	3%	< 20		
Nonjudicial punishments	49,184	46,182	94%	2,509	5%	493	1%	

Legend: <20 refers to education groups that have zero or fewer than 20 servicemembers, to protect privacy.

"N" refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown education level, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or in other tables in this appendix. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 32: Summary Statistics by Age for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population		< 21 years		21-25 years		26-30 years		> 30 years	
	N	N	%	N	%	N	%	N	%	
Total population	352,793	114,326	32%	141,427	40%	48,688	14%	48,352	14%	
Recorded investigations	6,833	1,986	29%	3,229	47%	954	14%	664	10%	
General and special courts-martial	1,354	323	24%	568	42%	248	18%	215	16%	
General and special courts-martial with a recorded investigation	862	210	24%	389	45%	139	16%	124	14%	
General and special courts-martial without a recorded investigation	492	113	23%	179	36%	109	22%	91	18%	
Acquittals (general and special courts-martial)	202	22	11%	91	45%	46	23%	43	21%	
Convictions (general and special courts-martial)	1,152	301	26%	477	41%	202	18%	172	15%	
Summary courts-martial	1,406	496	35%	613	44%	179	13%	118	8%	
Nonjudicial punishments	49,184	11,414	23%	22,288	45%	8,166	17%	7,316	15%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy's military criminal investigative organization's database.

Table 33: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other		Unknown race	
	N	N	%	N	%	N	%	N	%	N	%	
Recorded investigations for drug offenses (Article 112a)	2,290	1,471	64%	403	18%	327	14%	64	3%	25	1%	
Recorded investigations for sexual assault offenses (Article 120)	1,661	881	53%	295	18%	390	23%	65	4%	30	2%	
Recorded investigations for all other offenses	2,882	1,633	57%	588	20%	476	17%	129	4%	56	2%	
General and special courts-martial for drug offenses (Article 112a)	193	132	64%	36	18%	25	12%	< 20		< 20		
General and special courts-martial for sexual assault offenses (Article 120)	319	185	55%	53	16%	81	24%	< 20		< 20		
General and special courts-martial for all other offenses	560	307	53%	103	18%	117	20%	33	6%	< 20		

Legend: <20 refers to racial groups that have zero or fewer than 20 servicemembers, to protect privacy.

“N” refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown race, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. This table summarizes the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The term “recorded investigation” refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy’s military criminal investigative organization’s database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 34: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Marine Corps Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N		N	%	N	%
Recorded investigations for drug offenses (Article 112a)	2,290		2,181	95%	109	5%
Recorded investigations for sexual assault offenses (Article 120)	1,661		1,639	99%	22	1%
Recorded investigations for all other offenses	2,882		2,719	94%	163	6%
General and special courts-martial for all other offenses	575		549	95%	26	5%

Legend: “N” refers to the population size for each group.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. This table summarizes the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The term “recorded investigation” refers to an investigation where a servicemember was the subject of a criminal investigation that was recorded in the Navy’s military criminal investigative organization’s database. Although we analyzed gender data for general and special courts-martial for drug offenses and sexual assault offenses, we omitted those data from this table to protect privacy because a gender group had fewer than 20 servicemembers.

Multivariate Regression Analyses of Marine Corps Data

The multivariate results listed below in table 35 show the odds ratios for the multivariate regression analyses of Marine Corps data. We used logistic regression to assess the relationship between the independent variables, such as race, education, rank, or gender, with the probability of being subject to a military justice action. Logistic regression allows for the coefficients to be converted into odds ratios. Odds ratios that are statistically significant and greater than 1.00 indicate that individuals with that characteristic are more likely to be subject to a military justice action. For example, an odds ratio of 1.55 for Black servicemembers would mean that they are 1.55 times more likely to be subject to a military justice action compared to White servicemembers. Odds ratios that are statistically significant and lower than 1.00 indicate that individuals with that characteristic are less likely to be subject to a military justice action. We excluded age and years of service from the Marine Corps multivariate regression analyses due to high correlation with the rank variable.

Table 35: Odds Ratios for Marine Corps Multivariate Regression Analyses

	Black	Hispanic	Other	Unknown race	Male	High school or less	Unknown education	Rank E1-E4	Officers
Likelihood of being subject of recorded investigations	2.07**	1.07*	0.92	1.6**	2.15**	1.68**	1.89**	1.02	0.35**
Likelihood of trial in general and special courts-martial	1.99**	1.29**	1.2	1.7**	2.56**	1.4*	NA	0.57**	0.17**
Likelihood of trial in general and special courts-martial with a recorded investigation	0.84	2**	0.86	NA	0.81	0.91	NA	0.58**	NA
Likelihood of trial in general and special courts-martial without a recorded investigation	2.09**	1.23	1.09	NA	1.56*	1.35	NA	0.47**	NA
Likelihood of conviction in general and special courts-martial	1.06	1.11	1.27	1.18	2.47**	0.98	NA	1.52**	NA
Likelihood of dismissal or discharge when convicted in general and special courts-martial	0.96	1.30	1.81	2.48	2.65**	2.00*	NA	3.03**	NA
Likelihood of trial in summary courts-martial	1.57**	0.92	0.84	1.17	2.69**	1.9**	NA	1.09	NA
Likelihood of receiving nonjudicial punishments	1.41**	0.99	0.94**	1.35**	1.29**	1.52**	1.71**	0.7**	0.16**

Legend: ** next to the odds ratio indicates that the finding has a strong degree of statistical significance with a p-value less than 0.01.

* next to the odds ratio indicates that the finding is statistically significant with a p-value between 0.01 and 0.05.

If the space next to the odds ratio is blank, then the finding was not statistically significant.

NA indicates that the odds ratio for that group is not available because the number of servicemembers was too small to produce reliable findings.

Source: GAO analysis of Marine Corps investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These multivariate regression analysis results demonstrate the degree to which a racial, gender, education, or rank group is more likely than the reference category to be the subject of a recorded investigation, tried in general and special courts-martial, convicted in general and special courts-martial, receive a more severe punishment following a conviction, tried in summary courts-martial, or subject to nonjudicial punishments. All racial categories listed are in reference to White servicemembers, all gender groups listed are in reference to female servicemembers, all education groups listed are in reference to servicemembers with more than a high school education, and all rank groups are in reference to servicemembers between ranks E5 and E9. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races.

Appendix VII: Air Force Data and Analyses

This appendix contains several tables that show the underlying data and analyses used throughout this report relating to Air Force personnel and military justice disciplinary actions from fiscal years 2013 through 2017. We did not include populations that contained fewer than 20 servicemembers in the populations presented in these tables to ensure the protection of sensitive information. As a result, the populations presented in this appendix may vary among the different tables and may vary from the populations presented in other places in this report. Our analyses of the Air Force's investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination.

The following tables and information are included in this appendix:

- Table 36: Total Population of the Air Force by Race, Fiscal Years 2013–2017
- Table 37: Summary Statistics by Race for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 38: Summary Statistics by Gender for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 39: Summary Statistics by Rank for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 40: Summary Statistics by Education for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 41: Summary Statistics by Age for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 42: Summary Statistics by Rank and Years of Service Hybrid Variable for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 43: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 44: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Air Force Military Justice Actions, Fiscal Years 2013–2017
- Table 45: Odds Ratios for Air Force Multivariate Regression Analyses

Table 36: Total Population of the Air Force by Race, Fiscal Years 2013–2017

Race	Total population	
	Number	Percent
American Indian/Alaska Native	2,802	1%
Asian	16,273	3%
Black	73,836	15%
Hawaiian/Pacific Islander	5,000	1%
Hispanic	16,844	3%
Multiple	13,165	3%
Unknown	12,891	3%
White	343,655	71%
Total population	484,466	100%

Source: GAO analysis of Air Force personnel data. | GAO-19-344

Note: The total populations presented in this table represent the number of unique active-duty servicemembers who served during fiscal years 2013 through 2017.

Table 37: Summary Statistics by Race for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other		Unknown	
	N	N	%	N	%	N	%	N	%	N	%	
Total population	484,466	343,655	71%	73,836	15%	16,844	3%	37,243	8%	12,888	3%	
Recorded investigations	6,630	4,232	64%	1,470	22%	268	4%	476	7%	184	3%	
General and special courts-martial	2,359	1,518	64%	534	23%	86	4%	165	7%	56	2%	
General and special courts-martial with a recorded investigation	1,259	809	64%	274	22%	54	4%	85	7%	37	3%	
General and special courts-martial without a recorded investigation	1,081	709	64%	260	24%	32	3%	80	7%	<20	—	
Acquittals (general and special courts-martial)	404	265	61%	111	26%	<20	—	28	6%	<20	—	
Convictions (general and special courts-martial)	1,887	1,235	65%	416	22%	66	3%	130	7%	40	2%	
Summary courts-martial	473	297	61%	133	27%	<20	—	43	9%	<20	—	
Nonjudicial punishments	20,899	13,117	63%	5,274	25%	596	3%	1,470	7%	442	2%	

Legend: <20 refers to racial groups that have zero or fewer than 20 servicemembers, to protect privacy.

"N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown race, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 38: Summary Statistics by Gender for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N	N	%	N	%	
Total population	484,466	387,970	80%	96,496	20%	
Recorded investigations	6,630	6,006	91%	624	9%	
General and special courts-martial	2,359	2,188	93%	171	7%	
General and special courts-martial with a recorded investigation	1,259	1,179	94%	80	6%	
General and special courts-martial without a recorded investigation	1,100	1,009	92%	91	8%	
Convictions (general and special courts-martial)	1,887	1,738	92%	149	8%	
Summary courts-martial	490	441	90%	49	10%	
Nonjudicial punishments	20,899	17,991	86%	2,908	14%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's military criminal investigative organization's database.

Table 39: Summary Statistics by Rank for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population	Rank E1-E4		Rank E5-E6		Rank E7-E9 and officers	
	N	N	%	N	%	N	%
Total population	484,466	224,739	46%	127,516	26%	132,211	23%
Recorded investigations	6,630	4,248	64%	1,556	23%	826	12%
General and special courts-martial	2,359	1,764	75%	396	17%	199	8%
General and special courts-martial with a recorded investigation	1,259	1,034	82%	135	11%	90	7%
General and special courts-martial without a recorded investigation	1,100	730	66%	261	24%	109	9%
Acquittals (general and special courts-martial)	435	221	51%	167	38%	47	10%
Convictions (general and special courts-martial)	1,887	1,531	81%	216	11%	140	8%
Nonjudicial punishments	20,899	16,151	77%	3,707	18%	1,041	5%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's military criminal investigative organization's database. Although we analyzed officers separately from enlisted servicemembers, for reporting purposes we combined servicemembers in rank categories E7-E9 with officers in this table to protect privacy in those instances when the number of servicemembers was fewer than 20. The summary statistics for servicemembers tried in summary courts-martial were omitted from this table to protect privacy because a rank group had fewer than 20 servicemembers. Percentages in this table may not add up to 100 due to rounding.

Table 40: Summary Statistics by Education for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population			High school and some college		Associates degree		Bachelor’s degree		Post-bachelor’s degree		Unknown education	
	N	N	%	N	%	N	%	N	%	N	%	N	%
Total population	484,466	206,029	43%	156,762	32%	54,551	11%	59,161	12%	7,963	2%		
Recorded investigations	6,630	3,511	53%	2,268	34%	448	7%	377	6%	26	1%		
General and special courts-martial	2,345	1,392	59%	724	31%	138	6%	91	4%	<20			
General and special courts-martial with a recorded investigation	1,256	692	55%	437	35%	78	6%	49	4%	<20			
General and special courts-martial without a recorded investigation	1,089	700	64%	287	26%	60	5%	42	4%	<20			
Acquittals (general and special courts-martial)	418	210	48%	168	39%	40	9%	<20		<20			
Convictions (general and special courts-martial)	1,876	1,167	62%	547	29%	94	5%	68	4%	<20			
Summary courts-martial	481	417	85%	64	13%	<20		<20		<20			
Nonjudicial punishments	20,899	15,205	73%	4,475	21%	654	3%	377	2%	188	1%		

Legend: <20 refers to education groups that have zero or fewer than 20 servicemembers, to protect privacy. "N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown education level, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 41: Summary Statistics by Age for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population		< 21 years		21-25 years		26-30 years		31-35 years		> 35 years	
	N	N	%	N	%	N	%	N	%	N	%	
Total population	484,466	70,019	14%	119,557	25%	114,941	24%	73,072	15%	106,877	22%	
Recorded investigations	6,630	512	8%	2,214	33%	1,906	29%	989	15%	1,009	15%	
General and special courts-martial	2,359	282	12%	759	32%	676	29%	335	14%	307	13%	
General and special courts-martial with a recorded investigation	1,259	49	4%	414	33%	420	33%	198	16%	178	14%	
General and special courts-martial without a recorded investigation	1,100	233	21%	345	31%	256	23%	137	12%	129	12%	
Acquittals (general and special courts-martial)	435	32	7%	126	29%	134	31%	79	18%	64	15%	
Convictions (general and special courts-martial)	1,887	251	13%	627	33%	523	28%	253	13%	233	12%	
Summary courts-martial	471	160	33%	242	49%	69	14%	<20		<20		
Nonjudicial punishments	20,899	6,078	29%	7,614	36%	4,090	20%	1,811	9%	1,306	6%	

Legend: <20 refers to age groups that have zero or fewer than 20 servicemembers, to protect privacy.

"N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers in certain age groups, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's military criminal investigative organization's database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 42: Summary Statistics by Rank and Years of Service Hybrid Variable for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population	Rank E1-E4 and 0-4 years of service		Rank E1-E4 and 4-6 years of service		Rank E1-E4 and > 6 years of service	
	N	N	%	N	%	N	%
Total population	224,726	180,899	37%	35,495	7%	8,332	2%
Recorded investigations	4,248	2,189	33%	1,222	18%	837	13%
General and special courts-martial	1,764	925	39%	362	15%	477	20%
General and special courts-martial with a recorded investigation	1,034	375	30%	272	22%	387	31%
General and special courts-martial without a recorded investigation	730	550	50%	90	8%	90	8%
Acquittals (general and special courts-martial)	221	123	28%	67	15%	31	7%
Convictions (general and special courts-martial)	1,531	794	42%	296	16%	441	23%
Nonjudicial punishments	16,151	12,964	62%	2,205	11%	982	5%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Rank and years of service were highly correlated variables, which usually results in selecting just one of the variables to analyze in our multivariate analyses. Based on discussion with Air Force officials, we developed this hybrid rank and years of service variable that controlled for years of service among the lower enlisted ranks (E-1 through E-4). The total population presented in this table represents the number of servicemembers in ranks E1 through E4 that also had the reported number of years of service among unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's military criminal investigative organization's database. The summary statistics for servicemembers tried in summary courts-martial were omitted from this table to protect privacy because a rank group had fewer than 20 servicemembers. Percentages in this table do not add up to 100 because the table only shows populations in lower enlisted ranks, but the percentages were computed based on the rank group's proportion of the total Air Force population.

Table 43: Offenses Investigated and Tried in General and Special Courts-Martial by Race for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other		Unknown race	
	N	N	%	N	%	N	%	N	%	N	%	
Recorded investigations for drug offenses (Article 112a)	2,226	1,360	61%	558	25%	126	6%	79	4%	103	5%	
Recorded investigations for sexual assault offenses (Article 120)	2,522	1,623	64%	504	20%	218	9%	109	4%	68	3%	
Recorded investigations for all other offenses	1,652	1,074	65%	336	20%	105	6%	68	4%	69	4%	
General and special courts-martial for drug offenses (Article 112a)	925	599	65%	164	18%	85	9%	77	8%	<20	—	
General and special courts-martial for sexual assault offenses (Article 120)	718	407	57%	155	22%	102	14%	54	8%	<20	—	
General and special courts-martial for all other offenses	670	380	57%	167	25%	71	11%	52	8%	<20	—	

Legend: <20 refers to race groups that have zero or fewer than 20 servicemembers, to protect privacy.

“N” refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown race, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. This table summarizes the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force’s military criminal investigative organization’s database. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 44: Offenses Investigated and Tried in General and Special Courts-Martial by Gender for Air Force Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N		N	%	N	%
Recorded investigations for drug offenses (Article 112a)	2,226		1,903	85%	323	15%
Recorded investigations for sexual assault offenses (Article 120)	2,519		2,414	96%	105	4%
Recorded investigations for all other offenses	1,651		1,472	89%	179	11%
General and special courts-martial for drug offenses (Article 112a)	938		837	89%	101	11%
General and special courts-martial for all other offenses	682		617	90%	65	10%

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. This table summarizes the number of instances in which an offense was investigated or tried in general and special courts-martial. Multiple offenses may be incorporated into the investigation or court-martial of a single servicemember. As such, a single case could be included in multiple offense groups in this table. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force's criminal investigative organization's database. The summary statistics for servicemembers tried in general and special courts-martial for sexual assault offenses (Article 120) were omitted from this table to protect privacy because a gender group had fewer than 20 servicemembers. There were 3 cases with missing gender among recorded investigations for sexual assault offenses (Article 120) and there was 1 case with missing gender among recorded investigations for all other offenses.

**Multivariate Regression
Analyses of Air Force Data**

The multivariate results listed below in table 45 show the odds ratios for the multivariate regression analyses of Air Force data. We used logistic regression to assess the relationship between the independent variables, such as race, education, rank, or gender, with the probability of being subject to a military justice action. Logistic regression allows for the coefficients to be converted into odds ratios. Odds ratios that are statistically significant and greater than 1.00 indicate that individuals with that characteristic are more likely to be subject to a military justice action. For example, an odds ratio of 1.55 for Black servicemembers would mean that they are 1.55 times more likely to be subject to a military justice action compared to White servicemembers. Odds ratios that are statistically significant and lower than 1.00 indicate that individuals with that characteristic are less likely to be subject to a military justice action. We controlled for years of service among the lower enlisted ranks (E1-E4), but excluded age from the Air Force multivariate regression analyses due to high correlation with the rank and years of service variables.

Table 45: Odds Ratios for Air Force Multivariate Regression Analyses

	Black	Hispanic	Other	Male	High school or some college	Associates degree	Rank E1-E4 and 0-4 years of service	Rank E1-E4 and 4-6 years of service	Rank E1-E4 and > 6 years of service
Likelihood of being subject of recorded investigations	1.58**	1.36**	1.05	2.41**	1.55**	1.54**	1.14**	3.22**	9.74**
Likelihood of trial in general and special courts-martial	1.51**	1.34**	1.01	3.14**	1.41**	1.40**	1.98**	3.88**	21.60**
Likelihood of trial in general and special courts-martial with a recorded investigation	0.89	1.06	0.90	1.64**	0.54*	0.65*	2.57**	3.54**	9.58**
Likelihood of trial in general and special courts-martial without a recorded investigation	1.64**	1.17	1.06	2.84**	2.66**	1.71**	1.31**	1.14	5.17**
Likelihood of conviction in a general and special courts-martial	0.87	1.38	0.92	0.97	0.69	0.63*	2.77**	2.65**	11.15**
Likelihood of receiving a more severe punishment when convicted in general and special courts-martial	0.80*	0.87	1.00	1.70**	0.51**	0.41**	1.95**	4.12**	3.43**
Likelihood of trial in summary courts-martial	1.87**	NA	1.25	2.31**	5.72**	3.09*	7.64**	8.02**	8.51**
Likelihood of receiving nonjudicial punishments	1.77**	1.42**	0.99	1.62**	3.95**	2.34**	2.34**	2.00**	4.05**

Legend: ** next to the odds ratio indicates that the finding has a strong degree of statistical significance with a p-value less than 0.01.

* next to the odds ratio indicates that the finding is statistically significant with a p-value between 0.01 and 0.05.

If the space next to the odds ratio is blank, then the finding was not statistically significant.

“N” refers to the population size for each group.

“NA” indicates that the odds ratio for that group were not available because the number of servicemembers was too small to produce reliable findings.

The double line separates the multivariate analyses from the ordered logistic regression analysis.

Source: GAO analysis of Air Force investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These multivariate regression analysis results demonstrate the degree to which a racial, gender, or rank group combined with length of service is more likely than the reference category to be subject of a recorded investigation, tried in general and special courts-martial, convicted in general and special courts-martial, tried in summary courts-martial, and receive nonjudicial punishments. We used an ordered logistic regression analysis to calculate the likelihood of receiving a more severe punishment as a result of being convicted in general and special courts-martial. All racial categories listed are in reference to White servicemembers, all gender groups listed are in reference to female servicemembers, all education groups listed are in reference to servicemembers with more than a high school education, and all rank groups are in reference to servicemembers between ranks E5 and E9. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Air Force’s military criminal investigative organization’s database.

Appendix VIII: Coast Guard Data and Analyses

This appendix contains several tables that show the underlying data and analyses used throughout this report relating to Coast Guard personnel and military justice disciplinary actions from fiscal years 2013 through 2017. We did not include populations that contained fewer than 20 servicemembers in the populations presented in these tables to ensure the protection of sensitive information. As a result, the populations presented in this appendix may vary among the different tables and may vary from the populations presented in other places in this report. Our analyses of the Coast Guard's investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination.

The following tables and information are included in this appendix:

- Table 46: Total Population of the Coast Guard by Race, Fiscal Years 2013–2017
- Table 47: Summary Statistics by Race for Coast Guard Military Justice Actions, Fiscal Years 2013–2017
- Table 48: Summary Statistics by Gender for Coast Guard Military Justice Actions, Fiscal Years 2013–2017
- Table 49: Summary Statistics by Rank for Coast Guard Military Justice Actions, Fiscal Years 2013–2017
- Table 50: Summary Statistics by Education for Coast Guard Military Justice Actions, Fiscal Years 2013–2017
- Table 51: Summary Statistics by Age for Coast Guard Military Justice Actions, Fiscal Years 2013–2017
- Table 52: Odds Ratios for Coast Guard Multivariate Regression Analyses

Table 46: Total Population of the Coast Guard by Race, Fiscal Years 2013–2017

Race	Population	
	Number	Percent
American Indian/Alaskan Native	1,234	2%
Asian	879	1%
Black or African American	3,404	5%
Hispanic	8,534	13%
Multiple races	3,253	5%
Unknown race	4,357	7%
White	45,043	68%
Total population	66,704	100%

Source: GAO analysis of Coast Guard personnel data. | GAO-19-344

Note: The total populations presented in this table represent the number of unique active-duty servicemembers who served during fiscal years 2013 through 2017.

Table 47: Summary Statistics by Race for Coast Guard Military Justice Actions, Fiscal Years 2013–2017

	Population		White		Black		Hispanic		Other		Unknown race	
	N		N	%	N	%	N	%	N	%	N	%
Total population	66,704		45,043	68%	3,404	5%	8,534	13%	5,366	8%	4,357	7%
Recorded investigations	1,437		845	59%	144	10%	253	18%	114	8%	81	6%
General and special courts-martial	175		133	64%	< 20		42	20%	< 20		< 20	

Legend: <20 refers to race groups that have zero or fewer than 20 servicemembers, to protect privacy.

“N” refers to the population size for each group.

Source: GAO analysis of Coast Guard investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers were not included in the total populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Coast Guard’s criminal investigative organization’s database or was recorded in the Coast Guard’s military justice database as an investigation. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 48: Summary Statistics by Gender for Coast Guard Military Justice Actions, Fiscal Years 2013–2017

	Population		Male		Female	
	N	N	Percent	N	Percent	
Total population	66,704	56,117	84%	10,587	16%	
Recorded investigations	1,437	1,278	89%	159	11%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Coast Guard investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Coast Guard's criminal investigative organization's database or was recorded in the Coast Guard's military justice database as an investigation. The summary statistics for servicemembers tried in general and special and summary courts-martial were omitted from this table protect privacy because a gender group had fewer than 20 servicemembers.

Table 49: Summary Statistics by Rank for Coast Guard Military Justice Actions, Fiscal Years 2013–2017

	Population		Rank E1-E4		Rank E5-E9 and officers	
	N	N	Percent	N	Percent	
Total population	66,704	28,939	43%	37,765	57%	
Recorded investigations	1,437	622	43%	815	57%	
General and special courts-martial	209	81	39%	128	61%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Coast Guard investigations, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The populations presented in this table represent the unique records of active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Coast Guard's criminal investigative organization's database or was recorded in the Coast Guard's military justice database as an investigation. Although we analyzed officers separately from enlisted servicemembers, for reporting purposes we combined servicemembers in rank categories E5-E9 with officers in this table to protect privacy in those instances when the number of officers was fewer than 20.

Table 50: Summary Statistics by Education for Coast Guard Military Justice Actions, Fiscal Years 2013–2017

	Population		High school or less		More than high school		Unknown education	
	N	N	Percent	N	Percent	N	Percent	
Total population	66,704	43,985	66%	20,931	31%	1,788	3%	
Recorded investigations	1,437	1,073	75%	325	23%	39	3%	
General and special courts-martial	202	171	82%	31	15%	< 20		

Legend: <20 refers to education levels that have zero or fewer than 20 servicemembers, to protect privacy. "N" refers to the population size for each group.

Source: GAO analysis of Coast Guard investigation, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. Populations that contained fewer than 20 servicemembers, including servicemembers with unknown education level, were not included in the populations presented in this table to protect privacy. As a result, the populations presented in this table may vary from the populations presented in the body of the report or from other tables in this appendix. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal year 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Coast Guard's criminal investigative organization's database or was recorded in the Coast Guard's military justice database as an investigation. Percentages in this table may not add up to 100 due to rounding, the exclusion of information identified as unknown or missing, and/or to protect privacy.

Table 51: Summary Statistics by Age for Coast Guard Military Justice Actions, Fiscal Years 2013–2017

	Population		<25 years		25-30 years		30-40 years		≥40 years	
	N	N	Percent	N	Percent	N	Percent	N	Percent	
Total population	66,704	19,108	29%	15,524	23%	20,927	31%	11,145	17%	
Recorded investigations	1,437	399	28%	357	25%	510	35%	171	12%	
General and special courts-martial	209	44	21%	61	29%	82	39%	22	11%	

Legend: "N" refers to the population size for each group.

Source: GAO analysis of Coast Guard investigation, military justice, and personnel data. | GAO-19-344

Note: The information presented in this table, taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. The total population presented in this table represents the number of unique active-duty servicemembers during fiscal years 2013 through 2017. The term "recorded investigation" refers to where a servicemember was the subject of a criminal investigation that was recorded in the Coast Guard's criminal investigative organization's database or was recorded in the Coast Guard's military justice database as an investigation.

Multivariate Regression Analyses of Coast Guard Data

The multivariate results listed below in table 52 show the odds ratios for the multivariate regression analyses of Coast Guard data. We used logistic regression to assess the relationship between the independent variables, such as race, education, rank, or gender, with the probability of being subject to a military justice action. Logistic regression allows for the coefficients to be converted into odds ratios. Odds ratios that are statistically significant and greater than 1.00 indicate that individuals with that characteristic are more likely to be subject to a military justice action. For example, an odds ratio of 1.55 for Black servicemembers would mean that they are 1.55 times more likely to be subject to a military justice action compared to White servicemembers. Odds ratios that are statistically significant and lower than 1.00 indicate that individuals with that characteristic are less likely to be subject to a military justice action. We excluded age and years of service from the Coast Guard analyses due to high correlation with the rank variable.

Table 52: Odds Ratios for Coast Guard Multivariate Regression Analyses

	Black	Hispanic	Unknown race	Other	Male	High school or less	Unknown education	Rank E5-E9	Officers
Recorded investigations	2.36**	1.54**	1.03	1.13	1.43**	1.45**	1.52*	1.22**	0.71**

Legend: ** next to the odds ratio indicate that the finding has a strong degree of statistical significance with a p-value less than 0.01. * next to the odds ratio indicates that the finding is statistically significant with a p-value between 0.01 and 0.05. If the space next to the odds ratio is blank, then the finding was not statistically significant.

Source: GAO analysis of Coast Guard investigations and personnel data. | GAO-19-344

Note: The information presented in this table taken alone, should not be used to make conclusions about the presence or absence of unlawful discrimination. These multivariate regression analysis results demonstrate the degree to which a racial, gender, education, or rank group is more likely than the reference category to be subject of a recorded investigation. The term “recorded investigation” refers to where a servicemember was the subject of a criminal investigation that was recorded in the Coast Guard’s criminal investigative organization’s database or was recorded in the Coast Guard’s military justice database as an investigation. All racial categories listed are in reference to White servicemembers, all gender groups listed are in reference to female servicemembers, all education groups listed are in reference to servicemembers with more than a high school education, and all rank groups are in reference to servicemembers between ranks E1 and E4. The Other race group includes individuals who identified as American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and multiple races. We could not perform a multivariate regression analysis on general and special courts-martial due to the small number of adjudications in the Coast Guard during 2013 through 2017.

Appendix IX: Key Indicators for Military Justice Actions

We found that age, rank, length of service, and education were indicators of a servicemember's likelihood of being the subject of a recorded investigation, court-martial, or nonjudicial punishment across the military services.¹ To analyze age, rank, length of service, and education, we used bivariate regression analyses to determine which sub-population of each attribute was most likely to be subject to a recorded investigation, court-martial, or nonjudicial punishment. This appendix contains several tables that show the rank, education, length of service, and age groups most likely to be subject to a recorded investigation, tried in general and special courts-martial, tried in summary court-martial, and receive a nonjudicial punishment for all services from fiscal years 2013 through 2017. For the Coast Guard, we could not analyze age, rank, length of service, and education as indicators for courts-martial or nonjudicial punishment due to the small number of recorded military justice cases from fiscal years 2013 through 2017. Our analyses of the services' investigations, military justice, and personnel databases, as reflected in these tables, taken alone, do not establish the presence or absence of unlawful discrimination.

The following tables and information are included in this appendix:

- Table 53: Servicemember Rank Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Rank Groups
- Table 54: Overview of Servicemember Education Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Education Groups
- Table 55: Servicemember Length of Service Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Length of Service Groups

¹Investigations are recorded in the military services' criminal investigative organizations' databases when a servicemember is the subject of a criminal allegation made by another. For purposes of this report, we state that the servicemember had a "recorded investigation" to describe these cases. For additional explanation of the databases we used to analyze investigations, please see Appendix I. For purposes of this report, we use the term "likelihood" when discussing the odds ratios from the results of our regression analyses. Odds ratios that are statistically significant and greater than 1.00 or lower than 1.00 indicate that individuals with that characteristic are more likely or less likely, respectively, to be subject to a particular military justice action.

- Table 56: Servicemember Age Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Age Groups

Table 53: Servicemember Rank Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Rank Groups

Service	Investigations	Summary courts-martial	General and special courts-martial	Nonjudicial punishments (NJP)
Army	E1-E4 1.85 times more likely	No results due to incomplete summary courts-martial data	E5-E9 1.51 times more likely	No results due to incomplete NJP data.
Navy	E1-E4 1.37 times more likely	No results due to incomplete summary courts-martial data	E5-E9 1.39 times more likely	No results due to incomplete NJP data
Marine Corps	E1-E4 1.29 times more likely	E1-E4 1.52 times more likely	E5-E9 1.96 times more likely	E5-E9 1.56 times more likely
Air Force	E1-E4 2.08 times more likely	E1-E4 16.04 times more likely	E1-E4 3.42 times more likely	E1-E4 4.16 times more likely
Coast Guard	E5-E9 1.36 times more likely	No results due to small number of cases	No results due to small number of cases	No results due to small number of cases

Source: GAO analysis of each military service's personnel, investigations, and military justice database information. | GAO-19-344

Note: The results presented in this table were calculated through a bivariate regression model that compared servicemembers in one rank group with a composite variable of servicemembers in all other rank groups. We grouped the ranks in the Army, Navy, Marine Corps, and Coast Guard as; rank group 1: E1-E4, rank group 2: E5-E9, rank group 3: officers and warrant officers. We grouped the ranks in the Air Force as; rank group 1: E1-E4, rank group 2: E5-E6, rank group 3: E7-E9, rank group 4: officers and warrant officers.

Table 54: Servicemember Education Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Education Groups

Service	Investigations	Summary courts-martial	General and special courts-martial	Nonjudicial punishments (NJP)
Army	No results due to data reliability issues	No results due to data reliability issues	No results due to data reliability issues	No results due to data reliability issues
Navy	High school or less 2.16 times more likely	No results due to incomplete summary courts-martial data	High school or less 1.80 times more likely	No results due to incomplete NJP data
Marine Corps	High school or less 2.52 times more likely	High School or Less 3.93 times more likely	High school or less 2.09 times more likely	High school or less 2.49 times more likely
Air Force	High school/Some college 1.53 times more likely	High school/Some college 7.73 times more likely	High school/Some college 1.95 times more likely	High school/Some college 3.82 times more likely
Coast Guard	High school or less 1.56 times more likely	No results due to small number of cases	No results due to small number of cases	No results due to small number of cases

Source: GAO analysis of each military service's personnel, investigations, and military justice database information. | GAO-19-344

Appendix IX: Key Indicators for Military Justice Actions

Table 55: Servicemember Length of Service Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Length of Service Groups

Service	Investigations	Summary courts-martial	General and special courts-martial	Nonjudicial punishments (NJP)
Army	0-4 years 1.36 times more likely	No results due to incomplete summary courts-martial data	4-8 years 1.90 times more likely	No results due to incomplete NJP data
Navy	3-4 years 1.62 times more likely	No results due to incomplete summary courts-martial data	3-4 years 1.37 times more likely	No results due to incomplete NJP data
Marine Corps	5-6 years 1.63 times more likely	5-6 years 1.34 times more likely	5-6 years 1.96 times more likely	7-10 years 1.69 times more likely
Air Force	Over 6 years 9.07 times more likely	0-4 years 5.02 times more likely	Over 6 years 15.08 times more likely	Over 6 years 3.06 times more likely
Coast Guard	6-10 years 1.27 times more likely	No results due to small number of cases	No results due to small number of cases	No results due to small number of cases

Source: GAO analysis of each military service's personnel, investigations, and military justice database information. | GAO-19-344

Table 56: Servicemember Age Groups Most Likely to Be Subject to Investigations, Courts-Martial, and Nonjudicial Punishments when Compared with All Other Age Groups

Service	Investigations	Summary courts-martial	General and special courts-martial	Nonjudicial punishments (NJP)
Army	Under 25 years old 1.63 times more likely	No results due to incomplete summary courts-martial data	30-40 years old 1.37 times more likely	No results due to incomplete NJP data
Navy	21-25 years old 1.48 times more	No results due to incomplete summary courts-martial data	21-25 years old 1.25 times more likely	No results due to incomplete NJP data
Marine Corps	21-25 years old 1.35 times more likely	21-25 years old 1.15 times more likely	26-30 years old 1.4 times more likely	31-40 years old 1.32 times more likely
Air Force	21-25 years old 1.54 times more likely	21-25 years old 2.98 times more likely	21-25 years old 1.44 times more likely	Less than 21 years old 2.56 times more likely
Coast Guard	30-40 years old 1.12 times more likely	No results due to small number of cases	No results due to small number of cases	No results due to small number of cases

Source: GAO analysis of each military service's personnel, investigations, and military justice database information. | GAO-19-344

Appendix X: Comments from the Department of Defense



FORCE RESILIENCY

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MAY 15 2019

Ms. Brenda S. Farrell
Director, Defense Capabilities and Management
441 G St NW
Washington, DC 20548

Dear Ms. Farrell

This transmits the Department of Defense (DoD) response to the Government Accountability Office (GAO) Draft Report GAO-19-344, "MILITARY JUSTICE: DoD Needs to Improve Its Capability to Assess Racial and Gender Disparities," dated April 11, 2019 (GAO Code 102463). My point of contact is Ms. Mary Cullinan, who may be reached at mary.b.cullinan.civ@mail.mil, or (703) 695-8118.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth P. Van Winkle".

Elizabeth P. Van Winkle, Ph.D.
Executive Director, Force Resiliency

Enclosure:
As stated

GAO DRAFT REPORT DATED APRIL 11, 2019
GAO-19-344 (GAO CODE 102463)

“MILITARY JUSTICE: DOD NEEDS TO IMPROVE ITS CAPABILITY TO ASSESS
RACIAL AND GENDER DISPARITIES”

DEPARTMENT OF DEFENSE COMMENTS
TO THE GAO RECOMMENDATION

The Department of Defense commends GAO for its analysis. Any racial or gender discrimination is anathema to the operation of a criminal justice system. The Department understands GAO’s findings to mean that race and gender were not statistically significant factors in the likelihood of conviction in general and special courts-martial for most Services. Also, minority Service members were either less likely to receive a more severe punishment than white Service members or there was no difference among racial groups. These findings are consistent with the Department’s commitment to operating a colorblind military justice system. However, the GAO’s analysis of available data found gender and racial disparities in some phases of the military’s accountability system. Consistent with the Department’s commitment to operating an accountability system free from invidious discrimination, we will conduct a detailed analysis to identify the causes of any such disparities and will continue to ensure our system operates free from discrimination.

RECOMMENDATION 2: The GAO recommends that the Secretary of the Army should develop the capability to present servicemembers’ race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Army’s investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Army.

DoD RESPONSE: Concur.

RECOMMENDATION 3: The GAO recommends that the Secretary of the Air Force should develop the capability to present servicemembers’ race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Air Force’s investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Air Force.

DoD RESPONSE: Concur.

RECOMMENDATION 4: The GAO recommends that the Secretary of the Navy should develop the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for the military justice databases, either by (1) modifying the Navy's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Navy.

DoD RESPONSE: Concur.

RECOMMENDATION 6: The GAO recommends that the Secretary of Defense should ensure that the Joint Service Committee on Military Justice, in its annual review of the UCMJ, considers an amendment to the UCMJ's annual military justice reporting requirements to require the military services to include demographic information, including race, ethnicity, and gender, for all types of courts-martial.

DoD RESPONSE: Concur.

RECOMMENDATION 7: The GAO recommends that the Secretary of Defense, in collaboration with the DOD Office for Diversity, Equity, and Inclusion and the Secretaries of the military services and the Commandant of the Coast Guard, should issue guidance that establishes criteria to specify when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed, and that describes the steps that should be taken to conduct such a review.

DoD RESPONSE: Partially concur.

The Department concurs that guidance should be issued to establish criteria specifying when data indicating possible racial, ethnic, or gender disparities requires further review and the steps that will be taken to conduct the review. However, since the Secretary of Defense does not independently issue guidance to the Coast Guard, suggest the Secretary of Homeland Security be added to this recommendation. Also, recommend removing the DoD Office for Diversity, Equity, and Inclusion and the Commandant of the Coast Guard as they fall under the Secretary of Defense and the Secretary of Homeland Security respectively.

RECOMMENDATION 8: The GAO recommends that the Secretary of the Army should consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of their databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed.

DoD RESPONSE: Concur.

RECOMMENDATION 9: The GAO recommends that the Secretary of the Navy should consider the feasibility, to include the benefits and drawbacks, of collecting and maintaining

complete information for all nonjudicial punishment cases in one of their databases, such as information on the servicemembers' race, ethnicity, gender, offense, and punishment imposed.

DoD RESPONSE: Concur.

RECOMMENDATION 11: The GAO recommends that the Secretary of Defense should ensure that the DOD Office for Diversity, Equity, and Inclusion, in collaboration with the service Secretaries and the Commandant of the Coast Guard, conducts an evaluation to identify the causes of any disparities in the military justice system, and takes steps to address the causes of these disparities as appropriate.

DoD RESPONSE: Partially concur.

The Department concurs with the recommendation to conduct an evaluation to identify the causes of any racial or gender disparities in the military justice system, and, if necessary, take remedial steps to address the causes of these disparities as appropriate. The Department suggests, however, that the Secretary of Homeland Security be added to this recommendation and the DoD Office for Diversity, Equity, and Inclusion and the Commandant of the Coast Guard be removed.

Appendix XI: Comments from the Department of Homeland Security



U.S. Department of Homeland Security
Washington, DC 20528

**Homeland
Security**

May 10, 2019

Brenda S. Farrell
Director, Defense Capabilities and Management
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management Response to Draft Report: GAO-19-344, "MILITARY JUSTICE:
DOD Needs to Improve Its Capability to Assess Racial and Gender Disparities"

Dear Ms. Farrell:

Thank you for the opportunity to comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

The Department acknowledges GAO's finding that the ability to readily assess military justice data in order to identify disparities is limited by how the armed services collect and maintain data on race, ethnicity, and gender of servicemembers. The Coast Guard is committed to taking appropriate steps to develop the capability to present race and ethnicity data using the uniform standards established in December 2018 by the revised Uniform Code of Military Justice to allow for the efficient analysis and reporting of consistent military justice data.

The draft report contained ten recommendations, including three for DHS with which the Department concurs. Attached find our detailed response to each recommendation. Technical comments were previously provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim H. Crumpacker".

JIM H. CRUMPACKER, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Attachment

**Attachment: Management Response to Recommendations
Contained in GAO-19-344**

GAO recommended that the Secretary of Homeland Security ensure that the Commandant of the Coast Guard:

Recommendation 1: Modifies the Coast Guard's military justice database so that it can query and report on gender information.

Response: Concur. The Coast Guard Office of Military Justice will implement modifications to the military justice database to support queries and reporting of gender information. Estimated Completion Date (ECD): December 31, 2019.

Recommendation 5: Develops the capability to present servicemembers' race and ethnicity data in its investigations and personnel databases using the same categories of race and ethnicity established in the December 2018 uniform standards for military justice databases, either by (1) modifying the Coast Guard's investigations and personnel databases to collect and maintain the data in accordance with the uniform standards, (2) developing the capability to aggregate the data into the race and ethnicity categories included in the uniform standards, or (3) implementing another method identified by the Coast Guard.

Response: Concur. Under the uniform standards adopted by the Department of Defense to comply with Article 140A of the revised Uniform Code of Military Justice, the Coast Guard Office of Military Justice will implement modifications to the military justice database to support the tracking of race, ethnicity and gender information. The Coast Guard Investigative Service database presently uses the same standards for race, ethnicity and gender data as those mandated in the uniform standards. Implementing this recommendation for the Coast Guard's military justice database will be accomplished as part of a larger-long term initiative to adapt the database to capture all of the data elements that the Article 140A standards require. The Coast Guard will provide an update on the progress to implement this recommendation by December 30, 2019. ECD: September 31, 2020.

Recommendation 10: Considers the feasibility, to include the benefits and drawbacks, of collecting and maintaining complete information for all nonjudicial punishment cases in one of their databases, such as information of the servicemembers' race, ethnicity, gender, offense, and punishment imposed.

Response: Concur. Through a military justice and personnel work group, the Coast Guard Office of Military Justice will consider the feasibility of collecting and maintaining complete information for all nonjudicial punishment cases which may include updating applicable policies or databases. ECD: To Be Determined.

Appendix XII: GAO Contact and Staff Acknowledgments

GAO Contact

Brenda S. Farrell, (202) 512-3604 or farrellb@gao.gov.

Staff Acknowledgments

In addition to the contact named above, key contributors to this report were Kimberly C. Seay, Assistant Director; Parul Aggarwal; Christopher Allison; Renee S. Brown; Vincent M. Buquicchio; Won (Danny) Lee; Amie M. Lesser; Serena C. Lo; Dae B. Park; Samuel J. Portnow; Clarice Ransom; Christy D. Smith; Preston Timms; and Schuyler Vanorsdale.

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Tab 10
Subcommittee: Case Review Materials

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or as counsel in the same case.

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

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

Report of the Military Justice Review Group

Part I: UCMJ Recommendations

Article 25 Excerpt (Pages 251 - 254)

Article 25 – Who May Serve on Courts-Martial

10 U.S.C. § 825

1.

2. *Summary of the Current Statute*

Article 25 defines the eligibility requirements for members serving on courts-martial panels. Currently, the convening authority selects and details members using the following criteria listed in Article 25(d)(2): age, education, training, experience, length of service, and judicial temperament. The convening authority may select any active duty commissioned officer or warrant officer for service on a general or special court-martial panel.¹ The convening authority may also detail enlisted members, but only if requested by an enlisted accused. If such a request is made, Article 25(c)(1) provides that enlisted membership must comprise at least one-third of the total membership of the panel, unless eligible enlisted members cannot be obtained due to physical conditions or military exigencies.² When it can be avoided, an accused may not be tried by a member junior in rank or grade;³ and in all cases, enlisted members may never be detailed from the accused's same unit⁴

¹ Warrant officers and enlisted members are only eligible to serve as panel members on general and special courts-martial, whereas commissioned officers are eligible to serve on all courts-martial, including as a summary court-martial officer. Article 25(a)-(b).

² If enlisted members cannot be obtained following a request by the accused for enlisted membership on the panel, Article 25(c)(1) requires the convening authority to make a detailed written statement, to be appended to the record of trial, stating why they could not be obtained.

³ Prohibitions against members being tried at courts-martial by persons of inferior rank have been in effect since 1775. *See generally* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENCE* 951-983 (2000 reprint) (2d ed. 1920).

unless the prohibition is waived by the accused.⁵ Article 25(e) permits the convening authority to excuse members before the court-martial is assembled—delegable to the staff judge advocate, legal officer, or another principal assistant pursuant to service regulations. After the court-martial is assembled, however, Article 29 provides that members may be added to or removed from the panel only with the approval of the military judge.

3. Historical Background

The right to trial by jury in criminal cases has not been extended to courts-martial.⁶ Beginning in the Revolutionary era, the Articles of War and Articles for the Government of the Navy provided for the appointment of officers to serve on courts-martial, but otherwise did not provide statutory criteria for their selection by court-martial convening authorities. In the aftermath of controversies about court-martial practices during World War I,⁷ Congress first set forth basic criteria for service on courts-martial in the 1920 Articles of War.⁸ When Congress enacted the UCMJ in 1950, it incorporated these selection criteria into Article 25.⁹ With respect to enlisted representation on courts-martial, Congress did not authorize enlisted representation in statute until 1948, as part of the Elston Act amendments.¹⁰ This authorization was incorporated into Article 25 as enacted in 1950. From 1950 to 1986, Article 25 required all requests for enlisted members to be in writing. In 1986, Congress amended the statute to allow for oral requests by the accused.¹¹

⁴ Article 25(c)(2) currently defines a unit as being: “[A]ny regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship’s crew, or body corresponding to one of them.”

⁵ See *United States v. Kimball*, 13 M.J. 659, 660 (N.M.C.M.R. 1982) (holding that “where the accused and his defense counsel purported at trial to waive any objection to the enlisted members on the grounds that they were from the same unit as the accused, he will not be permitted to challenge the composition of the court in this regard on appeal.”).

⁶ *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. 2 (1866); *United States v. Guilford*, 8 M.J. 598, 601 (1979); see also *Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009); *Mendrano v. Smith*, 797 F.2d 1538 (10th Cir. 1986).

⁷ See Edward F. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 21 (1970); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, A. F. L. REV. 343, 347-349 (1978). See generally *United States v. White*, 25 C.M.R. 357 (1972).

⁸ AW 4 of 1920 (“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. . . .”); see WINTHROP, *supra* note 3, at 951-997.

⁹ Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; see *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1138-52 (1949).

¹⁰ AW 16 of 1948. The Ansell-Crowder debates, which preceded the passage of the 1920 Articles of War, first raised the possibility of having enlisted members serve on military panels.

¹¹ Military Justice Act of 1983, Pub. L. No. 98-209, § 803(a), 97 Stat. 1393.

4. Contemporary Practice

A court-martial is a temporary body, created by a convening order to hear a specific case. Each convening order sets forth the names of the individual members detailed to serve on the specific court-martial. The members are selected by the convening authority, frequently from lists of nominees prepared by the convening authority's staff judge advocate with input from the nominees' superiors. Most services prepare lists of members designated for service over a period of time; in one service, a new list of members is prepared for each case.¹² An allegation of improper manipulation of the member selection process may be reviewed as an issue of unlawful command influence.¹³

The President has implemented Article 25 through R.C.M. 502 (Qualifications and duties of personnel of courts-martial), R.C.M. 503 (Detailing members, military judge, and counsel), R.C.M. 505 (Changes of members, military judge, and counsel), and R.C.M. 903 (Accused's elections on composition of court-martial). R.C.M. 903(a)(1) specifically provides that the military judge shall ascertain, on the record and before the end of the initial Article 39(a) session, whether the accused wishes to exercise his right to elect enlisted membership on the panel. The convening authority's excusal power under Article 25(e) and R.C.M. 505(c) is typically exercised when the member has an approved reason for being absent from court duty.

5. Relationship to Federal Civilian Practice

Under the Sixth Amendment and 28 U.S.C §§ 1861-1869, federal jurors are randomly selected, and the jury venire is required to represent a fair cross-section of the local community in the district or division where the court convenes. Each federal district court is required to devise and implement a written plan for random selection of jurors that does not exclude potential jurors on the basis of race, color, religion, sex, national origin, or economic status. The practices for selecting and impaneling juries vary widely among the federal districts, as the specific processes are managed by judges, administrative staff, and local district rules.¹⁴ The military justice system must be able to operate in deployed and

¹² In the Army, Navy, Marine Corps, and Coast Guard, the common practice is for an annual standing convening order, with amendments made for specific courts-martial. Commanders update these standing orders annually or upon assuming command. *See* ARMY REG. 27-10; JAGINST 5800.7F; MARINE CORPS ORDER 5800.16A; COMMANDANT INSTR. M5810.1E. In the Air Force, commanders publish new convening orders for each new case referred for trial. *See* AIR FORCE INSTR. 51-201.

¹³ *See, e.g.,* United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (reversing for improper denial of challenge for cause of senior panel member who was in the chain of command of five other persons on the venire); United States v. Drain, 17 C.M.R. 44 (C.M.A. 1954) (reversing for improper denial of challenge for cause of senior panel member in part because he wrote the efficiency reports of all other court members); United States v. Mitchell, 19 M.J. 905 (A.C.M.R. 1985) (remanding a case where evidence was raised that the commander made remarks capable of influencing court members to disregard favorable character testimony by a convicted soldier who was a sentencing witness for the accused).

¹⁴ *See* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE § 22.2(a) (3d ed. 2013) (describing the minimum requirements applicable to all random selection plans issued by federal district courts, and highlighting areas of difference).

operational environments in which large numbers of potential court-members are engaged in vital national security activities. As a consequence, it has not been considered practicable to adopt the civilian random selection model for use in courts-martial on a system-wide basis.¹⁵ Although court-martial panel members are not considered to be jurors under the Sixth amendment,¹⁶ a well-developed body of case law addresses the need for assembled court members to be objective and impartial.¹⁷ In addition, members are subject to challenge and disqualification under criteria similar to—and in some cases more stringent than—the criteria applicable to removal of jurors from civilian panels.

6.

¹⁵ Attempts at random panel selection efforts have been made—most notably in experiments occurring at Fort Riley in 1974 and, later, at V Corps in 2005. Both experiments sought to apply random-selection procedures, but produced unforeseen difficulties in meeting the criteria under Article 25(d)(2). See James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 128-130 (2010). In 1999, Congress directed the Joint Service Committee on Military Justice to study random selection of court-martial members. See generally JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL (1999). In its study, the Committee examined different methods of panel selection employed by the services, analyzed past random court-martial selection experiments, and analyzed Canadian and United Kingdom member-selection systems. *Id.* at 3. The Committee concluded that random selection is incompatible with Article 25(d)(2), and found that the standard selection method best applies Article 25(d)(2)'s best qualified mandate. *Id.* at 3, 22.

¹⁶ See *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Ex parte Quirin*, 317 U.S. 1 (1942). See generally Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 485-500 (2014).

¹⁷ See, e.g., *United States v. McQueen*, 7 M.J. 281, 281 (C.M.A. 1979) (“The proper test to evaluate the propriety of the judge’s denial of a challenge for cause ‘is whether he (the prospective court member) is mentally free to render an impartial finding and sentence based on the law and the evidence.’”) (quoting *United States v. Parker*, 19 C.M.R. 400, 410-411 (1955)).



As of: November 28, 2022 4:25 PM Z

UNITED STATES v. CRAWFORD

United States Court of Military Appeals

September 18, 1964

No. 17,453

Reporter

15 U.S.C.M.A. 31 *; 1964 CMA LEXIS 197 **; 35 C.M.R. 3 ***

UNITED STATES, Appellee v RICHARD E. CRAWFORD, Private E-2, U.S. Army, Appellant

Prior History: **[**1]** On petition of the accused below. CM 409927, not reported below. Affirmed.

Core Terms

enlisted, court-martial, convening, appointed, enlisted man, rank, senior, eligible, courts-martial, military, grade, noncommissioned, membership, staff, Hearings, courts, judge advocate, jurors, military justice, cases, colored, armed forces, personnel, selecting, armed services, qualifications, civilian, deliberately, statistics, systematic

Case Summary

Procedural Posture

Appellant accused appealed the decision of the Board of Review, which affirmed the accused's conviction by a military court-martial of three specifications of assault with a dangerous weapon.

Overview

The accused was charged with three specifications of assault with a dangerous weapon. The accused asked for, and was granted, enlisted court members. The staff judge advocate directed that his staff choose responsible, senior noncommissioned officers and, because the accused was a Negro, at least one Negro. The staff judge advocate requested senior noncommissioned officers because he regarded seniority of rank as an indication of civic responsibility and intelligence. The court-martial convicted the accused of the specifications. The accused challenged the selection process of the court-martial before the board of review, but the board of review's decision affirmed the convictions. The court affirmed the decision of the board of review. The court held that the

consideration of senior noncommissioned officers for knowledge and intelligence purposes under art. 25(d)(2), Unif. Code Mil. Justice did not deprive the accused of his right to enlisted personnel as court members. The court found no error in the deliberate selection of a Negro person as a member of the court-martial because the inclusion was in favor of the accused, who was a member of the same race.

Outcome

The court affirmed a decision that affirmed the accused's conviction of three specifications of assault with a dangerous weapon.

LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

[HN1](#) [↓] **Juries & Jurors, Challenges to Jury Venire**

Ordinarily, an objection to the method of selection of the triers of the facts must be made before trial.

Criminal Law & Procedure > Trials > Defendant's Rights > General Overview

Military & Veterans Law > Military Justice > General Overview

[HN2](#) [↓] **Trials, Defendant's Rights**

Decisions respecting the right to trial by one's peers in civil courts are inapplicable to the military courts.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

of choosing juries.

Criminal Law & Procedure > ... > Impaneling Grand Juries > Selection of Jurors > General Overview

Criminal Law & Procedure > Juries & Jurors > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

[HN4](#) **Criminal Law & Procedure, Juries & Jurors**

The legislative branch of the government has broad power to prescribe the qualifications of jurors. Consistent with the public interest, it may exclude various groups in the community from eligibility.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Grand Jury Requirement

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Criminal Law & Procedure > ... > Grand Juries > Procedures > General Overview

Military & Veterans Law > Military Justice > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Special Courts-Martial

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > General Overview

[HN5](#) **Courts Martial, Court-Martial Member Panel**

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they can not be obtained. art. 25, Unif. Code Mil. Justice, [10 U.S.C.S. § 825](#).

[HN3](#) **Criminal Process, Right to Jury Trial**

Under the [Fifth](#) and [Sixth Amendments to the United States Constitution](#), persons in the armed forces do not have the right to indictment by grand jury and trial by petit jury for a capital or infamous crime. However, courts-martial are criminal prosecutions, and those constitutional protections and rights which the history and text of the Constitution do not plainly deny to military accused are preserved to them in the service. Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge. The United States Court of Military Appeals should, therefore, consider a challenge to the integrity of the selection process in the light of the experience and learning of the civilian courts that have dealt with challenges of the various methods

Military & Veterans Law > Military Justice > General

Overview

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

[HN6](#) **Military & Veterans Law, Military Justice**

The Uniform Code of Military Justice's definition of an enlisted person is not limited to those above a specified rank. [10 U.S.C.S. § 101\(17\)](#), superseding original art. 1(9), Unif. Code. Mil. Justice, [50 U.S.C.S. § 551](#), defines an enlisted person as "a person in an enlisted grade."

Criminal Law & Procedure > Juries & Jurors > Voir Dire > General Overview

[HN7](#) **Juries & Jurors, Voir Dire**

Gross population figures are generally recognized as not being useful for the purpose of determining qualified veniremen.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

[HN8](#) **Juries & Jurors, Challenges to Jury Venire**

Beyond the specific statutory exclusions, a method of selection which leaves out part of those nominally within the scope of eligibility is not necessarily unlawful. The use of voter registration lists as sources for eligibles is upheld, notwithstanding that qualified nonvoters are thereby automatically excluded. Similarly, telephone directories are valid selection sources, although they exclude those who may be qualified for jury service, but are too poor, or are unwilling, to have telephones.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

[HN9](#) **Juries & Jurors, Challenges to Jury Venire**

An irrelevant reason cannot be used to exclude a substantial group of otherwise qualified persons.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

[HN10](#) **Juries & Jurors, Challenges to Jury Venire**

A method of selection which uses criteria reasonably and rationally calculated to obtain jurors meeting the statutory requirements for service is proper.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

[HN11](#) **Juries & Jurors, Challenges to Jury Venire**

In the civilian community, a preference for certain voting districts as potentially more fruitful sources of eligible jurors is not exclusionary discrimination.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

Military & Veterans Law > Military Justice > General Overview

[HN12](#) **Juries & Jurors, Challenges to Jury Venire**

Where the selection process is designed only to find enlisted men qualified for court service, and the senior noncommissioned ranks provide a convenient and logically probable source for eligibles, to refer first to those ranks for prospective members is not an impermissible choice.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview

[HN13](#) **Equal Protection, Nature & Scope of Protection**

If deliberately to include qualified persons is discrimination, it is discrimination in favor of, not against, an accused. Equal protection of the laws is not denied, but assured.

Counsel: *Captain Charles W. Schiesser* argued the cause for Appellant, Accused. With him on the brief were *Colonel Joseph L. Chalk* and *Captain Daniel H. Benson*.

Captain John C. Cortesio, Jr., argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel Francis M. Cooper* and *Captain William L. Leonard*.

Judges: QUINN, Chief Judge; KILDAY, Judge (concurring in the result); FERGUSON, Judge (dissenting).

Opinion by: QUINN

Opinion

[*33] [***5] Opinion of the Court

QUINN, Chief Judge:

The question on this appeal,¹ and in several similar cases, is whether the method by which enlisted court members were selected discriminated against the lower enlisted ranks in such way as to threaten the integrity of the courts-martial system and violate the Uniform Code of Military Justice.

[**2] [HN1](#) [↑] Ordinarily, an objection to the method of selection of the triers of the facts must be made before trial. [Shotwell Mfg. Co. v United States](#), 371 US 341, 9 L ed 2d 357, 83 S Ct 448 (1963); [United States v Gale](#), 109 US 65, 27 L ed 857, 3 S Ct 1 (1883); [United States v Klock](#), 210 F2d 217 (CA 2d Cir) (1954). Objection was not made in this case until the record of trial was before the board of review. Consequently, Government counsel contend the accused waived the right to challenge the validity of the selection process, since it

¹ The accused was convicted of three specifications of assault with a dangerous weapon, and sentenced to a bad-conduct discharge, total forfeitures, confinement at hard labor for three years, and reduction to Private E-1. Modification of the sentence by the convening authority reduced the confinement to one year.

does not appear he was unaware of the essential facts until he presented the matter to the board of review. See [United States v Beer](#), 6 USCMA 180, 19 CMR 306. However, in two cases pending before us, the issue was raised at trial; and it appears likely to arise frequently until [*34] [***6] decided on the merits. Appropriately, therefore, we can pass over the procedural deficiency to reach the substance of the issue, which was considered by the board of review. See [Coleman v Alabama](#), 377 US 129, 12 L ed 2d 190, 84 S Ct 1152 (1964); [United States v Culp](#), 14 USCMA 199, 203, 33 CMR 411; [United States v Hood](#), 9 USCMA 558, 26 CMR 338.

Beyond waiver, [**3] the first issue for consideration is the standard of selection of courts-martial members.² Appellate defense counsel maintain military due process requires that the methods of selection approximate those in the civilian courts to insure a panel drawn from a cross section of the entire military community. Oppositely, the Government contends civilian standards are "antagonistic" to the military requirements. In support, it quotes a statement from the Court of Appeals for the Tenth Circuit to the effect that [HN2](#) [↑] "decisions respecting the right to trial by one's peers in civil courts are inapplicable" to the military courts. [DeWar v Hunter](#), 170 F2d 993, 997 (1948), cert den 337 US 908, 93 L ed 1720, 69 S Ct 1048 (1949).

[HN3](#) [↑] Under the [Fifth](#) and [Sixth Amendments to the United States Constitution](#), persons in the armed forces do not have the right to indictment by grand jury and trial by petit jury for a capital or infamous crime. [Ex parte Quirin](#), 317 US 1, 87 L ed 3, 63 S Ct 2 (1942). However, courts-martial are criminal prosecutions, and those constitutional protections [**4] and rights which the history and text of the Constitution do not plainly deny to military accused are preserved to them in the service. [United States v Culp](#), *supra*. Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge. [United States v Hedges](#), 11 USCMA 642, 29 CMR 458; see also [United States v Sears](#), 6 USCMA 661, 20 CMR 377. We should, therefore, consider the challenge to the integrity of the selection process, in the light of the experience and learning of the civilian courts that have dealt with challenges of the various methods

² We express our appreciation to both Government counsel and appellate defense counsel for their helpful briefs.

of choosing juries. See [United States v Baker, 14 USCMA 311, 34 CMR 91](#).

[HN4](#) [↑] The legislative branch of the Government has broad power to prescribe the qualifications of jurors. [United States v Wilson, 158 F Supp 442](#) (MD Ala) (1958), affirmed 255 F2d 686 (CA 5th Cir) (1958), cert den 358 US 865, 3 L ed 2d 98, 79 S Ct 97 (1958); [United States v Mirabal Carrion, 140 F Supp 226](#) (Puerto Rico) (1956). Consistent [\[**5\]](#) with the public interest, it may exclude various groups in the community from eligibility. [Rawlins v Georgia, 201 US 638, 50 L ed 899, 26 S Ct 560 \(1906\)](#). From the time of the War of Independence until 1948, membership on courts-martial was limited to officers. The accused does not dispute, and we do not doubt, the constitutionality of the practice, antedating, as it does, the adoption of the Constitution, which specifically exempts the military from the jury trial provision. See [United States v Culp, supra](#). After World War I, there was a considerable agitation, perhaps most articulately advanced by General Samuel T. Ansell, a judge advocate of the Army, to make enlisted persons eligible for appointment to a court-martial convened to try an enlisted accused. The attempt did not succeed at that time, but it gave strength and direction to the World War II reform movement. Morgan, "The Background of the Uniform Code of Military Justice," 6 Vanderbilt Law Review 169 (1953). In 1948, the Elston Act modified the Articles of War, which governed the Army and the Air Force, to provide for enlisted membership on a court-martial, if requested by an enlisted accused. Elston Act, Public [\[**6\]](#) Law 759, 80th Congress, 62 Stat 604, 628, approved June 24, 1948. In 1950, Congress enacted the Uniform Code of Military Justice for all the armed forces. With some modification of the [\[*35\]](#) [\[***7\]](#) Elston Act, the Code carried over the right of an enlisted accused to be tried by a court-martial composed in part of enlisted persons. The pertinent provision reads as follows:

[HN5](#) [↑] "Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one third of the total membership of the court, unless eligible

enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be [\[**7\]](#) obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained." [Article 25(c)(1), [10 USC § 825](#).]

It is unnecessary for present purposes to review the reasons for, and the long evolution of, the qualification of enlisted persons for service on courts-martial. Suffice it to say that the right to enlisted court members was deemed important. Its importance is emphasized by the exceedingly narrow and specifically defined conditions under which a trial can be had without enlisted membership. As Mr. Felix Larkin, one of the principal draftsmen of the Code, informed the Subcommittee of the House Armed Services Committee, which held hearings on the Uniform Code, the denial of the right to enlisted members would be justifiable only "in the most exceptional type of case," where the conditions "made it impossible for . . . [the convening authority] to obtain enlisted men." Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, pages 1150, 1151.

Here, the accused asked for, and was granted, enlisted court [\[**8\]](#) members. Of the four persons appointed to the court, three were sergeants major (E-9), and one was a master sergeant (E-7). The accused contends the method by which these members were selected violated the Uniform Code in that, all enlisted persons in grades lower than E-7, and all specialists regardless of grade, all of whom were otherwise eligible for appointment, were arbitrarily and discriminatorily excluded from consideration. He also contends the selection process was invalid because a Negro enlisted man was arbitrarily included in the court membership. The Government does not question the facts upon which the accused's allegation of error is predicated, but it denies the validity of the accused's conclusions. The facts are set out in affidavits by persons who participated in the selection process.

From the affidavits, it appears that in the late afternoon of the day before trial, the accused, through his counsel, informed trial counsel he desired to exercise his right to have enlisted members on the court. The request was transmitted to the staff judge advocate, who told his deputy to obtain from the adjutant general's office a list of "senior noncommissioned officers [\[**9\]](#) who were regarded as responsible and available for court-martial

duty." The staff judge advocate requested senior noncommissioned officers because he regarded "seniority of rank . . . [as an] indication of civic responsibility and intelligence." He also asked, because the accused in Negro and the alleged assaults were against white soldiers, that the list include at least one member of that race. The deputy telephoned the instructions to the deputy adjutant general, who in turn passed them on to the noncommissioned officer in charge, Sergeant Major R. M. Nelson. Understanding he was to select "mature, responsible, and experienced senior noncommissioned officers," Sergeant Nelson compiled a list of eight or ten names by "random" selection from the [*36] [***8] "personnel rosters" in the office. The names were submitted by telephone to the staff judge advocate's office. A written list with the names of Negro nominees marked with asterisks was prepared, and given to the chief of staff. He took the list to the convening authority. Three or four of the eight or ten names on the list were selected by the convening authority. No Negro on the list was chosen. Instead, the [**10] general asked by name for a Sergeant Jones who was believed to be a Negro. Jones, however, was not a member of that race. The adjutant general suggested two other enlisted men believed to be Negro; one turned out to be white; the other was rejected because two members of command were already "tapped" for the court. After further inquiry, the staff judge advocate succeeded in obtaining a "responsible" Negro sergeant first class from an engineer unit. He was accepted by the convening authority, and on the day of trial was added to the court. According to the staff judge advocate, his sole purpose was to obtain "court members with integrity and common sense." He regarded his method of selection as better designed to achieve that purpose than the mere submission of a list of names obtained "willy-nilly out of the . . . duty rosters of the Adjutant General." And he believed the method was sanctioned by the practice in the Federal courts as delineated in [United States v Hoffa, 205 F Supp 710](#) (SD Fla) (1962).

Undeniably, the selection of mature, responsible, and available persons for court-martial membership is in the best tradition of the judicial process. All civilian jurisdictions [**11] have similar qualifications for jurors. See [28 USC § 1861](#); [United States v Dennis, 183 F2d 201](#) (CA 2d Cir) (1950), affirmed [341 US 494, 95 L ed 1137, 71 S Ct 857 \(1951\)](#). In fact, the Uniform Code explicitly gives the convening authority a large measure of discretion in selecting court members to the end that he obtain the "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25(d)(2), Uniform

Code of Military Justice, [10 USC § 825](#). As large as the discretion appears to be, the Uniform Code does not contemplate blanket exclusion of persons below specified rank as being unlikely to possess the statutory qualities.

Nothing in the Uniform Code expressly limits membership on a court-martial to persons of a particular rank. On the contrary, notwithstanding the reference to the selection of those "best qualified," Article 25 implies all ranks and grades are eligible for appointment. Subsection (d)(1) carries forward the venerable tradition that, whenever it can be avoided, no court member shall be junior in rank or grade to the accused. Since the provision allows a court member junior to the accused to [**12] serve (see [Mullan v United States, 140 US 240, 35 L ed 489, 11 S Ct 788 \(1891\)](#)), Congress, apparently, believed the lower ranks would contain qualified persons who would be appointed to courts-martial as occasions warranted. The practice, both before and after the Uniform Code, reflects this belief, at least as far as officer members are concerned. The many records of trial that have come before this Court show that lieutenants and captains in the Army are frequently appointed to courts-martial, although they probably have substantially less experience and years of service than colonels and generals. Similarly, Navy courts-martial often include lieutenants as members, but rarely have admirals. Much less variation in rank has been observed in the enlisted membership, but, even here, almost all ranks have been appointed.

Enlisted grades range from E-1, the lowest, to E-9, the highest. Statistics presented by appellate defense counsel show that in the Army, during the period between 1959 through 1963, no enlisted court member was lower in grade than an E-4. Considering that E-1s and E-2s are normally persons with short periods of service, and allowing further for the statutory [**13] preference for persons senior in rank to the accused, the appellant's statistics appear to reflect a realization that all enlisted ranks are eligible for selection as [**37] [***9] court members. The testimony of several witnesses at the Congressional hearings on the Uniform Code indicates a general understanding to that effect. The following exchange between Mr. George Spiegelberg, testifying on behalf of the American Bar Association, and several members of the House Armed Services Subcommittee, is, perhaps, most representative:

"Mr. PHILBIN. Do you think a jury trial in any circumstances is advisable?"

"Mr. SPIEGELBERG. No, sir. As I said before, Mr. Philbin, I do not think that you should permit civilian interference.

"Mr. PHILBIN. I am speaking of a jury trial of his own peers.

"Mr. SPIEGELBERG. Oh, you are talking about the enlisted men on the court.

"Mr. RIVERS. That is what I am talking about.

"Mr. SPIEGELBERG. I am sorry, perhaps I misunderstood you completely. Frankly, and this has been discussed at length in the American Bar Association, we do not think that you get very far by having enlisted men on courts.

"Mr. RIVERS. It is not going to hurt.

[14]** "Mr. SPIEGELBERG. No, absolutely no.

"Mr. RIVERS. I do not think so.

"Mr. SPIEGELBERG. If it gives the enlisted man a feeling of confidence --

"Mr. RIVERS. That is right.

"Mr. SPIEGELBERG. That he might be able to have some of his peers on the court --

"Mr. RIVERS. That is right.

"Mr. SPIEGELBERG. Certainly the experiment can do no harm. But my shrewd guess would be that most of the enlisted men who serve on courts will either be master sergeants or tech sergeants with from 6 years' service up and that they will be more severe in their judgment of the man on trial than would officers.

"But I agree completely. It does no harm and it may do good.

"Mr. RIVERS. That is right.

"Mr. GAVIN. Why would it necessarily have to be a sergeant or a master sergeant?

"Mr. SPIEGELBERG. It would not. But, I say, my guess is that you will find in most cases the enlisted men on the court will be either first or second grade.

"Mr. PHILBIN. Why should that follow, necessarily?

"Mr. SPIEGELBERG. Well, I do not know why except that those are the enlisted men that the commander or

the junior officer -- the company commanders -- know and they are the men that they actually **[**15]** select and recommend as being qualified for court-martial duty.

"Mr. PHILBIN. Of course, in doing it, you could see that it would be a fair representation of all enlisted men, of all ranks, and so forth.

"Mr. SPIEGELBERG. You could. But I think it is not more than a third now on the court and that would mean at most two on the average court, and it would be pretty hard to administer such a provision.

"I do not say it could not be done. I think it is better not to try to specify --." [Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, pages 715, 723, 724.]

Two other matters reflect the general understanding at the time of enactment of the Code that all enlisted persons are eligible for court membership. First, [HNG](#)^[↑] the Uniform Code's definition of an enlisted person is not limited to those above a specified rank. [10 USC § 101 \(17\)](#), superseding original Article 1(9), [50 USC § 551](#), defines an enlisted person as "a person in an enlisted grade." (Emphasis supplied.) Secondly, the requirement of the 1948 Elston Act that court members have not less than two years' service was eliminated in the Uniform Code.

What we have said about the **[**16]** original **[*38]** **[***10]** understanding of the Code's enlisted membership provision indicates that a method of selection which disregards individual qualification and deliberately and systematically excludes all enlisted persons of the lower ranks is contrary to the Uniform Code. Cf. [Thiel v Southern P. Co.](#), [328 US 217, 90 L ed 1181, 66 S Ct 984 \(1946\)](#). The question is whether such discriminatory exclusion was practiced in this case.

Appellate defense counsel contend the statistics presented to us show that so few members of the lower enlisted ranks have served on courts-martial in relation to the large number of senior ranks as to establish a *prima facie* case of deliberate and long-continued discrimination throughout the Army. See [Norris v Alabama](#), [294 US 587, 79 L ed 1074, 55 S Ct 579 \(1935\)](#); [Pierre v Louisiana](#), [306 US 354, 83 L ed 757, 59 S Ct 536 \(1939\)](#). There are several flaws in the argument. For one, it is extremely doubtful that the accused's statistics can properly be applied to the court-martial jurisdiction in which he was tried. The figures for 1960, for example, show there were fifty-one general

courts-martial with enlisted members; twenty-two of these [**17] tried accused in the rank of E-3 and E-4. One of the E-3 cases had an E-4 court member; apparently, four of the E-4 cases had E-5 court members. It would seem, therefore, that in almost twenty-three percent of the cases in these categories, the court membership included enlisted persons in the lowest rank that would assure compliance with the statutory preference for members senior to the accused. We are not informed as to the commands in which these courts were appointed. If they were appointed within the general court-martial jurisdiction in issue, there would patently be little substance to the accused's claim of arbitrary discrimination against the lower ranks of enlisted personnel. Also, there is evidence that this jurisdiction had no requests by enlisted accused, other than in this case, for enlisted court members since October 1962. There is no evidence of how many, if any, requests were made in previous periods. Consequently, there is little or no basis for an inference of arbitrary discrimination from the fact of non-appointment of lower ranks over a long period of time. Cf. *Hill v Texas*, 316 US 400, 86 L ed 1559, 62 S Ct 1159 (1942). Taken as a whole, and considered [**18] in the light most favorable to the accused, the statistics do not establish a policy or predilection to exclude lower ranks from consideration for court membership, without regard to the qualifications established by the Uniform Code.

Turning to the particular method of selection in this case, Government counsel contend the accused's evidence fails to show any impropriety by the convening authority. They argue that there is a vast and vital difference between the list of the prospective court members submitted by the staff judge advocate and the actual selections by the convening authority. They say that the convening authority's request for an enlisted man not on the list shows he "did not regard [it] as binding." If the convening authority himself had no desire to discriminate arbitrarily against the lower ranks, discrimination by those charged with the responsibility for preparation of the list of eligibles would nevertheless vitiate the selection process. *Glasser v United States*, 315 US 60, 86 L ed 680, 62 S Ct 457 (1942); *United States v Dennis*, 183 F2d 201, *supra*, at pages 217-218. We must, therefore, consider appellate defense counsel's contention that the list [**19] of eligibles was invalid because those on the list were selected by the deliberate and blanket exclusion of all but senior noncommissioned officers. Such exclusion, they say, however well-intentioned it may have been, undermines the integrity of the courts-martial system. See *Thiel v*

Southern P. Co., *supra*.

The evidence does not show what enlisted ranks were contemplated by the staff judge advocate as constituting senior noncommissioned officers. Appellate defense counsel impress upon us the fact that of four enlisted men on the court, the lowest grade appointed was an E-7. There were, however, eight to ten names on the list, and we [**39] [***11] are not informed of the rank of the unselected eligibles. One or more of them may have had a lower rank than E-7. Still, we need not determine the precise rank separating the senior noncommissioned officer from other enlisted personnel. Whatever the cutoff point, undeniably some groups of otherwise eligible persons were not considered by the staff judge advocate in the initial selection. Was this so reprehensible as to invalidate his method?

HN7 [↑] Gross population figures are generally recognized as not being useful for the purpose [**20] of determining qualified veniremen. *United States v Flynn*, 106 F Supp 966, 972 (SD NY) (1952); *United States v Shannabarger*, 19 F Supp 975, 978 (WD Mo) (1937), ruling sustained in *Walker v United States*, 93 F2d 383 (CA 8th Cir) (1937). Some method of weeding out from the general population is essential. Every method involves a choice which will exclude part of the general community. In fact, normal statutory standards of eligibility such as age, literacy, and mental health automatically eliminate a part of the general population. **HN8** [↑] Beyond the specific statutory exclusions, a method of selection which leaves out part of those nominally within the scope of eligibility is not necessarily unlawful. The use of voter registration lists as sources for eligibles has consistently been upheld, notwithstanding that qualified nonvoters are thereby automatically excluded. *Gorin v United States*, 313 F2d 641 (CA 1st Cir) (1963), cert den 374 US 829, 10 L ed 2d 1052, 83 S Ct 1870 (1963); *United States v Flynn*, *supra*. Similarly, telephone directories are valid selection sources, although they exclude those who may be qualified for jury service, but are too poor, or are unwilling, to have telephones. [**21] *United States v Van Allen*, 208 F Supp 331 (SD NY) (1962). The gloss history has written on the *Magna Carta* provision that no "Freeman shall be taken . . . but by lawful Judgment of his Peers" does not demand that the triers of the facts come exclusively from the identical group to which the accused belongs. Without attempting to analyze separately the multitude of cases on the subject, it would appear that the important question is whether the standard for selection is relevant to the statutory bases for eligibility as a juror. **HN9** [↑] An irrelevant reason

cannot be used to exclude a substantial group of otherwise qualified persons because it deprives the jury system "of the broad base it was designed . . . to have in our democratic society." [Ballard v United States, 329 US 187, 195, 91 L ed 181, 67 S Ct 261 \(1946\)](#). The rule was exemplified in the *Thiel* case, *supra*, which struck down a system of selection that excluded all who earned their livelihood on a daily basis. The Supreme Court noted that "the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror." [Thiel v Southern P. Co., 328 US 217, supra, at page 223](#). See **[**22]** also *United States v Henderson, 298 F2d 522, 525 (CA 7th Cir) (1962)*, cert den 369 US 878, 8 L ed 2d 280, 82 S Ct 1150 (1962), in which the Court of Appeals for the Seventh Circuit described the rule as prohibiting exclusion of a substantial group on the basis of "irrational or self-imposed standards."

[HN10](#)  A method of selection which uses criteria reasonably and rationally calculated to obtain jurors meeting the statutory requirements for service is proper. Such a system does not threaten the representative nature of the panel. Over a defense objection, for example, that the selection system unfairly excluded members of the lower economic brackets, a United States District Court sustained the blanket exclusion of loafers and hangers-on, on the ground it was reasonably apparent such persons lacked the statutory requirements that jurors be sober, intelligent, and of good reputation. [United States v Shannabarger, supra, at pages 977-978](#). In [United States v Flynn, 106 F Supp 966, supra, at pages 978-979](#), the defendants contended the method of selection discriminated against manual workers. There, a prospective juror was excluded if the qualification questionnaire sent to him by the clerk's **[**23]** office was returned incomplete or with misspellings. The court held that these **[*40]** **[***12]** deficiencies in the questionnaire bore directly on the statutory requirements that jurors be able to read and write, and that they be intelligent and well-informed.

We may take judicial notice that many enlisted persons below the senior noncommissioned ranks are literate, mature in years, and sufficiently judicious in temperament to be eligible to serve on courts-martial. It is equally apparent, however, that the lower enlisted ranks will not yield potential court members of sufficient age and experience to meet the statutory qualifications for selection, without substantial preliminary screening. It is permissible to anticipate, therefore, as did the staff judge advocate in this case, that the senior ranks will more readily provide a large number of persons

possessing the varied qualities enumerated in the Uniform Code. In fact, the discussions of Article 25 in the hearings on the Code, which we quoted partially earlier, show a general understanding that the relationship between the prescribed qualifications for court membership, especially "training, experience, and length of **[**24]** service," and seniority of rank is so close that the probabilities are that those in the more senior ranks would most often be called upon to serve. House Hearings, *supra*, at page 724; see also Hearings before Senate Armed Services Committee on S. 857 and H.R. 4080, 81st Congress, 1st Session, page 183. [HN11](#)  In the civilian community, a preference for certain voting districts as potentially more fruitful sources of eligible jurors is not exclusionary discrimination. [United States v Dennis, supra](#). Reliance upon a standard of selection which is directly and reasonably calculated to obtain persons with the qualifications prescribed by law does not vitiate the selection system. All enlisted persons may be eligible for membership on courts-martial; but not all enlisted ranks must, or for that matter can, be represented on any one court-martial. The Uniform Code requires a choice based upon a variety of qualities, not, as the staff judge advocate pointed out, "willy-nilly" recourse to the routine duty roster.

Appellate defense counsel argue that senior noncommissioned officers are to be distinguished from all other enlisted persons in that they have a predilection to convict. No evidence **[**25]** is presented or offered to support that contention. And we reject summarily, as obnoxious to the Uniform Code and the traditions of American justice, the assumption that a senior noncommissioned officer would violate his oath to decide the cause impartially, because he is afraid of, or desires to curry favor with, the officer-members of the court. Our experience, and our convictions are to the contrary.

Career enlisted persons are no more inclined or likely to prejudice an accused, or to treat him with greater severity, than are career officers. This is not to say that all persons, commissioned and noncommissioned, are always free from fixed ideas and attitudes which may predispose them unfavorably toward an accused. Some individuals may be biased, actually or apparently, and are, therefore, subject to challenge. [United States v Drain, 4 USCMA 646, 16 CMR 220](#); see also [United States v Hedges, 11 USCMA 642, 29 CMR 458](#). Disqualification of an individual, however, does not vitiate the process by which the court members were selected. Here, the only purpose in looking to the senior

noncommissioned ranks was to obtain persons possessed of proper qualifications to judge and sentence **[**26]** an accused. There was no desire or intention to exclude any group or class on irrelevant, irrational, or prohibited grounds. In short, the evidence leaves no room to doubt that [HN12](#)^[↑] the selection process was designed only to find enlisted men qualified for court service. The senior noncommissioned ranks provided a convenient and logically probable source for eligibles. To refer first to those ranks for prospective members is not an impermissible choice. [United States v Dennis, supra.](#)

We turn to the intentional selection of a Negro to serve as a court member. **[*41]** **[***13]** Complaints about color or race in the selection of jurors normally deal with the *exclusion* of qualified persons solely on such irrelevant and prohibited bases. See Annotation, "Violation of constitutional rights of defendant in criminal case by unfair practices in selection of grand or petit jury," 82 L ed 1053. However, in [Collins v Walker, 329 F2d 100 \(1964\)](#), the Court of Appeals for the Fifth Circuit granted a writ of *habeas corpus* on the ground the accused, a Negro, was unlawfully discriminated against when the panel of twenty grand jurors which indicted him was so organized as deliberately **[**27]** to *include* six Negroes. The court reasoned that the intentional inclusion of Negroes constituted "discrimination against . . . [the accused] because of his race or color." [Id., at page 105](#). With due respect to the learning and experience of the Court of Appeals, we think it misapprehended the fundamental difference between inclusion of a member of a particular group for the purpose of obtaining a fair representation of a substantial part of the community, and exclusion of members of that group so as to reduce the representational character of the jury. In [Avery v Georgia, 345 US 559, 562, 97 L ed 1244, 73 S Ct 891 \(1953\)](#), which was relied upon by the Court of Appeals, the Supreme Court criticized the practice of using a white ticket to designate a prospective white juror, and a yellow ticket to indicate a Negro juror. However, the criticism was related to the established fact that no Negroes had been selected for service over an extended period of time, although they numbered five percent of the jury list. The flagging of the tickets, together with the long continued failure to select a single Negro for service, was held to establish a *prima facie* case of *exclusion* **[**28]** of Negroes from jury duty. It was exclusion, not inclusion, that vitiated the selection process. In [Dow v Carnegie-Illinois Steel Corporation, 224 F2d 414 \(CA 3d Cir\) \(1955\)](#), cert den 350 US 971, 100 L ed 842, 76 S Ct 442 (1956), the clerk deliberately

tried to place more than one Negro juror on each panel. To achieve that purpose, the cards of eligible jurors were marked to show those who were Negro. The court pointed out that, unlike *Avery*, which was a case of exclusion, the inclusion of Negroes on the jury was designed "to insure a fair representation" of that class, and was, therefore, proper. [Dow v Carnegie-Illinois Steel Corporation, 224 F2d 414, supra, at pages 425-426](#). Accord: [United States v Dennis, 183 F2d 201, supra, at page 223](#); [United States v Forest, 118 F Supp 504 \(ED Mo\) \(1954\)](#). [HN13](#)^[↑] If deliberately to include qualified persons is discrimination, it is discrimination in favor of, not against, an accused. Equal protection of the laws is not denied, but assured. We hold, therefore, there was no error in the deliberate selection of a Negro to serve on the accused's court-martial.

The decision of the board of review is affirmed.

Concur by: KILDAY

Concur

KILDAY, Judge **[**29]** (concurring in the result):

I concur in the result reached by Chief Judge Quinn. I do not agree with all of the reasons given by him in reaching that result. Because the routes we follow are so divergent, I feel it is requisite that my view be separately stated.

The Congress has power "to make Rules for the Government and Regulation of the land and naval Forces," [Constitution of the United States, Article I, Section 8, Clause 14](#). This power is entirely separate from the Congressional judicial powers as outlined in Article III of the Constitution. This is made clear in the early case of *Dynes v Hoover*, 20 Howard 65 (U.S. 1858), in the following language:

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other."

An accused before a court-martial is not entitled to a jury trial. *Ex parte* **[*42]** **[***14]** *Milligan*, 4 Wall **[**30]** 2, 123 (U.S. 1866); *Ex parte Quirin*, 317 US 1, 87 L ed

3, [63 S Ct 2 \(1942\)](#); [United States v Culp, 14 USCMA 199, 33 CMR 411](#).

A court-martial must be convened in faithful compliance with the statute under which it is authorized as is made clear by the following language of the Supreme Court:

". . . A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." [[McCloughry v Deming, 186 US 49, 62, 46 L ed 1049, 22 S Ct 786 \(1902\)](#).]

". . . To give effect to its [the court-martial] sentences, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law." [[Runkle v United States, 122 US 543, 556, 30 L ed 1167, 7 S Ct 1141 \(1887\)](#).]

It would therefore appear that it is neither necessary nor desirable to cite and analyze cases governing the formation of a jury in a trial before a court created and proceeding under the judicial power conferred by Article III of **[**31]** the Constitution in evaluating the formation of a court-martial under a statute passed by the Congress in the exercise of the power to make rules for the government and regulation of the land and naval forces conferred by Article I as the "two powers are entirely independent of each other." *Dynes v Hoover*, supra. Our inquiry in the case at bar should be limited to consideration as to whether, in the formation of the court-martial, the convening authority complied with the provisions of the statute.

Article 25(c)(1), Uniform Code of Military Justice, [10 USC § 825](#), makes it abundantly clear that any (or all) enlisted persons are eligible to serve on general and special courts-martial, where enlisted members are requested by the accused and within the other limitations expressly provided in Article 25, supra. The selection of enlisted men is, by Article 25(d)(2), committed to the sound discretion of the convening authority. There is, however, the strong direction of Article 25(d)(1) that, "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade."

In this separate opinion it shall be my purpose, by **[**32]** consideration of the statutory provisions, the legislative history of the provision for enlisted members

of courts-martial, and other considerations, to point out that the convening authority acted in conformity with such statutory provisions; and that the appellant was tried by a fair and impartial court-martial.

The issue pending before us for decision is contained in the language of the granted assignment as follows:

"THE INTENTIONAL AND SYSTEMATIC EXCLUSION FROM AN ENLISTED COURT-LIST OF MEMBERS OF LOWER ENLISTED GRADES, OTHERWISE ELIGIBLE, IS UNLAWFUL, AND IN THIS CASE, SUCH EXCLUSION DEPRIVED THE ACCUSED OF MILITARY DUE PROCESS."

It is to be noted that the appellant does not contend the court-martial which tried him was biased or prosecution minded. He does not contend the members appointed were not qualified, nor is there any indication the appellant did not receive a fair trial. Rather, he alleges that "Senior noncommissioned officers, quite naturally, would view a disturbance in a barracks in a different light than would lower grade enlisted men, and it is strenuously submitted that such senior noncommissioned officers would be likely to consider the entire matter **[**33]** more as a breakdown in discipline than anything else." ¹ There is, **[*43]** **[***15]** however, no contention that those who served on this court-martial were so oriented. Therefore, the naked question presented concerns the consideration for appointment and the appointment, as members of the court-martial, of senior noncommissioned officers only.

Appellate Government counsel vigorously contend that inasmuch as this question was first raised by an "Article 38(c) Brief" which was never presented to the convening authority; there was an absence of objection at the time the court-martial was convened as to the manner in which it was selected; the appellant failed to exercise any challenge for cause or peremptorily challenge any officer-member; and since he did not in any manner raise an issue relative **[**34]** to the composition or the manner of its selection; appellant is now precluded from raising the objection for the first time on appeal.

I am not prepared to say all of these objections are without merit. Indeed, orderly procedure obviously

¹ The charges and specifications and record of trial reflect that rather than this being a simple disturbance in the barracks, the accused was convicted of three specifications of assault with a deadly weapon (one specification by kicking the victim in the head with his foot encased in a shoe and two by brandishing an open straight edged razor) during a fight in the barracks.

dictates that any complaint regarding the composition of a court-martial should be raised at the earliest opportunity, where prompt action may be taken to rectify any defect. On the other hand, the importance of the issue involved, the earnestness with which it is presented, the fact that there are additional cases containing the identical question pending disposition by us, and other considerations, in my opinion, render it highly desirable, if not essential, that we proceed now to its determination.

I

In military jurisprudence, courts-martial were composed of officers only from time immemorial. At the conclusion of World War I and, again, at the conclusion of World War II, there was bitter complaint, from those who had served, against the manner in which military justice had been administered, including the exclusion from courts-martial of all enlisted personnel. These complaints gave rise to the consideration of these questions by a number **[**35]** of committees, commissions and boards, both officially appointed and privately convened.

The proposal that enlisted men be eligible to so serve was recommended, officially, to the House of Representatives, during the 79th Congress, through a report of a subcommittee of the Committee on Military Affairs, which was investigating the national war effort, the report being authored by Honorable Carl Durham, a Representative from North Carolina (House Report No. 2722, 79th Congress, 2d Session, page 2 (1946)).

During the 80th Congress, on March 12, 1947, Honorable Robert P. Patterson, Secretary of War, forwarded to the Speaker of the House of Representatives a draft of a bill entitled:

"A bill to amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences and for other purposes."

This draft bill was offered in the House of Representatives and became H.R. 2575, 80th Congress, 1st Session. It is to be noted that this bill constituted proposed amendments to the existing Articles of War, governing the Army. Included therein was a proposed amendment to "Art 4. Who May Serve on Courts-Martial," **[**36]** the second subsection thereof reading as follows:

"All enlisted persons in the active military service of the United States or in the active military service of the

Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of enlisted persons and persons of these categories shall be detailed for such service *when deemed proper by the appointing authority.*" [Emphasis supplied.] [Hearings before House Armed Services Committee on H.R. 2575, 80th Congress, 1st Session, page 1904.]

It is to be noted that H.R. 2575 was referred to the Legal Subcommittee of the Committee on Armed Services, of which Honorable Charles Elston, a Representative from Ohio, was Chairman, and upon the adoption of the bill **[*44]** **[***16]** it became popularly known as the "Elston Act."

At that time the Under Secretary of War represented the Secretary of War in the administration of military justice. Honorable Kenneth C. Royall, Under Secretary of War, appeared before the Elston Subcommittee to interpret and give the Department's views with reference to the pending bill. In explaining the provision **[**37]** for enlisted men as members of courts-martial, Secretary Royall stated:

"The bill would make qualified senior enlisted personnel -- here is another point that has caused a great deal of criticism, and I am going to discuss that a little more fully later on -- from other units than that of the enlisted man tried eligible to serve as members of general and special courts martial which try enlisted men, this to be done within the discretion of the appointing authority.

"As to enlisted men on the courts . . . the bill follows the recommendation of the American Bar Association Committee. The belief has been expressed in some quarters that enlisted men should be required on all courts trying enlisted men and that the matter should not be left discretionary with the appointing authority. On the other hand, there is a definite feeling that enlisted men may not wish to be tried by other enlisted men. And some combat commanders feel that it would be detrimental to discipline to have enlisted men on courts. For these reasons, I think, the committee left the matter flexible -- at least those are our reasons for approving the committee's recommendation.

"The second thing is they found **[**38]** that the enlisted men who were in authority -- the sergeants and the corporals -- were in many instances inclined to be considerably harsher than the officers, which from my experience in World War I was certainly the case. I don't know whether they have changed since then or not." [Emphasis supplied.] [House Hearings, supra,

pages 1920-1923.]

Brigadier General Hubert D. Hoover, Assistant Judge Advocate General in charge of military justice matters of the Army, testified, in part, as follows:

"As we conceive it, the appointment of enlisted persons is designed not to expand the groups of persons who may be eligible to serve on courts martial in order that we shall have an additional reservoir of eligibles, but, if we may put it that way, the appointment is authorized in deference to what appears to be the public demand for participation by enlisted persons in courts martial.

"Another consideration which comes to me is that the ordinary enlisted man who is selected for court-martial duty will probably be one of noncommissioned grade, because of his capacity and his experience. I think that the enlisted man who is being tried is due for a pretty serious disappointment, when **[**39]** he gets his sentence, because I really think that the noncommissioned officers will be harder with respect to punishment than officers will be." [House Hearings, supra, pages 2019, 2022.]

In reporting H.R. 2575, with amendments, to the House of Representatives and recommending that the bill, as amended, be passed, the committee stated the manner in which it had amended the War Department's proposal as to the language of Article 4 of the Articles of War with a very significant observation as follows:

"Should enlisted men be authorized to sit as members of a court martial in the trial of other enlisted men?

"The War Department agrees that they should, at the option of the appointing authority. Our committee agrees that they should, at the option of the defendant and has amended section 3 accordingly. *We seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants, however, the choice is properly a right of the defendant. Once having **[*45]** **[***17]** exercised that right he must assume the responsibility for the results of his choice.*" [Emphasis supplied.] [House Report No. 1034, 80th Congress, 1st Session, **[**40]** page 6.]

The provision, as thus amended, passed both the House of Representatives and the Senate and became law. The Elston Act also contained, as a part of Article of War 4, substantially the same language as presently appears in Article 25(d)(2) of the Code as to considerations to be observed by the appointing authority in convening a court-martial, except that it also

contained the provision, "officers and enlisted persons having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of minority membership thereof."

It is manifest that the committee and the Congress granted, in Article of War 4, wide discretion to the appointing authority in choosing those to compose the court-martial. It is equally manifest that had the Congress intended that such Article be construed as now contended by appellant, it had full authority, by appropriate language, to so provide. Rather, with a frank caveat from the highest civilian official and the highest military official of the War Department, having responsibility for the administration of military justice, that the language used would result **[**41]** in the appointment of noncommissioned officers or qualified senior enlisted personnel, nevertheless the Congress adhered to the language used by such officials in their draft bill. That the committee agreed such personnel would be appointed, and that they could be expected to be harsher than commissioned personnel is rendered indisputable by the language of the committee report expressing serious doubt that such enlisted men on courts-martial would benefit the defendant, and its even stronger caveat that: "Once having exercised that right he must assume the responsibility for the results of his choice."

II

With this background and legislative history of the introduction of enlisted men as members of courts-martial, I proceed to a consideration of the circumstances surrounding the enactment of Article 25, Uniform Code of Military Justice, [10 USC § 825](#).

The Elston Act was approved by the President on June 24, 1948, 62 Stat 604, 627, Public Law 759, 80th Congress. On February 8, 1949, Honorable James Forrestal, Secretary of Defense, forwarded to the Speaker of the House of Representatives a draft of a proposed bill "To unify, consolidate, revise, and codify the Articles of War, **[**42]** the Articles of the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice."

Article 25 of this draft bill followed the provisions of Article of War 4 of the Elston Act, but contained sufficient difference in language to justify the quotation of the whole thereof herein:

"ART. 25. Who may serve on courts-martial.

"(a) Any officer on active duty with the armed forces shall be competent to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

"(b) Any warrant officer on active duty with the armed forces shall be competent to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

"(c) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be competent to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall be appointed as a member of a court only if, prior to the convening of such court, [**43] the accused has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which [*46] [***18] does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

"For the purposes of this article, the word 'unit' shall mean any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, a squadron, or a ship's crew, or than a body corresponding to one of them.

"(d)(1) When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade.

"(2) When convening a court-martial, the convening authority shall appoint as members thereof such [**44] persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case." [Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, page 572.]

It should be noted that the above Article 25(d)(1) is a provision which had existed in the Articles of War for many years. Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, page 71. The language of Article 25(d)(2) was originally enacted by Act approved June 4, 1920, 41 Stat 759.

The proposal for the adoption of a Uniform Code of Military Justice was referred, by the Committee on Armed Services, to a subcommittee of which Honorable Overton Brooks, a Representative from Louisiana, was Chairman, and that subcommittee held extended and exhaustive hearings on its proposals.

The question of the eligibility and selection of enlisted men as members of courts-martial was again discussed by this second subcommittee [**45] to study the question. At that time a total of fifteen courts-martial containing enlisted men had been held and full information with reference thereto was available to the subcommittee. Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, page 727.

Among others, George A. Spiegelberg, Esquire, Chairman of the Special Committee on Military Justice of the American Bar Association, addressed himself to this question, testifying, in part, as follows:

"Mr. SPIEGELBERG. Oh, you are talking about the enlisted men on the court.

"Mr. RIVERS. That is what I am talking about.

"Mr. SPIEGELBERG. I am sorry, perhaps I misunderstood you completely. Frankly, and this has been discussed at length in the American Bar Association, we do not think that you get very far by having enlisted men on courts.

"Mr. RIVERS. It is not going to hurt.

"Mr. SPIEGELBERG. No, absolutely no.

"Mr. RIVERS. I do not think so.

"Mr. SPIEGELBERG. If it gives the enlisted man a feeling of confidence --

"Mr. RIVERS. That is right.

"Mr. SPIEGELBERG. That he might be able to have some of his peers on the court --

"Mr. RIVERS. That is right.

"Mr. SPIEGELBERG. [****46**] Certainly the experiment can do no harm. But my shrewd guess would be that most of the enlisted men who serve on courts will either be master sergeants [***47**] [*****19**] or tech sergeants with from 6 years' service up and that they will be more severe in their judgment of the man on trial than would officers.

"But I agree completely. It does no harm and it may do good.

"Mr. RIVERS. That is right.

"Mr. GAVIN. Why would it necessarily have to be a sergeant or a master sergeant?

"Mr. SPIEGELBERG. It would not. But, I say, my guess is that you will find in most cases the enlisted men on the court will be either first or second grade.

"Mr. PHILBIN. Why should that follow, necessarily?

"Mr. SPIEGELBERG. Well, I do not know why except that those are the enlisted men that the commander or the junior officer -- the company commanders -- know and they are the men that they actually select and recommend as being qualified for court-martial duty.

"Mr. PHILBIN. Of course, in doing it, you could see that it would be a fair representation of all enlisted men, of all ranks, and so forth.

"Mr. SPIEGELBERG. You could. But I think it is not more than a third now on the [****47**] court and that would mean at most two on the average court, and it would be pretty hard to administer such a provision.

"I do not say it could not be done. I think it is better not to try to specify --." [*Ibid*, pages 715, 724.]

After having heard testimony as to the manner in which the amended Article of War 4, making enlisted men eligible for membership on courts-martial, had been construed and administered, the Congress saw fit to reenact the same in substantially the same language. That no oversight was involved is evident. The fact that the Congress saw fit to change some of the language of Article of War 4 in readopting it as Article 25, places it beyond cavil that Congress recognized and ratified the prior interpretation made by the War Department, the executive department charged with responsibility for its interpretation. [United States v Davis, 12 USCMA 576, 31 CMR 162](#); [United States v Littrice, 3 USCMA 487, 13 CMR 43](#); [United States v Scheunemann, 14 USCMA 479, 482, 34 CMR 259](#).

III

Turning now to the language of Article 25(d)(1) and 25(d)(2), it is observed that the same is neither doubtful, obscure nor ambiguous, and resort to rules of statutory construction [****48**] is unnecessary. [United States v Davis, supra](#). The first clear and positive direction to the convening authority in appointing a court-martial is that: "When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade." This is an ancient provision of military law. Winthrop, *supra*. The plain and unambiguous meaning of this provision is that an accused before a court-martial is to be tried by his superiors, not by his peers or equals as is the case of a civilian defendant before a jury.

The direction of Article 25(d)(2) is that the convening authority shall appoint as members thereof such persons as, *in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. It would be difficult to conceive of words with which more adequately to commit the selection to the sound discretion of the convening authority. If the person under consideration for appointment is not junior to the accused, the selection is of those who "*in his opinion*" are best qualified. The guidelines established are those which, among other worthwhile [****49**] qualifications, tend to the accumulation of rank or grade. We are not blind to, nor ignorant of, the fact that under statutory provisions and ancient military procedures, age, education, training, experience, and length of service, do produce an accumulation of military rank and grade. This determination is within the sound discretion of the convening authority. He may not abuse that discretion by the choice of individuals who are not fair and impartial. He can no more "stack" the [***48**] [*****20**] court against the interests of the accused than he can pollute the court by command control or influence against him. [United States v Hedges, 11 USCMA 642, 29 CMR 458](#); [United States v Kitchens, 12 USCMA 589, 31 CMR 175](#). In the case before us there is no contention nor intimation that the convening authority abused his discretion in the selection of the individuals who composed the court, nor that any of them were other than fair and impartial.

IV

In an able and exhaustive brief, appellate defense counsel point out that in a long series of cases, which they cite, the Supreme Court has established certain

general rules which are now followed by the Supreme Court and other Federal **[**50]** courts as well. Counsel conclude that, broadly stated, the major rules are as follows: (1) An accused is not entitled to any particular kind of jury; (2) an accused has no right or inclusion on the panel of any person or class of persons; but (3) an accused is entitled to a fair and impartial jury drawn from a panel from which no class of eligible persons was systematically, arbitrarily, and purposefully excluded because of membership in that class or prejudice against that class.

Most likely counsel has analyzed the Federal cases correctly and has come to a justifiable conclusion with reference to those cases. However, the fact remains that in a military trial, an accused is entitled to no jury, but to a court-martial chosen in accordance with Article 25, Uniform Code of Military Justice, *supra*, the system of military justice provided by Congress in the exercise of its constitutional power to make rules for the government and regulation of the land and naval forces. *Ex parte Milligan*, 4 Wall 2, 137-138 (U.S. 1866); *Ex parte Quirin*, 317 US 1, 87 L ed 3, 63 S Ct 2 (1942); *United States v Culp*, 14 USCMA 199, 33 CMR 411. The language used in *DeWar v Hunter*, 170 F2d 993 (CA10th Cir) **[**51]** (1948), cert den 377 US 908, 93 L ed 1720, 69 S Ct 1048 (1949), well and properly states the law:

"Appellant's contention that a court-martial constituted to try a private soldier, composed entirely of officers, violates the 6th Amendment of the Constitution, in that it denies him a right to a trial before his peers or equals, is not well founded. The right of trial by jury guaranteed by the 6th Amendment to the Constitution of the United States is not applicable in a trial by military court-martial. Hence, decisions respecting the right to trial by one's peers in civil courts are inapplicable. A soldier is subject to military law and what constitutes due process in a trial by a military tribunal is gauged by the principles of military law enacted by the Congress, provided the accused is given due notice of the charge against him, a fair opportunity to prepare his defense, and his guilt is adjudicated by a competent tribunal."

The conclusion of the Court of Appeals for the Tenth Circuit is confirmed by those decisions of the Supreme Court holding unconstitutional provisions of the Uniform Code of Military Justice subjecting certain categories of civilians to trial by court-martial. **[**52]** The burden of those cases is that Congress may make liable to trial by court-martial only persons in military status and subject to military law, for the reason that civilians are not

subject to those exceptions to constitutional protections and due process which apply to those in military status. *Toth v Quarles*, 350 US 11, 100 L ed 8, 76 S Ct 1 (1955); *Reid v Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222 (1957); *Kinsella v United States*, 361 US 234, 4 L ed 2d 268, 80 S Ct 297 (1960); *McElroy v Guagliardo*, 361 US 281, 4 L ed 2d 282, 80 S Ct 305 (1960); *Grisham v Hagan*, 361 US 278, 4 L ed 2d 279, 80 S Ct 310 (1960). Thus the cases cited by the defense and which control in the selection of juries in civilian courts have but limited application to an accused before a court-martial, and none toward this accused.

Attention has been given to the fact that the issue as granted refers to the "intentional and systematic exclusion from an enlisted court-list of members of lower enlisted grades." Article 25, Uniform Code of Military Justice, **[*49]** **[***21]** *supra*, does not provide for any lists of prospective court members, in the sense that panels of prospective jurors must be formulated **[**53]** or persons drawn therefrom by lot or otherwise. Rather, that Article places the responsibility and grants the discretion to the convening authority to appoint the court members from no list or from any list. This record indicates that one of the enlisted men contemplated for the court was chosen by the convening authority on his own responsibility. Attention has also been given to the fact that this is the only case upon which enlisted men had served upon a court-martial in the area in which this trial was had over a protracted period and no evidence as to whether during any other time enlisted men had been requested in any other case. It is doubtful that this one case could show anything to be systematic.

In view of the fact that Article 25, Uniform Code of Military Justice, *supra*, places the selection of the officer and enlisted members of a court-martial within the sound discretion of the convening authority and there being no evidence or contention of abuse of that discretion in the choice of the individuals who served on the court-martial, no error is reflected by this assignment.

Proceeding to the consideration of the efforts made by the convening authority to secure **[**54]** a Negro enlisted man as a member of the court-martial, I concur with the Chief Judge in his conclusion and the reasoning by which he reached the same. Here, again, there is no contention the enlisted man selected and appointed by the convening authority was biased, prosecution minded nor in anywise other than a fair and impartial member of the court. One of the officer-members was also of appellant's race, a Negro, and no complaint is made as

to his membership on the court. This record reveals no more than that, in the exercise of his discretion, the convening authority chose this court member as qualified for membership on the court. As the Chief Judge points out, this contention is without merit.

I agree, the decision of the board of review should be affirmed.

Dissent by: FERGUSON

Dissent

FERGUSON, Judge (dissenting):

I dissent.

This case presents issues of the gravest concern to the administration of military justice and basically poses the questions whether the right to have enlisted personnel serve on courts-martial is to be enforced as Congress intended or is to be rendered valueless by Army practice, and whether race -- a standard so strongly rejected by our Federal constitutional [**55] system -- is to be allowed to raise its ugly banner as a criterion for membership on our military tribunals. There is no room for disagreement here; there is but a single answer which we can return to these inquiries. Whether by enactment of Congress or constitutional principle, no convening authority may limit selection of enlisted court members to senior noncommissioned officers, nor may he -- regardless of motive -- deliberately introduce into the military judicial system the practice of selecting a Negro to serve on a court-martial because of the color of the defendant's skin. Mr. Justice Harlan's ringing prophecy in *Plessy v Ferguson*, 163 US 537, 41 L ed 256, [16 S Ct 1138 \(1896\)](#), is the law which we should this day follow:

". . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when [**56] his civil rights as guaranteed by the supreme law of the land are involved." [*Plessy v Ferguson*, *supra*, at page 559.]

I regret that my brothers have reached a different

conclusion -- not because of the consequences to Private Crawford, for the elemency extended him below renders our affirmance of little practical import to him -- but because of the incalculable damage done to our system of military justice. To paraphrase Abraham Lincoln, the world [**50] [***22] will little remark what we have done here; it will not soon forget what we have said. While I have not succeeded in persuading them to follow the only path which I, in good conscience, can adopt, I necessarily record my reasons in order to disassociate myself from conclusions which are difficult to sustain either in logic or in law.

On June 4, 1963, various charges of aggravated assault against the accused were referred to trial by general court-martial. On June 10, 1963, the accused submitted a written request that enlisted personnel be appointed by the convening authority to the general court-martial designated to hear his case. Affidavits filed by various officers involved in the process of selecting members [**57] indicate the following occurred.

According to the sworn declarations of the staff judge advocate, upon receiving the accused's request, the "adjustment general or his deputy was requested to furnish my office a list of senior noncommissioned officers who were regarded as responsible and available for court-martial duty." (Emphasis supplied.) Further, in view of the fact that Private Crawford was a Negro, "we asked that at least one enlisted man be colored." These names were submitted, a written list was prepared, and the matter turned over to the chief of staff. Prospective colored members were marked with an asterisk, and "I . . . indicated in some way, possibly a double asterisk, the court members who I believed were possibly better qualified by intelligence or temperament for the responsible assignment of being general court members."

In delivering the list to the chief of staff, the staff judge advocate "explained . . . that while I thought it desirable that at least one of the enlisted members be colored in view of the fact that Crawford was accused of a knife assault on a white soldier, one of the officer members was colored, and that a colored enlisted member was therefore [**58] not too important. . . . In short, I furnished a list of names and asked the Commanding General to select therefrom or to ask for other names, keeping in mind that at such short notice we might not be able to obtain a colored enlisted member."

The chief of staff delivered the list to the convening authority, returned and informed the staff judge

advocate "the Commanding General wanted one colored member (whose name as I recall was Sergeant Rufus Jones) appointed to the court. This colored enlisted man's name was not on the list submitted by me to the General." In addition, the convening authority had marked the names of those senior noncommissioned officers on the list whom he desired to serve as the balance of the enlisted membership.

When Sergeant Jones was contacted, he vehemently protested that he was white, and the staff judge advocate obtained the name of another available colored, senior noncommissioned officer. This individual was appointed by the convening authority to serve at the trial.

The staff judge advocate pointed out that, in "seeking names of prospective court members I have always sought individuals with integrity and common sense." He thought "seniority [****59**] of rank might give some indication of civic responsibility and intelligence and that amongst this group of nominees the Commanding General, hopefully, might find some nuggets of pure gold for court-martial membership purposes."

The deputy staff judge advocate submitted an affidavit generally corroborative of that of the staff judge advocate, adding that he had sought, on the latter's behalf, from the adjutant general, a list of "nine or ten . . . mature, responsible and experienced *senior noncommissioned officers* from units other than the accused." (Emphasis supplied.) He had specifically requested "the name of a colored noncommissioned officer be included if this was possible." The need for nine or ten names was required in order to give the Commanding General a broader basis for selecting the needed four enlisted members.

From January 1961, until accused's trial in June 1963, no other defendant had requested enlisted personnel to be appointed to his court-martial.

[*51] **[***23]** Other affidavits filed on behalf of the accused support the foregoing declarations and establish beyond cavil that the standard for appointment of enlisted personnel to Crawford's court was **[**60]** that of "mature, responsible and experienced *senior noncommissioned officers*" (emphasis supplied) with the direction that a Negro noncommissioned officer be included.

Those enlisted personnel who were actually appointed to hear accused's case and, in fact, did so, were Sergeant Major (E-9) Graeff, Sergeant Major (E-9)

Giggey, Sergeant Major (E-9) Frejosky, and Master Sergeant (E-7) McNair, the last named being the Negro member located and recommended for selection to the Commanding General by the staff judge advocate. Thus, three out of the four members who participated in the trial occupied the highest enlisted grade in the Army and the fourth, while two steps below them, was also in the class popularly referred to as "first three graders."

In addition to the foregoing matters, the defense submitted to this Court certain statistical charts reflecting Army practice in appointing enlisted court members during the period 1959-1962. These in general indicate that, in 5,582 trials, enlisted accused sought appointment of enlisted court members on only 154 occasions. In 1959, out of 221 enlisted members thus selected, 204, or 92.3%, held the three most senior grades in the Army **[**61]** -- E-7, E-8, or E-9. Yet, only three cases involved accused of the rank of E-7, and no E-8 or E-9 personnel were subjected to trial.

In 1960, 206 enlisted members were appointed to hear 51 cases. There were 186 such persons in the three senior grades, amounting to 90% of those selected. Again, only three cases were tried involving defendants in the grade of E-7, and no first sergeants or sergeant majors were brought to trial.

In 1961, 179 enlisted members participated in 46 cases. One hundred and sixty were "first three graders," constituting 89.3% of those selected. During this year, only one defendant ranked as high as an E-7.

In 1962, the last year covered by the statistical analysis, 35 trials involved appointment of 136 enlisted members. One hundred eighteen, or 86.7%, were in the grades of E-7, E-8, or E-9, although only two defendants were so ranked. Thus, for the whole period of 1959-1962, an average of 89.4% of all enlisted court members have been selected from the three most senior noncommissioned officer grades.

The foregoing constitute the factors which bear upon the decision which this Court is required to make concerning whether, in the words of the assignment:

[62]** "THE INTENTIONAL AND SYSTEMATIC EXCLUSION FROM AN ENLISTED COURT-LIST OF MEMBERS OF LOWER ENLISTED GRADES, OTHERWISE ELIGIBLE, IS UNLAWFUL, AND IN THIS CASE, SUCH EXCLUSION DEPRIVED THE ACCUSED OF MILITARY DUE PROCESS."

II

At the outset, two matters which tend to obfuscate the issue before us should be clarified and put to one side. First, the Government stringently urges that the affidavits provided by the appellate defense counsel are not properly before us and that the entire matter was waived at the trial level by failure to enter any objection to the composition of the court-martial or to use the provided challenging process. The principal opinion mentions the matter in passing but eliminates it from consideration on the basis that Crawford's dilemma should be resolved in order to settle the question and eliminate uncertainty. In my opinion, the issue strikes at the heart of the process by which court members are selected, involves a violation of the Congressional mandate concerning the appointment of enlisted personnel, and is, therefore, jurisdictional in nature.

In [McClaughry v Deming, 186 US 49, 49 L ed 1049, 22 S Ct 786 \(1902\)](#), the Supreme Court declared, at page **[**63]** 62:

"... A court-martial is the creature of statute, and, as a body or tribunal, *it must be convened and constituted in entire conformity with the provisions of the statute, or else* **[*52]** **[***24]** *it is without jurisdiction.*" [Emphasis supplied.]

And in [Runkle v United States, 122 US 543, 30 L ed 1167, 7 S Ct 1141 \(1887\)](#), the same body declared, at page 555:

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. . . . To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law."

These decisions, which stand unimpeached today, make it clear that exacting compliance with the commands of the Code regarding the constitution of courts-martial is required in order to breath judicial life into the proceedings. [United States v Robinson, 13 USCMA **\[**64\]** 674, 33 CMR 206](#); [United States v Vanderpool, 4 USCMA 561, 16 CMR 135](#). Whether there has been such compliance is the very question before us. And that jurisdictional matters may be raised and disposition made of them on the basis of affidavits is clearly settled both in this Court and before the

boards of review. [United States v Ferguson, 5 USCMA 68, 17 CMR 68](#); [United States v Roberts, 7 USCMA 322, 22 CMR 112](#); [United States v Dickenson, 6 USCMA 438, 20 CMR 154](#); Rule IX F Uniform Rules of Procedure for Proceedings In and Before Boards of Review. The cases upon which the United States relies to support the contrary conclusion deal with the ordinary incidents of the trial and matters in mitigation of punishment. See [United States v Fagnan, 12 USCMA 192, 30 CMR 192](#), and [United States v Roberts, supra](#). Jurisdictional questions may be raised at any time, and the argument of waiver has no place in this controversy.

Secondly, the issue whether a member of the armed forces is entitled to a trial by jury is not involved here. That has long since been settled by the Supreme Court, and it cannot be gainsaid that neither indictment by grand jury nor trial by petit jury is constitutionally **[**65]** required in the military forces. [Ex parte Quirin, 317 US 1, 87 L ed 3, 63 S Ct 2 \(1942\)](#); [United States v Culp, 14 USCMA 199, 33 CMR 411](#); [United States v Jacoby, 11 USCMA 428, 29 CMR 244](#). It is for the Congress to provide the rules for the government of the land and naval forces, subject, generally, to the necessity for providing an opportunity for a fair hearing. [Whelchel v McDonald, 340 US 122, 95 L ed 141, 71 S Ct 146 \(1950\)](#). I hasten to add that the Congressional power is circumscribed, as the Chief Judge notes, by those constitutional guarantees which are neither expressly nor impliedly made inapplicable to military trials. [United States v Jacoby, supra](#). And the "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." [Burns v Wilson, 346 US 137, 142, 97 L ed 1508, 1515, 73 S Ct 1045, 1048 \(1953\)](#). But the issue of trial by jury of one's peers, except insofar as Congress has provided therefor in the Uniform Code, is not one with which we are now concerned. Rather, it is a question of what Congress has determined with regard to enlisted composition of courts-martial that **[**66]** needs must be found.

III

Code, supra, Article 25, [10 USC § 825](#), provides pertinently:

"(c)(1) *Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a*

court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial [*53] [***25] the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

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

"(2) When convening a court-martial, the convening authority shall detail as members thereof *such members of the armed forces* as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." [Emphasis supplied.]

As long ago as [United States v Dickenson, supra](#), we pointed out, at page 449:

"A statute must be interpreted in accordance with the declared intention of the legislature. [United States v Cooper Corp., 312 US 600, 61 S Ct 742, 85 L ed 1071; Hassett v Welch, 303 US 303, 58 S Ct 559, 82 L ed 858](#). If the words used in the statute convey a clear and definite meaning, a court has no right to look for or to impose a different meaning. It is clearly and forcefully set out in 50 Am Jur, Statutes, § 225, page 207, that 'a plain and unambiguous statute is to be applied, and *not interpreted*, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity.'"

See also [United States v Hicks, 6 USCMA 621, 20 CMR 337](#), and [United States \[**68\] v Davis, 12 USCMA 576, 31 CMR 162](#).

That is the principle which is applicable to our consideration of Code, supra, Article 25. We do not sit here, as did the Committee on Armed Services, to determine what rules should govern the convening authority in selecting court members. We take the rules which the Committee saw fit to submit to the House and Senate after long and careful consideration; which those

bodies saw fit to pass and submit to the President; and which that Chief Executive, acting pursuant to his constitutional authority, determined to approve. To act otherwise is simply to substitute our judgment for that of those to whom the legislative authority is properly confided and to set military justice upon a course rejected by the representatives of the people. And when we view it properly, the statute inescapably makes every enlisted member of the armed forces, who is not a member of the same unit as the accused, eligible for appointment on courts-martial.

First, Code, supra, Article 25, expressly declares, "Any enlisted member of an armed force on active duty who if not a member of the same unit as the accused is eligible to serve . . . for the trial of any enlisted [**69] member of an armed force." This declaration can scarcely be found to contain any ambiguities or to require construction which would merely serve to introduce doubts not theretofore present. [United States v Hicks, supra](#). Secondly, having made this general declaration of eligibility, the Article in question goes on to state certain specific substandards for use in selecting court members from this class of *all* enlisted men. It continues in effect and codifies the long policy of appointing no members to the court junior to the accused in rank or grade if such can be avoided. Code, supra, Article 25(d)(1). It confers upon the convening authority the sole discretion to select from the class first delineated in the enactment those who are, "in his opinion . . . best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." The only other condition contained in the statute, which is not relevant to the problem before us, is the prohibition [*54] [***26] against appointing any person as a court member who was the accuser, a witness for the prosecution, or who had acted as investigating officer or counsel in the same [**70] case. Code, supra, Article 25(d)(2).

The statute, therefore, sets up a class of enlisted members who, after accused has filed his request for their appointment in writing, are all eligible for consideration by the convening authority. Not a single condition is inserted with regard to their rank or position within the military community, except those very general and personal factors which are to be considered by the convening authority in the exercise of his discretion. Indeed, the authors of the Uniform Code expressly eliminated in Code, supra, Article 25, the proviso contained in its predecessor legislation, which prohibited members with less than two years' service from being appointed to hear general and special court-martial

cases. See Public Law 759, 80th Congress, 62 Stat 604, 628. And the reasons which led to the creation of this broad class of eligibles were those placed before the House Armed Services Committee as the views of enlisted men in general:

". . . They have two particular reasons for wanting it.

"One is that they feel that officers, in the main, have never served in the enlisted grades and do not understand the problems of enlisted people. While they **[**71]** don't expect any particular sympathy from the court because of that, a court which might include enlisted persons, nevertheless they feel that they would have more understanding.

"The second reason is this: They say it is much more democratic. They just like the idea that they have a choice. They say 'We would have it in civilian life and we like the idea that we can have it here.'" [Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, page 1142.]

Throughout the Hearings, fears were expressed that an attempt would be made to limit the accused's right by appointing only senior noncommissioned officers to courts-martial. Committee counsel brought to the members' attention the fact that "some of these 'crusty' noncoms might throw the book at these boys." House Hearings, supra, page 1140. And, as the Chief Judge notes, Mr. Spiegelberg, appearing on behalf of the American Bar Association, thought the right would prove valueless to enlisted accused as "most of the enlisted men who serve on courts will either be master sergeants or tech sergeants with from 6 years' service up and . . . they will be more severe in their judgment of the man on trial **[**72]** than would officers." House Hearings, supra, page 724. The comments of Mr. Philbin, a member of the House Committee, indicate perplexity as to "[w]hy should that follow, necessarily" and why the convening authority could not get "a fair representation of all enlisted men." House Hearings, supra, page 724. Perhaps Senator Wayne Morse most succinctly stated the legislative position when he declared:

"Why can we not have findings of fact by a cross-section of your personnel, whether the man is an enlisted man or a general?

"We have bankers and ditchdiggers on our juries, and I do not know why we cannot have generals and privates on our court-martial when a determination of facts in the application of the law -- [is in question]." [Hearings

before Senate Armed Services Committee on S. 857 and H.R. 4080, 81st Congress, 1st Session, page 93.]

All these considerations make clear beyond cavil the Congressional intent that all enlisted personnel be eligible for consideration by the convening authority in selecting enlisted members for courts-martial, and, as noted above, the express, unambiguous words of the statute command it. Yet, turning to the evidence before us, we find **[**73]** that each and every affidavit presented declares that the convening authority limited his choice of members to the very class which Congress hoped would not become the sole source of eligibles, *i.e.*, "senior noncommissioned officers." Thus, the staff judge advocate listed as recommended court members only those **[*55]** **[***27]** "senior noncommissioned officers who were regarded as responsible and available for court-martial duty." The affidavit which he filed indicates he considered seniority of rank the governing "indication of civic responsibility and intelligence." His deputy deposed that the list submitted to the convening authority was limited to "nine or ten . . . mature, responsible and experienced senior noncommissioned officers." And those senior noncommissioned officers considered most qualified for appointment were duly marked with double asterisks by the staff judge advocate. Finally, from this list and after an apparently extended hunt for another senior noncommissioned officer of the colored race, the enlisted members actually appointed consisted of three sergeants-major (E-9) and one master sergeant (E-7). Truly, this was precisely the sort of court which **[**74]** Mr. Spiegelberg, in testifying before the Armed Services Committee, feared would, in practice, result, and the sort of members to which the Committee Counsel referred as "some of these 'crusty' noncoms." House Hearings, supra, page 1140. Upon the face, therefore, of the record before us, the very letter of Code, supra, Article 25, was violated, for -- contrary to its terms -- the convening authority looked only to a small group of senior noncommissioned officers in selecting enlisted court members rather than making a choice from "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." To hold to the contrary simply writes into the statute, as a matter of law, that those who possess high enlisted rank, not only meet all these qualifications but are the only ones who do so. And this conclusion is reached despite the existence in the Army of a large reservoir of highly educated and trained enlisted specialists who hold comparable pay grades but are not considered noncommissioned officers as their tasks

envison the use of technical skill rather than command.

[75]** That such practice is not limited to the jurisdiction with which we now deal is graphically illustrated by the statistics furnished on this appeal by counsel regarding the appointment in general of senior grade enlisted personnel to courts-martial. The average of 89.4% throughout the Army eloquently bespeaks the reason why the right to have enlisted personnel on one's court-martial has become a relatively dead letter throughout the armed services.

It is in considering the effect of such deliberate exclusion of other ranks and junior noncommissioned officers from consideration for court membership that well considered precedents in the Federal system become relevant. Thus, the Supreme Court has consistently strick down systematic, arbitrary, and discriminatory exclusion of classes from jury service, when it appears that such classes meet the qualifications for service under the statutes involved. Of particular interest to those who argue that private soldiers -- the "hoi polloi" -- are not qualified to judge their fellows is the following language dealing with a similar contention regarding Negroes:

". . . The general attitude of the jury commissioner is shown by the following **[**76]** extract from his testimony: 'I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.' In the light of the testimony given by the defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan County. It is so sweeping, and so contrary to the evidence as to the many qualified negroes, that it destroys the intended effect of the commissioner's testimony." [[Norris v Alabama, 294 US 587, 598, 79 L ed 1074, 1081, 55 S Ct 579, 587 \(1935\).](#)]

[*56] **[***28]** And, in speaking of the deliberate exclusion of daily wage earners from a Federal jury, and, finding no base for such action under applicable statutes, Mr. Justice Murphy stated, for the Supreme Court:

". . . Wage earners, including **[**77]** those who are paid

by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

". . . Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial. 'That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.' *Glasser v United States*, supra (315 US 86, 86 L ed 707, [62 S Ct 457](#)).

". . . **[**78]** The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen." [[Thiel v Southern P. Co., 328 US 217, 90 L ed 1181, 66 S Ct 984, at page 223 \(1946\).](#)]

So also in this case, as has been demonstrated above, there is no basis in law for the exclusion of those persons who are not senior noncommissioned officers and who certainly form "a very substantial portion of the [military] community." [Thiel v Southern P. Co., supra](#). Both the admitted practice in this case and statistics regarding such appointments to courts-martial throughout the Army should indicate to us our duty to revivify the Article in question, to prevent the very practice which its proponents in Congress feared, and, as did the Supreme Court in the case of Federal juries, deny the breath of life to those who would make the court-martial the instrument of the higher ranks and eliminate the thoughts of those who sought to infuse in it some of the spirit of a civilian jury trial. House **[**79]** Hearings, supra, at page 1142. I would conclude, therefore, that this accused's court-martial consisted in part of improperly chosen enlisted members, was not duly constituted, and would order another trial.

IV

It does not appear that the Chief Judge disagrees with the legal conclusion which I reach, for he, too, finds nothing in the "Uniform Code expressly limits membership on a court-martial to persons of a particular rank" and that Code, *supra*, Article 25, "implies all ranks and grades are eligible for appointment." He finds, nevertheless, that the evidence does not establish the practice of discriminatory exclusion in this case. First, he treats each general court-martial jurisdiction within the Army as if it were a separate entity unresponsive for appointments occurring in other commands and, thus, believes the statistics filed by appellate defense counsel are of little moment. But, assuming such an approach to be correct, the value of the statistics lies in the background which it furnishes for consideration of the action of the convening authority and staff judge advocate in this case. It demonstrates beyond peradventure a widespread refusal on the part of the military **[**80]** to consider other than first three grade noncommissioned officers for appointment on courts-martial and serves to illuminate the affidavits filed in this **[*57]** **[***29]** case concerning selection from a list expressly limited to senior noncommissioned officers. In short, as was stated in [Hernandez v Texas, 347 US 475, 98 L ed 866, 74 S Ct 667 \(1954\)](#), at page 479:

"The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites.' One method by which this may be demonstrated is by showing the attitude of the community."

So also may the attitude of the military community toward the elimination of lower enlisted grades in the process of selecting and appointing enlisted court members be shown.

Secondly, conceding that the convening authority was limited to "senior noncommissioned officers" during the selection process, the Chief Judge believes that such a limitation is valid on the basis "that the senior ranks will more readily provide a large number of persons possessing the varied qualities enumerated in the Uniform Code." In so concluding, **[**81]** he relies on a number of well-settled Federal decisions which permit various criteria and sources to be used in the selection of veniremen. [United States v Flynn, 106 F Supp 966, 972 \(SD NY\) \(1952\)](#); [Walker v United States, 93 F2d, 383 \(CA 8th Cir\) \(1937\)](#); [Gorin v United States, 313 F2d 641 \(CA 1st Cir\) \(1963\)](#), cert den [374 US 829, 10 L ed](#)

2d 1052, [83 S Ct 1870 \(1963\)](#). But the important point which he overlooks is that none of these cases, in setting up various means of obtaining qualified jurors, involved a departure from statutory norms or a narrowing of those eligible under the statute by class. Cf. [Thiel v Southern P. Co., supra](#). Thus, in [Gorin, supra](#), Chief Judge Woodbury, speaking for the Circuit Court, stated, at page 644:

"This does not mean blanket endorsement of jury selection directly or indirectly from voting lists. It means that voting lists may be used as the basis for jury selection *unless it appears that in the community there is systematic and intentional exclusion from those lists of a particular economic, social, religious, racial, geographical, or political group. When such a showing is made some other basis of selection must be used.* Here, however, **[**82]** the appellants have not shown that in Boston any enumerated class is systematically and intentionally discriminated against in registering to vote. Indeed the evidence is quite to the contrary." [Emphasis supplied.]

In the instant case, however, the affidavits make quite clear that the convening authority was limited to the class or group of senior noncommissioned officers, thereby excluding from consideration all those not possessing one of those ranks. The statistics cited show that in the Army there is a "systematic and intentional exclusion" from such court lists of the other ranks. [Gorin, supra, at page 644](#). Hence, rather than the use of the ordinary screening process, we are confronted with the intentional narrowing of the class of eligibles under the Article in question which, in respect to a similar process under Federal jury enactments, the Supreme Court so vigorously condemned in [Thiel v Southern P. Co., supra](#). In short, we have that very departure from the statute which its drafters feared and predicted would occur. Taken all in all, the Chief Judge's reasoning to the contrary notwithstanding, if such can be done through the device of screening potential members, **[**83]** then the wording of the Article making "[a]ny enlisted member" eligible to participate in the military judicial process is indeed meaningless.

For these reasons, I record my disagreement with his conclusion.

V

The final question before us deals simply with whether a convening authority may ever select a member of a court-martial of the same race as the accused solely on the grounds of that race, *i.e.*, legitimately appoint a

Negro member of a court solely on the grounds that the defendant is colored. In my opinion, he clearly cannot.

The authorities are, of course, legion [*58] [***30] that systematic exclusion of Negroes or other classes of persons from service on juries is constitutionally impermissible. [Norris v Alabama, supra](#); [Hernandez v Texas, supra](#); [Eubanks v Louisiana, 356 US 584, 2 L ed 2d 991, 78 S Ct 970 \(1958\)](#); [Arnold v North Carolina, 376 US 773, 12 L ed 2d 77, 84 S Ct 1032 \(1964\)](#). But it is equally discriminatory deliberately to *include* court members on the basis that they are of the same race as the defendant.

In [Collins v Walker, 329 F2d 100](#) (CA 5th Cir) (1964), it was established that six Negroes were intentionally included in a list of [*84] twenty persons from whom twelve grand jurors were to be drawn. Five were actually selected to serve on the grand jury which indicted the accused, whose case was the only one scheduled to be heard by such body. The Circuit Court of Appeals concluded that the indictment was void and granted a writ of *habeas corpus* to the defendant. In so acting, it stated, at page 105:

"The only list of importance to the decision of this case is the list of twenty from which the foreman was selected and the other eleven grand jurors drawn. Six Negroes were deliberately included in this list of twenty because of their race. When to this circumstance is added the additional facts then known to the jury commissioners that the grand jury to be chosen from that list of twenty was to consider whether to return an indictment against Collins, and that no other case was scheduled to be considered by that grand jury, the conclusion becomes inescapable that in the organization of the grand jury which indicted Collins there was discrimination against him because of his race or color."

While, because of the nature of our national development, most cases have involved *exclusion* of Negroes from juries, [*85] the whole point of the discussion in this area is that race is an impermissible criterion for selection of jurors. In the administration of justice, we are to all be considered, not as Negroes, Whites, Chinese, Jews, or Christians, but as Americans. That is the teaching of [Collins v Walker, supra](#), and, contrary to the view of my brothers, I believe it is well-founded. Mr. Justice Harlan's dictum that the Constitution is color-blind is worth repeating. [Plessy v Ferguson, supra](#). An accused cannot demand that members of his own race be appointed to his court-martial, but he is "entitled to demand under the

Constitution . . . that in organizing the . . . jury there shall be no discrimination against him because of his race or color." [Collins v Walker, supra, at page 105](#); [Martin v Texas, 200 US 316, 50 L ed 497, 26 S Ct 338 \(1906\)](#).

In [Avery v Georgia, 345 US 559, 562, 97 L ed 1244, 73 S Ct 891 \(1953\)](#), the Supreme Court condemned the use of white and yellow tickets to indicate the race of prospective jurors, holding that such constituted *prima facie* evidence of discrimination. Mr. Justice Frankfurter, concurring, noted that "opportunity for working of a discriminatory system exists [*86] whenever the mechanism for jury selection has a component part, . . . that differentiates between white and colored." [Id., supra, at page 564](#). How much more does that discrimination exist when, as here, the convening authority is furnished with a list, the Negro members of which are marked with an asterisk! To establish conclusively the use of such an impermissible standard, it appears that, rejecting the colored member suggested by the staff judge advocate, the general determined to appoint another sergeant who turned out to be white. Finally, the staff judge advocate himself sought out Master Sergeant McNair and secured his appointment on the court-martial solely on the basis of his race and that of the defendant. Thus, in defiance of the constitutional prohibitions, as laid down in [Collins v Walker](#) and [Avery v Georgia](#), both *supra*, race was undeniably used as the standard by which at least one of the court members was selected and, for this reason also, I would reverse the decision of the board of review and order a new trial.

VI

In sum, then, I am of the opinion [*59] [***31] that this record conclusively establishes the convening authority impermissibly limited [*87] himself to senior noncommissioned officers in choosing enlisted court members, in violation of Code, *supra*, Article 25. Further, the detailed and arduous quest for a Negro member of the court, selected solely on the basis of his race, establishes beyond cavil that the ugly fact of race was considered, at least in this jurisdiction, to be the standard by which military jurors should be selected in the case of Negro defendants. I would not hesitate to strike this practice down and remind commanders everywhere that neither race, nor color, nor creed, enter into the administration of any American judicial system. Considering as I do that these errors go to the competency of the court-martial which heard accused's case, I would order another trial before a properly selected court. [Thiel v Southern P. Co., supra](#).

15 U.S.C.M.A. 31, *59; 1964 CMA LEXIS 197, **87; 35 C.M.R. 3, ***31

I, therefore, dissent from the contrary view of my brothers.

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Review Granted in Part by [U.S. v. Jeter](#), U.S. Armed Forces, May 3, 2022

81 M.J. 791

157
U.S. Navy-Marine Corps Court of Criminal Appeals.

UNITED STATES Appellee
v.
Willie C. JETER Lieutenant Junior Grade
(O-2), U.S. Navy Appellant

No. 201700248

Argued: 28 July 2021
Decided: 20 October 2021

Synopsis

Background: Black accused was convicted by general court-martial, Heather Partridge, J., at arraignment and [Jason L. Jones, J.](#), at trial, of violating the Navy's sexual harassment instruction, drunken operation of a vehicle, sexually assaulting two women, extortion, burglary, conduct unbecoming an officer, communicating a threat, and unlawful entry, and was sentenced to confinement for 20 years and dismissal. The United States Navy-Marine Corps Court of Criminal Appeals, [Frank D. Hutchison](#), Senior Judge, [78 M.J. 754](#), affirmed. Review was granted. The Court of Appeals for the Armed Forces vacated and remanded.

Holdings: On remand, the Navy-Marine Corps Court of Criminal Appeals, [Christopher J. Deerwester, J.](#), held that:

[1] accused did not make prima facie case of systematic exclusion of Black members from court-martial panels in violation of equal protection clause;

[2] accused did not make prima facie case of purposeful exclusion of Black members in his case in violation of equal protection clause;

[3] accused did not meet his burden of establishing some evidence of potential unlawful command influence;

[4] convening authority's selection of white, male panel members did not constitute apparent unlawful command influence;

[5] sufficient evidence supported accused's conviction for sexual assault; and

[6] panel member's service as legal officer during one witness' administrative separation board did not constitute actual bias.

Findings and sentence affirmed.

West Headnotes (9)

[1] **Military Justice**  Convening Courts-Martial; Detailing Members

The mere absence of minority members within a court-martial venire selected by the convening authority, unlike a prosecutor's use of a peremptory challenge against a juror of the same racial group as the accused, does not establish a prima facie case of purposeful discrimination, which then shifts the burden to the government to provide a race-neutral explanation for the absence of such minority members. UCMJ, Art. 25, [10 U.S.C.A. § 825](#).

[2] **Military Justice**  Convening Courts-Martial; Detailing Members

Batson's per se rule, that a prosecutor's use of a peremptory challenge against a juror of the same racial group as the criminal defendant establishes a prima facie case of purposeful discrimination, does not apply to the member selection process for courts-martial. UCMJ, Art. 25, [10 U.S.C.A. § 825](#).

[3] **Constitutional Law**  War and national security
Military Justice  Convening Courts-Martial;

Detailing Members

Black accused did not make prima facie case of systematic exclusion of Black members in court-martial panels in cases with a Black accused, in violation of equal protection clause, even though accused presented affidavit noting four cases, including accused's, in which only white members were selected for a Black accused's court-martial panel; affidavit did not include any information as to exclusion, improper or not, of Black members from panels, there was no evidence that convening authority who selected members for subject panels knew race of members selected or purposefully chose not to select Black members, and officers serving as convening authority who replaced original panel with new members in accused's case were not involved in other three cases. U.S. Const. Amend. 5; UCMJ, Art. 25, 10 U.S.C.A. § 825.

- [4] **Constitutional Law** → War and national security
Military Justice → Convening Courts-Martial; Detailing Members

Black accused did not make prima facie case of purposeful exclusion of Black members in court-martial panel in his case, in violation of equal protection clause, even though two of ten members of original court-martial panel were Black, amended convening order replaced all ten members with eight new white members, and subsequent amended convening order added one white member to panel; all three officers involved in member selection process were unaware of race of members detailed in either original convening order or amended convening orders. U.S. Const. Amend. 5; UCMJ, Art. 25, 10 U.S.C.A. § 825.

- [5] **Military Justice** → Command influence
Military Justice → Convening Courts-Martial; Detailing Members

While convening authorities are presumed to act in accordance with the military code's court-martial member selection criteria and prohibition on unlawful command influence over a court-martial, this presumption can be called into question under the totality of the circumstances. UCMJ, Arts. 25, 37, 10 U.S.C.A. §§ 825, 837.

- [6] **Military Justice** → Command influence

Black accused did not meet his burden of establishing some evidence of potential unlawful command influence exerted by convening authority by empaneling only white, male members to his general court-martial, even though seven of nine members' questionnaires contained racial or ethnic responses, since there was no evidence that convening authority knew of race or ethnicity of other two members. UCMJ, Arts. 25, 37, 10 U.S.C.A. §§ 825, 837.

- [7] **Military Justice** → Command influence

Convening authority's selection of white, male members to Black accused's general court-martial did not constitute apparent unlawful command influence; reasonable person would not harbor doubt of fairness of the proceeding, and accused did not present any evidence that convening authority selected members using criteria other than those in military code. UCMJ, Arts. 25, 37, 10 U.S.C.A. §§ 825, 837.

- [8] **Military Justice** → In general; nature and elements

Sufficient evidence supported finding that

accused threatened victim, as required to support accused's conviction for sexual assault; accused told victim she had to either engage in sexual relations with him or be held accountable for misconduct, and quid pro quo nature of his statement transformed it into wrongful conduct, even if reporting misconduct was normal part of accused's duties. UCMJ, Art. 120, 10 U.S.C.A. § 920(g)(7).

JAGC, USN (argued), Lieutenant John L. Flynn, JAGC, USN (on brief), Lieutenant Gregory A. Rustico, JAGC, USN (on brief)

Before STEPHENS, HOUTZ, and DEERWESTER Appellate Military Judges

Judge DEERWESTER delivered the opinion of the Court, in which Senior Judge STEPHENS and Judge HOUTZ joined.

[9] **Military Justice** → Disqualification of Members

Panel member's service as legal officer during one witness' administrative separation board and service as recorder at unrelated administrative separation board for sexual assault did not constitute actual bias in general court-martial charging accused with violating the Navy's sexual harassment instruction, drunken operation of a vehicle, sexually assaulting two women, extortion, burglary, conduct unbecoming an officer, communicating a threat, and unlawful entry; member stated he had little experience as legal officer and did not interact with witness closely. UCMJ, Arts. 92, 111, 120, 127, 129, 133, 134, 10 U.S.C.A. §§ 892, 911, 920, 927, 929, 933, 934.

*792 Appeal from the United States Navy-Marine Corps Trial Judiciary following remand from the United States Court of Appeals for the Armed Forces

Military Judges: Heather Partridge (arraignment) Jason L. Jones (trial)

Sentence adjudged 14 April 2017 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of officer members. Sentence approved by the convening authority: confinement for 20 years and a dismissal.

For Appellant: Major Anthony M. Grzincic, USMC (argued), Lieutenant Clifton E. Morgan III, JAGC, USN (on brief)

For Appellee: Lieutenant Catherine M. Crochetiere,

PUBLISHED OPINION OF THE COURT

DEERWESTER, Judge:

*793 A general court-martial consisting of officer members convicted Appellant, contrary to his pleas, of violating the Navy's sexual harassment instruction, drunken operation of a vehicle, sexually assaulting two different women, extortion, burglary, conduct unbecoming an officer, communicating a threat, and unlawful entry, in violation of Articles 92, 111, 120, 127, 129, 133, and 134, Uniform Code of Military Justice [UCMJ].¹

This case is before us for a second time. This Court issued its opinion in *Jeter I*, on 3 January 2019, where we affirmed the findings and sentence after addressing Appellant's original eleven assignments of error [AOEs]:²

- I. Whether removal of minority and female members from the court-martial panel violated Appellant's Equal Protection and Due Process rights;*
- II. Whether the Convening Authority committed actual or apparent unlawful command influence by stacking the members entirely with white men;*
- III. Whether the military judge erred in admitting evidence and instructing members on the Appellant's motive and intent;*
- IV. Whether Appellant's conviction for sexual assault by bodily harm is legally and factually sufficient;*
- V. Whether Appellant's conviction for sexually assaulting his victim while she was asleep is legally and factually sufficient;*
- VI. Whether Appellant's conviction for sexual assault by threatening or placing his victim in fear is legally and factually sufficient;*
- VII. Whether Appellant's conviction for drunken operation of a vehicle in violation of the Virginia Code is legally and factually insufficient;*³

VIII. Whether the military judge erred by denying Appellant's request for a mistake of fact instruction;

IX. Whether Appellant's trial defense counsel was ineffective;

X. Whether the military judge abused his discretion when he denied Appellant's motion to challenge a member for cause;

XI. Whether the military judge abused his discretion in denying Appellant's request for a new Article 32, UCMJ, proceeding.

After this Court issued its opinion, Appellant petitioned the Court of Appeals for the Armed Forces [CAAF]. CAAF issued a summary disposition⁴ vacating this Court's opinion and remanding for further consideration in light of *United States v. Bess*.⁵ In *Bess*, the issue before CAAF was whether the convening authority, who was the same convening authority in Appellant's case, violated due process by stacking the members' panel with white members when the accused was black. Judge Ryan, joined by Chief Judge Stucky, concluded that the protections found in *Batson v. Kentucky*⁶ do not extend to the *794 selection of members by the convening authority.⁷ Similar to this Court's now-vacated opinion in *Jeter I*, these judges noted that there was no precedent to extend the *Batson* protections to a convening authority's member selection, which is already covered by the requirements of Article 25, UCMJ.⁸ Upon re-docketing with this Court, additional briefing and oral argument were provided by the parties on the issue of *Batson's* applicability to member selection by the convening authority.

We find that the convening authority did not violate Appellant's equal protection or due process rights, and affirm on this AOE. We further adopt our holdings on AOE's II-XI, consistent with this Court's prior published opinion in *Jeter I* and once again conclude the findings and sentence are correct in law and fact and that no error materially prejudiced Appellant's substantial rights.

I. Background

The facts of Appellant's assignments of error sent back to this Court in light of *Bess* stem from the 4 January 2017 General Court-Martial Convening Order [GCMCO] 1-17, whereby the convening authority, Rear Admiral (O-8) [RADM] JS, Commander, Navy Region Mid-Atlantic, convened a general court-martial composed of ten officer members. Based on evidence attached to the record on appeal, which was not presented to the trial court, two of the ten members of this original court-martial panel were

black.

On 6 April 2017, four days prior to the beginning of Appellant's trial, Captain (O-6) [CAPT] MM, who was serving as the Acting Commander, Navy Region Mid-Atlantic, and convening authority, amended GCMCO 1-17, and issued GCMCO 1B-17. He removed the ten members selected by RADM JS, and appointed eight new members. Based on the court-martial members' questionnaires, seven of these members identified themselves as white men.⁹ When RADM JS returned as the convening authority, the day before trial was set to begin, he again amended the convening order by adding an additional member for a total of nine members. Based on the military judge's factual finding at trial, all nine of these members of the venire were white.

Prior to voir dire, Appellant's trial defense counsel [TDC] challenged the makeup of the members panel. He argued that a lack of minority members demonstrated a "systematic exclusion of members based on race and gender."¹⁰ Having been presented with no evidence regarding the racial composition of the original panel, the military judge concluded that there was no evidence of a systematic, purposeful exclusion of any minority members by the convening authority. During a later Article 39(a), UCMJ, session conducted during a recess in individual voir dire, TDC renewed his motion, arguing that the convening authority had engaged in a pattern of empaneling only white male members in courts-martial for accused who were black. In support of his motion, TDC noted that the members' questionnaires asked the members their race and gender. The TDC also offered a portion of a trial transcript from a previous court-martial—purportedly convened by the same convening authority—wherein the trial defense counsel in the other courts-martial complained that there was no racial diversity—meaning no black members—on the panel. The military judge maintained his previous ruling, concluding, "I don't see any unlawful Article 25[, UCMJ] issue here ... there is no evidence [the convening authority is] not using the Article 25[, UCMJ] criteria. ... I still don't see the systematic exclusion of [eligible members based on race or gender]."¹¹

*795 The members returned a finding of guilty on multiple charges and specifications and sentenced Appellant to 20 years' confinement and a dismissal. In Appellant's first appeal before this Court, he submitted an affidavit from the Executive Officer [XO], Defense Service Office Southeast. In his affidavit, the XO asserted that RADM JS convened two other courts-martial besides Appellant's, where the accused was a black man and was convicted by panels made up of only white members.

With the affidavit, the XO also enclosed a letter he had sent to RADM JS complaining about the lack of minority representation on members' panels for black accused. Thereafter, according to the XO's affidavit, RADM JS twice amended an existing convening order in the case of a black Naval officer represented by the XO, in order to include minority members. According to the affidavit, that officer accused was eventually acquitted.

CAAF remanded this case to this Court to consider Appellant's arguments concerning members' selection in light of its holding in *Bess*.¹² To that end, we found the evidence presented to this Court sufficient to question the presumption of regularity of the convening authorities' member selection¹³ and ordered sworn declarations from RADM JS, CAPT MM, and CAPT AA, the staff judge advocate [SJA] who advised them. Appellant asserts that, in light of *Bess*, the convening authority's selection of panel members violated his right to equal protection under the Fifth Amendment.¹⁴

II. Discussion

A. Members Selection Due Process

In his initial Appeal, Appellant argued first that the convening authority removed all minority representation from his court-martial, in violation of his Due Process and Equal Protection rights.¹⁵ In our analysis we discussed *Batson's* avenue for a criminal defendant who is a member of a "cognizable racial group" to establish a prima facie case of purposeful discrimination in the selection of a jury based solely on the prosecution's use of peremptory challenges for jurors who are part of the same racial group.¹⁶ Ultimately, we cited our unpublished decision in *Bess* in concluding that *Batson's* per se rule did not extend to a convening authority's selection of members.¹⁷ Further, upon de novo review, we found Appellant failed to make a showing of systematic exclusion. We now further examine this issue in light of CAAF's decision in *Bess*.

1. Court-Martial Referral Process and Member Selection Procedure

The process of convening a court-martial is governed by the UCMJ and Rules for Courts-Martial [R.C.M.] and

involves "preferring" charges, forwarding the charges, and "referring" the charges to a court-martial. The preferral process consists of the "accuser," signing an oath on the charge sheet that he or she has personal knowledge of or has investigated the allegations and that they are true to the best of his or her knowledge and belief.¹⁸ The accuser then forwards the charges to the summary court-martial convening authority, that is, the commander who has summary court-martial jurisdiction over the accused.

The summary court-martial convening authority may either dismiss the charges, refer the charges to a summary court-martial, or forward the charges to the special court-martial convening authority, a superior commander who has special court-martial jurisdiction over the accused.¹⁹ The special court-martial *796 convening authority may, in turn, dismiss the charges, refer the charges to either a summary or special court-martial, or, if the charges are of a serious nature, direct an Article 32, UCMJ, preliminary hearing to determine whether the charges should be forwarded to the general court-martial convening authority for disposition.²⁰

When a convening authority refers charges to a special or general court-martial, he or she issues a convening order which creates a panel of members to whom the charges can be referred (also referred to as the "venire").²¹ The venire may be composed of officers specially selected by the convening authority for the specific case or it may be a panel of officers on a so-called "standing order." A standing order or "standing panel" consists of members selected by the convening authority to potentially serve on any or all courts-martial convened during a period of time and to which the convening authority may ultimately refer many different cases.

The date of the trial is determined by the military judge, who is detailed to the case after the convening authority refers the case to court-martial. Depending on a number of factors, including the need for one or more pretrial hearings, the military judge may not decide upon the trial date for some time. When the judge does eventually set the trial date, the judge takes into account the judge's availability as well as the availability of the counsel for both sides—including any civilian counsel hired by the accused—and of the lay and any expert witnesses. In the typical case, the judge sets the trial for a date that is many weeks, if not months, after the convening authority originally selected the court members. It is quite common that several, and sometimes *all*, of the original members are not available for what eventually becomes the trial date. In such cases, the convening authority routinely amends the convening order to remove the unavailable

members and to select replacements.

2. *Batson's Applicability to Member Selection*

^[1]As we found in our initial opinion,²² we again find that the mere absence of minority members within the venire selected by the convening authority, unlike a prosecutor's use of a peremptory challenge against a juror of the same racial group as the accused, does *not* establish a prima facie case of purposeful discrimination, which then shifts the burden to the government to provide a race-neutral explanation for the absence of such minority members. We have found no precedent to allow for the proposition that the mere selection of an all-white panel would require the convening authority to provide a race-neutral reason for the selection. Unlike the mechanism utilized in preemptory challenges in which a prosecutor specifically excludes a member of the same cognizable racial group, member selection is generally a process of *inclusion*, based on the statutory requirements found in Article 25, UCMJ. As such, we decline to adopt Appellant's position at oral argument that detailing an all-white panel is alone enough to establish a prima facie case of *exclusion* of black members.

3. *Systematic Exclusion of Cognizable Racial Group*

^[2]As we discussed in our original opinion,²³ our analysis does not end with finding that *Batson's* per se rule does not apply to the member selection process. We also review whether, through submission of other evidence, a prima facie case of systematic exclusion of minority members has been made. In addition, we review whether evidence presented establishes purposeful exclusion of minority members in Appellant's case, even if not over a period of time. Here, evidence submitted in the form of an affidavit from the XO of the Defense Service Office supports that similar all-white panels were selected in three other cases with a black *797 accused. Further, Appellant also submitted evidence to this Court that the original standing court-martial convening order contained two black members, such that the effect of the subsequent amending convening orders replacing the original panel of ten members with nine all-white members at least has the appearance of excluding members of Appellant's cognizable racial group from his court-martial panel.

a. *Affidavit from the Executive Officer of the Defense Service Office*

^[3]As we discussed in our initial opinion, and as CAAF outlined in *Bess*, the affidavit from the XO does not itself establish a prima facie case of systematic exclusion of black members in cases in which there is a black accused. While the affidavit may appear to show a pattern of these cases over a period of time, it does not alone show exclusion, let alone systematic exclusion of black members. While the affidavit notes four cases (including Appellant's) in which only white members were selected for a black accused's court martial panel, it does not include any information as to the *exclusion*, improper or not, of black members. There is no evidence that the convening authority who selected these members knew the race of the members selected—let alone purposefully chose not to select members of the particular accused's cognizable racial group—or even knew the race of the accused. Further, the officers serving as the convening authority who replaced the standing panel with new members in Appellant's case were not the same officer mentioned in the three other cases. As such, while the XO's affidavit might be used by the trial defense counsel to request additional member selection discovery to evaluate whether to make a motion for improper member selection, it is not enough to establish a prima facie case of systematic exclusion of black members in Appellant's case.

b. *Evidence of Black Members on the Standing Order*

^[4] ^[5]More problematic, however, is evidence submitted to this Court pursuant to its fact-finding authority supporting that two members on the original standing order were black. If the race of the members on the standing order were in fact known to the convening authority, and the convening authority specifically excluded such minority representation on the venire through the amended convening orders, it would tend to show a purposeful, albeit not systematic, exclusion of members of the accused's cognizable racial group—if, in addition to knowing the race of the members, the convening authority also knew the race of the accused. While convening authorities are presumed to act in accordance with Articles 25 and 37, UCMJ,²⁴ this presumption, like any other, can be called into question under the totality of the circumstances. In this case, because there appeared to be at least some evidence of actual exclusion (even if not purposeful) of members of the accused's own racial group, this Court ordered affidavits from the convening authority, acting convening authority, and SJA to provide their rationale for selection of the members in Appellant's

case.²⁵ In the affidavits filed in response to our Order, all three individuals involved in the member selection process state they were not aware of the race of the members detailed in either the standing convening order or the amended convening orders. Further, they describe the process utilized during their time at Navy Region Mid-Atlantic. This consisted of an SJA review of Article 25 qualified members, which was presented to the convening authority for selection of the venire. According to the affidavit filed by the SJA, the race of neither the accused nor the members was ever discussed, either for Appellant's case or any other case involving these three individuals during their tenure at Navy Region Mid-Atlantic.²⁶

*798 Accordingly, we conclude based on the evidence in the record that the selection process utilized in Appellant's case was proper. While there may have been a need to switch out the members on the standing order to allow for nominating and seating new members, this is common practice especially in large jurisdictions such as Navy Region Mid-Atlantic. As such, we find there was neither purposeful nor systematic exclusion of members of Appellant's racial group.

B. Unlawful Command Influence

^[6]Appellant next argues the convening authority exerted actual or apparent unlawful command influence [UCI] by empaneling only white, male members to his court-martial. We examined *United States v. Lewis*, where CAAF discussed that five women detailed to a court-martial was an anomaly, specifically finding that there was no evidence of improper selection criteria.²⁷ We have also considered *United States v. Riesbeck*, in which five women, four of whom were victim advocates, were detailed to the appellant's panel and in which the case was "replete with evidence ... of intentional choices by the first three convening authorities ..."²⁸ Turning to this case, only although seven of the nine members' questionnaires contained racial or ethnic responses, there was no evidence the convening authority knew of the race or ethnicity of the other two members. Appellant's case is more analogous to *Lewis*, with no evidence of improper selection criteria. Further, there is no evidence of any of the improper selection criteria as in *Riesbeck*. Accordingly, we find Appellant has not met his burden to establish some evidence of potential UCI.

^[7]We also considered the case for apparent UCI, asking whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor

a significant doubt about the fairness of the proceeding."²⁹ We find that there are insufficient facts to lead a reasonable person to harbor doubt of the fairness of the proceeding, and that Appellant has not presented evidence the convening authority selected members using criteria other than those in Article 25, UCMJ.

C. Additional Assignments of Error

1. Military Rule of Evidence 404(b)

Appellant further argues the military judge erred in instructing the members they could use evidence from the charged allegations against victims GCM, MH, and AM to prove Appellant's motive and intent of other charged misconduct under Military Rule of Evidence [Mil. R. Evid.] 404(b). In reviewing the applicability of *United States v. Hills*, we conclude that it did not apply to this case.³⁰ We fully adopt our analysis in *Jeter*³¹ that *Hills* deals with propensity evidence and that evidence admitted under Mil. R. Evid. 404(b) is not propensity evidence as it is "not admissible to prove the character of a person in order to show action in conformity therewith."³²

Next, in reviewing evidence of motive and intent, we agree with the military judge's application of the *Reynolds* test, finding that a reasonable factfinder could, by a preponderance of the evidence, find that Appellant engaged in or attempted the specific acts.³³ We also find the military judge did not abuse his discretion in admitting evidence of Appellant's intent. Finally, in examining the third prong, we conclude the military judge did properly apply the Mil. R. Evid. 403 balancing test. Ultimately, the military judge did not abuse his discretion in admitting evidence of charged misconduct to prove motive and intent regarding other charged misconduct. *799 Further, even if there was error, it is harmless error.

2. Legal and Factual Sufficiency

Appellant also contends his convictions for sexual assault of AM and GCM are factually and legally insufficient. In reviewing the evidence supporting Appellant's conviction for sexually assaulting AM, we reviewed Appellant's allegations of gaps in her memory, and conclude that in considering all the evidence in a light most favorable to the prosecution, a rational factfinder could have found that she did not consent.

¹⁸Concerning Appellant’s conviction for sexually assaulting GCM, he argues that the Government failed to prove that he threatened her, a necessary element for that specification as charged. In reviewing Appellant’s statements, we disagree, and find that a reasonable person would have been in fear of being subjected to Appellant’s implied actions—i.e., either engage in sexual relations with him or be held accountable for misconduct. Appellant argues that reporting misconduct is not a “wrongful action” as required by statute, but was instead a normal part of his duties. However, we fully adopt our analysis in *Jeter I*³⁴ that the quid pro quo nature of his statement transformed the statement into wrongful conduct. Further, Article 120(g)(7) specifies threatening or placing that other person in fear of the threat “to accuse any person of a crime.” We therefore find a reasonable trier of fact could have found all the essential elements beyond a reasonable doubt.

3. Mistake of Fact Instruction

Appellant further claims the military judge erred in denying his request for a mistake of fact as to a consent instruction. However, in reviewing all the evidence admitted during trial, we adopt our analysis in *Jeter I*³⁵ and find that no evidence was presented to justify a mistake of fact instruction.

4. Ineffective Assistance of Counsel

Appellant next claims that his trial defense counsel [TDC] was ineffective, insofar that he should have requested the bridge deck log to demonstrate Appellant was on watch when GCM claimed he assaulted her. Further, he alleges his TDC should have presented MH’s 911 call, describing the intruder wearing a purple or orange shirt, when Appellant was arrested wearing a gray shirt. In our review applying the test for ineffective assistance of counsel under *Strickland v. Washington* test, we once again adopt our analysis in *Jeter I*³⁶ and do not find the TDC deficient.³⁷ Instead, we find he made reasonable tactical

decisions.

5. Challenges for Cause

¹⁹Finally, Appellant challenges one of the members, Lieutenant [LT] B, for actual and implied bias. He argues LT B knew one of the witnesses, thought he had a poor work ethic, served as the legal officer during the witness’ administrative separation board, and served as recorder at an unrelated administrative separation board for sexual assault. The military judge denied the challenge for cause at trial. As we did in *Jeter I*,³⁸ we reviewed for both actual and implied bias. LT B stated he had little experience as a legal officer and did not interact with the witness closely. The military judge’s ruling on the record was thorough and noted that knowing a witness is not uncommon in courts-martial. Therefore, we find no actual bias, concurring with the military judge’s findings at trial. Further, in applying *United States v. Woods*,³⁹ and in review of the totality of the circumstances, we conclude that the presence of the member would not cause the public to think the accused did not receive a fair and impartial panel of members, and would not *800 injure the public’s perception of the military justice system.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant’s substantial rights occurred.⁴⁰

The findings and sentence are **AFFIRMED**.

Senior Judge STEPHENS and Judge HOUTZ concur.

Footnotes

¹ 10 U.S.C. §§ 892, 911, 920, 927, 929, 933, and 934 (2012). After announcement of the findings, the military judge conditionally dismissed the sexual harassment specification, one of two specifications of drunken operation of a vehicle, one of three specifications of sexual assault, and one of two specifications of unlawful entry.

2 *United States v. Jeter*, 78 M.J. 754, 761–62 (N-M. Ct. Crim. App. 2019) [*Jeter I*].

3 Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The military judge conditionally dismissed this specification. See R. at 958. AOE's IX, X, and XI were also raised pursuant to *Grostefon*.

4 *United States v. Jeter*, 80 M.J. 200 (C.A.A.F. 2020) [*Jeter II*].

5 *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020).

6 476 U.S. 79, 96–97, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (holding that if an accused member of a cognizable racial group can establish a prima facie case of purposeful discrimination in jury selection based on the prosecution's use of peremptory challenges for jurors of the same racial group, the government must provide a race-neutral explanation for challenging those jurors).

7 *Bess*, 80 M.J. at 8. The other three judges in *Bess* either did not reach or disagreed with this legal conclusion. See *id.* at 15–23.

8 *Id.* at 8–9.

9 Of the nine court-martial member questionnaires, only seven listed race on them. The final questionnaire did not have a race question on it. It is unclear from the record why some questionnaires asked about race, while others did not.

10 R. at 171.

11 *Id.* at 277.

12 80 M.J. 1.

13 See *Bess*, 80 M.J. at 10 (citations omitted).

14 U.S. Const. amend V.

15 See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (holding that the equal protection clause

forbids a prosecutor to peremptorily challenge potential jurors based solely on their race).

16 *Id.* at 96, 106 S.Ct. 1712.

17 *United States v. Bess*, No. 201300311, 2018 WL 4784569, 2018 CCA LEXIS 476 (N-M. Ct. Crim. App. Oct. 4, 2018) (unpublished).

18 R.C.M. 307(b)

19 R.C.M. 403.

20 R.C.M. 404.

21 R.C.M. 501. The exception would be when a case is referred to a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), UCMJ.

22 *Jeter I*, 78 M.J. at 765–66.

23 *Id.* at 766.

24 See *Bess*, 80 M.J. at 10.

25 We conclude the trial judge was correct in finding there was no evidence of such exclusion, because the evidence regarding the racial composition of the original standing panel was not presented to him for comparison against the venire at trial.

26 The SJA did mention one time in which there was a challenge under *Batson v. Kentucky* in a separate case, in which he did discuss the merits of the challenge with the convening authority.

27 *United States v. Lewis*, 46 M.J. 338, 342 (C.A.A.F. 1997).

28 *United States v. Riesbeck*, 77 M.J. 154, 164 (C.A.A.F. 2018).

29 *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

30 *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

31 *Jeter I*, 78 M.J. at 769–70.

32 Mil. R. Evid. 404(b) (2012).

33 *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

34 *Jeter I*, 78 M.J. at 776.

35 *Id.* at 777–78.

36 *Id.* at 778–79.

37 *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

38 *Jeter I*, 78 M.J. at 779–80.

39 *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015).

40 Articles 59 & 66, UCMJ.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,

Appellee

v.

Willie C. JETER
Lieutenant Junior Grade (O-2)
United States Navy,

Appellant

**BRIEF ON BEHALF
OF APPELLANT**

Crim.App. Dkt. No. 202000169

USCA Dkt. No. 22-0065/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE CONVENING AUTHORITY VIOLATED LTJG JETER'S EQUAL PROTECTION RIGHTS, OVER OBJECTION, WHEN HE CONVENED AN ALL-WHITE PANEL FOR A MINORITY ACCUSED USING A RACIALLY NON-NEUTRAL PROCESS FOR SELECTION AND PROVIDED NO EXPLANATION FOR THE MONOCRHOMATIC RESULT BEYOND A NAKED AFFIRMATION OF GOOD FAITH.

Introduction

For over a century, the Supreme Court has battled invidious discrimination in the jury selection process.¹ Time and again, our nation’s highest Court has held that an accused should not have to overcome an insurmountable burden to establish a *prima facie* case of racial discrimination.² We are far from having concluded that battle—racism sadly persists in our institutions.³ But safeguards exist to protect minority accused from this pernicious evil.

Seventy years ago, in *Avery v. Georgia*, and fifty years ago, in *Alexander v. Louisiana*, the Supreme Court created and re-affirmed a framework for addressing discrimination in the selection of jurors.⁴ This framework applied to a system in which an administrative agent who, despite operating under race-neutral statutory guidelines to select jurors, utilized a selection process that identified potential members by race. The military in this case employed a process that is generally akin to the systems in *Avery* and *Alexander*—a convening authority (an administrative agent) applied Article 25, UCMJ (race-neutral statutory guidance) to select members using questionnaires that solicited and identified their race.

¹ See generally *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879).

² *Flowers*, 139 S. Ct. at 2241; see *Alexander v. Louisiana*, 405 U.S. 625, 631-32 (1972); *Whitus v. Georgia*, 385 U.S. 545, 551 (1967); *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

³ See *Flowers*, 139 S. Ct. at 2235.

⁴ *Alexander*, 405 U.S. at 625; *Avery*, 345 U.S. at 559.

Under the *Avery* and *Alexander* tests, LTJG Jeter established a *prima facie* showing of racial discrimination in the selection of his initial member panel. He did so by showing that he is a member of a cognizable racial group, that his panel was selected using a non-race-neutral process, and that his monochromatic panel had no minority representation. The Supreme Court is clear—the burden shifted to the Government to demonstrate no improper discrimination.

Lieutenant Junior Grade Jeter also established a *prima facie* case of racial discrimination under *Batson v. Kentucky*. By replacing all members on the original convening order, the Convening Authority removed the only two black members ever detailed to this case and replaced them with an all-white panel. That, accompanied with the facts and circumstances here, shifted the burden.

This Court should apply the Supreme Court’s pre-established frameworks. If racism exists in the civilian world then surely the armed forces, which draws from all walks of life, must contain this taint. There is no magic bullet that strikes racism from the hearts of military ranks. Convening Authorities are no exception, and should not be given special deference. The right to equal protection should never be “essentially unenforceable in the military.”⁵ The scrutiny necessary to extirpate the deep-seeded taint of racial discrimination must apply to the armed forces.

⁵ *United States v. Bess*, 80 M.J. at 20 n.10 (Ohlson, J., with whom Sparks, J. joined, dissenting) (“under the majority’s view of *Castaneda*, the constitutional right to equal protection would be essentially unenforceable in the military”).

Statement of Statutory Jurisdiction

Lieutenant Junior Grade Jeter's approved general court-martial sentence included a dismissal and confinement for more than one year.⁶ The lower court exercised jurisdiction under Article 66(b)(1), Uniform Code of Military Justice ("UCMJ").⁷ Thus, this Court has jurisdiction under Article 67(a)(3), UCMJ.⁸

Statement of the Case

At a general court-martial in 2017, LTJG Jeter was found guilty, contrary to his pleas, of one specification of sexual harassment, two specifications of drunken operation of a vehicle, three specifications of sexual assault, one specification of extortion, one specification of burglary, two specifications of conduct unbecoming an officer and gentleman, one specification of communicating a threat, and two specifications of unlawful entry in violation of Articles 92, 111, 120, 127, 129, 133, and 134, UCMJ, respectively.⁹ The members sentenced him to confinement for twenty years and a dismissal.¹⁰ The Convening Authority approved the sentence as adjudged and, except for the dismissal, ordered it executed.¹¹

⁶ Joint Appendix ("J.A.") 072.

⁷ 10 U.S.C. § 866(b)(1) (2016).

⁸ 10 U.S.C. § 867(a)(3) (2016).

⁹ 10 U.S.C. §§ 892, 911, 920, 927, 929, 933, 934 (2016); J.A. 070-71.

¹⁰ J.A. 072.

¹¹ J.A. 073-79.

The Record of Trial was first docketed with the lower court on August 22, 2017. In a published opinion, the lower court affirmed LTJG Jeter’s findings and sentence.¹²

On March 4, 2019, LTJG Jeter first petitioned this Court for review of this case. This Court granted LTJG Jeter’s petition but ordered no briefs be filed. After deciding *United States v. Bess*, this Court summarily vacated the lower court’s decision and remanded LTJG Jeter’s case for further consideration in light of *Bess*.¹³

The remanded case was re-docketed at the lower court on July 1, 2020. On remand, the lower court ordered the Convening Authority, his Acting Convening Authority, and his Staff Judge Advocate to submit affidavits related to the member-selection process. On October 20, 2021, after briefing and oral argument, the lower court issued a published opinion affirming LTJG Jeter’s findings and sentence.¹⁴

Lieutenant Junior-Grade Jeter petitioned this Court on December 20, 2021 and this Court granted review on May 3, 2022.

¹² *United States v. Jeter*, 78 M.J. 754 (N-M. Ct. Crim. App. 2019).

¹³ *United States v. Jeter*, 80 M.J. 200 (C.A.A.F. 2020); *Bess*, 80 M.J. at 1.

¹⁴ *United States v. Jeter*, 81 M.J. 791 (N-M. Ct. Crim. App. 2021).

Statement of Facts

A. After soliciting potential members' race, the Convening Authority selected a panel composed entirely of white men for the trial of a black man.

The Convening Authority solicited information about the race and gender of potential members.¹⁵ This information was provided to the Convening Authority through questionnaires that the Convening Authority used to select the members.¹⁶ All questionnaires except for two identified their race.¹⁷

There were three convening orders in this case: an original and two amending orders.¹⁸ The original convening order contained two black men, but the first amending order removed and replaced all members.¹⁹ The panel in the first amending order contained eight new members.²⁰ Of note, the name of one of the [REDACTED] members [REDACTED] was highlighted, without explanation, on the first amending order.²¹ All selected members were white men.²²

Lieutenant Junior Grade Jeter is a black man. The Convening Authority later admitted “it is likely I would have known the race of the Appellant.”²³

¹⁵ J.A. 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794.

¹⁶ J.A. 093, 099, 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794.

¹⁷ J.A. 093, 099, 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794 n.9.

¹⁸ J.A. 091-103.

¹⁹ J.A. 091-97; *Jeter*, 81 M.J. at 797.

²⁰ J.A. 049.

²¹ J.A. 049, 124-131.

²² J.A. 056; *Jeter*, 81 M.J. at 794.

²³ J.A. 094.

B. The Defense objected to the exclusion of members based on race and gender at a court-martial onboard the world’s largest naval base.

At the beginning of the first day of trial on the merits, the military judge raised concerns about the peculiarly small composition of the panel provided by the first amending order.²⁴ He stated, “we’re the largest naval base in the world, but the waterfront is literally littered with ships parked left and right side-by-side, and we have eight members.”²⁵ In response, the Government told the military judge that the Convening Authority identified four additional members.²⁶ Of these four additional members, the Convening Authority ultimately only detailed one more member—another white male.²⁷

As a black man, LTJG Jeter found the absence of minority representation to be peculiar and was seriously concerned that racism may have played a part in the selection of this all-white panel. His counsel raised the issue of invidious discrimination in the member-selection process.²⁸ Specifically, he objected to the “systematic exclusion of members based on race and gender” through “the Convening Authority’s ability to select members ahead of time.”²⁹ After reviewing

²⁴ J.A. 051.

²⁵ J.A. 051.

²⁶ J.A. 051.

²⁷ J.A. 050, 178.

²⁸ J.A. 054.

²⁹ J.A. 054-55.

the members' questionnaires, the military judge found that the panel was composed of "all white men."³⁰

C. The Government argued that the exclusively white male panel was representative of the composition of the military.

The trial counsel argued that the absence of minorities was to be expected because "the military itself is made up of a large majority of what the panel is representative of" (white men).³¹ The military judge disagreed, stating "I don't know if I agree with your statement that the military is made up generally of white males."³² He held that "[t]he military is quite a diverse tapestry of people."³³

D. The military judge refused to compel the Convening Authority to explain the selection process. He declined to find discrimination without evidence of a pattern of the Convening Authority detailing all-white panels.

The military judge stated that he did not have any evidence of purposeful, systematic exclusion of minorities or women based on the composition of the panel.³⁴ The trial defense counsel attempted to fill the evidentiary vacuum regarding whether invidious discrimination was involved in the member-selection process by moving for the military judge to compel the Convening Authority to explain the

³⁰ J.A. 056; *Jeter*, 81 M.J. at 794 ("Based on the military judge's factual finding at trial, all nine of these members of the venire were white").

³¹ J.A. 056.

³² J.A. 056.

³³ J.A. 056.

³⁴ J.A. 056.

result.³⁵ The Defense noted it was unable to “delve into the thought processes of the Convening Authority” when “all we have is the makeup [of the panel] to go on.”³⁶

The military judge denied this request.³⁷ He ruled that there was no evidence of purposeful discrimination in the selection process—“other than the bare makeup of the panel.”³⁸ Although the Defense did not request that minority members be added to the panel, the military judge volunteered that he did not have authority to order the Convening Authority to include diversity on the panel.³⁹ But he also noted that the Defense could re-raise the issue if they somehow discovered more evidence.⁴⁰ He stated that evidence of a pattern of the Convening Authority detailing all-white member panels was the type of evidence he referred to.⁴¹ He then warned the Convening Authority by stating “with that said, Convening Authority of this region[,] I wouldn’t do it twice.”⁴²

³⁵ J.A. 057.

³⁶ J.A. 057.

³⁷ J.A. 057.

³⁸ J.A. 057.

³⁹ J.A. 057.

⁴⁰ J.A. 057-58.

⁴¹ J.A. 057-58.

⁴² J.A. 058-59.

E. The Defense presented some evidence of a pattern of the Convening Authority detailing all-white member panels. The military judge again denied LTJG Jeter’s request.

After the members were seated in open court, the Defense re-raised its original objection based on discrimination in the member-selection process.⁴³ The Defense presented to the military judge a portion of the record of trial from *United States v. Bess* that included an open-court colloquy in which the defense counsel alleged that in “at least the last two [other] panels [convened by the same Convening Authority] . . . we’ve had all-white panel members with an African-American client.”⁴⁴ Evidence of this pattern was later strengthened when the lower court attached to the record a declaration from the former Executive Officer of Defense Service Office Southeast who observed the pattern.⁴⁵

⁴³ J.A. 060.

⁴⁴ J.A. 061, 069.

⁴⁵ J.A. 080-85. The Executive Officer, who supervised defense counsel in the region, confirmed the pattern of all-white panels. He sent a letter to the Convening Authority after the Convening Authority detailed an all-white panel in *United States v. LTJG Johnson*, providing:

There is an appearance in the Central Judicial Circuit that race is being improperly considered when selecting members for General Court-Martial Convening Orders. In a number of cases, most recently *United States v. HM2 Bess*, *United States v. MMC Rollins*, and *United States v. LTJG Jeter*, where defense counsel have raised the issue, African Americans were convicted in the Central Judicial Circuit by all-white panels. All of the members detailed to the courts-martial of these accused were caucasian.

Id.

After presenting the portion of the record from *Bess* to the military judge, the Defense re-raised its objection, stating:⁴⁶

ADC: The defense's contention is that the questions regarding race and gender on the questionnaire shows that the Convening Authority was soliciting this information and considering it, and that combined with the makeup that we have should be sufficient to at least require the government to show that there was no improper consideration

The panel had been seated, confirming for the parties that the panel was comprised of all white males, and the Government did not challenge the fact.⁴⁷ The Defense specifically articulated that the issue was an equal protection violation, and the military judge again denied the Defense request.⁴⁸ Initially, he framed his ruling as a response to an Article 25, UCMJ issue.⁴⁹ Although it is inaudible, it appears the defense counsel re-oriented the military judge to the fact that the Defense raised the issue of improper exclusion based on race rather than Article 25.⁵⁰ This is because the military judge responded, “Okay. But in this case, I still don’t see the systematic exclusion of those people.”⁵¹

⁴⁶ J.A. 061.

⁴⁷ J.A. 061-63.

⁴⁸ J.A. 063.

⁴⁹ J.A. 063.

⁵⁰ J.A. 063.

⁵¹ J.A. 063.

In sum, by the time of this final ruling, the military judge was aware that:

1. On the largest naval base in the world, the two men serving as the Convening Authority decided that not a single black person was best qualified to serve as a member in LTJG Jeter's court-martial.⁵²
2. The panel was unusually small (as first noted by the judge himself), and the Convening Authority remedied this by adding another white man.⁵³
3. The Convening Authority added the additional white man despite having four individuals (whose race was not established) available.⁵⁴
4. The process for selecting members was not race-neutral (race was indicated on the majority of the questionnaires).⁵⁵
5. And this was not the first time the issue of discrimination during member-selection had been raised regarding this Convening Authority.⁵⁶

And yet the military judge denied the Defense request to simply have the Convening Authority explain how an all-white-male member panel was selected under these circumstances.⁵⁷ The all-white court-martial panel convicted LTJG Jeter and sentenced him to a dismissal and confinement for twenty years.⁵⁸

F. The lower court ordered affidavits related to the member-selection process four-and-a-half years after the court-martial.

On remand after oral argument, the lower court “found the evidence presented to this Court sufficient to question the presumption of regularity of the convening

⁵² J.A. 051, 054.

⁵³ J.A. 050, 178.

⁵⁴ J.A. 051.

⁵⁵ J.A. 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794 n.9.

⁵⁶ J.A. 060-61.

⁵⁷ J.A. 063.

⁵⁸ J.A. 070-72.

authorities' member-selection."⁵⁹ The lower court ordered affidavits explaining the member-selection process from the Convening Authority, the Acting Convening Authority, and their Staff Judge Advocate.⁶⁰ By this time, both the Convening Authority and Acting Convening Authority had retired from the Navy. All three men (who are all white themselves) answered the majority of the lower court's questions by stating they "do not recall."⁶¹

For example, the Acting Convening Authority (who signed the first amending order) stated "I do not recall" to every question the lower court asked specific to LTJG Jeter's case.⁶² Of the nineteen questions he responded to, the only answers that did *not* include "I do not recall" were two questions regarding the general process of member-selection, a statement that he is white, and a caveated denial that he was aware of LTJG Jeter's race when selecting the panel.⁶³

Likewise, even though the Convening Authority (who signed the original convening order and the second amending order) acknowledged that he reviewed the court-martial member questionnaires (the majority of which indicated the members' race), he claimed he did not remember knowing the race of the members.⁶⁴

⁵⁹ *Jeter*, 81 M.J. at 795.

⁶⁰ J.A. 086-88.

⁶¹ J.A. 091-103.

⁶² J.A. 049, 095-97.

⁶³ J.A. 095-97.

⁶⁴ J.A. 091.

However, he also provided that he “may have been aware of the race of some of the prospective members.”⁶⁵ Of note, his Staff Judge Advocate stated that the Convening Authority would ordinarily spend at least a full day reviewing the questionnaires.⁶⁶ But like the Acting Convening Authority, the answers the Convening Authority gave with regard to member-selection all referred to the process generically, not with regard to this specific case.⁶⁷ He did note that he likely “would have known the race of the Appellant.”⁶⁸

The Staff Judge Advocate provided slightly more detail regarding the member-selection process.⁶⁹ Notably, he acknowledged that the Convening Authority drew court-martial members not only from his own staff, but the entire panoply of “commands resident within Navy Region Mid-Atlantic.”⁷⁰ Beyond a generic claim to have followed statutory Article 25 criteria, he provided no explanation as to how nine of nine members ended up being white men, despite having an enormous body of individuals to choose from.⁷¹

While the Staff Judge Advocate stated “the race of a particular accused never came up,” the Convening Authority acknowledged that he likely knew that LTJG

⁶⁵ J.A. 093.

⁶⁶ J.A. 099.

⁶⁷ J.A. 091-94.

⁶⁸ J.A. 094.

⁶⁹ J.A. 098-103.

⁷⁰ J.A. 098.

⁷¹ J.A. 098.

Jeter was black based on the “significant amount of paperwork and investigation material” that would have been provided by the Staff Judge Advocate.⁷²

Finally, the Staff Judge Advocate acknowledged that this was not the only time concerns regarding an all-white panel had been raised during his and the Convening Authority’s tenures.⁷³

Ultimately, the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate acknowledged that the court-martial questionnaires—most of which plainly indicated the members’ races—were thoroughly reviewed.⁷⁴ None of the declarations provided substantive information as to how, on the largest naval installation in the world, a black man ended up with an all-white panel of members.

⁷² J.A. 094, 103.

⁷³ J.A. 101-02.

⁷⁴ J.A. 091-103, 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794 n.9.

Summary of Argument

The Supreme Court in *Avery v. Georgia* and *Alexander v. Louisiana* provided that minority accused can establish a *prima facie* case of racial discrimination in a jury selection process by showing: (1) they are a member of a cognizable racial group; (2) their member panel was selected using a non-race-neutral process; and (3) members of their race were either absent from, or statistically underrepresented, on their panel.

Lieutenant Junior Grade Jeter established such a *prima facie* case. First, he is a black man, and thus a member of a cognizable racial minority group. Second, the Convening Authority employed a non-race-neutral member-selection process by soliciting race through all but two of the nine member questionnaires. Finally, the resulting panel was composed entirely of white men. Pursuant to *Avery* and *Alexander*, these factors established a *prima facie* case.

Having established a *prima facie* case of racial discrimination, the burden shifted to the Government to adequately explain the exclusion. The Government failed to make such a showing at trial and the military judge failed to require it. The Convening Authority's naked affirmations of good faith failed as well. The Supreme Court specifically provided that "affirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of discrimination."⁷⁵ Thus,

⁷⁵ *Alexander*, 405 U.S. at 632.

under *Avery* and *Alexander*, LTJG Jeter established an un rebutted *prima facie* case of racial discrimination.

Alternatively, this Court should find that LTJG Jeter established a *prima facie* case of racial discrimination under *Batson v. Kentucky*. The Supreme Court in *Batson* provided three factors to establish such a *prima facie* case: (1) the defendant is a part of a cognizable racial group; (2) the Government removed venire members of the same racial group; and (3) the facts and circumstances raised an inference of exclusion on account of race. Here, these factors are met because (1) LTJG Jeter is a black man, (2) the Government removed venire members of his racial group, and (3) the facts and circumstances raise an inference of exclusion on account of race.

This Court could also depart from its decision in *United States v. Bess* and find LTJG Jeter established a *prima facie* case of discrimination under *Castaneda v. Partida*. This Court's holding that a one-year pattern is insufficient to demonstrate discrimination, and its strong implication that even a five-year pattern would be insufficient, disregards the fact that convening authorities serve for two to three years. Thus, this Court should depart from *Bess* and render the *Castaneda* framework of establishing a *prima facie* case enforceable in the military.

Ultimately, because LTJG Jeter established an un rebutted *prima facie* case of racial discrimination in the member-selection process, this Court should dismiss the findings and specifications in this case.

Argument

THE CONVENING AUTHORITY VIOLATED LTJG JETER'S EQUAL PROTECTION RIGHTS, OVER OBJECTION, WHEN HE CONVENED AN ALL-WHITE PANEL FOR A MINORITY ACCUSED USING A RACIALLY NON-NEUTRAL PROCESS FOR SELECTION AND PROVIDED NO EXPLANATION FOR THE MONOCHROMATIC RESULT BEYOND A NAKED AFFIRMATION OF GOOD FAITH.

Standard of Review

Whether the Convening Authority's selection of members violated the Fifth Amendment's equal protection guarantee is a question of law reviewed *de novo*.⁷⁶

Discussion

The major aspects of the military's member-selection process in this case directly mirror historical civilian jury selection practices the Supreme Court has already reviewed in *Avery v. Georgia* and *Alexander v. Louisiana*.⁷⁷ As such, the Supreme Court's precedents involving these civilian jury selection practices provide relevant guidance on how equal protection rights should be applied in the context of the military—including the Convening Authority's venire selection.

Accordingly, in light of these Supreme Court precedents, this Court should hold that an accused who is a member of a racial minority can establish a *prima facie*

⁷⁶ *Bess*, 80 M.J. at 7.

⁷⁷ *Alexander*, 405 U.S. at 625-631; *Avery*, 345 U.S. at 559-563.

case of racial discrimination by showing that: (1) the accused is a member of a cognizable racial group; (2) the member panel was selected using non-race-neutral processes; and (3) members of the accused's race were either absent from, or statistically underrepresented on, his panel.

A. Equal protection against invidious racial discrimination applies to the court-martial member-selection process.

The Supreme Court more than a century ago held that the Government denies a minority accused equal protection under the laws when members of his or her race have been purposefully excluded from deciding guilt or innocence.⁷⁸ *United States v. Strauder* “laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.”⁷⁹ “In the decades after *Strauder*, the Court reiterated that States may not discriminate on the basis of race in jury selection.”⁸⁰ Although “critical problems persisted,” the Court has maintained that “even a single instance of race discrimination against a prospective juror is impermissible.”⁸¹

Two years after *Batson* was decided, the Court of Military Appeals considered how it applied to the military. The Court observed that *Batson* “is not based on a right to a representative cross-section on a jury but, instead, on an equal-protection

⁷⁸ *Strauder*, 100 U.S. at 303.

⁷⁹ *Batson v. Kentucky*, 476 U.S. 79, 84-85 (1986).

⁸⁰ *Flowers*, 139 S. Ct. at 2239.

⁸¹ *Id.* at 2239-42.

right to be tried by a jury from which no ‘cognizable racial group’ has been excluded.”⁸² The Supreme Court had also previously clarified this point in *Alexander v. Louisiana*, holding that while there was no right to minority representation on a jury panel, the equal protection right still entitles defendants to a jury selected without invidious discrimination.⁸³

Ultimately, the Court of Military Appeals held that the Fifth Amendment equal protection right to a jury selected without invidious discrimination applies to courts-martial “just as it does to civilian juries.”⁸⁴

B. Lieutenant Junior-Grade Jeter established a *prima facie* case of an equal protection violation in accordance with *Avery* and *Alexander*.

1. The military’s venire selection process in this case mirrors the system Georgia employed in *Avery v. Georgia*.

The military employed a selection process for the initial venire panel similar to Georgia’s jury member-selection process that the Supreme Court evaluated in *Avery v. Georgia*. The major aspects of the jury-selection process considered in *Avery* were threefold and similar to the military in each key aspect.

First, just like the military in this case, Georgia’s system was not race-neutral because it identified most individuals in the pool of prospective jurors by race.⁸⁵ Tax

⁸² *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988).

⁸³ *Alexander*, 405 U.S. at 628-29.

⁸⁴ *Santiago-Davila*, 26 M.J. at 389-90.

⁸⁵ *See Avery*, 345 U.S. at 560-63.

rolls in Georgia included racial identifiers, and it was these tax rolls from which jury pools were drawn.⁸⁶ Likewise, although the use of race on military members' questionnaires was not required, the Convening Authority and his agents in this case used questionnaires that identified the races of most of the members.⁸⁷ Thus, as in *Avery*, a non-race-neutral procedure was employed in this case.

Second, both Georgia at the time of *Avery* and the present-day-military have statutory guidance on who should be selected for jury service.⁸⁸ The Georgia statute required commissioners to select jurors who were "upright" and "intelligent."⁸⁹ In accordance with Article 25, UCMJ, Convening Authorities are required to select members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."⁹⁰ The statutory requirement in force at the time of *Avery* is thus similar to Article 25's present-day military requirements.

Finally, both systems employ the use of an administrative agent directed by law to choose members from a larger population of available individuals. In *Avery*, the process involved administrative agents referred to as "commissioners" who

⁸⁶ *Id.*

⁸⁷ Manual for Courts-Martial, Rule for Court-Martial 912(a)(1)(C)(2016).

⁸⁸ *Avery*, 345 U.S. at 562.

⁸⁹ *Avery*, 345 U.S. at 562; *see also Whitus*, 385 U.S. at 548.

⁹⁰ 10 U.S.C. § 825 (2016).

selected jury members from their communities based on statutory criteria.⁹¹ In the military, a convening authority operates in the same way. He or she acts as an administrative agent using the statutory Article 25 criteria to choose available individuals from the military community to sit on the panel.

In sum, the military member-selection process in this case is the same in all key respects as the process Georgia utilized in *Avery*. As such, the Supreme Court's analysis and ruling in *Avery* should guide this Court in evaluating whether Appellant's equal protection rights were violated.

2. The Supreme Court has twice held that where a non-race-neutral system was employed and a monochromatic panel resulted, a *prima facie* violation of an accused's equal protection rights is established.

a. *Avery* provided that a *prima facie* violation of an appellant's equal protection rights is established by a total absence of minorities where a racially non-neutral selection process was employed.

In *Avery*, the Supreme Court held that the absence of any minority members from a venire panel when a racially non-neutral selection process was employed was sufficient to establish a *prima facie* case of racial discrimination, which the state could then rebut.⁹²

⁹¹ *Avery*, 345 U.S. at 560-61.

⁹² *Avery*, 345 U.S. at 560; *see also* *Washington v. Davis*, 426 U.S. 229, 241 (1976) (“A *prima facie* case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, or with racially non-neutral selection procedures.”); *Hill v. Texas*, 316 U.S. 400, 414 (1942).

In doing so, the Supreme Court rejected the rationale that the appellant was required to show “a particular act of discrimination by a particular officer responsible for the selection of the jury.”⁹³ The simple fact that jurors were identified by their race meant “opportunity was available to resort to it at other stages in the selection process.”⁹⁴ Where not a single minority was selected to the panel, the Court found that was enough to establish a *prima facie* case even though no actual discrimination was shown.⁹⁵

The Supreme Court also rejected the argument that it was the appellant’s duty to fill any “factual vacuum.”⁹⁶ The Supreme Court placed that burden on the Government, holding that “if there is a ‘vacuum’ it is one which the state must fill, by moving with sufficient evidence to dispel the *prima facie* case of discrimination.”⁹⁷ Where not a single African American was selected to the panel, and the jury selection process was racially non-neutral, the Court found that was enough to establish a *prima facie* case.⁹⁸

⁹³ *Avery*, 345 U.S. at 562.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

b. In *Alexander*, the Court went further and held that even statistical underrepresentation can establish a *prima facie* equal protection violation where a racially non-neutral selection process was employed.

In *Alexander v. Louisiana*, the Supreme Court found that a *prima facie* case of discrimination is established by the use of jury questionnaires that identify members by race when the result is minority underrepresentation on the panel.⁹⁹ The Court noted that regardless of which part of the jury-selection process is being evaluated, “[t]he principles that apply to the systematic exclusion of potential jurors on the ground of race are essentially the same.”¹⁰⁰

The appellant in *Alexander* relied on statistical data to establish a *prima facie* case of discrimination based on the fact that minorities were only included on his grand jury and venire in token numbers.¹⁰¹ The process of selecting members in *Alexander* involved a panel of five white men who compiled a list of names of potential jurors and sent questionnaires to individuals on the list.¹⁰² As in this case, the questionnaires included a question about the recipient’s race.¹⁰³ The panel then selected roughly 2,000 potential jurors, ruling out roughly 5,000 others “ostensibly on the ground that these persons were not qualified.”¹⁰⁴ The panel then selected a

⁹⁹ *Alexander*, 405 U.S. at 630-31.

¹⁰⁰ *Id.* at 626 n.3.

¹⁰¹ *Id.* at 626-31.

¹⁰² *Id.* at 627-28.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

smaller group of individuals purportedly at random.¹⁰⁵ Although some black jurors were selected, the numbers were not representative of the population at large.¹⁰⁶

While acknowledging that “a defendant has no right to demand that members of his race be included in the grand jury that indicts him,” the Court still found that the statistical underrepresentation was evidence that established a *prima facie* case of invidious discrimination because the non-race-neutral process presented “a clear and easy opportunity for racial discrimination.”¹⁰⁷ Thus, the Court found that where a non-race-neutral jury selection process is employed, a *prima facie* case can be established even if there are *some* minority members present on the panel.¹⁰⁸

In this case, the lower court directed that the Convening Authority, the Acting Convening Authority, and the Staff Judge Advocate to provide information regarding the number of available potential minority members. Importantly, the Staff Judge Advocate acknowledged that this information was ascertainable at the time of trial. Thus, if the military judge had granted the Defense’s request at trial, the command could have provided this information. Nevertheless, on the largest Naval installation in the world, where the “waterfront is literally littered with ships parked left and right, side by side,” black members were statistically

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 628-30.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 628-29.

underrepresented—zero percent of black individuals were detailed as members in this case.¹⁰⁹ In *Alexander*, statistics were useful because there were black members included in the panel, albeit in suspiciously low numbers. But here, where none were detailed at all, the statistical data is self-evident.

Further, the *Alexander* Court reiterated from *Avery* that while statistical data was useful to evaluate underrepresentation during the selection process writ-large, their decision was also based on the fact that a non-race-neutral method of selection was employed and ultimately the grand jury who indicted the accused was monochromatic.¹¹⁰ The Court reaffirmed their holding from *Avery* that evidence of specific discrimination is unnecessary “given the fact that no Negroes had appeared on the final jury: ‘obviously that practice makes it easier for those to discriminate who are of a mind to discriminate.’”¹¹¹ In both *Avery* and *Alexander*, the Supreme Court noted that a *prima facie* case was established even though there was no evidence of conscious discrimination.¹¹²

Accordingly, minority accused can establish a *prima facie* case of racial discrimination by showing: (1) they are a member of a cognizable racial group; (2) their member panel was selected using non-race-neutral processes; and (3) members

¹⁰⁹ J.A. 051, 056.

¹¹⁰ *Alexander*, 405 U.S. at 630.

¹¹¹ *Id.* at 631 (citing *Avery*, 345 U.S. at 562).

¹¹² *Alexander*, 405 U.S. at 630.

of their race were absent from, or statistically underrepresented, on their panel. As the Supreme Court reaffirmed in *Batson*, “This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse.”¹¹³

3. Lieutenant Junior Grade Jeter established a *prima facie* case of an equal protection violation.

The facts in this case establish a *prima facie* case of discrimination. First, LTJG Jeter is black, and thus a member of a cognizable racial minority group. Second, the Convening Authority employed a non-race-neutral member-selection process. Race was indicated in all but two of nine questionnaires. Finally, the resulting panel was composed entirely of white men. Pursuant to *Avery* and *Alexander*, these factors are sufficient to establish a *prima facie* case.

Additionally, the military judge suggested that the Defense needed to submit evidence that this had occurred on other occasions—despite that Supreme Court precedent holds that the Defense is not required to show specific discrimination or a pattern of discriminatory actions in order to establish a *prima facie* case where a racially non-neutral selection process was used.¹¹⁴ But when the Defense ultimately presented some evidence to show that further inquiry was necessary (that this

¹¹³ *Batson*, 476 U.S. at 95.

¹¹⁴ *Batson*, 476 U.S. at 95-96; *Alexander*, 405 U.S. at 631; *Avery*, 345 U.S. at 562.

convening authority selected all-white panels in other cases), the military judge still did not change his original ruling that there was no evidence of discrimination in the member-selection process. He did not even compel additional testimony, which could have explained whether discrimination was involved in the panel selection.

Lastly, while the lower court found LTJG Jeter did not make a *prima facie* case of racial discrimination, its actions raise an interesting question: if LTJG Jeter did not establish a *prima facie* case of racial discrimination, then why did the lower court order the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate to explain their actions?¹¹⁵

The lower court noted that it found the circumstances suspicious enough to require an explanation from these individuals, stating, “We found the evidence presented to this Court sufficient to question the presumption of regularity of the convening authorities’ member-selection.”¹¹⁶ It seems they were simply unwilling to call it what it really was—a *prima facie* case of discrimination that shifted the burden to the Government. The lower court’s actions demonstrate that the threshold of a *prima facie* case was met. And regardless, the facts here show that a *prima facie* case was established. The burden shifted to the Government.

¹¹⁵ See *Jeter*, 81 M.J. at 795.

¹¹⁶ *Id.*

C. The Convening Authority’s naked affirmations of good faith are insufficient to rebut a *prima facie* case of discrimination.

“Once the defendant makes the requisite showing [of a *prima facie* case] the burden shifts to the State to explain *adequately* the racial exclusion.”¹¹⁷ In *Alexander*, the Supreme Court stated, “affirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of discrimination.”¹¹⁸ This Court has further noted that “If these general assertions were accepted as rebutting a defendant’s *prima facie* case, the Equal Protection Clause ‘would be but a vain and illusory requirement.’”¹¹⁹

In *Alexander*, “[t]he clerk of court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure.”¹²⁰ Likewise, in *Avery*, the commissioners never explained their process and the judge, who picked the panel using names selected by the commissioners, “testified that he did not, nor had he ever, practiced discrimination in any way, in the discharge of that duty.”¹²¹ The Court specifically noted that there was “no contradictory evidence” of discrimination.¹²²

¹¹⁷ *Batson*, 476 U.S. at 94 (citing *Alexander*, 405 U.S. at 632) (emphasis added).

¹¹⁸ *Alexander*, 405 U.S. at 632.

¹¹⁹ *Santiago-Davila*, 26 M.J. at 392 (citing *Norris v. Alabama*, 294 U.S. 587, 598 (1935)).

¹²⁰ *Id.*

¹²¹ *Avery*, 345 U.S. at 561; *see also Whitus*, 385 U.S. at 549.

¹²² *Avery*, 345 U.S. at 561.

The words of the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate in this case could be taken straight from the mouths of the commissioners in either *Avery* or *Alexander*.¹²³ But here, the lower court inexplicably found the general denials adequate to explain how an all-white panel resulted.¹²⁴ Blanket denials were not good enough for the Supreme Court in *Avery* and *Alexander*, and they should not satisfy this Court either. This Court should find, as in *Avery* and *Alexander*, that the mere denials of untoward member-selection are insufficient to overcome the *prima facie* case LTJG Jeter established. The Convening Authority and Acting Convening Authority had an opportunity to explain themselves and they failed.

By comparison, in *United States v. Gooch*, the accused, an African American man, claimed that members were improperly excluded on the basis of race in violation of the Fifth Amendment.¹²⁵ The Government responded to this allegation at trial by providing a thorough explanation of the specific member-selection process employed, often accounting for the unavailability of individual members.¹²⁶ And they accomplished this without even needing to call the Convening Authority as a witness.¹²⁷ Based on the detailed information the Government provided through the

¹²³ See *Avery*, 345 U.S. at 561; *Alexander*, 405 U.S. at 632.

¹²⁴ *Jeter*, 81 M.J. 797-98.

¹²⁵ *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011).

¹²⁶ *Id.* at 355-56.

¹²⁷ *Id.*

testimony of a clerk from the Staff Judge Advocate’s office who was intimately familiar with the selection process in that case, the Court agreed with the military judge that there was clearly no invidious discrimination during the member-selection process.¹²⁸ *Gooch* demonstrates the proper way for a command to show that no discrimination has taken place during the member-selection process. Unlike in this case, there was more than just general assertions and blanket denials from Government agents.

D. Alternatively, this Court should evaluate the Convening Authority’s selection of members under *Batson v. Kentucky*.

1. Convening authorities effectively exercise an unlimited number of peremptory challenges.

Convening authorities have the broad discretion to select panel members who, “*in [their] opinion [are] best qualified.*”¹²⁹ Accordingly, a convening authority “*has the functional equivalent of an unlimited number of peremptory challenges.*”¹³⁰ But these challenges occur behind closed doors, in the privacy of convening authorities’ offices, and outside the observation of court or counsel.

¹²⁸ *Id.* at 359.

¹²⁹ 10 U.S.C. § 825(e)(2) (2016) (emphasis added).

¹³⁰ *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring) (emphasis added).

2. The principles in *Batson* apply to convening authorities’ functional exercise of peremptory challenges through Article 25 member-selection.

Before *Batson*, “prosecutors’ peremptory challenges [were] largely immune from constitutional scrutiny.”¹³¹ *Batson* changed this paradigm, which previously required a defendant to demonstrate a history of racially discriminatory strikes.¹³² The Supreme Court found that the lack of scrutiny created a “crippling burden of proof” that was “insurmountable.”¹³³ The Court recognized its duty to protect jury-selection practice against government action “through its administrative officers in effecting the prohibited discrimination.”¹³⁴ The Court found that it is a “denial of equal protection” where “procedures implementing a neutral statute [are] operated to exclude persons from the venire on racial grounds.”¹³⁵

Article 25, UCMJ, is a race-neutral statute.¹³⁶ Through its procedures, convening authorities exclude persons from venires.¹³⁷ In this respect, convening authorities are Government officers effectuating peremptory challenges outside *voir*

¹³¹ *Batson*, 476 U.S. at 92-93.

¹³² *Id.* at 92, n.17.

¹³³ *Id.*

¹³⁴ *Id.* at 88.

¹³⁵ *Id.*

¹³⁶ *See* 10 U.S.C. § 825 (2016).

¹³⁷ *See id.*

dire. *Batson*'s equal protection principles should thus apply to these private peremptory challenges.¹³⁸

The *Batson* Court noted that it aimed to “eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.”¹³⁹ Judge Ohlson and Judge Sparks have stated, “it simply cannot be the state of the law that the shield of the Fifth Amendment is strong enough to protect an African American defendant from the impermissible exclusion of panel members on the basis of race *during voir dire*, but is impotent in similarly protecting those servicemembers *during the selection of the venire panel in the first instance*.”¹⁴⁰

The Court of Military Appeals applied *Batson* and its principles to the military justice system in *Santiago-Davila*.¹⁴¹ As such, the *Batson* framework for establishing a *prima facie* showing of racial discrimination must apply to the convening authority's peremptory selection of members.

3. Lieutenant Junior Grade Jeter established a *prima facie* case of racial discrimination by the Convening Authority under *Batson*.

The *Batson* Court provided three factors to establish a *prima facie* case of discrimination raising an inference of purposeful discrimination in selection of the

¹³⁸ *Id.* at 89.

¹³⁹ *Id.* at 85.

¹⁴⁰ *Bess*, 80 M.J. at 20 (Ohlson, J., with whom Sparks, J. joined, dissenting) (citing *Batson*, 476 U.S. at 89).

¹⁴¹ *Santiago-Davila*, 26 M.J. at 389-90.

venire.¹⁴² The factors are: (1) the defendant is a part of a “cognizable racial group;” (2) the Government removed venire members of the same racial group from the venire; and (3) the facts and circumstances raised an inference of exclusion on account of race.¹⁴³

Here, all three factors are met because (1) LTJG Jeter is a black man, (2) the Government removed venire members of his same racial group by removing two black members, and (3) the facts and circumstances raise an inference of exclusion on account of race because:

- The black members on the original convening order were replaced with an all-white panel;
- The questionnaires asked the majority of the members about their race;
- The name of one of the [REDACTED] members [REDACTED] [REDACTED] was highlighted on the first amending order;
- The Convening Authority knew the race of LTJG Jeter;
- The Convening Authority detailed another white member *after* LTJG Jeter first objected to the racial makeup of the panel *and* the military judge noted that the panel was unusually small;
- This took place at “the largest naval base in the world . . . [where] the waterfront [was] literally littered with ships parked left and right side-by-side;”¹⁴⁴

¹⁴² *Batson*, 476 U.S. at 96.

¹⁴³ *Id.*

¹⁴⁴ J.A. 051.

- The Convening Authority detailed one additional white male member despite having identified four available individuals;
- Neither the Convening Authority, the Acting Convening Authority, nor the Staff Judge Advocate could provide an explanation beyond a naked affirmation of good faith; and
- This was one of four courts-martial of an African-American accused in which the same Convening Authority hand-selected all-white panels.

If this Court does not apply *Batson* in this case, convening authorities' discretion to select members will remain immune from constitutional scrutiny—like prosecutors' peremptory strikes before *Batson*.

E. This Court could also depart from its decision in *Bess* and evaluate the Convening Authority's selection of members under *Castaneda*.

- 1. *Castaneda* provided a framework to establish *prima facie* violations of equal protection rights in cases where only a pattern of racial discrimination could be shown.**

The Supreme Court in *Castaneda* created a framework through which minority accused could establish a *prima facie* showing of racial discrimination by demonstrating substantial underrepresentation of minority jurors over significant periods of time.¹⁴⁵ The Court created this framework because “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”¹⁴⁶

¹⁴⁵ *Castaneda v. Partida*, 430 U.S. 482, 494-495 (1977).

¹⁴⁶ *Id.* at 493 (internal citation and quotation omitted).

2. This Court rendered *Castaneda* unenforceable in the military.

In *United States v. Bess*, this Court considered whether a *prima facie* showing of racial discrimination could be established in the military under the *Castaneda* framework.¹⁴⁷ *Bess* was convened by the same Convening Authority as this case. And it was not the first court-martial in which his selection of members was questioned as discriminatory. *Bess* was one of four cases in which the same Convening Authority selected an all-white panel within one year, and, like here, the same Convening Authority knew the appellant's race.¹⁴⁸

This Court declined to apply *Castaneda* in *Bess* because “one year is not a ‘significant period of time’ and therefore would not establish a *prima facie* case of a pattern of discrimination under the *Castaneda* framework.”¹⁴⁹ In support of this position, this Court cited a string of decisions from other courts in which one, two, three and a half, and even five year patterns were insufficient periods of time to make a *prima facie* showing of discrimination.¹⁵⁰ This Court pointed to cases in which seven and eleven year patterns were sufficient.¹⁵¹ But the unique nature of convening authorities’ relatively short periods of tenure should prompt a departure from such an extensive time requirement.

¹⁴⁷ *Bess*, 80 M.J. at 9-10.

¹⁴⁸ *Id.* at 5-6.

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

As Judge Ohlson noted in his dissent, “[c]onvening authorities serve in their roles for a finite period of time, often for a few years or less. In the instant case, for example, the convening authority served from March 10, 2016, to July 20, 2018, for a total of just twenty-seven months.”¹⁵² If the precedents this Court cited apply equally to the military—and a five year pattern is insufficient to demonstrate racial discrimination—then no racist convening authority will *ever* have to worry about their racist patterns being questioned. Because of this Court’s decision, military accused throughout the armed forces are essentially prohibited from establishing *prima facie* showings of racial discrimination through the *Castaneda* framework. *Castaneda* has been rendered unenforceable in the military.

Convening authorities should not receive special treatment in equal protection analyses. If the Fifth Amendment equal protection right to a jury selected without invidious discrimination applies to courts-martial “just as it does to civilian juries,” then the protective framework of *Castaneda* should apply to the military as well.¹⁵³ Military commanders are not immune from the racist evils of society, but if this Court’s reasoning in *Bess* controls, the military is the only criminal jurisdiction essentially shielded from an entire sphere of equal protection analysis.

¹⁵² *Id.* at 20 n.10 (Ohlson, J., with whom Sparks, J. joined, dissenting).

¹⁵³ *Santiago-Davila*, 26 M.J. at 389-90.

3. Lieutenant Junior Grade Jeter established a *prima facie* case of racial discrimination by the Convening Authority under *Castaneda*.

The Supreme Court in *Castaneda* created a three-step framework through which minority accused could demonstrate substantial underrepresentation of minority jurors and thereby make a *prima facie* showing of discrimination in the member-selection process.¹⁵⁴ First, the defendant must belong to a “recognizable, distinct class, singled out for different treatment under the laws.”¹⁵⁵ Second, “the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.”¹⁵⁶ Third and finally, the selection procedure must be susceptible to abuse or it must be non-race-neutral.¹⁵⁷ Once a defendant makes this requisite showing, a *prima facie* case is established, and the burden shifts to the Government to rebut the case.¹⁵⁸

Here, all factors are met because (1) LTJG Jeter is a black man, (2) his court-martial was one of four cases within a year in which the same Convening Authority selected an all-white panel for the trial of a minority, and (3) the selection procedure was non-race-neutral because the majority of questionnaires indicated race.

¹⁵⁴ *Castaneda*, 430 U.S. at 494-495.

¹⁵⁵ *Id.* at 494.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 495.

Unlike *Bess*, LTJG Jeter clearly established a *prima facie* case. In *Bess*, the majority of questionnaires were race-neutral.¹⁵⁹ Here, the majority of questionnaires indicated the members' race. In *Bess*, the trial defense counsel conceded that the panel may not have been all-white and the military judge specifically declined to make a finding as to the racial makeup of the panel.¹⁶⁰ Here, the Defense twice asserted that the panel was all-white, the military judge found the panel was all-white, and the Government never challenged this finding. In *Bess*, the military judge did not see any indication of impropriety by the convening authority.¹⁶¹ Here, the military judge warned the Convening Authority not to do it again.

The factual predicate necessary to raise a *prima facie* case of discrimination was established. When LTJG Jeter's counsel objected, highlighted the race-indicating questionnaires, and presented the record of trial from *Bess*, he made a *prima facie* showing of racial discrimination. The burden shifted to the Government.

An accused's burden, like LTJG Jeter's, is insurmountable if he is required to prove a convening authority repeatedly excluded people by race from panels over periods longer than convening authorities actually serve in their roles.

¹⁵⁹ *Bess*, 80 M.J. at 5.

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.* at 10.

Conclusion

Lieutenant Junior Grade Jeter established a *prima facie* case of an equal protection violation because the Convening Authority used a non-race-neutral member-selection process and the resulting panel had no minority representation. The Government had the burden to demonstrate this was an innocent omission, but it did not. Despite the Government failing to meet its burden, the lower court gave it a second chance by ordering the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate to provide an explanation. But instead of providing a detailed explanation, as the Government provided in *Gooch*, they provided the type of blanket denials and assertions of regularity that the Supreme Court has rejected. Accordingly, the Government violated LTJG Jeter's equal protection rights.

Alternatively, this Court should find that Lieutenant Junior Grade Jeter established a *prima facie* case of an equal protection violation under the *Batson* or *Castaneda* frameworks. Convening Authorities' unlimited number of peremptory challenges, and their patterns of selecting substantially underrepresented panels, should not receive special protections from constitutional scrutiny.

Relief Requested

This Court should set aside the findings and sentence.

Respectfully submitted.



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were delivered to the Court on July 11, 2022, that a copy was securely transmitted to Deputy Director, Appellate Government Division, and that a copy was securely transmitted to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 11, 2022. I also certify that a copy with the sealed portions redacted was electronically filed and submitted to all aforementioned parties on July 11, 2022.



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Supplement complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. The brief contains 8,363 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	ANSWER ON BEHALF OF
Appellee)	APPELLEE
)	
v.)	Crim.App. Dkt. No. 201700248
)	
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Appellant)	

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Issue Presented

WHETHER THE CONVENING AUTHORITY VIOLATED LTJG JETER'S EQUAL PROTECTION RIGHTS, OVER OBJECTION, WHEN HE CONVENED AN ALL-WHITE PANEL FOR A MINORITY ACCUSED USING A RACIALLY NON-NEUTRAL PROCESS FOR SELECTION AND PROVIDED NO EXPLANATION FOR THE MONOCHROMATIC RESULT BEYOND A NAKED AFFIRMATION OF GOOD FAITH.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016), because Appellant's approved sentence included a dismissal and confinement for more than one year. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of officers sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual harassment, drunken operation of a vehicle, sexual assault, extortion, burglary, conduct unbecoming an officer and gentleman, communicating a threat, and unlawful entry, in violation of Articles 92, 111, 120, 127, 129, 133, and 134, UCMJ, 10 U.S.C. §§ 892, 911, 920, 927, 929, 933, 934 (2012). The Members sentenced Appellant to twenty years of confinement and a

dismissal. The Convening Authority approved the sentence and, except for the dismissal, ordered it executed.

On initial review, the lower court affirmed the findings and sentence. *United States v. Jeter (Jeter I)*, 78 M.J. 754, 780 (N-M. Ct. Crim. App. 2019).

Appellant petitioned for review, and this Court remanded for further consideration in light of *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020). *United States v. Jeter*, 80 M.J. 200, 200 (C.A.A.F. 2020).

On remand, the lower court ordered the production of declarations from the Convening Authority, Acting Convening Authority, and Staff Judge Advocate. (J.A. 86–88.) The United States produced the Declarations, and they were attached to the Record. (J.A. 89–103.)

The lower court affirmed the findings and sentence and held the Convening Authority did not violate Appellant’s equal protection or due process rights. *United States v. Jeter (Jeter II)*, 81 M.J. 791, 794 (N-M. Ct. Crim. App. 2021).

Appellant petitioned this Court for review, which it granted. *United States v. Jeter*, No. 22-0065/NA, 2022 CAAF LEXIS 327 (C.A.A.F. May 3, 2022). Appellant filed his merits Brief. (Appellant’s Br., July 11, 2022.)

Statement of Facts

A. The United States charged Appellant with sexual offenses.

The United States charged Appellant with nineteen Specifications, including violation of a lawful general order, drunken or reckless operation of a vehicle, sexual assault, abusive sexual contact, indecent exposure, extortion, burglary, conduct unbecoming an officer and gentleman, communicating a threat, and unlawful entry. (J.A. 44–47.)

B. Appellant objected to the composition of the Members Panel. The Military Judge found no evidence of systematic exclusion or that the Convening Authority considered any criteria other than those in Article 25, UCMJ.

1. The Acting Convening Authority detailed eight Members. Six identified as Caucasian males, and two did not identify their race.

The Convening Authority referred the case to a general court-martial under General Court-Martial Convening Order (GCMCO) 1-17. (J.A. 48.) Around three months later, the Acting Convening Authority amended the Convening Order, selecting eight Members for Appellant’s court-martial under GCMCO 1A-17. (J.A. 49–50, 92, 95–97.) Six Members self-identified as Caucasian males. (J.A. 105, 133, 142, 151, 160, 169.) The remaining two Members did not identify their race or gender. (J.A. 114–131.)

2. The Convening Authority detailed one additional Member after the Military Judge expressed concern about the small size of the venire.

The Convening Authority, not the Chief of Staff, detailed one additional Member under GCMCO 1B-17. (J.A. 50.) He detailed the Member after the Military Judge expressed concern on the Record about the size of the venire and potential to break quorum. (J.A. 51–53.) The additional Member self-identified as a Caucasian male. (J.A. 178.)

3. Appellant objected to the Panel’s composition. The Military Judge stated, based on the Questionnaires, the Members all “appear[ed]” to be white males. Appellant neither requested nor offered evidence. The Military Judge denied the Motion.

Before the Military Judge first called the Members into court or voir dire, Appellant, an African American male, objected to the entire panel, claiming systematic exclusion of females and minority Members. (J.A. 54, 58; R. 176–77.) The Military Judge then discussed the apparent race of the Members, “Looking at the questionnaires” and “looking at what people have sort of self-identified themselves, Question 7 Without asking people directly what do you consider their [sic] race . . . and background [i]t appears that they [are] all white men.” (J.A. 54–55.) The Military Judge continued, “[T]he fact that [the panel] is all white men . . . [does not show improper] selection because the underlying Article 25 [criteria] . . . aren’t something that you were attacking.” (J.A. 57.) After denying the Motion, and still before the Members entered court, the Military Judge

stated “[if I were] the Convening Authority of this region I wouldn’t [exclude minorities and females] twice.” (J.A. 59.)

The Military Judge did not elaborate how he knew the race of the two Members who did not provide racial information. (J.A. 54–58, 114, 124.)

The Military Judge asked Appellant if he had any support for systematic exclusion “other than just the bare makeup of the panel.” (J.A. 55–56.) Appellant responded, “No, Sir. That’s all we have.” (J.A. 56.)

Following Appellant’s objection to the panel, the Military Judge advised him, “[I]t’s your motion. You have ways to attempt to try to do this . . . [you can] put[] on evidence or call[] witnesses.” (J.A. 57–58.) Appellant stated he would “stand on our motion as it is.” (J.A. 58.)

4. Appellant never requested or offered evidence about past racial compositions of court-martial panels by the Convening Authority, statistics about the pool of individuals available for selection, or other similar evidence.

Appellant never offered or requested any general or specific racial statistics for potential members at trial. (J.A. 54–63.)

Appellant never requested information about the racial compositions of courts-martial panels detailed by the Convening Authority, or any other convening authority. (J.A. 54–63.) Nor did Appellant request a fact-finding hearing to develop facts for a *Castaneda* claim. (J.A. 54–63.) Appellant never moved to

attach evidence about the selection process for his panel or the racial composition of his panel. (J.A. 54–63.)

Appellant never moved to compel data showing the racial breakdown of servicemembers available for selection by the Convening Authority in his case, or any other convening authority, over any period of time. (J.A. 54–63.) He also never requested data related to the racial breakdown of all court-martial panels throughout the Navy or military over any period of time. (J.A. 54–63.)

5. During voir dire, Appellant renewed his objection to the Panel’s makeup and provided a transcript from an unidentified case. The Military Judge reaffirmed his ruling.

During individual voir dire, Appellant renewed his objection to the Panel, offering the Military Judge a six-page transcript from an unidentified court-martial. (J.A. 61, 64–69.) Appellant said the transcript was from another case referred by the same Convening Authority, where the members appeared to be white and the counsel and judge discussed that the accused was African American. (J.A. 61, 64–69.) The Military Judge recognized the name of a trial counsel, thought he knew “who the military judge [was],” and would “take it on good faith this is a Norfolk case.” (J.A. 62.)

Appellant argued the document, combined with the composition of the Panel and the fact that the Members’ questionnaires included questions about race, required the United States to demonstrate an absence of improper considerations.

(J.A. 61.) The Military Judge reaffirmed his Ruling, concluding: “I don’t see any unlawful Article 25 issue here . . . there is no evidence [the CA is] not using the Article 25 criteria I still don’t see the systematic exclusion of [eligible members based on race or gender].” (J.A. 63.)

6. Appellant never questioned the Members about their racial identity during voir dire.

The Parties conducted individual voir dire of each of the nine Members. (See R. 223–310.) Despite questioning all nine Members, Appellant never asked the two Members who had not self-identified about their racial identity. (J.A. 114–115, 124–125; R. 243–265.)

Appellant never questioned any Members about their racial identity or background. (R. 223–310.)

C. The Members returned mixed findings and sentenced Appellant.

The Members convicted Appellant of sexually harassing, threatening, extorting, and sexually assaulting Victim 2; sexually assaulting and unlawfully entering the residence of Victim 1; unlawful entry and burglary of Victim 3’s residence; two Specifications of drunken operation of a vehicle; and two Specifications of conduct unbecoming an officer and gentleman. (J.A. 70–71.)

The Members sentenced Appellant to twenty years confinement and a dismissal. (J.A. 72.)

D. On appeal, Appellant moved to attach a Declaration to the Record, but again never moved to compel or attach statistical evidence to support his claims.

After the case was docketed at the lower court, Appellant filed a Motion to Attach a Declaration from Commander Czaplak, the Executive Officer of Defense Service Office Southeast, to the Record. (J.A. 80.)

Attached to the Declaration was a year-old letter Commander Czaplak wrote to the Convening Authority, as defense counsel for an African-American accused, asking him to “include minority members in any . . . convening order” in his client’s case. (J.A. 82–85.) According to Commander Czaplak, the Convening Authority then detailed several minority members to his client’s panel. (J.A. 83.)

Commander Czaplak’s Declaration alleged the Convening Authority “did not detail any African-American members” to four courts-martial: *Rollins*, *Bess*, *Jeter*, and *Johnson*. (J.A. 83.) He did not indicate how he knew the racial make-up of the panels for the three other courts-martial. (J.A. 82–83.) The Declaration did not state whether Commander Czaplak was detailed defense counsel in those other cases, whether he was present in the court room, or the basis of his claims. (J.A. 82–83.) Nor did the Declaration attach evidence directly supporting his claims about the selection and racial composition of those panels. (J.A. 82–83.)

Appellant never moved to attach or compel production of statistical evidence for available member pools in this or other cases, panels of courts-martial actually

referred by the Convening Authority, other courts-martial in the Navy, the racial makeup of the Navy, or any evidence beyond the Czaplak Declaration.

E. The lower court affirmed the findings and sentence. This Court remanded for consideration in light of *Bess*.

In Appellant's first appeal, the lower court affirmed the findings and sentence. *Jeter I*, 78 M.J. at 780. In response to Appellant's Petition, this Court remanded the case for consideration in light of *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020). *United States v. Jeter*, 80 M.J. 200, 200 (C.A.A.F. 2020).

F. On remand, the lower court ordered Declarations from the Convening Authority, Acting Convening Authority, and Staff Judge Advocate about the selection of Members. Appellant made no motion to compel or attach statistical information about that command, the Navy, or other courts-martial.

On remand, the lower court ordered the production of declarations from the Convening Authority, Acting Convening Authority, and Staff Judge Advocate. (J.A. 86–88.) At the time, the court did not explain the legal basis for ordering further factfinding. (*See* J.A. 86.)

In accordance with the lower court's order, the Convening Authority and his staff provided their Declarations in August 2021—over four years after they issued the Convening Orders. (J.A. 86–88, 90, 94.)

Appellant never moved to attach or compel production of statistical evidence for available members or other courts-martial referred by the Convening Authority, other courts-martial in the Navy, or the racial makeup of the Navy.

1. The Declarations described the Member selection process.

The Convening Authority and his staff explained that first, the Convening Authority reviewed all questionnaires from prospective members to ensure they satisfied Article 25. (J.A. 91.) The prospective members were provided by “commands resident within Navy Region Mid-Atlantic in accordance with . . . the Convening Authority’s published instruction.” (J.A. 98.)

The Convening Authority used questionnaire templates provided by the Chief Trial Judge of the Navy-Marine Corps. (J.A. 98–99.) One of the standard questionnaires “did not include race as a question” while another “included race as a question;” though “potential members frequently declined to answer this question.” (J.A. 99.) Next, the Staff Judge Advocate “provided a slate of potential members for consideration,” including a list of names and questionnaires, to the Convening Authority for approval for General Court-Martial Convening Order (GCMCO) 1-17. (J.A. 91, 95–96, 98–99.)

Standing convening orders, including GCMCO 1-17, were “not intended for use in any particular court-martial.” (J.A. 100.) The Staff Judge Advocate prepared the amended convening orders the same way as a standing convening order by making a list of names from the “available population that were all senior to the accused and available for the expected trial dates.” (J.A. 100.)

The Convening Authority did not “recall being aware of, or otherwise able to infer, the race of the members selected” for any of the convening orders in this case: GCMCO 1-17, GCMCO 1A-17, or GCMCO 1B-17. (J.A. 91–92, 95.)

Because the Convening Authority reviewed all questionnaires, he “may have been aware of the race of some of the prospective members . . . if they provided that information.” (J.A. 93.) But he did “not recall any specific discussion on the diversity make-up” of the panels. (J.A. 93.)

2. The Declarations explained the Acting Convening Authority amended the standing Convening Order, GCMCO 1-17, replacing it with GCMCO 1-17A, and did so by selecting from a pool of prospective members provided by the Staff Judge Advocate.

The Acting Convening Authority amended GCMCO 1-17 and replaced it with GCMCO 1A-17. (J.A. 92.) It was “not uncommon for a GCMCO to be amended due to lack of availability for the originally assigned members.”

(J.A. 92.) He could not recall why GCMCO 1-17 was amended or if he knew the racial makeup of GCMCO 1-17A. (J.A. 96.)

The Acting Convening Authority, “reviewed the list of eligible [Members and their questionnaires] and selected the members from this pool based on best-qualified attributes which to my recollection included experience, length of service, and judicial temperament.” (J.A. 96.)

The Convening Authority's "standard practice" was to "provide a venire of eight potential members to make five for quorum." (J.A. 100.)

3. The Declarations explained the Convening Authority and his staff used statutory criteria under Article 25 to select potential Members. They did not screen Members based on race.

The Convening Authority explained in his Declaration that in selecting members he first reviewed "all members questionnaires to ensure [the command] selected qualified members based on statutory criteria." (J.A. 100.)

Neither the Convening Authority nor the Acting Convening Authority were provided, nor did they ever ask for, "information about the racial makeup of any court-martial venire." (J.A. 102–103.) Member selection was conducted in line with "statutory requirements" of Article 25. (J.A. 94; *see also* J.A. 95–96, 102.)

The Convening Authority made no "effort to screen potential members based on race." (J.A. 94.) The Acting Convening Authority "was neither aware of nor considered the Appellant's race as a criteria for detailing potential eligible members for this court-martial." (J.A. 97.)

The Staff Judge Advocate stated: "race never entered any discussion of potential members for any court-martial." (J.A. 99.) He could not recall "the convening authority in any case to ever have been aware of or discussed the race of any member of any court-martial." (J.A. 101.)

- G. The lower court found no evidence of purposeful exclusion in the Declarations of the Convening Authority and his staff, declined to extend *Batson*, and affirmed the findings and sentence.

The lower court affirmed the findings and sentence. *Jeter II*, 81 M.J. at 794.

The court held that “the mere absence of minority members within the venire selected by the convening authority . . . does not establish a prima facie case of purposeful discrimination” and declined to extend *Batson*. *Id.* at 796.

1. Based on information outside the Record of Trial, the lower court found two Members on the Standing Convening Order were African American.

Appellant cited two online biographies in his Brief to the lower court, arguing two Members on the standing Convening Order were African American. (Appellant’s Br. at 5 n.2, Jan. 4, 2021.) The United States opposed this citation of extra-Record facts. (Appellee’s Answer at 12–13, May 4, 2021.)

The Record contains no evidence of the racial makeup of the Standing Convening Order.

Appellant never moved to attach this factual evidence to the Record, but the lower court nonetheless stated in its opinion that the two Members were African American. *Jeter II*, 81 M.J. at 797.

2. The lower court’s opinion cited Articles 25 and 37 and found Appellant’s evidence sufficient to question the presumption of regularity, ordered declarations, but found the Declarations showed the selection process properly used Article 25.

The lower court’s opinion for the first time explained its reason for ordering Declarations: it said that while convening authorities are presumed to act in accordance with Articles 25 and 37, “there appeared to be at least some evidence of actual exclusion (even if not purposeful) of members of the accused’s own racial group,” thus they found evidence “sufficient to question the presumption of regularity” and wanted the “rationale for selection of the members.” *Jeter*, 81 M.J. at 795, 797.

The lower court reasoned that if the Convening Authority (1) knew “the race of the members on the standing convening order,” (2) “specifically excluded such minority representation on the venire through the amended convening orders,” and (3) “knew the race of the accused,” it would “tend to show a purposeful, albeit not systematic, exclusion of [African American] members.” *Id.* at 797.

But the court then found the Declarations from the Convening Authority and his staff rebutted an inference of purposeful exclusion of African Americans. *Id.* at 797–98. All three officers involved in the member selection process declared (1) “they were not aware of the race of the members detailed in either the standing convening order or the amended convening orders,” and (2) they employed the Article 25 criteria and never discussed the accused’s or the member’s race. *Id.*

Further, the lower court reasoned the Convening Authority’s replacement of the Standing Convening Order failed to show purposeful discrimination: “It is quite common that several, and sometimes *all*, of the original members are not available for what eventually becomes the trial date. In such cases, the convening authority routinely amends the convening order to remove the unavailable members and to select replacements.” *Id.* at 796; *see also id.* at 798 (“While there may have been a need to switch out the members on the standing order to allow for nominating and seating new members, this is common practice especially in large jurisdictions such as Navy Region Mid-Atlantic.”).

3. The lower court found the Czaplak Declaration failed to establish a prima facie case of systematic exclusion as it failed to show the Convening Authority used a non-race neutral selection process.

The lower court found the Czaplak Declaration did “not include any information as to the exclusion, improper or not, of black members” resulting in the alleged all-white panels in the four cases, including Appellant’s case. *Id.* at 797. The Court found no evidence demonstrating the Convening Authority used a non-race neutral selection process or had a racial animus: he did not “kn[o]w the race of the members selected—let alone purposefully cho[ose] not to select members of the particular accused’s cognizable racial group—or even kn[o]w the race of the accused.” *Id.*

The lower court further noted the officer who “replaced the standing panel with new members in Appellant’s case” were not “the same officer mentioned in the three other cases.” *Id.* Thus, the evidence was insufficient “to establish a prima facie case of systematic exclusion of black members in Appellant’s case.”

Id.

H. Appellant never offered or moved to compel statistical evidence supporting his claim of systematic exclusion.

Appellant filed (1) an Initial Brief at the lower court; (2) a Motion to Attach the Czaplak Declaration; (3) a Reply Brief at the lower court; (4) a Remand Brief at the lower court; and (5) a Reply Brief on remand. (Appellant’s Br., Mar. 5, 2018; Appellant’s Mot. to Attach, Mar. 5, 2018; Appellant’s Reply, Aug. 10, 2018; Appellant’s Br., Jan. 4, 2021; Appellant’s Reply, June 14, 2021.)

He never moved to produce or attach statistics supporting his claim of systematic exclusion.

Argument

APPELLANT’S CASE IS NOT MATERIALLY DIFFERENT THAN *BESS*, SO THE OUTCOME SHOULD BE THE SAME. THE COURT NEED NOT EXPAND *CASTANEDA* OR *BATSON* TO MEMBER SELECTION BECAUSE THE ANECDOTES AND LACK OF STATISTICAL EVIDENCE APPELLANT PROVIDES FALL SHORT OF A PRIMA FACIE CASE. MOREOVER, THE DECLARATIONS DISPROVE THE PURPOSEFUL EXCLUSION REQUIRED TO MAKE A PRIMA FACIE CASE. THE MILITARY JUDGE CORRECTLY FOUND “NO DISCRIMINATORY INTENT.”

A. The standard of review is de novo.

Whether a convening authority’s selection of a court-martial venire violated the Fifth Amendment’s implicit guarantee of equal protection is reviewed de novo.

United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020).

B. To establish an equal protection violation, an appellant must establish a prima facie case of purposeful racial discrimination.

“[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.” *Washington v. Davis*, 426 U.S. 229, 239 (1976).

1. The equal protection component of the Fifth Amendment applies to a convening authority’s selection of members.

The Fifth Amendment’s equal protection component applies to a convening authority’s selection of members under Article 25, UCMJ, 10 U.S.C. § 825 (2012).

See, e.g., United States v. Loving, 41 M.J. 213, 283–86 (C.A.A.F. 1994)

(conducting equal protection analysis of member selection).

2. Proving a prima facie case of an equal protection violation requires proof of disparate impact on similarly situated individuals and discriminatory intent.

In multiple criminal law contexts, equal protection violations require proof of an action that (1) has a discriminatory effect; and (2) was motivated by a discriminatory intent or purpose. *See, e.g., United States v. Armstrong*, 517 U.S. 456 (1996) (selective prosecution); *United States v. Bass*, 536 U.S. 862 (2002) (per curiam) (selective prosecution); *United States v. Washington*, 869 F.3d 193 (3rd Cir. 2017) (selective enforcement); *McCleskey v. Kemp*, 418 U.S. 279 (1987) (capital punishment); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (peremptory challenges).

An appellant alleging an equal protection violation bears the burden to make a prima facie case, including proving that “the decisionmakers in *his* case acted with discriminatory purpose.” *McCleskey*, 481 U.S. at 292; *Washington*, 426 U.S. at 241; *see also Batson*, 476 U.S. at 93.

In the selective prosecution and enforcement contexts, the standard requires “clear evidence of discriminatory effect and discriminatory intent.” *See, e.g., Washington*, 869 F. 3d at 214.

In other contexts, like the use of peremptory challenges, the discriminatory effect can create an inference of discriminatory intent. *See, e.g., Parks v. Chapman*, 815 F. App'x 937, 951 (6th Cir. 2020) (noting prosecutor's removal of two African Americans but not two others "raise[d] an inference of discrimination").

In limited contexts, courts may accept statistics as proof of discriminatory intent. For example, in venire selection, statistics of significant underrepresentation over a significant period of time can implicitly establish purposeful discrimination. *Castaneda v. Partida*, 480 U.S. 482 (1976). The Supreme Court has also accepted statistics to prove statutory violations under Title VII of the Civil Rights Act of 1964. *Bazemore v. Friday*, 487 U.S. 385, 400–01 (1986) (Brennan, J., concurring).

3. An accused bears the burden of proving a prima facie equal protection case against a convening authority by "clear evidence"—or at minimum a preponderance of evidence.

The default burden of proof "on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence."

R.C.M. 905(c).

Sometimes, a different burden applies. Precedent establishes a different burden for unlawful command influence: there, an accused bears the burden of

showing “some evidence” to raise a claim. *United States v. Bartee*, 76 M.J. 141, 143 (C.A.A.F. 2017.)

To raise a prima facie equal protection claim under the *Batson* framework, an accused’s burden of proof is low. *See United States v. Collins*, 551 F.3d 914, 920 (9th Cir. 2009) (“At the prima facie stage of a *Batson* challenge, the burden of proof required of the defendant is small.”).

As explained below, a presumption of regularity applies to a convening authority’s selection of members, raising the default preponderance of the evidence burden of proof to the “clear evidence” standard. *See Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464.

4. Once an appellant establishes a prima facie case of an equal protection violation, the burden shifts to the government to rebut the claim.

If an appellant establishes a prima facie equal protection violation, “the burden of proof shifts to the [government] to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.” *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).

C. Appellant fails to establish a prima facie case: the Military Judge’s Ruling found the Convening Authority acted with no discriminatory intent, and Appellant fails to overcome the presumption of regularity.

1. This Court is bound by the Military Judge’s Finding of Fact that no systematic exclusion occurred as his Finding of Fact is not clearly erroneous.

Appellate courts are bound by the findings of trial judges unless they are clearly erroneous. *United States v. Benedict*, 55 M.J. 451, 454 (C.A.A.F. 2001).

In *United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004), the trial judge’s findings of fact—because they were not clearly erroneous—bound this Court when it reviewed whether the convening authority improperly selected a court-martial panel. *Id.* at 171. The Court relied on the trial judge’s findings of fact, supported by the record, concerning the convening authority’s member selection to determine the convening authority properly applied Article 25. *Id.* at 174.

Here, the Military Judge found no evidence of systematic exclusion of minority Members and “no evidence” that the Convening Authority was “not using the Article 25 criteria.” (J.A. 56, 58, 63.) Appellant presented no evidence at trial undermining the Military Judge’s finding. Instead, Appellant offered a six-page transcript from another, unidentified court-martial, which failed to identify the convening authority or the court-martial. (J.A. 61–62, 64–69.)

Although Appellant moved to attach the Czaplak Declaration on appeal, the assertion of three other cases without African American members is insufficient to

show the Military Judge’s Findings of Fact were clearly erroneous. (J.A. 82–85.) Appellant failed to attach or move to compel any evidence, beyond the ordered Declarations, of how the Convening Authority conducted member selection.

As in *Dowty*, this Court is bound by the trial court’s findings of no evidence of systematic exclusion of minority members, and no evidence the Convening Authority selected based on improper criteria. *See Benedict*, 55 M.J. at 454. Appellant’s Fifth Amendment claim fails.

2. This Court can dispose of Appellant’s claim because he fails to show clear evidence to overcome the presumption of regularity.
 - a. The presumption of regularity accords judicial deference to the discretionary actions and decisions of convening authorities, taken in discharging their official duties.

“[T]he presumption of regularity supports that in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.” *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (presumption applied to Department of State official’s actions). The Supreme Court extends this presumption to “prosecutorial decisionmaking” in the civilian justice system. *Hartman v. Moore*, 547 U.S. 250, 263 (2006); *see, e.g., Reno v. American-Arab Anti- Discrimination Comm.*, 525 U.S. 471, 489–490 (1999); *Armstrong*, 517 U.S. at 464–66 (according “[j]udicial deference to the decisions of federal executive officers”).

This Court affords convening authorities similar deference: “[Courts] apply the presumption of regularity and assume that the convening authority was aware of his responsibilities and performed them properly.” *United States v. McClain*, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J. concurring); *United States v. Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008); *cf. Hartman*, 547 U.S. at 263 (noting “judicial intrusion into executive [level agent] discretion of such high order should be minimal”).

- b. An appellant must show clear evidence—or at minimum a preponderance—to overcome the presumption of regularity in an equal protection claim. To the extent the lower court applied the unlawful command influence “some evidence” standard to this issue, it was incorrect.

To overcome this presumption for an equal protection claim, an appellant must show clear evidence the convening authority deviated from the prescribed criteria of Article 25. *See Armstrong*, 517 U.S. at 464. “Clear evidence . . . [is] more than just a preponderance . . . ‘clear’ evidence or ‘clear and convincing’ evidence [is] the same thing.” *United States v. Smith*, 231 F.3d 800, 808 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001); *see also Conley v. United States*, 5 F.4th 781, 789–90 (7th Cir. 2021) (discussing clear evidence as a “rigorous standard” greater than preponderance of the evidence).

This Court has never explicitly stated an appellant’s burden of proof to overcome the presumption of regularity. *See United States v. Wise*, 6 C.M.A. 472, 478 (C.M.A. 1955) (applying presumption but not discussing evidentiary

standard); *United States v. Del Carmen Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008) (same); *Bess*, 80 M.J. at 10 (same); *United States v. Gonzalez*, 79 M.J. 466, 471 (C.A.A.F. 2020) (Maggs, J., dissenting) (same).

The lower court’s post-hoc explanation of its Order to produce the Declarations seems to suggest it used a “some evidence” standard to overcome the presumption of regularity, which would be incorrect under equal protection precedent. *See Jeter II*, 81 M.J. at 797. On the other hand, the lower court’s citation of the “some evidence” standard may suggest that it ordered further factfinding through the lens of unlawful command influence—a much lower burden on the defense to shift the burden to the United States.

Further complicating the lower court’s post-hoc explanation, regardless of whether it ordered factfinding under equal protection or unlawful command influence—and regardless of whether it knew yet what equal protection test might apply to these facts—it shifted the burden because “there appeared to be at least some evidence of actual exclusion (even if not purposeful) . . . of the accused’s own racial group.” *Id.* at 797. But unlawful command influence and equal protection both require intentional—that is, purposeful—exclusion contrary to either Article 25, or on the basis of race. So the lower court’s explanation is at best

unhelpful and may more indicate that court ordered factfinding “just to be sure” the Article 25 process was copacetic.¹

The Supreme Court requires “clear evidence” to overcome the presumption of regularity, which is greater than a preponderance of the evidence— both of which are greater than “some evidence.” *See Chem. Found., Inc.*, 272 U.S. at 14–15; *Smith*, 231 F.3d at 808. At minimum, the lower court should have applied R.C.M. 905’s default preponderance of the evidence standard if their order for factfinding was predicated on an equal protection analysis. Regardless, as explained below, Appellant’s claim fails either burden.

- c. Like in *Armstrong* and *Bess*, Appellant’s anecdotal evidence is not “clear evidence”—or even a preponderance of the evidence—to overcome the presumption of regularity this Court already applied to this same Convening Authority during the same time timeframe.

In *Armstrong*, the Supreme Court relied on the presumption of regularity afforded to prosecutors to reject a claim of racially discriminatory selective prosecution. 517 U.S. at 458. The defendants’ claim rested primarily on an affidavit and “study” claiming all twenty-four crack-cocaine cases closed by the public defender’s office that year were African American. *Id.* at 459. This did not

¹ The United States rejects Appellant’s implicit contention that every time the Czaplak Declaration is attached on appeal, or members of the accused’s race are not on a court-martial panel, further factfinding or a *DuBay* is needed.

constitute “clear evidence to the contrary” to overcome the presumption of regularity because it failed to show any “individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted.” *Id.* at 464–65, 470.

In *Bess*, this Court was faced with the same “anecdotal allegations” from Commander Czaplak regarding the race of members selected by the Convening Authority that Appellant now offers. *Compare* 80 M.J. at 5 n.2 *with* (J.A. 80–85). The court found the affidavit insufficient and reasoned, “[T]he presumption of regularity requires us to presume that [the Convening Authority] carried out the duties imposed upon him by the Code and the Manual.” *Id.* at 10 (citing *Wise*, 6 C.M.A. at 478).

As in *Bess* and *Armstrong*, Appellant presented insufficient evidence to overcome the presumption of regularity afforded to convening authorities. *Compare* (J.A. 56 (finding no evidence Convening Authority purposefully excluded minority members, “other than just the bare makeup of the panel”)), *with Bess*, 80 M.J. at 11 (“[A]t most Appellant presents a potential anomaly with a few cases within a short period of time, with no evidence whatsoever of intentional discrimination.”), *and Armstrong*, 517 U.S. at 470 (“[The appellant’s] affidavits . . . recounted hearsay and reported personal conclusions based on anecdotal evidence.”).

The Military Judge correctly found no “systematic, purposeful exclusion” or evidence of discriminatory intent. (J.A. 56, 58, 63.) Appellant fails to acknowledge or address that this Court has already applied the presumption of regularity to this very same Convening Authority during the same time frame. *Compare Bess*, 80 M.J. at 10 (presuming this Convening Authority acted lawfully), *with* (Appellant’s Br. at 16–40).

Appellant fails to show clear evidence or a preponderance of the evidence to overcome the presumption of regularity. However, as explained below, even if this Court were to find Appellant met his burden, his claim is rebutted by the Convening Authority’s Declarations.

- d. Even if this Court believes Appellant provided “clear evidence” to overcome the presumption of regularity, the Declarations rebut Appellant’s claim.

Although the lower court appears to have been overgenerous in stating that the presumption of regularity was overcome based on “some evidence of actual exclusion (even if not purposeful)”—because, as explained above, only the unlawful command influence standard uses “some evidence” and any exclusion must be intentional under any test—it nonetheless correctly found no evidence of purposeful discrimination. *Jeter II*, 81 M.J. at 797.

Even if this Court finds “clear evidence” to overcome the presumption of regularity, it should find the Declarations from the Convening Authority and his

staff demonstrate he conducted member selection in accordance with Article 25 and did not consider race. (*See* J.A. 91–103); *Jeter II*, 81 M.J. at 797–98. Because the Convening Authority and his staff “were not aware of the race of the members detailed in either the standing convening order or the amended convening orders,” the alleged removal of two African Americans from the Standing Convening Order was not evidence of purposeful discrimination. *See Id.* at 797–98; (Appellant’s Br. at 6, 34).

Even if the presumption of regularity is overcome, no evidence supports a finding of purposeful discrimination. Appellant’s claim fails.

D. This Court should again decline to extend *Castaneda* to member selection. Even applying *Castaneda*, Appellant’s anecdotal evidence, of four cases in less than a year, is insufficient.

An appellant’s burden of proof in a *Castaneda* claim as a default is preponderance of the evidence, but the presumption of regularity elevates the burden to the “clear evidence” standard. *See* R.C.M. 905(c); *Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464; *supra* Section C.2.

1. *Castaneda* established a three-part test for establishing a prima facie case of racial discrimination in grand jury selection based on statistical evidence alone.

In *Castaneda*, the Court held the government failed to rebut a prima facie case of purposeful racial discrimination in the civilian grand jury selection process. 430 U.S. at 483, 500–01. In dicta, the Court noted a three-step framework civilian

defendants could use to establish a prima facie case of purposeful racial discrimination in the selection of grand jurors. *Id.* at 494-95. To allege purposeful racial discrimination, a defendant must (1) show he belongs to a “recognizable, distinct class, singled out for different treatment under the laws”; (2) prove the “degree of underrepresentation [on grand juries] . . . over a significant period of time”; and (3) show the selection procedure is “susceptible to abuse or is not racially neutral,” which would support a “presumption of discrimination.” *Id.*

“A prima facie case of systematic exclusion is not established by the absence of minorities on a single panel.” *Loving*, 41 M.J. at 285 (citing *Castaneda*, 430 U.S. at 494).

2. No military court has relied on the *Castaneda* framework to grant relief for a Fifth Amendment claim in the convening authority’s member selection process.

This Court has twice discussed the *Castaneda* framework in the context of a convening authority’s selection of members, but it has never adopted this civilian framework from “the context of grand jury selection” to military member selection. *See Loving*, 41 M.J. at 284–86; *Bess*, 80 M.J. at 9. As the *Bess* Court noted: “We have not determined whether and how *Castaneda* applies in the military justice system where specific criteria for selecting members exist, *see* Article 25, UCMJ, none of which are race, and where deployments and other factors would likely skew a straight percentage comparison.” *Bess*, 80 M.J. at 9.

3. As in *Bess*, this Court need not decide if and how *Castaneda* applies. Appellant made no attempt to present statistical evidence, merely cites the same evidence that failed in *Bess*, and fails to satisfy the second prong of *Castaneda*.

Under the second prong *Castaneda*, an appellant must demonstrate the “degree of underrepresentation [on grand juries] . . . over a significant period of time” by comparing “the proportion of the group in the total population to the proportion called to serve as grand jurors.” 430 U.S. at 494.

To meet this burden, the respondent in *Castaneda* presented: (1) census statistics showing the local population to be seventy-nine percent Mexican American; and (2) eleven years of data compiled from grand jury records, which showed thirty-nine percent of persons summoned for grand jury service were Mexican American. *Id.* at 486–87. Mexican Americans comprised fifty percent of the grand jury that indicted the respondent. *Id.* at 487. The Court found the forty-percentage-point disparity between the local Mexican American population and those summoned for grand jury service over an eleven-year period was “enough to establish a prima facie case of discrimination.” *Id.* at 495–96.

Here, as in *Bess*, this Court need not decide whether and how *Castaneda* applies, because Appellant “fails to meet the second prong of *Castaneda*.” 80 M.J. at 9. In *Bess*, a majority of this Court declined to “determine[] whether or how *Castaneda* applies in the military justice system” because “it would not change the outcome in this case.” 80 M.J. at 9. As the *Bess* court held: “[O]ne year is not a

‘significant period of time’ and would not establish a prima facie case under the *Castaneda* framework.” *Id.*

“Were *Castaneda* to apply—however imperfectly given the unique characteristics of the military justice system—we need decide nothing more than that Appellant fails to meet the second prong of *Castaneda*.” *Id.* The appellant “proffered allegations that within a one-year period, the convening authority detailed all-white panels in four cases.” *Id.*

Appellant could have—given *Castaneda*, readily available federal precedent, and this Court’s clear message in *Bess*—attached or moved to compel the alpha roster or pool of “everyone whom the convening authority could detail to the court-martial.” *Bess*, 80 M.J. at 12. He could also have attached or moved to compel statistics, including the racial makeup of other courts-martial and those available to be detailed to other courts-martial, for example, that might have helped demonstrate systematic discrimination. But he did none of these things.

Instead, Appellant simply relies on the same anecdotal evidence that failed to show an equal protection violation in *Bess*. Appellant relies on the same Czaplak Declaration, about the same four cases, involving the same Convening Authority, and over the same one-year period. *Compare Bess*, 80 M.J. at 5, n.2, 16 n.2, *with* (J.A. 81–83; Appellant’s Br. at 10).

This Court should reject Appellant’s claim. This evidence is insufficient to support a finding of discriminatory intent on the basis of systematic exclusion.

- a. Even reviewing Commander Czaplak’s allegations from *Bess* anew, this Court should reject them: he speculated about the composition of various panels and his claims are not based on personal knowledge.

The burden is on an appellant “to introduce, or to offer, distinct evidence in support of the motion” challenging the selection of the jury panel—rather than relying “exclusively [on] counsel’s statements, unsworn and unsupported by any proof or offer of proof.” *See Frazier v. United States*, 335 U.S. 497, 503 (1948) (citation omitted).

A witness “may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Mil. R. 602. This applies to post-trial submissions, which “have no automatic value as evidence where they are . . . not based upon personal knowledge of the declarant.” *United States v. Bush*, 68 M.J. 96, 104 n.9 (C.A.A.F. 2009) (citing Mil. R. Evid. 602); *see also United States v. Dugan*, 58 M.J. 253, 259 (C.A.A.F. 2003).

In *Bush*, this Court determined an appellant’s post-trial declaration alleging he lacked employment opportunities did not constitute evidence of prejudice because the appellant lacked personal knowledge as to “the reasons [a] particular employer declined to hire him.” *See* 68 M.J. at 104 n.9. There, the Court noted

that post-trial submissions did not have “automatic value as evidence” if not based on personal knowledge. *Id.*

Like the post-trial submission in *Bush*, the Czaplak Declaration, offered after trial, does not indicate his assertions are based on his own observations or personal knowledge. It provides mere conclusory statements—that Appellant’s panel and three others lacked “any African-American members.” (*See* J.A. 82–83.) Commander Czaplak provides no further detail for these claims.

Most importantly, with respect to Appellant’s and other cases, the Czaplak Declaration provides no basis for concluding he had personal knowledge of the race of each of the members on each of the panels he describes. (J.A. 82–83.) He does not claim to have reviewed members’ questionnaires, discussed race with the relevant members, observed voir dire for cases to which he was not detailed, or discussed this issue with relevant counsel on any of these cases. (J.A. 82–83.) Commander Czaplak provides no factual basis to support his implicit claim to superior knowledge of the racial composition of Appellant’s panel and the other panels he references.

Because the Czaplak Declaration contains no basis for finding he had personal knowledge of the racial makeup of the four panels, it is mere speculation and insufficient to provide any evidence, let alone satisfy *Castaneda*’s demand for statistics showing substantial underrepresentation.

- b. Even taking Appellant’s anecdotal, “four cases” claim at face value, it fails to show the Convening Authority purposefully discriminated by detailing an “all-white” panel to his, or any other, court-martial.

Rather than providing relevant statistics for the pool of everyone available to be detailed to Appellant’s court-martial and for the other cases cited in the Czaplak Declaration, Appellant merely asserts his is one of “four cases” in which the Convening Authority “hand-selected all-white panels” for “African-American accused.” (Appellant’s Br. at 10 (citing *Rollins*, *Bess*, and *Johnson* cases).)

Once again, Appellant’s claims rely on speculation. First, he relies on the Czaplak Declaration as his sole evidence for the *Rollins* case. That Declaration provides no basis for that knowledge, and notably the *Rollins* appellant never alleged improper member selection on appeal. *See United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, at *1 (N-M. Ct. Crim. App. July 30, 2018).

Second, the Acting Convening Authority in Appellant’s case did not detail members to the *Johnson* court-martial, and Appellant fails to show if this same acting Convening Authority selected members for any of the other cases. *See Jeter II*, 78 M.J. at 764–65; (J.A. 49, 82–85).

Third, the Convening Authority, when asked, detailed four minority members and a female member to the *Johnson* court-martial. (J.A. 82–85); *see also Loving*, 41 M.J. at 286 (rejecting equal protection claim against “all-white, all-male panel” where convening authority detailed minority members when asked).

- c. Appellant’s claim fails the second prong of *Castaneda*: he failed to move to compel or attach statistics demonstrating substantial underrepresentation.

In *Castaneda*, the respondent provided census data to demonstrate the “proportion of [Mexican-Americans] in the total population” in his county, and eleven years of grand jury data to demonstrate “the proportion [of Mexican-Americans] called to serve . . . over a significant period of time.” *Castaneda*, 430 U.S. at 486–87.

In *Loving*, defense counsel presented demographic data for two military installations around the time of the appellant’s court-martial. *Loving*, 41 M.J. at 285–86. But the *Loving* court agreed the raw data was “somewhat irrelevant.” *Id.* at 286. The data did not (1) reflect who was ineligible for court-martial duty; (2) reflect those likely unable to meet the “best qualified” requirement of Article 25; and (3) account for rotations on and off base of African American officers who might be eligible for court-martial duty. *Id.* at 286.

This Court in *Bess* discussed the statistics that might have been relevant to make a claim for improper member selection, despite not changing the result in that case: “the pool of individuals eligible and available to serve as court members” and “everyone whom the convening authority *could* detail to the court-martial.” *Bess*, 80 M.J. at 11–12 (citing *United States v. Lewis*, 46 M.J. 338, 339, 341–42

(C.A.A.F. 1997)). The *Bess* opinion provided the clearest roadmap to litigants that might attempt to prove a *Castaneda* claim in courts-martial.

But Appellant made no attempt to develop the facts that the *Bess* appellant failed to develop. Instead, despite the *Bess* opinion’s lengthy discussions of the evidentiary deficiencies in that case, and unlike the respondent’s efforts in *Castaneda*, Appellant never attempted to obtain or attach: (1) data showing the proportion of African Americans in the Convening Authority’s “pool of members”; or (2) data showing the proportion of African Americans “called to serve [as members] . . . over a significant period of time.” 430 U.S. at 494.

Appellant provides even less evidence than the *Loving* Court found insufficient. *See* 41 M.J. at 283–86. No statistics show the racial breakdown of the “total population,” or the racial breakdown of any other panels—let alone panels “over a significant period of time.” *Id.*

Because Appellant fails to provide necessary statistics to conduct the *Castaneda* analysis, his claim fails, and he cannot establish a prima facie case.

- d. Appellant waived any right to materials pertaining to persons not selected by the convening authority.

Copies of “materials pertaining solely to persons who were not selected for detail as members need not be provided” unless: (1) a party requests them; and (2) the military judge, upon a showing of good cause, directs they be provided.

R.C.M. 912(a)(2). If not raised before a court-martial adjourns, a request for these materials is waived. *See* R.C.M. 905(e).

Here, Appellant never requested the Military Judge direct the provision of materials related to persons not selected to serve on his court-martial panel. When the Military Judge gave Appellant an opportunity by advising him “it’s your motion. You have ways to attempt to [gather and offer evidence],” Appellant declined to do so and “st[oo]d on [his] motion as it [was].” (J.A. 57–58.)

Appellant waived any request for evidence related to servicemembers considered, but not selected, by the Convening Authority. *See* R.C.M. 905(e); R.C.M. 912(a)(2).

4. If this Court applies *Castaneda* to member selection, it should not be watered down. Truncated timelines would be inconsistent with equal protection precedent and risk inferring purposeful discrimination simply based on the racial composition of a single or small number of panels. *Castaneda* itself suggested two and a half years of evidence may have been sufficient, rebutting Appellant’s argument that *Castaneda* is unworkable.

The *Castaneda* line of precedent requires an appellant to provide statistics showing a group was substantially underrepresented in selections “over a significant period of time.” 430 U.S. at 494. Courts typically consider a period of time to be “significant” where it shows the group’s representation over years. *See Castaneda*, 430 U.S. at 494 (eleven-year period); *Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993) (finding two years

insufficient); *Bryant v. Wainwright*, 686 F.2d 1373, 1377–78 (11th Cir. 1982), *cert. denied*, 461 U.S. 932 (1983) (five-year period sufficient). This method of proof is based on the “rule of exclusion”—the idea that that “[i]f a statistical disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident.” *Castaneda*, 430 U.S. at 494 n.13. The “rule of exclusion” applies even where those who select jurors for grand jury service are appointed “at each term of court.” *See Hernandez*, 347 U.S. at 476 n.1, 480; *Castaneda*, 430 U.S. at 496 n.16 (comparing judge’s grand jury selections in two-and-a-half year term to substantial period of time).

Appellant argues his burden under *Castaneda* is “insurmountable” and requires a lower burden of merely showing a “pattern” in the military context, but he fails to present evidence to support his contentions that *Castaneda* precedent cannot equally apply to the military. (Appellant’s Br. at 35–39.) Appellant’s demand for truncated timelines in the military is unnecessary and unworkable for four reasons. First, courts have found Appellant’s proposed “four cases in less than a year” time period to be insufficient under *Castaneda*. *See Rose v. Mitchell*, 443 U.S. 545, 566, 570 (1979) (testimony from witnesses covering period of “five or six years,” “several years,” and “two years” not significant); *see also Beyer*, 983 F.2d at 1233 (two-year period insufficient).

Second, the Supreme Court applies *Castaneda*'s "rule of exclusion" to grand jury selection processes even where the persons selecting grand jurors change between court terms. *See Hernandez*, 347 U.S. at 476 n.1, 480. Because the *Castaneda* framework is applicable to selection procedures where commissioners change with a "term of court," it can also—as it currently exists—be applied to the military's convening-authority-driven selection process where convening authorities change every few years.

Alternatively, an appellant could try to prove a *Castaneda* case of systematic discrimination by gathering data from multiple command tours for a single convening authority. Indeed, if an armed force is comprised of a knowable percentage of underrepresented groups, and one convening authority—or multiple convening authorities—never, or in a substantially underrepresented way, selects a cognizable group over a significant period of time, then those statistics may be relevant to a *Castaneda* analysis.

Third, creating a new, "military timeline," would increase the chance that courts will have to weigh and analyze, for the purpose of finding constitutional equal protection violations, statistical disparities in panel compositions, based on "chance or accident"—which longstanding and developed *Castaneda* precedent seeks to and helps avoid. *See Rose*, 443 U.S. at 568–74. Removing the "significant period of time requirement" undermines the justification for inferring

purposeful or intentional constitutional discrimination from statistics alone. This is so, because it increases the likelihood of benign statistical anomalies being labeled as purposeful discrimination.

Fourth, the *Castaneda* Court also noted that the “district judge who impaneled the respondent’s grand jury was in charge for only two and one-half years of the eleven year period considered in that case.” 430 U.S. at 496 n.16. And the Court noted that because the two and one-half year time period itself revealed a “significant disparity,” the District Court’s assumption that “shorter time period would [not support a] . . . prima facie case of discrimination” was unwarranted. *Id.* Therefore, the need to change the *Castaneda* test is far from clear.

This Court should decline Appellant’s invitation to extend the *Castaneda* inference of intentional discrimination to four anecdotal cases in less than a year where Appellant failed to develop necessary facts, and where military rotation time periods suggest that—in the right case—facts might be developed that fit well within the Court’s own comments about what may work within the *Castaneda* framework. 430 U.S. at 496 n.16.

Even assuming *Castaneda* applies to convening authority selection, this Court should not depart from the requirement for an appellant to provide statistics

“over a significant period of time.” Whatever that means in the military justice system, Appellant fails to prove it here.

E. Unlike in *Avery* and *Alexander*, Appellant fails to show the Convening Authority’s selection process was susceptible to abuse because he fails to present evidence the Convening Authority knew, or could have known, the race of all potential members.

An appellant’s burden of proof in an *Avery* or *Alexander* claim as a default is preponderance of the evidence, but the presumption of regularity elevates the burden to the “clear evidence” standard. *See* R.C.M. 905(c); *Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464.

1. The Supreme Court conducted case-specific factual inquiries in *Avery* and *Alexander* and found (1) systematic exclusion of African Americans in the jury selection process resulting in significant underrepresentation on the panel and (2) race-prominent selection procedures susceptible to abuse.

In *Avery v. Georgia*, 345 U.S. 559 (1953), an African American appellant made a prima facie case of racial discrimination when his venire of sixty potential jurors had zero African Americans, while public registries showed “many [African Americans were] available” to serve on the jury, and race featured prominently in the selection process. *Id.* at 562. There, after selecting potential jurors from local tax returns, jury commissioners placed “white” names on “white tickets” and African American names on “yellow tickets” where the only other information on the card was the name and address of the potential juror. *Id.* at 560. After a

number of tickets were randomly drawn, a clerk “arrange[d]” the tickets for who would “serve on the panel.” *Id.* at 561.

In *Alexander v. Louisiana*, 405 U.S. 625 (1972), each step in the grand jury selection process showed statistically significant winnowing of African American candidates and left opportunity for abuse because it highlighted the race of potential jurors. *Id.* 627–28. Jury commissioners received a pool that had 13.76% African Americans. *Id.* at 627. The commissioners then highlighted the race of each potential juror by attaching a “card” stating each member’s race to each questionnaire. *Id.* The commissioners removed questionnaires on the grounds they were “not qualified” or “exempted under state law.” *Id.* Commissioners then “random[ly]” selected “400” of the remaining “2,000,” of which 6.75% were African American. *Id.* Out of the twenty on appellant’s grand jury venire, one was African American, and zero African Americans were among the twelve that indicted him. *Id.*

This “striking,” “progressive decimation of potential [African American] grand jurors,” coupled with the “[non]racially neutral” selection procedures at “two crucial steps in the selection process” that highlighted the race of the potential jurors and disparately narrowed the percentage of African American jurors, created a prima facie case of racial discrimination. *Id.* at 629–30. *See also Whitus v. Georgia*, 385 U.S. 545, 549 (1967) (grand and petit juries selected using records

where black persons designated with “(c)” amounted to race-prominent selection procedure susceptible to abuse); *Castaneda*, 430 U.S. at 484–86, 495 (grand jury selection procedure “not racially neutral,” for Latinos because: (1) jury commissioners picked names from local population for grand jury list; and (2) “Spanish surnames are . . . easily identifiable.”).

2. Appellant fails to provide any evidence beyond mere speculation that the alleged lack of African Americans on his panel resulted from systematic exclusion from a system susceptible to abuse.

Unlike in *Avery* and *Alexander*, where the Court engaged in fact-intensive analysis to find equal protection violations, Appellant fails to show African Americans were systematically excluded from his venire through a system susceptible to abuse for three reasons.

First, unlike *Avery* and *Alexander*, Appellant never attached or developed statistics or data for consideration. He neither moved to attach nor moved to produce the percentage of African Americans available as prospective members for his court-martial, the percentage of African Americans aboard Naval Station Norfolk, or even the percentage of African Americans in the Navy.

Without even that numerical or statistical baseline to compare to Appellant’s Members, no court—not the trial court, the lower court, or this Court—can determine if Appellant’s allegations result from systematic exclusion, or are statistically insignificant such that they provide no circumstantial evidence of the

intent required for an Equal Protection violation. Indeed, unlike the more obvious cases of systematic exclusion in areas with larger African American populations such as *Avery*—zero African Americans out of sixty members—and *Alexander*—one out of twenty—the exclusion of African Americans here could be coincidental because there were only nine Members.

Second, unlike *Avery* and *Alexander*, Appellant neither produced nor requested through discovery the racial makeup of the prospective members provided to the Convening Authority, and he fails show how many of those would have been qualified under Article 25 criteria. He fails to show any data about potential members, both available to serve on the panel and senior to Appellant, a company grade officer. *See Loving* 41 M.J. at 286 (noting failure to show “percentages of [potential members] [eligible] for court-martial duty”).

Third, unlike *Avery* and *Alexander*, Appellant fails to show a system susceptible to abuse. There, grand jury selection processes that highlighted prospective members’ race provided an “easy opportunity for racial discrimination.” *Alexander*, 405 U.S. at 630. Here, Appellant solely relies on the question about race that appeared on the Navy-Marine Corps Trial Judiciary’s model questionnaire. (Appellant’s Br. at 19–21.) But: (1) members were not required to answer and “frequently declined to answer” the race question; (2) not

all questionnaires included the race identifier question; and (3) the race identifier was one of over fifty questions listed in the questionnaire. (*See* J.A. 99, 104–131.)

Moreover, under *Avery* and *Alexander*, the mere identification of race in the process is not dispositive; instead, those cases support a finding of purposeful discrimination where the race prominent procedures have “no conceivable purpose or effect other than to enable those so disposed to discriminate . . . on the basis of their race.” *Turner v. Fouche*, 396 U.S. 346, 355 n.13 (1970).

But in the military, race identifiers are considered “neutral” because a convening authority may “seek[] in good faith to make the panel more representative of the accused’s race or gender.” *Riesbeck*, 77 M.J. at 163; *see also infra* Section E.3.

3. Unlike in *Avery* and *Alexander*, Appellant fails to show race-prominent selection procedures. Nothing requires a convening authority to be “race ignorant,” and information about race has long been held to be neutral for Article 25 purposes.

“[A] convening authority is not required to be race-ignorant; he or she is only required to be race-neutral.” *United States v. Green*, 37 M.J. 380, 384 (C.M.A. 1993). Military courts do “not presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty.” *Loving*, 41 M.J. at 285. This is so because “[r]ace and gender identifiers are neutral; they are capable of being used for proper as well as improper reasons.” *Id.*; *see, e.g., Riesbeck*, 77 M.J. at 163 (permitted for inclusion).

Likewise, a convening authority cannot be presumed to discriminate on race if he does not know the racial makeup of the potential members during selection. *See Bess* 80 M.J. at 7 (rejecting argument convening authority discriminated when not all questionnaires had racial information).

Unlike in *Avery* and *Alexander*, Appellant fails to present clear evidence of race-prominent or even non-race-neutral selection procedures. (*See* Appellant’s Br. at 25–27.) This Court already rejected the claim that members’ questionnaires with an optional race-identifier question amount to a non-race neutral selection process. *See Loving*, 41 M.J. at 285; *Green*, 37 M.J. at 384.

Even if a single, optional race question somehow amounted to a race-prominent selection procedure, two of the nine Questionnaires had no racial identifier question. (J.A. 114–131.) If the Convening Authority sought to systematically discriminate by race, it would be a curious choice to select Members of unknown races. *See Bess* 80 M.J. at 7; (Appellant’s Br. at 22–23, 27).

Indeed, the Declarations show the Convening Authority did not discriminate on the basis of race during selection and screening members by race was “never done” and race was “no[t] considered.” (J.A. 91, 97, 100, 102.) Furthermore, when other accuseds requested minority representation, the Convening Authority granted the request, which undercuts any inference of purposeful discrimination. (J.A. 82–85.)

Appellant fails to show by “clear evidence” or by a preponderance of the evidence that his case had systematic exclusion or race-prominent selection procedures susceptible to abuse found in *Avery* or *Alexander*. His claim fails.

F. The narrow *Batson* framework, which has not been extended to other contexts, does not apply to a convening authority’s selection of the venire under Article 25.

1. This Court has not extended *Batson* to member selection.

A convening authority’s member selection process is “substantially different from civilian jury selection practice.” *United States v. Bertie*, 50 M.J. 489, 491 (C.A.A.F. 1999). “[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.” *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citation omitted).

“A service member has no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen.” *Id.* (citations omitted); *see also United States v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988) (noting this process “contemplates that a court-martial panel will not be a representative cross-section of the military population”).

There is no constitutional or statutory right for an accused to have members of his own race, or any other, included on either a court-martial panel or a civilian jury. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 404 (1991); *Bess* 80 M.J. at 7. The

Fifth Amendment nonetheless prohibits excluding members of any “cognizable racial group” from court-martial service. *See Santiago-Davila*, 26 M.J. at 389–90.

In *Bess*, two members of the Court rejected extending *Batson* to the convening authority’s selection of members, and a majority declined to decide if or how *Batson* applied because “the record [did] not establish the factual predicate for Appellant’s proposed constitutional test.” 80 M.J. at 14 (Maggs, J., concurring).

2. *Batson* applies to peremptory challenges, not member selection.

In *Batson*, the Court held an accused could establish a prima facie case of purposeful discrimination in the selection of a petit jury based solely on a prosecutor’s exercise of peremptory challenges at trial. 476 U.S. at 96. The *Batson* framework has never been extended beyond peremptory challenges. *See Bess*, 80 M.J. at 9 n.9; *cf. also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (discussing expansions of *Batson* to peremptory challenges in other contexts).

An accused must show: (1) he is a member of a “cognizable racial group,” and the prosecutor removed a member of the defendant’s race with a peremptory challenge; and (2) the facts and circumstances “raise an inference” the prosecutor used the peremptory challenge “on account of [the juror’s] race.” *Batson*, 476 U.S. at 96. An accused is “entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’” *Id.* (quoting *Avery*, 345 U.S. at 562).

Appellant fails to “cite any precedent that would require extending *Batson*’s holding outside the context of peremptory challenges.” *Bess*, 80 M.J. at 8–9 (plurality); (Appellant’s Br. at 31–33). “Indeed, the only extensions of *Batson* have been within the peremptory strike context itself.” *Id.* at 9 (citing *Flowers*, 139 S. Ct. at 2243).

3. Failing to detail members is not equivalent to using a peremptory challenge: *Batson*’s rationale applies to purposeful exclusion, not to lack of inclusion.
 - a. The Article 25 framework distinguishes member selection from a prosecutor’s unregulated peremptory challenges. Striking members from a limited pool is fundamentally unlike including members from hundreds or thousands of available servicemembers.

Convening authorities must select members based on identified statutory criteria. *See* Art. 25(d)(2), UCMJ, 10 U.S.C. § 825 (2012). A decision to not select a member, using statutory criteria, is legally and substantively distinct from using a peremptory challenge—“the component of the jury selection process at issue [in *Batson*].” *Batson*, 476 U.S. at 89; *see also United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

Peremptory challenges involve striking or removing potential members. *See* Art. 41(b), UCMJ, 10 U.S.C. § 841(b) (2012). Conversely, member selection under Article 25 involves selecting qualified members based on statutory criteria. While a convening authority may not be “precluded by Article 25 from

appointing . . . a representative cross-section of the military community,” he or she is not required to do so. *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988).

In reviewing grand jury selection—a process more akin to convening authority member selection than peremptory challenges—the Supreme Court does not view jury commissioners using statutory criteria to select members as exercising “the functional equivalent of an unlimited number of peremptory challenges.” (Appellant’s Br. at 31 (quoting *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring)); see, e.g., *Alexander*, 405 U.S. at 628–30; *Castaneda*, 430 U.S. at 484–88. This Court should decline to do so as well.

Appellant’s removal framework is not appropriately tailored to the selection of members to courts-martial for four reasons. (Appellant’s Br. at 31–35.) First, unlike peremptory challenges, which remove members from panels, the failure to select a member does not “remove” members of a particular group.

Second, there is no presumption that the lack of members of a particular group resulted from improper consideration. *Bertie*, 50 M.J. at 492.²

Third, this requirement would be unworkable—since a convening authority routinely considers a “full roster” of potential members. See, e.g., *Bartee*, 76 M.J. at 143 (noting convening authority considered “roughly 8,000” potential members). A prosecutor’s requirement to provide a race-neutral explanation for a

² See *supra* Section C.2.b.

peremptory challenge is limited to that member—*Batson* would require a convening authority to explain his or her rationale for not selecting dozens, hundreds, or thousands of potential members.

Fourth, *Batson* protects an accused from racially motivated peremptory challenges—procedures with little to no statutory or regulatory protections. *See* R.C.M. 912(g); *Batson*, 476 U.S. at 89. But the convening authority selection process already includes these protections through operation of Article 25, which generally prohibits convening authorities from selecting members on the basis of race. *See Riesbeck*, 77 M.J. at 162.

- b. A convening authority’s member selection is distinguishable from a prosecutor’s peremptory challenges. *Batson* does not apply.

Appellant’s claim that convening authorities exercise “an unlimited number of peremptory challenges” during member selection is an easy shorthand, but fails closer scrutiny of the differences between the two processes. (Appellant’s Br. at 31.) A convening authority, as an Executive Branch decisionmaker, applies the statutory, objective criteria of Article 25, outside the courtroom and prior to trial, based on paper questionnaires and information provided by staff, sometimes after reviewing large alpha rosters of available personnel. *See* Art. 25, UCMJ, 10 U.S.C. § 825 (2012); *see, e.g.*, (J.A. 91–93, 95–96, 98–100); *see also Batson*, 476

U.S. at 86–87 (“Those on the venire must be ‘indifferently chosen.’” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879))).

By contrast, a trial counsel’s challenges come in the heat of trial proceedings, after significant voir dire questioning, observation of individual members, and can be made “for any reason at all, as long as that reason is related to [counsel’s] view concerning the outcome.” *Batson*, 476 U.S. at 89. The *Batson* test was created to account for exactly these circumstances.

The convening authority’s selection of members is a detached process of inclusion based on discrete statutory criteria, while peremptory challenges are a deliberate, subjective process of exclusion. *See Jeter II*, 81 M.J. at 796 (“Unlike the mechanism utilized in peremptory challenges in which a prosecutor specifically excludes a member of the same cognizable racial group, member selection is generally a process of *inclusion*, based on the statutory requirements found in Article 25, UCMJ.”).

Additionally, the sui generis nature of the *Batson* framework makes it less adaptable to process-focused equal protection claims involving convening authorities’ member selection. Unlike *Castaneda* and *Alexander*, whose frameworks address selection procedures like Article 25 selection, the *Batson* framework applies—not to an official Executive Branch process aided by staff—but to the subjective, fully discretionary courtroom action of a single prosecutor

that, except for *Batson*, requires no explanation. *See Castaneda*, 430 U.S. at 494; *Alexander*, 405 U.S. at 627–28; *Batson*, 476 U.S. at 96. Convening authorities’ member selection, through applying Article 25, is too different from a prosecutor’s exercise of peremptory challenges for *Batson* to be useful.

Further, the subjective response called for under *Batson* is the subject of much criticism. Some, for example, argue the “race neutral response” requirement encourages a minimalist response and mendacity. *See, e.g.,* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L. Q. 713, 786-796 (Fall 1999). Too, *Batson* focuses on any subjective plausible response from the prosecutor—or here, would focus on the convening authority. In contrast, *Castaneda* and general Equal Protection law would encourage full litigation—both by placing a burden on the movant to present and explain a clear or preponderance of the evidence case, but also by requiring a substantive response concerning the selection process. In any case, shallow litigation of the issues would be discouraged. The *Batson* framework, with this baggage, should not be further extended to convening authority member selection.

Finally, the *Batson* test permits shifting of the burden even with narrow proof that there may be a “‘pattern’ of strikes against black jurors included in the particular venire” of a single case, rather than requiring proof across multiple criminal trials as in *Castaneda*. 476 U.S. at 97. The *Castaneda* and broader equal

protection “systematic exclusion” framework, as demonstrated above and below, are far better suited to providing protection for equal protection violations. And, the statutory unlawful command influence “court stacking” framework, with its low burden on the movant and constitutional-type prejudice analysis, has its own benefits in protecting accuseds where raised and litigated.

As the plurality in *Bess* explained, “[T]he narrow terms of *Batson*’s holding neither compel nor impel [this Court] to extend it to a convening authority’s selection of members, the manner of which Article 25, UCMJ, limits and directs, even if his supposition about the race of his panel’s members was an established fact.” *Bess*, 80 M.J. at 8.

Batson need not and should not be extended to a process already protected by Articles 25 and 37, UCMJ, and already protected by standard Equal Protection law. *Batson*’s framework—never held to apply to Article 25, UCMJ—need not be applied to the convening authority’s member-selection process.

4. The member selection process is not “immune from constitutional scrutiny” in the absence of *Batson*.

Appellant’s claim that “convening authorities’ discretion to select members will remain immune from constitutional scrutiny” if this Court does not apply *Batson* is incorrect. (Appellant’s Br. at 35.)

First, the Constitution’s equal protection guarantee already applies to convening authority member selection, regardless of whether *Batson* applies, and it

is buttressed by Article 25. *See Bess*, 80 M.J. at 7; Art. 25, UCMJ. Appellant was free to gather or request evidence and make a prima facie equal protection claim under any of the equal protection frameworks for addressing racial discrimination in jury selection he discusses in his brief. (Appellant’s Br. at 23–25, 35–36); *see, e.g., Castaneda*, 430 U.S. at 494; *Alexander*, 405 U.S. at 627–28. But importantly, Appellant has chosen time and again not to make a case, at trial or on appeal, to gather or request evidence. He never requested statistical evidence for any courts-martial, available member pools, or even the racial makeup of the Navy.

Second, Appellant ignores this Court’s well-established court-stacking framework for addressing improper member selection, which provides ample protection. *See Riesbeck*, 77 M.J. at 165; (Appellant’s Br. at 35). That framework requires that appellant meet the low evidentiary threshold of “some evidence” to shift the burden to the government to prove no improper selection beyond a reasonable doubt. *See Bartee*, 76 M.J. at 143; *Riesbeck*, 77 M.J. at 165.

Third, Appellant requests this Court apply a framework used for peremptory challenges to member selection, which no court has ever done. *See Bess*, 80 M.J. at 9 n.9; *Flowers*, 139 S. Ct. at 2243 (discussing extension *Batson* framework to peremptory challenges in other contexts).

The Constitution and Article 25 already provide frameworks to scrutinize convening authorities' member selection procedures. Appellant's argument fails and *Batson* need not apply.

5. Even applying *Batson* to the member selection context, Appellant fails to: (1) overcome the "clear evidence" burden; (2) present evidence the convening authority "removed" any African American members; or (3) present facts and circumstances sufficient to "raise an inference" of a "practice to exclude [members] . . . on account of their race."

An appellant's burden of proof in a *Batson* claim is low. *See Collins*, 551 F.3d at 920. In any application of *Batson*'s principles to a convening authority's member selection as a default is preponderance of the evidence, but the presumption of regularity elevates the burden to the "clear evidence" standard. *See R.C.M. 905(c); Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464.

In *United States v. Gooch*, 69 M.J. 353 (C.A.A.F. 2011), the Court held an appellant failed to demonstrate that a court-martial member selection method improperly excluded African American members. *Id.* at 358–59. There, evidence showed the selection process used "exclude[d] three of the four eligible African American members from [the convening authority's] consideration." *Id.* Citing *Batson* and *Santiago-Davila*, this Court found those cases to be "distinguishable" because the appellant presented no evidence showing an "improper motive" to "exclude members based on race." *Id.*

Here, as in *Gooch*, any purported *Batson* issue is “distinguishable,” and Appellant fails to merit relief under *Batson* for three reasons. First, Appellant fails to prove African Americans were absent from his panel: although the Military Judge observed it “appeared” to be an all-white panel, he made this comment based on the questionnaires, prior to the Members entering court, and Appellant never asked two of the Members, who did not self-identify, about their race. *See Bess*, 80 M.J. at 4 (noting lack of clarity about members’ races); *see also id.* at 14–15 (Maggs, J., concurring) (same).

Second, Appellant presents no evidence, let alone clear evidence, establishing the Convening Authority had improper motives in the member-selection process.

Third, even shifting the burden to the Convening Authority, the Declarations provided race-neutral explanations for the Convening Authority’s actions. The Convening Authority and his staff described the selection process in detail and how they applied statutory criteria, not race, to select members. (J.A. 94–97, 100–02.)

Thus, even applying *Batson* to convening authority member selection, Appellant’s claim fails.

G. If this Court finds Appellant has made a prima facie case of an equal protection violation, the Declarations from the Convening Authority and his staff rebut Appellant's claim of racial discrimination.

All equal protection frameworks, after an appellant first establishes a prima facie case, shift the burden and provide the government an opportunity for rebuttal.

1. The United States can rebut a prima facie case through showing potential jurors were selected using a race-neutral selection process.

“With a prima facie case made out, ‘the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.’” *Castaneda*, 430 U.S. at 494 (citation omitted); *see also Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991) (same). “If the defendant carries this burden of production [in rebuttal], the presumption raised by the prima facie case is rebutted and drops from the case.” *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993).

2. The Declarations show the Convening Authority conducted a race-neutral member selection.

In *Gooch*, an affidavit from a legal clerk detailed the member selection process and showed there was no improper motive “to exclude members based on race” because the command never advised the clerk to select members based on race and “the methodology used was not intended to exclude African Americans.” 69 M.J. at 359.

In *Castaneda*, the state failed to rebut the petitioner’s prima facie case when they did not call the commissioners who selected the grand jury venire to explain how they determined which members to include. 430 U.S. at 497. “[T]he lack of rebuttal evidence in the record” was “particularly revealing” as the “grand jury commissioners [did not testify] about the method by which they determined [juror qualifications]” and the state did not challenge the accused’s provided statistics. *Id.* at 498–99; *see also Alexander*, 405 U.S. at 632 (finding affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion).

In *Woodfox v. Cain*, 772 F.3d 358 (5th Cir. 2014), the testimony of one of two judges in rebuttal evidence constituted “more than affirmations of good faith that discrimination did not occur” because it described the selection criteria and process they used to select grand jury forepersons. *Id.* at 381–83. The judge testified to seeking “facts about the person . . . including character, communication skills, patience, independence, reputation and education” and “actively tried to be inclusive, and appointed women and African-American forepersons.” *Id.* at 381. The court found the one judge employed race-neutral selection criteria, but the state failed to provide adequate rebuttal evidence as to the other judge, who was deceased, and could not account for his selections. *Id.* at 383.

Here, as in *Gooch*, this Court can look to the Declarations from the Convening Authority and his staff to rebut Appellant’s claim. *See* 69 M.J. 388–89. Unlike the lack of evidence in *Castaneda* and more akin to the judge’s race-neutral criteria in *Woodfox*, the Convening Authority and his staff provided more than mere affirmations of good faith. (Appellant’s Br. at 29–30, 35.) In detailing their selection procedures, the Acting Convening Authority explained selections were made based on “best-qualified attributes [including] experience, length of service, and judicial temperament.” (J.A. 95.)

The Convening Authority explained he would first review the questionnaires to ensure they aligned with Article 25, (J.A. 91, 100), and then the Staff Judge Advocate would create a list of potential members in line with Article 25 criteria for his review and signature. (J.A. 91, 95–96, 98–99.)

In describing the process, the Convening Authority and his staff declared: (1) they did not make “any effort to screen potential members based on race”; (2) “race never entered any discussion of potential members for any court-martial”; and (3) they never “considered [the Appellant’s] race as a criteria for detailing potential eligible members for this court-martial.” (J.A. 94, 97, 99.)

Thus, because the Declarations provided details about what criteria the Convening Authority used and how he conducted the selection process without any discriminatory intent, the Declarations sufficiently rebut Appellant’s claim.

H. If this Court finds the Declarations insufficient to rebut the prima facie case, the United States should be given the opportunity to rebut Appellant’s prima facie case.

The government is generally provided an opportunity to present rebuttal evidence after an appellant has made a prima facie case. *See Castaneda*, 430 U.S. at 497; *see also United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996) (rebutting prima facie case under *Castaneda*).

This Court can reject Appellant’s requested remedy of “dismiss[ing] the findings and specifications,” because the United States has not been provided an opportunity to present rebuttal evidence. (Appellant’s Br. at 17, 29, 41.)

Although the lower court, without explanation, ordered Declarations to answer specific questions, the United States never had the opportunity—or motivation, not knowing any equal protection burden had shifted—to present evidence or request a *DuBay* in rebuttal, as seemingly neither the trial court nor the lower court found a prima facie equal protection case to shift the burden. *See* (J.A. 63); *Jeter I*, 81 M.J. at 797–98 (post-hoc explanation for ordering Declarations citing Articles 25, 37, and “some evidence” of non-purposeful exclusion); *Jeter II*, 78 M.J. at 767.

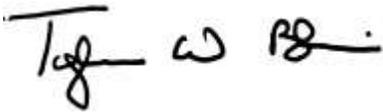
Moreover, *Avery* and *Alexander* do not support Appellant’s claim his prima facie case went “unrebutted.” (Appellant’s Br. at 17, 29.) Both *Avery* and *Alexander* involved cases where the state had the opportunity to rebut and used it

to present evidence before reaching the Supreme Court. *See Avery*, 345 U.S. at 561–62; *Alexander*, 405 U.S. at 632. The Court decided those cases on the evidence the state had already presented. But that is not this case.

If this Court finds Appellant has shown a prima facie case, the United States should be given an opportunity to present rebuttal evidence.

Conclusion

The United States respectfully requests this Court affirm the lower court’s decision.



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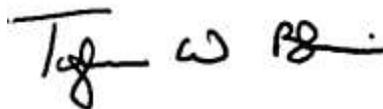
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**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,

Appellee

v.

Willie C. JETER
Lieutenant Junior Grade (O-2)
United States Navy,

Appellant

**REPLY BRIEF ON BEHALF
OF APPELLANT**

Crim.App. Dkt. No. 201700248

USCA Dkt. No. 22-0065/NA

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Argument

A. The Government asks this Court to disregard Supreme Court precedent. Insurmountable burdens cannot be placed on accused raising equal protection claims.

“[R]equiring a defendant to ‘investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges’ pose[s] an ‘insurmountable’ burden.”¹ The Government’s position creates the exact burden that the Supreme Court condemned.²

Throughout its answer, the Government argues that LTJG Jeter should have investigated and attached statistics on the percentage of African Americans available for trial, the amount of African Americans stationed in Norfolk, the amount of African Americans in the Navy at large, and the amount of African Americans in the Navy throughout history.³ Effectively, the Government expects military accused to “investigate, over a number of cases, the race of persons tried in the particular jurisdiction, [and] the racial composition of the venire[.]”⁴ The Supreme Court

¹ *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) (quoting *Batson v. Kentucky*, 476 U.S. 79, 92, n.17 (1986)).

² *Flowers*, 139 S. Ct. at 2241; see *Alexander v. Louisiana*, 405 U.S. 625, 631-32 (1972); *Whitus v. Georgia*, 385 U.S. 545, 551 (1967); *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

³ Answer at 5-6, 8-9, 13, 16, 31, 34, 36-37, 40, 43-44, 55, 57.

⁴ *Flowers*, 139 S. Ct. at 2241 (internal quotations omitted); Answer at 5-6, 8-9, 13, 16, 36-37, 43-44, 55, 57.

explicitly held that, once a *prima facie* case is established, such burden is on the Government—not the accused.⁵

The Supreme Court in *Alexander v. Louisiana* emphasized that while statistical data was useful, their decision was based on the fact that a non-race-neutral selection process was employed and the resulting panel was monochromatic.⁶ Such is the case here. Lieutenant Junior Grade Jeter objected to the Convening Authority employing a non-race-neutral member selection process to create an all-white panel. Lieutenant Junior Grade Jeter preserved the members' race on the Record when he objected to the selection process, when the military judge found as fact that the panel was all-white, and when he renewed his objection after the members entered the courtroom. Under *Avery v. Georgia* and *Alexander v. Louisiana*, LTJG Jeter's objections were sufficient. And, after considering the surrounding facts and circumstances (to include that the Convening Authority followed the same pattern in three other cases that year), a *prima facie* case was also established under *Batson v. Kentucky* and *Castaneda v. Partida*. The additional fact-finding and investigation the Government expects the Defense to have conducted was the Government's burden.

⁵ Compare Answer at 5-6, 8-9, 13, 16, 36-37, 43-44, 55, 57 with *Flowers*, 139 S. Ct. at 2241.

⁶ *Alexander*, 405 U.S. at 630.

B. Contrary to the Government’s assertion, the Defense moved to compel evidence about the selection process.

The Government argues that LTJG Jeter never moved to attach or produce evidence about the selection process of his panel.⁷ But the trial defense counsel asked the military judge to “compel[] the convening authority to show that there was no improper criteria considered[.]”⁸ And he later renewed his motion and explained that the “questionnaire shows that the Convening Authority was soliciting this [racial] information and considering it, and that combined with the makeup that we have should be sufficient to at least require the government to show that there was no improper consideration[.]”⁹

Thus, the Defense did indeed move to compel evidence about the selection process of LTJG Jeter’s panel.

C. The Record does not support the assertion that the military judge found no systematic exclusion occurred. Rather, the military judge made factual findings sufficient to establish a *prima facie* case of discrimination.

The Government argues that “The Military Judge correctly found ‘no systematic, purposeful exclusion,’” but the Record does not support this assertion.¹⁰ While the military judge believed there was no evidence in front of him of systematic

⁷ Answer at 5-6.

⁸ J.A. 57.

⁹ J.A. 61.

¹⁰ Compare Answer at 21, 27 with J.A. 56, 58, 63.

exclusion or discriminatory intent, this is hardly the same as finding that systematic exclusion never occurred.¹¹ The military judge never made such a finding.

The military judge held that the Convening Authority solicited members using questionnaires that included racial identifiers and that the resulting panel was all-white.¹² These findings of fact were sufficient to establish a *prima facie* case and shift the burden to the Government.¹³

D. The Government misunderstands LTJG Jeter’s equal protection claim.

The Government writes that LTJG Jeter’s claim fails because “under *Avery* and *Alexander*, the mere identification of race in the process is not dispositive.”¹⁴ But LTJG Jeter’s equal protection rights were not violated merely because race was identified in the selection process. Identification of race in the process of selecting members—a non-race-neutral process—is evidence of only one of three elements required to raise a *prima facie* case of discrimination under *Avery* and *Alexander*.¹⁵

¹¹ J.A. 56, 58, 63.

¹² J.A. 54-56.

¹³ *Avery*, 345 U.S. at 560-63.

¹⁴ Answer at 45.

¹⁵ *Avery*, 345 U.S. at 560-63. The three elements to establish a *prima facie* case of discrimination under *Avery* and *Alexander* are (1) the accused is a member of a cognizable racial group; (2) the member panel was selected using non-race-neutral processes; and (3) members of the accused’s race were either absent from, or statistically underrepresented on, his panel. *Alexander*, 405 U.S. at 626-31; *Avery*, 345 U.S. at 560-63.

The Government makes several arguments that highlight its confusion. It attempts to distinguish this case from *Avery* and *Alexander* because in this case “members were not required to answer and ‘frequently declined to answer’ the race question[.]”¹⁶ But this is incorrect and irrelevant. None of the members declined to answer the race question. And the Convening Authority solicited and received information regarding the majority of the members’ race. Thus, the selection process was non-race-neutral.

The Government argues that this case is distinguishable because “not all questionnaires included the race identifier question.”¹⁷ But the majority of questionnaires solicited race—indicating that the process was non-race-neutral, and satisfying one of the three elements under *Avery* and *Alexander*.¹⁸

The Government argues that “the race identifier was one of over fifty questions listed in the questionnaire,” but this is also irrelevant.¹⁹ Does it really matter if the Convening Authority solicited forty-nine questions in addition to the race-soliciting question? The Supreme Court never held that racial identifiers can be tempered by the amount of information solicited from potential jurors.

¹⁶ Answer at 44.

¹⁷ Answer at 44-45.

¹⁸ *Avery*, 345 U.S. at 560-63.

¹⁹ Answer at 45.

E. Despite attempting to distinguish this case from *Alexander*, the Government demonstrates how *Alexander* is comparable.

In its discussion of *Alexander*, the Government argues that the jury commissioner process in that case is distinguishable from the member selection process here.²⁰ But when discussing *Batson*, the Government provides the opposite. In the latter argument, the Government argues that the jury commissioner process in *Alexander* demonstrates *Batson*'s inapplicability to the selection process in this case.²¹

Thus, the Government is having it both ways. It treats the selection process in *Alexander* as distinguishable, but separately treats it as a comparable and analogous precedent. These contradictory analyses cannot both be correct. The selection process in *Alexander* mirrors the selection process in this case and this Court should reach a similar conclusion here.

F. Contrary to the Government's assertions, a Convening Authority's selection process is subjective, inclusive, and exclusive. *Batson* applies to a Convening Authority's member selection process.

The Government attempts to distinguish the Convening Authority's member selection process from a prosecutor's peremptory challenges by arguing that the

²⁰ Answer at 44.

²¹ Specifically, the Government writes "the Supreme Court does not view jury commissioners using statutory criteria to select members as exercising 'the functional equivalent of an unlimited number of peremptory challenges'" and it cites *Alexander* in making this argument. Answer at 50 (citing *Alexander*, 405 U.S. at 628–30).

former is an objective process of inclusion whereas the latter is a subjective process of exclusion.²² This argument has three problems.

First, the subjective versus objective argument is legally unsupported: Article 25, UCMJ, directs Convening Authorities to select members who “*in his opinion, are best qualified[.]*”²³ Because Article 25 requires Convening Authorities to make decisions based on their opinions, the selection process is inherently subjective. Thus, Article 25 does not protect servicemembers from racist decisions. A Convening Authority can exercise their member selection authority while being influenced by racist opinions and without violating their Article 25 powers.

For example, consider a racist Convening Authority who believes that a potential member has the right age, education, training, experience, and length of service to properly serve as a member. This hypothetical racist Convening Authority happens to believe that African American people do not have the judicial temperament to properly serve as members and, for that reason, the racist Convening Authority removes potential black members from his list of members. In this example, there is no violation of Article 25, UCMJ—the racist Convening Authority limited their decision purely to the factors contained in Article 25 and, as directed by Article 25, did so based on his or her own opinion.²⁴ However, the subjective

²² Answer at 52.

²³ 10 U.S.C. § 825(e)(2) (2016) (emphasis added).

²⁴ *Id.*

nature of this selection process is precisely why equal protection frameworks must protect military accused from racist opinions.

Second, the Government argues that *Batson* does not apply because Convening Authorities include, rather than exclude, members from panels.²⁵ But whether Convening Authorities include or exclude potential members is a question of semantics. Convening Authorities, in selecting members, take a list of potential members, review their questionnaires, and exclude those who do not have the requisite age, education, training, experience, length of service, or judicial temperament.²⁶ Whenever they include members, they also exclude members. A servicemember's equal protection rights cannot hinge on the academic and unrealistic distinction between whether a Convening Authority chooses the venire by affirmatively selecting members from a list or by whittling down that list through process of elimination.

Third, even if this Court does not consider inclusion versus exclusion to be mere semantics, consider the facts of this case. There were two black members on the original convening order, but the Convening Authority removed them. The lower court, applying its Article 66 fact-finding powers, found that these two

²⁵ Answer at 52.

²⁶ 10 U.S.C. § 825(e)(2) (2016).

removed members were indeed African American.²⁷ How can their removal be anything other than the exclusion of potential members?

G. The Record does not support the Government’s assertions regarding the Convening Authorities’ statements.

The Government makes four assertions regarding the Convening Authorities that are not supported by the Record. First, the Government quotes the Convening Authority’s affidavit when it writes that the Convening Authority “did not make ‘any effort to screen potential members based on race[.]’”²⁸ However, the full quote reads: “*I am not aware of any effort to screen potential members based on race.*”²⁹ Redacting the words “I am not aware of” and adding “did not make” before quoting this sentence completely changes its meaning.³⁰ The Convening Authority never provided that he made no effort to screen members by race—he just said he is not sure if he did.³¹

Second, the Government quotes the lower court and writes, “the Convening Authority and his staff ‘were not aware of the race of the members detailed in either

²⁷ *United States v. Jeter*, 81 M.J. 791, 797 (N-M. Ct. Crim. App. 2021).

²⁸ Answer at 60. The Government also wrote that “the Convening Authority made no ‘effort to screen potential members based on race.’” Answer at 12.

²⁹ J.A. 94.

³⁰ Compare Answer at 12, 60 with J.A. 94.

³¹ J.A. 94.

the standing convening order or the amended convening orders[.]”³² But the Record does not support this assertion.

The Convening Authority stated:

- “*I may have been aware* of the race of some of the prospective members[.]”³³
- “*I do not recall* being aware of, or otherwise being able to infer, the race of the members selected.”³⁴
- “*I do not recall* if there were any African American members detailed[.]”³⁵
- “*I do not know* if he [the Acting Convening Authority] was aware of, or able to infer the race of the members detailed. Additionally, *I do not recall* being aware of, or being able to infer the race of the members detailed[.]”³⁶
- “*I do not recall* being aware of, or otherwise able to infer, the race of the member detailed by GCMCO IB-17.”³⁷

The Acting Convening Authority similarly provided, “*I do not recall* the availability or use of racial information to detail members[.]”³⁸ Not remembering if one knew the members’ race is hardly the same as not knowing their race. The Government’s assertion is thus unsupported: at no point did the Convening Authority or Acting Convening Authority ever state that they did not know the

³² Answer at 14, 28.

³³ J.A. 93 (emphasis added).

³⁴ J.A. 91 (emphasis added).

³⁵ J.A. 91 (emphasis added).

³⁶ J.A. 92 (emphasis added).

³⁷ J.A. 92 (emphasis added).

³⁸ J.A. 96 (emphasis added).

members' race. Quite the opposite—the Convening Authority admitted that he may have known their race.³⁹

Third, the Government quotes the lower court and asserts that both Convening Authorities “never discussed the accused’s or the member’s race.”⁴⁰ But the Record also does not support this assertion. The Convening Authority provided “*I do not recall* any specific discussion on the diversity make-up of the court-martial panels[.]”⁴¹ The Acting Convening Authority similarly wrote, “*I do not recall* the availability or use of race as a criteria for screening potential eligible members.”⁴² And while the Staff Judge Advocate provided that he never discussed race, the Convening Authorities never made this assertion.⁴³ Both Convening Authorities merely provided that they could not remember discussing race or using it as a criteria—an odd assertion given that they did not simply deny considering race. Regardless, the Government’s assertion that they never discussed race is unsupported.

Fourth, and finally, the Government quotes the Staff Judge Advocate and asserts that “Neither the Convening Authority nor the Acting Convening Authority were provided, nor did they ever ask for, ‘information about the racial makeup of

³⁹ J.A. 93.

⁴⁰ Answer at 14, 28.

⁴¹ J.A. 93 (emphasis added).

⁴² J.A. 96 (emphasis added).

⁴³ J.A. 99.

any court-martial venire.’’⁴⁴ But this is unsupported by the Record as well. The Convening Authorities were clearly provided information about the racial makeup of members because they solicited that information through the questionnaires that they reviewed.

H. Given the Convening Authorities’ actual statements, there is no need for additional affidavits or a *DuBay* hearing.

The Government argues that, if this Court finds that a *prima facie* case was established, the United States should be able to present rebuttal evidence.⁴⁵ But the Government contradicts itself. At the lower court on remand, it argued that additional fact-finding in this case was unnecessary.⁴⁶ It asserted that Appellant’s case could be decided “even if his factual claims are true.”⁴⁷

Since then, and upon being ordered by the lower court, the Government produced declarations from the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate.⁴⁸ The Government was thus already given an opportunity to present rebuttal evidence. Nothing indicates that the Convening Authorities or their Staff Judge Advocate will change their answers. And regardless, no further information is needed to decide this case.

⁴⁴ Answer at 12.

⁴⁵ Answer at 61.

⁴⁶ Answer at the lower court on remand (“*Jeter II* Answer”) at 30-31.

⁴⁷ *Jeter II* Answer at 31.

⁴⁸ Appellee’s response to the lower court order to produce declarations on remand.

United States v. Riesbeck demonstrates why this Court does not need additional information to decide this case.⁴⁹ In *Riesbeck*, this Court considered whether a Convening Authority intentionally stacked a members' panel with women.⁵⁰ The lower court had ordered a *DuBay* hearing to receive evidence regarding the panel's composition.⁵¹ The hearing received stipulations of expected testimony from four Admirals who served as Convening Authorities, and it received evidence from their Staff Judge Advocate.⁵² Such evidence was sufficient for this Court to find that the Convening Authority stacked the panel and for this Court to dismiss the charges and specifications with prejudice.⁵³

The same type of information obtained through a *DuBay* hearing in *Riesbeck* is already in front of this Court. This Court has affidavits of both Convening Authorities and their Staff Judge Advocate. This Court thus has all the information it needs to rule on this issue. Moreover, this Court has previously denied requests for additional fact-finding after a lower court used its Article 66, UCMJ, fact-finding powers to gather affidavits.⁵⁴ This Court should do the same here. Further information is unnecessary.

⁴⁹ *United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 168-76.

⁵³ *Id.* at 167.

⁵⁴ *United States v. Ginn*, 47 M.J. 236, 241 (C.A.A.F. 1997).

I. The presumption of regularity does not apply. However, even if it does apply, it does not elevate the burden of proof and has been rebutted.

1. The presumption of regularity does not apply because Article 25, UCMJ, is a race-neutral statute.

The Government argues that the presumption of regularity requires finding that there was no equal protection violation.⁵⁵ But this argument fails for two reasons. First, as previously discussed, Article 25, UCMJ, is a race-neutral statute. A Convening Authority can discharge their duties in accordance with Article 25 while inserting racial discrimination into their subjective selection process. Thus, the presumption of regularity has no bearing on this equal protection analysis.

Second, while the Government argues that *United States v. Bess* and *United States v. Armstrong* demonstrate that the presumption of regularity applies, these cases do not support their assertion.⁵⁶ This Court in *Bess* discussed the presumption of regularity in the *Castaneda* context, but *Bess* did not explain how Article 25—a race-neutral statute—imposes a duty on Convening Authorities to avoid racial considerations when selecting members.⁵⁷ In *Armstrong*, the Supreme Court did not discuss the *Avery*, *Alexander*, or *Castaneda* frameworks, and it explicitly provided that the presumption of regularity does not apply to *Batson* challenges.⁵⁸ The

⁵⁵ Answer at 20, 41.

⁵⁶ Answer at 20, 41 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Bess*, 80 M.J. 1, 10 (C.A.A.F. 2020)).

⁵⁷ *Bess*, 80 M.J. at 10.

⁵⁸ *Id.* at 467-68.

Supreme Court in *Avery*, *Alexander*, *Batson*, and *Castaneda* did not consider the presumption of regularity, and neither should this Court.⁵⁹

2. Even if the presumption of regularity applies, it does not elevate the burden of proof to establish a *prima facie* showing of discrimination.

The Government argues that *Bess* and *Armstrong* demonstrate that the presumption of regularity raises LTJG Jeter’s burden of proof to establish a *prima facie* case from a preponderance of the evidence standard to the “clear evidence” standard.⁶⁰ But neither case supports the Government’s position. *Bess* does not discuss requisite burdens of proof and does not demonstrate that LTJG Jeter’s burden should be raised.⁶¹ And the Government misapplies *Armstrong*.

In *Armstrong*, the Supreme Court examined a selective prosecution equal protection claim.⁶² The Court held that “clear evidence” needed to be shown in order to overcome the presumption of regularity that prosecutors properly discharged their duties.⁶³ But this burden of proof applied to overcoming the presumption of regularity—not to establishing a *prima facie* case of discrimination itself.⁶⁴ Indeed,

⁵⁹ See *Batson*, 476 U.S. at 79, *Castaneda v. Partida*, 480 U.S. 482 (1976); *Alexander*, 405 U.S. at 625; *Avery*, 345 U.S. at 562; see generally *Parke v. Raley*, 506 U.S. 20, 25 (1992) (applying the presumption of regularity to state governments and thereby demonstrating that the Supreme Court could have applied this presumption in *Avery* or *Alexander*).

⁶⁰ Answer at 20, 41 (citing *Armstrong*, 517 U.S. at 464; *Bess*, 80 M.J. at 10).

⁶¹ *Bess*, 80 M.J. at 10.

⁶² *Armstrong*, 517 U.S. at 464.

⁶³ *Id.*

⁶⁴ *Id.* at 464-65.

the *Armstrong* Court explained that, after rebutting the presumption of regularity with clear evidence to the contrary, a claimant must then establish the requisite showing in order to make a *prima facie* case of selective prosecution in violation of equal protection.⁶⁵

Thus, the Government misapplies *Armstrong* by attempting to graft the burden of proof to overcome the presumption of regularity onto the requirements for a *prima facie* claim itself. If this Court were to adopt the Government's interpretation of *Armstrong*, and expect military accused to show "clear evidence" of discrimination in order to establish a *prima facie* case, then this Court would effectively nullify the ability to establish *prima facie* cases of discrimination altogether. If such *prima facie* showings required "clear evidence," then they would not be *prima facie* at all and there would be no point in shifting the burden to the Government. Requiring military accused to have to prove "clear evidence" of discrimination would place the "insurmountable burden" on the Defense that the Supreme Court prohibited.⁶⁶

⁶⁵ *Id.* at 465 (providing that, after overcoming the presumption of regularity, a claimant raising a selective prosecution equal protection claim must show that the prosecutorial policy had a discriminatory effect, that it was motivated by a discriminatory purpose, and that similarly situated individuals of a different race were not prosecuted).

⁶⁶ *Flowers*, 139 S. Ct. at 2241; see *Alexander*, 405 U.S. at 631-32; *Whitus*, 385 U.S. at 551; *Avery*, 345 U.S. at 562.

3. Even if the presumption of regularity applies, it has been rebutted. A non-race-neutral selection procedure was employed, but the resulting panel was devoid of diversity.

Citing *Riesbeck*, the Government argues that the presumption of regularity requires presuming that racial identifiers were in place for a valid purpose.⁶⁷ The Government writes that in the military “[r]ace and gender identifiers are neutral; they are capable of being used for proper as well as improper reasons” and “a convening authority may ‘seek[] in good faith to make the panel more representative of the accused’s race or gender.’”⁶⁸

The Government makes a critical point. If the Convening Authority used racial identifiers in soliciting members to properly ensure that the panel would be more representative, then there would be no issue. But that is not the case. The Convening Authority used racial identifiers, yet the resulting panel was not diverse—it was all-white. As the Government highlights: racial identifiers can be used for proper or improper purposes.⁶⁹ Here, the racial identifiers were not used for a proper purpose because the resulting panel was entirely composed of white men. If the racial identifiers were not used for a proper purpose, then what does that leave? And if the Convening Authority (who admitted that he likely knew LTJG

⁶⁷ Answer at 45 (citing *Riesbeck*, 77 M.J. at 163).

⁶⁸ Answer at 45 (quoting *Riesbeck*, 77 M.J. at 163); see also *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994).

⁶⁹ See also *Loving*, 41 M.J. at 285 (providing that racial identifiers “are capable of being used for proper as well as improper reasons”).

Jeter's race) acted with regularity, then why did he solicit potential members' races only to ultimately select an all-white panel?

These facts show that the presumption of regularity has been rebutted. The Convening Authority solicited the members' race yet, rather than use that information to create a diverse veneer, the resulting monochromatic panel was guaranteed to ensure that LTJG Jeter's racial group was underrepresented. Under *Avery* and *Alexander*, this was enough. A *prima facie* case of racial discrimination was established.

Respectfully submitted.



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This Reply complies with the type-volume limitations of Rule 24(c) because it does not exceed 7,000 words, and complies with the typeface and style requirements of Rule 37. This Reply contains 3,868 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.



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I certify that the foregoing was transmitted by electronic means with the consent of the counsel being served to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on 14 September 2022.



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U.S. Court of Appeals for the Armed Forces.

UNITED STATES, Appellee

v.

Pedro M. BESS, Hospital Corpsman
Second Class Petty Officer United States
Navy, Appellant

No. 19-0086

Crim. App. No. 201300311

Argued October 23, 2019

Decided May 14, 2020

Synopsis

Background: Accused was convicted by general court-martial, Colleen Glaser-Allen and Douglas P. Barber Jr., JJ., of attempting to commit indecent acts and committing indecent acts. The United States Navy–Marine Corps Court of Criminal Appeals, 2014 WL 5449625, affirmed. Review was granted. The Court of Appeals for the Armed Forces, 75 M.J. 70, reversed. Following new general court-martial, Heather Partridge, J., accused was convicted of indecent conduct and sentenced to reduced grade of E-3, confinement for one year, and a reprimand. The United States Navy–Marine Corps Court of Criminal Appeals, 2018 WL 4784569, affirmed. Review was granted.

Holdings: The United States Court of Appeals for the Armed Forces, Ryan, J., held that:

[1] convening authority’s failure to include African American members on general court-martial panel did not violate accused’s Fifth Amendment equal protection rights;

[2] convening authority’s selection of allegedly all-white members for accused’s general court-martial panel did not constitute unlawful command influence;

[3] military judge was within her discretion in denying accused’s discovery request seeking statistical racial breakdown of convening authority’s command; and

[4] accused was not entitled to *DuBay* hearing to seek evidence of racial makeup of potential members for his general court-martial panel.

Affirmed.

Maggs, J., filed opinion concurring in part and concurring in the judgment.

Ohlson, J., filed dissenting opinion, in which Sparks, J., joined.

Sparks, J., filed dissenting opinion, in which Ohlson, J., joined.

West Headnotes (23)

[1] **Military Justice** → Questions of fact

When the findings of a Court of Criminal Appeals are neither clearly erroneous nor unsupported by the record, the Court of Appeals for the Armed Forces defers to those factual findings.

[2] **Military Justice** → Preservation of Grounds of Review; Waiver; Plain Error
Military Justice → Scope of review in general

Accused adequately preserved his claim on appeal that systematic exclusion of racial group from his general court-martial panel violated his Fifth Amendment equal protection rights, and, thus, his claim was subject to de novo review, rather than plain error review, where, at trial, he cited *Batson* and referred to possible pattern of discrimination in recent cases. U.S. Const. Amend. 5.

[3] **Military Justice** → Scope of review in general

The Court of Appeals for the Armed Forces

reviews de novo the selection of court-martial members.

U.S. Const. Amend. 5.

1 Cases that cite this headnote

[4] **Constitutional Law** → War and national security

Military Justice → Classification and composition in general

Convening authority's failure to include African American members on general court-martial panel did not violate accused's Fifth Amendment equal protection rights; members' questionnaires did not have race information, accused had no right to have members of his own race included on his court-martial panel, under Fifth Amendment and military code's member selection criteria and prohibition on unlawfully influencing a court-martial, and there was no evidence that convening authority knew or had reason to know race of members detailed to court-martial or excluded persons of any racial group. *U.S. Const. Amend. 5*; UCMJ, Arts. 25, 37, 10 U.S.C.A. §§ 825, 837.

2 Cases that cite this headnote

[5] **Constitutional Law** → Juries
Military Justice → Equal protection

What the Fifth Amendment's Equal Protection Clause provides is not a promise to include, but rather protection against intentional racial discrimination through exclusion in the jury selection process. *U.S. Const. Amend. 5*.

[6] **Military Justice** → Classification and composition in general

Neither in civilian courts nor in a court-martial does the Fifth Amendment guarantee an accused jurors or members who are of the same race.

[7] **Military Justice** → Classification and composition in general

An accused has an absolute right to a fair and impartial panel, guaranteed by the Fifth Amendment's Equal Protection Clause and effectuated by the military code's member selection criteria and prohibition on unlawfully influencing a court-martial. *U.S. Const. Amend. 5*; UCMJ, Arts. 25, 37, 10 U.S.C.A. §§ 825, 837.

[8] **Military Justice** → Classification and composition in general

The military code's member selection criteria and prohibition on unlawfully influencing a court-martial do not require affirmative inclusion of a particular racial group in a court-martial panel.

[9] **Constitutional Law** → War and national security

Military Justice → Classification and composition in general

If a convening authority, in selecting the members to detail to a court-martial, intentionally excluded potential members on the basis of race, the convening authority's actions would be unconstitutional under the Fifth Amendment's Equal Protection Clause. *U.S. Const. Amend. 5*.

2 Cases that cite this headnote

- [10] **Constitutional Law** → War and national security
Military Justice → Classification and composition in general

Alleged absence of African American members on general court-martial panel did not establish prima facie case of exclusion based on race, as would violate accused's Fifth Amendment equal protection rights, even though convening authority allegedly detailed all-white panels in four cases within one-year period, where one year was not significant period of time, and, without pattern of discrimination by excluding minority members in prior panels, or any indication of impropriety by convening authority, convening authority's actions were entitled to presumption of regularity. *U.S. Const. Amend. 5.*

2 Cases that cite this headnote

- [11] **Military Justice** → Scope of review in general

The Court of Appeals for the Armed Forces reviews de novo claims of unlawful command influence in a court-martial. UCMJ, Art. 37(a), 10 U.S.C.A. § 837(a).

- [12] **Military Justice** → Command influence

Court stacking is a form of unlawful command influence in a court-martial. UCMJ, Art. 37(a), 10 U.S.C.A. § 837(a).

- [13] **Military Justice** → Command influence

To establish unlawful command influence in a court-martial, the accused must show beyond mere speculation: (1) facts, that if true,

constitute unlawful command influence; (2) the prior proceedings were unfair; (3) the unlawful command influence caused the unfairness. UCMJ, Art. 37(a), 10 U.S.C.A. § 837(a).

- [14] **Military Justice** → Command influence

Convening authority's selection of allegedly all-white members for accused's general court-martial panel did not constitute unlawful command influence, where convening authority neither knew nor had reason to know races of nine of ten members whom he detailed to panel; mere absence of African Americans on accused's panel did not itself raise reasonable doubt as to procedure used to select his panel, and, given that convening authority only knew one member's race and was amenable to including diverse members when asked to do so, objective, disinterested observer, fully informed of all facts and circumstances, would not harbor significant doubt about fairness of proceeding. UCMJ, Art. 37(a), 10 U.S.C.A. § 837(a).

- [15] **Military Justice** → Command influence

Apparent unlawful command influence in a court-martial can be shown through evidence that an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. UCMJ, Art. 37(a), 10 U.S.C.A. § 837(a).

- [16] **Military Justice** → Discretion of military judge

The Court of Appeals for the Armed Forces reviews a military judge's ruling on a request for production of evidence for an abuse of

discretion.

5 Cases that cite this headnote

[17] **Military Justice** → Discretion of military judge
Military Justice → Questions of fact

A military judge abuses her discretion in ruling on a request for production of evidence when her findings of fact are clearly erroneous or her ruling is influenced by an erroneous view of the law.

2 Cases that cite this headnote

[18] **Military Justice** → Discretion of military judge

A military judge abuses her discretion in ruling on a request for production of evidence when a decision is outside the range of choices reasonably arising from the applicable facts and the law.

[19] **Military Justice** → Discovery

Military judge was within her discretion in denying accused's discovery request at general court-martial on two specifications of indecent conduct, seeking statistical racial breakdown of convening authority's command, where information sought was irrelevant because it had little to do with available pool of members, and it would have done nothing to add to legal force of accused's observation at trial that he was African American and it appeared members of his court-martial panel were not. *R.C.M. 703(f)(1)*; Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2012).

[20] **Military Justice** → Remand; rehearing

Accused was not entitled to *DuBay* hearing to seek evidence of racial makeup of potential members for his general court-martial panel, in connection with his claims that convening authority's failure to include African American members on panel violated his Fifth Amendment equal protection rights and constituted unlawful command influence, where there was not scintilla of evidence on appeal that convening authority even knew race of more than one person detailed to panel or had any bad intent in exercising his duty under military code's member selection criteria, and military judge did not deny accused opportunity to develop his equal protection and unlawful command influence claims. *U.S. Const. Amend. 5*; UCMJ, Arts. 25, 37(a), 10 U.S.C.A. §§ 825.37(a), 837(a).

1 Cases that cite this headnote

[21] **Military Justice** → Trial

A creature of judicial fiat rather than statute, a *DuBay* hearing permits an accused to gather additional evidence and resolve conflicting evidence when: (1) an issue was discovered after trial, or (2) a request made at trial was improperly denied.

[22] **Military Justice** → Remand; rehearing

The goal in a *DuBay* hearing is to develop a record so that the appellate court can resolve the issues presented, but a *DuBay* hearing is neither necessary nor warranted when there was no effort made at trial to develop a record on any relevant facts, and the claims on appeal rest on pure speculation.

1 Cases that cite this headnote

[23] **Military Justice**  Trial

The threshold triggering further inquiry in a *DuBay* hearing should be low, but it must be more than a bare allegation or mere speculation.

***3 Military Judge: Heather Partridge**

For Appellant: Lieutenant Clifton E. Morgan III, JAGC, USN (argued); Lieutenant Commander William L. Geraty, JAGC, USN, and Lieutenant Commander Jacob E. Meusch, JAGC, USN (on brief).

For Appellee: Lieutenant Kurt W. Siegal, JAGC, USN (argued); Colonel Mark K. Jamison, USMC, Captain Brian L. Farrell, USMC, and Brian K. Keller, Esq. (on brief); Lieutenant Joshua C. Fiveson, JAGC, USN.

Amicus Curiae for Appellant: [Daniel S. Harawa](#), Esq., [Sherrilyn A. Ifill](#), Esq., [Kerrel Murray](#), Esq., Janai S. Nelson, Esq., and [Samuel Spital](#), Esq., for the NAACP Legal Defense and Educational Fund, Inc. (on brief).

Judge [RYAN](#) delivered the opinion of the Court, in which Chief Judge [STUCKY](#) joined, and Judge [MAGGS](#) joined, except as to Part II.B.1. Judge [MAGGS](#) filed a separate opinion, concurring in part and concurring in the judgment. Judge [OHLSON](#) filed a dissenting opinion, in which Judge [SPARKS](#) joined. Judge [SPARKS](#) filed a dissenting opinion, in which Judge [OHLSON](#) joined.

Judge [RYAN](#) delivered the opinion of the Court.

***4** Appellant's original conviction was set aside for legal error, and a rehearing was authorized. *United States v. Bess*, 75 M.J. 70, 77 (C.A.A.F. 2016). The convening authority then referred charges to a new general court-martial. A panel of three officer and two enlisted members, convicted Appellant, an X-ray technician, contrary to his pleas, of two specifications of indecent conduct in violation of [Article 120, Uniform Code of Military Justice \(UCMJ\)](#), 10 U.S.C. § 920 (2012),¹ for his wrongful requirement that two women undress during their respective X-ray examinations. The court-martial sentenced Appellant to be reduced to the grade of E-3, to be confined for one year, and to be reprimanded. The

convening authority approved the adjudged sentence, and the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence. *United States v. Bess*, No. NMCCA 201300311, 2018 CCA LEXIS 476 *33, 2018 WL 4784569, *12 (N-M. Ct. Crim. App. Oct. 4, 2018).

On appeal, Appellant alleges racial discrimination and unlawful influence in the convening authority's selection of members. We granted review to consider three issues:

I. Whether the convening authority's selection of members violated the equal protection requirements of the Fifth Amendment.

II. Whether the convening authority's selection of members constituted unlawful command influence.

III. Whether the lower court erred in affirming the military judge's denial of Appellant's motion to produce evidence of the racial makeup of potential members.

We answer all three questions in the negative. While racial discrimination is clearly unconstitutional, absent intentional racial discrimination or an improper motive or criteria in the selection of members, the mere fact a court-martial panel fails to include minority representation violates neither the Fifth Amendment nor Article 37, UCMJ, [10 U.S.C. § 837](#) (2012)'s prohibition against unlawful command influence. Additionally, Appellant's oral discovery request sought irrelevant information, thus the military judge did not abuse her discretion by denying it.

I. Background

In November 2016, immediately prior to individual voir dire, while the members were not present, Appellant's individual military counsel stated to the military judge: "The defense has noticed that the panel is all white. ... [O]ur client is African-American, and there's no African-American representation on the panel." Upon further discussion, counsel refined his observation, stating: "I may have misspoke and said that [the members] were all Caucasian, and that might not be true. I am fairly confident that there is no African-American on the panel" The military judge responded:

I can't speak to the racial makeup of our panel. I agree with you that I don't see anyone who I think is obviously of the same race as your client, but then again, I would not have known, frankly, that he is of the race he is, absent reviewing materials of the previous case and how his identification was made.

Trial defense counsel did not inquire about the members'

races during individual voir dire. Following individual voir dire, the military judge excused five members at defense counsel's request—three of which requests the Government joined—leaving five members on the panel.

In response to trial counsel's request that he explain the basis for his objection to the composition of the panel, individual military counsel explained: "[I]t's ... basically a combination of an Article 25 challenge and, I guess, it's almost like a preventative *Batson* challenge. If you don't put any African-Americans on the panel from the get-go, then you can't get a *Batson* challenge because nobody is getting eliminated based on their race." The military judge rejected this challenge because of the "absen[ce] [of] any evidence of *5 anything inappropriate being done by the convening authority in assembling the panel."

Individual military counsel then made an oral discovery request for a "statistical breakdown of the population as far as race with respect to the convening authority's command." The military judge denied the request on the grounds the members' questionnaires noted their races and had been available for a week, the request was untimely, acquiring the data would be impracticable, and the resultant statistics were not relevant absent evidence of impropriety or a pattern of discrimination in other panels, which she had not seen.

Responding to the first reason given by the military judge, individual military counsel countered: "If you look at the questionnaires, only some of them have racial information listed upon the questionnaire." The military judge noted this response but did not change her ruling. In addition, apparently responding to the military judge's statement that she had not seen any pattern of discrimination, individual military counsel said:

Can I just make a quick record with the last members panel that [the trial counsel], myself, and you were on? We had a different African-American client, and also it was an all-white panel. So, this is the second time in a row that we've been on a case where the same issue has occurred.

The military judge replied that she did not believe that two examples evidenced a pattern.² Appellant never moved to stay the proceedings under Rule for Courts-Martial (R.C.M.) 912(b) "on the ground that members were improperly selected."

¹The record demonstrates that the convening authority had reason to know that Appellant was African American, as that information was included in a report that summarized testimony from the complaining witnesses. The record, however, contains no evidence that the convening authority either actually knew or had reason to

know the races of the members when he detailed them to Appellant's court-martial.³ As discussed *infra* Part II.C., none of the members selected were from his command, and all members confirmed during voir dire they neither personally knew nor worked with the convening authority. Moreover, only one member's questionnaire asked for the member's race. That member checked a box for "Caucasian." The other members were not asked, and did not provide, any information about their races. Though he received the trial questionnaires a week before trial, trial defense counsel neither objected to the questionnaires nor requested supplemental *6 questionnaires.⁴

After the trial, Appellant's counsel submitted a request for clemency to the convening authority, asserting that "[b]ased on *Batson* principles, the military judge should have required the Convening Authority to articulate the non-race based reason for excluding all African-Americans, but [the military judge] did not. This was prejudicial error."⁵ The convening authority denied relief, approving the findings and sentence. The NMCCA affirmed. 2018 CCA LEXIS 476 at *33, 2018 WL 4784569, at *12.

The NMCCA found the military judge erred in declaring that the defense objection was untimely and that she was mistaken about the content of the questionnaires, but concluded she did not abuse her discretion. The NMCCA found that the requested data was "irrelevant" because trial defense counsel had asked for the racial makeup of the convening authority's "command" instead of the convening authority's "pool of available members," and no members were selected from the convening authority's command. 2018 CCA LEXIS 476 at *22, 2018 WL 4784569, at *8. The NMCCA also rejected the claim of unlawful command influence, citing a lack of evidence concerning the convening authority's knowledge of the races of members detailed to the court-martial. 2018 CCA LEXIS 476, at *25–27, 2018 WL 4784569, at *9–10. Additionally, the NMCCA found no precedent to extend *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to the convening authority's selection of members and held the mere absence of African Americans on the panel did not demonstrate systematic exclusion. 2018 CCA LEXIS 476, at *23–24, 2018 WL 4784569, at *9.

II. Discussion

The issues in this case are relatively straightforward. Appellant's complaint at trial rested on his supposition

that the court-martial didn't include members of his race; his complaints on appeal allege violations of the Due Process Clause of the Fifth Amendment and Article 37, UCMJ, because he objected to the panel composition and no action was taken. Moreover, Appellant appears to believe that the fact a court-martial panel doesn't include members of an accused's race remedies deficient requests for irrelevant discovery at trial, or otherwise entitles an *7 accused on appeal to further factfinding at a *DuBay*⁶ hearing. His arguments—both at trial and now—have no support in the law for the reasons set forth below.

A. The Fifth Amendment

[2] [3] Appellant argues that the convening authority's selection of members violated the Fifth Amendment's implicit guarantee of equal protection of the laws. We review this question of law de novo. See *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018).⁷

[4] The sole basis for Appellant asserting a constitutional violation *at trial* was his claim that there were no African American members included on his court-martial panel and one other. There are several logical flaws with this. First, because the questionnaires did not have this information, and because Appellant declined to inquire into the races during voir dire, we don't know with certainty what race any member save one identifies as. Second, there is no constitutional or statutory right to have members of your own race (or any other) included on either a court-martial panel or a civilian jury. See *Powers v. Ohio*, 499 U.S. 400, 404, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). And third, there is precisely zero evidence that this convening authority knew or had reason to know the race of the persons he detailed to the court-martial or engaged in any impropriety.

[5] What the Fifth Amendment provides is not a promise to include, but rather protection against intentional racial discrimination through exclusion. Cf. *Flowers v. Mississippi*, — U.S. —, 139 S. Ct. 2228, 2242, 204 L.Ed.2d 638 (2019) (“Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.”); *Batson*, 476 U.S. at 93, 106 S.Ct. 1712 (“As in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination.” (internal quotation marks omitted) (citation omitted)); *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988) (Fifth Amendment equal protection includes the “right to be tried by a jury from which no ‘cognizable racial group’

has been excluded.” (quoting *Batson*, 476 U.S. at 96, 106 S.Ct. 1712)).

[6] Neither in civilian courts nor in a court-martial does the Fifth Amendment guarantee an accused jurors or members who are of the same race. See, e.g., *Powers*, 499 U.S. at 404, 111 S.Ct. 1364; *Batson*, 476 U.S. at 85, 106 S.Ct. 1712; *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Virginia v. Rives*, 100 U.S. 313, 323, 25 L.Ed. 667 (1879); *United States v. Adkinson*, 916 F.3d 605, 609 (7th Cir. 2019); *Sanchez v. Roden*, 753 F.3d 279, 290 (1st Cir. 2014); *United States v. Mitchell*, 502 F.3d 931, 952 (9th Cir. 2007); *Lowery v. Cummings*, 255 F. App'x 409, 420 (11th Cir. 2007); *United States v. Brooks*, 161 F.3d 1240, 1246 (10th Cir. 1998); *United States v. Steen*, 55 F.3d 1022, 1030 (5th Cir. 1995).

[7] [8] An accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on unlawfully influencing a court-martial. See also *Riesbeck*, 77 M.J. at 163. Neither of those articles requires affirmative inclusion. Rather, Article 25(d)(2), UCMJ, provides in relevant part: “When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” Race is not one of the criteria.⁸ And by its terms, Article 37(a), UCMJ, *8 expressly prohibits the convening authority from selecting members in an attempt to influence the outcome of the court-martial, on the basis of race or otherwise. See *infra* Part II.C.

[9] Of course, if a convening authority, in selecting the members to detail to a court-martial, intentionally *excluded* potential members on the basis of race, the convening authority's actions would be unconstitutional. But that is entirely different than a mere failure to *include*, which is what Appellant complained of at trial, and which many courts, see *supra*, including our Court in *United States v. Loving*, found insufficient to support a Fifth Amendment claim. 41 M.J. 213, 285 (C.A.A.F. 1994) (“A *prima facie* case of systematic exclusion is not established by the absence of minorities on a single panel.”).

B. Request to Extend *Batson* and Apply *Castaneda*

Nevertheless, *on appeal* Appellant now urges us to apply the frameworks of either *Batson* or *Castaneda* to find that the absence of African Americans on his panel constitutes

an equal protection violation. We decline this invitation.

1.

Batson held that, under the Equal Protection Clause, *peremptory strikes* of an African American from the jury venire may establish a prima facie case of purposeful discrimination, and once that prima facie case is established, the burden shifts to the government to provide a race-neutral explanation for the strike. 476 U.S. at 96–97, 106 S.Ct. 1712.

Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Id. at 97–98. The Court's holding further took into account the fact that peremptory strikes may "permit those to discriminate who are of a mind to discriminate," *id.* at 96, 106 S.Ct. 1712 (internal quotation marks omitted) (citation omitted), and previous cases imposed too high a bar by requiring proof of repeated racial strikes outside of the defendant's particular case, *id.* at 92–93, 106 S.Ct. 1712. Recognizing the truism that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors," *id.* at 88, 106 S.Ct. 1712, the Court distilled from its broad discussion of equal protection principles the narrow conclusion that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 96, 106 S.Ct. 1712.

Batson procedures do apply in the military justice system when a party makes a peremptory challenge, *Santiago-Davila*, 26 M.J. at 389–90, but the narrow terms of *Batson*'s holding neither compel nor impel us to extend it to a convening authority's selection of members, the manner of which Article 25, UCMJ, limits and directs, even if his supposition about the race of his panel's members was an established fact. Nor does Appellant cite any precedent that would require extending *9 *Batson*'s holding outside the context of peremptory challenges. Indeed, the only extensions of *Batson* have been within the peremptory strike context itself. See *Flowers*, 139 S.

Ct. at 2243 (recognizing application to gender discrimination, criminal defendant's peremptory strikes, and civil cases).⁹

2.

Castaneda is not so limited in scope. Nevertheless, even if *Castaneda*'s framework for addressing systematic discrimination in the selection of grand jurors *could* be extended to a convening authority's selection of court-martial members, it would not change the outcome in this case. There, in evaluating a prisoner's claim alleging systematic discrimination against Mexican Americans in the selection of members of the grand jury that indicted him, 430 U.S. at 485–86, 97 S.Ct. 1272, the Supreme Court held that there is a three-step process for making a prima facie showing that a procedure employed for selecting grand jurors violates the Equal Protection Clause. *Id.* at 494, 97 S.Ct. 1272. The Supreme Court explained:

The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez v. Texas*, 347 U.S. [475, 478–479, 74 S.Ct. 667, 98 L.Ed. 866 (1954)]. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. *Id.* at 480 [74 S.Ct. 667].... Finally, ... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. *Washington v. Davis*, 426 U.S. [229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)]; *Alexander v. Louisiana*, 405 U.S. [625, 630, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972)].

*Id.*¹⁰

We have not determined whether and how *Castaneda* applies in the military justice system where specific criteria for selecting members exist, see Article 25, UCMJ, none of which are race, and where deployments and other factors would likely skew a straight percentage comparison. Yet, in *Loving*, we ruled that the absence of minorities on a single court-martial panel does not make out a prima facie case of systematic exclusion. 41 M.J. at 285. To support this rule, we noted that a prima facie case of underrepresentation was established in *Castaneda* "by comparing [the] population 'to the proportion called to serve ... over a significant period of time.'" *Id.* (internal quotation marks omitted) (quoting *Castaneda*, 430 U.S. at 494, 97 S.Ct. 1272). In particular, that prisoner presented

statistics, which the government did not contest, showing that 79.1% of his county's population was Mexican American, but that over an eleven-year period, only 39% of grand jurors in the county were (or appeared to be) Mexican American. *Castaneda*, 430 U.S. at 486–87, 97 S.Ct. 1272.

^[10]Were *Castaneda* to apply—however imperfectly given the unique characteristics of the military justice system—we need decide nothing more than that Appellant fails to meet the second prong of *Castaneda*. Appellant and the amicus NAACP have proffered allegations that within a one-year period, the convening authority detailed all-white panels in four cases. Even if mere allegations constitute competent evidence (and we do not believe they do), one year is not a “significant period of time” and would not establish a prima facie case under the *Castaneda* framework. See, e.g., *Hobby v. United States*, 468 U.S. 339, 341, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984) (seven years was significant period); *Castaneda*, 430 U.S. at 487, 97 S.Ct. 1272 * 10 (eleven years was significant period); *United States v. Quinones*, No. 93 10751, 1995 U.S. App. LEXIS 1635, at *30–31, 1995 WL 29500, at *10–11 (9th Jan. 25, 1995) (unpublished) (one year of data insufficient); *Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992) (two years was not significant period); *Bryant v. Wainwright*, 686 F.2d 1373, 1377–78 (11th Cir. 1982) (minor statistical variations over five-year period insufficient).¹¹ What we said in *Loving*—that the absence of minorities on a single panel does not make out a prima facie case of systematic exclusion—is likewise true if there are allegations concerning several panels over a short period of time. See *Bryant*, 686 F.2d at 1379 (for grand jury foreperson selection, “ten selections from a brief three and one-half year period simply is not sufficiently large to allow a meaningful statistical comparison”); cf. *Truesdale v. Moore*, 142 F.3d 749, 756 (4th Cir. 1998) (“[A]llegations of statistical disparity will not suffice to show a violation of the Fourteenth Amendment where no discriminatory purpose was afoot.”).

The case law makes clear that even if no African American members were included in Appellant's case, a fact that is unknown, even when combined with other anecdotal allegations raised by the trial defense counsel and now amici and the appellate defense counsel, it does not establish a prima facie case of exclusion based on race. Rather, we cleave to the ordinary rule that without contrary indication, “the presumption of regularity requires us to presume that [the convening authority] carried out the duties imposed upon him by the Code and the Manual.” *United States v. Wise*, 6 U.S.C.M.A. 472, 478, 20 C.M.R. 188, 194 (1955); see also *United States v.*

Scott, 66 M.J. 1, 4 (C.A.A.F. 2008) (applying a “presumption of regularity” to the convening authority's actions (internal quotation marks omitted) (citation omitted)). We thus presume the convening authority acted in accordance with Articles 25 and 37, UCMJ, here. The military judge stated that she had “not seen any indication of any pattern of discrimination by excluding minority members” in prior panels, or any indication of impropriety by the convening authority. Based on our review of the record and the pertinent case law, we agree with the military judge.¹²

C. Unlawful Influence

^[11] ^[12] ^[13]Appellant also fails to show unlawful command influence. We review such claims de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Article 37(a), UCMJ, provides in relevant part: “No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case.” Court stacking is a form of unlawful command influence. *Riesbeck*, 77 M.J. at 165. For actual unlawful command influence, the accused must show beyond “mere ... speculation”: (1) facts, that if true, constitute unlawful command influence; (2) the prior proceedings were unfair; (3) the unlawful command influence caused the unfairness. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

On one end of the spectrum are cases like *Riesbeck*, where we found unlawful court stacking because, inter alia, the record “paint[ed] a clear picture of court stacking based on gender in an atmosphere of external pressure to achieve specific results in sexual assault cases,” the panel was “seventy percent female, most of whom [were] victim advocates,” the enlisted pool “was only thirteen *11 percent female,” and the impaneling authorities thought it “ ‘very important’ to have a ‘large number of women’ ” decide the case, 77 M.J. at 164, 166.

On the other end of the spectrum are cases like *United States v. Lewis*, where we found no improper motive when presented with a statistically high and anomalous number of women on the panel given the comparatively low number of women on panels over the preceding three years at the same air force base. 46 M.J. 338, 339, 341–42 (C.A.A.F. 1997); see also *id.* (bare numbers in unit strength report showing total officers and enlisted members as well as how many were women “d[id] not adequately reflect the pool of individuals eligible and

available to serve as court members,” so did not evidence improper selection). The paucity of evidence here is even greater than that found to be deficient in *Lewis*.

^[14]The record shows the convening authority neither knew nor had reason to know the races of nine of the ten members whom he detailed to Appellant’s court-martial; it does not reveal with certainty the actual racial makeup of Appellant’s panel; it contains no findings of fact by the NMCCA with respect to allegations regarding the races of members in other courts-martial, and at most Appellant presents a potential anomaly with a few cases within a short period of time, with no evidence whatsoever of intentional discrimination. Appellant fails to carry his burden to show unlawful command influence by more than mere speculation. With due respect to the dissents, *United States v. Bess*, 80 M.J. 1, 17, 21 (C.A.A.F. 2020) (Ohlson, J., with whom Sparks, J., joined, dissenting); *id.* at 22 (Sparks, J., with whom Ohlson, J., joined, dissenting), the mere absence of African Americans on Appellant’s panel does not itself raise reasonable doubt as to the procedure used to select his panel. *See supra* Part II.A.

^[15]Nor does Appellant show apparent unlawful command influence—that “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted). A fully informed observer would know the convening authority only knew one member’s race, that no member knew or worked with the convening authority, and—taking the declaration at face value—the convening authority was amenable to including diverse members when asked to do so, which Appellant failed to do prior to trial. Appellant presents no reasonable grounds for “an objective, disinterested observer, fully informed of all the facts and circumstances”—to include the legal fact that no one is entitled to members of the same race in either a military or civilian court—to “harbor a significant doubt about the fairness of the proceedings.” *Id.* (internal quotation marks omitted) (citation omitted).

D. Appellant’s Discovery Request

^[16] ^[17] ^[18]The third assigned issue is whether the NMCCA erred in affirming the military judge’s denial of the oral discovery request that Appellant made at trial. We review a military judge’s ruling on a request for production of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). A military

judge abuses her discretion when her findings of fact are clearly erroneous or her ruling is influenced by an erroneous view of the law. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). A military judge also abuses her discretion when a “decision ... is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting *United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013)).

^[19]An accused is entitled to production of “relevant and necessary” evidence. R.C.M. 703(f)(1). Appellant requested “a statistical breakdown of the population as far as race with respect to the convening authority’s command.” The military judge denied the request on three grounds, and as noted *supra* Part I, the NMCCA disagreed with her in part but upheld the denial for a different reason, which is permissible. *See* *12 *Murr v. Wisconsin*, — U.S. —, 137 S. Ct. 1933, 1949, 198 L.Ed.2d 497 (2017) (explaining that a “judgment below ... may be affirmed on any ground permitted by the law and record”); *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) (affirming a military judge’s denial of a motion to suppress evidence where “the military judge reached the correct result, albeit for the wrong reason”).

We agree with the NMCCA that the information sought by Appellant was irrelevant because, in fact, the information requested had little to do with the available pool of members. We further conclude that the information requested is not relevant because it would do nothing to add to the legal force of his observation at trial that he was African American and it appeared the members were not. Just as the bare population statistics in the unit strength report in *Lewis* did “not adequately reflect the pool of individuals eligible and available to serve as court members,” 46 M.J. at 341–42, so too would Appellant’s request here not produce relevant information. In *Lewis*:

[w]ith respect to the officer members, [the evidence did] not reflect how many officers were ineligible or disqualified because of their involvement in law enforcement or the investigation of this case, and it [did] not reflect how many were unavailable because of absence from the command or operational duties. With respect to the enlisted members, the defense evidence lack[ed] the same information. In addition, it fail[ed] to identify how many enlisted airmen were presumptively unqualified because they lacked the experience and maturity contemplated by Article 25, UCMJ, 10 U.S.C. § 825.

Id. Appellant’s request for a racial breakdown of the convening authority’s command suffers the same

shortcomings. First, the request covered only the convening authority's command, which is only a subset of the total eligible pool of members. Second, a racial breakdown alone does not reveal enough detail to discern who would be eligible to serve on a panel. As *Lewis* describes, far more factors bear on that determination, *see id.*, and that is the legally relevant question.

Appellant's argument is that although trial defense counsel specifically asked for statistical information concerning the convening authority's command, this was clearly meant to include everyone whom the convening authority could detail to the court-martial. Appellant asserts that trial defense counsel's broad meaning is discernible from the military judge's response that the discovery request was impracticable.

We agree that the wording of any motion must be understood in the context in which it was made, especially an oral motion in the middle of a trial. *See R.C.M. 905(a)*. But in this case, Appellant's argument about what the context shows is unpersuasive. Looking at the entire exchange, the most reasonable understanding of Appellant's request was that he was seeking only the information that he asked for. Moreover, even if he had received what he *now* says he wanted, it would still do nothing to change the legal landscape.¹³ The military judge did not abuse her discretion in denying Appellant's oral discovery request.

E. Appellant is Not Entitled to a *DuBay* Hearing

^[20] ^[21] ^[22] Finally, Appellant argues that, in the alternative, he is entitled to a *DuBay* hearing. A creature of judicial fiat rather than statute, *see United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997); *United States v. Ingham*, 42 M.J. 218, 224 (C.A.A.F. 1995), the *DuBay* hearing was created to permit an accused to gather additional evidence and resolve conflicting evidence where (1) an issue, such as ineffective assistance of counsel, was discovered after trial, *see Ginn*, 47 M.J. at 244, or (2) a request made at trial was improperly denied, *see United States v. Riesbeck*, No. 1374, slip op. at 1 (C.G. Ct. Crim. App. Jan. 20, 2015). The goal in either case is *13 to develop a record so that the appellate court can resolve the issues presented. *United States v. Flint*, 1 M.J. 428, 429 (C.M.A. 1976). But it is decidedly *not* the case that a *DuBay* hearing is either necessary or warranted in an instance, such as this case, where there was no effort made at trial to develop a record on any relevant facts, and the claims on appeal rest on pure speculation. *Cf. Ingham*, 42 M.J. at 224.

^[23] We have long held that where a post-trial claim is inadequate on its face, or facially adequate yet conclusively refuted by the record, such a hearing is unnecessary. *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). “[T]he threshold triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation.” *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994). Because the appellant in *Johnston* showed “not a scintilla of evidence” of unlawful command influence, the Court declined to order a hearing. *Id.* at 244–45. And that’s what we face in this case: “not a scintilla of evidence” the convening authority even knew the race of more than one person detailed to the panel or had any malintent in exercising his duty under Article 25, UCMJ. Moreover, the population statistics Appellant now seeks would, as in *Lewis*, prove nothing.

This case differs from *Riesbeck*. There, defense counsel at trial produced evidence that, inter alia, the member questionnaires indicated each member's gender; the convening order was amended multiple times to add women; the final panel had seven women, five of whom were victim's advocates; and defense counsel produced the rosters of potential members. *United States v. Riesbeck*, No. 1374, 2014 CCA LEXIS 946, at *7–11 (C.G. Ct. Crim. App. Aug. 5, 2014) (unpublished). It similarly differs from cases like *United States v. Sales*, where “there [was] a reasonable probability that there would have been a different result if the factual conflicts among the affidavits were resolved in appellant's favor” regarding his ineffective assistance of counsel claim. 56 M.J. 255, 258 (C.A.A.F. 2002). These cases presented a dispute of material fact or otherwise raised a reasonable possibility of a colorable claim that could be developed through a *DuBay* hearing. The record here does neither: only one questionnaire indicated race; there is zero evidence that the convening order was amended to add or remove racially representative members for this particular case;¹⁴ the record does not reflect with certainty the actual racial composition of Appellant's panel. Appellant's speculative assertions do not merit a *DuBay* hearing.

And the military judge did not erroneously deny Appellant's opportunity to develop the equal protection and unlawful command influence claims—fully articulated only on appeal—which were grounded in truth on nothing more than suppositions about the racial composition of his panel. First, the military judge properly denied his mid-voir dire oral discovery request. *See supra* Part II.D. Second, while Appellant did include a broader request for panel selection information in an initial discovery request and the record does not show

what—beyond the member questionnaires—he received in return, this appeared not to concern Appellant at the time. *See supra* note 4.

Appellant’s supplemental discovery request did not reiterate the request for panel selection information; Appellant’s subsequent motion to compel did not ask for the information; the military judge thus made no ruling with respect to the request for panel selection information in that June 2016 request; and Appellant did not assign any errors at this Court or the NMCCA regarding that June 2016 discovery request, *see supra* Part I; *Bess*, 2018 CCA LEXIS 476, at *2–3, 2018 WL 4784569, at *1. Nor did Appellant move to stay the proceedings on the ground that improper selection criteria were used by the convening authority. *See R.C.M. 912(b)(1)*.

To the extent Appellant now seeks information that was available yet neither requested nor pursued at trial, Appellant has waived any right to further exploration in a *DuBay* hearing. *See United States v. Curtis*, 44 M.J. 106, 133 (C.A.A.F. 1996) (“If the *14 defense wanted to explore the convening authority’s role and knowledge [in appointing members], they could have raised this issue at trial. Because it was not raised at trial, we hold that this issue was waived.”).

III. Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Judge **MAGGS**, concurring in part and concurring in the judgment.

I concur in the judgment affirming the U.S. Navy-Marine Corps Court of Criminal Appeals, and I join all of the Court’s opinion except for Part II.B.1. In Part II.B.1., Judge Ryan, joined by Chief Judge Stucky, concludes that Appellant’s argument based on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), lacks merit. I agree that Appellant’s argument lacks merit but, as I explain below, my reasoning is different.

I. Analysis

Appellant makes two arguments advancing his claim under the Fifth Amendment. One argument is based on *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), a decision concerning the selection of grand jurors. Appellant acknowledges that “*Castaneda* is not a perfect fit as precedent” given the differences between court-martial panel selection and grand jury selection. But Appellant argues that we should adapt *Castaneda*’s analysis for deciding when court-martial member selection violates the equal protection guarantee implicit in the Fifth Amendment. He asserts that, under *Castaneda* as it should be adapted to the military justice system, he has established a prima facie equal protection violation by showing (1) that he is African American, (2) that “African-Americans were not only excluded from (and underrepresented on) the panel in [his] case, but in a series of cases,” and (3) that “the selection process set out in Article 25, UCMJ, is susceptible to abuse due to the inherent subjectivity involved.”

In addressing Appellant’s argument, the Court recognizes that “[w]e have not determined whether and how *Castaneda* applies in the military justice system.” The Court then decides that resolving these constitutional issues is unnecessary because the record does not establish one of the factual predicates of Appellant’s argument. The Court explains: “Were *Castaneda* to apply—however imperfectly given the unique characteristics of the military justice system—we need decide nothing more than that Appellant fails to meet the second prong of *Castaneda*.” Put simply, for reasons the Court demonstrates, the record does not establish that African Americans in fact have been excluded from panels for a significant period. I agree with the Court’s restrained approach. There is no need to decide how *Castaneda* might apply in the military justice system when the facts do not present the issue. *See City of W. Covina v. Perkins*, 525 U.S. 234, 244, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999) (reasoning that when the record “undermines the factual predicate for [an] ... argument ... we need not discuss it further”).

Appellant’s other argument advancing his Fifth Amendment claim is based on *Batson*, a case concerning peremptory challenges to members of the venire. Appellant recognizes that the *Batson* precedent is also “not a perfect fit” in a case involving a convening authority’s selection of panel members, but he argues that the Court can use *Batson* as a “guidepost.” Appellant contends that if (1) “the defense identifies that the panel does not include any members from the same cognizable racial group as the accused” and (2) “raises the issue with the military judge before the members are empaneled,” then the equal protection principle in *Batson* requires the

convening authority either to “detail[] additional members on the basis of race for the purpose of inclusion or provide[] a race-neutral reason for declining to do so.”

In my view, the Court ought to address Appellant’s *Batson* argument in the same restrained manner that it addresses Appellant’s *Castaneda* argument. Specifically, we need decide nothing more than that the record does not establish the factual predicate for Appellant’s proposed constitutional test. For the reasons thoroughly explained by the Court, the record in this case does not establish that the “panel [did] not include any *15 members from the same cognizable racial group as the accused.” Accordingly, we do not need and have no reason to decide the important and difficult issues of whether or how *Batson* hypothetically might apply to member selection by the convening authority. For this reason, I do not join Part II.B.1. of the Court’s opinion.

The conclusion that Appellant has not established the factual predicate necessary for his *Batson* argument raises the question whether we should order a hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to allow Appellant to discover the race of each of the members at his court-martial. Our decision in *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996), on reconsideration, 46 M.J. 129 (C.A.A.F. 1997), answers this question. In *Curtis*, the appellant requested a *DuBay* hearing to determine whether the convening authority knew that he could have appointed a panel of all enlisted members under Article 25, UCMJ, 10 U.S.C. § 825. 44 M.J. at 132. We rejected the request for the *DuBay* hearing, explaining: “If the defense wanted to explore the convening authority’s role and knowledge, they could have raised this issue at trial. Because it was not raised at trial, we hold that this issue was waived.” *Id.* at 133.

The same conclusion follows here. The inadequate record regarding the members’ races in this case was not inevitable. Appellant could have insisted, through a motion to compel, that all of the questionnaires submitted to the members asked the members to identify their races. See Rule for Courts-Martial 912(a)(1)(C) (expressly requiring questionnaires to include this question upon the request of defense counsel). Appellant, however, made no such motion. Although Appellant timely requested that trial defense counsel submit questionnaires to each of the members the convening authority detailed to his panel, he did not move to compel that all the questionnaires include a question regarding the member’s race. And even after Appellant had seen the members detailed to his court-martial, and had raised an issue about the composition of the panel, he gave up a second opportunity to inquire about their races. Both sides agreed at oral

argument that trial defense counsel could have asked the members during individual voir dire to identify their races, but trial defense counsel did not do so. Because Appellant did not avail himself of either of these opportunities to determine the races of the members of his panel, he has waived any right to further discovery regarding the members’ races in a *DuBay* hearing.

II. Conclusion

For these reasons, I agree with the conclusion in Part II.B.1. that Appellant’s *Batson* argument lacks merit. But I would not resolve the legal questions of whether or how *Batson* principles might apply to member selection by the convening authority because those questions are not presented by the facts. Given that there is no majority view on those issues in this case, they remain open for decision if the record in a case ever properly presents them.

Judge OHLSON, with whom Judge SPARKS joins, dissenting.

The record before this Court unquestionably compels the remand of this case for an evidentiary hearing in order to ensure that Appellant’s court-martial was not subject to the pernicious effects of unlawful command influence, and to ensure that Appellant’s constitutional right to equal protection under the Fifth Amendment was not violated by the impermissible exclusion of panel members on the basis of race. Because the majority holds to the contrary, I must respectfully dissent.

I. Unlawful Command Influence

Issue II in this case reads as follows: “Whether the convening authority’s selection of members constituted unlawful command influence.” *United States v. Bess*, 79 M.J. 46 (C.A.A.F. 2019) (order granting review). As *16 we recently held in *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017), “[T]he appearance of unlawful command influence [exists] where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the

fairness of the proceedings.” Thus, it is necessary to begin an analysis of this case by reviewing “all the facts and circumstances” relevant to the issues before us.

The filings and the joint appendix reflect the following:

- Appellant was an African American male who was charged with sex-related offenses. His accusers were white females.
- Appellant’s defense was mistaken identity caused by difficulties with cross-racial identification. Specifically, Appellant argued that his white accusers confused him with a different but similar-looking African American male who also worked as an x-ray technician at the hospital where the offenses occurred. Brief for Appellant at 12–20, *United States v. Bess*, No. 19-0086 (C.A.A.F. June 19, 2019).
- As in all criminal cases in the military, the commander who convened Appellant’s court-martial personally selected the venire panel. That is, he selected the pool of personnel from which the court-martial panel members (i.e., the jurors) ultimately would be chosen. Thus, it is essential to note that *there was nothing random about the selection of the venire panel in this case*. See Articles 22 and 23, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 822, 823 (2012).
- As soon as the members of the venire panel walked into the courtroom, Appellant observed that each and every one of them appeared to be white.¹
- During voir dire, trial defense counsel challenged the racial composition of the panel. He pointed out to the military judge that all of the panel members appeared to be white, and he also noted that *this was the second court-martial in a row* where the accused was African American but all of the panel members appointed by this particular convening authority appeared to be white.² Trial defense counsel characterized his motion “almost like a preventative *17 *Batson* challenge.”³
- In furtherance of his motion, trial defense counsel specifically asked the military judge to give him the opportunity to discover the “statistical breakdown of the population as far as race with respect to the convening authority’s command.” The military judge denied the defense motion.
- Appellant was subsequently convicted by the panel members and sentenced to prison.

Based on these facts, would “an objective, disinterested observer ... harbor a significant doubt about the fairness of the proceedings”? *Boyce*, 76 M.J. at 248. In light of the current state of the record, the answer is an unequivocal and emphatic, “Yes.”

Because of the grave and broad implications of this matter, however, it is important that this Court not prematurely reach any conclusions—or cast any aspersions—regarding precisely what happened in this, and similarly situated, cases. Simply stated, we need more information. Accordingly, at this juncture I merely seek to remand this case for a *DuBay* hearing so that additional facts can be developed and included in the record.⁴ *DuBay*, 17 U.S.C.M.A. at 147, 37 C.M.R. at 411.

Indeed, that is exactly what occurred in the recent case of *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018), which also involved the issue of unlawful command influence resulting from a convening authority’s selection of court-martial members. Specifically, in that case there were allegations of “court stacking” because of the disproportionately large number of females selected to serve on the court-martial panel of a servicemember charged with rape, and the court below “ordered a post-trial hearing in accordance with *DuBay* ... to receive testimony and evidence regarding the composition of Appellant’s court-martial panel.” *Id.* at 159–60, 163. Surely a *DuBay* hearing is similarly reasonable, appropriate, and prudent in the instant case.⁵ And yet, the majority inexplicably has chosen to foreclose this basic and necessary avenue of inquiry.

In concluding that no *DuBay* hearing is necessary, the majority assumes—and rests *18 its holding on the conclusion that—“[t]he record shows the convening authority neither knew nor had reason to know the races of nine of the ten members whom he detailed to Appellant’s court-martial.” But the record reveals no such thing. In actuality, the record is devoid of any information regarding what the convening authority knew about the race of the members he selected or how he selected those members for Appellant’s court-martial panel.

II. The Defense Discovery Motion

The majority’s decision to affirm the Navy-Marine Corps Court of Criminal Appeals is particularly surprising because even if we were to remove our analysis of this case from an unlawful command influence context and instead analyze it simply as a mundane discovery motion, a remand for a *DuBay* hearing still would be clearly warranted.⁶ This conclusion is supported by the following points.

In essence, trial defense counsel was making an oral discovery motion when he asked the military judge to give him the opportunity to discover the “statistical breakdown of the population as far as race with respect to the convening authority’s command.” The standard we use in reviewing a military judge’s discovery ruling is an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996)). By definition, the military judge in this case abused her discretion because her ruling on the motion was grounded in her misunderstanding of both the law and the facts. See *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010).

First, the military judge concluded that Appellant’s discovery motion was untimely. Specifically, she stated:

[W]e’ve all had the members’ questionnaires for a week, and the race that each member most strongly identifies with is noted on the questionnaires. If this was an issue that you wanted to raise prior to now, when we are in individual voir dire, that would have been a more appropriate time.

(Emphasis added.) Her reasoning, however, was faulty—both factually and legally. The factual assertion that the race of each member was noted on the questionnaires was inaccurate. For unexplained reasons, only one of the questionnaires listed race. Moreover, as we noted in *Riesbeck*, Rule for Courts-Martial (R.C.M.) 912(b)(3) “provides an *exception* to the requirement that a timely motion be made *where an objection is based on an allegation that the convening authority selected members for reasons other than those listed in Article 25, UCMJ.*” 77 M.J. at 160 (emphasis added). Thus, the military judge was wrong when she ruled that Appellant’s discovery motion was untimely when he raised it during voir dire.

Second, the military judge erred in basing her ruling on her unsubstantiated belief that obtaining statistical information about Navy personnel would be a difficult “feat,” stating that she had “no idea how the command would go about accomplishing” this task. There was no evidence adduced at the court-martial which supported this contention that it would be difficult to obtain the requested information, and in fact, intuitively the opposite is true; the military is very adept at tabulating data about its personnel and that information is readily available.⁸ Therefore, the military judge’s purported finding of fact was not supported by the record and is an abuse of discretion. See *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

Third, the military judge erred both factually and legally when she ruled that the information sought by trial defense counsel *19 was irrelevant to his claim that the

convening authority had improperly excluded African American servicemembers from the court-martial panel. Specifically, the military judge averred:

I don’t see, frankly, how it is relevant, absent any evidence of impropriety. I have sat on numerous panels and observed members of other panels while here, and I have not seen any indication of any pattern of discrimination by excluding minority members.

To begin with, the military judge herself had previously acknowledged that trial defense counsel’s argument would be “slightly stronger” if he “knew more information about the racial and statistical makeup of the pool of members for that particular convening authority.” Thus, she conceded that the information was relevant. But then when trial defense counsel requested that type of information in order to support his argument, the military judge executed an about-face and denied his request.

Further, in ruling on the discovery motion, the military judge claimed she could *not* determine the race of the members of the panel *based on her personal observations*. However, at virtually the same time she claimed that *based on her personal observations* of other panels, she *could* determine there was no pattern of discrimination based on the race of the members. To put it charitably, these claims are in tension with one another. Moreover, in making these claims the military judge used her personal observations—rather than in-court evidence—to find the defense discovery request was not relevant. Again, this constituted an abuse of discretion. See *Gore*, 60 M.J. at 185.

It is evident that relevant statistical information regarding the convening authority’s command would have been instrumental in supporting—or refuting—Appellant’s claim that there had been an improper exclusion of members from the court-martial panel on the basis of race. And yet, the majority asserts that Appellant’s claim must fail because the discovery motion at trial “covered only the convening authority’s command, which is only a subset of the total eligible pool of members.” The majority’s concern is misplaced. In *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005), this Court properly noted that an oral motion or objection made during a court-martial must be considered in context to determine if the basis for the motion was sufficiently clear to the military judge. Here, it was clear to everyone at the court-martial exactly what the defense was seeking—information that would help to determine whether there was an improper exclusion of members from the venire panel on the basis of race.

In light of the fact that trial defense counsel already had

noted that this was the *second* case in which an African American servicemember accused of a sex-related offense was tried by a hand-selected panel that appeared to be all white, the military judge's blanket refusal to let trial defense counsel simply "peer behind the curtain" at how the convening authority had selected these panel members was an abuse of discretion. Thus, contrary to the military judge's ruling, trial defense counsel should have been permitted to obtain such information. Because the military judge abused her discretion in deciding this matter, the instant case should be remanded for a *DuBay* hearing so that the information may now be obtained.

III. Appellant's Constitutional Right to Equal Protection Under the Fifth Amendment

Even standing alone, the two issues cited above—i.e., Appellant's unlawful command influence claim and the military judge's abuse of discretion in resolving Appellant's discovery motion—provide compelling and conclusive reasons mandating the remand of this case for a *DuBay* hearing. And that is before I even have had the opportunity to address Issue I, which serves as the very core of Appellant's claim; namely, whether the convening authority's selection of members violated his constitutional right to equal protection under the Fifth Amendment.⁹

*20 In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court made the following observation:

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposely excluded. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880). *That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.* *Id.* at 85, 106 S.Ct. 1712 (emphasis added).

Consistent with this line of jurisprudence, the Supreme Court has unequivocally held that "the systematic exclusion of [African Americans in the jury selection process] is ... an 'unequal application of the law.' " *Castaneda v. Partida*, 430 U.S. 482, 493, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). Similarly, the Supreme Court has held that the equal

protection component of the Due Process Clause of the Fifth Amendment prohibits the United States from engaging in governmental action that "invidiously discriminat[es] between individuals or groups." *Washington*, 426 U.S. at 239, 96 S.Ct. 2040. In *United States v. Santiago-Davila*, this Court made clear that this equal protection component of the Fifth Amendment applies to the military, holding that the "equal-protection right to be tried by a jury from which no 'cognizable racial group' has been excluded" applies to courts-martial panels with the same force as it applies to civilian juries. 26 M.J. 380, 390 (C.M.A. 1988) (quoting *Batson*, 476 U.S. at 96, 106 S.Ct. 1712).

Although *Batson* holds that the Equal Protection Clause "forbids the prosecutor to challenge potential jurors solely on account of their race," the constitutional scope of that opinion—if not its literal holding—extends beyond the context of peremptory challenges during voir dire. *Batson*, 476 U.S. at 89, 106 S.Ct. 1712 (emphasis added). First, in *Batson* the Supreme Court specifically noted that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." *Id.* at 88, 106 S.Ct. 1712 (emphasis added). Second, as noted earlier, the Supreme Court in *Batson* tellingly referred to the need "to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Id.* at 85, 106 S.Ct. 1712 (emphasis added). And third, it simply cannot be the state of the law that the shield of the Fifth Amendment is strong enough to protect an African American defendant from the impermissible exclusion of panel members on the basis of race during voir dire, but is impotent in similarly protecting those servicemembers during the selection of the venire panel in the first instance. *Id.* at 86, 106 S.Ct. 1712.

The uniqueness of the role of the convening authority in the military justice system underscores the importance of this point. Unlike in the civilian jury system, venire pools in the military are not chosen at random from, for example, voter registration rolls or Department of Motor Vehicles databases. Rather, a convening authority has significant and broad discretion to detail to the court-martial panel anyone who, "in his opinion, [is] best qualified for the duty." Article 25(e)(2), UCMJ. Accordingly, the convening authority "has the functional equivalent of an unlimited number of peremptory challenges." *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring) (emphasis added). Thus, the fundamental equal protection principles espoused in *Batson* must apply broadly to the entire jury-selection process—to specifically include the convening authority's selection of the venire panel—to ensure that the constitutional rights of accused

servicemembers are protected.¹⁰

*21 In the instant case, Appellant properly and timely sought to avail himself of his constitutional rights by challenging the composition of the venire panel during voir dire.¹¹ And yet, the military judge thwarted his efforts by improperly denying his discovery motion. This Court must now remedy this error, and can begin doing so by simply remanding this case for an evidentiary hearing so that the facts can be gathered that will either expose and rectify an invidious pattern of racial discrimination in the member-selection process, or reveal Appellant's court-martial to be a mere "anomaly ... with no evidence whatsoever of intentional discrimination." *Bess*, 80 M.J. at 11 (C.A.A.F. 2020). Only then can we be assured that Appellant's constitutional rights have been protected.

IV. Conclusion

When a member of our Armed Forces makes a prima facie showing of a violation of his constitutional right to equal protection under the Fifth Amendment based on the intentional and impermissible exclusion of African Americans from a court-martial panel hand-selected by a convening authority, a remand for an evidentiary hearing is mandated. Indeed, as we recently and unanimously stated, "[I]t is *incumbent upon this Court to scrutinize carefully* any deviations from the protections designed to provide [the] accused servicemember with a properly constituted panel. ... [E]ven *reasonable doubt concerning the use of impermissible selection criteria for members cannot be tolerated.*" *Riesbeck*, 77 M.J. at 163 (emphasis added) (internal quotation marks omitted) (citations omitted).

And yet, despite the clear-cut mandate of *Riesbeck* and despite the compelling and highly disturbing facts in the instant case, the majority has chosen to ignore this precedent, our attendant responsibilities, and the fundamental principles underlying a number of relevant Supreme Court cases by denying Appellant a simple *DuBay* hearing so that he may seek to vindicate his legal and constitutional rights. This decision by the majority is wrong—fundamentally and egregiously—and has grave implications for all future courts-martial involving African American servicemembers. Therefore, I respectfully dissent.

Judge SPARKS, with whom Judge Ohlson joins, dissenting.

I agree with Judge Ohlson that the military judge abused her discretion and I join his dissent. The military judge's somewhat cursory treatment of the issues and her desire to move on demonstrated her frustration with the timing of defense counsel's request. *22 Nonetheless, given the significance of the issue, the military judge should have at least ordered a brief recess to allow the parties time to investigate whether a compromise could be reached to resolve the issue. Indeed, there is some indication in this record that the convening authority might have obviated the issue all together. True, it is just as possible that an effort seeking such a compromise might not have been successful, but in my view an attempt would have been worthwhile.

I especially agree with Judge Ohlson that even if *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), itself does not explicitly apply to the convening authority, "the fundamental equal protection principles espoused in *Batson* must apply broadly to the *entire* jury-selection process." *United States v. Bess*, 80 M.J. 1, 20 (C.A.A.F. 2020) (Ohlson, J., with whom Sparks, J., joined, dissenting). That includes subordinate authorities tasked with providing candidates for the convening authority's consideration. I also agree that the state of this record does not allow a proper resolution of Issues I and III. I believe Appellant presented enough evidence of inconsistencies in and questions about the member selection process that this Court should order a post-trial hearing in accordance with *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to gather further information.

As articulated in *United States v. Campbell*, the bar for ordering further collection of evidence through a *DuBay* hearing is not high:

A [*DuBay*] hearing need not be ordered if an appellate court can conclude that the motion and the files and records of the case...*conclusively* show that [an appellant] is entitled to no relief [A] hearing is unnecessary when the post-trial claim (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case, *i.e.*, they state conclusions instead of facts, contradict the record, or are inherently incredible.

57 M.J. 134, 138 (C.A.A.F. 2002) (alterations in original) (internal quotation marks omitted) (quoting *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997)).

Here, Appellant introduced enough uncertainty about

racial disparities in the member selection process in his and other cases that his claim was neither inherently incredible nor conclusively refuted. As the record currently stands, we do not know if or why all-white panels may have been assigned to cases involving African American defendants accused of sexual offenses. The letter and signed affidavit from Commander Czaplak, the Executive Officer of the Defense Service Office Southeast, raises questions about a possible pattern of improper selection that this Court should investigate further, especially given the Supreme Court's recent reliance on "historical evidence" to identify patterns in jury selection in *Flowers v. Mississippi*. — U.S. —, 139 S. Ct 2228, 2245, 204 L.Ed.2d 638 (2019).¹ Therefore, I believe a *DuBay* hearing is merited.

This Court has acknowledged that the military justice system's member selection process, though not bound by the strictures of the Sixth Amendment jury trial requirements, merits vigilance and careful scrutiny to ensure that protections afforded a military accused are not violated. *United States v. Riesbeck*, 77 M.J. 154, 162–63 (C.A.A.F. 2018). We have also recognized that the convening authority has "significant discretion" to select panel members as he or she sees fit consistent with Article 25, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 825. *Id.* at 163. Therefore, it is vitally important that our military justice system take seriously any claim that the member selection process in a particular court-martial may have improperly disadvantaged the accused in any way.

In my view, a remand for a *DuBay* hearing would be in the convening authority's interest. From a good order and

discipline standpoint, the convening authority, like any commander, would want to be informed and *23 to take measures to tamp down any perception, even an erroneous one, that racial animus might have found its way into the court-martial process. Commanders, unlike judges and lawyers, are uniquely positioned to understand how easily perception can transform into fact in the minds of some members of the command.

The current record leaves a number of unanswered questions surrounding the concerns raised by Appellant. The prudent step at this point in the proceedings would be for the Court to authorize a *DuBay* hearing to shed further light on the panel selection process including the actual racial composition of Appellant's panel, the information available to the convening authority and how he or any subordinate commanders might have gone about selecting prospective members for this court-martial, and *relevant* racial statistics of the member pool. We might all agree that trial defense counsel could have done better in presenting and following up on his claim. However, defense counsel's actions notwithstanding, given the serious nature of the issues—and that they potentially impact other African American accuseds under this convening authority—it is this Court's responsibility to gather a complete enough record that we may fully assess whether any impropriety has occurred. Importantly, such an inquiry does not, in and of itself, suggest anything improper.

For these reasons, I respectfully dissent.

Footnotes

¹ The members acquitted Appellant of one specification of indecent conduct and one specification of attempted indecent conduct.

² Appellant and amicus NAACP now claim the same convening authority detailed all-white panels in three other courts-martial in which the accused was African American. Appellant first introduced this allegation at the NMCCA—not at the court-martial—through a declaration by the Executive Officer of Defense Service Office Southeast. The declaration averred the author sent a letter to the convening authority concerning the racial diversity of members detailed in three recent cases (described without further detail as "*United States v. LTJG Johnson*," "*United States v. MMC Rollins*," and "*United States v. LTJG Jeter*"). Without providing a foundation, the letter asserted that in each of those courts-martial, the accused was African American and all of the members were Caucasian. He did not claim the convening authority knew the race of any member detailed to those cases or intentionally excluded any person because of race. Rather, he requested minority representation in his client's case. While it granted the motion to attach the declaration, the NMCCA made no finding of fact as to the truth of any matter alleged therein or the race of any panel member. The declaration further avers that upon receiving the letter, the convening authority amended the court-martial convening order in LTJG Johnson's case to include "one African-American, one Hispanic-American, one Asian-American, one Native-American and one Caucasian female member."

³ The NMCCA found that, excepting the one member whose questionnaire indicated race, there was “no evidence that the CA knew the race of any of the ... members detailed to the court-martial” and “no reason to suspect that the CA personally knew [the members] and would therefore have known their race.” 2018 CCA LEXIS 476 at *25, 2018 WL 4784569, at *10. The Courts of Criminal Appeals have factfinding authority under Article 66, UCMJ, 10 U.S.C. § 866 (2012); under Article 67, UCMJ, 10 U.S.C. § 867 (2012), we do not. See, e.g., *United States v. Piolunek*, 74 M.J. 107, 110 (C.A.A.F. 2015). Where, as here, a CCA’s findings are neither clearly erroneous nor unsupported by the record, this Court defers to those factual findings. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000).

⁴ In his initial written discovery request, Appellant requested the Government produce “Panel Selection” information, including court-martial member questionnaires responsive to the items listed in R.C.M. 912(a)(1), which includes race, “all written matters provided to the convening authority concerning selection of the members detailed to the court-martial” under R.C.M. 912(a)(2), and “all information known to the government as to the identities of potential alternate and/or additional panel members.” Appellant never followed up on these requests, despite filing a supplemental discovery request “highlight[ing] material discovery yet to be delivered” and, later, a motion to compel “discovery which is material to the preparation of the defense.” The only material in the record responsive to discovery requests regarding the panel is the member questionnaires, but the defense never presented the other requests to the military judge as R.C.M. 912 permits.

⁵ Appellant also raised this argument to the military judge, and the NMCCA. 2018 CCA LEXIS 476, at *23–24, 2018 WL 4784569, at *9. In his briefing to this Court, Appellant urges a “workable process” outside of Article 25, UCMJ, 10 U.S.C. § 825 (2012), wherein:

First, the defense identifies that the panel does not include any members from the same cognizable racial group as the accused and raises the issue with the military judge before the members are empaneled, *requesting to have the convening authority detail additional members of the same race as the accused*. The military judge, after appropriately inquiring into the matter, then adjourns the *voir dire* proceedings so that the convening authority can be notified. Finally, upon notification, the convening authority ... either details additional members on the basis of race for the purpose of inclusion or provides a race-neutral reason for declining to do so.

Reply Brief for Appellant at 6–7, *United States v. Bess*, No. 19-0086 (C.A.A.F. July 29, 2019) (emphasis added). There is no procedure to ensure a particular racial composition in any court in the United States, and, as discussed *infra* Part II.A., the legal precedent is to the contrary. While the process is both different than its civilian counterpart and the subject of numerous appeals, if what Appellant seeks is an extraconstitutional and radical overhaul of Article 25, UCMJ, and the member selection system in the military—a system that has been in place for a very long time—his suggestions are better addressed to Congress. No one has challenged the constitutionality or soundness of Article 25, UCMJ, and we decline to judicially craft a rule encroaching on Congress’s legislative province.

⁶ *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

⁷ The Government asserts that we should review the Fifth Amendment issue for plain error because Appellant at trial did not specifically argue that a racial group was systematically excluded from his court-martial panel in violation of the standards set forth in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). We conclude that Appellant’s citation of *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, and reference to a possible pattern of discrimination in recent cases adequately preserved his Fifth Amendment arguments.

⁸ This Court has held, however, that the convening authority may consider race in detailing members if that consideration serves “deliberately to include qualified persons,” rather than to exclude members based on race. *United States v. Crawford*, 15 U.S.C.M.A. 31, 41, 35 C.M.R. 3, 13 (1964); see also *Riesbeck*, 77 M.J. at 163 (*Crawford* allows a convening authority to “seek[] in good faith to make the panel more representative of the accused’s race or gender”).

Even these decisions are constitutionally problematic in some sense, given that they seemingly stem from some notion that an accused “has a better chance of winning if more members of his race are on the jury. But that thinking relies on the very assumption that *Batson* rejects: that jurors might be partial to the defendant because of their shared race.” *Flowers*, 139 S. Ct. at 2270 (Thomas, J., dissenting) (internal quotation marks omitted) (citation omitted); see also *Castaneda*, 430 U.S. at 499, 97 S.Ct. 1272 (“Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”). In any event, “may” does not equate to “must.”

⁹ Other federal and state courts have held that *Batson* should not be extended to other contexts. See, e.g., *United States v. Elliott*, 89 F.3d 1360, 1364–65 (8th Cir. 1996) (“*Batson* applies only to peremptory strikes. We know of no case that has extrapolated the *Batson* framework to for-cause strikes.”); *State v. Gould*, 322 Conn. 519, 142 A.3d 253, 261 (2016) (“[T]he *Batson* framework has been limited to peremptory challenges.”).

¹⁰ Though *Castaneda* itself dealt with grand jurors, its framework applies to petit jury venires as well. See *Batson*, 476 U.S. at 94, 106 S.Ct. 1712.

¹¹ Of note, *Castaneda* itself involved a process wherein the authority selecting grand jurors turned over periodically: under the “key man” system, the state district judge would appoint three to five jury commissioners, those commissioners would then select the pool of grand jurors, and the judge would then test their qualifications. 430 U.S. at 484, 97 S.Ct. 1272. The district judge who impaneled the respondent’s grand jury was in charge for only two and one-half years of the eleven-year period considered in that case. *Id.* at 495–96, 97 S.Ct. 1272.

¹² We reject Appellant’s suggestion that the military judge’s denial of his discovery request “compound[ed] the prejudice” by preventing him from producing evidence to support his equal protection claim. As discussed below in Part II.D., the military judge properly denied the request because it sought irrelevant information and the request would not have furthered Appellant’s equal protection or unlawful command influence claims.

¹³ The *Castaneda* framework and the unlawful influence framework require a proffer of something more than statistical disparity. As explained above, Appellant still fails the *Castaneda* requirement of a comparison of the statistics over a significant period of time, and the unlawful influence framework requires some evidence of improper motive. In sum, the mere racial composition of a court-martial, without more, does not make discovery into the detailing process relevant and necessary.

¹⁴ The single change to the convening order appears to be only in response to Appellant’s request for enlisted representation.

¹ I see no reason to question the good faith of Appellant and his counsel in assuming that none of the panel members at his court-martial was African American based on outward appearances. But this Court cannot rely on this assumption in deciding this case because nothing in the record provides a basis for concluding that the assumption is correct. The military judge made no finding as to the members’ races and explained that she was uncertain of their races based on their appearances. She properly refused to infer their races based on stereotypes.

¹ In a request for clemency after Appellant’s conviction, trial defense counsel described the scene in the courtroom as follows:

At the beginning of the trial, a white military judge, asked a white bailiff, to call in the all-white military venire panel. As the white defense attorneys and the white prosecutors stood at attention as the panel members filed in, it was difficult to reassure HM2 Bess as he leaned over to ask, “Why aren’t there any black people?” This all-white panel would hear evidence from the four complaining witnesses in the case—each of them white.

- 2 In a sworn declaration written after Appellant’s court-martial but included in the Joint Appendix to this case, Commander Christopher W. Czaplak, JAGC, USN, the Executive Officer of Defense Service Office Southeast, cited a letter he sent to the Commander, Navy Region Mid-Atlantic, which stated in relevant part:

There is an appearance in the Central Judicial Circuit that race is being improperly considered when selecting members for General Court-Martial Convening Orders. In a number of cases, most recently *United States v. HM2 Bess*, *United States v. MMC Rollins*, and *United States v. LTJG Jeter* where defense counsel have raised this issue, African-Americans were convicted in the Central Judicial Circuit by all-white panels. All of the members detailed [by the convening authority] to the courts-martial of these accused were Caucasian. By contrast, minority members have been detailed to cases involving Caucasian accused facing court-martial for sexual assault

Further, an amicus brief submitted to this Court by the NAACP Legal Defense & Educational Fund, Inc., states that during the course of one year this particular convening authority “detailed *four* all-white panels for *four* Black defendants charged with sex-related offenses.” Brief of Amicus Curiae NAACP Legal Defense & Education Fund, Inc., in Support of Appellant at 11, *United States v. Bess*, No. 19-0086/ (C.A.A.F. June 28, 2019) (emphasis added) [hereinafter Brief of Amicus NAACP]. Only eighteen general courts-martial went to trial over that same period. *Id.* (citing U.S. Navy Judge Advocate Gen.’s Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2016.htm (last visited June 14, 2019); U.S. Navy Judge Advocate Gen.’s Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2017.htm (last visited June 14, 2019)).

- 3 Trial defense counsel explained to the military judge what he meant by a “preventative *Batson* challenge”:

If you don’t put any African-Americans on the panel from the get-go, then you can’t get a *Batson* challenge because nobody is getting eliminated based on their race. It is almost as though [the] command is preventing [African Americans] from representation on the panel so that [the prosecution] can avoid a *Batson* challenge. ...

....

... With respect to the evidence and the burden, with a *Batson* challenge, the burden would be on the attorney challenging that member to show evidence why they are challenging that member but for the[ir] race, so we would argue that, by avoiding a *Batson* challenge, by not putting ... African-Americans on the panel, the same burden should apply to the people [i.e., the convening authority and those acting on behalf of the convening authority] that didn’t put any African-Americans on the panel.

- 4 Ordering a factfinding “*DuBay* hearing” is an often-used practice in the military when information relevant to deciding an issue before the Court is not “apparent on the face of the record.” *United States v. DuBay*, 17 U.S.C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967).

- 5 The types of questions that could be answered in the course of a *DuBay* hearing are self-evident: Were there any African Americans on the panel at Appellant’s court-martial? What was the racial composition of the pool of potential panel members from which the convening authority could have selected? Was the convening authority aware of the race of the members he detailed, either through personal knowledge or through documents or other information presented to him? What was the process the convening authority used in selecting members for Appellant’s court-martial? Did the convening authority’s subordinate commanders or the staff judge advocate (or other staff members) screen potential panel members based on race, thereby effectively excluding African Americans from the convening authority’s consideration? How did the convening authority know how to identify minority members to be added to a later court-martial when that African American defendant similarly objected to the original all-white panel? See *United States v. Bess*, 80 M.J. 1, 5 (C.A.A.F. 2020). In how many instances did the same convening authority

convene an all-white venire panel when the accused was a member of a racial minority, and in how many instances were these members of a racial minority accused of sex-related offenses? If the answers responsive to the questions above are supportive of Appellant's position, can the convening authority identify race-neutral reasons why he appointed all-white panels in several cases where an African American was accused of sex-related offenses?

6 Issue III in this case reads as follows: "Whether the lower court erred in affirming the military judge's denial of Appellant's motion to produce evidence of the racial makeup of potential members." *Bess*, 79 M.J. at 47.

7 Article 25(e)(2), UCMJ, states in relevant part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2).

8 See, e.g., U.S. Navy Demographic Data, https://www.navy.mil/strategic/Navy_Demographics_Report.pdf (last visited on May 8, 2020).

9 The majority characterizes Appellant's Fifth Amendment claim as one seeking "to have members of [his] own race ... included on ... [his] court-martial panel." Although trial defense counsel's initial objection stated, "[O]ur client is African-American, and there's no African-American representation on the panel," he later clarified that the basis for his objection was a "preventative *Batson* challenge." In doing so, trial defense counsel explained, "If you don't put any African-Americans on the panel from the get-go, then you can't get a *Batson* challenge because *nobody is getting eliminated based on their race*." Thus, contrary to the majority's portrayal, Appellant's claim is rooted *not* in a failure to include African Americans on the panel, but in the possible *intentional exclusion* of potential members on the basis of race.

10 In *Castaneda*, a case relied upon by the *Batson* court, the Supreme Court outlined the process by which an accused could make a prima facie showing of an equal protection violation in the context of grand jury selection. 430 U.S. at 494–95, 97 S.Ct. 1272. The second step of the analysis requires an accused to prove the underrepresentation of a cognizable racial group in the pool of those called to serve as grand jurors "over a significant period of time." *Id.* at 494, 97 S.Ct. 1272. The majority implies that *Castaneda* requires an accused to produce data covering a lengthy number of years before a court could intervene to halt pernicious racial discrimination. However, the majority fails to explain how their expansive time frame fits within the unique features of the military justice system. Convening authorities serve in their roles for a finite period of time, often for a few years or less. In the instant case, for example, the convening authority served from March 10, 2016, to July 20, 2018, for a total of just twenty-seven months. Brief of Amicus NAACP, *supra* note 2, at 20. Thus, under the majority's view of *Castaneda*, the constitutional right to equal protection would be essentially unenforceable in the military where a convening authority serves in that particular role for less than a lengthy number of years—as happened in Appellant's case.

11 The majority faults Appellant for failing to ask the convening authority to "includ[e] diverse members [on his court-martial panel] ... prior to trial." However, Appellant did not raise his Fifth Amendment claim prior to trial because only one of the ten deficient member questionnaires created by the Government listed race, and thus Appellant was not aware of the suspicious nature of his all-white panel until he saw the members for the first time in court during voir dire. As soon as Appellant learned the racial composition of his panel, he raised his preventative *Batson* objection. Further, to be clear, *an accused has no right to a member panel "composed in whole or in part of persons of [his] own race."* *Powers v. Ohio*, 499 U.S. 400, 404, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (emphasis added) (internal quotation marks omitted) (quoting *Strauder*, 100 U.S. at 305). But, an accused such as this Appellant "does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria," and it is *this* constitutional right of which Appellant sought to avail himself *at trial*. *Id.* (emphasis added).

- ¹ In *Flowers*, the Supreme Court reiterated a defendant's right to cast a wide net in gathering relevant historical evidence pertaining to the government's discriminatory jury selection process (in the case of *Flowers*), a pattern of preemptive strikes of black jurors in direct violation of *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. 139 S. Ct. at 2245. To paraphrase that opinion, we cannot take the history out of the case. *Id.* at 2246.

Tab 11
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counsel and has been informed of the right to make the election of the applicable sentencing rules under subsection (c).

(ggg) R.C.M. 1001 is amended as follows:

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, ~~and the accused has had the opportunity to make a sentencing forum election under R.C.M. 1002(b),~~ the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.*

(A) *Crime victim.* At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

(B) *Accused.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matters to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are forfeited.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15 [and summary courts-martial after review has been completed pursuant to Article 64](#). "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible

under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* Trial counsel may introduce evidence of prior military or civilian convictions of the accused. For purposes of this rule, there is a “conviction” in a court-martial case when a sentence has been adjudged. In a civilian case, a “conviction” includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. A “conviction” does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated, or pardoned.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible ~~except that a finding of guilty by summary court martial may not be used for purposes of this rule until review has been completed pursuant to Article 64.~~ Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

(4) *Evidence in aggravation.* Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused’s offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, sex (including pregnancy),

gender ([including gender identity](#)), disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

(5) *Evidence of rehabilitative potential.* “Rehabilitative potential” refers to the accused’s potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) *In general.* Trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused’s previous performance as a service member and potential for rehabilitation.

(B) *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused’s rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused’s character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

(C) *Bases for opinion.* An opinion regarding the accused’s rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused’s personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused’s offense or offenses may not serve as the principal basis for an opinion of the accused’s rehabilitative potential.

(D) *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused’s unit.

(E) *Cross-examination.* On cross-examination, inquiry is permitted into relevant and specific instances

of conduct.

(F) *Redirect*. Notwithstanding any other provision in this rule, the scope of opinion testimony permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination.

(c) *Crime victim's right to be reasonably heard*.

(1) *In general*. After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. A crime victim who makes an unsworn statement under subsection (c)(5) is not considered a witness for the purposes of Article 42(b). If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial. The exercise of the right is independent of whether the crime victim testified during findings or is called to testify by the ~~e~~Government or defense under this rule.

(2) *Definitions*.

(A) *Crime victim*. For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.

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

(C) *Mitigation*. For the purposes of this subsection, mitigation includes any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.

(D) *Right to be reasonably heard*.

(i) *Capital cases*. In capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement. The statement may not include a recommendation of a specific sentence.

(ii) *Noncapital cases.* In noncapital cases, for purposes of this subsection, the “right to be reasonably heard” means the right to make a sworn statement, an unsworn statement, or both. This right includes the right to be heard on any objection to any unsworn statement.

(3) *Contents of statement.* The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. ~~The statement may not include a recommendation of a specific sentence.~~

(4) *Sworn statement.* The crime victim may make a sworn statement and shall be subject to cross-examination concerning it by trial counsel and defense counsel or examination on it by the court-martial.

(5) *Unsworn statement.*

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both, and may be made by the crime victim, by counsel representing the crime victim, or both.

(B) *Procedure.* After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, the military judge may permit the crime victim’s counsel, if any, to deliver all or part of the crime victim’s unsworn statement.

(C) *New factual matters in unsworn statement.* If during the presentencing proceeding a crime victim makes an unsworn statement containing factual matters not previously disclosed under subparagraph (5)(B), the military judge shall take appropriate action within the military judge’s discretion.

(d) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the

defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a service member.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, to rebut matters presented by the prosecution, or to rebut statements of fact contained in any crime victim's sworn or unsworn statement, whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The accused may make a request for a specific sentence. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony and shall be subject to cross-examination concerning it by trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation

or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(e) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under paragraph (d)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(f) *Production of witnesses.*

(1) *In general.* During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. During presentencing proceedings, a dispute as to the production of a witness at Government expense ~~Whether a witness shall be produced to testify during presentencing proceedings~~ is a matter within the discretion of the military judge to resolve subject to the limitations in paragraph (2).

(2) *Limitations.* A witness may be produced to testify during presentencing proceedings through a subpoena or travel orders at Government expense only if—

(A) the testimony of the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence;

(B) the weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) the other party refuses to enter into a stipulation ~~of fact~~ containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation ~~of fact~~ would be an insufficient substitute for the testimony;

(D) other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(g) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—

- (1) That a plea of guilty is a mitigating factor; and
- (2) Any evidence properly introduced on the merits before findings, including:
 - (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and
 - (B) Evidence relating to any mental impairment or deficiency of the accused.

(h) *Argument.* After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any other higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to the sentencing considerations set forth in R.C.M. 1002(f). Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection.

(hhh) R.C.M. 1002 is amended as follows:

(a) *Generally.* Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing under subsection ~~(f)~~(d), including the maximum punishment or

DAC-IPAD Policy Subcommittee Summary Victim Impact Statements at Sentencing

This summary contains the following sections:

- I. Introduction
- II. Legal Basis for Victim Impact Statements
- III. FY21 Courts-Martial Case Review
- IV. Stakeholder Input Regarding Victim Impact Statements
- V. Federal and Select State Law Regarding Victim Impact Statements
- VI. Joint Service Committee Proposed Changes to R.C.M. 1001(c)

I. Introduction.

Congress, in the Joint Explanatory Statement (JES) of the Fiscal Year 2020 National Defense Authorization Act (NDAA), requested the DAC-IPAD study the issue of victim impact statements at sentencing. The JES provision reads as follows—

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

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

Pending Change to Courts-Martial Sentencing

In the FY22 NDAA, Congress enacted a provision that will require that military judges serve as the sentencing authority in all special and general courts-martial, with the exception of capital cases.¹ This provision will take effect for cases in which the charged offenses were committed after December 27, 2023.²

¹ National Defense Authorization Act for Fiscal Year 2022 [FY22 NDAA], Pub. L. No. 117-81, §539E, 135 Stat. 1541 (2021).

² FY22 NDAA, §539C.

II. Legal Basis for Victim Impact Statements

A. Uniform Code of Military Justice and Rules for Court-Martial

[Article 6b, UCMJ](#). Congress enacted Article 6b in the FY14 NDAA.³ Article 6b codifies the rights of crime victims and incorporates many of the provisions of the federal [Crime Victims' Rights Act](#).⁴ Article 6b, among other rights, provides that a victim of an offense has the right to be reasonably heard at a sentencing hearing relating to the offense.⁵ A provision in the FY15 NDAA provides that when a victim of a sexual offense has the right to be heard, the victim may exercise that right through counsel, including a special victims' counsel (SVC) or victims' legal counsel (VLC).⁶

[Rule for Courts-Martial 1001\(c\)](#). The Article 6b right for a victim to be heard at sentencing was initially implemented through Rule for Courts-Martial (R.C.M.) 1001A, effective June 17, 2015, which was subsequently incorporated into R.C.M. 1001(c).⁷

R.C.M. 1001(c) lays out the parameters for victim impact statements and provides specific limitations. The discussion to R.C.M. 1001(c) also provides that a military judge may limit the form of the statement if there are numerous victims.⁸ A crime victim's right to be heard is independent of whether the victim testifies during findings or sentencing. The victim may make a sworn or unsworn statement, or both, and the statement may be oral, in writing, or both.⁹

The Rule defines a crime victim as “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.” Victim impact is defined as including “any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.”¹⁰ [*emphasis added*]

In determining whether someone is a victim for purposes of R.C.M. 1001(c), a court must look not just at the type of offense the accused was convicted of, but must further determine “whether that offense is the source of the harm discussed by the victim.”¹¹

³ FY14 NDAA § 1701, as amended in the FY15 NDAA § 531(f).

⁴ 18 U.S.C. § 3771.

⁵ 10 U.S.C. § 806b (2021) (Art. 6b, UCMJ).

⁶ FY 15 NDAA § 534(c); Special victims' counsel is the designation used by the Army and Air Force, while victims' legal counsel is the designation used by the Navy, Marine Corps, and Coast Guard.

⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) [2019 MCM], Rule for Courts-Martial [R.C.M.] 1001(c).

⁸ 2019 MCM, R.C.M. 1001(c)(1) discussion.

⁹ The victim is limited to a sworn statement in capital cases.

¹⁰ 2019 MCM, R.C.M. 1001(c)(2)(A)&(B).

¹¹ [In re A.J.W.](#), 80 M.J. 737 (N-M. Ct. Crim. App. 2021).

If the victim makes an unsworn statement, they may not be cross-examined; however, the prosecution or defense may rebut any factual statements. A military judge may permit the victim’s counsel to deliver the victim impact statement “upon good cause shown.”¹²

The discussion to the Rule further states—

A victim’s statement should not exceed what is permitted under R.C.M. 1001(c)(3). A crime victim may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3). Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).¹³

B. Uses of and Limitations on Victim Impact Statements

1. Use of unsworn statements. In *United States v. Tyler*, the Court of Appeals for the Armed Forces (CAAF) clarified that victim impact statements not made under oath (unsworn statements) are not evidence and thus not subject to the Military Rules of Evidence.¹⁴ The Court further stated, however, that the military judge has an obligation to ensure the contents of a victim impact statement comports with the definition of victim impact in R.C.M. 1001(c).¹⁵ In the case of *United States v. Hamilton*, CAAF cautioned military judges, particularly in cases in which the sentencing authority is a panel of members, to “be mindful of information that is not attributable to the offenses for which an accused is being sentenced.”¹⁶

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

The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.¹⁷

2. Scope of victim impact statements. R.C.M. 1001(c) provides that victim impact must relate to or arise from an offense of which the accused has been found guilty.¹⁸

¹² R.C.M. 1001(c).

¹³ 2019 MCM, R.C.M. 1001(c)(5) discussion.

¹⁴ *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021).

¹⁵ *Id.*

¹⁶ *United States v. Hamilton*, 78 M.J. 335, 340 n. 6 (C.A.A.F. 2019).

¹⁷ *Id.*, Instr. 2-5-23 at 90.

¹⁸ 2019 MCM, R.C.M. 1001(c)(2)(B).

In the case of *United States v. Hamilton*, CAAF cautioned military judges, particularly in cases in which the sentencing authority is a panel of members, to “be mindful of information that is not attributable to the offenses for which an accused is being sentenced.”¹⁹ The Service Courts of Criminal Appeals have further elaborated that the scope of victim impact must relate to or arise from the offenses for which the accused has been convicted.²⁰

Additionally, if the victim impact statement can be interpreted more broadly than the rules allow, the judge must either limit the statement or instruct the members how the statement should be interpreted in order to ensure the accused is not sentenced for a crime for which he was not found guilty.²¹

3. Sentence recommendation. R.C.M. 1001(c)(2)(D)(3) specifically provides that a victim impact statement may not include a recommendation for a specific sentence.²²

4. Form of the victim impact statement. In *United States v. Edwards*, the CAAF found that R.C.M. 1001 requires that unsworn statements be either oral, written, or both, and “a video including acoustic music and pictures is neither oral nor written and thus violates the rule.”²³ Further, since the trial counsel produced the video, it should not have been admissible at sentencing. The CAAF clarified that “the right to make an unsworn statement solely belongs to the victim or the victim’s designee and cannot be transferred to trial counsel.”²⁴

¹⁹ *United States v. Hamilton*, 78 M.J. 335, 340 n. 6 (C.A.A.F. 2019).

²⁰ In determining the scope of proper victim impact, “the victim is not necessarily bound by the facts the accused admitted to during providency or in the stipulation of fact.” However, victim impact statements are not unfettered and must be within the scope of “victim impact” as defined under R.C.M. 1001(c). *In re A.J.W.*, 80 M.J. 737, 743 (N-M. Ct. Crim. App. 2021); *United States v. Hamilton*, 77 M.J. 579, 585-86 (A. F. Ct. Crim. App. 2017), *aff’d*, 78 M.J. 335 (C.A.A.F. 2019); The right to be reasonably heard does not “transform the sentencing hearing into an open forum to express statements that are not otherwise permissible under R.C.M. 1001.” *United States v. Roblero*, 2017 CCA LEXIS 168 at *18 (A.F. Ct. Crim. App. Feb. 17, 2017) (unpublished); *United States v. DaSilva*, 2020 CCA LEXIS 213 (A.F. Ct. Crim. App. June 25, 2020) (unpublished). A victim impact statement that was “well-focused on [the victim’s] own general lack of trust in others as a result of appellant’s maltreatment” was not outside the scope of victim impact though the accused was acquitted of the sexual assault specifications involving the victim. *United States v. Stanley*, 2020 CCA LEXIS 264, 269 (A.C.C.A. 2020). A statement that shows a victim’s “state of mind...upon learning of the offense that Appellant committed” did not qualify as victim impact, as it “did not include direct ‘financial, social, psychological, or medical impact’ that [the victim] suffered and was therefore improper for consideration....” *United States v. McInnis*, 2020 CCA LEXIS 194 (A.F.C.C.A. 2020).

²¹ *In re A.J.W.* at 744.

²² 2019 MCM, R.C.M. 1001(c)(3). The NMCCA held that it was error for a military judge to allow a victim to state the accused “needs a significant amount of jail time” in her impact statement as it constituted a recommendation for a specific sentence. *United States v. Mellette*, 81 M.J. 681, 700 (N-M. Ct. Crim. App. 2021), *rev’d on other grounds*, *United States v. Mellette*, 2022 CAAF LEXIS 544 (C.A.A.F. 2022).

²³ See *United States v. Edwards*, 82 M.J. 239, 241 (C.A.A.F. 2021).

²⁴ *Id.* at 241, citing *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019); *United States v. Barker*, 77 M.J. 377, 378 (C.A.A.F. 2018).

III. FY21 Courts-Martial Case Review

A. Methodology

For cases that were tried to verdict in FY21, the staff reviewed cases resulting in a guilty verdict for one of the following offenses—

- Article 120: rape, sexual assault, aggravated sexual contact, abusive sexual contact, or attempts to commit one of these offenses
- Article 120b: rape, sexual assault, or sexual abuse of a child under 16, or attempts to commit one of these offenses [note that we did not include cases in which the offense involved attempted conduct in which a real child was not involved, e.g. law enforcement “sting” operations]
- Article 120c: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure; or attempts to commit one of these offenses
- Article 93: sexual harassment offenses
- Article 93a: abuse of training leadership position or recruiter position involving sexual activity with a trainee or recruit
- Article 117a: wrongful broadcast or distribution of intimate visual images
- Article 128: assault, only in cases in which there was a referred specification of an Article 120, 120b, or 120c offense and the accused was either found not guilty of the Article 120, 120b, or 120c offense or this offense was dismissed as part of a pretrial agreement.

The staff reviewed the records of trial for these cases to determine whether one or more victims provided a victim impact statement under R.C.M. 1001(c) during presentencing. For those cases involving a victim impact statement, the staff collected data regarding whether the sentencing authority was a military judge or panel of members, whether the military judge limited the victim impact statement in some way, and whether the victim, special victims’ counsel / victims’ legal counsel (SVC/VLC), or someone else delivered the victim impact statement, if read aloud.²⁵

For cases in which the military judge limited the victim impact statement in some way, members of the DAC-IPAD reviewed relevant portions of the record of trial to determine whether the military judges in these cases acted in accordance with R.C.M. 1001(c) in limiting the statements. *[results of member review]*

The following data tables reflect FY21 victim impact statement case review information.

²⁵ In reviewing these cases, the staff noted instances in which trial counsel, defense counsel, or the SVC/VLC noted that they had agreed to a proposed redaction of the victim impact statement. Because these agreements occurred outside of court and are not reflected in the transcript, the staff could not determine how frequently this occurred.

B. FY21 Courts-Martial Data

1. Cases with a victim impact statement (VIS)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Total	140	27	19	51	4	241
VIS	96	18	15	40	4	173
No VIS	44	9	4	11	0	68 ²⁶

2. Form and delivery of victim impact statements

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Total	96	18	15	40	4	173
Written	5	4	2	8	1	20
Oral or Both	91	14	13	32	3	153
Victim	74	12	11	30	2	129
SVC/VLC	13	1	2	2	1	19
Other	4	1	0	0	0	5

3. Sentencing forum

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

4. Cases in which a military judge limited a victim impact statement

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Total Judge Alone	91	14	13	31	2	151
VIS limited	8 (9%)	1 (7%)	1 (8%)	3 (10%)	0 (0%)	13 (9%)
Total Members	5	4	2	9	2	22
VIS limited	0 (0%)	4 (100%)	0 (0%)	3 (33%)	0 (0%)	7 (32%)

²⁶ In 30 of these cases, one or more victims provided sworn testimony in the government's sentencing case pursuant to R.C.M. 1001(b).

IV. Stakeholder Input Regarding Victim Impact Statements

A. Survivors United

At the February 14, 2020 DAC-IPAD public meeting, a representative from Survivors United—Ms. Jennifer Elmore—provided a public comment regarding victim impact statements at sentencing. She told the Committee that restrictions placed on victim impact statements “severely limit” what a crime victim is allowed to say.²⁷ She listed as examples of these restrictions that victim impact statements are “redlined” prior to delivery, military judges cut off victims during the delivery of their statements, and victims are not permitted to state their preference for a sentence.²⁸ Survivors United members spoke to legislators about these restrictions, which was the impetus for Congress’ request for the DAC-IPAD review in the FY20 NDAA JES.

At the December 6, 2022 DAC-IPAD public meeting, members of Survivors United and Mr. Ryan Guilds, an attorney who has represented several members of Survivors United, provided information to the Committee regarding victim impact statements.

[Dec. 6 meeting info here]

B. Special Victims’ Counsel / Victims’ Legal Counsel

At the December 6, 2022 DAC-IPAD public meeting, the Service SVC/VLC program managers presented information and answered questions regarding victim impact statements at sentencing.

[Dec. 6 meeting info here]

C. Military Judges

At the February 14, 2020 DAC-IPAD public meeting, several former military judges provided information to the Committee regarding their experiences with victim impact statements, as well as other topics.²⁹

Some of the examples that the former military judges provided for when they had limited victim impact statements were when the statement contained information the judge had previously ruled inadmissible³⁰ and when the statement recommended a particular sentence for the accused.³¹ One former judge provided that he did not recall ever limiting a victim impact statement and two of

²⁷ *Transcript of DAC-IPAD Public Meeting 291* (Feb. 14, 2020) (all DAC-IPAD public meeting transcripts are available at <https://dacipad.whs.mil/>).

²⁸ *Id.*

²⁹ *Transcript of DAC-IPAD Public Meeting 142-149* (Feb. 14, 2020).

³⁰ *Id.* at 145, 149.

³¹ *Id.* at 147, 148.

the judges offered that victims' counsel did a good job helping to prepare the statement and modifying it according to the rules.³²

The overall sense of the former military judges was that victims were allowed fairly broad latitude in what they were able to say in their impact statements.³³

³² *Id.* at 147.

³³ *Id.* at 147-148.

V. Federal and Select State Law Regarding Victim Impact Statements

Jurisdiction	Victim Impact Statement Provisions	Right to discuss sentence?
Federal	Victims may provide a written impact statement to be included in the presentencing report that goes to the judge. The victim may also provide an oral impact statement at the sentencing hearing. The statement is to describe the emotional, physical, and financial impact of the crime on the victim.	Not addressed
Arizona	<p>Victims may provide a written or oral impact statement for inclusion in the presentencing report discussing the economic, physical and psychological impact that the criminal offense has had on the victim and the victim's immediate family.</p> <p>The victim may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at a sentencing hearing. The victim may provide an oral, written, or a pre-recorded statement, which does not have to be disclosed to the state or defendant and the victim is not subject to cross-examination.</p>	Yes
California	The victim or victim's parents or guardian if the victim is a minor, have the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express their views concerning the crime, the person responsible, and the need for restitution.	Not addressed
Florida	<p>The victim or victim's parents or guardian if the victim is a minor, may provide an oral or written statement, under oath, at a sentencing proceeding or provide a written statement, under oath prior to the hearing.</p> <p>The impact statement should relate to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced, and any matter relevant to an appropriate disposition and sentence.</p>	Yes
Illinois	The victim or representative may present an oral or written statement, not under oath or subject to cross-examination, in sentencing in cases in which the defendant was found guilty of a violent crime. The victim may also provide a written impact statement at any point in the proceeding. The statement is to show impact on the victim, and information in mitigation or aggravation (though information in mitigation and aggravation must be in writing and provided prior to presentation).	Not addressed
Maryland	A victim may provide a written impact statement to be included in the presentencing report. The impact statement shall identify the victim, the economic, physical impact; effect of crime on victim's relationships or personal welfare. The victim or representative may also address the court under oath and subject to cross-examination during the sentencing proceeding.	Not addressed

Massachusetts	The victim may provide an oral or written statement in cases in which defendant was found guilty of a felony or crime against a person resulting in injury. The victim’s attorney or a designated family member may provide this statement if the victim is unable to due to mental, emotional, or physical incapacity or age. The victim may provide impact information for the presentencing report on financial or psychological impact.	Not addressed
Minnesota	The victim may present an oral or written impact statement at the sentencing hearing, or may request the prosecutor present the statement on their behalf. The impact statement may include a summary of the economic or other harm or trauma suffered as a result of the crime and the victim’s reaction to the proposed sentence.	Yes
New Jersey	A victim may provide an in-person impact statement directly to the court prior to sentencing and provide a written impact statement for inclusion in the presentencing report. The statement provided for the presentencing report may include information on economic, physical, mental, or emotional harm suffered by the victim and the effect on the victim’s family.	Not addressed
New York	The victim or representative may provide an impact statement to the court regarding any matter relevant to the sentence. The request to make this statement must be made at least 10 days prior to the hearing. The victim may also provide impact information for the presentencing report detailing injury and economic loss, and the victim’s views relating to disposition, including restitution.	Yes
Ohio	The victim may make an oral or written impact statement to the person designated to prepare the presentencing report. The impact statement may include information about physical, mental, or emotional impact or economic loss as the result of the crime. The statement may also include the victim’s for an appropriate disposition or sanction for the crime and recommendation for restitution. The victim may also provide an oral or written statement at the sentencing hearing.	Yes
Texas	The victim may provide impact information to law enforcement or the prosecutor regarding economic impact or physical, emotional, or psychological harm suffered by the victim or victim’s relative as a result of the offense. The court shall consider the impact statement prior to imposing sentence.	Not addressed
Virginia	The victim may testify during the sentencing proceeding regarding the impact of the crime. The impact statement may include information on economic harm or physical, emotional, or psychological harm to the victim as a result of the crime. The victim may also provide this information for inclusion in the presentencing report.	Not addressed

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

A. Proposed Changes to the Manual for Courts-Martial.

On October 19, 2022, the Joint Service Committee on Military Justice (JSC) released for public comment its draft executive order with numerous proposed changes to the Manual for Courts-Martial (MCM).³⁴ This draft included three proposed changes to R.C.M. 1001(c) regarding victim impact statements. These changes are:

1. RCM 1001(c)(2)(D)(ii) would explicitly give the victim the right to be heard concerning any objections to the victim's unsworn statement;
2. RCM 1001(c)(3): the provision restricting a victim from making a recommendation for a specific sentence has been removed (still applies in capital cases); and
3. RCM 1001(c)(5)(A) would now allow an unsworn victim impact statement to be made by the victim, the victim's counsel, or both (the requirement to show "good cause" for the SVC/VLC to make the statement has been removed).

The JSC held a public hearing on the proposed MCM changes on November 16, 2022. The public comment period for the proposed changes closes December 19, 2022.

³⁴ Joint Service Committee on Military Justice [draft Executive Order](#) and [Annex to the draft Executive Order](#).

Tab 12
Public Comment

Trexler, Dale L CIV OSD OGC (USA)

From: Clarence Anderson III [REDACTED]
Sent: Monday, November 28, 2022 10:14 AM
To: [REDACTED]
[REDACTED]
WHS Pentagon EM Mailbox DACIPAD
Cc: [REDACTED]
Subject: [Non-DoD Source] DAC-IPAD/Major Clarence Anderson III
Attachments: Petition for Reconsideration to CAAF-Nov 2017.pdf; Petition for a New Trial to CAAF.pdf

Greetings DAC-IPAD,

Again I am Major Clarence Anderson III and we met at the DAC-IPAD a little over two months ago, where Federal Judge Reggie Walton asked me questions about the authentication process and why did that affect the Air Force from hearing exculpatory evidence in my case.

Here is a video from my testimony to reorient you to Judge Walton's questions:

<https://youtu.be/PBuxK-6zrNg>

After relistening, I don't think I thoroughly explained to Judge Walton that because the convening authority ordered my post-trial hearing and not the judge (due to the record already being authenticated when the new evidence was discovered), the Air Force determined that the judge was without authority to hear the evidence or order a new trial.

Unfortunately this decision conflicted with court martial rules, case law (see AFCCA/2013 *US v. Roy* where a judge ordered a new trial ordered by the convening authority) but more importantly conflicted with what the Air Force affirmed to US Congresswoman Martha Roby.

To help you better understand, attached is my personally written *Petition for a New Trial*, I submitted to the Judge Advocate General of the Air Force once I discovered after my post-trial hearing, that the Air Force did affirm with Congresswoman Roby the judge had the authority to hear the evidence and order a new trial, but withheld that correspondence from my Attorneys prior to trial.

- Please note that because at the time CAAF was reviewing my case to decide if they were going to take it or not, by law, the Judge Advocate General had to submit the Petition to CAAF

Secondly, Judge Walton also asked did I appeal the decision to CAAF and I told him that CAAF did not accept it. Please see the second attachment my *Petition for Reconsideration* that I, again, personally wrote to CAAF - Please note that my *Petition for a New Trial* was not submitted pursuant to CAAF rules by my Appellate Attorney, Mr. Brian Mizer, which gave CAAF the grounds to reject it; when I fired him, the Air Force replaced him with an Attorney who was directed to only file my briefs but not draft them for me, thus why my *Petition for Reconsideration* is again, written by me and submitted by my new Attorney

- Please also note in my Petition for Reconsideration that I request an investigation into my Appellate Attorney, Mr. Brian Mizer, for not following CAAF rules when he did not file my Petition for a New Trial pursuant to CAAF rules; unfortunately CAAF did not investigate Mr. Mizer's actions (from what I was told Mr. Mizer had a colleague who was a Clerk at CAAF, Joseph Perlak I believe, that got him to kill it)

I believe this will thoroughly explain to Judge Walton why the Air Force unlawfully refused to accept exculpatory evidence in my case, all explained in my own words under the penalty of perjury, and more than likely why the Air Force did not have a rep to attend the DAC-IPAD when I testified.

I offer myself for any additional questions, and beg you in the interest of justice to have an independent party review my case, and provide me my merited relief.

Respectfully,

Clarence Anderson III

I, CLARENCE ANDERSON III, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

TO THE HONORABLE, THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

Issue Presented

I.

DID NEWLY DISCOVERED EVIDENCE OF A CONGRESSIONAL RESPONSE FROM THE CONVENING AUTHORITY PRESCRIBING THE MILITARY JUDGE'S AUTHORITY DURING A POST-TRIAL ARTICLE 39(A) SESSION, THAT WOULD AFFIRM AND SUBSTANTIATE THE DEFENSE'S ARGUMENT THAT THE MILITARY JUDGE'S POWERS WERE NOT LIMITED PURSUANT TO M.R.E. 412 DURING THE POST TRIAL ARTICLE 39(A) SESSION, WHEREAS THE APPOINTED MILITARY JUDGE AND CONVENING AUTHORITY REFUSED TO EXERCISE THAT AUTHORITY PRESCRIBED IN THE GOVERNMENT'S CONGRESSIONAL RESPONSE, UNFAIRLY PREJUDICED THE ACCUSED, AND WARRENT A NEW TRIAL UNDER UCMJ ARTICLE 73, 10 U.S.C. § 873?

Statement of the Case

Between 20 and 22 April 2015, contrary to my pleas, I was convicted of one specification of sexually assaulting my wife, one specification of abusive sexual contact, one specification of aggravated assault, one specification of assault, one specification of wrongfully communicating a threat, and one specification of kidnapping by confining my wife in our bathroom for a number of minutes in violation of Articles 120, 128, and 134, UCMJ and 10 U.S.C. §§ 920, 928, 934 (2012). The military judge sentenced me to 42 months confinement and a dismissal.

Subsequently, an Assignments of Error (AOE) and a *Grosteffon* brief were submitted to the Air Force Court of Appeals (see 29 September 2016 Defense Appellate Brief and 4 October 2016 Motion to Attach Documents to *A.F. Ct. Crim App*). My appeals and petition for a new trial were denied by the Air Force Court of Criminal Appeals and my conviction and sentence were affirmed (see 31 May 2017 decision from the *A.F. Ct. Crim App*).

Statement of Facts

In the congressional inquiry that followed the revelation that Mr. John Madden, a witness who

testified in the preliminary hearing, was paid \$10,000 by the victim's mother before he testified, Major General Thomas W. Bergeson, Secretary of the Air Force Legislative Liaison (SAF/LL), informed Congresswoman Martha Roby that the convening authority had ordered a post trial hearing in this case. (see attached September 2015 congressional from Congresswoman Roby) (see attached October 2015 response from SAF/LL). General Bergeson prescribed under Air Force vested authority from the convening authority, "This hearing will take testimony and evidence to determine if this post-trial information impacted the validity of the court martial results. The military judge also may rule on *any* motions the defense counsel submits." (*Id.*) The government's response to the Congressional was not provided to my Defense Counsel at the time of the post-trial Article 39(a) session, and was only obtained by a witness tangentially related to the case upon receipt from Congresswoman Roby's office approximately four months after the post-trial proceedings. (see attached affidavit from Beatrice Anderson). Testimony adduced from the post-trial hearing confirmed the amount at issue was not \$10,000 but \$100,000 in a potential bribe that impacted the veracity of testimony made during the trial. (R. at 663).

With Mr. Madden still on the stand, my Defense sought to elicit testimony covered in the M.R.E. 412 hearing in February 2015, to prove the allegations that warranted the post-trial Article 39(a) session and also to prove the allegations submitted in the congressional from Congresswoman Roby. (R. at 754; 757). The military judge prohibited my Defense from discussing material topics we wanted to cover on the record in the requested M.R.E. 412 hearing, and instead discussed the matter off the record in two R.C.M. 802 hearings. (R. at 760-61). When my Defense repeatedly insisted that we be allowed to develop the record with a proffer, even in a closed session, the military judge refused to allow us to do so. (R. at 765; 786-787; 790-791; 795). The military judge stated, "I don't think I've been authorized to do that. I think you could ask the convening authority for another post trial 39(a) session, if that was appropriate. But right now, I don't think I have any evidence that would cause me to even

allow you to make a proffer on [M.R.E. 412] because there's been nothing tied to the issue that's been given to me, which is to explore funding.” (R. at 787). The military judge ruled that he would not “entertain follow-on motions or subsequent motions as part of this post-trial 39(a) session.” (R. at 806). “I believe that that is outside the scope of this post-trial 39(a) session.” (R. at 807). The military judge then directed my Defense to file a second motion for a new Article 39(a) session with the convening authority to address Defense motions related to a motion for a new trial due to perjury and obstruction of justice stemming from the M.R.E. 412 hearing. (*Id.*).

Nevertheless, in his written post-trial 39(a) findings of fact and conclusions of law summary, the military judge concluded that the evidence he would not allow my Defense to introduce on the record would “not probably produce a substantially more favorable result for the accused.” (A.E. XXXVI at 4). However, the military judge failed to include in his post-trial 39(a) findings of fact and conclusions of law summary, the material fact that he did not allow my Defense to elicit key testimony to confirm the allegations that warranted the post-trial Article 39(a) session, and the judge also failed to include in his summary that he directed my Defense counsel to file a second motion for a new Article 39(a) session with the convening authority, even when advised by the government's trial counsel to do so. The government's trial counsel stated, “I think that if there's something here that informs the defense counsel that there is something 'fishy' with another matter, that that is something that at this stage, post-authentication of the record of trial by the military judge, you need to take your findings of fact that you will provide at the conclusion of this session, or at whatever time, take that and marry it with the other issue and provide that to the convening authority for action.” (R. at 771). Unfortunately, the record will show the military judge did not follow the government trial counsel's advice on including these central trial issues in his post-trial 39(a) findings of fact and conclusions of law summary, and therefore failed to provide the convening authority with a complete and accurate summary of the issues.

On 15 January 2016, I followed the military judge's direction and submitted a second motion for

a new Article 39(a) session with the convening authority. The motion specifically argued, "... in order to provide additional context as to why the new evidence of payments from Dr. Horace to Mr. Madden was significant and warranted a new trial for Maj Anderson." (see 15 January 2016 Motion for a second Article 39(a) session). On 23 February 2016, the convening authority subsequently denied my request for a second 39(a) session to explore a good-faith legal basis to grant me a new trial (even though the military judge directed my Defense counsel to file the motion). (see 23 February 2016 decision from convening authority).

The convening authority subsequently affirmed my conviction and submitted my record to the Air Force Court of Criminal Appeals. My appeals and petition for a new trial were denied by the Air Force Court of Criminal Appeals and my conviction and sentence were affirmed (see 31 May 2017 decisions from the *A.F. Ct. Crim App*). I have been in confinement since 22 April 2015.

Law and Analysis

I.

DID NEWLY DISCOVERED EVIDENCE OF A CONGRESSIONAL RESPONSE FROM THE CONVENING AUTHORITY PRESCRIBING THE MILITARY JUDGE'S AUTHORITY DURING A POST-TRIAL ARTICLE 39(A) SESSION, THAT WOULD AFFIRM AND SUBSTANTIATE THE DEFENSE'S ARGUMENT THAT THE MILITARY JUDGE'S POWERS WERE NOT LIMITED PURSUANT TO M.R.E. 412 DURING THE POST TRIAL ARTICLE 39(A) SESSION, WHEREAS THE APPOINTED MILITARY JUDGE AND CONVENING AUTHORITY REFUSED TO EXERCISE THAT AUTHORITY PRESCRIBED IN THE GOVERNMENT'S CONGRESSIONAL RESPONSE, UNFAIRLY PREJUDICED THE ACCUSED, AND WARRANT A NEW TRIAL UNDER UCMJ ARTICLE 73, 10 U.S.C. § 873?

When it became evident during the post-trial Article 39(a) session that the victim and a key witness both committed perjury during their testimony at a hearing sealed pursuant to M.R.E. 412, and that my Defense intended to move for a new trial and to re-litigate the exclusion of evidence, the government successfully argued that the military judge's powers were limited because the record had been authenticated pursuant to R.C.M. 1102. (R. at 771-72). However, approximately two months prior to the post-trial hearing, the government assured Congresswoman Roby, that the convening authority

ordered a post trial hearing to evaluate new material evidence of a \$10,000 payment. The government also assured Congresswoman Roby that the judge may rule on *any* motions my Defense counsel submits (to include a motion for a new trial), thus the government concluded in the congressional response, the judge's powers were *not* limited pursuant to R.C.M. 1102. (*Id*). Unfortunately, the government deviated from vested guidance prescribed by law and also in its response to the congressional, and allowed the government to determine the military judge was not given authority to rule on any motion presented by my Defense (to include a motion for a new trial). "I don't think I've been authorized to do that. I think you could ask the convening authority for another post trial 39(a) session, if that was appropriate." (R. at 787).

To be clear, when the government responded to Congresswoman Roby's inquiry in October 2015, the record was already authenticated in July 2015. In other words, in responding to the congressional, the government knew the record was authenticated and acknowledged only the convening authority had the authority to order a post-trial hearing post authentication of the record, pursuant to the language found in R.C.M. 1102. "Based on this post-trial information, Lieutenant General Nowland decided to delay signing the final action against Major Anderson and order a post-trial hearing as requested by Major Anderson's Defense counsel." (*Id*).

Also in responding to the congressional, the government acknowledged the convening authority granted the military judge full authority prescribed by law to rule on any motions (to include a motion for a new trial), and the government also acknowledged the military judge's powers were *not* limited pursuant to R.C.M. 1102, contrary to what was later argued at trial by the government. "The military judge also may rule on *any* motions the defense counsel submits." (*Id*).

The government's response to the congressional, substantiates my Defense's argument at trial that the authentication language found in R.C.M. 1102(b)(2) only governed that the military judge may order a post-trial hearing prior to the authentication of the record. The government's response to the

congressional, also substantiates my Defense's argument at trial that R.C.M. 1102(d) prescribes only the convening authority may order a post-trial hearing post-authentication. And finally, the government's response to the congressional, substantiates my Defense's argument at trial that R.C.M. 1102(e)(2) prescribes once the convening authority orders a post-trial hearing post-authentication, the military judge shall take such action as appropriate. (R. at 772-73).

Unfortunately for my Defense, the government never provided my counsel its response to the congressional inquiry from Congresswoman Roby in time for trial, nor did the government adhere to the provisions prescribed in its close-held response to Congresswoman Roby, when the convening authority considered matters for a second post-trial Article 39 (a) session and later, matters for clemency. This materially prejudiced my Defense when it challenged the government's novel argument that the military judge's powers were limited, because the record had been previously authenticated pursuant to R.C.M. 1102.

As a result, the military judge, the convening authority, and the Air Force Court of Criminal Appeals, were allowed to fatally and unfairly rule against the government's official prescription cited in its response to Congresswoman Roby, therefore prohibiting my Defense from eliciting testimony to prove the allegations in the congressional, thus unfairly and ultimately concluding that a \$100,000 payment of benefits to a key witness prior to his testimony, would "not probably produce a substantially more favorable result for the accused." (*Id.*)

Argument for a New Trial

Article 73, 10 U.S.C. § 873, which governs petitions for a new trial states, "At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the

appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.”

Article 67(a)(2), 10 U.S.C. § 867(a)(2), which governs review by the Court of Appeals for the Armed Forces states, “The Court of Appeals for the Armed Forces shall review the record in all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review.”

Governing rules and case law (R.C.M. 1210 and United States v. Scuff, 29 M.J. 60) (C.M.A. 1989), provide that three elements must be met in order to grant a new trial based on the discovery of new evidence. First, the evidence was discovered after trial. Second, the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence. Finally, the newly-discovered evidence, if considered by a court-martial in the light of all the pertinent evidence, would probably produce a substantially more favorable result for the accused.

The **first element** of *Scuff* [the evidence was discovered after trial] must first prove there is tangible-credible evidence and secondly, that evidence was discovered after trial. In this case both parts of the first element exist. The proof of the government's response to the congressional from Congresswoman Roby is both factual and indisputable. (*Id*). This evidence, obtained by a witness tangentially related to the case upon receipt from Congresswoman Roby's office after the post-trial proceedings, is also both factual and indisputable. (*Id*). Therefore the evidence of the government's response to the congressional, that neither my counsel nor I was made aware existed until after my post-trial proceedings, is also factual and indisputable, thus the first element of *Scuff* is met.

The **second element** of *Scuff* [the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence] is substantiated as the government's response to the congressional was not made known to my counsel from the convening authority nor was it submitted as discovery evidence from the government. The government's response to Congresswoman Roby was submitted by and through the convening authority, presumably vetted

through the Judge Advocate General, and ultimately through the Secretary of the Air Force Legislative Liaison (SAF/LL), thus the government was the sole gate keeper to this evidence. There was no other reasonable way my counsel could have anticipated this evidence and therefore discovered it, short of my counsel being told by the government, thus this evidence was not available to discover at the time of trial even with the exercise of due diligence.

The **third element** of *Scaff* [newly-discovered evidence, if considered by a court-martial in the light of all the pertinent evidence, would probably produce a substantially more favorable result for the accused] is substantiated by the impact of all the material factors not afforded to my Defense by the Constitution, to prove my innocence of all charges and to fairly and equitably challenge the government's novel argument that the military judge's powers were limited, because the record had been authenticated pursuant to R.C.M. 1102. The government's response to the congressional proved the judge's powers were *not* limited, even after the record was authenticated pursuant to R.C.M. 1102.

To begin, this is a 'he said-she said' case where my innocence hinged on if the judge (and later the Air Force Court of Criminal Appeals) believed my testimony or the victim's. The government even admitted during my trial that the government's case was problematic because it was a 'he said-she said' case. The government's trial counsel stated, "And the sexual offenses--you know, we don't have in that, what we have in the others, which is the accused admitting to putting his hands on her because when it comes to sexual assault, he's a squadron commander, apparently he knows. I mean he didn't even touch her. 'I just got into the bed naked with her' and either went to sleep or tapped her and started talking about divorce. And it is one person's word against another" (R. at 584).

When it became evident during the post-trial Article 39(a) session that the victim and key witness both committed perjury during their testimony at a hearing sealed pursuant to M.R.E. 412, and that my Defense intended to move for a new trial and to re-litigate the exclusion of evidence, the merits of the government's case fell apart because now my Defense had a 'smoking gun'. The only solution the

government had to maintain my conviction was to argue that the law, post authentication, limited the military judge's powers pursuant to M.R.E. 412. This novel argument coupled with the fact the military judge conducted two R.C.M. 802 conferences to prevent central trial issues from appearing on the record; the military judge failed to include central trial issues in his post-trial 39(a) findings of fact and conclusions of law summary to the convening authority for action (as advised by the Trial Counsel not to do); and the Judge Advocate General of the Air Force being cited in a ruling three months prior to my trial that "victims' are to be believed and their cases referred to trial," (United States v. Wright, 75 M.J. 501) (A.F.C.C.A 2015), all violated my Constitutional rights to prove my innocence.

My Defense should have been allowed to bolster its argument by producing the government's response to Congresswoman Roby's congressional, and proved the convening authority's intent that the military judge's powers were *not* limited pursuant to M.R.E. 412. This would have caught the government in a lie, and presumably allowed my Defense to develop additional evidence by cross examining testimony provided at the post-trial hearing with that of the M.R.E. 412 hearing. My Defense then would have proved perjury and filed a motion for obstruction of justice and petitioned the government to solicit a federal investigative agency i.e. the FBI, to thoroughly investigate the circumstances surrounding the \$100,000 payment by investigating e-mail, phone records, tax returns, etc., from the civilian witnesses who testified at the post-trial hearing (and potentially other culprits that did not testify), and not just rely solely on witness testimony at trial. This would have undoubtedly proved my innocence by establishing reasonable doubt, destroyed the credibility of the victim, and shifted the landscape of the trial on its merits.

Perjury that Would Produce a Substantially More Favorable Result for the Accused

First, it is now clear that the dating relationship between Mr. Madden and the victim began well before the time that was suggested in the M.R.E. 412 hearing. (R. at 95). More importantly, testimony from the post-trial hearing proved the sexual nature between the victim and Mr. Madden began well

before the time suggested in the M.R.E 412 hearing. In ruling against my previous petition for a new trial under Article 73, the Court argued, “Unlike *Williams*, a newly convened court-martial in this case could not find or infer that by reporting Petitioner's crimes [the victim] was attempting to preserve a sexual relationship with [Mr. Madden] because, at the time she reported Petitioner's offenses, no such relationship existed.” (*A.F. Ct. Crim App* decision from Petition for New Trial Pursuant to Article 73; page 6). (Decided 31 May 2017). At the requested M.R.E. 412 hearing (that the military judge denied at the post-trial Article 39(a) session), my Defense would have proved and/or 'inferred', the sexual nature between the victim and Mr. Madden began before the victim made her sexual assault accusations against me to AFOSI. Similarly to my trial, at the requested M.R.E. 412 hearing, I would have testified to confirm the police report from September 2013, where I tell the responding officer that I believe the victim is having an affair with Mr. Madden. (AE XXII police report). The responding officer also verified my belief of their affair during her testimony at trial. (R. at 304).

My belief from the aforementioned police report, of the victim's and Mr. Madden's affair, were affirmed before the victim made her report to AFOSI and while we were still married and living together, thus would contest the Court's decision that, “at the time she reported Petitioner's offenses, no such relationship existed.” (*Id*). I would have also testified at the requested M.R.E. 412 hearing to the Letter of Counseling statement I received in October 2013. (see PE 11). I received a Letter of Counseling for e-mailing Mr. Madden at his job (where he shared a classroom with the victim) (R. at 699), when my neighbor across the street from the home I recently shared with the victim, revealed to me that Mr. Madden started spending the night with the victim, only days after I moved out on or around 16 September 2013. Though both the victim and Mr. Madden danced around actually affirming when they began their sexual relationship, the victim testified in her own words, her intent to have me out of the house so she could begin her “dating” relationship with Mr. Madden, thus corroborating my neighbor's story. “I did not start dating John Madden until after that relationship was over; until after

Clarence was moved out of the house.” (R. at 684). My testimony at a new M.R.E. 412 hearing, coupled with the victim and Mr. Madden's testimony, as they are now willing to provide, completely undercuts both of their insistence that they had a sexual relationship at the conclusion of my divorce from the victim in April or May of 2014 (R at 95).

A review of Mr. Madden's testimony from the M.R.E. 412 hearing in February 2015, shows how evasive, unresponsive, and uncooperative Mr. Madden was with the Defense during that hearing and also during his brief pre-trial interview. (R. at 61-67). Also troubling, while Mr. Madden testified at the M.R.E. 412 hearing, the victim chose to remain in the court-room to observe his testimony (R. at 61). My Defense would have argued a key Defense theory: the victim's behavior suggested the victim remained in the court-room during Mr. Madden's testimony to ensure he fulfilled his obligations for the \$100,000 payment, and the victim wanted to make certain he remained, evasive, unresponsive, and uncooperative while he testified. This theory is further reinforced by the victim's behavior at the post-trial hearing. After it was discovered there was a \$100,000 payment to Mr. Madden, and her involvement in this matter needed to be explained, the victim elected to leave and not remain in the courtroom to observe Mr. Madden's testimony. (R. at 685). The Defense would have also correlated this suspicious behavior to the only other occurrence when the victim chose to remain in the court-room while another key witness testified, her child (see paragraph #6 from February 2016 Clemency Memorandum). (R. at 288). Most telling, her child's testimony was ultimately impeached, because it was discovered after the child testified that he witnessed me assault the victim (his mother), the child's father later testified the child admitted to his father prior to trial, the child *never* witnessed me assault the victim (R at 332). Forcing her child to testify untruthfully creates an additional problem for the victim, 'Subornation of Perjury', and punishable under 18 U.S.C § 1622.

Mr. Madden summarized in a statement some of the evidence that would have been elicited if allowed to at the post-trial 39(a) session (see 15 January 2016 Motion for a second Article 39(a)

session). That statement, in conjunction with testimony that was actually given by both Mr. Madden and the victim at the post-trial hearing, coupled with the testimony I would have provided, proves that a M.R.E. 412 hearing at a new trial, would be dramatically different than the one that took place in February 2015.

Mr. Madden's testimony at a M.R.E. hearing in a new trial, corroborated by the common sense that their engagement in June 2014, would have followed nearly nine months of dating, would catch the victim in a lie, and would presumably have been deemed admissible before the fact-finder. Lying about a sexual relationship with another man before she made the sexual assault accusations against me, in the midst of divorce and custody proceedings, would have amounted to important cross-examination material against the victim at trial. Not only would this material evidence cast doubt about the truth of her sexual assault allegations (along with the other allegations), it also reinforces another key Defense theory my Defense would have presented at the new M.R.E. 412 hearing: her motive to fabricate allegations to deflect what would certainly have been viewed in family court as unfavorable, adulterous behavior during her attempt to win custody of our minor child. (R. at 704-05).

This evidence could have been used to show that the victim only used contraception with Mr. Madden while our divorce was pending. Once the divorce was finalized, the victim had to no longer worry about the stigma in family court of becoming pregnant by another man, and began having unprotected sex with Mr. Madden. Not coincidentally, within about one month of doing so, she became pregnant. (again see 15 January 2016 Motion for a second Article 39(a) session). Such evidence reflects the victim's manipulative nature, which my Defense should have been allowed to explore at trial. The ability to do so would have affected my forum choice, because I would have testified at the conclusion of the new M.R.E. 412 hearing that I would have elected a jury panel instead of a judge alone panel, based on if the information revealed at the new M.R.E. 412 hearing, was made available at the time of trial. Especially in the absence of evidence (other than the victim's and her son's perjured testimony) to

corroborate the victim's allegations, these are crucial decisions, and the impact of this new evidence (as well as Mr. Madden's uninhibited testimony) on those decisions reiterate why a new trial is appropriate, if the findings are not altogether disapproved.

Finally, it must be noted that the third element of *Scaff*'s standard for a new trial only references the probability of producing a substantially more favorable result at a new trial. A more favorable result is not limited to findings; it can include sentencing. This is where, if nothing else, the new evidence would have clearly produced a more favorable result, as the victim perjured details to her benefit. In her 'unsworn' statement to the court, the military judge acknowledged he would consider it in arriving at a sentence. (R. at 600). The victim stated, "Because of the things Clarence has done to me, I have difficulty trusting and struggle to allow people to get close to me." (R. at 598). My Defense should have been allowed to appropriately qualify this lie, either through cross-examination at findings, or through rebuttal at sentencing. By introducing evidence that the victim was in a committed relationship that lasted nearly a year, and which was sexual before she brought allegations against me, my Defense could have further proven this statement was false. The intimate nature of the victim's relationship with Mr. Madden, culminating in having a child together, further demonstrates this point. At the post-trial hearing, the victim admitted that she and Mr. Madden were engaged to be married. (R. at 657). Most damaging to the victim's credibility, the victim admitted at the post-trial hearing, her relationship with Mr. Madden ended not as a result of the accusations alleged against me as mentioned in her unsworn statement and also her testimony at trial, the victim admitted her relationship with Mr. Madden ended because of lack of "communication" with Mr. Madden. (R. at 659).

And ultimately, the fact that Dr. Horace, at the victim's behest, "invested" \$100,000 in the victim's fiance's home, squarely places her "victim impact" statement not only into the realm of fraudulent, but also self-serving and disingenuous. Because the military judge took that impact into consideration, I was irreparably prejudiced at trial and my adjudged sentence was improper.

Testimony of Dr. Horace that Would Produce a Substantially More Favorable Result for the Accused

Another deeply troubling issue relating back to the victim's credibility also extends to her mother, Dr. Katheryne Horace, who over the course of the summer of 2014 invested up to an estimated \$100,000 into the home of Mr. Madden. This is an enormous amount of money, so serious and suspicious, it warranted both a congressional and a post-trial hearing to investigate the circumstances surrounding the payment. Since my Defense was prevented from developing additional testimony to prove why this exchange of money warranted a new trial, I will connect the dots to prove this evidence (in the light of all the pertinent evidence), would also bolster a substantially more favorable result for the accused.

To begin, the purported agreement simply does not make sense. Dr. Horace is not a wealthy woman. (R. at 716). Despite her salary, she regularly provides financial support to her daughter, and she testified that this entire endeavor exhausted her assets. (R. at 691,715). So investing the amount she did was no small matter. But when Mr. Madden and the victim effectively ended their engagement on a whim, Dr. Horace simply accepted her lost investment and moved on? This is a preposterous assertion, especially after she testified that her willingness to provide the money was predicated exclusively on helping her daughter. (R. at 716). It is significant that testimony reveals she began paying for the renovations to Mr. Madden's house around the same time that AFOSI requested a witness statement from her. (R. at 678,721,728). After renovations were complete in October 2014 and the victim and Mr. Madden moved into the house, the victim only lived there for one day before ending her engagement with Mr. Madden and moving out. (R. at 749). The victim moved out days before she testified at the Article 32 hearing in my case. My Defense would have argued the victim only lived with Mr. Madden for one day in their newly renovated home, and moved out to live alone because she had to appear victimized by my acts, as testified during her unsworn statement that she “struggle[s] to allow people to get close to [her]”, and being engaged and also living with Mr. Madden, would have been used to

damage her credibility at the Article 32 hearing.

It is also significant that Dr. Horace's testimony from the post-trial Article 39(a) session was that everyone knew from the beginning of the project, that this was merely a loan to her daughter and her daughter's fiance, and that she fully expected payment. (R. at 714). Despite this understanding, no effort was made to memorialize such a large agreement in writing. (R. at 667, 714). Dr. Horace testified she paid for the renovations because neither the victim nor Mr. Madden had the finances to qualify for a home. (R. at 710). However, the victim contradicted her mother's testimony and stated her mother paid for the home, *not* because of the victim's bad credit or because the victim couldn't qualify, but because it was easier to pay her mother back. (R. at 662). And perhaps most telling is the fact that Dr. Horace did not begin pursuing legal options against Mr. Madden to repay the money, until more than a year after the relationship with the victim ended. (R. at 719). To be sure, Dr. Horace did not begin seeking remedies against Mr. Madden until after the evidence was discovered, the post-trial Article 39(a) session had been ordered, and she had been subpoenaed to testify. In other words, Dr. Horace only began treating the payments as a loan once it became clear that she and the victim needed to craft an explanation for them, such that it would suit their interests to act as if the payments were something other than what they were.

Mr. Madden acknowledged in testimony that this is a benefit he stills enjoys to this day. (R. at 753). Though the non-contractual nature of these payments left him with no legal indebtedness to the victim and Dr. Horace, there was absolutely a moral indebtedness. And that indebtedness appears to have affected his testimony at the M.R.E 412 hearing. Again, a review of Mr. Madden's testimony from the M.R.E. 412 hearing (as was also observed by the victim), shows how evasive, unresponsive, and uncooperative Mr. Madden was with the Defense during that hearing and also during his brief pre-trial interview. (R. at 61-67). After the evidence showing the breadth of his connections to Dr. Horace and the victim became public, however, he was required to embrace and explain those payments, just as

they did.

Regardless of the collective disavowal of any wrongdoing, the simple truth remains that a witness received substantial benefits from an interested party before testifying. Another 'red flag' that would have supported my Defense's petition to solicit a federal investigative agency such as the FBI to thoroughly investigate this \$100,000 payment; when Dr. Horace was questioned under oath why she didn't pay the victim directly instead of Mr. Madden, Dr. Horace said because the victim was stressed because of the emotional issues of her baby and asked not to have one more thing to worry about. (R. at 711). This testimony was proven false, which substantiates some underhanded purpose to the payment, because Dr. Horace later testified she did not discover the victim was pregnant with Mr. Madden's child, until after the renovations were completed and only when the victim visited Dr. Horace at Alabama in November 2014. (R. at 730-32). When the victim was questioned why her mother paid Mr. Madden directly instead of her, she could not provide a definitive answer but never mentioned it was due to her pregnancy. (R. at 665). Again this new evidence, in the light of all the pertinent evidence (as well as the aforementioned evidence of perjury), would bolster a substantially more favorable result for the accused and reiterate why a new trial is appropriate, if the findings are not altogether disapproved.

Factual Sufficiencies Used to Bolster My Conviction

Having proved why the newly discovered-evidence of a congressional response from the convening authority would, in the light of all the pertinent evidence (to include the aforementioned evidence of perjury from victim), probably produce a substantially more favorable result for the accused. I will briefly challenge the Court's response why my conviction should still be affirmed and a new trial should not be awarded based on newly discovered evidence.

Again, this is a 'he said-she said' case where my innocence hinged on if the judge (and later the Air Force Court of Criminal Appeals) believed my testimony or the victim's. The Court acknowledged I testified at trial but that the merits of my conviction did not rest solely on the victim's credibility. (*A.F.*

Ct. Crim App decision from Petition for New Trial Pursuant to Article 73; page 7). (Decided 31 May 2017). The Court bolstered its affirmation of my guilt from the police officers' testimony who responded in 2009 and 2012, the victim's 13 year old son who testified about what he witnessed in the 2012 assault, the government's introduced photograph's taken after the 2012 assault, the text messages from me to the victim following the 2012 assault, and the fact I admitted to taking off my clothes before getting into our bed. (*Id*). I will briefly and factually address these issues to further prove my innocence.

To begin, I was acquitted from two very violent allegations of punching the victim in the face multiple times and striking the victim in the buttocks with a door knob, even though the victim testified under oath I committed these offenses. (see charge sheet). The victim testified I punched her repeatedly as hard as I could leaving no visible signs of injury whatsoever. A medical doctor for the Defense, Major Hampton, testified there is no scientific explanation how the victim could have been punched not only once, but multiple times in the face and not sustain a black eye, bruise, facial fractures or broken teeth. (R. at 540-41). Dr. Hampton also testified that I would have also sustained some type of injury to my hand to include possible fractures. (R. at 541-42). No such injuries were ever reported.

I was also acquitted from striking the victim in the buttocks with the door knob even with photos used as evidence produced by her and taken by her child who later testified against me. (R. at 217-218). Again, the medical doctor for the Defense, Major Hampton, testified there is no scientific explanation for a doorknob at the height of 3 feet, could sustain the injuries on the buttocks of a 5 foot 4 inch person. (R. at 536). Dr. Hampton also testified the only way the victim could have sustained an injury on her buttocks the way she testified, was if she were wearing "several 3 or 4 inch heels stacked on top of one another." (R. at 537).

The significance of these specifications, and especially the allegation of being punched in the face, is that they did not result from a finding of 'not guilty' simply from a lack of supporting evidence.

Rather, they failed because the victim was clearly fabricating details that simply were not possible. This must lead the Court to question, if the victim was willing to lie under oath about several serious allegations against me, why would she not lie about the others? I've already proved the victim committed perjury during the M.R.E. 412 hearing, where she again lied under oath about the sexual relationship with Mr. Madden. So it should be expected she would also lie about being punched in the face multiple times and assaulted by a door knob on her buttocks.

Both police officers who testified from the police reports in 2009 and 2012 both testified after their investigations, they concluded I committed no crime, therefore I was not subject to an arrest. (R. at 262,269,276).

In the 2009 incident, the government argued during cross examination of this incident, I conveniently changed the story during my testimony adding details about a radio being the cause of the argument which I did not disclose to AFOSI during my interview. (R. at 474). However the police report of the incident states, "the disagreement was over him turning the lights and radio on while getting ready for work...", which was a true statement and consistent with my testimony. (I.O. Ex. 11 at 2; A.E. XXI). The police officer from the 2009 incident testified on the stand, no matter what a witness reports, it is protocol to check for injuries anyway and he did not notice any injuries after interviewing both the victim and I. (R. at 275-76). The officer stated he couldn't remember the incident even with the help of reviewing his report. (R. at 274).

In the 2012 incident, where I was convicted for covering the victim's mouth and nose, communicating a threat, and kidnapping by confining her in our bathroom, these allegations were not only investigated by civilian law enforcement and concluded I committed no crime therefore I was not subject to an arrest, but the government also investigated the incident and determined no crime occurred, therefore I was not punished nor charged. (see attachment #5 from February 2016 Clemency Memorandum). (A.E. XXII at 18). The state's attorney office was also notified and sought no action

(*Id.*; R. at 262). Also note pertaining to the 2012 incident, a medical doctor for the Defense, Major Hampton, testified that according to the victim's testimony, she should have sustained injuries across her chest by the force she described I used to restrain her while allegedly covering her mouth and nose and that she never reported any such injuries across her chest. (R. at 533). The medical doctor also testified it would not "be unreasonable to associate [the bruise on K.A.'s arm] with finger pressure." (R. at 529).

Again from the 2012 incident I was convicted for allegedly communicating a threat saying "I know how to kill you and blame it on PTSD". Again evidence and testimony will show this incident was also reported to and investigated by on the scene civilian law enforcement officials, along with the government and again due to there being no evidence I committed a crime, I was never arrested nor charged. (R. at 262,269). My testimony along with my medical records will reflect I have never been treated for or diagnosed with PTSD (see AFOSI Form 40 where my mental health records were obtained and state "there is no suspicion SUBJECT had mental health counseling").

The 2012 incident where I allegedly confined her in the bathroom for 45 minutes should have also been dismissed at trial. A text message I sent at 1700 later that day while in Saint Petersburg, Florida, which is an hour drive from the home we shared, also proved she was not confined in the bathroom at all. (R. at 411-13,419). We arrive to my house at 1600, incident occurs lasting no more than a few minutes, I leave immediately with my daughter and make the text message at 1700 when I arrive at Saint Petersburg, Florida. (R. at 421).

Again, her son testified he witnessed me assault the victim during the 2012 incident, but the child's father later testified the child admitted to his father prior to trial, the child *never* witnessed me assault the victim, and the child's testimony was impeached (R. at 332).

From the 2012 incident, I was granted a protective order against the victim, for her assaulting me. (R. at 424). This proves my testimony was consistent and believable even in the language I used

from the text message months after the incident. My testimony is consistent that I only 'restrained' the victim from assaulting me.

Finally with the sexual assault charges. I testified I did not commit these offenses. (R. at 443). I have proved my testimony is consistent. Evidence will show in my testimony and police report weeks after the alleged sexual assault, the victim and I shared a bed as we were still married and living together. (R. at 446). Also testimony on a text message I sent her regarding sex almost a year prior to this alleged incident, I acknowledge that I complained of us only having sex "when she wanted to", proving I had no such history of forcing her to have sex. (*Id*). Also weeks later after the alleged sexual assault, we both testified to sharing a bed and I initiated sex (again I was naked in our shared bed as I always sleep naked). This testimony was also verified by the responding police officer. (AE XXII police report). (R. at 304-07). After I initiated sex that morning, she refused consent. There is no testimony from her or I that at this time, I forced her to have sex even after she said no to my advances. After she declined my offer, I got out of the bed, never forcing myself on her (*Id*).

Conclusion

I have proven the Government's response to the congressional inquiry from Congresswoman Roby was discovered after trial substantiating all three elements of *Scaff*. I have proven the victim perjured herself during the M.R.E. 412 hearing and that by reporting my crimes, the victim was attempting to preserve a sexual relationship with Mr. Madden because, at the time she reported my offenses, the relationship existed. Finally, I have proven the merits the Air Force Court of Criminal Appeals used to affirm my convictions (in light of all the pertinent evidence), should not be considered when deciding to grant me a new trial.

WHEREFORE, I respectfully request this Court accept and affirm this petition based on the evidence discovered after trial, and order a rehearing.

Signed on this 8th day of August 2017.



CLARENCE ANDERSON III, Major, USAF

MARTHA ROBY
2ND DISTRICT, ALABAMA

CANNON HOUSE OFFICE BUILDING
ROOM 442
WASHINGTON, DC
PHONE: (202) 225-2801

COMMITTEE
APPROPRIATIONS

Congress of the United States
House of Representatives

Washington, DC 20515-0102

September 24, 2015

Lieutenant General Mark Nowland
Commander, 12th Air Force
United States Air Force
2915 S. 12th AF Drive, Suite 228
Davis-Monthan Air Force Base, Arizona 85707

Dear General Nowland:

I write regarding the matter of USAF Major Clarence Anderson who was convicted under the Uniform Code of Military Justice on 22 April 2015 and is now incarcerated at Naval Consolidated Brig Miramar.

Beatrice Anderson is Major Anderson's mother, a resident of Ozark, Alabama, and my constituent.

Mrs. Anderson strongly maintains her son's innocence, and appeared in person at my office in Washington to discuss her son's conviction and subsequent incarceration. My understanding, based on conversations with Mrs. Anderson and documents that she has provided, is that at a court martial convened on April 22, 2015 and Major Anderson was found guilty of sexual assault and a number of other related charges. My further understanding is that, under established procedure at the time of the alleged criminal acts, Major Anderson is afforded the opportunity to have his case reviewed by you, as the Convening Authority, and could later appeal his conviction to both the Air Force's Court of Criminal Appeals and the Court of Appeals for the Armed Forces.

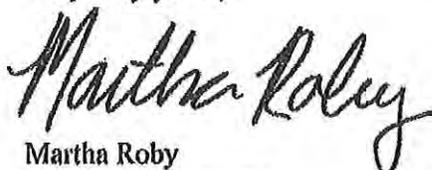
According to Mrs. Anderson, new evidence has come to light in the intervening period of time that could cast serious doubt on the veracity of testimony made during the trial. Further, according to Mrs. Anderson, she has physical evidence of witness tampering and has submitted that evidence to the defendant's counsel.

As you know, my responsibility is to represent my constituents, and one form of that representation is to serve as a conduit of information between citizens and their government. I have no personal knowledge of the merits of this matter, nor is it my intent to influence your decision making in any way. However, in the course of representing my constituent, I ask that you please:

1. Make note of my Congressional office's interest in this matter, and as appropriate provide this letter to all interested parties,
2. Consider the totality of all evidence now available, as presented by legal counsel, and use your best judgment when weighing the relative merits of that evidence in the full pursuit of justice,
3. Use appropriate channels to keep my office informed about the progress of this case, as consistent with all applicable laws and regulations and as deemed appropriate by you.

Thank you for your distinguished service to our country, and thank you in advance for your time and consideration of this matter.

Very truly yours,



Martha Roby
Member of Congress



DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330-1000

OFFICE OF THE SECRETARY

October 23, 2015

SAF/LL
1160 Air Force Pentagon
Washington, DC 20330

The Honorable Martha Roby
United States Representative
422 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Roby:

Thank you for your letter to Lieutenant General Mark Nowland, Commander, 12th Air Force, regarding Major Clarence Anderson. Lt Gen Nowland's staff directed your letter to the Secretary of the Air Force Office of Legislative Liaison for consideration and appropriate response.

At the present time, Major Anderson's conviction and sentence are not yet final. Lieutenant General Nowland, the convening authority for Major Anderson's case, was made aware of a \$10,000 payment to a witness who testified at a pre-trial hearing. Based on this post-trial information, Lieutenant General Nowland decided to delay signing the final action against Major Anderson and order a post-trial hearing as requested by Major Anderson's defense counsel. This hearing will take testimony and evidence to determine if this post-trial information impacted the validity of the court martial results. The military judge also may rule on any motions the defense counsel submits.

Once the post-trial hearing is concluded, the record of trial from the hearing will be provided to Major Anderson. After receiving this information, Major Anderson will be given an opportunity to submit additional matters in clemency for Lieutenant General Nowland to consider before taking action on the findings and sentence.

We encourage Major Anderson to continue engaging with his defense counsel to seek redress for any perceived legal deficiencies in his case.

We trust this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas W. Bergeson".

THOMAS W. BERGESON
Major General, USAF
Director, Legislative Liaison

STATE OF ALABAMA)

COUNTY OF DALE)

To all interested parties: Congresswoman Martha Roby provided me the Congressional Response from Major General Thomas W. Bergeson. I then mailed a copy of the Congressional Response from Major General Thomas W. Bergeson to my son, Major Clarence Anderson III, on or around April 2016, four months after the post-trial hearing.

Beatrice Anderson

BEATRICE Anderson

State of Alabama)

County of Dale)

Subscribed, Sworn To and Acknowledged before me this the 1st day of August, 2017.

Sara Elizabeth C. Matthews
Notary Public

My commission expires:



**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee,

v.

Major (O-4)
CLARENCE ANDERSON III,
United States Air Force,

Appellant.

**PETITION FOR
RECONSIDERATION**

USCA Dkt. No. 17-0429/AF
Crim. App. No. 39023

Filed on November 13, 2017

**TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES**

Appellant personally requests this Court to reconsider its order dated 11 October 2017

(Attachment 1), denying his petition for a new trial, for the following reasons:

1. First, the appellant's previous Petition for a New Trial pursuant to Article 73 UCMJ, dated 8 August 2017 (Attachment 2), was filed erroneously by his former counsel, Mr. Brian Mizer. A Petition for a New Trial pursuant to Article 73 UCMJ can only be filed to TJAG pursuant to CAAF Rule 19 (f) and/or CAAF Rule 29. However, in this case, it was filed pursuant to Grostefon (Attachments 3 and 4) under CAAF Rule 21A and/or Rule 19 (a)(5)(C), rather than under CAAF Rule 29. In addition, the Petition for a New Trial exceeded the limit of 15 pages, was not filed within 30 days of the filing of the supplement, and was not filed in the correct form pursuant to CAAF Rule 21A (a-c). Moreover, counsel did not file a brief in support of appellant's Petition for a New Trial as required by CAAF Rule 29(c). Therefore, the appellant was prejudiced because his petition for a New Trial pursuant to Article 73 UCMJ, was filed erroneously, failed to comply with the Rules of this Court and may not have been considered by this Court on its merits.
2. Additionally, because appellant was prejudiced by his former counsel for erroneously filing his Petition for a New Trial not pursuant to Article 73 UCMJ, CAAF Rule 19 (f), and CAAF Rule 29, he requests this Court conduct an inquiry into his former counsel, Mr. Brian Mizer, pursuant to CAAF Rule 15, for failing to comply with the Rules of this Court.
3. Lastly, appellant asks this court to reconsider its denial of his prior Petition for New Trial because his previous appellate counsel works for the Air Force and is a judge advocate in the U.S. Navy Reserves and as a result any Air Force or Navy counsel detailed to assist him likely has a conflict of interest. As a result, appellant requests a civilian appellate counsel be provided to him at no expense or an attorney be detailed from the Army's Appellate Defense Division.

Respectfully submitted,

CLARENCE ANDERSON III

CERTIFICATE OF FILING AND SERVICE

I hereby certify I filed a copy of the foregoing electronically with the Clerk of Court on November 13, 2017 and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

A handwritten signature in black ink, appearing to read 'M. D. Van Maasdam', with a stylized flourish at the end.

Matthew D. Van Maasdam, Maj, USAF
Chief, Policy & Training
C.A.A.F. Bar No. 34619
AFLOA/JAJD
1500 W. Perimeter Road, Suite 1310
Joint Base Andrews, MD 20762
Office: (240) 612-4793

20 November 2017

**IN THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

UNITED STATES,)	OPPOSITION TO APPELLANT’S
<i>Appellee,</i>)	PETITION FOR
)	RECONSIDERATION
v.)	
)	Crim. App. No. 39023
Major (O-4))	
CLARENCE ANDERSON III, USAF,)	USCA Dkt. No. 17-0429/AF
<i>Appellant.</i>)	

**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:**

Pursuant to Rule 31(b) of this Court’s Rules of Practice and Procedure, the United States responds and opposes Appellant’s Petition for Reconsideration. Appellant has failed to show why reconsideration is necessary in this Court’s denial of his second petition for new trial.

First, Appellant claims he was prejudiced “because his petition for a New Trial pursuant to Article 73 UCMJ, was filed erroneously, failed to comply with the Rules of this Court and may not have been considered by this Court on its merits.” (App. Pet. at 1.) Yet Appellant wholly fails to explain how the rule under which his Petition was filed in any way prejudiced this Court’s review of his petition. Moreover, Appellant’s ambiguous and speculative claim that this Court “may not” have considered his petition on the merits falters as well as he wholly

fails to show that this Court did not properly and judiciously review his petition before denying it.

Next, Appellant turns his sights on his former appellate counsel and requests that this Court “conduct an inquiry” into his former counsel’s actions since Appellant was allegedly “prejudiced by his former counsel for erroneously filing his Petition for a New Trial” (Id.) Again, Appellant has failed to show how he has been prejudiced by any action of his former appellate defense counsel, let alone the way in which his counsel filed his latest petition for new trial. Notably, Appellant’s former appellate counsel assisted Appellant in drafting and filing numerous motions, briefs, writs, and Appellant’s first petition for new trial before the Air Force Court of Criminal Appeals (AFCCA). Moreover, Appellant’s former counsel represented him before AFCCA during the oral argument in this case that focused on Appellant’s first petition for new trial.

Before this Court, the extensive representation of Appellant’s former appellate counsel continued before in the form of drafting and filing multiple motions, as well as a petition for review and its accompanying supplement. Appellant has unquestionably benefitted from his former appellate counsel’s representation; while each of the issues and petitions raised by Appellant have ultimately failed, such is due to the lack of evidentiary support for those issues and petitions, not the advocacy by which Appellant’s former counsel presented them.

Appellant has simply not been prejudiced in any fashion by the representation of his former appellate counsel, particularly with regard to the instant petition for new trial.

Finally, Appellant asks this Court to provided him with “a civilian appellate counsel . . . at no expense or an attorney detailed from the Army’s Appellate Defense Division.” (Id.) Again, Appellant fails to explain how his current representation by his newly-assigned Air Force military appellate defense counsel is insufficient. Moreover, he wholly fails to explain how such representation is “likely . . . a conflict of interest” due to his former appellate defense counsel’s affiliation with the Air Force as a civilian attorney and the Navy as a reserve judge advocate. Such claims and requests should be easily dismissed.

Notably, Appellant does not even attempt to ask this Court to reconsider his petition based on the actual merits of said petition. Likely, this is because this second petition for new trial, an essential carbon copy of his first petition for new trial filed at AFCCA, was as equally unpersuasive to this Court as it was to AFCCA when AFCCA rightfully denied his first petition. Every claim and complaint Appellant raised in his second petition has been thoroughly examined and shown to warrant no relief. As such, reconsideration is unnecessary in this instance.

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's Petition for Reconsideration.



G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 32986



JOSEPH J. KUBLER, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33341

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and to the Appellate Defense Division on 20 November 2017.



G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 32986

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee,

v.

Major (O-4)
CLARENCE ANDERSON III,
United States Air Force,

Appellant.

**REPLY TO GOVERNMENT ANSWER
TO PETITION FOR
RECONSIDERATION**

USCA Dkt. No. 17-0429/AF
Crim. App. No. 39023

Filed on November 27, 2017

**TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

Appellant personally requests this Court consider his reply to the Government's answer to his Petition for Reconsideration.

Pursuant to Rule 31(c) and 34 of this Court, the Appellant responds to the Government and wholeheartedly rejects its assertion that the merits of his petition for reconsideration are "ambiguous and speculative," that "[e]very claim and complaint Appellant raised in his second petition has been thoroughly examined and shown to warrant no relief," and "this second petition for new trial, [is] an essential carbon copy of his first petition for new trial filed to AFCCA." (Gov't. Response at 1 and 3).

The petition is neither frivolous nor speculative. The Government alleged that the appellant did not address any of the merits contained in his petition for a new trial. To address those merits, the appellant asks that this Court consider the following. First, it is a fact that Appellant's second petition for a new trial disclosed the Government withheld favorable discovery evidence of a congressional response pursuant to Article 46 UCMJ, 10 U.S.C. § 846, (as implemented by RCM 701-703, MRE 401 and MRE 402) and constituted a violation of its discovery obligations. (*Brady v.*

Maryland, 373 U.S. at 83, 87 (1963) (See also *Appellant's Second Petition for a New Trial at 5*). This issue was not brought up in Appellant's initial petition for a new trial. In fact, the Government will not find any previously filed assignment of errors brief, oral argument, or petition for a new trial to the Air Force Court of Criminal Appeals (AFCCA), nor will the Government find any previously filed extraordinary writ, or petition for review to this Court -- alleging the Government withheld discovery. "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, 'irrespective' of the good faith or bad faith of the prosecution." (*Id*). This Court has gone even further and held that Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional rights to due process. (*United States v. Roberts*, 59, M.J. 327). (C.A.A.F. 2004). (citing *United States v. Hart*, 29, M.J. 407, 409-10). (C.M.A. 1990).

The Appellant's second petition for a new trial showed the Government stated in the congressional response, which was not provided as discovery evidence to the Appellant, the proper interpretation of RCM 1102, which grants the military judge authority to order a new trial during a post-trial Article 39(a) session, even after post-authentication of the record. (*see Appellant's Second Petition for a New Trial at 5*). The Government stated in the congressional response three months after the record was authenticated that "the military judge may rule on *any* motions the defense counsel submits" (to include a motion for a new trial). (*Id*). The Appellant should have been allowed to support his argument at trial by producing the Government's congressional response, and prove the law pursuant to RCM 1102(e), authorizes "that the military judge shall take such action as may be appropriate" and even order a new trial after authentication of the

record. This would have allowed the Appellant's trial defense team to counter the Government's argument at trial by showing that its assertion at trial was contradicted by the overall position of the Air Force as a whole. It is especially noteworthy that neither the Government nor the AFCCA, mention RCM 1102(e) in their justification to deny Appellant merited relief. The newly discovered evidence of the Government's congressional response conflicts with both the Government's novel argument made during the post-trial Article 39(a) session, and the AFCCA's ruling on this element of law, and could have been used to impeach the Government's case at trial. *Anderson v. United States*, 2017 CCA LEXIS 382 (A.F. Ct. Crim App. 2017). Therefore, the Government violated the Appellant's due process rights because it withheld evidence that is "exculpatory, substantive evidence, or evidence capable of impeaching the [G]overnment's case," and "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (*United States v. Behenna*, 71, M.J. 228, 238). (C.A.A.F. 2012).

Additionally, it is neither frivolous nor speculative that Appellant's second petition for a new trial also disclosed the AFCCA erred in its decision that *U.S. v. Williams* (37 M.J. 352 (C.M.A. 1993)) does not apply to the Appellant when it argued that "Unlike *Williams*, a newly convened court-martial in this case could not find or infer that by reporting Petitioner's crimes [the victim] was attempting to preserve a sexual relationship with [Mr. Madden] because, at the time she reported Petitioner's offenses, no such relationship existed." *Anderson v. United States*, 2017 CCA LEXIS 382 at 11 (A.F. Ct. Crim App. 2017). Because the Government was allowed to successfully argue the military judge's powers were limited at the post-trial Article 39(a) session because the record was previously authenticated, and subsequently also successfully argue for the military judge to deny the Appellant's request to prove perjury and obstruction pursuant to M.R.E. 412,

the Appellant was unlawfully prohibited from proving and/or 'inferring', the sexual nature between the alleged victim and Mr. Madden began before the victim made her sexual assault accusations against the Appellant. Evidence clearly shows the AFCCA ignored the police report from 14 September 2013, where the Appellant reports to the responding officer his belief that the alleged victim was having an affair with Mr. Madden. (AE XXII.) The responding officer also verified the Appellant's belief of the affair during her testimony at trial. (R. at 304). The Appellant's belief substantiated by the aforementioned police report of the affair, were affirmed before the alleged victim made her report to AFOSI and while she and the Appellant were still married and living together, thus fatally contests the AFCCA's decision that "at the time she reported Petitioner's offenses, no such relationship existed." *Anderson v. United States*, 2017 CCA LEXIS 382 at 11 (A.F. Ct. Crim App. 2017).

Further proof of the misapplication of *Williams* from the AFCCA is substantiated when it also blatantly ignored evidence that Mr. Madden admitted to the Appellant's mother on a recorded phone call after the Appellant's trial, that he was dating the alleged victim in August of 2013 (one month before the alleged victim made her report to AFOSI and while she was still married and living with the Appellant), which clearly proves Mr. Madden not only perjured himself during the MRE 412 hearing where both he and the alleged victim testified that they had a dating and sexual relationship around the time of her divorce from the Appellant in April or May of 2014, but again fatally contests the AFCCA's decision that "at the time she reported Petitioner's offenses, no such relationship existed." (*Id.*) (R. at 95). (AE XXIX at 37).

Furthermore, it is not frivolous nor speculative but also fact Appellant is not arguing that his former appellate counsel did not effectively assist Appellant in "drafting and filing numerous

motions, briefs, writs," to the AFCCA or this Court. (Gov't Answer at 2). Appellant specifically argues his former appellate counsel did not provide effective assistance of counsel when filing Appellant's petition for a new trial pursuant to the rules of this Court. Effective assistance of counsel and due diligence is not one step in the process, but a continuum throughout. "A military accused is entitled to the effective assistance of counsel during pretrial stages, trial proceedings, and post-trial processing of the court-martial." (*United States v. Rivas*, 3 M.J. 282). (C.M.A. 1977).

It is indisputable as evidence clearly shows Appellant's former counsel did not adhere to the rules of this Court when he filed the Appellant's petition for a new trial pursuant to *Grosteffon*, and that the Appellant was prejudiced as a result of this erroneous filing because his former counsel did not file a brief in support of the petition for a new trial or advise the Appellant of this Rule pursuant to 29(c). (*See Attachment 1*) (*see also Appellant's Second Petition for a New Trial at 1*). Appellant's former counsel even stated there are no rules for the accused to submit his own petition for a new trial. (*See Attachment 2*). However, RCM 1210(b) states "a petition for a new trial may be submitted by the accused personally," proving his counsel was ineffective and his actions prejudiced the Appellant.

The Appellant's former counsel and the Government wish the Appellant to speculate and accept the preposterous assumption that this Court would accept and review a petition for a new trial on its merits alleging a *Brady* violation but not submitted pursuant to its Rules, and that this Court (without a request from appellant) would waive the requirement to file a brief in support of the petition for a new trial, ruling in favor of the Appellant's petition on its merits, and never provide the Government an opportunity to contest the petition on its merits in an adversarial form. (*See Attachment 3*).

Appellant's former counsel even stated the Government does not have to respond to the petition for a new trial by stating "the government doesn't have to file a response" (*Id*). However, Rule 29(c) of this Court states "An appellee's answer 'shall be' filed no later than 30 days after the filing of an appellant's brief" further proving his former counsel was ineffective and did not fall within the range of competence.

Also noteworthy, the Appellant's former counsel even suspected this Court was going to deny Appellant's petition for a new trial for not following the rules of being timely filed "I suspect they were originally going to deny it for being untimely filed", but now expects Appellant to believe his petition for a new trial was thoroughly considered on its merits without following the rules which specifically state a brief in support of the petition for a new trial "will be filed" pursuant to Rule 29(c) of this Court. (*Id*).

The Sixth Amendment guarantees an accused the right to the effective assistance of counsel. (*United States v. Gooch*, 69, M.J. 353, 361). (C.A.A.F.2011) (citing *United States v. Gilley*, 56, M.J. 113, 124). (C.A.A.F.2001). To establish that his counsel was ineffective, appellant must satisfy the two-part test, "both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." (*United States v. Green*, 68, M.J 360, 361-362). (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687). (1984). It is evident that because the Appellant's petition was not filed pursuant to the rules of this Court, due process was impeded even preventing the Government from fairly responding to the accusations of withholding discovery (please note the government did not respond to Appellant's petition for a new trial but did respond to Appellant's petition for reconsideration as the latter was filed pursuant to this Court's rules), and ultimately prejudiced the Appellant from appropriately presenting these issues before this Court. This Court is a federal court of appeals, governed by federal judges appointed by the President of the United

States, and affirmed by members of the United States Senate, therefore the rules of this Court are not open for interpretation, they must be followed.

Furthermore, it appears the integrity of due process may be further compromised which warrants a deeper dive into these matters pursuant to Rule 15 of this Court. It is highly suspicious when the Appellant began to challenge the dubious nature of how his former counsel submitted his petition for a new trial on Tuesday, 10 Oct 2017 (after waiting almost two months on the status of the petition) (*See Attachments 4 and 5*), his former counsel responded later that day to the Appellant's challenge hinting that the petition would likely be "denied any day" (*See Attachment 1*). Suspiciously, the following day on Wednesday, 11 Oct 2017, Appellant's former counsel "suddenly" received word from this Court that Appellant's petition for a new trial was denied. (*See Attachments 3 and 6*) (*See also Court of Appeals for the Armed Forces decision on Petition for New Trial Pursuant to Article 73, Decided 11 Oct 2017*).

Finally, Appellant recognizes and understands this Court previously denied a petition for review in another case, but when additional evidence was presented, this Court reversed course and granted review of the case because of the merits of the new evidence. (*United States v. Keith E. Barry*). (C.A.A.F. 2017). Likewise, the Appellant rejects the advice from his former counsel that he can only receive justice by way of "collateral attack/habeas corpus in U.S. District Court" (*See Attachment 3*), and prays in the interest of justice this Court also accept the merits of the new evidence in this case, and reject the Government's argument against merited relief. (Gov't. Response at 3).

Lastly, Appellant respectfully withdraws his request for civilian counsel or counsel from the Army's Appellate Defense Division, as the conflict of interest issues no longer exist as his newly assigned counsel works in a separate division not associated with the Appellate Defense

Division or the Government Appellate Division.

Respectfully submitted,



CLARENCE ANDERSON III

CERTIFICATE OF FILING AND SERVICE

I hereby certify I filed a copy of the foregoing electronically with the Clerk of Court on November 27, 2017 and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.



Matthew D. Van Maasdam, Maj, USAF
Chief, Policy & Training
C.A.A.F. Bar No. 34619
AFLOA/JAJD
1500 W. Perimeter Road, Suite 1310
Joint Base Andrews, MD 20762
Office: (240) 612-4793

Attachment 1

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Tuesday, October 10, 2017 2:34 PM

To: Beatrice Anderson
Subject: RE: Update and CAAF Rule 29

Mrs. Anderson,

I apologize for the delayed response. Our office and the courts were closed yesterday. Today, I have been in court, and preparing for another full day of court tomorrow. I likely will not be able to speak with Clarence until tomorrow afternoon or Thursday. But the bottom line is there isn't much to discuss.

As I have relayed to both you and Clarence, his petition for new trial was filed on time. I have confirmed the court received it. There isn't a brief in support because Clarence's brief was incorporated into the petition pursuant to Grostefon. I expect the petition for new trial to be denied any day, and Clarence can then appeal his case to federal district court, where I hope a judge will give it the review his case deserves.

Very Respectfully,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

Attachment 2

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Tuesday, October 10, 2017 7:55 PM
To: Beatrice Anderson
Subject: RE: [Non-DoD Source] Re: Update and CAAF Rule 29

Mrs. Anderson,

The Grostefon rules refer to direct appeal, and there is no rule pertaining to a Grostefon petition for new trial. I submitted it, and the Court accepted it, pursuant to Rule 29. Petitions for new trial are rare, and the rules really do not contemplate the filing of a Grostefon petition for new trial. Clarence can rest easy that, while we disagree with the outcome, the CAAF reviewed the merits of his case and there are no procedural defects in his pleadings submitted either by his attorneys or himself. I hope that helps.

Very Respectfully,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

Attachment 3

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Wednesday, October 11, 2017 6:29 PM
To: Beatrice Anderson
Cc: Boomer, Jane E Col USAF AFLOA (US)
Subject: RE: [Non-DoD Source] Re: Update and CAAF Rule 29

Mrs. Anderson,

I tried calling Clarence's counselors at the brig for two hours this afternoon, to include on my drive home this evening, but the phone was either busy or just rang. You appear to be able to contact him much more easily than I, so I will write a brief explanation tonight. I will hopefully be able to reach Clarence tomorrow, and I will be in the office all morning.

I do not mean to discourage you from contacting Colonel Cordova. You have the same rights as any citizen to contact your government. However, you should not include our private/potentially privileged/attorney-client communications. He can share anything you send him with the government, to include U.S. Attorneys should Clarence pursue collateral attack in the future.

Clarence's petition was filed with TJAG pursuant to Article 73 in August, as Clarence and I have discussed on multiple occasions. TJAG fulfilled his obligation under Article 73, UCMJ, and forwarded the petition to CAAF. CAAF Rule 29, to the extent it is substantively relevant, was triggered. I have repeatedly told Clarence that the Court's clerk's office may have been confused by the pleading because it was delivered before the Court denied his direct appeal, but they didn't process it or review it until after direct appeal was denied. I suspect they were originally going to deny it for being untimely filed, but I insisted in multiple phone calls to the clerk's office that the Court consider it on its merits because it was timely filed pursuant to Article 73, UCMJ.

The government doesn't have to file a response. In fact, they did not file anything but a pro forma response to the attorney petition for new trial, which I filed earlier this summer. That is actually true of most pleadings filed even on direct appeal at CAAF. The government rarely responds to our requests asking the Court to review a case. As you can see from the order I forwarded earlier this evening, CAAF considered Clarence's Grostefon arguments on their merits, and denied them on their merits. Clarence's procedural concerns are not valid. Substantively, I could not ethically file the pleading Clarence drafted and I submitted to TJAG because any attorney would consider it to be frivolous. Put another way, no attorney would argue the Air Force's representation to a member of Congress regarding the general powers of a military judge conducting a post-trial Article 39a hearing has any legal significance whatsoever at either that hearing or on appeal. Grostefon permits Clarence to submit frivolous pleadings, but there is no procedural rule that operates to make them any more likely to succeed.

None of that is meant to say that I do not believe there has been a great injustice in Clarence's case. I sincerely believed CAAF would cure that error, but that obviously did not happen. I can speculate they did this because they may have believed the Air Force Court was wrong, but that it did not abuse its discretion, which is a high standard of review. However, nobody but the judges will ever know why they denied review because they don't have to offer an explanation.

With Clarence's direct appeal at an end, I can send the entire paper copy of the record of trial to you or Clarence's future counsel or designee. I would encourage Clarence to pursue collateral attack/habeas corpus in U.S. District Court. I hope that blatant perjury is enough to interest the federal, civilian judiciary. Unfortunately, I have no statutory authorization to participate in that process absent some nexus to an eventual hearing under the UCMJ. I hope you can find some measure of comfort in the fact that Clarence will soon be home with you, and I wish you all the best. As always, I stand ready to answer any remaining questions about Clarence's now-complete appeal.

Very Respectfully,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

Attachment 4

-----Original Message-----

From: Beatrice Anderson

[Caution-Caution-Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com < Caution-Caution-Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com >]

Sent: Tuesday, October 10, 2017 10:40 AM

To: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>

Subject: [Non-DoD Source] Update and CAAF Rule 29

Mr. Mizer, I am very disappointed and baffled to say the least. I have tried to contact you and my son has tried to contact you with no luck. Could you give me any updates on what's going on and explain to me CAAF Rule 29?

According to CAAF Rule 29(a), if the TJAG has filed the 7 copies to the Clerks office at CAAF? Rule 29(b), If the Clerk at CAAF has notified all Counsel of the petition for a new trial? Finally in Rule 29(c), If a brief in support of his petition for a new trial has been submitted to CAAF?

Thanks and look forward to hearing from you.

Beatrice Anderson

Crime Victims' Right Advocate and Crime Victim

Attachment 5

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

-----Original Message-----

From: Beatrice Anderson [Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com < Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com >]
Sent: Tuesday, October 10, 2017 9:31 PM
To: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Subject: [Non-DoD Source] Re: Update and CAAF Rule 29

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Brian thanks for the prompt reply, but Clarence is confuse with what you told him about Grostefon.

According to Rule 21A, Grostefon shall be presented in a separate Appendix to the supplement not exceed, 15 pages. Clarence's petition for a new trial was submitted to the TJAG per Article 73 and was 21 pages long. Rule 21A states Grostefon issues raised within 30 days of the filing of the supplement under Rule 19 (a) (5) (C) are subject to and included within the 15 page limit in Rule 21A (a).

Clarence busted his Grostefon suspense because you filed his petition for review to CAAF on 6 June 2017, therefore his Grostefon was due no later then 6 July 2017.

When Clarence filed his petition for a new trial, he filed it on 16 August 2017, past the suspense of 6 July 2017.

If this is the case, Clarence file his petition for a new trial under Rule 29 and not under Rule 21A. Thanks and I look forward to your reply.

Beatrice Anderson

Crime Victims Right Advocate

and Crime Victim

Attachment 6

Sent: Wednesday, October 11, 2017 11:41 PM
To: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Cc: Boomer, Jane E Col USAF AFLOA (US) <jane.e.boomer.mil@mail.mil>
Subject: Re: [Non-DoD Source] Re: Update and CAAF Rule 29

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Brian, I just talked to Clarence and he wishes to talk to both you and Col. Boomer tomorrow morning at 0930 EST. Clarence feels it is highly suspicious for CAAF to deny his petition for a new trial pursuant to Article 73 the day he question how you erroneously filed his petition for a new trail directly to CAAF and not the TJAG pursuant to Article 73 and Rule 29. Clarence feels that this warrants an IAC complaint and would like to speak to Col. Boomer or anyone else who can provide him counsel to file the IAC complaint. After the IAC complaint is filed Clarence wants to file a petition for a new trial with the new counsel Col. Boomer will provide to him. Good Luck to You and Thanks for all your help in highlighting all of the injustices Clarence has received.

Beatrice Anderson
Crime Victims' Right Advocate and Crime Victim

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Wednesday, October 11, 2017 6:29:59 PM
To: Beatrice Anderson
Cc: Boomer, Jane E Col USAF AFLOA (US)
Subject: RE: [Non-DoD Source] Re: Update and CAAF Rule 29

Mrs. Anderson,

I tried calling Clarence's counselors at the brig for two hours this afternoon, to include on my drive home this evening, but the phone was either busy or just rang. You appear to be able to contact him much more easily than I, so I will write a brief explanation tonight. I will hopefully be able to reach Clarence tomorrow, and I will be in the office all morning.

I do not mean to discourage your from contacting Colonel Cordova. You have the same rights as any citizen to contact your government. However, you should not include our private/potentially privileged/attorney-client communications. He can share anything you send him with the government, to include U.S. Attorneys should Clarence pursue collateral attack in the future.

Clarence's petition was filed with TJAG pursuant to Article 73 in August, as Clarence and I have discussed on multiple occasions. TJAG fulfilled his obligation under Article 73, UCMJ, and forwarded the petition to CAAF. CAAF Rule 29, to the extent it is substantively relevant, was triggered. I have repeatedly told Clarence that the Court's clerk's office may have been confused by the pleading because it was delivered before the Court denied his direct appeal, but they didn't process it or review it until after direct appeal was denied. I suspect they were originally going to deny it for being untimely filed, but I insisted in multiple phone calls to the clerk's office that the Court consider it on its merits because it was timely filed pursuant to Article 73, UCMJ.

The government doesn't have to file a response. In fact, they did not file anything but a pro forma response to the attorney petition for new trial, which I filed earlier this summer. That is actually true of most pleadings filed even on direct appeal at CAAF. The government rarely responds to our requests asking the Court to review a case. As you can see

06/07 DEC 22

From: Manuel Dominguez, Lieutenant Commander USN
To: Defense Advisory Committee – Investigation, Prosecution, & Defense of Sex Assault in the Armed Forces (DAC-IPAD)
Subj: LCDR MANUEL DOMINGUEZ LETTER TO DAC-IPAD, DECEMBER 2022
PUBLIC MEETING
Ref: (a) April 21, 2022, public comments to the DAC-IPAD from LCDR Manuel Dominguez
(b) April 21, 2022, DAC-IPAD public meeting transcript (pages 115-127)
(c) September 21, 2022, DAC-IPAD public meeting transcript

To the DAC-IPAD Staff,

1. Thank you for your time and forum for communication. I previously made comments and spoke to the committee on April 21st. As a follow-up, I invited the committee to send representatives to my rehearing held from 27 June – 01 July. At that rehearing, (which was observed by your staff) I was fully acquitted of all charges by a panel of officer members at a general court-martial. The allegations levied against me were patently false, and the jury clearly saw that. The military judicial process started for me in February of 2017 and unfortunately, the process is still on-going nearly 6 years later. Following my exoneration, I have not received my due back-pay and allowances, I have not received my due promotion, my records have not been corrected, and I am facing forced retirement due to no fault of my own.

Note: I also want to provide better context to an observation your staff made regarding my court-martial, the comment was that “both the prosecution and defense were incredibly well staffed (*reference c*).” The reasons for the observed parity resulted from: 1) my family investing in procuring civilian counsel and, 2) the uniqueness of the convening authority being located in Hawaii while the trial was held in Washington, thus, I had assigned representation to accommodate this dynamic. Observations of prosecution and defense compositions would illustrate disparity tilted toward prosecution teams, my rehearing was outside the scope in this regard (the former dynamic being illustrated during my first trial among other cases).

2. Simply put, there’s an abhorrent lack of accountability on the part of the Navy. I have always maintained my innocence to the egregious allegations to which I was eventually cleared. The results from the rehearing would have been the same results for the first court-martial if it were not for three significant abuse of discretion errors with serious evidentiary ramifications committed by the judge. Moreover, the actions of the original trial counsel were unethical in withholding *exculpatory* evidence from panel members. Prosecutorial zeal and lack of a merit-based approach resulted in my wrongful investigation, prosecution, conviction, and incarceration. Yet, there’s been no recourse or accountability for those involved in my case. Thankfully, the judge in my case has retired and can no longer make legal errors. A true merit-based assessment of my case should have resulted in charges never being brought forward, but no one had the courage to look at the facts for their face value. Decisions were made based on optics, emotions, pressure, and institutional risk management. *I remind...this is the same Navy that has repeatedly failed victims of sexual assault, mishandled numerous cases like*

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mine, failed sailors' families in the fatal ship crashes of the USS McCain and USS Fitzgerald, woefully erred in the Bonhomme Richard ship fire case, and could not grasp the severity of the Red Hill fuel-water crisis in Pearl Harbor, Hawaii until it was too late.

3. The committee's debrief of my case (*reference c*) is lacking this essential observation: I was locked up for 22 months, during which time I was stripped of my family, career, financial stability, mental health, and dignity. Furthermore, upon my original conviction being overturned in October of 2021, my release was not secured until I filed a writ of habeas corpus to a federal district court, upon which the court **forced** the Secretary of the Navy to show cause. I also reiterate that since my acquittal, I am still fighting for my due pay, rights, and corrections. I have exhausted all means of administrative relief and I have been forced to hire civilian counsel to remedy post-trial matters. *The Navy's official stance has been to deny me continued legal and administrative representation due to "my case being closed, and that I am no longer considered a client after being acquitted."*

4. In the aftermath of my acquittal, I have fought for provisions contained in 10 USC 875: Art 75 Restoration. My back pay, promotion to O5/CDR, adverse record corrections, as well as career billeting/progression have all been put on hold due to this miscarriage of military justice. I also requested the bureau of Navy personnel to enact a statutory retirement *time hold or freeze* on my time in grade data until the Bureau of Corrections for Naval Records can review and favorably adjudicate my record (which was projected to take 10-18 months to correct). Due to these false allegations, I have two failures to select in my record which are not of my own fault or failure. Prior to this ordeal I was on an upward career track and progression to promote within the Surface Warfare Officer community (1110 designation); I wholeheartedly believe I could have been a commanding officer of a Naval warship.

5. Suffice it to say, I have in-depth and firsthand experience with how the military justice system oversees sex assault allegations, I make the following *actionable* comments for consideration on how to improve the military justice system:

A. First, I applaud the recognition and work which resulted in removing the convening authority from sex assault disposition decisions, this is a particularly important and monumental step. *But as I pointed out in previous comments (reference b), the threshold of probable cause remains the essential problem in disposition decisions.* The premise of eradicating sex assault, coupled with an overwhelmingly victim-centric (and irrefutable) stance puts potentially innocent service members at risk for wrongful prosecution...regardless of whom is making the decisions. I recommend the committee continue to monitor the Article 32 / preliminary inquiry phase to give decision makers the best process for determining merits of an allegation. *The article 32 juncture is the pivotal point where the beyond a reasonable doubt standard must be applied*, such is one check in preventing wrong cases from going forward. Had my case been truly evaluated on its merits and these fact-finding standards, it is unlikely my case would have gone to court-martial in the first place. I ask the committee to draft findings on this matter and publish them in their report.

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B. *Second, it was hypothesized that majority verdicts protect jury members from undue disclosure of their vote (reference c).* On its face, this is a good reason for majority verdicts, but the reasoning undercuts progress the military has made in undue command influence and protecting service members from reprisal. In relying on majority verdicts for this reason alone, the military is signaling that it does not trust its service members to function as professionals. Furthermore, there are information measures that can be enacted to protect jury member composition & deliberations from being general knowledge. Have we forgotten the scope and magnitude of effects when charges are brought forth on a service member? Simply put, the stakes are too high, and the cost too much in criminal proceedings. ***While beyond a reasonable doubt does not mean all doubt...each impaneled jury must be convinced in unanimity to convict a service member of such serious crimes.*** Continuing to rely on non-unanimous verdicts is a violation of basic constitutional rights, state and federal guidelines, and the Supreme Court ruling in Ramos v. Louisiana. I once again ask the committee to draft findings on this matter and publish them in their report.

C. *Third, the military justice system does not have a standing conviction integrity unit, directorate, or office.* Currently, the process of conviction integrity is premised on the appellate process in of itself. The problem here is two-fold, for one, cases like mine, it takes too long for injustice to be corrected. There were 3 significant abuse of discretion errors with serious evidentiary ramifications as well as cumulative error which rendered my case as egregiously unfair, hence the setting aside of findings in my case. ***This occurred after I had already spent nearly 2 years wrongfully incarcerated.*** The other issue is that military appointed appellate attorneys simply cannot match the experience, care, and continuity of individually procured civilian counsel, the service member finds themselves in a “pay-for-justice” arrangement that is resource dependent. Standing up a conviction integrity unit is a needed resource to aid in identifying the right cases for expedited review. I ask the committee to form a subcommittee on this matter and publish their findings.

D. *Fourth, in evaluating regulations, specifically 10 USC 875: Art. 75. Restoration,* the law is woefully inadequate and does not address the psychological, emotional, career, and financial damages inflicted on falsely accused service members. On one hand, my accuser has financially benefitted from DoD instruction 1342.24 (abused dependent transition compensation) and is in fact, still being paid by the government...this is an anti-deficiency act violation. On the other hand, I am still fighting for my own rights to be restored even after having been cleared of all allegations. Furthermore, due to the Feres act, I am unable to seek financial restitution, or punitive damages from the government. Such is comparatively unfair when considering the recent ruling from the Court of Appeals for the Ninth Circuit – the ruling allows for military sexual assault survivors to sue for damages sustained during service (See Col. Kathryn Spletstoser (ret) vs. U.S.). For those service members wrongfully accused and exonerated, I advocate for punitive compensation, explicitly compensation outside backpay that is owed. This compensation should come from the same operations and maintenance funding allotted to DoD instruction 1342.24. Congress has already amended the law to permit service member claims for medical malpractice. Pursuant to the ninth circuit appeal (above) and in line for malpractice in principality, ***service members should be allowed to pursue recompense for legal malpractice from the government as well.*** Servicemembers who

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are falsely accused and exonerated deserve no less consideration; the current structure is an egregious double standard. I ask the committee to tackle this topic in a subcommittee and publish their findings.

E. *Fifth, I advocate for and recommend follow-on codification of 10 USC 875: Article 75 Restoration.* No service has an instruction, standard operating procedure, or commander's guidance on what to do for exonerated service members. A reading of Article 75 defines bounds, but no ways or means; the law is vague and woefully inadequate. Each service has a myriad of instructions that codifies nearly every aspect in the military, yet there is no guidance to oversee Article 75 Restoration. Considering the amount of legislation and policy dedicated to combating sexual assault, there must be a comparative 'closing of the loop' that manages what to do when the military justice system gets it wrong. There must be DoD wide codification for managing these types of cases because exonerations do actually happen, there must be guidance on the matter. *I specifically recommend a DoD wide instruction that prescribes specific measures to enact UCMJ Article 75 across all the service branches.* Research will show a lack of guidance across the services for Article 75, enacting such needed guidance would provide actional vice in name only restoration.

Along with the financial compensation I addressed in 5.D above, I recommend 2 key points to be codified in future instructions. First, exonerated service members that return to active duty should be afforded expedited transfer orders that facilitate the needs of the exonerated service member. The committee and DoD have already committed ways, means, and analysis in facilitating expedited transfer orders for victims of sexual assault. The same level of trauma that occurs for victims are also felt by wrongfully accused service members, facilitating expedited transfers for exonerated service members is one step in restoration. Second, there are serious mental health concerns incurred by victims (and their families) of wrongful prosecution in the military justice system. Unfortunately, there are numerous administrative obstacles in receiving requisite care. When cases involve child or minor victims and exonerated service members, there is extensive therapy required to even begin the healing process. Military insurance does not cover these circumstances. Receiving due and requisite mental health care is not as arduous for victims of sexual assault in the military. Service members who are falsely accused and exonerated deserve no less consideration; the current structure is an egregious double standard. I ask the committee to tackle these issues in a subcommittee and publish their findings.

F. *Sixth, I recommend what I refer to as 'comparative composition' in military cases.* There is a disparity of resources afforded the accused versus the resources afforded the alleged victim (especially early in the process). I advocate for the creation and appointment of a Special Defense Liaison (SDL) and Special Defense Investigator (SDI) that work in the interest of the accused. The positions would be akin to their prosecutorial counterpart's, Special Victim Liaisons (SVL) and Special Prosecution Investigators (SPI); these positions would provide early parity and balance in the current victim-centric resource composition. *The two perspectives would be invaluable in disposition decisions.* Service members who are accused of such serious offenses deserve no less consideration; the current structure is an egregious double standard that should be remedied. Additionally, the creation and appointment of a Special Defense Liaison (SDL) would serve as case managers for exonerated service members to navigate the administrative hurdles in non-codified *10 USC 875: Art. 75. Restoration* procedures. As discussed

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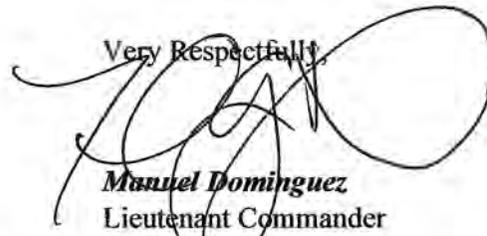
earlier, the Navy's official stance in my case has been to deny me continued legal and administrative representation due to "my case being closed and no longer considered a client due to being acquitted." This should never happen to another exonerated service member and these issues need to be corrected. I ask the committee to investigate, prescribe policy on this matter and publish their findings.

5. The court-martial of U.S. v. Dominguez, LCDR USN is a sad and troubling tragedy. There were no winners in this case, just broken pieces that are left to be picked up. The damage inflicted by the military justice system on my family is incomprehensible to those not having lived the circumstances. I request the committee consider the points I've brought up; my case is not some one-off anomaly. ***There are wrongly accused service members out there right now...***there will continue to be more if actions are not taken to preserve due process and a presumption of innocence. Such consideration is not mutually exclusive to eradicating sexual assault in the military. Due process and fairness are requisite pillars to ensure integrity of the system, to protect victims of sexual assault, and to prevent the persecution of innocent service members. Thank you for your time and consideration, ***I sincerely hope the committee turns their intentions and words into substantive action.***

Copy To:

Tami Mitchell

Very Respectfully



Manuel Dominguez
Lieutenant Commander
United States Navy
"Have a powerful day..."

Dominguez DAC-IPAD: Survivor Impact Statement 06/07 December 2022

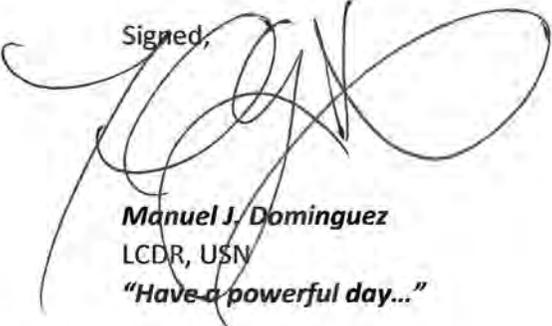
- ***My name is LCDR Manuel Dominguez, and I've served honorably in the United States Navy for 19 years.*** I spoke before this committee in April of this year. Your committee sent representatives and attended my retrial in June. My long fought for exoneration occurred on July 1st of this year and observations of my court-martial were briefed in September.
- My own experience with the military justice system, reviewing many cases (and not just my own), and interactions with inmates, tells me this. The process 'on the whole,' gets it right on most occasions. Sexual assault survivors are rightfully being taken more seriously than in the past and more offenders are being held accountable. However, the problem is, and remains a system that also gets it wrong...we need to face that reality and do something about it. ***The process remains overtly 'victim-centric' with few, time-late, and in many cases, plainly ineffective mechanisms for accountability when defendants' rights have been violated.*** My key issues and pleas on actionable items to the staff is contained in my policy statement contained therein, so I will not rehash those points. Instead, I want to convey a personal perspective in this portion.
- ***First***, for those of you who have children, I want you to imagine being alienated from them for 6 years. ***I have not seen or spoken to my children in 6 years... please let that sink in.*** The military justice system is a direct contributor to that reality. In pursuit of 'getting a conviction,' prosecution teams set conditions to further confuse my daughter...she doesn't know what the truth is, she's only been fed perspectives from one side and one side only. Throughout the 6-year process she never spoke to me or my legal teams...she was forced to interact with them solely in a courtroom setting. No child should ever have to go through that, especially when the evidence and facts don't support the case. The adults in the military justice system, the stewards of the process have failed my daughter, my son, my family, and many other service members.
- ***Second***, imagine being handcuffed and having your feet shackled. Think of shuffling your feet in small steps in the cold, wearing the often-imagined orange jumpsuit while being transferred. I recall people and children staring at me at the airport, realizing I was handcuffed and being escorted by guards. Most people averted their eyes, I could see and hear children asking their parents, "what did he do?" I received death threats and sexual assault threats from inmates in my first week at Fort Leavenworth. I remember being stripped searched, naked, and having to spread my butt cheeks and shift my scrotum to confirm I had no items on me. In the three military confinement facilities I found myself in, I came across 2 poignant observations...most people assume you are guilty, and most people don't view you as an actual person. ***Me being innocent had absolutely no bearing on these circumstances.***
- ***Third***, imagine a personal or private nightmare that is instead displayed very publicly. Think about the people most important to you witnessing the injustice in real-time. My wife and in-laws witnessed me taken into custody...I was there one day and gone the next. My family visited

Dominguez DAC-IPAD: Survivor Impact Statement 06/07 December 2022

me until they couldn't, COVID prevented me from seeing loved ones for over a year, those were tough times. I often thought of committing suicide...knowing the truth, the love I received, peoples belief in me, and hoping the appellate process might correct the injustices are all that prevented me from taking my life. The circumstances were a far cry from standing as the tactical action officer onboard a navy warship...leading sailors and doing the bidding of what I once considered to be a great nation.

- ***Lastly***, being exonerated is not a 'lifetime' or 'hallmark movie.' No one in the Navy has offered an apology or words of accountability; I don't imagine anyone from the Department of Defense ever will. Words and phrases like "predecessor, based on legal advice, administrative requirements and system or legal flaws" are tossed around casually by those not having experienced what I have lived. The road to restoration is paved in glass and gravel, I am still fighting for my rights and it's akin to pulling teeth. I look forward to ending my service with all that I am due...I remain very conflicted about the Navy and this country. In the collective execution of mandates and good intentions we lost sight of the responsibility and ramifications of our actions and policy. I request the committee consider the points I've brought up here and more so in my written statement; my case is not some one-off anomaly. ***There are wrongly accused service members out there right now...there will continue to be more if actions are not taken to preserve due process and a presumption of innocence.*** Such consideration is not mutually exclusive to eradicating sexual assault in the military. Due process and fairness are requisite pillars to ensure integrity of the system, to protect victims of sexual assault, and to prevent the persecution of innocent service members. No one should ever have to go through what myself and family have gone through. Thank you for your time and consideration, ***I sincerely hope the committee turns their intentions and words into substantive action.***

Signed,



Manuel J. Dominguez

LCDR, USN

"Have a powerful day..."



THE LAW OFFICE OF TAMI L. MITCHELL*

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November 28, 2022

Defense Advisory Committee on the
Investigation, Prosecution, and
Defense of Sexual Assault in the
Armed Forces (DAC-IPAD)
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ATTN: DAC-IPAD
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Re: *United States v. LCDR Manuel J. Dominguez*

Dear DAC-IPAD Members,

I am writing to you regarding my representation of LCDR Manuel Dominguez, whose case has been the topic of several committee meetings. I was an Army Judge Advocate, retiring on September 30, 2016 after 20 years of service. I have been in private practice since retirement, defending Servicemembers at trial and on appeal. I was the first Army Judge Advocate to serve as a trial counsel, defense counsel, Government appellate counsel, Special Victims Counsel (SVC), and Law Instructor at the Army's Military Police School at Fort Leonard Wood, Missouri, where I was rated one of the best Law Instructors in 25 years. I was certified as an SVC in 2014 and as an Instructor in 2015. I also defend college students accused of "sexual misconduct" in Title IX proceedings. My biography can be reviewed on my office's website and on Avvo at www.avvo.com/attorneys/80911-co-tami-mitchell-1506390.html.

I represented LCDR Dominguez during his successful appeal of his wrongful court-martial conviction, and during his rehearing in 2022, which resulted in a full acquittal. This was a righteous and just acquittal of someone who was factually innocent, and who should never have been prosecuted. I write this letter in my personal capacity, to create a public record of LCDR Dominguez's innocence, respond to questions and comments about his case, and provide my observations and recommendations for improvement of the military justice system.

I was surprised no one asked the committee members who observed LCDR Dominguez's rehearing why he was acquitted. The facts as presented to the panel members, and which were *always* the underlying facts of this case, showed that LCDR Dominguez committed no acts of "molestation" of his daughter, OD. Instead, his ex-wife, JB, falsely and maliciously accused him of "causing" OD to touch his penis and digitally penetrating OD's vulva shortly before JB filed for a divorce in February 2017. JB and LCDR Dominguez had agreed in August 2016 that she would file for their divorce when she met the 6-month residency requirement for Texas. For two years after JB's initial report, the allegations mounted in severity and frequency (including an allegation of oral

penetration of OD's vulva), culminating in LCDR Dominguez's wrongful conviction and confinement for almost two years.

Motives for False Allegations

JB had several motives launching false accusations against LCDR Dominguez.

1. Emails between LCDR Dominguez and JB, hours before JB's report to law enforcement officials, showed that she believed LCDR Dominguez intended to report her for physically abusing OD. This was based on JB's admission she spanked OD so hard that OD needed an icepack (JB claimed this spanking prompted OD's initial "disclosure"). Under the circumstances, JB made false accusations of "molestation" to preempt LCDR Dominguez from making a truthful report of JB physically abusing OD.
2. LCDR Dominguez and JB argued over money, specifically that his support obligation would decrease from \$6,000/month for the entire family to about \$2,000/month for the children. JB resented him for living "the high life" while she had to singularly parent two small children while working and finding a place to live.
3. JB was frustrated with OD, who actively voiced her hatred of JB for separating her from her preferred parent—LCDR Dominguez. In fact, OD expressed her hatred of JB by telling JB she wanted her (JB) to die so that she (OD) could return to Hawaii to be with her father. Launching false allegations against LCDR Dominguez led to a no-contact order, which helped JB regain control of OD.

OD could not distinguish between telling the truth and telling a lie. In her own words during her first "forensic" interview, "lying is like telling the truth." OD also related during this interview that she had discussed the allegations with JB "a million times in [her] life." OD had her own motives to repeat the false accusations. She was miserable in Texas, and wanted to return to Hawaii. Having been spanked hard enough to require an ice pack, OD succumbed to JB's emotional, direct questioning, and gave an answer that JB "desperately wanted to hear." From that point forward, OD received positive attention from JB and other individuals. OD has been so brainwashed she cannot distinguish fantasy from reality. She has also been thoroughly alienated from LCDR Dominguez that specialized, reunification therapy is necessary to reestablish their relationship.

The Evidence

1. "Causing OD to Touch his Penis"

- a. LCDR Dominguez did not "cause" OD to touch his penis. She poked it once while they showered together because she was curious about the differences between boys and girls. LCDR Dominguez stopped her, reported the incident to JB (who laughed about it), and stopped showering with OD, as any reasonable father would do. "Communal showering" was a normal activity for this family.

b. OD was not credible. Her statements from initial disclosure to JB, to her first “forensic” interview (about a week after initial disclosure), to a law-enforcement driven “medical examination” (a subject of the appeal and not admitted during the rehearing), to her second “forensic” interview (16 months after the first), to the first court-martial, to the rehearing, varied widely, and were contradicted in several key aspects by JB. For example, OD claimed that JB and a friend of JB’s returned from a “girls’ night out,” caught OD touching LCDR Dominguez’s penis, and LCDR Dominguez went to jail as a result. JB denied witnessing this. The only time LCDR Dominguez went to jail was because of a domestic dispute in Texas during the family’s PCS move from Japan to Hawaii in 2015. OD’s second “forensic” interview was wholly unreliable, the result of more than 16 months of coaching from JB and OD’s therapist at the child advocacy center, and leading, suggestive questioning by the forensic interviewer.

c. Ultimately, OD’s report of LCDR Dominguez putting a “white” or “clear” (or “green” according to her second interview) “sticky” or “slimy” substance on her mouth that tasted like throw-up, and misrepresented as “ejaculate,” was nothing more than LCDR Dominguez putting hydrocortisone cream and Vaseline around OD’s mouth to treat her hand-foot-mouth disease. This illness resulted in a rash around OD’s mouth. OD even demonstrated this during her first forensic interview when she talked about the “red dots” around her mouth, but the forensic interviewer never explored this. OD’s hand-foot-mouth illness was corroborated by text messages between LCDR Dominguez and JB, with a picture of OD, in November of 2016 when LCDR Dominguez came to Texas to spend Thanksgiving with his children. OD had a history of hand-foot-mouth disease, with the rash getting inside of her mouth, which caused her to throw up when she ate.

2. “Digital Penetration of OD’s Vulva”

a. LCDR Dominguez never disputed digitally penetrating OD’s vulva. Rather, he disputed he had a sexual intent in doing so. The evidence showed LCDR Dominguez digitally penetrated OD’s vulva while performing his parenting duties to wipe OD after toileting and bathing, or to apply medication. OD had an extensive medical history of injuries and illnesses in her vulva area, including but not limited to labial adhesions, urinary tract infections, and yeast infections, which would worsen if *any* residual moisture remained. In her first forensic interview, OD described LCDR Dominguez separating her labia while he wiped her, and demonstrated the action. LCDR Dominguez testified he and JB did this because it was medically necessary to deal with her labial adhesions. This was corroborated by OD’s medical records, which could have been obtained by LCDR Dominguez’s previous civilian defense counsel, but he neglected to request them.

b. OD also described in her first forensic interview, and demonstrated, that she would bend over with her “butt in the air” for her parents to wipe after defecating (“the credit card game”). LCDR Dominguez testified both of the children would bend over for visual inspection and wiping by both parents, if needed, to ensure no fecal matter remained. Their son was just beginning his toilet training, and OD was not yet fully capable of wiping herself. Once again, OD twisted a normal parenting activity into a sinister “little piggy game” due to manipulations by her mother and her therapist at the child advocacy center.

3. “Oral Penetration of OD’s Vulva”

a. LCDR Dominguez did *not* orally penetrate OD's vulva. As detailed in the NMCCA's 2021 decision, 81 M.J. at 806, 815-20, OD experienced oral copulation from a neighbor girl during a "privacy game," which was not litigated at LCDR Dominguez's first court-martial. During the rehearing, this incident was the subject of a defense motion pursuant to MRE 412, which was not opposed by the Government or OD. Furthermore, during LCDR Dominguez's first court-martial, OD flatly denied *under oath* that he ever put his mouth on her vulva. This was during direct examination by the *trial counsel*.

b. OD's testimony changed dramatically and was absolutely incredible. She initially disclosed during her second forensic interview, in response to suggestive questioning, that LCDR Dominguez put his mouth on her vulva in her parents' bedroom on their bed while JB was in the adjoining bathroom.¹ But OD testified at the rehearing that he licked her vulva while she was sitting on the toilet in her parents' bathroom. During a pretrial interview by trial counsel and the Government's expert witness, OD claimed she was "pretty sure" this incident happened. By the time OD testified at the rehearing, she was "confident" this incident happened, obviously the result of continued influence.

Rehearing Litigation

Motions were litigated in May of 2022. Some of motions the defense filed were: (1) MRE 412 related to OD's sexual experience with another child (unopposed); (2) MRE 513 related to OD's behavioral health records in Hawaii and from a child advocacy center in Texas (granted with respect to the Texas records, based on JB's waiver of OD's privilege); (3) motion to dismiss for a defective referral and lack of jurisdiction due to an improperly convened panel (almost half of panel members were junior to LCDR Dominguez at the time of referral) (denied); (4) motion to compel production of OD's educational and medical records in Texas (granted on educational records, denied on medical records); (5) motion *in limine* regarding MRE 404(b) and 414 evidence (granted in part); (6) motion to suppress LCDR Dominguez's testimony from his first court-martial; and (7) motion to compel production of witnesses (granted in part).

Disturbingly, trial counsel received OD's counseling records from Texas and Hawaii during LCDR Dominguez's first court-martial; the records contained exculpatory information. Yet instead of disclosing them to defense counsel or submitting them to the military judge for an *in camera* review, as they were obligated to do, trial counsel removed them. Those records were subsequently "lost."

The Government affirmatively disavowed an intent to introduce OD's forensic interview statements under the residual hearsay exception. However, the Government wanted to introduce some of OD's statements as prior consistent statements, while the Defense sought to introduce some of her statements as prior inconsistent statements. In response to a comment that the presentation of OD's prior statements seemed "confusing," this is because of the different evidentiary standards for prior consistent statements (admissible as substantive evidence), prior inconsistent statements made under oath (also admissible as substantive evidence), and prior

¹ A picture of the master bedroom and adjoining bathroom contradicted OD's claims.

inconsistent statements generally (limited to evaluating credibility of the witness's in-court testimony). This required both parties to create clips to comply with the military judge's order to "surgically excise" OD's forensic interview statements with the "precision of a scalpel, not a meat cleaver." The panel members were able to view these clips in the courtroom during deliberations.

Responding to the comment that the panel members seemed "annoyed" at having to leave the courtroom while the parties were litigating issues, the Rules for Court-Martial require everything said in court to be "on the record," as Congress defines that term (Article 1(14), UCMJ). "Sidebars" are not allowed because there would be no "record" of the discussion in the audio recording or written transcript. The panel members seemed to be very understanding of this dynamic.

Observations and Recommendations

LCDR Dominguez's case is one of the most egregious miscarriages of justice I have seen in my 26+ years of practicing military law. In my opinion, the victim-centric changes over the last two decades have not "improved" military justice. Instead, the responses to Congressional and Presidential demands for "more prosecutions and convictions" have created imbalance because the changes are designed to make it easier for the Government to prosecute and obtain convictions, and harder for defense counsel to defend. As long as changes to military justice favor the Government, at the expense of the accused, there will be more cases like LCDR Dominguez's.² I offer the following observations and recommendations:

1. Confirmation bias was rampant throughout the investigation, due to indoctrination to blindly believe putative victims and not challenge their credibility. A law enforcement agent even went so far as to suggest that OD was credible because "she looks credible" in her forensic interview. "Start by believing the victim" should not have a place in a criminal investigation because it injects bias into what should be an impartial process.

- a. As a result of "believe the victim" dogma, there were no efforts to challenge JB's credibility, even though she was an interested party and gave wildly conflicting statements about what OD allegedly reported to her. In her first forensic interview, OD failed the "test" for evaluating her ability to distinguish between the truth and a lie, yet the forensic interview proceeded. The forensic interviewer failed to follow up with OD on inconsistencies within each of her interviews and inconsistencies between her first and second interviewers. The forensic interviewer also failed to pursue an alternative hypothesis that "abuse" never happened.

- b. Law enforcement agents did not pursue leads that would have exposed JB and OD as being incredible, such as identifying JB's friend who purportedly witnessed OD touching LCDR Dominguez's penis. They also ignored the biggest indicator of innocence—LCDR Dominguez actively supported OD's behavioral health therapy, *and cooperated with JB in finding a therapist for OD when she moved from Hawaii to Texas.*

² This problem is not unique to the military. A wealth of information about the dangers of "victim-centered" investigations and prosecutions can be found at www.prosecutorintegrity.org.

RECOMMENDATION: Law enforcement agents need to be trained to remain objective, and to pursue the facts *wherever they lead*, even when those facts show innocence.

2. Disparity in resources. LCDR Dominguez had to pay for civilian defense counsel, and for the defense's expert consultants travel time for both courts-martial. At his previous court-martial, LCDR Dominguez had *one* military defense counsel, who was replaced by another military defense counsel late in the process. LCDR Dominguez was assigned two military defense counsel for his rehearing because he was returned to Hawaii, but the rehearing was held in Bremerton. Trial counsel got access to JB and OD for both trials; defense counsel did not. Military defense counsel do not receive the same level of paralegal and administrative support that trial counsel receive.

RECOMMENDATION: Military defense counsel should be resourced on par with trial counsel. Consider establishing rules and a fund for "court appointed" civilian defense counsel. Create a rule that defense counsel are entitled to interview *all* Government witnesses, including the complainant and other witnesses with a vested interest in the outcome. Perpetuating the idea that putative victims and those with a vested interest (such as OD and JB in this case) have a "right to refuse" pretrial interviews by the defense counsel harms military justice and creates the risk that defense counsel will be ineffective for its inability to investigate. It is difficult, if not impossible, for defense counsel to make informed decisions about strategy when Government witnesses refuse reasonable defense requests for interviews.

3. The standard for referring cases to trial, probable cause, is too low. The value of an Article 32, UCMJ, hearing has been eviscerated by changing its purpose. It used to provide a realistic assessment of the strengths and weaknesses of the Government's case, including remarks about the believability, or lack thereof, of witnesses, as well as a means of discovery for the defense.

RECOMMENDATION: Restore Article 32, UCMJ to its former purpose, to include being a source of discovery. Raise the bar for referral to whether there is sufficient *admissible* evidence to obtain a conviction beyond a reasonable doubt."³ Consideration should also be given to permitting retired Judge Advocates to serve as Article 32 preliminary hearing officers. Many retired Judge Advocates have a wealth of military justice experience, and could provide valuable insight. Also consider making a recommendation of non-referral binding on the Government.

4. A panel member questioned the military judge as to whether the public would know how the members voted. However, this does not justify continuing non-unanimous verdicts. Concerns about undue influence for disclosing a panel member's vote would only be valid if Congress required unanimous acquittals. After *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), our military justice system is now the *only* American criminal justice system that does not require unanimous verdicts. Consider the following:

³ This Committee addressed this issue in its October 2020 report at pp. 55-57, Finding #96. "The difference between the minimal evidentiary threshold of probable cause and the beyond a reasonable doubt standard needed to obtain a conviction at trial is significant." *Id.* at 56.

- a. Courts-martial panels are now comprised of eight members (except in capital cases);
- b. The risk of convicting an innocent person rises as the size of the jury diminishes. *Ballew v. Georgia*, 435 U.S. 223, 234 (1978);
- c. Non-unanimous verdicts have racist origins. *Ramos*, 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring); *see also United States v. Causey*, 82 M.J. 574, 591 (N-M. Ct. Crim. App. 2022) (Gaston, S.J., concurring), *rev. denied*, 2022 CAAF LEXIS 618 (C.A.A.F. Aug. 26, 2022);
- d. “The active-duty component officer population is less diverse than the eligible civilian population,” and “the officer corps is significantly less racially and ethnically diverse than the enlisted population, for both active and Reserve Components.” Department of Defense Board on Diversity and Inclusion Report: Recommendations to Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military, Executive Summary at viii, available at <https://media.defense.gov/2020/Dec/18/2002554852/-1/-1/0/DOD-DIVERSITY-AND-INCLUSION-FINAL-BOARD-REPORT.PDF> (last accessed Aug. 11, 2022).

As a minority, LCDR Dominguez’s reality was that he, an officer sworn to uphold and defend the Constitution, was denied the protection of a unanimous verdict in a system with less racial diversity, because he is a Servicemember. While he was fortunate to finally be exonerated by a panel of officers, I have many other minority clients who are not. It is antithetical to “justice for all” that the Constitution now provides protection of a unanimous verdict for *everyone except* those who are sworn to uphold and defend it.

RECOMMENDATION: Congress should require unanimous verdicts of guilty to convict Servicemembers, with authorization for one more trial if there is a “hung” panel. If there is not a unanimous verdict after a second trial, the Servicemember must be found not guilty. Consider the use of retirees to serve as panel members to address issues of “undue influence.”

5. The ability of a CCA to reverse a wrongful conviction for factual insufficiency remains vital to the legitimacy of the military justice system, especially in light of the fact that non-unanimous guilty verdicts are still permitted. In my experience, the CCAs do not abuse this authority, and use it as an option of “last resort.”⁴ When the CCAs do set aside convictions for factual insufficiency, they explain their rationale for doing so. *See United States v. Armendariz*, 82 M.J. 712 (N-M. Ct. Crim. App. 2022); *United States v. Gilpin*, 2019 CCA Lexis 515 (N-M. Ct. Crim. App. 30 Dec. 2019) (unpub. op.); *United States v. Dawkins*, 2019 CCA Lexis 386 (N-M. Ct. Crim. App. 4 Oct. 2019) (unpub. op.); *United States v. Wilson*, 2019 CCA Lexis 276 (N-M. Ct. Crim. App. 1 Jul. 2019) (unpub. op.); *United States v. Whisenhunt*, 2019 CCA Lexis 244 (A. Ct. Crim. App. 3 Jun. 2019) (unpub. op.); *United States v. Soto*, 2014 CCA Lexis 681 (A.F. Ct. Crim. App. 16 Sep. 2014)

⁴ We asserted on appeal that the evidence was factually and legally insufficient to support LCDR Dominguez’s convictions. 81 M.J. at 805. However, because the NMCCA found three other legal errors, and cumulative error, the Court set aside his convictions for those reasons and authorized a rehearing. Considering the results of the rehearing, I believe the NMCCA would have been justified in setting aside LCDR Dominguez’s convictions for factual and legal insufficiency.

(unpub. op.). Sometimes, panels, and even military judges, erroneously convict, and therefore, it remains vital for the CCAs to have the ability to correct that erroneous conviction. *See i.e. United States v. Thompson*, 2021 CCA Lexis 641 (A.F. Ct. Crim. App. 29 Nov. 2021) (unpub. op.), *reversed and remanded*, 2022 CAAF Lexis 832 (C.A.A.F. 21 Nov. 2022) (holding the AFCCA erred in its factual sufficiency review in affirming sexual assault conviction).

RECOMMENDATION: The CCAs should continue having authority to set aside convictions for factual insufficiency. Congress has already amended Article 66, UCMJ to require an appellant to specifically identify the deficiencies in the evidence, and to raise the standard to “clear and convincing,” but it will take time to see how the CCAs implement it.

6. Despite his exoneration, LCDR Dominguez is still treated as a pariah by his command. Additionally, members from his first court-martial are still stationed at his command in Hawaii. LCDR Dominguez’s pay and benefits have yet to be restored pursuant to Article 75, UCMJ. He has been left to fend for himself to correct his records to regain the promotion he lost. His reasonable request for a humanitarian transfer to Texas to be with his family has been denied, and he continues to be held in Hawaii, with no meaningful duties commensurate with his rank and experience. This forces LCDR Dominguez to use leave and incur travel expenses to spend time with his family over the holidays. He is a *bona fide* victim of false accusations and a wrongful conviction and incarceration, without a legal remedy to make him whole. LCDR Dominguez is not the only Servicemember who has been wronged by the military justice system. The military has a duty to care for *all* Servicemembers and their dependents.

RECOMMENDATIONS:

a. Issue guidance implementing Article 75, UCMJ to restore exonerated Servicemembers in a timely fashion. This guidance should come from the DOD to establish uniformity across the services. This guidance should include directives to the services’ respective boards of correction of military records to automatically and expeditiously correct exonerated Servicemembers’ records to enable them to receive lost promotions, awards, etc.

b. Authorize expedited transfers for exonerated Servicemembers, in the same manner as sexual assault victims are authorized expedited transfers when they make unrestricted reports of sexual assault.

c. Establish a compensation fund for Servicemembers who succeed in getting their convictions and/or sentence overturned on appeal. Those facing a rehearing have to wait for the results of the rehearing before their backpay can be calculated and paid. Those who obtained civilian employment while on appellate leave have their backpay reduced, and sometimes completely withheld, to prevent “double-dipping.” In the meantime, the lives of these Servicemembers are on hold, but they still must find a way to pay their bills. Compensation funds could be used to bridge the gap. Compensation should be paid to those who served confinement, in addition to “backpay.”

This compensation fund could be similar to dependent transitional compensation.⁵

d. Establish mental health services for exonerated Servicemembers, and a PTSD-related condition that qualifies for VA services and disability compensation. Regarding the need for specialized, reunification therapy to reestablish LCDR Dominguez's relationship with his children, this should be covered by Tricare and/or the VA.

7. Finally, LCDR Dominguez's case could serve as the impetus for establishing a DOD conviction integrity unit. The military should seek to eradicate false accusations, prevent wrongful convictions, and hold false accusers accountable as vigorously as it seeks to eradicate and prevent sexual assault, and to hold offenders accountable.

RECOMMENDATION: Obtain a copy of the audio recording of LCDR Dominguez's rehearing (there is no transcript due to the full acquittal). I would be happy to provide additional information about this case, as well as other cases I have worked on.

Conclusion

I consider it a privilege to have represented LCDR Dominguez during his appeal and his rehearing, and to continue advocating on his behalf, and on behalf of other clients, for meaningful improvements to the military justice system to obtain justice for all. I can be reached at (719) 426-8967 or tamimitchelljustice@gmail.com for any questions or concerns. Thank you.



Tami L. Mitchell

cf: LCDR Manuel Dominguez
Sarah Gonzales

⁵ JB and the children began receiving transitional compensation (TC) for abused dependents after LCDR Dominguez was convicted in February 2020, approximately \$2,000/month for three years. LCDR Dominguez believes they are still receiving TC even though he was acquitted. The committee should investigate whether the family is still receiving TC because if they are, then there is an Anti-Deficiency Act violation. 31 U.S.C. § 1331(a)(1) prohibits federal employees from making expenditures in excess of what Congress appropriated. Pursuant to DEP'T OF DEFENSE INSTRUCTION (DODI) 1342.24, eligibility for TC requires a conviction, which there is not. Furthermore, payments must stop when the conviction is set aside, which occurred on October 22, 2021. DODI 1342.24, para. 3.2.d.(1)(a). Payment should have stopped effective December 1, 2021. *Id.* at para. 3.2.d.(2).

06/07 DEC 22

From: **Sarah Elizabeth Gonzales**

To: Defense Advisory Committee – Investigation, Prosecution, & Defense of Sex Assault in
the Armed Forces (DAC-IPAD)

Subj: **SARAH ELIZABETH GONZALES VICTIM IMPACT STATEMENT TO THE DAC-IPAD**

Dear DAC-IPAD Committee and Staff Members,

My name is Sarah Gonzales. I am the wife of LCDR Manuel Dominguez (Manny). I am writing this letter to you regarding my victimization, at the behest of the US Navy and military justice system, because those in charge chose to believe lies. You are already familiar with the NMCCA's decision for Manny's appeal (81 M.J. 800), as well as the results of his rehearing (FULL ACQUITTAL), so I will not repeat those particular details. My purpose in submitting this letter is so that you, and members of the public, understand that there are a variety of victims that deserve to be treated with dignity and respect. I am one of those "other" victims, as in those victims who are generally ignored in the interests of political correctness and expediency. As my husband, my husband's civilian counsel (Tami Mitchell), and I were not able to get on the committee's agenda for December, I respectfully request that you take the time to read my letter, reflect on my experience, and use this to bring meaningful change. This is my lived experience, my truth, the truth.

I met Manny while we both attended the University of Texas at Austin in the early 2000s. After more than a decade of separation, we reconnected in the fall of 2016, after Manny and his then wife (JB) legally separated and prepared to divorce. In February 2017, JB maliciously filed false accusations of "child sex abuse" against Manny related to their daughter, OD. Knowing that these accusations were ridiculous, false, and retaliatory in nature, Manny and I married in November of 2017. The entirety of our marriage has been lived under the shadow of these fictitious allegations.

Those who are in the Government (specifically US Navy officials) and aware of our situation tend to use the word "unusual" to describe it. I mark this word in quotations because I have come to realize these people use this word as a way to tacitly acknowledge the utter injustice of what happened to me and Manny, while at the same time, avoid responsibility for their complicity in believing the false accusations, without any fact-checking. If something is "unusual," it's not unjust and therefore no one is at "fault". If no one is at fault, no one needs to remedy the wrongdoing that occurred.

The evidence showed that JB was able to fabricate enough information through her manipulation of Manny's own daughter (OD), that the Navy decided to file charges. My mother is an attorney, so I am well aware of the biases that lie within the criminal justice system, so Manny and I quickly pursued outside representation. Living in Hawaii, our choices were few, yet we were able to hire a civilian attorney (who was previously a JAG) for Manny's first court-martial, naturally at our own expense. While Manny had to buy out JB's interest in his TSP account, we were able to use the remainder to pay for legal fees. This marked the first and a long line of financial traumas we incurred as a result of these false accusations. Manny maintained a positive attitude that

since he was factually innocent, that people would see the truth and find him not guilty. I myself, having a better understanding of the legal system, knew that we were in a battle for our lives.

Manny's first court-martial was, by dictionary standards, a farce.[1] Some might call it a "kangaroo court." Regardless of what terms people want to use, Manny's first court-martial was not a legitimate trial. First, the military judge (CAPT Ann Minami) for Manny's first court-martial was not assigned to be a military judge based on her experience. Her lack of experience showed in the rulings she made. Second, the panel member (i.e. jury in the civilian sector) *voir dire* process was ridiculous. The singular person of color was removed due to a personal experience, where a brother of his had gone through a divorce and had been falsely accused of sexual assault by their ex-partner. Several members of the panel had been assigned as SAPR representatives for the Navy, so they were predisposed to believe an alleged victim without question. The panel member who had experienced false accusations before was dismissed, while the SAPR representatives were allowed to remain on the panel and were considered to not have bias. My heart sank in my chest over realizing no justice was going to be done in this trial.

Moving forward to trial testimony, **OD actually recanted her allegations on the stand!** She looked directly at Manny when she testified about this. I know this because I was there, I saw it with my own eyes as I sat behind Manny in the courtroom. I held out hope that the panel members would see the allegations for what they were—false accusations drummed up by a vindictive ex who pressured her daughter to repeat the lies, but who realized she could not lie under oath. But after this, CAPT Minami admitted OD's "forensic interviews" as substantive evidence, without even viewing them. That she admitted the videos as evidence without even viewing them was a complete joke—truth-seeking was not part of this process. This proceeding reminded me of the Salem Witch trials—everyone was ready to burn the witch, convict the man.

I also note that the two Navy JAGs who were detailed as trial counsel were both heavily pregnant and emphasized their pregnancies throughout the trial by leaning back whenever they stood up, doing their best to villainize Manny. They sent a subliminal message to the panel members that if they acquitted him, they would send a message that they were anti-child as well as anti-Government. During the closing argument, trial counsel argued that OD's second interview showed she was an abused child. If that was true, who do you think was the perpetrator of said abuse? It would've been JB, since OD was in her continuous and exclusive custody since the initial allegations in February 2017. Despite all of this, I continued to hold out hope that the truth would set Manny free—I could not imagine the panel coming to a guilty verdict when the alleged victim had recanted on the stand in front of them, under oath. I was wrong.

In early February 2020, about 3 years after JB's initial report, the panel found Manny guilty of 3 offenses, and then sentenced him to 16 years in prison. I could not breathe. A strange noise rang in my ears, and the room seemed to get smaller and brighter. I vaguely recall testifying on Manny's behalf during sentencing. But it didn't matter, because the truth didn't count in this farcical nightmare. I also remember thinking, when the sentence was announced, that Manny and I had made it through a decade apart, so we could do it again. I remember going to the Navy exchange with a list in my hand of what Manny would need in prison. Socks, underwear, toiletry items that did not contain alcohol, lest he would drink it, which was ridiculous. I remember trying not to cry in the store. The night he was sentenced, he was taken away to confinement, that was one of the worst nights of my life. Several family members came to stay with me over the next few weeks although I barely remember any of it. I am sure the committee members are familiar with the effects of trauma on the brain and memory.

After a few days, I received my first phone call from Manny and began the process of getting cleared to visit him in prison on Ford Island, Hawaii. I don't suppose any of you have ever visited a loved one in prison before. I certainly had not. This would be the first of three prisons Manny would be sent to throughout his wrongful incarceration. Manny was transferred from Hawaii to Miramar, California in March of 2020, during the height of the global COVID-19 pandemic. As a result, I was pretty much on my own.

The one instance where I felt supported during this time frame, and one of few bright spots in this entire story, was Captain Patton. He really supported me in getting myself, our belongings, and our three dogs relocated to Texas. I was forced to quit my job as a second-grade teacher in Hawaii in order to relocate to Texas. I had never relocated as a military spouse before and had no idea how to process anything. And going back to the effects of trauma on the brain, I really wasn't able to think either. I know that Captain Patton did most of the work and for that I am truly thankful.

I was told that I could apply for relief at Manny's command to receive a few additional months of his salary while I relocated to Texas to establish a new residence and find a new job. I wrote my letter to the command, explaining the situation and asking for relief. I thought that since I had nothing to do with any of this, why would they punish me? Again, I was wrong. I was denied this relief and told to move home on my own, with no income and, as explained to me, no health insurance, in the middle of a global pandemic. I was diagnosed with adjustment disorder, generalized anxiety and depression, as a result of the years long investigation that occurred leading up to the first court martial. Suddenly my insurance had been ripped from me, and I was no longer able to see my therapist, attend group therapy sessions, or receive necessary medication. Of all the ways I have been victimized by the US Navy, this is one that makes me the angriest. Another person in my shoes might have suicided. But I was too angry for that, and I had a husband to think about. I had to survive so that I could continue advocating on Manny's, and my, behalf. I also had an appeal to win and another court martial to endure, although I didn't know it at the time.

I returned to Texas in May 2020 and began a 2-week quarantine at my parents' house near Waco, TX. Please note: this was before vaccines were available. I was fortunate to find a job as an educator in July 2020, in Austin, TX. I began searching for an attorney to oversee Manny's appeal, even though I didn't know how to pay for those services, as there was no income from Manny's employment (or lack thereof), and his credit was ruined. We had to rely on my parents to support our endeavors. After talking to several different attorneys, I found Tami. For the first time, I felt someone was actually listening to me, even though Tami was cautious in her initial response, since she hadn't received the record of the trial. When she did review it, after reading about 2000 pages of transcript, Tami sounded just as angry and appalled as I felt. She confirmed what we believed all along as an injustice—a military judge who abused her power, trial counsel who crossed the line of ethical boundaries, a host of Navy authorities willing to believe a series of lies, and a vindictive ex willing to lie and manipulate a child. That is what supposedly counted for truth in this post-Me Too world.

We hired Tami to lead the way with the appeal. Our experience with the military did not instill any level of trust, so relying solely on military-appointed appellate defense counsel was not an option. Those familiar with the appeal process know that it takes around 18 months, which equals 78 weeks, 546 days, and 13,104 minutes. It's multiple birthdays, holidays, weekends, etc. where my only contact with Manny would be through a monitored phone call with a maximum of 30 minutes duration. Even though it took a long time, Tami assured us it was because of the numerous issues that needed to be raised due to the complexity or "uniqueness" of Manny's case. If you were to read the briefs that were submitted, you would agree. It also took a long time due to COVID-19, when attorneys had to rotate being in the office, and as I understand, telework from home was less than optimal for military appellate counsel and judges.

While Manny and I endured the appellate process, I was limited to supporting my husband via phone; I couldn't visit him in person due to the pandemic. Can you understand how hard it is to listen to your spouse trying to stay positive while he's in prison for something that he didn't do? Can you understand how hard it is to listen to your spouse describe how guards verbally abuse him and other inmates, and abused their authority by "searching" him in what would normally be considered a "sexual assault" in the military? Can you imagine your spouse describing the food and the activities which he does to pass time while he waits for confirmation of his innocence? And on top of this, dealing with a COVID-19 pandemic, which didn't permit visitors, and greatly limited phone calls. Additionally, I don't think people comprehend the cost of maintaining communication with Manny. I was able to set up a phone account that allowed him to call me. But every time I added money to his account I was charged \$4.95 out of whatever amount up to \$50 that I put in. Each phone call had a connection fee and then a fee per minute that was paid after that. Each month I spent on average \$250 talking on the phone to Manny. The farce continued.

We held out hope when the NMCCA granted our request for oral argument at the NMCCA at the Washington Navy Yard, D.C. Manny would obviously not be allowed to attend. My father and I purchased plane tickets, and a hotel reservation, with our own funds in order to watch oral arguments take place. While my father was able to attend, I was not, because a thunderstorm left me stranded in Dallas. On the other hand, JB and OD were flown to watch the oral arguments on the government's budget, as well as OD's victim legal counsel. One would think that, if a child was actually victimized, the mother would not permit her child to attend oral argument for an appeal, because attending oral argument would expose the child to further trauma. So why did JB attend the oral argument with OD? I believe she sought information about the case to "adjust" testimony, and because JB wanted to blame Manny for OD's suffering. But again, this was all at Government expense because Government officials considered them victims, while I was not.

During the appeals process, Manny was transferred to Fort Leavenworth, Kansas. In a way, this was a blessing, as the staff and facilities at Fort Leavenworth were far superior and professional to those at Miramar. A vaccine for COVID was authorized and I was able to make plans to visit Manny in person for the first time in over a year. In total, I traveled to Kansas from Texas four times, all at my own cost. The last time I visited Manny at Leavenworth was November of 2021, after the NMCCA released its opinion concluding that Manny's convictions and sentence had to be set aside. Yet, Manny remained in prison.

I can't accurately express in words my mindset during the months of November and December 2021 as we tried to get Manny released from prison. I was exhausted yet energized and confused. Nobody could give me a concrete answer as to when Manny would be released or where he would go upon his release. Tami and military appellate defense counsel inquired several times, but officials at the NMCCA weren't providing answers. No JAGs in Hawaii or at Leavenworth were providing answers either. The command in Hawaii was using the Pearl Harbor fuel-water crisis as an excuse to avoid dealing with Manny. Oddly enough, another inmate at Leavenworth suggested that Manny sue in federal district court for habeas corpus. That is exactly what he did. A falsely accused and convicted man sues the US Navy for his own release; sounds like a farce to me.

Manny sued the US Navy in the Federal District Court, and the court ordered the Navy to show cause why he shouldn't be released. This was about 7-10 days before Christmas in 2021, more than 22 months after Manny's initial conviction and incarceration. Several questions remained. Where would he be sent? We thought surely he would come home to Texas—that made sense on a financial and emotional level, as well as considering that Hawaii was still much more restrictive than the rest of the country in admitting people during

the global pandemic that was still raging. At this point in my victimization, I somehow remained optimistic that the Navy would take an action that made common sense. But again, my optimism was misplaced. We later discovered that Navy officials bowed to JB's demand to keep Manny incarcerated, and then when they explained they could not justify his continued confinement, JB demanded that he be returned to Hawaii.

I want you, the committee members and general public, to envision what happened at this point. Finally, Manny was to be released from wrongful imprisonment. Even though he was being returned to Hawaii, as opposed to Texas, he was being released from imprisonment. But how do you think the process of his release played out in real time?

Picture prison officials driving Manny to the Kansas City airport, only to claim they didn't have the correct documentation and had to return to Leavenworth. The commander of the prison issued Manny a debarment letter, claiming he couldn't return to Leavenworth based on his "conviction," which technically didn't exist. Prison officials claimed no hotel facilities were available for Manny to stay in overnight while he waited for his early-morning flight to Honolulu. Really, in ALL OF KANSAS CITY there were no hotels available for one single night? Instead, prison officials told Manny he had a "choice"—return to Leavenworth for the evening or sleep on the Kansas City airport floor. Not really a choice if you ask me. Manny told them to leave him at the airport overnight.

Imagine Manny carrying the entirety of his belongings in a cardboard produce box, given to him from the prison kitchen. Imagine him wearing a shirt too small for his frame and pants two sizes too big, his hair unkempt because it had not been cut in several months. No official identification, no cell phone, and only \$30 in his pocket. Picture Manny relying on the kindness of two strangers, one at each airport during his travel, to use a cell phone to call me with status updates on his release. We don't have to imagine it, because we lived it.

I flew to Honolulu, HI, again with my own funds that we couldn't really afford, to meet him upon his arrival. Although Manny and I were both vaccinated, he needed to be able to fill out an online entry form to enter the island state of Hawaii, as they were much more restrictive than the rest of the United States. If I had not met him in person in Hawaii, he would've been without a cell phone and without an identification card, and therefore would not have been allowed to even leave the airport. We were finally met by a representative of the command at baggage claim as I was waiting to pick up my suitcases, one of which contained clothes and shoes for Manny. I remember being excited when I was able to give him his wedding ring back.

A few days passed, and we were informed of the command's intention to retry him on the three specifications Manny was initially convicted of. While this was the command's legal right, I was still angry. Did they think we had just given up on proving his innocence? Did the Navy hope we were emotionally and financially drained to the point where we would just give in this time? For once, they were wrong.

I had to return to Texas, and Manny made plans to take leave to spend time with me in Austin over the holidays. You would think the command would empathize and support that endeavor. Instead, what happened was a barrage of texts, phone calls, and emails, between Manny, me, Tami, the command's sponsor and the command's SJA over Manny's plans for leave and his intended route, which necessarily included a layover in Dallas. JB and the children lived in Arlington, TX. Despite the fact that Manny was issued a no-contact order with JB and both children, and his stated intention to follow the no-contact order, there was a

flurry of questions about his intentions during his layover, the scheduling of Manny's travel, and whether a layover in Dallas was necessary. All because of his angry, vindictive ex-wife JB. Again, really? This was pure harassment.

Since Manny's release from confinement, almost a year now, Manny and I have been forced to live over **3000 miles** apart, separated by people who don't care what we have gone through to get to this point. In June we faced the second court-martial. At least this time our optimism had some support. We retained Tami to spearhead Manny's defense; she obtained OD's medical records, which Manny's prior civilian counsel could have done, but didn't. She was also able to secure an expert in forensic psychology who was capable of identifying the multiple deficiencies in OD's video interviews. Manny was assigned two military defense counsel, LT Sarah DiMarzo (Hawaii) and LCDR Benjamin Adams (Bremerton, WA). I would note that this was unusual because Manny's court-martial was to be held in Bremerton, WA, instead of Hawaii. Manny's case was so complex it demanded the attention of at least 3 attorneys.

I noticed there was more care in detailing the Judge. While Manny was forced to appear before CAPT Minami for his arraignment, she had to recuse herself from presiding over the rehearing, and another, experienced judge, CAPT Angela Tang, was detailed. Although she issued some rulings we disagreed with, her rulings were fair, and based on an actual review of the evidence as well as legal precedent.

There were several issues with panel member selection, including the fact that half of the members originally detailed were junior in rank (a violation of his rights per the UCMJ). But at least the members involved in the rehearing weren't SAPR representatives, there was minority representation, and several medical personnel, which was important given that OD had many medical problems that were relevant to the charges. Manny's request for reassignment to Austin, or alternatively Bremerton, was denied. Reasonable requests for discovery, including OD's records from a "child advocacy" center in Texas, were being denied by the Government, resulting in litigation at Bremerton in May. Keep in mind that OD disclosed during her second videoed interview that she learned from her therapist at the child advocacy center that what Manny did to her was "abusing," even though most parents would call wiping your 4-year-old child after going to the bathroom normal parenting duties. Trial counsel had previously received these records, but culled them from the materials disclosed to the defense, and subsequently "lost" them. The Navy gave JB her own VLC, even though she didn't qualify because she wasn't a named victim. Why did the Navy spend its resources supporting JB and her (and OD's) lies, while denying me my basic needs and support?

I spent over 2 weeks of leave from my work as an educator attending hearings and meetings related to Manny's rehearing. My parents, Manny's mother, brother and uncle, and our close friends all attended the second trial. So did a few representatives from this committee. Because I was needed as a witness for the merits this time, due to new fabricated information from JB and OD, I was unable to watch the trial as I had done the first time. It was so nerve wracking to not know what was going on. And I had to testify, in front of strangers, about Manny's sexual preferences to rebut JB's false claims. Do you understand how embarrassing that is? I suspect you do, but only in the context of an alleged victim, *i.e.* the complainant (OD), and her mother (JB). And keep in mind that JB didn't have any problems vilifying Manny and his sexual "preferences" if she thought it would benefit the case. Anyone reviewing JB's statements, contained in the NCIS investigative file, would see that.

Luckily this panel saw through the lies, this judge allowed in the proper evidence and the correct verdict was rendered. Not Guilty. When the verdict was announced it felt like the air was gone from the courthouse. I cried out. My dad cried tears of relief. He never cries. Finally, after 5 years and 5 months (65 months, 260 weeks, or 1,950 days) since the original allegations, Manny and I were going to be free of all this...right?

I'm sure you've seen the pattern by now. But no, we are still not free. To this day Manny and I continue to live separately. It's been 5 months since his full acquittal of all charges. The Navy continues to victimize me each day we live apart. Manny requested a humanitarian transfer to return to Texas. It was denied without explanation, though I believe I know who is behind this decision. No orders have been issued that would allow me to move back to Hawaii at Government expense. Even if the Navy did issue orders for me to move to Hawaii, it would be impossible for me to do so. I can't just quit my job and relocate myself, our belongings, and our dogs to Hawaii, for what would be a short period of time.

Manny and I continue to fly back-and-forth across the globe using our own money in order to see each other. The average flight from Austin to Honolulu is around \$2000 roundtrip. We continue to celebrate holidays and birthdays and special occasions separately. I continue to go to bed each night and wake up each morning separated from my husband, Manny. We continue to receive no answer from the Navy, as far as when Manny's back-pay and allowances will be paid. The Navy has wrongly denied us the family separation allowance we are entitled to receive. So, while we run separate households, financially, we are not supported in any way to do so, despite both of us being fully employed. The interest rates on the credit cards that I have been using to pay for attorneys and for travel have gotten so bad due to inflation that I have had to send them to a debt collection agency. Manny's credit score was ruined as a result of these false accusations, and now my credit score suffers as well. As a result, neither of us is eligible for loans or financial aid from a bank.

We requested financial aid from several places. One of those places was the Navy Marine Corps Relief Society. When Manny was incarcerated, he was unable to pay child support because he was not receiving an income. However, the state of Texas does not care if you're unemployed and in prison for something that you did not do. Upon release from prison Manny owed over \$10,000 in child support. We requested a grant to pay the child support and were denied. Adding insult to injury, the Navy paid JB monthly "transitional compensation" based on Manny's wrongful conviction, which approximated his monthly support obligation. To the best of our knowledge and belief, the Navy is STILL paying this amount, despite the fact that they no longer qualify because his convictions were set aside on appeal and he has no conviction. The irony that the Navy has no problem financially supporting known liars, but won't financially support the known victim in this case—Manny. But that's just what the Navy is doing. It wasn't until the command wrote a letter on our behalf that Manny and I were issued a no-interest loan to cover the child support that was continuously accruing interest.

While our net monthly income is close to \$12,000 we continue to live paycheck to paycheck. In total we have debts over \$180,000. Almost all of this debt is due to attorney fees over almost 6 years as well as travel to see each other or attend legal matters during Manny's incarceration, or now while the Navy wrongly forces us to live apart.

There is no happy ending to this story, our story. I leave you with some questions that need answers. What resources does this committee have for victims like me? What support can you offer me or my family? Do you think we even deserve support, or are you of the opinion that's so commonly heard in JAG offices around the country: That if someone is charged with something, they probably did it. Do you think that only 2-5% of sexual assault accusations are false, or do you think those statistics are higher? Even if you believe only 2-5% accusations are false, why would you tolerate *any* percentage of false accusations? I recognize the military

has some adjusting to do in terms of how it oversees sexual assault and sex crimes. I know many victims have gone unheard and underserved for far too long. However, if your system of justice creates *more* victims, how is that just? Unfortunately, I know I won't be the last spouse or family member of a wrongfully accused and imprisoned military member. I do hope that knowing my story will start not just a conversation of how to address the injustice to those wrongly accused and convicted, but also lead to meaningful change to prevent future Servicemembers and their family members from suffering the same way Manny and I have suffered.

Respectfully Submitted,

Sarah Gonzales

Sarah E. Gonzales

[1] "A light dramatic work, in which highly improbable plot situations, [and] exaggerated characters . . . are used; a **ludicrous, empty show, a mockery**. www.thefreedictionary.com/farce. "**An empty or patently ridiculous act, proceeding, or situation.**" www.merriam-webster.com/dictionary/farce.

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

**Meeting Materials
"Day Of"**

December 6 & 7, 2022

**Defense Advisory Committee on Investigation, Prosecution, and Defense of
Sexual Assault in the Armed Forces (DAC-IPAD)
25th Public Meeting**

**December 6 & 7, 2022
Public Meeting Read-Ahead Materials**

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

PUBLIC MEETING AGENDA

**December 6-7, 2022
Ritz-Carlton, Pentagon City, Virginia**

Tuesday, December 6, 2022 (Day 1)

8:30 a.m. – 8:50 a.m. Administrative Session (*Closed*) (Plaza B)

Colonel Jeff A. Bovarnick, Director, DAC-IPAD

9:00 a.m. - 9:10 a.m. Welcome and Introduction to Public Meeting (Grand Ballroom)

*Mr. Dwight Sullivan, Designated Federal Officer, Opens Meeting
Honorable Karla N. Smith, Chair, Opening Remarks*

**9:10 a.m. – 10:10 a.m. Uniform Code of Military Justice Panel Selection
(60 minutes)**

*Colonel Christopher Kennebeck, Chief, Criminal Law, OTJAG, U.S. Army
Captain Andrew House, SJA, U.S. Naval Academy, U.S. Navy
Colonel Shannon Sherwin, SJA, Air Education & Training Command,
U.S. Air Force
Colonel Christopher G. Tolar, Deputy SJA to the Commandant of the
Marine Corps, U.S. Marine Corps
Commander Kismet Wunder, Legal Services Command, U.S. Coast Guard*

10:10 a.m. – 10:15 a.m. Break

**10:15 a.m. – 11:15 a.m. Survivors United
(60 minutes)**

*Ms. Adrian Perry, Victim Advocate, Survivors United
Dr. Breck Perry, Victim Advocate, Survivors United
Mr. Ryan Guilds, Special Victims' Counsel, Arnold & Porter LLP*

11:15 a.m. – 11:30 a.m. Break

**11:30 a.m. – 12:30 p.m. Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Panel
(60 minutes)**

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

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

PUBLIC MEETING AGENDA

12:30 p.m. – 1:30 p.m. Lunch

1:30 p.m. – 3:00 p.m. Offices of Special Trial Counsel Panel
(60 minutes)

Honorable Carrie F. Ricci, General Counsel, Department of the Army

Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army

Honorable John P. “Sean” Coffey, General Counsel, Department of the Navy

Vice Admiral Darse E. “Del” Crandall, Jr., Judge Advocate General, U.S. Navy

*Major General David J. Bligh, Staff Judge Advocate to the Commandant,
U.S. Marine Corps*

Honorable Peter J. Beshar, General Counsel, Department of the Air Force

*Lieutenant General Charles L. Plummer, The Judge Advocate General,
U.S. Air Force*

**3:00 p.m. – 3:30 p.m. DAC-IPAD and U.S. Government Accountability Office (GAO) Racial
Disparity Reports Discussion**
(30 minutes)

Mr. Chuck Mason, DAC-IPAD Staff Attorney

Ms. Nalini Gupta, DAC-IPAD Staff Attorney

3:30 p.m. – 3:45 p.m. Break

3:45 p.m. – 4:00 p.m. Preview Next Day Meeting

4:00 p.m. – 4:15 p.m. Public Comment
(15 minutes)

Mr. Christopher Hines

4:15 p.m. Public Meeting Adjourned

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

PUBLIC MEETING AGENDA

Wednesday, December 7, 2022 (Day 2)

- 8:55 a.m. – 9:00 a.m.** **Welcome and Overview of Day** (*Grand Ballroom*)
- 9:00 a.m. – 9:30 a.m.** **Case Review Subcommittee Update**
(30 minutes)

Ms. Audrey Critchley, DAC-IPAD Staff Attorney
Ms. Kate Tagert, DAC-IPAD Staff Attorney
- 9:30 a.m. – 10:00 a.m.** **Special Projects Subcommittee Update**
(30 minutes)

Ms. Meghan Peters, DAC-IPAD Staff Attorney
Ms. Eleanor Magers Vuono, DAC-IPAD Staff Attorney
- 10:00 a.m. – 10:15 a.m.** **Comments by The Honorable Caroline D. Krass**
General Counsel, DoD
- 10:15 a.m. – 10:45 a.m.** **Policy Subcommittee Update**
(30 minutes)

Ms. Terri Saunders, DAC-IPAD Staff Attorney
Ms. Theresa Gallagher, DAC-IPAD Staff Attorney
- 10:45 a.m. – 10:55 a.m.** **Break**
- 10:55 a.m. – 11:55 a.m.** **Deliberations**
(60 minutes)

March 2023 Report

Colonel Jeff A. Bovarnick, Director, DAC-IPAD
- 11:55 a.m. – 12:10 p.m.** **Meeting Wrap-up; Preview Next Meeting**
(15 minutes)
- 12:10 p.m.** **Public Meeting Adjourned**

**Uniform Code of Military Justice Panel Selection
Presenter Biographies**

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

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

Captain Andrew House, Staff Judge Advocate, U.S. Naval Academy, U.S. Navy

Captain Andrew R. House, JAGC, USN, currently serves as the Staff Judge Advocate for the United States Naval Academy. He graduated from the University of North Carolina at Chapel Hill in 1993 with a bachelor of arts degree in political science. He received his juris doctor degree from UNC-Chapel Hill in 1997. He was commissioned as an Ensign in the United States Navy JAG Corps in 1997. Prior to commissioning, he served as an enlisted soldier in the U.S. Army and the North Carolina National Guard. Following commissioning and completion of Naval Justice School, CAPT House reported to Naval Legal Service Office Central, Branch Office Corpus Christi for service as both Legal Assistance and Defense Attorney from January 1998 to March 2000. In March 2000, he reported to Pearl Harbor, Hawaii for duty as Assistant Staff Judge Advocate for Commander, Navy Region Hawaii. In March 2002, he transferred to Brunswick, Maine as Station Judge Advocate for Naval Air Station Brunswick. This tour was followed by assignment as Officer in Charge of Naval Legal Service Office Pacific, Detachment Guam in October 2003. In May 2005, CAPT House transferred to USS Enterprise (CVN 65) for duty as Command Judge Advocate.

After completion of a seven-month combat deployment, he reported to Commander, Naval Air Force Atlantic in February 2007 for duty as Deputy Force Judge Advocate. In July 2008, he assumed duty as Executive Officer for Naval Legal Service Office Central in Pensacola, Florida, and then served as Commanding Officer of NLSO Central from March 2009 until July 2011. He served as Deputy Assistant Judge Advocate General for Legal Assistance (Division Director, Code 16) from August 2011 through September 2013. He then served as the inaugural Deputy Chief of Staff for the Navy Victims' Legal Counsel Program from October 2013 until July 2015. He then served as the Staff Judge Advocate for Navy Region Mid-Atlantic in Norfolk, VA from July 2015 to August 2016. This was followed by a tour as the Division Director for the Navy-Marine Corps Appellate Defense Division (Code 45) in Washington, D.C. from August 2016 to January 2019. Prior to assuming his current duties, he served as the Commanding Officer of Defense Service Office North onboard the Washington Navy Yard from January 2019 to June 2021.

Colonel Christopher G. Tolar, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, U.S. Marine Corps

Colonel Tolar currently serves as Deputy Staff Judge Advocate to the Commandant of the Marine Corps and Deputy Director, Judge Advocate Division, Headquarters, U.S. Marine Corps (HQMC).

A native of New Orleans, Colonel Tolar earned a Bachelor of Arts in Political Science from the University of New Orleans in 1993, a Juris Doctor from Loyola University College of Law in 1997, and a Master of Laws from The Judge Advocate General's Legal Center and School in 2006. He completed the Air War College curriculum in 2015, and was a fellow in the Massachusetts Institute of Technology's Seminar XXI national security and foreign policy program.

Commissioned as a second lieutenant in 1995, he has served in a variety of assignments, including Staff Judge Advocate, U.S. Marine Corps Forces, Pacific; Principal Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff; Deputy Staff Judge Advocate, II Marine Expeditionary Force; and Staff Judge Advocate, 13th Marine Expeditionary Unit. He deployed with 13th MEU in 2007 in support of Operation IRAQI FREEDOM, and in 2009 with the 13th MEU-USS BOXER Amphibious Ready Group in support of operations in the INDOPACOM, CENTCOM, and AFRICOM areas of responsibility.

In addition to service in support of operational forces, Colonel Tolar has served as Branch Head, International and Operational Law, HQMC; Staff Judge Advocate, Marine Corps Recruiting Command; as an attorney in the Military Justice and Judge Advocate Support Branches, HQMC; and as defense counsel.

Colonel Shannon Sherwin, Staff Judge Advocate, Air Education and Training Command, U.S. Air Force

Colonel Shannon L. Sherwin is the Staff Judge Advocate, Headquarters Air Education and Training Command (AETC), Joint Base San Antonio-Randolph, TX. AETC is responsible for the recruiting, training, and education of Air Force personnel. The Office of the Staff Judge Advocate establishes policy oversight for 14 legal offices, including six general court-martial jurisdictions, which provide legal services to over 62,000 active duty, Reserve, and Guard personnel.

Col Sherwin received a direct commission as an Air Force judge advocate in November 1997 and entered active duty in January 1998. She has served as a headquarter director; an installation, deployed, and Numbered Air Force staff judge advocate; an installation and Major Command deputy staff judge advocate; legal advisor to the Combat Operations Division at the Combined Air and Space Operations Center and legal advisor to the 603rd Air and Space Operations Center. She is admitted to practice law before the United States Supreme Court, United States Court of Appeals for the Armed Forces, and the Supreme Court of the State of Colorado. Prior to her current position, Col Sherwin was the Director and Chief Information Officer, Legal Information Services Directorate, Headquarters Air Force, Maxwell, Air Force Base Alabama.

She received her Juris Doctor from the University of Denver College of Law and a Masters of Law, Military Law w/ International Law Specialty from TJAGLCS.

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

Commander Kismet R. Wunder currently serves as the Executive Officer for the Legal Service Command in Norfolk, Virginia. He is responsible for the delivery of the full spectrum of legal services to more than 65 Mission Support Commands and military justice and court-martial support for the entire Coast Guard.

Prior to this assignment, he served as the Deputy Staff Judge Advocate for the Ninth Coast Guard District in Cleveland, Ohio and was a collateral duty Military Judge. CDR Wunder's prior Coast Guard tours include: Health, Safety and Work-Life (HSWL) Regional Practice Manager and the Base Cleveland HSWL Department Head from July 2012 to July 2016, Staff attorney for the Fifth Coast Guard District from July 2010 to July 2012, and in the Military Justice Division of the Maintenance and Logistics Command Atlantic/Legal Service Command from May 2008 to July 2010.

Commander Wunder received his commission from the University of Dayton Army ROTC program in 1997. He earned his Juris Doctor from the Cleveland-Marshall College of Law in 2000. He is licensed to practice law in the State of Ohio. He served on active duty as an Army Judge Advocate from 2001-2005 and is a veteran of Operations Enduring and Iraqi Freedom. In 2005, Commander Wunder left military service and entered private practice, where his focus was business litigation, contract disputes, and employment law. In 2008, Commander Wunder joined the Coast Guard as a Direct Commission Lawyer.

DAC-IPAD Proposed Questions for SJA Panel Selection Panel

Training

1. What training do SJAs and convening authorities receive about the panel selection process? Who provides the training? Do Special and General Courts-Martial convening authorities receive the same training?
2. Does a command member nominating potential panel members receive any training on the panel selection process? If so, please describe the training, who provides it, and when the training is provided.

Consideration of race and gender in nominations and selections

3. If an SJA or convening authority determines that a slate of members available for selection is racially imbalanced, what are the SJA/CA's options to ensure the selected panel is drawn from a racially representative population of eligible members?
4. What can an SJA do to ensure race and gender are factors for inclusion in the panel selection process?
5. What can an SJA do to ensure race and gender factors are not excluding in the panel selection process?

Standing Panels

6. Does your Service have standing panels? Why or why not? If so, what is the typical length of time for a panel?

Nominating potential panel members

7. What criteria is used to develop the pool of potential panel members (geographic location, assignment, etc.)? Who establishes this criteria?
8. Is a selective nomination process necessary in your Service? Why or why not?
9. Could a random selection process from the designated pool of available members be used to develop panel member nominees? What are the likely effects of randomizing nominee selection?
10. Who nominates potential panel members? Grade/position.
11. Who generally provides legal advice to the command member(s) nominating potential panel members? What type of advice is provided?
12. What information about a potential panel member is available to the command member(s) nominating potential panel members?

Convening Authority Panel Member Selection

13. What advice does the SJA provide to the Convening Authority on selecting panel members, in addition to the selection memorandum?

14. Are questionnaires completed by the panel nominees prior to CA selection?

15. Does a CA review completed questionnaires before selecting panel members?

Delegated Authority

16. What authority is normally delegated to the SJA? Excusals, etc.

17. What limitations, if any, are placed on the discretionary exercise of delegated authority?

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or as counsel in the same case.

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

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

Air Force
Pretrial/Panel Selection Materials



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

(DATE)

MEMORANDUM FOR (GCMCA)

FROM: (SJA)

SUBJECT: SAMPLE - Pretrial Advice—*U.S. v. (MEMBER), (UNIT)*

1. (MEMBER), (UNIT), was charged with (X) charge and (X) specification(s) of (offense) in violation of Article (X), Uniform Code of Military Justice (UCMJ). The charge was preferred on (DATE). The preliminary hearing under Article 32, UCMJ, was held on (DATE) (Attachment 2). On (DATE), the Preliminary Hearing Officer (PHO) submitted his report. The PHO found probable cause to believe the accused committed the charge and its specification(s) and recommended trial by General Court-Martial. On (DATE), the (SPCMCA) forwarded the charge and its specifications with a recommendation for trial by General Court-Martial (GCM).

2. Pursuant to R.C.M. 406 and Article 34, UCMJ, I provide you the following advice:

a. The charge and specifications each allege offenses under the UCMJ.

b. There is probable cause to believe the accused committed the offenses in the charge and specifications.

c. The accused is on active duty in the United States Air Force and was on active duty at the time of the alleged offenses. I am satisfied a court-martial would have jurisdiction over the accused and over the charge and its specifications.

3. I recommend you refer the charge and specifications to trial by GCM.

4. If you determine referral to trial by GCM is appropriate, I recommend you do so by selecting at least 16 court-martial members on the proposed 1st Indorsement (Attachment 1). In accordance with Article 25, UCMJ, members detailed to a court-martial shall be those persons who you determine are best qualified by reason of their age, education, training, experience, length of service, and judicial temperament. Neither rank, race, ethnicity, sexual orientation, AFSC, duty position, nor any other factor may be used for the deliberate or systematic exclusion of qualified persons for court-martial membership. Your selection of members is not limited to the individuals listed on Attachment 1; you may select any eligible member in your command, or in another command with concurrence of the commander concerned, not junior in grade to the accused. You may also require additional nominees be submitted for your consideration.

5. Pursuant to R.C.M. 912A, you may authorize the military judge to impanel alternate members. You may either designate a specific number of alternates or specify that alternates may be impaneled only if excess members remain after the exercise of all challenges. Please

indicate on the 1st Indorsement whether you authorize the military judge to impanel alternate members, and, if so, whether you designate a specific number of alternates. I recommend you not authorize the military judge to impanel alternate members.

(NAME), (RANK), USAF
Staff Judge Advocate

2 Attachments:

1. GCMCA 1st Indorsement
2. Article 32 Report

1st Ind to Pretrial Advice, *United States v. (MEMBER), (UNIT)*

From: (GCMCA)

To: (GCMCA/JA)

1. Direction of the Convening Authority: I reviewed the charge sheet, Preliminary Hearing Officer's report and all evidence associated with this case, and considered the advice of my Staff Judge Advocate in the above-named case. I approve the recommendation by the Staff Judge Advocate and direct the charge and specifications be referred to trial by general court-martial.

2. By reason of their age, education, training, experience, length of service, and judicial temperament, under Article 25, UCMJ, I hereby select the following individuals to serve as members in the general court-martial of *U.S. v. (MEMBER), (SSN)*. Selection is made by my placement of a mark in one of the spaces next to the selectees.

	<u>NAME</u>	<u>UNIT</u>	<u>MAJCOM</u>
_____	COL XXXXXXXX	90 MSFS	AFGSC
_____	COL XXXXXXXX	321 MS	AFGSC
_____	LT COL XXXXXXXX	319 MS	AFGSC
_____	LT COL XXXXXXXX	90 MW	AFGSC
_____	LT COL XXXXXXXX	90 CONS	AFGSC
_____	MAJ XXXXXXXX	90 CPTS	AFGSC
_____	MAJ XXXXXXXX	90 MUNS	AFGSC
_____	MAJ XXXXXXXX	90 OMRS	AFGSC
_____	MAJ XXXXXXXX	890 MSFS	AFGSC
_____	CAPT XXXXXXXX	320 MS	AFGSC
_____	CAPT XXXXXXXX	90 OSS	AFGSC
_____	CAPT XXXXXXXX	320 MS	AFGSC
_____	CAPT XXXXXXXX	90 CS	AFGSC
_____	CAPT XXXXXXXX	90 OSS	AFGSC
_____	1ST LT XXXXXXXX	90 MMXS	AFGSC
_____	1ST LT XXXXXXXX	319 MS	AFGSC
_____	1ST LT XXXXXXXX	90 CES	AFGSC
_____	1ST LT XXXXXXXX	319 MS	AFGSC
_____	2ND LT XXXXXXXX	90 SFS	AFGSC
_____	2ND LT XXXXXXXX	321 MS	AFGSC
_____	2ND LT XXXXXXXX	320 MS	AFGSC
_____	2ND LT XXXXXXXX	90 FSS	AFGSC
_____	_____	_____	_____
_____	_____	_____	_____

In accordance with R.C.M. 912A:

_____ I authorize the military judge to impanel _____ alternate members.

_____ I authorize the military judge to impanel alternate members only if, after the exercise of challenges, excess members remain.

_____ Alternate members are not authorized.

3. Prepare an order effecting the appointment of the above-named selectees.

(NAME)
(RANK), [(USAF)(USSF)]
Commander

**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, (GCMCA) (MAJCOM/FLDCOM)
(BASE), (STATE) (ZIP CODE)**

SPECIAL ORDER
A-(X)

(DATE)

Pursuant to authority contained in Special Order G-20-001, Department of the Air Force, dated 5 December 2019, a general court-martial is hereby convened. It may proceed at (BASE), (STATE), to try such persons as may be properly brought before it. The court will be constituted as follows:

MEMBERS	UNIT	MAJCOM	BASE
COL XXXXXX	321 MS	AFGSC	F.E. WARREN AFB
LT COL XXXXXX	319 MS	AFGSC	F.E. WARREN AFB
LT COL XXXXXX	90 MW	AFGSC	F.E. WARREN AFB
MAJ XXXXXX	90 MUNS	AFGSC	F.E. WARREN AFB
MAJ XXXXXX	90 OMRS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	320 MS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	320 MS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	90 CS	AFGSC	F.E. WARREN AFB
CAPT XXXXXX	90 OSS	AFGSC	F.E. WARREN AFB
1ST LT XXXXXX	319 MS	AFGSC	F.E. WARREN AFB
1ST LT XXXXXX	90 CES	AFGSC	F.E. WARREN AFB
1ST LT XXXXXX	319 MS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	90 SFS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	321 MS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	320 MS	AFGSC	F.E. WARREN AFB
2ND LT XXXXXX	90 FSS	AFGSC	F.E. WARREN AFB

The military judge is not authorized to impanel alternate members.

(NAME)
(RANK), [(USAF)(USSF)]
Commander

FOR THE COMMANDER

(NAME), Colonel, USAF
Staff Judge Advocate

Distribution:
1 - Ea Individual
1 - Ea Org
1 - (INSTALLATION LEGAL OFFICE)

SO A-(X)

MEMORANDUM FOR (SJA for GCMCA)

FROM: (GCMCA)

SUBJECT: General Court-Martial of *U.S. v. (MEMBER)*

1. The following individuals were previously selected to serve as members of a general court-martial convened by Special Order A-(X), dated (DATE), to hear the case of *U.S. v. (MEMBER)*. The individuals denoted by my initials are relieved as court-martial members in this case:

MEMBERS	UNIT	MAJCOM
_____ COL XXXXXXXXXXX	321 MS	AFGSC
_____ LT COL XXXXXXXXXXX	319 MS	AFGSC
_____ LT COL XXXXXXXXXXX	90 MW	AFGSC
_____ MAJ XXXXXXXXXXX	90 MUNS	AFGSC
_____ MAJ XXXXXXXXXXX	90 OMRS	AFGSC
_____ CAPT XXXXXXXXXXX	320 MS	AFGSC
_____ CAPT XXXXXXXXXXX	320 MS	AFGSC
_____ CAPT XXXXXXXXXXX	90 CS	AFGSC
_____ CAPT XXXXXXXXXXX	90 OSS	AFGSC
_____ 1ST LT XXXXXXXXXXX	319 MS	AFGSC
_____ 1ST LT XXXXXXXXXXX	90 CES	AFGSC
_____ 1ST LT XXXXXXXXXXX	319 MS	AFGSC
_____ 2ND LT XXXXXXXXXXX	90 SFS	AFGSC
_____ 2ND LT XXXXXXXXXXX	321 MS	AFGSC
_____ 2ND LT XXXXXXXXXXX	320 MS	AFGSC
_____ 2ND LT XXXXXXXXXXX	90 FSS	AFGSC

2. I hereby select the following individuals, denoted by my initials, as court-martial members in this case:

_____ COL XXXXXXXXXXX	90 OMRS	AFGSC
_____ LT COL XXXXXXXXXXX	90 OSS	AFGSC
_____ MAJ XXXXXXXXXXX	90 HCOS	AFGSC
_____ MAJ XXXXXXXXXXX	321 MS	AFGSC
_____ CAPT XXXXXXXXXXX	90 OSX	AFGSC
_____ 1ST LT XXXXXXXXXXX	90 LRS	AFGSC
_____ CMSGT XXXXXXXXXXX	90 CES	AFGSC
_____ CMSGT XXXXXXXXXXX	90 LRS	AFGSC
_____ SMSGT XXXXXXXXXXX	790 MXS	AFGSC
_____ MSGT XXXXXXXXXXX	90 FSS	AFGSC

_____	MSGT JACK A. XXXXXXXXXXXX	90 MDG	AFGSC
_____	MSGT XXXXXXXXXXXX	90 LRS	AFGSC
_____	TSGT XXXXXXXXXXXX	90 CS	AFGSC
_____	TSGT XXXXXXXXXXXX	90 CES	AFGSC
_____	TSGT XXXXXXXXXXXX	90 MW	AFGSC
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

In accordance with R.C.M. 912A:

_____ I authorize the military judge to impanel _____ alternate members.

_____ I authorize the military judge to impanel alternate members only if, after the exercise of challenges, excess members remain.

_____ Alternate members are not authorized.

3. Prepare a new convening order reflecting the appointment of the members selected and relieving the individuals named above.

(NAME)
 (RANK), [(USAF)(USSF)]
 Commander

**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, (GCMCA) (MAJCOM/FLDCOM)
(BASE), (STATE) (ZIP CODE)**

SPECIAL ORDER
A-(X)

(DATE)

The following members are detailed to the general court-martial convened by Special Order A-(X), this headquarters, dated (DATE), vice LT COL XXXXXXXX, LT COL XXXXXXXX, MAJ XXXXXXXX, CAPT XXXXXXXX, 1ST LT XXXXXXXX, and 2ND LT XXXXXXXX, relieved.

MEMBERS	UNIT	MAJCOM	BASE
CMSGT XXXXXXXXXXXX	90 CES	AFGSC	F.E. WARREN AFB
CMSGT XXXXXXXXXXXX	90 LRS	AFGSC	F.E. WARREN AFB
SMSGT XXXXXXXXXXXX	790 MXS	AFGSC	F.E. WARREN AFB
MSGT XXXXXXXXXXXX	90 FSS	AFGSC	F.E. WARREN AFB
MSGT XXXXXXXXXXXX	90 MDG	AFGSC	F.E. WARREN AFB
MSGT XXXXXXXXXXXX	90 LRS	AFGSC	F.E. WARREN AFB

The military judge is not authorized to impanel alternate members.

(NAME)
(RANK), [(USAF)(USSF)]
Commander

FOR THE COMMANDER

(NAME), Colonel, USAF
Staff Judge Advocate

DISTRIBUTION:
1 – Ea Individual
1 – Ea Org
1 – (INSTALLATION LEGAL OFFICE)

SO A-(X)



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

MEMORANDUM FOR (SUBORDINATE SPCMCAs)

FROM: (GCMCA)
(ADDRESS LINE 1)
(ADDRESS LINE 2)

SUBJECT: Duty as a Court-Martial Member

1. As commander of (UNIT), I have the responsibility to serve as general court-martial convening authority for this command. The military justice system remains vital to the Department of the Air Force mission and the maintenance of morale, good order, and discipline. Likewise, faithful and attentive service as a court-martial panel member has proven indispensable for military justice to function properly.
2. I view the duty of court-martial panel member as one of the most important duties any officer or enlisted person can be called upon to perform. Following guidelines set out in the Uniform Code of Military Justice, for general courts-martial, I personally review the background data of each member nominated for service. Further, I select only those who I believe are best qualified for this duty by reason of their age, education, training, experience, length of service, and judicial temperament.
3. Because of the critical importance of service as a court-martial member, once an individual is selected to serve, that person should serve unless a compelling reason arises. Service as a court member becomes an individual's primary duty during the period of the trial. Additionally, subordinate commanders should nominate their best personnel for this duty, regardless of AFSC.

(NAME)
(RANK), USAF
Commander

cc:
(SUBORDINATE SPCMCA LEGAL OFFICES)



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

(DATE)

MEMORANDUM FOR (GCMCA)

FROM: UNIT/OFFICE SYMBOL

SUBJECT: Excusal from Court Member Duty

I, (NAME), respectfully request that I be excused from the court-martial scheduled to begin on (DATE). I am unavailable to fulfill these duties due to (REASON).

(NAME), [(USAF)(USSF)]
Duty Title

1st Ind, [(SQ/CC) (or equivalent)]

I concur/do not concur.

(NAME), [(USAF)(USSF)]
Commander, (UNIT)

2nd Ind, [(GROUP/CC) (or equivalent)]

I concur/do not concur.

(NAME), [(USAF)(USSF)]
Commander, (UNIT)



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS (GCMCA) (MAJCOM/FLDCOM)**

(DATE)

MEMORANDUM FOR (PANEL MEMBER'S COMMANDER)

FROM: (GCMCA/SJA)

SUBJECT: Excusal from Court Member Duty

On (DATE), I received your request to excuse (NAME), (RANK) from court- martial duty for the general court-martial scheduled to convene on (DATE). Pursuant to the delegated authority from (GCMCA), I hereby excuse (NAME) from court-martial duty.

(NAME), Colonel, USAF
Staff Judge Advocate

cc:

Court-martial Member (NAME)
(INSTALLATION LEGAL OFFICE)

Navy
Pretrial/Panel Selection Materials



DEPARTMENT OF THE NAVY
NAVAL DISTRICT WASHINGTON
1343 DAHLGREN AVE SE
WASHINGTON NAVY YARD DC 20374-5161

31 Jan 22

GENERAL COURT-MARTIAL CONVENING ORDER 1-22

Pursuant to authority contained in Article 22, Uniform Code of Military Justice, and paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7G of 15 January 2021, a general court-martial is convened with the following members:

Captain [REDACTED], U.S. Navy
Captain [REDACTED], U.S. Navy
Captain [REDACTED], U.S. Navy
Commander [REDACTED], U.S. Navy
Commander [REDACTED], U.S. Navy
Commander [REDACTED], Medical Service Corps, U.S. Navy
Lieutenant Commander [REDACTED], U.S. Navy
Lieutenant Commander [REDACTED], U.S. Navy
Lieutenant Commander [REDACTED], U.S. Navy
Lieutenant [REDACTED], U.S. Navy

Alternative members are not authorized.



Rear Admiral, U.S. Navy
Commandant, Naval District Washington

Certified as a true and complete copy.
[REDACTED]
31 Jan 2022

CDR [REDACTED] JAGC, USN
Staff Judge Advocate
Notary Public
Under the Authority of 10 U.S.C. 1044a
Commission Expires: Indefinite



23 May 22

GENERAL COURT-MARTIAL CONVENING ORDER 1A-22

The following members are detailed to the General Court-Martial convened by Commandant, Naval District Washington General Court-Martial convening order 1-22 dated 31 January 2022 for the trial of *United States v. CTRSA [REDACTED]* USN:

- Commander [REDACTED], Dental Corps, U.S. Navy
- Lieutenant Commander [REDACTED], U.S. Navy
- Lieutenant Commander [REDACTED], U.S. Navy
- Lieutenant Junior Grade [REDACTED], U.S. Navy
- Lieutenant Junior Grade [REDACTED], U.S. Navy
- Ensign [REDACTED], U.S. Navy
- Master Chief Petty Officer [REDACTED], U.S. Navy
- Senior Chief Petty Officer [REDACTED], U.S. Navy
- Chief Petty Officer [REDACTED], U.S. Navy
- Petty Officer First Class [REDACTED], U.S. Navy
- Petty Officer Second Class [REDACTED], U.S. Navy
- Petty Officer Second Class [REDACTED], U.S. Navy
- Petty Officer Third Class [REDACTED], U.S. Navy

All members previously detailed to the General Court-Martial convened by Commandant Naval District Washington General Court-Martial convening order 1-22 dated 31 January 2022 are relieved for the trial of *United States v. CTRSA [REDACTED]* USN.



Rear Admiral, U.S. Navy
Commandant



28 Jun 22

GENERAL COURT-MARTIAL CONVENING ORDER 1B-22

The following members are excused from the General Court-Martial convened by Commandant, Naval District Washington General Court-Martial convening order 1-22 dated 31 January 2022 and amended by convening order 1A-22 of 23 May 2022 for the trial of *United States v. CTRSA [REDACTED]*, USN:

Commander [REDACTED], Dental Corps, U.S. Navy
Lieutenant Commander [REDACTED] U.S. Navy
Lieutenant [REDACTED], U.S. Navy
Lieutenant [REDACTED], U.S. Navy
Ensign [REDACTED] U.S. Navy
Master Chief Petty Officer [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer Second Class [REDACTED] U.S. Navy

The following additional members are detailed for the trial of *United States v. CTRSA [REDACTED]*
[REDACTED] USN:

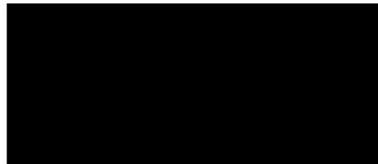
Commander [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy

GENERAL COURT-MARTIAL CONVENING ORDER 1B-22

The Court-Martial, as amended and relieved, for the trial of *United States v. CTRSA* [REDACTED]
[REDACTED] USN is comprised of:

Commander [REDACTED] U.S. Navy
Lieutenant Commander [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] U.S. Navy
Lieutenant [REDACTED] Medical Service Corps, U.S. Navy
Lieutenant Junior Grade [REDACTED] U.S. Navy
Lieutenant Junior Grade [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Senior Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED], U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Chief Petty Officer [REDACTED] U.S. Navy
Petty Officer First Class [REDACTED] U.S. Navy
Petty Officer Second Class [REDACTED] U.S. Navy
Petty Officer Third Class [REDACTED] U.S. Navy

No alternate members are authorized.



Rear Admiral, U.S. Navy
Commandant

Marine Corps
Pretrial/Panel Selection Materials



UNITED STATES MARINE CORPS
MARINE CORPS AIR STATION NEW RIVER
PSC BOX 21001
JACKSONVILLE, NC 28545-1001

5000-82
CO
Ser: 1-20
DEC 11 2019

GENERAL COURT-MARTIAL CONVENING ORDER 1-20

Pursuant to the authority in Article 22(a) of the Uniform Code of Military Justice, Rule for Court-Martial 504, and Section 0120a of the Manual of the Judge Advocate General, a standing court panel for a General Court-Martial is hereby convened. It may try such persons as may be properly brought before it. The court shall meet at Marine Corps Air Station New River, unless otherwise directed. The court will be constituted as follows:

MEMBERS

- Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
- Commander [REDACTED] U.S. Navy, Member;
- Major [REDACTED] U.S. Marine Corps, Member;
- Captain [REDACTED] U.S. Marine Corps, Member;
- Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
- Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
- Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member; and
- Warrant Officer [REDACTED] U.S. Marine Corps, Member.





UNITED STATES MARINE CORPS
MARINE CORPS AIR STATION NEW RIVER
PSC BOX 21001
JACKSONVILLE, NC 28545-1001

5811
CO
7 Jun 21

GENERAL COURT-MARTIAL CONVENING ORDER 1A-20

General Court-Martial Convening Order 1-20 dated 11 December 2019 is hereby modified for the case of United States vs. [REDACTED] U.S. Marine Corps. The court shall meet at Marine Corps Air Station New River, unless otherwise directed. I authorize the military judge to impanel alternates if excess members are available after identification of the primary panel members:

MEMBERS

Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
Commander [REDACTED] U.S. Navy, Member;
Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Warrant Officer [REDACTED] U.S. Marine Corps, Member;

DELETE

Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Warrant Officer [REDACTED] U.S. Marine Corps, Member;

ADD

Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Master Sergeant [REDACTED] U.S. Marine Corps, Member;



GENERAL COURT-MARTIAL CONVENING ORDER IA-20

Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;

The General Court-Martial is hereby constituted as follows:

Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
Commander [REDACTED], U.S. Navy, Member;
Major [REDACTED], U.S. Marine Corps, Member;
Captain [REDACTED], U.S. Marine Corps, Member;
Captain [REDACTED], U.S. Marine Corps, Member;
Captain [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED], U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED], U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Master Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member; and Gunnery
Sergeant [REDACTED], U.S. Marine Corps, Member.
Gunnery Sergeant [REDACTED], U.S. Marine Corps, Member;

[REDACTED]
Colonel
U.S. Marine Corps
Commanding Officer



UNITED STATES MARINE CORPS
MARINE CORPS AIR STATION NEW RIVER
PSC BOX 21001
JACKSONVILLE, NC 28545-1001

5811
CO
8 Jun 21

GENERAL COURT-MARTIAL CONVENING ORDER 1B-20

General Court-Martial Convening Order 1A-20 dated 7 June 2021 is hereby modified for the case of United States vs. [REDACTED] U.S. Marine Corps. The court shall meet at Marine Corps Air Station New River, unless otherwise directed. I authorize the military judge to impanel alternates if excess members are available after identification of the primary panel members:

MEMBERS

Lieutenant Colonel [REDACTED], U.S. Marine Corps, President;
Commander [REDACTED] U.S. Navy, Member;
Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Master Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member; and
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member.

DELETE

Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member; and
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member.

ADD

Captain [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member; and
Staff Sergeant [REDACTED] U.S. Marine Corps, Member.



GENERAL COURT-MARTIAL CONVENING ORDER 1B-20

The General Court-Martial is hereby constituted as follows:

Lieutenant Colonel [REDACTED] U.S. Marine Corps, President;
Commander [REDACTED] U.S. Navy, Member;
Major [REDACTED] U.S. Marine Corps, Member;
Captain [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 4 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 3 [REDACTED] U.S. Marine Corps, Member;
Chief Warrant Officer 2 [REDACTED] U.S. Marine Corps, Member;
Master Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Master Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Gunnery Sergeant [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member;
Staff Sergeant [REDACTED] U.S. Marine Corps, Member; and
Staff Sergeant [REDACTED] U.S. Marine Corps, Member.

[REDACTED]

Colonel
U.S. Marine Corps
Commanding Officer

[REDACTED]

Coast Guard
Pretrial/Panel Selection Materials



5817
12 Apr 2021

MEMORANDUM

From: [REDACTED]
Deputy Staff Judge Advocate
CG Legal Service Command

Reply to
Attn of: [REDACTED]

To: [REDACTED] CDR
CG Base Alameda (cd)

Subj: NOMINATION OF COURTS-MARTIAL PANEL MEMBERS FOR POOL

Ref: (a) Article 25, UCMJ, Manual for Courts-Martial (2019 ed.)
(b) Rules for Court-Martial 501-505, Manual for Courts-Martial (2019 ed.)

1. It is necessary to select new court-martial panel members for cases referred on or after 1 January 2021. The convening authorities for DOL, CG Base Alameda, or other convening authorities must personally select the members for courts-martial that they convene and to which they refers particular matters. It is necessary that you as the acting Executive Officer of Base Alameda nominate potential court-martial panel members to assist in their selection.
2. Several courts-martial are anticipated for the coming year. Your nominations would create a pool from which convening authorities may select panel members for each of these courts-martial. A larger number than the required number of members is normally selected to allow for any necessary excusals, i.e. illness, military exigencies, etc., and for legal challenges to the members.
3. The convening authorities are free to select anyone whom they feel is "best qualified" to serve on the court-martial panels. However, throughout the selection process, any person involved in nominating potential panel members must follow the guidance as to the qualifications of panel members as detailed in references (a) and (b). **Specifically, individuals nominated by you or ultimately selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. All selected members must be senior to the accused.**
4. You may use only the criteria listed in paragraph (3) in deciding whether to nominate someone. Military grade by itself is not a permissible criteria for selection of court-martial panel members. It is not appropriate to select members to achieve a particular result on findings or sentence.
5. You must nominate potential panel members that are "best qualified" following the criteria in references (a) and (b) which is also summarized in paragraph 3. All personnel should be given equal consideration in light of the above factors and those factors only. If you desire more information to determine an individual's qualifications, please notify me so I may advise you.
6. I recommend that you take the following action:

Subj: NOMINATION OF COURTS-MARTIAL PANEL MEMBERS FOR
POOL

5817
12 Apr 2021

a. To potentially serve as a court-martial panel members, personally nominate at least eighty (80) officers and fifty-six (56) enlisted personnel within 50 miles of Base Alameda. A roster is provided in Enclosure (1). You may nominate more.

b. Record your nominations in Enclosure (2), provide the list to Legal Service Command, and wait for next steps.

#

Enclosure: (1) Alpha Roster of Officers and Enlisted within 50 miles
(2) List of Nominated Officers and Enlisted

Copy: 
CG Base Alameda (cd)

Excerpt of excel spreadsheet. Sample truncated for audience.

EMPLID	LAST NAME	FIRST NAME	EMPL CLASS	PGVD	RATE	SAL ADMIN PLAN	SEX	AGE	TIME IN SERVICE	HIGHEST_EDUC_LVL	EDUCATION LEVEL	POSITION_NBR	CG_EXP_AD_TERM_DT	CG_EXP_LOSS_DT	CG_AD_BASE_DT	PAY BASE DT	RANK DT	ROTATE DT	MBS DEPTID	MBS S ATU	MBS OFFAC	MBS DEPT NAME	CITY	STATE	POSTAL
AD	06	CAPT	OFF	M	9	26	G	30	00-JUN-24	30-JUN-24	18-MAY-94	18-MAY-94	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	05	COR	OFF	M	1	19	G	30	30-MAR-31	30-MAR-31	23-MAY-01	23-MAY-01	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	W2	AV2	WAR	M	9	23	G	31	01-OCT-27	01-OCT-27	25-AUG-97	25-AUG-97	01-JUN-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	05	COR	OFF	M	0	17	G	30	30-MAY-33	30-MAY-33	21-MAY-03	21-MAY-03	01-JUL-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	03	LT	OFF	M	21	21	G	30	30-JUN-41	30-JUN-41	27-SEP-90	27-SEP-90	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	04	LCDR	OFF	M	36	18	G	30	30-JUN-40	30-JUN-40	21-OCT-02	21-OCT-02	01-AUG-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	04	LCDR	OFF	M	35	12	C	30	30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	04	LCDR	OFF	M	3	12	C	30	30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-OCT-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	05	COR	OFF	M	1	2	G	30	30-MAY-35	30-MAY-35	01-JUN-96	01-JUN-96	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	03E	LT	OFF	M	38	1	I	30	30-JUN-42	30-JUN-42	25-JUL-06	25-JUL-06	11-MAY-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	03	LT	OFF	M	32	9	C	30	17-MAY-41	17-MAY-41	18-MAY-11	18-MAY-11	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	04	LCDR	OFF	M	2	20	G	30	30-JUN-39	30-JUN-39	31-DEC-00	28-SEP-96	01-JUL-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	03	LT	OFF	M	29	7	C	30	30-JUN-44	30-JUN-44	17-JUN-13	17-JUN-13	21-MAY-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	04	LCDR	OFF	M	36	16	G	30	30-JUN-40	30-JUN-40	16-NOV-04	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128					
AD	04	LCDR	OFF	F	6	21	G	30	30-JUN-40	30-JUN-40	29-SEP-99	19-AUG-92	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	03	LT	OFF	F	28	6	C	30	20-MAY-44	20-MAY-44	21-MAY-14	21-MAY-14	21-MAY-14	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	02	LTIG	OFF	M	27	3	A	30	20-MAY-41	20-MAY-41	21-MAY-14	21-MAY-14	17-MAY-17	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	02	LTIG	OFF	M	26	3	A	30	16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	02	LTIG	OFF	M	26	3	A	30	16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	02	LTIG	OFF	M	26	3	A	30	16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-MAY-17	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	03	LT	OFF	M	31	6	C	30	30-JUN-47	30-JUN-47	09-DEC-14	22-NOV-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128					
AD	03	LT	OFF	M	30	5	I	30	30-JUN-46	30-JUN-46	21-APR-15	24-NOV-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128					
AD	03	LT	OFF	M	3	9	G	30	30-JUN-47	30-JUN-47	26-JUL-16	26-JUL-16	22-NOV-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128				
AD	06	CAPT	OFF	M	3	21	C	30	30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-JUL-19	01-JUL-23	000503	37	51290	CEU OCEANOGRAPHY LINE	OAKLAND	CA	94632				
AD	W4	INV4	WAR	M	52	28	C	30	30-JUN-22	30-JUN-22	19-APR-92	14-SEP-87	01-JAN-17	01-JUL-23	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501				
AD	W3	INV3	WAR	M	8	21	C	30	30-SEP-29	30-SEP-29	20-JUL-99	01-JUN-18	01-JUL-24	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501					
AD	W2	INV2	WAR	M	38	18	C	30	30-SEP-32	30-SEP-32	16-JUL-02	16-JUL-02	01-JUN-20	01-JUL-24	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501				
AD	W2	INV2	WAR	M	0	13	G	30	31-OCT-37	31-OCT-37	23-OCT-97	23-OCT-97	01-JUL-19	01-JUL-23	000716	47	77100	CG 5 PACIFIC REG	ALAMEDA	CA	94501				
AD	06	CAPT	OFF	M	6	23	G	30	30-JUN-27	30-JUN-27	21-MAY-97	21-MAY-97	01-JUL-19	01-JUL-22	002368	74	61200	TRACEN PET CMD STAFF	PETALUMA	CA	94952				
AD	05	COR	OFF	M	3	21	G	30	30-JUN-30	30-JUN-30	14-JAN-00	14-JAN-00	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMD STAFF	PETALUMA	CA	94952				
AD	04	LCDR	OFF	M	2	22	C	30	30-JUN-41	30-JUN-41	12-JUL-10	12-JUL-10	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMD STAFF	PETALUMA	CA	94952				
AD	03E	LT	OFF	M	6	23	G	30	31-AUG-27	31-AUG-27	19-JUN-97	19-JUN-97	01-JUL-19	01-JUL-22	002370	74	61200	TRACEN PET CUST SPT SERVICES	PETALUMA	CA	94952				
AD	W2	PER2	WAR	M	33	15	C	30	31-AUG-35	31-AUG-35	12-JUL-05	01-JUN-18	01-JUL-24	002370	74	61200	TRACEN PET CUST SPT SERVICES	PETALUMA	CA	94952					
AD	03E	LT	OFF	M	38	19	C	30	30-SEP-31	30-SEP-31	10-JUL-01	10-JUL-01	01-MAY-19	01-JUL-23	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952				
AD	04	LCDR	OFF	M	38	15	C	30	30-MAR-36	30-MAR-36	13-JUL-05	13-JUL-05	01-JUL-17	01-JUL-22	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952				
AD	05	COR	OFF	M	1	18	C	30	30-MAY-32	30-MAY-32	22-MAY-02	22-MAY-02	01-JUL-18	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952				
AD	W4	MATA	WAR	M	51	28	C	30	31-AUG-22	31-AUG-22	05-JUN-92	16-SEP-91	01-JUN-13	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952				
AD	04	LCDR	OFF	F	35	12	C	30	30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952				
AD	04	LCDR	OFF	M	27	1	C	30	17-MAY-46	17-MAY-46	18-MAY-16	18-MAY-16	01-JUN-19	01-JUL-23	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952				
AD	04	LCDR	OFF	M	35	12	C	30	30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUN-24	003491	74	61200	TC PET PERFS DIV	PETALUMA	CA	94952				
AD	04	LCDR	OFF	M	1	1	A	30	30-JUN-37	30-JUN-37	04-OCT-06	04-OCT-06	01-SEP-17	01-JUL-22	003491	74	61200	TC PET PERFS DIV	PETALUMA	CA	94952				
AD	03E	LT	OFF	M	39	15	C	30	26-SEP-05	26-SEP-05	10-JAN-20	10-JAN-20	01-JUL-22	003493	74	61200	TC PET OPS TRNG DIV	PETALUMA	CA	94952					
AD	04	LCDR	OFF	M	2	23	D	30	24-JUN-97	24-JUN-97	19-JUN-97	19-JUN-97	01-AUG-20	01-JUL-23	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952				
AD	W4	ELC4	WAR	M	9	29	C	30	31-MAR-22	31-MAR-22	06-JAN-92	06-JAN-92	01-JUN-18	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952				
AD	03E	LT	OFF	M	35	11	C	30	30-JUN-46	30-JUN-46	13-JUN-06	07-DEC-19	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952					
AD	W3	ISM3	WAR	M	52	27	C	30	31-JUL-23	31-JUL-23	31-MAY-93	31-MAY-93	01-JUN-18	01-JUL-22	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952				
AD	03	LT	OFF	F	31	9	G	30	17-MAY-43	17-MAY-43	18-MAY-11	18-MAY-11	01-MAY-18	01-JUL-23	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952				
AD	06	CAPT	OFF	F	31	9	G	30	30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-OCT-20	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501				
AD	05	COR	OFF	M	9	19	C	30	12-OCT-01	12-OCT-01	01-SEP-18	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501						
EAD	03E	LT	OFF	M	33	10	C	30	30-JUN-40	30-JUN-40	09-APR-10	18-JUN-07	16-APR-16	01-JUL-22	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501				
AD	03	LT	OFF	M	38	1	C	30	19-JUN-48	19-JUN-48	18-JUN-18	18-JUN-18	01-JUL-22	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501					
AD	W4	ISM4	WAR	M	23	1	C	30	31-AUG-27	31-AUG-27	17-JUN-97	17-JUN-97	01-JUN-20	01-JUL-23	004881	31	53798	ESD PETALUMA	PETALUMA	CA	94952				
AD	W3	F853	WAR	M	8	28	C	30	31-AUG-22	31-AUG-22	02-JUN-92	02-JUN-92	01-JUN-20	01-JUL-23	006880	98	70900	FM/SPS INERT TEAM-PETALUMA	PETALUMA	CA	94952				
AD	06	CAPT	OFF	M	6	22	C	30	30-JUN-21	30-JUN-21	04-JAN-95	04-JAN-95	01-OCT-27	01-JUL-22	007561	11	37270	SEC SAN FRAN CMD CADRE	SAN FRANCISCO	CA	94130				
AD	06	CAPT	OFF	M	9	26	G	30	30-JUN-24	30-JUN-24	18-MAY-94	18-MAY-94	01-MAY-16	01-JUL-22	007561	11	37270	SEC SAN FRAN CMD CADRE	SAN FRANCISCO	CA	94130				
AD	05	COR	OFF	F	3	18	G	3																	

Enclosure (2) – Nominations

Officers

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I nominated the above persons based off the advice provided to me in the [REDACTED] memo 5817 of 12 April 2021.

Signature: _____

Date: _____

[REDACTED]

From: [REDACTED]
Sent: Tuesday, May 10, 2022 6:34 PM
Cc: [REDACTED]
Subject: Please Read: Notification as Potential Panel Member for GCM (Questionnaire due: 24 May 22)
Attachments: Court-Martial Members Questionnaire - M5810_1G.pdf
Importance: High

Good Afternoon Sir, Ma'am

You have been nominated to potentially serve as a panel member of a General Court-Martial in Alameda, CA. As part of your nomination, please complete the attached questionnaire pursuant to the Uniform Code of Military Justice. This questionnaire will be used in evaluating your qualifications for potential court-martial duty in the near future. Persons ultimately selected serve based upon a "best qualified" standard.

We are respectfully requesting for the questionnaire to be signed and returned to [REDACTED] [REDACTED] by close of business, Tuesday, 24 May 2022.

Your cooperation and service, should be selected, is greatly appreciated in advance. If you have any questions, please contact CDR [REDACTED].

V/R
[REDACTED]
Paralegal Specialist

[REDACTED]
Alameda, CA 94501
[REDACTED]

COURT-MARTIAL MEMBER QUESTIONNAIRE

You have been nominated to serve as a member of a court-martial. Accordingly, this questionnaire is submitted to you under Rule for Courts-Martial 912, Manual for Courts- Martial. **This questionnaire should be completed, signed and returned as soon as possible.** Entries may be either typed or written if printed out. Instead of writing in your assignment history, you may include your CG Member Information Summary Sheet. However, it is not required.

PRIVACY ACT STATEMENT

1. **AUTHORITY:** 10 U.S.C. §§ 825, 841

2. **PRINCIPAL PURPOSE:** The information solicited is intended principally for use in the administration of military justice.

3. **ROUTINE USES:**
 - a. To assist the court-martial convening authority in evaluating your qualifications for court-martial duty.
 - b. To assist counsel in the exercise of statutory rights to challenge members of court-martial and to assist the military judge in ruling on such challenges. By requesting this information on a one-time basis before you actually serve as a member, repetitive questions and unnecessary delay can be avoided.
 - c. To assist reviewing authorities in resolving issues relating to your qualifications for court-martial duty.

4. **DISCLOSURE MANDATORY/VOLUNTARY, CONSEQUENCES OF REFUSAL TO DISCLOSE:** Disclosure is mandatory and failure to provide the information solicited may result in disciplinary action or criminal proceedings.

COURT-MARTIAL MEMBER QUESTIONNAIRE

1. Full Name (Last, First, Middle): _____

2. Rate/Rank/Designator: _____

3. Date of Rank: _____

4. Branch of Service: _____

5. (For Officers Only) Source of Commission: _____

6. Place of Birth: _____

7. Marital Status: Never Married Married Separated
 Divorced in _____ Widow/Widower since _____

8. If currently married:

Spouse's Occupation: _

Spouse's Place of Work: _

Spouse's Job Description: _

Years Spouse has been at Current Job: _____

9. Contact Information:

Office Telephone: _____

Cell Phone Number: _____

Email: _____

18. Have you ever served as a Summary Court-Martial Officer?

Yes/ No, if "yes", indicate the following:

Number of times: _____

Dates (year only): _____

19. Have you ever imposed Non-Judicial Punishment (NJP) Yes/ No

Number of times: _____

Dates (year only): _____

20. Have you ever been appointed as a member of a General (GCM) or Special Court-Martial (SPCM)?

Yes/ No, if "yes", indicate the following:

	Number Served	Year(s) Served
SPCM		
GCM		

21. Have you ever served on an Administrative Separation Board or on a Board of Inquiry?

Yes/ No, if "yes", indicate the following:

When did you serve? _____

What was the charge or reason for separation? _____

What did the board determine? _____

22. Have you ever served as a juror in a civil or criminal civilian trial (state or federal)? Yes/ No, if "yes", indicate the following:

When did you serve? _____

What was the nature of the case? _____

What did the jury determine? _____

23. Have you ever appeared as a witness in military or civilian court?

Yes/ No, if “yes”, indicate the following:

When did you appear? _____

For which side did you appear? _____

24. Have you had any specialized law enforcement training, civilian or military (either before or after entering the military service)? Examples include civilian police academy, courses at FLETC, MLEA, and Coast-Guard specific courses like boarding officer school.

Yes/ No, if “yes,” describe:

25. Have you worked in any capacity as law enforcement? Examples include civilian police officer, reserve police officer, military police or shore patrol, boarding officer or team member, etc.

Yes/ No, if “yes”, explain:

26. Are you taking any medications that might affect your ability to devote your undivided attention to the court-martial proceedings? Yes/ No

27. Have you or anyone close to you ever been arrested?

Yes/ No, if “yes”, explain:

28. Have you or anyone else close to you ever been charged with a crime?

Yes/ No, if “yes”, explain:

29. Have you ever had to call the police or have the police been called on you or anyone close to you? Yes/ No, if “yes”, explain:

30. Have you or anyone close to you ever been the victim of any crime? Yes/ No, if “yes”, indicate the following:

Person’s relationship to you: _

Incident: _____

31. Have you or anyone close to you ever been involved in any of the following areas: crime prevention (police, detective, etc); health care (doctor, nurse, pharmacist); or law (attorney/paralegal)? If "yes," please describe briefly:

32. Please list any social, professional, civic, victim- advocacy, or civil-liberties organizations that you or your spouse are a member of:

33. Have you ever served as a victim advocate or received any training in the field of sexual assault or victim advocacy (e.g. Victim Advocate, SAVI, SARC, CIT)?

Yes/ No if "yes", when, what role or training, and what type of cases were involved:

34. Have you ever served as a member of a member of a Family Advocacy Program (FAP) board or committee? Yes/ No, if "yes", when, what role, and what type of cases were involved:

35. Other than General Military Training (e.g. Learning Portal), have you ever served or received any training in the field of alcohol and substance abuse? For example, training to be a civilian bartender, collateral duty drug or alcohol program coordinator training, or university psychology classes dealing with substance abuse. Yes/ No, if "yes", when and please describe:

36. Please describe the sexual assault awareness training, education, counseling, or indoctrination you have been exposed to within the last 24 months (written communications, “all hands,” social media, informal discussions, viewing posters or videos, etc.)
37. Have you, or someone close to you, ever delivered sexual assault awareness or prevention training, education, indoctrination, counseling, etc. – or worked as a counselor, support person, advocate, medical provider, or in some other capacity in a case involving sexual assault? If yes, describe.
38. Have you ever served in any capacity in a command or service sponsored urinalysis program? Yes/No, if “yes”, when and please describe:
39. If you were sitting at the defense table as the accused, would you be satisfied to have your guilt or innocence and sentence determined by a court member who was in your present state of mind? Yes/No
40. Is there anything in your background or experience that might affect your ability to be a fair and impartial decision-maker? Yes/No

[Continued Next Page]



5817
22 Sep 2021

MEMORANDUM

From: [REDACTED] CAPT
Legal Service Command (CG LSC)

Reply to [REDACTED] CDR
Attn of: [REDACTED]

To: [REDACTED] RDML
Director of Operational Logistics (CG DOL)

Subj: SELECTION OF MEMBERS FOR STANDING GCM PANEL IN ALAMEDA, CA

Ref: (a) Article 25, UCMJ, Manual for Courts-Martial (2019 ed.)
(b) Rules for Court-Martial 501-505, Manual for Courts-Martial (2019 ed.)

1. This memorandum provides advice to you, as a Convening Authority, concerning selection of members for a standing panel pursuant to references (a) and (b) for general courts-martial referred on or after 1 January 2021 that will meet in Alameda, California.¹ I respectfully request you indicate your selections using the draft endorsement prepared at Enclosure (1). I also request to personally brief you on the requirements and answer any questions you may have before you actually select members.

2. As the Director of Operational Logistics (DOL), you must personally select the members for general courts-martial that you convene and to which you refer particular matters. General courts-martial are anticipated for the coming year stemming from DOL units located in Pacific Area's area of responsibility. Your selections would create a standing panel for general courts-martial to convene in Alameda, California.

3. In accordance with changes in the 2019 edition of the Manual for Courts-Martial, general courts-martial require eight (8) members. A larger number than the required number of members is normally selected to allow for any necessary excusals, i.e. illness, military exigencies, etc., and for legal challenges to the members. In addition, with the changes to the Uniform Code of Military Justice (UCMJ) that became effective on 1 January 2019, you may authorize alternate members. These are members of the court-martial who hear the case, and can substitute for any primary members who become unavailable during trial, for example, become ill and cannot continue, without the need to appoint new members to the court-martial. You are not required to authorize alternate members, you may authorize up to three alternate members, or you may leave the appointment of alternate members to the discretion of the military judge. An enlisted accused may request that the membership of the court-martial to which that accused's case has been referred be comprised of at least one-third enlisted members. Under the changes to the UCMJ, you may select enlisted members for a court-martial that tries an enlisted accused whether or not the accused has already requested enlisted members.

4. You are free to select anyone whom you feel is "best qualified" to serve on court-martial panels. However, throughout the selection process you must follow the guidance as to the

¹ A separate convening order will govern courts-martial to be held in the Norfolk, Virginia area.

qualifications of panel members as detailed in references (a) and (b). Specifically, individuals selected as panel members must be those who are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Military grade by itself is not a permissible criteria for selection of court-martial panel members. However, all selected members must be senior to the accused. It is not appropriate to select members to achieve a particular result on findings or sentence.

5. To assist you in selecting panel members, I am providing a list of officers and enlisted stationed in the Alameda, California area in Enclosure (2). Enclosure (3) encompasses a list of officer and enlisted members who have been nominated as potential panel members by CDR [REDACTED] the then-Acting Executive Officer of [REDACTED]. He was advised to nominate individuals based on the same "best qualified" criteria provided herein.

6. For nominated members as indicated in Enclosure (3), a completed court-martial questionnaire can be found on [CGPortal](https://cglink.uscg.mil/alamedaquestionnaires) at <https://cglink.uscg.mil/alamedaquestionnaires>.² These documents are provided only to assist you in exercising your independent discretion as Convening Authority. You are free to select anyone whom you feel is "best qualified" to serve on the court-martial panels. All personnel should be given equal consideration in light of the above factors and those factors only. You may select members from your own command if you feel they meet these qualifications.

7. Additionally, you may select members that are not included in the provided enclosures if you believe they meet the criteria set forth in references (a) and (b). If you desire more information to determine an individual's qualifications, please notify me so that I may assist you.

8. I recommend that you take the following actions:

a. Personally select any forty (40) officers (twenty-five primary and fifteen alternates) and twenty-five (25) enlisted personnel (fifteen primary and ten alternates) within 50 miles of Base Alameda. You may nominate more.

b. Delegate your authority to excuse individual members from a court-martial without cause shown, pursuant to reference (b), R.C.M. 505(c)(1)(B), to me as your Staff Judge Advocate. This authority shall be limited so no more than one-third of the total members detailed may be excused by me in any one court-martial.

c. Indicate your decision to authorize or not authorize alternate members, and if authorized, how many alternate members the military judge shall impanel.

9. I have drafted an endorsement to assist you in documenting your selections at Enclosure (1).

#

Enclosure: (1) First Endorsement on CG LSC memo 5817: Selection of Members for Standing GCM Panel in Alameda, CA
(2) List of Alameda AOR Officers and Enlisted
(3) Nominated Roster of Officers and Enlisted within 50 miles

² Permission to this folder is strictly restricted to those who need access. Please contact [REDACTED] on my staff for permission issues.

FIRST ENDORSEMENT on CG LSC memo 5817 of 22 Sep 2021

From: [REDACTED], RDML
Director of Operational Logistics (CG DOL)

To: [REDACTED] CAPT
Legal Service Command (CG-LSC)

Subj: SELECTION OF MEMBERS FOR STANDING GCM PANEL IN ALAMEDA, CA

1. As the Director of Operational Logistics, I have personally selected the members listed below to serve as a standing panel of general courts-martial members on CG DOL General Court Martial Convening Order No. 01-21.

2. In selecting those panel members, I used the criteria articulated in references (a) and (b) of the memorandum. I acknowledge your advice concerning these criteria provided verbally by you and via your memo. I selected panel members who were, in my opinion, best qualified for the duty based on their age, education, training, experience, length of service, and judicial temperament, and used no other criteria.

3. Pursuant to reference (b), R.C.M. 505(c)(1)(B), the recommended delegation of authority to excuse members without cause to Staff Judge Advocate, Legal Service Command is:

Approved

Denied

4. Pursuant to reference (b), R.C.M. 503(a)(1)(C), with regard to alternate members,

I do not authorize the use of alternate members;

the military judge shall impanel one (1) alternate member;

the military judge shall impanel two (2) alternate members;

the military judge shall impanel three (3) alternate members; or

the military judge may impanel alternate members at his or her discretion only if, after the exercise of all challenges, excess members remain.

5. I select the following twenty-five (25) officers to serve as members:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____
13. _____
14. _____
15. _____
16. _____
17. _____
18. _____
19. _____
20. _____
21. _____
22. _____

23. _____

24. _____

25. _____

6. If an enlisted accused requests enlisted representation pursuant to Article 25(c)(2)(B), UCMJ, an appropriate number of the following fifteen (15) enlisted persons in the priority order listed below will replace the requisite number of lowest priority ordered officers in paragraph 5 such that the panel is composed of one-third enlisted members. The officers replaced shall become alternate members.

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____

10. _____

11. _____

12. _____

13. _____

14. _____

15. _____

7. I select the following fifteen (15) officers to serve as alternate members in the order listed below:

1. _____

- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____
- 11. _____
- 12. _____
- 13. _____
- 14. _____
- 15. _____

8. I select the following ten (10) enlisted persons to serve as alternate members in the order listed below:

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____

8. _____

9. _____

10. _____

#

Nominated Roster of Officers and Enlisted within 50 miles

Excerpt of list for audience.

NOMINATED MEMBERS (OFFICERS)								
Last Name	First Name	Rank	Date of Rank	Unit	Rotation Date	Education Level	Questionnaire	Comments
		CAPT		D11 PREVENTION DIV (DP)	01-JUL-22	I-Master's Level Degree	Y	Frocked
		CDR		D11 INSP & INVEST BR (DPI)	01-JUL-24	G-Bachelor's Level Degree	Y	
		CDR		OL-SFLC LRE ENG-ALAMEDA	01-JUL-22	G-Bachelor's Level Degree	Y	
		EBR		BASE ALAM FAC ENG DEPT (F)	01-JUL-22		N/A	XO
		CDR		ASSET LINE MANAGEMENT BRANCH	01-JUL-22		N/A	PCS
		CDR		PACAREA (PAC-13)	01-JUL-23	G-Bachelor's Level Degree	Y	
		CDR		TRACEN PET HEALTH SVCS BR	01-JUL-22	G-Bachelor's Level Degree	Y	
		CDR		PACAREA (PAC-3MF)	01-JUL-23	D-Some College	Y	
		LCDR		DD-MIFC PAC	01-JUL-23	G-Bachelor's Level Degree	Y	Old Form
		LCDR		PACAREA (PAC-3MF)	01-JUL-24	G-Bachelor's Level Degree	Y	Old Form
		LCDR		DOL-43	01-JUL-23	D-Some College	Y	
		LCDR		SEC SAN FRAN ENFORCEMENT DIV	01-JUL-22	G-Bachelor's Level Degree	Y	
		LCDR		PACAREA (PAC-543)	01-JUL-24	G-Bachelor's Level Degree	Y	
		LCDR		OL-SFLC IBCT PDM-ALAMEDA	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LCDR		D11 INCIDENT MGMT BR (DRM)	01-JUL-23	A-Not Indicated	Y	
		LCDR		PACAREA (PAC-092)	01-JUL-22	G-Bachelor's Level Degree	Y	AKA Scott
		LCDR		SEC SAN FRAN INSPECTIONS DIV	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LCDR		PSU 312 LOGISTICS DEPT	01-JUL-22	A-Not Indicated	Y	
		LCDR		MIFC PAC COLLECTION MGMT BR	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LCDR		D11 EXT AFFAIRS STAFF (DE)	01-JUN-24	C-HS Graduate or Equivalent	Y	Maternity Leave until 1 Aug 21
		LT		CIVIL RIGHTS DET REGION 3	01-JUL-23		N/A	DCMS Directive N/A
		LT		PACAREA (PAC-3MF)	01-JUL-23	C-HS Graduate or Equivalent	Y	Old Form
		LT		D11 WATERWAYS MGMT BR (DPW)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		BASE ALAM HEALTH SVC DIV (HH)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-3SF)	01-JUL-22	D-Some College	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		SEC SAN FRAN CP/RDNS STF	01-JUL-23	A-Not Indicated	Y	
		LT		SEC SAN FRAN CP/RDNS STF	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LT		COMMANDANT (CG-LMA-A-OL WEST)	01-JUL-22	G-Bachelor's Level Degree	Y	
		LT		OL-CSISC DSF & AVIATN PLAT-OAK	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-094)	01-JUL-22	K-Doctorate (Professional)	Y	
		LT		TRACEN PET COMPROLLER DIV	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-57)	01-JUL-23	G-Bachelor's Level Degree	Y	
		LT		PACAREA (PAC-3MF)	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LT		ASSET LINE MGMT SECTION	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		PACAREA (PAC-55)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LT		AIRSTA SAN FRANCISCO	01-JUL-23	I-Master's Level Degree	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-22	G-Bachelor's Level Degree	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-22	F-2-Year College Degree	Y	
		LT		MSST SF OPS SPRT DEPT	01-JUN-22	C-HS Graduate or Equivalent	Y	
		LT		MIFC PAC TRANSNATL CRIME SEC	01-JUL-24	C-HS Graduate or Equivalent	Y	
		LT		OL-SFLC IBCT APM2-ALAMEDA	01-JUL-24	C-HS Graduate or Equivalent	Y	
		LT		D11 ENFORCEMENT BR (DRE)	01-JUL-23	G-Bachelor's Level Degree	Y	
		LT		PACAREA (PAC-3MF)	01-JUL-22	I-Master's Level Degree	Y	
		LTJG		D11 COMMAND CENTER (DRMC)	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LTJG		AIRSTA SAN FRANCISCO	01-JUL-23	C-HS Graduate or Equivalent	Y	
		LTJG		OL-SFLC SBPL AMS3-ALAMEDA	01-JUL-22	C-HS Graduate or Equivalent	Y	
		LTJG		OL-SFLC LRE SES1-ALAMEDA	01-JUL-22		N/A	PCS to FL on 14 May 21
		LTJG		OL-SFLC-ALAMEDA CA	01-JUL-22	C-HS Graduate or Equivalent	Y	

Note: this is an excerpt of a list shown for example purposes.

EMPLID	LAST NAME	FIRST NAME	EMPL CLASS	PGVD	RATE	SAL ADMIN PLAN	SEX	AGE	TIME IN SERVICE	HIGHEST_EDUC_LVL	EDUCATION LEVEL	POSITION_NBR	CG_EXP_AD_TERM_DT	CG_EXP_LOSS_DT	CG_AD_BASE_DT	PAY BASE DT	RANK DT	ROTATE DT	MBS S DEPTID	MBS S ATU	MBS S OFFAC	MBS S DEPT NAME	CITY	STATE	POSTAL
AD	06	CAPT	OFF	M	9			26	0	G-Bachelo 's Level Deg ee		30-JUN-24	30-JUN-24	18-MAY-94	18-MAY-94	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	COR	OFF	M	1			19	0	G-Bachelo 's Level Deg ee		30-MAR-31	30-MAR-31	23-MAY-01	23-MAY-01	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	W2	AV3	WAR	M	9			23	0	C-HS G aduate o Equ valent		31-OCT-27	31-OCT-27	25-AUG-97	25-AUG-97	01-JUN-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	05	COR	OFF	M	0			17	0	G-Bachelo 's Level Deg ee		30-MAY-33	30-MAY-33	21-MAY-03	21-MAY-03	01-JUL-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	21			21	0	C-HS G aduate o Equ valent		30-JUN-40	30-JUN-40	27-SEP-90	27-SEP-90	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	36			18	0	D-Some College		30-JUN-40	30-JUN-40	21-OCT-02	21-OCT-02	01-AUG-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUL-19	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	3			2	0	C-HS G aduate o Equ valent		30-MAY-35	30-MAY-35	21-MAY-08	21-MAY-08	01-OCT-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	38			1	1	I-Maste 's Level Deg ee		30-JUN-42	30-JUN-42	01-JUN-96	01-JUN-96	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	32			9	0	C-HS G aduate o Equ valent		17-MAY-41	17-MAY-41	18-MAY-11	18-MAY-11	01-JUL-16	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	2			20	0	G-Bachelo 's Level Deg ee		30-JUN-39	30-JUN-39	31-DEC-00	28-SEP-96	01-JUL-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	29			7	0	C-HS G aduate o Equ valent		30-JUN-44	30-JUN-44	17-JUN-13	17-JUN-13	21-MAY-18	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	M	36			16	0	G-Bachelo 's Level Deg ee		30-JUN-40	30-JUN-40	16-NOV-04	16-NOV-04	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	04	LCDR	OFF	F	6			21	0	G-Bachelo 's Level Deg ee		30-JUN-40	30-JUN-40	29-SEP-99	19-AUG-92	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	F	28			6	0	C-HS G aduate o Equ valent		20-MAY-44	20-MAY-44	21-MAY-14	21-MAY-14	21-MAY-14	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	A-Not Ind cated		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	A-Not Ind cated		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	02	LTIG	OFF	M	26			3	0	C-HS G aduate o Equ valent		16-MAY-47	16-MAY-47	17-MAY-17	17-MAY-17	17-NOV-18	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	31			6	0	G-Bachelo 's Level Deg ee		30-JUN-47	30-JUN-47	09-DEC-14	09-DEC-14	22-NOV-20	01-JUL-24	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	30			5	1	I-Maste 's Level Deg ee		30-JUN-46	30-JUN-46	21-APR-15	21-APR-15	24-NOV-19	01-JUL-23	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	03	LT	OFF	M	3			0	0	G-Bachelo 's Level Deg ee		30-JUN-47	30-JUN-47	26-JUL-16	26-JUL-16	01-JUL-20	01-JUL-22	000162	11	20180	A RSTA SAN FRANCISCO	SAN FRANCISCO	CA	94128	
AD	06	CAPT	OFF	M	3			21	0	C-HS 's Level Deg ee		30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-JUL-19	01-JUL-23	000503	37	51290	CEU OAKLAND-PRODUCT LINE	OAKLAND	CA	94652	
AD	W4	INV4	WAR	M	52			28	0	C-HS G aduate o Equ valent		30-JUN-22	30-JUN-22	19-APR-92	14-SEP-87	01-JAN-17	01-JUL-23	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501	
AD	W3	INV3	WAR	M	8			21	0	D-Some College		30-SEP-29	30-SEP-29	20-JUL-99	20-JUL-99	01-JUN-18	01-JUL-24	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501	
AD	W2	INV2	WAR	M	38			18	0	C-HS G aduate o Equ valent		30-SEP-32	30-SEP-32	16-JUL-02	16-JUL-02	01-JUN-20	01-JUL-24	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501	
AD	W2	INV2	WAR	M	38			15	0	C-HS G aduate o Equ valent		30-SEP-32	30-SEP-32	23-OCT-97	23-OCT-97	01-JUL-19	01-JUL-23	000716	47	77100	CG S PACIFIC REG	ALAMEDA	CA	94501	
AD	06	CAPT	OFF	M	0			23	0	G-Bachelo 's Level Deg ee		30-JUN-27	30-JUN-27	21-MAY-97	21-MAY-97	01-JUL-19	01-JUL-22	002368	74	61200	TRACEN PET CMO STAFF	PETALUMA	CA	94952	
AD	05	COR	OFF	M	3			21	0	G-Bachelo 's Level Deg ee		30-JUN-30	30-JUN-30	14-JAN-00	14-JAN-00	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMO STAFF	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	2			2	0	D-Docto ate (P rfees onal)		30-JUN-41	30-JUN-41	12-JUL-10	12-JUL-10	01-JUL-16	01-JUL-22	002368	74	61200	TRACEN PET CMO STAFF	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	6			23	0	G-Bachelo 's Level Deg ee		31-AUG-27	31-AUG-27	19-JUN-97	19-JUN-97	26-AUG-96	01-JUL-22	002370	74	61200	TRACEN PET CUST SPRT SVCS	PETALUMA	CA	94952	
AD	W2	PER2	WAR	M	33			15	0	C-HS G aduate o Equ valent		30-SEP-35	30-SEP-35	12-JUL-05	12-JUL-05	01-JUN-18	01-JUL-24	002370	74	61200	TRACEN PET CUST SPRT SVCS	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	38			19	0	C-HS G aduate o Equ valent		30-SEP-31	30-SEP-31	10-JUL-01	10-JUL-01	01-MAY-19	01-JUL-23	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	38			15	0	C-HS G aduate o Equ valent		30-MAY-36	30-MAY-36	11-JUL-05	11-JUL-05	01-JUL-17	01-JUL-22	002374	74	61200	TRACEN PET COMPTROLLER DIV	PETALUMA	CA	94952	
AD	05	COR	OFF	M	1			18	0	G-Bachelo 's Level Deg ee		30-MAY-32	30-MAY-32	22-MAY-02	22-MAY-02	01-JUL-18	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	W4	MATA	WAR	M	51			26	0	C-HS G aduate o Equ valent		31-AUG-22	31-AUG-22	05-JUN-92	16-SEP-91	01-JUN-13	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	F	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUL-22	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	27			12	0	C-HS G aduate o Equ valent		17-MAY-46	17-MAY-46	18-MAY-16	18-MAY-16	01-JUN-19	01-JUL-23	002378	74	61200	TRACEN PET FAC ENG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	35			12	0	C-HS G aduate o Equ valent		30-MAY-38	30-MAY-38	21-MAY-08	21-MAY-08	01-JUN-19	01-JUN-24	003491	74	61200	TC PET PERF SYS DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	1			1	0	A-Not Ind cated		30-JUN-37	30-JUN-37	04-OCT-06	04-OCT-06	01-SEP-17	01-JUL-22	003491	74	61200	TC PET PERF SYS DIV	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	39			15	0	C-HS G aduate o Equ valent		30-JUN-40	30-JUN-40	26-SEP-05	26-SEP-05	10-JAN-20	01-JUL-22	003493	74	61200	TC PET OPS TRNG DIV	PETALUMA	CA	94952	
AD	04	LCDR	OFF	M	2			23	0	D-Some College		30-JUN-40	30-JUN-40	24-JUN-97	24-JUN-97	01-AUG-20	01-JUL-23	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	W4	ELC4	WAR	M	9			29	0	C-HS G aduate o Equ valent		31-MAR-22	31-MAR-22	06-JAN-92	06-JAN-92	01-JUN-18	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	03E	LT	OFF	M	35			11	0	I-Maste 's Level Deg ee		30-JUN-46	30-JUN-46	18-MAY-09	13-JUN-06	07-DEC-19	01-JUL-22	003496	74	61200	TC PET ELEC & INFO TRNG DIV	PETALUMA	CA	94952	
AD	W3	ISM3	WAR	M	52			27	0	C-HS G aduate o Equ valent		31-JUL-23	31-JUL-23	31-MAY-93	31-MAY-93	01-JUN-18	01-JUL-22	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952	
AD	03	LT	OFF	F	31			9	0	G-Bachelo 's Level Deg ee		17-MAY-45	17-MAY-45	18-MAY-11	18-MAY-11	01-MAY-18	01-JUL-23	003498	74	61200	TC PET TRNG RESOURCE SUPT BR	PETALUMA	CA	94952	
AD	06	CAPT	OFF	F	21			9	0	G-Bachelo 's Level Deg ee		30-JUN-29	30-JUN-29	19-MAY-99	19-MAY-99	01-OCT-20	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501	
AD	05	COR	OFF	M	9			19	0	K-Docto ate (P rfees onal)		30-JUN-30	30-JUN-30	12-OCT-01	09-OCT-01	01-SEP-18	01-JUL-23	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501	
EAD	03E	LT	OFF	M	33			10	0	C-HS G aduate o Equ valent		17-JUN-13	17-JUN-13	09-APR-10	18-JUN-07	16-APR-16	01-JUL-22	003509	11	71111	D11 LEGAL STAFF (DU)	ALAMEDA	CA	94501	
AD	03	LT	OFF	F	36			8	0	G-Bachelo 's Level Deg ee		30-JUN-46	30-JUN-46	18-JUN-98	18-JUN-98	01-JUL-16	01-JUL-22</								



5810
6 Apr 2022

MEMORANDUM

From: [REDACTED]
Convening Authority, Staff Judge Advocate

To: File

Subj: GRANT OF EXCUSAL FOR MEMBERS FOR 04 APR – 15 APR 2022 FOR
UNITED STATES V. [REDACTED]

Ref: (a) Article 25, Uniform Code of Military Justice
(b) Rule for Courts-Martial 505, Manual for Courts-Martial (2019 Ed.)
(c) DOL GCM Convening Order 01-19 Amendment No. 1
(d) DOL GCM Convening Order 01-19 Amendment No. 4
(e) DOL GCM Convening Order 01-19 Amendment No. 5

1. Pursuant to references (a) and (b), the following person is excused as a detailed member in the case of United States v. [REDACTED] during the time period 04 Apr 2022 to 15 Apr 2022:

[REDACTED]

2. The excusal is for a medical reason which was related by telephone by the aforementioned member to [REDACTED] of the LSC on 6 Apr 2022.

3. This excusal is pursuant to the Convening Authority's delegation to me to excuse individual members from the court-martial as recognized in references (b) through (e).

4. Should the subject trial be continued to a later time, the aforementioned excused member will be available to serve as a panel member as prescribed in references (b) through (e).

#

SPECIAL COURT-MARTIAL

) COMMANDING OFFICER
)
)
) CG SMTC
) CAMP JEJUNE, NORTH CAROLINA
)
)
)
)
)
)
)

CONVENING ORDER
NO. 1-20

Date: 15 September 2020

COMMANDING OFFICER
SPECIAL MISSIONS TRAINING CENTER

1. A special court-martial is hereby convened. It may try such persons as may properly be brought before it, and shall meet at Norfolk, Virginia unless otherwise directed. Designation of this convening authority is Secretarial and pursuant to Article 23, UCMJ.

2. The court-martial will be detailed with the following members:

Commander [REDACTED]
Commander [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant Junior Grade [REDACTED]
Chief Warrant Officer [REDACTED]

3. In all cases in which the accused submits a request pursuant to Article 25(c)(2), UCMJ, that enlisted members serve on the court-martial panel, the court-martial will be detailed with the following members:

Commander [REDACTED]
Commander [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
YNCM [REDACTED]
AETCM [REDACTED]
GMC [REDACTED]
SKC [REDACTED]
HSC [REDACTED]

4. Should any officer in paragraph two (2) or in the officer portion of paragraph three (3) be properly excused prior to assembly, that member will be replaced with an officer listed below, in the order listed below. [Please note that the first three (3) names listed below apply only if the accused submits a request for enlisted members to serve on the panel pursuant to Article 25(c)(2), UCMJ].

Lieutenant [REDACTED]
Lieutenant [REDACTED] ned
Chief Warrant Officer [REDACTED]
Commander [REDACTED]
Lieutenant [REDACTED]
Lieutenant [REDACTED]
Chief Warrant Officer [REDACTED]
Chief Warrant Officer [REDACTED]
Chief Warrant Officer [REDACTED]

5. Should any enlisted members in paragraph three (3) be properly excused prior to assembly, that member will be replaced with an enlisted member below, in the order listed:

MKC [REDACTED] tin
DCC [REDACTED]
SKCS [REDACTED]
SKC [REDACTED]

6. After identification of primary members, if excess members remain, the military judge may impanel alternate members at his or her discretion.

[REDACTED]
Captain, U. S. Coast Guard
Commanding Officer
Coast Guard Special Missions Training Center

GENERAL COURT-MARTIAL) United Stated Coast Guard
) Director of Operational Logistics
)
) Norfolk, Virginia
CONVENING ORDER)
NO. 01-19)
AMENDMENT NO. 5) Date: 29 March 2022
_____)

UNITED STATES COAST GUARD, DIRECTOR OF OPERATIONAL LOGISTICS

1. I excuse the following member related to DOL General Court-Martial Convening Order No. 01-19, Amendment No. 04, dated 8 March 2022, in the case of United States v. [REDACTED] a
USCG:

CDR [REDACTED]

2. In the event the number of members is reduced below the number required under R.C.M. 501(a) in the aforementioned case, the following officers shall be detailed to this court-martial in the following order:

LCDR [REDACTED]

LCDR [REDACTED]

LT [REDACTED]

BOSN3 [REDACTED]

WEPS2 [REDACTED]

3. In the event the number of enlisted members is reduced below one-third of the total membership in the aforementioned case, the following enlisted members shall be detailed to this court-martial in the following order:

MEC [REDACTED]

GMC [REDACTED]

YNC [REDACTED]

EM1 [REDACTED]

ET1 [REDACTED]

4. I hereby delegate to my Staff Judge Advocate the authority to excuse individual members from this court-martial. This delegated authority shall be limited so that no more than one-third of the total members detailed to a court-martial may be excused.

5. After the identification of primary members, the military judge may impanel alternate members at his or her discretion.



Captain, U.S. Coast Guard
Acting Director of Operational Logistics

Army
Pretrial/Panel Selection Materials

OPORD 22-XX (Courts-Martial Panel Member Selection) (U).

(U) References: None

Time Zone Used Throughout the OPORD: QUEBEC (Local).

(U) Task Organization: No change.

1. (U) SITUATION. New court-martial panel members must be selected on an annual basis or as needed. In accordance with Article 25, Uniform Code of Military Justice, (UMCJ), nominees will be personnel “best qualified” by reason of age, education, training, experience, length of service, and judicial temperament.

2. (U) MISSION. All subordinate and tenant commanders submit nominees for consideration by the Commanding General of XX Division required in ANNEX A. All nominees must be screened IAW criteria in Article 25, UCMJ, prior to submission to the XXX OSJA NLT 26 1600 August 2022 to the XX Division Staff Judge Advocate POC.

3. (U) EXECUTION.

a. (U) Commander's Intent. Nominate prospective courts-martial panel members and screen them IAW the criteria in Article 25, UCMJ, and my instructions in Annex A.

b. (U) Concept of Operations. No change.

c. (U) Tasks to Subordinate Units.

(1) (U) 1 BCT, 2 BCT, CAB, DSB, DIVARTY, and HHBN.

(a) (U) Identify and recommend nominees IAW Article 25 criteria and ANNEX A.

Submit a list of nominees using Annex D, with SRBs for each nominee, and certifying memorandum (Annex B) to POC NLT 26 1600 August 2022.

d. (U) Tasks to Staff.

(1) (U) Office of the Staff Judge Advocate (SJA).

(a) (U) Receive and compile all nominees for final selection NLT 26 1600 August 2022.

(2) (U) G-1

(a) (U) Provide an AAA-162 (Alpha Roster) to POC NLT 26 1600 August 2022. Alpha Roster will reflect manning as of 1 August 2022.

e. (U) Tasks to Garrison Command.

(1) (U) USAG.

(a) (U) Identify and recommend nominees based on Article 25 Criteria and IAW ANNEX A. Submit a list of nominees using Annex D, color SRBs for each nominee, and certifying memorandum (Annex B), to POC NLT 26 1600 August 2022.

f. (U) Tasks to Tenant Units.

(1) (U) MEDDAC, DENTAC

(a) (U) Identify and recommend nominees based on Article 25 Criteria and IAW ANNEX A. Submit a list of nominees using Annex D, color SRBs for each nominee, and certifying memorandum (Annex B), to POC NLT 26 1600 August 2022.

g. (U) Coordinating Instructions.

(1) (U) List the identified personnel in the spreadsheet enclosed in ANNEX D. Font will be size 10, Arial, and using all capital letters. The unit need only be specified to BCT level with no spaces. Personnel will be listed in date of rank order, highest ranking first.

(2) (U) Nominees must not be scheduled to deploy, PCS, ETS, REFRAD, retire or otherwise depart the command or the Fort XXXXXX area for at least six months from the date of nomination.

(3) (U) Commanders must include nominees who are currently deployed but will redeploy prior to 1 December 2021 and are not barred from nomination, IAW paragraph 3(g)(2).

(4) (U) Each commander will sign a memo stating whether he or she met the qualitative and quantitative requirements of this order and if not, the reason why the commander could not comply. Sample memorandum is included at Annex C.

(5) (U) Include a digital copy of each nominee's SRB.

(6) (U) All nominees will be submitted through the unit's servicing legal office to the XX Division Office of the Staff Judge Advocate POC.

4. (U) SUSTAINMENT. No change.

5. (U) COMMAND AND SIGNAL.

a. (U) POC for this FRAGO is Senior Military Justice Operations NCO, at NIPR: XXXXXX@mail.mil or SSG XXXXX, at NIPR XXXXX.mil@mail.mil.

b. (U) In the event a tasking suspense detailed in this OPORD is not met, it is this POC's responsibility to contact one the following:

(1) MSE G3, Current Operations, Operations Specialist, Mr. XXXX at NIPR XXXXXXXXX.civ@mail.mil or DSN: xxx-xxxx.

(2) MSE G3, Current Operations, Tasking Analyst, Mr. XXXXX at NIPR: XXXXXXXXX.civ@mail.mil or DSN: xxx-xxxx.

ACKNOWLEDGE:

XXXXX MG
COMMANDING

OFFICIAL:

XXXXX, COL
G3

ANNEXES:

- A- Courts-Martial Panel Selection Memo
- B- Sample Memo All Personnel Met
- C- Sample Memo All Personnel Not Met
- D- Spreadsheet

DISTRIBUTION:

CDR, 1 BCT
CDR, 2 BCT
CDR, CAB
CDR, DSB
CDR, DIVARTY

CDR, MEDDAC
CDR, DENTAC
CDR, GARRISON
CDR, HHB



DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT XXXXX
FORT XXXXX

AFX-SC

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Courts-Martial Panel Selection

1. I will soon be selecting primary and alternate members for Special and General Courts-Martial panel duties. Submit your nominees, reviewed personally by you, to this Headquarters, through the Office of the Staff Judge Advocate, Military Justice Division, no later than **26 1600 August 2022**.

2. In accordance with Article 25, Uniform Code of Military Justice, nominees will be personnel "best qualified" by reason of age, education, training, experience, length of service, and judicial temperament.

3. Commanders will provide the nominations as follows (please note that all officers in the grades of O-6 and O-5, and noncommissioned officers in the grade E-9, will be nominated):

Unit	O6	O5	O4	O3	O2-01	CW5-WO1	E9	E8	E7-E6	E5-E1
1ST BCT	All	All	4	8	6	4	All	6	6	3
2D BCT	All	All	4	8	6	4	All	6	6	3
DSB	All	All	4	8	6	4	All	6	6	3
HHBN	All	All	4	4	2	2	All	6	6	3
CAB	All	All	4	8	6	10	All	6	6	3
USAG	All	All	1	1	1	0	All	1	1	3
MEDDAC	All	All	3	2	2	1	All	3	3	3
DENTAC	All	All	1	2	1	1	All	1	1	3
DIVARTY	All	All	1	2	1	1	All	1	1	3

4. If the requested number of personnel are not provided, submit a memorandum justifying the reason for the deficiency. The memorandum should accompany the list of nominated personnel provided.

5. **Nominees must not be scheduled to deploy, PCS, ETS, REFRAD, retire, or otherwise depart this command or the Fort XXXX area for at least twelve (12) months from the date of nomination.**

6. **IMPORTANT NOTE:** Officers whose basic branch is MC, DC, VC, CH, JA, or who are detailed as IGs are no longer disqualified from this duty. Your nominations should not be limited by branch, corps, or occupational specialty.

AFDR-SC
Courts-Martial Panel Selection

7. All nominations will be accompanied by a copy of the ORB for officers and the ERB for enlisted Soldiers. Your list of nominees must include the social security number, unit address, two letter basic branch abbreviation for officers, MOS code for enlisted Soldiers, date of rank, duty position, telephone number, ETS/PCS date of each nominee, as well as any other date the nominee may be scheduled to depart from Fort XXX. Submit your nominations to the OSJA, Military Justice Division, NLT 26 1100 August 2022. Submit a copy of one ORB or ERB for each nominee.

8. POC for this action is MSG XXXXXX, Senior Military Justice Operations NCO, at (315) 772-XXXX or XXXXXXXXX.mil@mail.mil, or SSG XXXXXX, Senior Litigation NCO, at 315-772-XXXX or XXXXXXXXX.mil@mail.mil.

XXXXXXXXXXXXXXXXXXXXX
Major General, USA
Commanding

DISTRIBUTION:
SJA
CDR, 1ST BCT
CDR, 2D BCT
CDR, DSB
CDR, HHBN
CDR, CAB
CDR, USAG
CDR, MEDDAC
CDR, DENTAC
CDR, DIVARTY



DEPARTMENT OF THE ARMY
LETTERHEAD
FORT XXXXXXXXX

OFFICE-SYMBOL

MEMORANDUM FOR Commander, Fort XXXX, Fort XXXXX,

SUBJECT: Courts-Martial Panel Selection

1. I have personally selected the attached courts-martial panel member nominees. I have selected these nominees using the criteria outlined in Article 25 of the Uniform Code of Military Justice. They are best qualified for panel duty by reason of age, education, training, experience, length of service, and judicial temperament.
2. Point of contact for this memorandum is the undersigned at DSN 772-xxxx.

Encl

SIGNATURE BLOCK
COL, IN
Commanding



DEPARTMENT OF THE ARMY
LETTERHEAD
FORT XXXXXXX XXXXX-5000

OFFICE-SYMBOL

MEMORANDUM FOR Commander, Fort XXXX,

SUBJECT: Courts-Martial Panel Selection

1. I have personally selected the attached courts-martial panel member nominees. I have selected these nominees using the criteria outlined in Article 25 of the Uniform Code of Military Justice. They are best qualified for panel duty by reason of age, education, training, experience, length of service, and judicial temperament.
2. Due to the unavailability of personnel, nominees have not been provided in the grades listed below. For the reasons given, I request that this command not be required to provide nominees in the specified grades.
 - a. O-5. The only two persons of this grade assigned to my command are both scheduled to PCS in the summer.
 - b. O-4. There is currently only one person of this grade assigned to my command and he has been nominated.
3. Point of contact for this memorandum is the undersigned at DSN 772-1234.

Encl

SIGNATURE BLOCK
COL, IN
Commanding



DEPARTMENT OF THE ARMY

MEMORANDUM FOR Commander, Headquarters, XXXXXXXX Division and Fort XXXX

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019 *[one panel for GCM and one for SPCM; with substitutes (so panel lasts one year); no alternates authorized]*

1. It is necessary to select new court-martial panel members for cases referred on or after 1 January 2019. The current court-martial panels have been sitting since **DATE**. I recommend that you detail one new court-martial panel for special courts-martial and another for general courts-martial.

2. In accordance with Article 25(e)(2), Uniform Code of Military Justice (UCMJ), and R.C.M. 502(a)(1), you must detail those persons who are best qualified for this duty by reason of age, education, training, experience, length of service, and judicial temperament. Race, rank, gender, duty position, or any other factor may not be used to exclude otherwise qualified persons for court-martial membership.

a. Enclosed for your review is a list of nominees for court-martial duty, submitted by the subordinate commanders, along with nominee Officer and Enlisted Record Briefs.

b. You are not limited to the names appearing on the list of nominees. A roster of all available personnel assigned to your GCMCA is attached for your consideration. You may detail anyone assigned to your command who meets the Article 25, UCMJ, criteria.

c. All personnel on the list of nominees and within your command should be considered in light of the above Article 25(d)(2), UCMJ, factors and those factors only. You may detail to the new court-martial panels any or all of those personnel that you personally selected to serve on the current court-martial panels.

3. Panel configuration.

a. General. The members you select will be detailed on orders for courts-martial duty until they are permanently excused or until you select a new court-martial panel. I recommend that you select substitute members who may be detailed in place of members who are temporarily or permanently excused from service. Under recent changes to the UCMJ, any Soldier may serve on the court-martial panel of any other Soldier, subject only to the requirement, when it can be avoided, that no Soldier will be tried by a panel member junior to them. I recommend that the new "default" panel be composed of at least one-third enlisted members, recognizing that the majority of court-

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

martial cases involve an enlisted accused, and a significant number of those cases involve an election of at least one-third enlisted members.

b. Panel selection.

(1) Selection of officer members. I recommend that you select **22 officer members** to serve on courts-martial by placing your initials beside their names in the column marked "Officer Members."

(2) Selection of enlisted members. I recommend that you select **22 enlisted members** by placing your initials beside their names in the column marked "Enlisted Members."

c. The members you select will be ordered by seniority as shown on the panel selection documents, by date of rank, for the purpose of detailing them as indicated below. I recommend you detail the members you select as follows:

(1) detail the first six available officers and the first eight available enlisted members to general courts-martial where the enlisted accused does not make an election pursuant to Article 25(c)(2)(A) (this panel must have at least one-third enlisted members if the accused makes an election pursuant to Article 25(c)(2)(B));

(2) detail the first 14 available officers to general courts-martial in which the accused is either an officer or an enlisted member has elected trial by a court-martial composed of all officer members pursuant to Article 25(c)(2)(A);

(3) detail the first five available officers and the first five available enlisted members to special courts-martial where an enlisted accused does not make an election pursuant to Article 25(c)(2)(A) (this panel must have at least one-third enlisted members if the accused make an election pursuant to Article 25(c)(2)(B));

(4) detail the first ten available officers to special courts-martial in which the accused is either an officer or an enlisted member who has elected trial by a court-martial composed of all officer members pursuant to Article 25(c)(2)(A); and

(5) designate all other panel members selected for court-martial duty but not detailed under this paragraph to serve as substitute members for any court-martial referred to the panel concerned.

4. Substitution of members prior to assembly. I recommend you adopt the following procedures for excusal and replacement of members prior to assembly:

a. Excusal authority. Prior to assembly, you may excuse any member, with or without cause.

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

b. Replacement of members excused prior to assembly. A member excused prior to assembly will be replaced for the period of the excusal by the next available substitute member in the order shown on the convening order, except that, in all cases, excused officer members will be replaced with officer member substitutes, and excused enlisted members will be replaced with enlisted member substitutes.

c. Panel exhaustion. If there are insufficient available substitute members to replace an excused member, then the panel nomination and selection process described in this memorandum will be repeated.

d. Delegation of excusal authority. I recommend that you delegate to the staff judge advocate (SJA), or the acting SJA, in the SJA's absence, the authority to excuse individual members from a court-martial prior to assembly, without cause shown, pursuant to R.C.M. 505(c)(1)(B). This authority shall be limited so that no more than one-third of the total members detailed to a particular court-martial may be excused pursuant to this delegation.

e. Automatic excusal criteria. I recommend that members meeting one or more of the below criteria be excused automatically from a court-martial, without any further action by you, if, prior to assembly, it has been determined that:

(1) the member is a witness in the case;

(2) the member has acted as accuser or has forwarded, investigated, or made a recommendation as to the disposition of the accused's case; or

(3) the member does not outrank the accused.

5. Alternate and substitute members. Alternate members have the same duties as members; however, an alternate member shall not vote or participate in deliberations on findings or sentencing unless the alternate member has become a member by replacing a member who was excused after impanelment. If you authorize alternate members, they will be determined and impaneled according to the rules for courts-martial and this advice. A general court-martial may lose two members after impanelment without requiring new (or alternate) members. A special court-martial must maintain the required four members both at and after impanelment.

a. I recommend that you state in the convening order that alternates are not authorized.

b. If insufficient members remain after challenges to satisfy the numerical requirements as set forth in R.C.M. 501, I recommend that substitute members be detailed automatically in accordance with paragraph 6 below.

6. Automatic replacement procedures after assembly and challenges, and before impanelment.

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

a. In general courts-martial in which the accused has elected trial by a court-martial composed of all officer members, if the number of members falls below eight, the next available officer members by seniority will be detailed to increase the total number of members to 12.

b. In all other general courts-martial, if the number of members falls below eight, the next available enlisted members by seniority will be detailed to increase the total number of members to 12.

c. In special courts-martial in which the accused has elected trial by a court-martial composed of all officer members, if, after challenges, the number of members falls below four, the next available officer members by seniority will be detailed to increase the total number of members to eight.

d. In all other special courts-martial with members, if the number of members falls below four, the next available enlisted members by seniority will be detailed to increase the total number of members to eight.

7. Automatic replacement procedures after impanelment. If, after impanelment, the excusal of any member(s) results in less than the number of members required under the Rules for Courts-Martial for the type of court-martial involved, then I recommend that the procedures in paragraph 6 above shall apply.

8. Issuance of court-martial convening orders.

a. I recommend that you issue court-martial convening orders (CMCO) that detail members you selected for court-martial duty as follows:

(1) the new CMCO 1 will detail members for general courts-martial and will list substitute members for automatic detailing in accordance with paragraphs 6 and 7, above;

(2) the new CMCO 2 will detail members for special courts-martial and will list substitute members for automatic detailing in accordance with paragraphs 6 and 7, above.

b. For all cases referred on or after 1 January 2019, I recommend that you refer general courts-martial cases to the court-martial created by CMCO 1 and special courts-martial cases to the court-martial created by CMCO 2.

c. I recommend that both panels serve from the date of this memorandum until you or your successor select new court-martial panels.

9. The point of contact is the undersigned.

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

5 encls

1. Panel Nominee Selection Sheet
2. Panel Nominee ORB/ERBs
3. Notification Memo to Panel Members
4. AAA-162 Duty Roster (electronic)
5. FRAGO – Panel Nominations

XXXXXXXXXXXX

COL, JA

Staff Judge Advocate

SUBJECT: SAMPLE - Selection and Detailing of Courts-Martial Panel Members for Cases Referred on or After 1 January 2019

DIRECTION OF THE CONVENING AUTHORITY:

1. The recommendations of the Staff Judge Advocate are (approved) / (disapproved).
2. My selections are noted on Enclosure 1.

XXXXXXXXXXXXXXXXX
Major General, USA
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXX DIVISION AND FORT XXXXXXXXX
FORT XXXXX

AFX-CG

MEMORANDUM FOR Courts-Martial Panel Members

SUBJECT: Duties of Courts-Martial Members

1. I have personally selected you to be a primary or substitute courts-martial panel member based on my determination that you are the best qualified by reason of age, education, training, experience, length of service, and judicial temperament.
2. Your selection for this duty is an honor and is of the utmost importance to the fair administration of military justice. This duty takes precedence over all other duties, to include TDY and exercises, unless I specifically excuse you.
3. Neither you nor your chain of command may schedule absences that would conflict with your courts-martial duty. Only I, or the Acting Commander in my absence, may excuse members from courts-martial duty.
4. The Office of the Staff Judge Advocate, Military Justice Division, will give you as much notice as possible regarding the date, time, place, and uniform when your service is required. However, due to the nature of judicial proceedings, last minute changes often occur which may necessitate your service on very short notice. Courts-martial may convene early, beyond duty hours, and when necessary, extend into weekends and holidays. I expect members to be patient, flexible, and understanding when such circumstances arise.
5. Excusals. As stated above, this duty takes precedence over all duties, including field duty, TDY, leave, and pass. Thus, when informed that your service as a panel member is required, I expect you to be available.
 - a. Requests for excusal from duty will only be approved if you have demonstrated good cause for the excusal. I am providing you this information now so that you can, to the extent possible, plan any absence (e.g., pass, leave, training exercises, temporary duty, etc.) around your service as a courts-martial panel member.
 - b. You are required to send all requests for excusal in memorandum format, by the suspense dates you will be provided, to the Military Justice Division, attention Mrs. XXXXXXXXX, at XXXXXXXXXX.civ@army.mil. It is your sole responsibility as a courts-martial panel member to submit excusal requests in a timely manner.

AFBL-CG

SUBJECT: Duties of Courts-Martial Members

c. All excusal requests MUST be accompanied by supporting documentation (e.g., leave form, orders, etc.). Failure to submit supporting documentation, or to submit requests by the required time, may result in my automatic denial of your request.

d. You are required to be present at the time and place of which you have been notified until such a time you are properly excused in writing from duty by me, the Acting Commander, or the Military Judge.

6. Verification. Upon receiving a copy of this memorandum, you must contact Mrs. XXXXX via email to acknowledge receipt of this notification and duty. Members of this panel are personally accountable and obligated to keep the Military Justice Division abreast of your duty status during the duration of your term of service.

7. Any questions regarding your duties as a court-martial panel member should be directed to Major XXXXXXXXX, Chief, Military Justice, at (XXX) XXX-XXXX.

8. I hope that you will find this duty professionally and personally rewarding.

XXXXXXXXXXXXXXXXXXXXX
Major General, USA
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXXXX DIVISION AND FORT XXXXX

AFVB-XY-Z

1 September 2022

MEMORANDUM FOR Office of the Staff Judge Advocate, Fort XXXXXX

SUBJECT: Excusal Request - Court-Martial Duty

1. This is a request for excusal from court-martial duty:

Name: LTC John Doe

Unit: HHC, X Bn, Y Regt

Reason for request: TDY to MCAS Miramar, CA. Squadron Commanders are required by Department of Army to attend the Senior Leader Training and Development on advanced pilot training programs and upcoming changes to aircraft OPTEMPO. Use or lose leave.

Date(s) of excusal: 5-10 OCT 2017 (TDY)
15-29 NOV 2017 (Use or lose leave)

2. Point of Contact is the undersigned at 915-744-1234.

JOE DOE
COL, AV
Commanding



DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXX DIVISION AND FORT XXXXXX

AFX-CG

MEMORANDUM FOR RECORD

SUBJECT: Request for Temporary Excusal from Court-Martial Duty

1. The following requests for temporary excusal from court-martial duty pertaining to the below-listed individuals are approved unless otherwise indicated.

	NAME	DATE/CASE	REASON(S)	DISAPPROVE
1	COL DOE, John	25-28 Oct 2022	TDY 18 Sep-11 Nov 22	
2	COL ROE, Jane	25-28 Oct 2022	Leave 28 Oct 22	

2. The point of contact for this action is MAJ XXXXXXXXXXXX, Chief, Military Justice, at (XXX) XXX-XXXX.

XXXXXXXXXXXXXX
Major General, USA
Commanding

Court-Martial Convening Order X was the last of the series for 2018

**DEPARTMENT OF THE ARMY
GCMCA**

**COURT-MARTIAL CONVENING ORDER
NUMBER 1**

1 January 2019

A general court-martial is hereby convened by this order. The following primary members are permanently detailed to this court-martial. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, 42nd Fires Brigade
CPT XXXXXXXXXXXX, USAG
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Brigade
CSM XXXXXXXXXXXX, MEDDAC
CSM XXXXXXXXXXXX, 54th Infantry Division
1SG XXXXXXXXXXXX, 2nd Brigade
1SG XXXXXXXXXXXX, DENTAC

In the event the accused is an officer, or an enlisted accused submits a request pursuant to Article 25(c)(2)(A), UCMJ, the court will be composed of the following officer members. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
LTC XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, DENTAC
LTC XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, 2nd Brigade
MAJ XXXXXXXXXXXX, 3rd Brigade
MAJ XXXXXXXXXXXX, 603rd Training Division
MAJ XXXXXXXXXXXX, 42nd Fires Brigade
MAJ XXXXXXXXXXXX, USAG
CPT XXXXXXXXXXXX, USAG

CONTINUATION SHEET: Court-Martial Convening Order #1, dated 1 January 2019,
Headquarters, GCMCA

The following members will serve as substitutes in the order they are listed here (officers will replace officers, and enlisted will replace enlisted) when any of the members listed above are temporarily or permanently excused.

COL XXXXXXXXXXXX, 42nd Fires Brigade
COL XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, USAG
LTC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
MAJ XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, MEDDAC
MAJ XXXXXXXXXXXX, 3rd Brigade
MAJ XXXXXXXXXXXX, USAG
CSM XXXXXXXXXXXX, DENTAC
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
1SG XXXXXXXXXXXX, 2nd Brigade
1SG XXXXXXXXXXXX, 4th Brigade
1SG XXXXXXXXXXXX, 54th Infantry Division
1SG XXXXXXXXXXXX, DENTAC
MSG XXXXXXXXXXXX, 54th Infantry Division
MSG XXXXXXXXXXXX, MEDDAC
MSG XXXXXXXXXXXX, 3rd Brigade
SFC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
SFC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
SFC XXXXXXXXXXXX, 42nd Fires Brigade

BY COMMAND OF MAJOR GENERAL GCMCA:

DISTRIBUTION:

1-MJ, TC, DC, Accused
1-Ea Indiv Concerned
1-Rec Set

FNAME MI LNAME
MSG, USA
Chief Paralegal NCO

Court-Martial Convening Order X was the last of the series for 2018

DEPARTMENT OF THE ARMY
GCMCA

COURT-MARTIAL CONVENING ORDER
NUMBER 2

1 January 2019

A special court-martial is hereby convened by this order. The following primary members are permanently detailed to this court-martial. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX 54th Infantry Division
MAJ XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 3rd Brigade
CSM XXXXXXXXXXXX, MEDDAC

In the event the accused is an officer, or an enlisted accused submits a request pursuant to Article 25(c)(2)(A), UCMJ, the court will be composed of the following officer members. No alternate members are authorized.

COL XXXXXXXXXXXX, 3rd Combat Aviation Brigade
COL XXXXXXXXXXXX, USAG
COL XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
LTC XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, DENTAC
LTC XXXXXXXXXXXX, 1st Brigade
LTC XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, 2nd Brigade
MAJ XXXXXXXXXXXX, 3rd Brigade

CONTINUATION SHEET: Court Martial Convening Order #2, dated 1 January 2019,
Headquarters, GCMCA

The following members will serve as substitutes in the order they are listed here
(officers will replace officers, and enlisted will replace enlisted) when any of the
members listed above are temporarily or permanently excused.

COL XXXXXXXXXXXX, 42nd Fires Brigade
COL XXXXXXXXXXXX, 3rd Brigade
LTC XXXXXXXXXXXX, USAG
LTC XXXXXXXXXXXX, 3rd Combat Aviation Brigade
MAJ XXXXXXXXXXXX, 54th Infantry Division
MAJ XXXXXXXXXXXX, MEDDAC
MAJ XXXXXXXXXXXX, 3rd Brigade
MAJ XXXXXXXXXXXX, USAG
CSM XXXXXXXXXXXX, DENTAC
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
CSM XXXXXXXXXXXX, 42nd Fires Brigade
CSM XXXXXXXXXXXX, 3rd Combat Aviation Brigade
1SG XXXXXXXXXXXX, 2nd Brigade
1SG XXXXXXXXXXXX, 4th Brigade
1SG XXXXXXXXXXXX, 54th Infantry Division

BY COMMAND OF MAJOR GENERAL GCMCA:

DISTRIBUTION:

1-MJ, TC, DC, Accused
1-Ea Indiv Concerned
1-Rec Set

FNAME MI LNAME
MSG, USA
Chief Paralegal NCO

DEPARTMENT OF THE ARMY
HEADQUARTERS, XXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXXX, XXXXXXX

COURT-MARTIAL CONVENING ORDER
NUMBER XX

XX October 2022

The following members are detailed to the general court-martial convened by Court-Martial Convening Order (CMCO) Number XX, this headquarters, dated XX August 2022, as amended by CMCO Number XX, dated XX October 2022, for the case of United States v. Staff Sergeant XXXXXXXXXXXX only, scheduled to be assembled XXX November 2022:

1LT XXXXXXXXXXXXXXX, 1BCT
MSG XXXXXXXXXXXXXXX, Garrison

VICE:

LTC XXXXXXXXXXXXXXX, 2BCT
MSG XXXXXXXXXXXXXXX, CAB

BY COMMAND OF MAJOR GENERAL XXXXXXXXXXXX:

DISTRIBUTION:
Each Record of Trial (1)
Record Set (1)

XXXXXXXXXXXXXXXXXXXX
MSG, USA
Senior Military Justice Operations NCO

**Survivors United
Presenter Biographies**

Ms. Adrian Perry, Victim Advocate

Adrian Perry is a professional educator, victim advocate, and spouse of a retired Marine. After completing her Bachelor of Science Degree in Criminal Justice from Radford University, she married her husband Breck Perry and they moved to Quantico, Virginia in 2002.

In 2003, the Perry's received orders to Oahu, Hawaii. While in Hawaii, Adrian served as the Director of a Preschool in Honolulu. In 2005, their first child was born and Adrian became a dedicated mother of three girls over the last thirteen years and eight duty-stations across the United States and Japan. Throughout that time, Adrian has served as a long-term substitute teacher, volunteer reading instructor, and volunteer children's ministry teacher. She is the co-founder of Survivors United, Inc., a Non-Profit for sexual assault survivors in the military. Survivors United connects survivors of sexual assault with critical resources and support, while elevating the voice of the Survivor.

Adrian testified before the Senate Armed Services Committee on Sexual Assault in the Military in order to shine light on current legislative inadequacies for sexual assault survivors, while recommending the necessary changes to ensure justice is served for sexual assault survivors and their families. In 2020, Adrian became a Nationally Credentialed Victim Advocate, and has worked multiple cases in support of justice for sexual assault and domestic violence survivors. Adrian is currently living in Virginia with her family where she worked as a Victim Witness Assistant Director for a local county. During her time working for the Victim and Witness Program, she was able to support multiple survivors throughout the criminal process. She has been able to observe many Victim Impact Statements be delivered at sentencing. Last year, she completed her Master's Degree in Criminal Justice with an Emphasis in Legal Studies. Adrian is a Doctoral Student pursuing a Doctoral Degree in Community Counseling and Traumatology.

Dr. Breck Perry, Victim Advocate

Dr. Breck Perry currently serves as the Director of Operations for Covan Group, LLC, an Adjunct Professor of Qualitative Research at the Liberty University School of Education, and is a retired Marine Corps infantry officer. While in the Marines, Breck served in various command and staff positions across the globe in support of combat, humanitarian, and crisis response operations. As a young Captain, Breck discovered his passion for teaching and writing, and served for six years as a non-resident Expeditionary Warfare School and Command and Staff College adjunct faculty instructor, earning the Thomas S. Jones Instructor of the Year Award in 2015, 2016, and 2020. Upon retirement from active duty in the spring of 2022, Breck completed his Ph.D. in Educational Leadership and currently focuses on improving public and private sector education. Breck is a certified Sexual Assault Victim Advocate and serves as a member of the Survivor's United Board of Advisors.

Mr. Ryan Guilds, Special Victim Counsel

Ryan Guilds' is Counsel at Arnold & Porter LLP, a nationally recognized Law Firm, with offices throughout the United States. His commercial practice focuses on complex products liability litigation, white collar criminal defense, and internal corporate compliance. Mr. Guilds is a recognized national victims' rights expert who represents survivors of crime in connection with the investigation and prosecution of their assailants. Under his leadership, Arnold & Porter has represented sexual assault survivors in both civilian and military proceedings pro bono for over a decade. He is on the board of the National Crime Victim Law Institute, the honorary board of Protect Our Defenders, and is the former board chair of the Network for Victim Recovery of DC.

**DAC-IPAD Proposed Questions for Adrian and Breck Perry (Survivors United)
and Ryan Guilds**

For Adrian and Breck Perry:

1. From a crime victim's perspective, what would you like the Committee to know regarding how limitations on victim impact statements effect how victims deliver them?
2. Based on your experience, what are the benefits to a victim when they provide an impact statement at sentencing?

For Ryan Guilds:

1. In an FY 2020 Joint Explanatory Statement, Congress asked the DAC-IPAD to review the issue of whether military judges are interpreting Rule for Courts-Martial 1001 too narrowly and restricting what crime victims can say in their impact statement. What changes have you seen since 2020?
 - 2a. In your experience working with victims, what have you learned or observed regarding military judges allowing victims to speak freely without limiting the impact statement?
 - 2b. Have you seen a difference between judge alone sentencing and member sentencing cases?
3. Have you seen military judges limit victims speaking directly to the accused during their impact statements?
4. What have you observed regarding parents or others providing an impact statement when they are not the named victim in the convicted offenses?
5. What is the most frequent victim complaint regarding victim impact statements?
6. You are familiar with the JSC's proposed changes to RCM 1001 in the draft executive order. Do you believe the proposed changes to RCM 1001 will alleviate some of the objections with victim impact statements, such as the ability to recommend a specific sentence?
7. Do you have any recommendations for additional changes to RCM 1001?

**Special Victims' Counsel/Victims' Legal Counsel Panel
Presenter Biographies**

Colonel Carol A. Brewer, Chief, Special Victims' Counsel Program, U.S. Army

Colonel (COL) Carol A. Brewer assumed her current duties as Chief of the U.S. Army's Special Victims' Counsel Program in July 2021. She has served for 21 years in the Army in its Judge Advocate General's Corps. She was the Staff Judge Advocate (SJA) for the 19th Expeditionary Sustainment Command, Daegu, Korea from 2019 – 2021. She served as Special Victim Prosecutor in the Military District of Washington from 2016 – 2019. COL Brewer also served as a Deputy SJA, Chief, Administrative and Civil Law, Senior Trial Defense Counsel, Brigade Judge Advocate, Chief, Operations and Training, and Trial Counsel. COL Brewer has an LL.M., Military Law from The Judge Advocate General's Legal Center & School. She earned her Juris Doctorate from Rutgers School of Law and her B.A. in Politics and Education. She completed the Army's Basic Officer Leadership Course, extensive training regarding victim behavior and litigation and the Army and Air Force Special Victims' Counsel Certification Courses. She's a member of the Pennsylvania and New Jersey Bars, admitted to practice before the U.S. Supreme Court, the Army Court of Criminal Appeals, and the New Jersey Supreme Court. Her military awards include the Bronze Star, the Army's Meritorious Service Medal, the Parachutist Badge, the Air Assault Badge, and campaign medals for service in Iraq.

Captain Daniel Cimmino, Chief, Victims' Legal Counsel Program, U.S. Navy

Captain Cimmino has been the Chief, Navy Victims' Legal Counsel Program since October 2021. Prior to this position, he served in several positions within the Navy's JAG Corps including Chief of Staff, Defense Service Offices; Commanding Officer, Defense Service Office West; and Executive Assistant and Special Counsel to the General Counsel of the Department of the Navy. Captain Cimmino received his law degree from Rutgers University School of Law-Newark, and his LLM with a certificate in national security, from Georgetown University. He also received his MSM from Troy University and his MA from the Naval War College. He is admitted to practice law in New Jersey and before the Court of Appeals for the Armed Forces.

Colonel Tracy Park, Chief, Victims' Legal Counsel Program, U.S. Air Force

Colonel Tracy A. Park is the Chief, Victims' Counsel Division, Military Justice and Discipline Domain, Joint Base Andrews, Maryland. In this capacity, she is responsible for developing policies and procedures for the Victims' Counsel program, and providing professional oversight for 60 judge advocates, 52 paralegals, and one civilian appellate counsel at 49 locations worldwide. Victims' Counsel and Victims' Paralegals are detailed to represent victims of sexual assault and domestic violence crimes before military courts-martial and in administrative legal matters, and provide confidential legal advice to victims of interpersonal violence. Colonel Park entered the Air Force in February 2004 through the Direct Appointment Program. She has served as a Staff Judge Advocate, Deputy Staff Judge Advocate, Chief Legal Advisor, and Instructor, as well as deployed to Iraq, Kuwait, and Bosnia & Herzegovina. Prior to her current position, Colonel Park was the Section Commander for the Air Force Judge Advocate General's Corps Headquarters and Field Operating Agency, supporting more than 1,200 personnel worldwide. Colonel Park is admitted to practice law in California. She received a Bachelor of Arts in English Literature from Washington University and her Juris Doctor from George Washington University Law School.

Lieutenant Colonel Iain D. Pedden, Chief, Victims' Legal Counsel Program, U.S. Marine Corps

Lieutenant Colonel Pedden currently serves as the Chief Victims' Legal Counsel (CVLC) of the Marine Corps and Officer in Charge of the Victims' Legal Counsel Organization (VLCO). Prior to serving in the Marine Corps, LtCol Pedden clerked in the chambers of a state court trial judge. From 2001–2003 he clerked in the Criminal Appeals Division of the Illinois Attorney General's Office drafting briefs for the Illinois and federal courts, and representing the state in collateral and clemency proceedings death penalty cases.

Lieutenant Colonel Pedden has served in several military justice billets related to victims and the statements they provide during courts-martial, including service as Senior Defense Counsel, Chief Trial Counsel, and Military Justice Officer. From 2014–2017 he served on the faculty of the U.S. Army Judge Advocate General's Legal Center and School as Associate Professor of Criminal Law, teaching evidence and constitutional law. He also managed the Intermediate Trial Advocacy Course, and provided both lectures and advocacy training during the Special Victims Counsel (SVC) and Child SVC certification courses. During this tour, he was certified as an SVC, Child SVC, and Victim's Legal Counsel (VLC), and was certified and sworn as a military judge.

From 2017 to 2019, LtCol Pedden served as Branch Head of Military Justice at Headquarters Marine Corps in the Pentagon. In that capacity, he advised the Staff Judge Advocate to the Commandant on all military justice matters, assisted in policy development, and developed and implemented a uniform training curriculum and plan for Marine judge advocates following the Military Justice Act of 2016. He went on to additional advanced education in 2019, a command tour from 2020–2022, and reported for his current duties in August 2022.

Ms. Elizabeth Marotta, Chief, Special Victims' Counsel Program, U.S. Coast Guard

Elizabeth Marotta is the Chief, Office of Member Advocacy. In this capacity, she is responsible for the Coast Guard's Special Victims' Counsel Program and the Disability Attorney function. Prior to the Coast Guard, Ms. Marotta served 25 years in the Army and retired in the rank of Colonel. While in the Army, Ms. Marotta most recently served as the Chief, Defense Appellate Division and the Program Manager, Special Victims' Counsel. She also served in numerous other position including Staff Judge Advocate, Deputy of Government Appellate Division, Chief of Justice, and Trial Counsel.

DAC-IPAD Proposed Questions for SVC/VLC Panel

Victim Impact Statements

1. What training do victims' counsel receive regarding victim impact statements?
2. What advice do you and other SVC/VLC provide clients when preparing impact statements?
3. How involved are SVC/VLC in preparing impact statements?
4. Do SVC/VLC generally coordinate with trial and defense counsel prior to sentencing to determine potential objections to material in impact statements?
5. What are the most common objections you hear regarding information in impact statements?
6. In your experience, do military judges allow victims to speak freely without limiting the impact statement? Does this differ between judge alone sentencing and member sentencing cases?
7. Have you observed military judges limit victims speaking directly to the accused during their impact statements?
8. What is the most frequent victim complaint regarding victim impact statements?
9. You are familiar with the JSC's proposed changes to RCM 1001 in the draft executive order. Do you believe the proposed changes to RCM 1001 will alleviate some of the objections with victim impact statements, such as the ability to recommend a specific sentence?
10. Do you have any recommendations for additional changes to RCM 1001?

Appellate Practice

11. What training do SVC/VLC receive regarding appellate rights for victims?
12. Do you communicate and/or coordinate with appellate government or defense counsel regarding appellate positions and filings?
13. What is your experience filing matters with appellate courts? Have appellate courts been willing to consider the merits of SVC/VLC motions, and to grant the requested relief?

Restorative Justice

14. Congress asked the DAC-IPAD to review alternative justice programs, such as mediation or restorative engagement, as a means to aid victims and alleged offenders, particularly in cases in which the evidence is insufficient for prosecution or nonjudicial punishment.

Please share your thoughts on whether such programs would be beneficial in cases involving sexual assault allegations.

15. Canada and Australia offer military victims of sexual assault an opportunity to speak with senior military officials in a facilitated meeting to share their experience of trauma.

Please share your thoughts on whether military victims would benefit from the creation of a facilitated restorative engagement program unrelated to the court-martial process?

**Office of Special Trial Counsel Panel
Presenter Biographies**

Honorable Carrie F. Ricci, General Counsel, Department of the Army

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

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

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

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

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

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

Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army

Lieutenant General Risch is a native of Orange/West Orange, NJ, was initially commissioned a Second Lieutenant in the Field Artillery in 1984. He served as a Platoon Leader, Executive Officer, and Company Commander in the 78th Infantry Division, U.S. Army Reserve, while attending law school. He entered active duty and the Judge Advocate General's Corps in 1988.

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

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

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

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

Honorable John P. Coffey, General Counsel, Department of the Navy

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

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

After returning home to New York, Mr. Coffey continued to serve in the Navy Reserve for eighteen years. Among other things, he flew anti-submarine missions in the North Atlantic and Mediterranean, counter-narcotics missions in the Caribbean, and armed missions in support of the blockade of the former Yugoslavia. Mr. Coffey was selected to serve as commanding officer both of a reserve P-3C squadron (VP-92) and the reserve component of the Enterprise carrier battle group staff (CCDG-12), and served as a staff officer in the Office of the Secretary of Defense (Reserve Affairs). Mr. Coffey retired at the rank of captain in 2004.

Vice Admiral Darse E. "Del" Crandall, The Judge Advocate General, U.S. Navy

Vice Admiral Crandall is a native of Elgin, Illinois. He was commissioned in 1984 through the Naval Reserve Officers Training Corps Program at Northwestern University, where he received a bachelor of arts degree in Economics. As a midshipman he earned silver "Dolphins," the enlisted submarine warfare qualification, on USS Woodrow Wilson (SSBN 624 GOLD). His first tour of duty was as communications officer and anti-submarine warfare officer on USS Lockwood (FF 1064), homeported in Yokosuka, Japan, where he earned his surface warfare officer qualification. While serving as administrative assistant and aide to the Deputy Chief of Naval Operations (Naval Warfare), Crandall was selected for the law education program. In 1992, he graduated from Georgetown University Law Center, cum laude. In 1999, he received a masters of law degree in international law from The George Washington University, with highest honors.

Major General David J. Bligh, Staff Judge Advocate to the Commandant to the Marine Corps, U.S. Marine Corps

Major General Bligh was raised in Athens, Pennsylvania. He is a 1988 graduate of Indiana University of Pennsylvania and a 1997 graduate of the University of Georgia School of Law. Major General Bligh was commissioned through the Platoon Leaders Course program in 1988. He initially served as a Platoon Commander and Company Commander at 2d Assault Amphibian Battalion, Camp Lejeune, North Carolina. He later served as a Series Commander at Marine Corps Recruit Depot, Parris Island, South Carolina.

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

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

Honorable Peter J. Beshar, General Counsel, Department of the Air Force

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

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

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

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

Lieutenant General Charles L. Plummer, The Judge Advocate General, U. S. Air Force

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

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

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

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

DAC-IPAD Questions for OSTC Panel

1. The Committee understands that your respective OSTC Training and Education plans will be issued this month (no later than December 31, 2022). Through the staff, can you please provide the committee your training and education plans once published.

At this time, can you please give us a general description of the additional training requirements for judge advocates and paralegals selected to serve in the OSTC?

2. As you are aware, some committee members attended training courses for the Air Force at Maxwell AFB and at the Army Advocacy Center – thank you for those invitations and the members appreciated the professionalism of your course facilitators and were impressed with the training.

What upcoming courses do you anticipate in 2023 and will there be opportunities for Committee members to attend and based on the members' experience and expertise perhaps be active participants in the exchange with the students.

3. How will training be specialized for the 11 covered offenses (including murder and manslaughter in addition to rape and sexual assault) as opposed to generalized litigation training?

4. How will training provide the skills needed to develop the investigation of a covered offense?

5. What role do the OSTC civilian attorneys have in the training and education of special trial counsel, paralegals, and other support staff?

6. When an STC exercises exclusive authority to determine whether a reported offense is a covered, how will that determination be documented and who will be notified of that determination?

7. How will your OSTC will coordinate and communicate with your respective Special Victim's Counsel programs?

8. How will you ensure STC communications with SJAs and convening authorities or commanders remain free from unlawful or unauthorized influence?

9. Have you established test sites using OSTC processes and procedures to capture lessons learned?

9a. Please describe the test sites and how lessons learned are incorporated into policy and training materials.

9b. How are these lessons shared with the other Services?

DAC-IPAD Special Projects Subcommittee Questions for OSTC Panel

(to supplement the previously provided questions from the full committee)

1. What are the Services doing to ensure there is some racial and gender diversity in building the new OSTC?

We have concerns that especially among the more senior members of the OSTCs, they will skew overwhelmingly white and male and have not historically exhibited much diversity, particularly racial diversity.

2. What cross-collaboration efforts are you undertaking to make the three OSTCs as joint and uniform as possible?

If there are deviations in major office standards/policy/regulations, please explain why with concrete examples.

If you oppose jointness/uniformity, please explain why.

3. Will the Army's new Advocacy Center at Fort Belvoir become a DoD joint training center so that the Air Force, Navy/Marine Corps, and Coast Guard can all train together to deliver the same caliber of advocacy across the DoD?
4. What safeguards are you establishing to ensure the independence of the OSTC?
5.
 - a. What training standards are being established for the OSTCs?
 - b. Will OSTC training involve cross-organizational learning at external institutions like the DoJ's NAC (including Discovery Bootcamp, Forensic Evaluation of Strangulation and Gunshot Wounds, and sexual assault-focused courses)?
6.
 - a. Who have you selected for your LSTC?
 - b. When are they scheduled to start in the offices?
7.
 - a. Please tell us about the military justice experience of your selected LSTC, for example, when was the last time they tried or defended a court-martial as first or second chair?
 - b. What specialized experience do they have interfacing with special victims, including those who experience military sexual trauma?

RACIAL DISPARITY REPORTS: DAC-IPAD & GAO

December 6, 2022

R. Chuck Mason
Staff Attorney

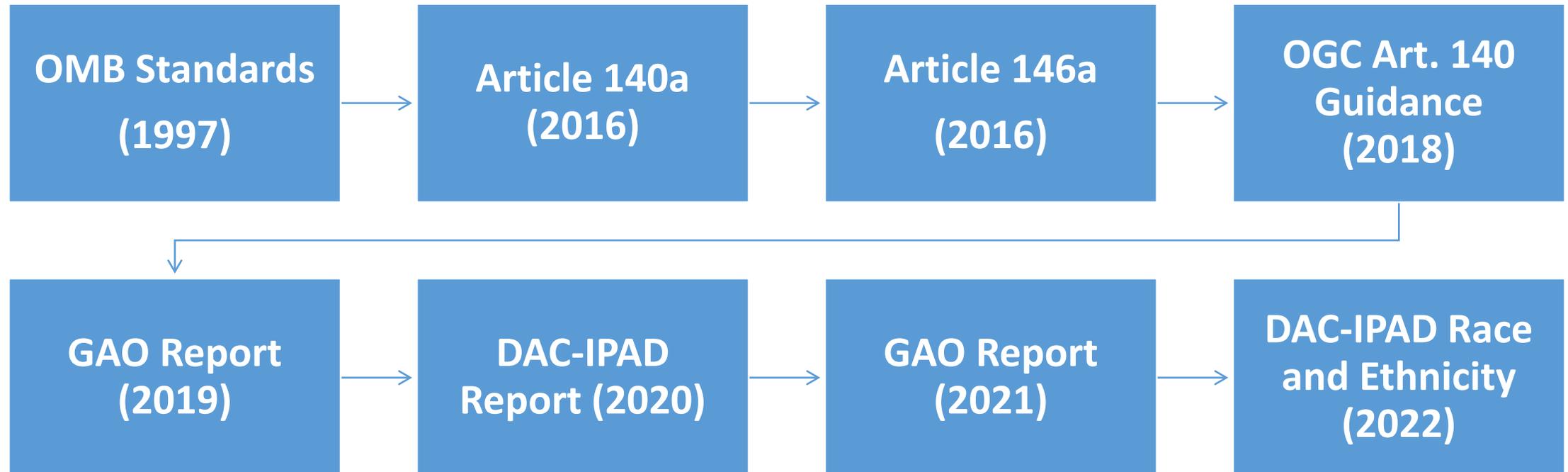


DAC-IPAD Race and Ethnicity Request for Information – 2022

- Issued in response to June 22, 2022 testimony regarding diversity of practitioners within the JAG Corps (paralegals, trial counsel, defense counsel, judges, etc...)
- Requested:
 - Sex, Race, Ethnicity, Pay Grade by Member
 - Sex, Race, Ethnicity by Pay Grade



Race & Ethnicity Standards and Criteria



Office Management and Budget Statistical Policy Directive No. 15 (OMB 15)

- Race – 5 minimum categories
 - American Indian/ Alaska Native
 - Asian
 - Black or African American
 - Native Hawaiian or Other Pacific Islander
 - White
- Ethnicity
 - Hispanic or Latino
 - Not Hispanic or Latino



Article 140a – UCMJ

- Case management: data collection and accessibility
 - (a) Secretary of Defense . . . prescribe uniform standards and criteria
 - (1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making with military justice system, and that enhances the quality of periodic reviews under Article 146 (Military Justice Review Panel)



Article 140a – Uniform Standards and Criteria

- OGC Memorandum (December 17, 2018) – Apply OMB 15 standards
- Race:
 - American Indian/ Alaska Native
 - Asian
 - Black or African American
 - Native Hawaiian or Other Pacific Islander
 - White
 - Other
- Ethnicity
 - Hispanic or Latino
 - Not Hispanic or Latino



Article 146a – Annual Reports

- Joint Service Committee submits consolidated report to Congress
- Statutory language is not explicit on required data points
- Article 146a Reports:
 - Accused – gender, race, and ethnicity
 - Victim – gender, race, and ethnicity
- Sex v. gender distinction



GAO and DAC-IPAD Reports on Race/Ethnicity

1. GAO, *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, GAO-19-344 (May 2019)
2. DAC-IPAD, *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military* (December 2020)
3. GAO, *Military Justice: DOD and Coast Guard Improved Collection and Reporting of Demographic and Nonjudicial Punishment Data, but Need to Study Causes of Disparities*, GAO-21-105000 (August 30, 2021)



GAO – Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities (May 2019)

- Acknowledged application of Art. 140a standards to military justice databases
- Art. 146a annual reports lack demographic data for servicemembers who experienced a military justice action

Recommendations:

- Race & ethnicity data in investigations & personnel databases should mirror 140a standards
- DoD annual reports include race, ethnicity, and gender
- Incorporate nonjudicial punishment information in database



GAO – Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities (May 2019)

Findings:

- Black, Hispanic, and male servicemembers were more likely than White or female members to be subjects of investigations and tried in general and special courts-martial
- Race and gender were not statistically significant factors in the likelihood of conviction



DAC-IPAD – Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military (December 2020)

- Congress directed DAC-IPAD to review and assess racial disparities in the investigation and prosecution of sexual offenses
- Does not offer a comprehensive assessment on racial disparities due to inconsistencies in data gathering and reporting
- Importance of implementation of Art. 140a standards and criteria
- 5 Findings & 8 Recommendations



DAC-IPAD – Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military (December 2020)

- R.33: designate military personnel system as primary data system
- R.34: record race and ethnicity data utilizing same standard in military criminal investigative orgs, military justice, and military personnel systems
- R.36: collect race, ethnicity, sex, gender, age, and grade – victim and accused
 - 140a standard: accused – race, ethnicity, sex, age, grade
 - 140a standard: victim – sex, status (does not include race or ethnicity)
- R.37: collect race and ethnicity of participants in process
 - 140a standard: not captured/recorded



***GAO – Military Justice: DOD and Coast Guard Improved Collection and Reporting of Demographic and Nonjudicial Punishment Data, but Need to Study Causes of Disparities
(August 30, 2021)***

Findings:

- Improved ability to collect and report consistent demographic and NJP data.
- DoD has not identified when disparities should be further reviewed
- DoD has not studied the causes of disparities in the military justice system



Developments in Race and Ethnicity Assessments

- DOD: Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (May 3, 2022) – *findings pending*
 - Effort to address root causes of racial disparities in the investigative and military justice systems
 - Actionable recommendations to improve policies, programs, processes, and resources to address the disparities
- FY22 NDAA – Sec. 549G: Inclusion of Race and Ethnicity in Annual Reports on Sexual Assaults; Reporting on Racial and Ethnic Demographics in the Military Justice System
 - Statistical categories: race, sex, ethnicity, rank, and offense



DAC-IPAD Race and Ethnicity Request for Information – 2022

- Requested:
 - Sex, Race, Ethnicity, Pay Grade by Member
 - Sex, Race, Ethnicity by Pay Grade
- Intentionally did not provide categories for race or ethnicity



DAC-IPAD Race and Ethnicity RFI – 2022:

Race

	Army	Navy	Marine Corps	Air Force/ Space Force	Coast Guard
American Indian or Alaska Native		X	X	X	X
Asian		X	X	X	X
Black or African American		X	X	X	X
Native Hawaiian or Pacific Islander		X	X	X	X
White		X	X	X	X
More than one/Other		X		X	X
Declined to Respond		X	X	X	X



DAC-IPAD Race and Ethnicity RFI – 2022: Ethnicity

	Army	Navy	Marine Corps	Air Force/ Space Force	Coast Guard
Hispanic/Latino		X	X	X	X
Non-Hispanic/Latino		X		X	X
Declined to Respond			X	X	
American Indian or Alaska Native			X		
Asian			X		
Black or African American			X		
Native Hawaiian or Pacific Islander			X		
White			X		



Questions



APPENDIX

Report Period: FISCAL YEAR 2021

PART 1 - PENDING COURTS-MARTIAL (As of 30 September 2021)			
TYPE COURT	PREFERRED PENDING DISPOSITION DECISION	REFERRED	TOTAL
GENERAL		12	
BCD SPECIAL		2	
NON-BCD SPECIAL		0	
MILITARY JUDGE ALONE SPECIAL (ART. 16(c)(2)(A))		3	
SUMMARY		0	
TOTAL:	728	17	745

PART 2 - BASIC COURTS-MARTIAL STATISTICS (Persons)

TYPE COURT	TRIED		CONVICTED	ACQUITTALS	RATE OF INCREASE (+)/ DECREASE (-) OVER LAST REPORT
	Arraigned	Completion			
GENERAL	502	394	321	73	+2.3%
BCD SPECIAL [A]	155	127	122	5	-14.2%
NON-BCD SPECIAL	0	0	0	0	0.0%
MILITARY JUDGE ALONE SPECIAL (ART. 16(c)(2)(A))	48	38	31	7	-22.4%
SUMMARY	105		104	1	+15.5%
OVERALL RATE OF INCREASE (+)/DECREASE (-) OVER LAST REPORT					

PART 3 – ACCUSED DEMOGRAPHIC DATA (Persons)

TYPE COURT	Total	GENDER		ETHNICITY			RACE						
		Male	Female	Hispanic / Latino	Non-Hispanic / Latino	Unknown/ Other	American Indian / Alaska Native	Asian	Black / African American	Native Hawaiian / Pacific Islander	White	Other	Unknown
GENERAL	394	386	8	79	297	18	7	10	114	11	220	16	16
BCD SPECIAL	127	120	7	25	35	67	1	4	42	1	68	2	9
MILITARY JUDGE ALONE SPECIAL	38	33	5	6	22	10	0	1	13	0	23	1	0
SUMMARY	105	96	9	16	51	38	1	5	38	0	44	2	15

APPENDIX

PART 4 – VICTIM DEMOGRAPHIC DATA (Persons)

TYPE COURT	Total*	GENDER			ETHNICITY			RACE					
		Male	Female	Unknown	Hispanic / Latino	Non-Hispanic / Latino	Unknown/ Other	American Indian / Alaska Native	Asian	Black / African American	Native Hawaiian / Pacific Islander	White	Unknow
GENERAL	438	81	346	11	63	293	115	3	10	84	12	266	63
BCD SPECIAL	98	36	61	1	20	58	20	1	1	17	1	62	16
MILITARY JUDGE ALONE SPECIAL	13	6	7	0	3	9	1	0	0	2	0	11	0
SUMMARY	33	15	18	0	4	19	10	0	3	5	0	19	6

* Total number of identifiable victims.

PART 5 – DISCHARGES APPROVED/ENTERED ON ENTRY OF JUDGMENT [B]

GENERAL COURTS-MARTIAL (CA LEVEL)		
NUMBER OF DISHONORABLE DISCHARGES (+ dismissals)	92(+16)	
NUMBER OF BAD-CONDUCT DISCHARGES [A]	112	
SPECIAL COURTS-MARTIAL		
NUMBER OF BAD-CONDUCT DISCHARGES	65	

PART 6 – RECORDS OF TRIAL RECEIVED FOR REVIEW BY JAG

FOR REVIEW UNDER ARTICLE 66(b)(1) – APPEALS BY ACCUSED	1	
FOR REVIEW UNDER ARTICLE 66(b)(2) – CASES FORWARDED FOR REVIEW BY TJAG	0	
FOR REVIEW UNDER ARTICLE 66(b)(3) – AUTOMATIC REVIEW	314	
FOR EXAMINATION UNDER ARTICLE 65(d)	127	

PART 7 – WORKLOAD OF THE U.S. ARMY COURT OF CRIMINAL APPEALS

TOTAL ON HAND BEGINNING OF PERIOD		50[C]	
TOTAL CASES THAT CAME AT ISSUE		354[C]	
TOTAL CASES DECIDED		364[D]	
TOTAL PENDING AT CLOSE OF PERIOD		40[C]	
RATE OF INCREASE (+)/DECREASE (-) OVER NUMBER OF CASES DECIDED DURING LAST REPORTING PERIOD		-20.5%	

PART 8 – APPELLATE COUNSEL REQUESTS BEFORE U.S. ARMY COURT OF CRIMINAL APPEALS (ACCA)

NUMBER	352	
PERCENTAGE	99.44%	

APPENDIX

PART 9 - ACTIONS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES (CAAF)

TOTAL PETITIONS TO CAAF	203
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PART 10 – APPLICATIONS FOR RELIEF UNDER ARTICLE 69, UCMJ

TOTAL PENDING BEGINNING OF PERIOD		10	
RECEIVED		10	
DISPOSED OF		0	
GRANTED	1		
DENIED	6		
NO JURISDICTION	0		
WITHDRAWN	0		
TOTAL PENDING AT END OF PERIOD		3	

PART 11 – ORGANIZATION OF COURTS [E]

TRIALS BY MILITARY JUDGE ALONE			
GENERAL COURTS-MARTIAL		299	
SPECIAL COURTS-MARTIAL		111	
MILITARY JUDGE ALONE SPECIAL (ART. 16(c)(2)(A))		38	
TRIALS BY MILITARY JUDGE WITH MEMBERS			
GENERAL COURTS-MARTIAL		95	
SPECIAL COURTS-MARTIAL		16	

PART 12 – STRENGTH

AVERAGE ACTIVE DUTY STRENGTH	489,069 [F]
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PART 13 – NONJUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)

NUMBER OF CASES WHERE NONJUDICIAL PUNISHMENT IMPOSED	25,232
RATE PER 1,000	51.59

EXPLANATORY NOTES

- [A] Cases convened by GCM convening authority.
- [B] Based on Entry of Judgment and records of trial received in FY for appellate review.
- [C] Includes only cases briefed and at issue.
- [D] Includes Article 62 appeals, All Writs Act cases, and appeals withdrawn.
- [E] Only includes cases that were tried to completion.
- [F] This number includes only Active Component Soldiers and does not include USAR, National Guard or AGR personnel

Case Review Subcommittee Update

December 7, 2022

Ms. Kate Tagert, Ms. Audrey Critchley
DAC-IPAD Staff Attorneys

Ms. Stacy Boggess, Senior Paralegal



Appellate Review of Military Sexual Assault Cases

Total cases for review: 34

- Cases under review by Committee Members
 - Panel Composition cases: 7
 - Factual Sufficiency cases: 3
 - Prosecutorial Misconduct cases: 2
 - MRE 513 (psychotherapist-patient privilege) cases: 3



Appellate Review of Military Sexual Assault Cases

“When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”

Article 25(e)(2), UCMJ.



Appellate Review of Military Sexual Assault Cases

A convening authority may depart from the Article 25, UCMJ, criteria when seeking in good faith to make the panel more representative of the accused's race or gender. *United States v. Crawford*, 15 C.M.A. 31 (1964).



Appellate Review of Military Sexual Assault Cases

United States v. Jeter, 81 M.J. 791 (N-M. Ct. Crim. App. Oct. 20, 2021), rev. granted in part, 82 M.J. 355 (May 3, 2022), oral argument held Oct. 12, 2022.

Did the convening authority violate Appellant's equal protection rights when he convened an all-white panel using a racially non-neutral member selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith?

Should the Court overrule *Crawford*?



Appellate Review of Military Sexual Assault Cases

Appellate Case Review Observations:

- Panel Composition
- Factual Sufficiency
- MRE 513
- Prosecutorial Misconduct



Appellate Review of Military Sexual Assault Cases

Next Steps for Case Review Subcommittee:

- Subcommittee meeting (Dec. 7): strategy session
- Overview of selected topics for further study:
 - member selection and panel composition
 - factual sufficiency
 - sentence appropriateness
- Conviction data
- Contribution to the Annual Report



Special Projects Subcommittee Update to the DAC-IPAD

December 7, 2022

Ms. Meghan Peters & Ms. Eleanor Vuono
Staff Attorneys

Ms. Stayce Rozell
Senior Paralegal



Subcommittee Projects

- Office of the Special Trial Counsel (OSTC) program evaluation
 - Implementing Rules for Courts-Martial (R.C.M.s)
 - Personnel qualifications
 - Prosecution standards and protocols for preferral and deferral
- Other potential topics
 - Proposed in June: whether the Services should have standing military magistrates



Subcommittee Review of Proposed Rules for Courts-Martial (R.C.M.)

- Proposed changes to the R.C.M. published for public comment October 2022
 - Draft Executive Order: “2023 amendments to the Manual for Courts-Martial, United States”
- Public comment period ends December 19
- Many proposed changes implement the NDAA provisions establishing the role of the Special Trial Counsel



Subcommittee Review of Proposed Rules for Courts-Martial (R.C.M.) continued....

- Joint Service Committee (JSC) offered to answer DAC-IPAD questions about the proposed changes
- Chair consolidated questions from all Subcommittees
 - Submitted questions to the JSC on November 17 as a public comment
- JSC response to DAC-IPAD's public comment
- DAC-IPAD members attended the annual JSC public meeting



Special Projects Subcommittee Dec 7 Meeting Agenda

- Conversation with members of the inter-service working group for the Office of the Special Trial Counsel
- Conversation with JAG Corps personnel managers
- Subcommittee discussion and deliberation
 - Introduction of draft assessment of Articles 32 & 34 as applied to military sexual offenses
 - Additional topics/studies addressing OSTC
 - Annual Report (details next slide)



Special Projects Subcommittee: Annual Report

- Subcommittee contribution to the Annual Report
 - Summarize OSTC developments and Committee and Subcommittee concerns, recommendations, projects
 - Comments on proposed RCM changes
 - Subcommittee assessment of Arts. 32 & 34 in cases over which STC's exercise authority



Special Projects Subcommittee

- Subcommittee comments?
- DAC-IPAD questions?



Policy Subcommittee Review of Victim Impact Statements

December 7, 2022

Ms. Terri Saunders and Ms. Terry Gallagher
DAC-IPAD Staff Attorneys

Ms. Marguerite McKinney
Management and Program Analyst



Victim Impact Statements

- Summary of information on victim impact statements for annual report
- Committee discussion of proposed response to Congress
- Deliberations and vote on proposed DAC-IPAD public comment to JSC and annual report recommendations



FY20 NDAA Joint Explanatory Statement

- Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?
- Are military judges appropriately permitting other witnesses to testify about the impact of the crime?



Victim's Right to be Heard

- **Article 6b**, UCMJ, [enacted in FY14 NDAA] establishes the right of victims to be “reasonably heard at a sentencing hearing relating to the offense.”
- **Rule for Courts-Martial [R.C.M.] 1001(c)** implements Art. 6b:
“After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense.”



R.C.M. 1001(c) Definitions

Crime victim:

an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.

Victim impact:

any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.



Victim Impact Statements

- Impact statements may be sworn, unsworn or both; written, oral or both
- Unsworn statements:
 - Not considered evidence/not subject to Military Rules of Evidence
 - May only include victim impact or matters in mitigation
- Must be within the scope of victim impact—directly relating to or arising from the offense for which the accused has been found guilty
- May not recommend a specific sentence
- Appellate courts have clarified that “crime victim” not limited to named victim on charge sheet



FY22 NDAA Change

- Requires judge alone sentencing in all but capital cases
- For cases involving offenses committed on/after Dec. 27, 2023



Stakeholder Input

- Survivors United
- SVC/VLC



Civilian Jurisdiction Overview

Reviewed VIS law/rules for federal and state jurisdictions:

- Most limit the VIS to financial, physical, psychological, or emotional harm to the victim related to the crimes of conviction
- Many states explicitly allow the victim to discuss a sentence or disposition in their VIS
- Some states require the VIS to be sworn or only in writing
- Some states allow VIS to include impact on victim's family
- Some states allow VIS through audio/video recording



Review of FY21 Sexual Offense Cases

- Reviewed **241** cases tried in FY21 resulting in guilty verdict for:
 - Article 120: adult sexual offenses
 - Article 120b: child sexual offenses
 - Article 120c: indecent viewing, recording, indecent exposure
 - Article 93: sexual harassment offenses
 - Article 93a: military trainer/recruiter sexual conduct with trainee/recruit
 - Article 117a: wrongful broadcast/distribution of intimate images
 - Article 128: assault (had Art. 120 or 120b offense referred and accused was acquitted or charge was dismissed pursuant to a pretrial agreement)
 - Article 80: attempts to commit one of these offenses



Cases in Which Military Judges Limited Victim Impact Statements

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



FY21 Case Review

Key Points for Military Judge Sentencing Cases

- For **13** cases when military judge limited VIS in sentencing:
 - 12 limited due to outside the scope of victim impact (impact not directly related to or arising from the crime for which accused was convicted)
 - 4 limited due to recommending a specific sentence
- For remaining **138** military judge sentencing cases – no limits to VIS
 - In most cases, the military judge did not ask if there were any objections to VIS
 - In **27** cases with defense objections, the military judge allowed victim to read VIS and judge only considered VIS as it related to convicted offenses



PSC Review of VIS Limited Cases

- In most cases, the military judge applied R.C.M. 1001(c) appropriately
- Some judges applied a narrow interpretation of the rule
- Standard that impact must directly relate to or arise from the crime of conviction should be clarified and may be too narrow



Draft E.O. Changes to R.C.M. 1001(c)

- Gives victim right to be heard on objections to the unsworn statement
- Provision prohibiting recommendation for specific sentence removed (still applies in capital cases)
- Unsworn VIS can be made by the victim, victim's counsel, or both
- Sentence removed from discussion section: “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3).”



Proposed Response to Congress Question 1

- Military judges are not limiting a victim's right to be heard at sentencing in the vast majority of cases.
- FY21 case review: Of 151 cases in which the military judge was the sentencing authority, the military judge limited a victim impact statement in 13 cases (9%).
- In the few cases in which the military judge has limited the VIS, they have done so in accordance with R.C.M. 1001(c) in most instances.
- Rule allows for interpreting the scope narrowly and should be clarified to eliminate a narrow interpretation of the scope of a VIS.



Proposed Response to Congress Question 2

- Military judges are permitting individuals who have suffered harm as a result of the crimes for which the accused has been convicted to provide victim impact statements, and not just those who are named victims in the convicted offenses.



Proposed Public Comment to Draft E.O.: Recommendation 1

The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(2)(B) to remove the word “directly” from the definition of victim impact.

Alternately, the words “or indirectly” should be added to the definition of victim impact.



Recommendation 2

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



Recommendation 3

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



Recommendation 4

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



Recommendation 5

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



Recommendation 6

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



counsel and has been informed of the right to make the election of the applicable sentencing rules under subsection (c).

(ggg) R.C.M. 1001 is amended as follows:

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, ~~and the accused has had the opportunity to make a sentencing forum election under R.C.M. 1002(b),~~ the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.*

(A) *Crime victim.* At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

(B) *Accused.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matters to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are forfeited.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15 [and summary courts-martial after review has been completed pursuant to Article 64](#). "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible

under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* Trial counsel may introduce evidence of prior military or civilian convictions of the accused. For purposes of this rule, there is a “conviction” in a court-martial case when a sentence has been adjudged. In a civilian case, a “conviction” includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. A “conviction” does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated, or pardoned.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible ~~except that a finding of guilty by summary court martial may not be used for purposes of this rule until review has been completed pursuant to Article 64.~~ Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

(4) *Evidence in aggravation.* Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused’s offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, sex (including pregnancy),

gender ([including gender identity](#)), disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

(5) *Evidence of rehabilitative potential.* “Rehabilitative potential” refers to the accused’s potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) *In general.* Trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused’s previous performance as a service member and potential for rehabilitation.

(B) *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused’s rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused’s character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

(C) *Bases for opinion.* An opinion regarding the accused’s rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused’s personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused’s offense or offenses may not serve as the principal basis for an opinion of the accused’s rehabilitative potential.

(D) *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused’s unit.

(E) *Cross-examination.* On cross-examination, inquiry is permitted into relevant and specific instances

of conduct.

(F) *Redirect*. Notwithstanding any other provision in this rule, the scope of opinion testimony permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination.

(c) *Crime victim's right to be reasonably heard*.

(1) *In general*. After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. A crime victim who makes an unsworn statement under subsection (c)(5) is not considered a witness for the purposes of Article 42(b). If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial. The exercise of the right is independent of whether the crime victim testified during findings or is called to testify by the ~~e~~Government or defense under this rule.

(2) *Definitions*.

(A) *Crime victim*. For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.

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

(C) *Mitigation*. For the purposes of this subsection, mitigation includes any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.

(D) *Right to be reasonably heard*.

(i) *Capital cases*. In capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement. The statement may not include a recommendation of a specific sentence.

(ii) *Noncapital cases.* In noncapital cases, for purposes of this subsection, the “right to be reasonably heard” means the right to make a sworn statement, an unsworn statement, or both. This right includes the right to be heard on any objection to any unsworn statement.

(3) *Contents of statement.* The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. ~~The statement may not include a recommendation of a specific sentence.~~

(4) *Sworn statement.* The crime victim may make a sworn statement and shall be subject to cross-examination concerning it by trial counsel and defense counsel or examination on it by the court-martial.

(5) *Unsworn statement.*

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both, and may be made by the crime victim, by counsel representing the crime victim, or both.

(B) *Procedure.* After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, the military judge may permit the crime victim’s counsel, if any, to deliver all or part of the crime victim’s unsworn statement.

(C) *New factual matters in unsworn statement.* If during the presentencing proceeding a crime victim makes an unsworn statement containing factual matters not previously disclosed under subparagraph (5)(B), the military judge shall take appropriate action within the military judge’s discretion.

(d) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the

defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a service member.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, to rebut matters presented by the prosecution, or to rebut statements of fact contained in any crime victim's sworn or unsworn statement, whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The accused may make a request for a specific sentence. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony and shall be subject to cross-examination concerning it by trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation

or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(e) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under paragraph (d)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(f) *Production of witnesses.*

(1) *In general.* During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. During presentencing proceedings, a dispute as to the production of a witness at Government expense ~~Whether a witness shall be produced to testify during presentencing proceedings~~ is a matter within the discretion of the military judge to resolve subject to the limitations in paragraph (2).

(2) *Limitations.* A witness may be produced to testify during presentencing proceedings through a subpoena or travel orders at Government expense only if—

(A) the testimony of the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence;

(B) the weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) the other party refuses to enter into a stipulation ~~of fact~~ containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation ~~of fact~~ would be an insufficient substitute for the testimony;

(D) other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(g) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—

- (1) That a plea of guilty is a mitigating factor; and
- (2) Any evidence properly introduced on the merits before findings, including:
 - (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and
 - (B) Evidence relating to any mental impairment or deficiency of the accused.

(h) *Argument.* After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any other higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to the sentencing considerations set forth in R.C.M. 1002(f). Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection.

(hhh) R.C.M. 1002 is amended as follows:

(a) *Generally.* Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing under subsection ~~(f)~~(d), including the maximum punishment or



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

December 7, 2022

Colonel Elizabeth Hernandez, U.S. Air Force
Chair, Joint Service Committee on Military Justice
Department of Defense
Office of the Assistant to the Secretary of Defense
For Privacy, Civil Liberties, and Transparency,
Regulatory Directorate
4800 Mark Center Drive
Mailbox #24, Suite 08D09
Alexandria, Virginia 22350-1700

Dear Colonel Hernandez:

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) submits the following public comment regarding Rule for Courts-Martial 1001 to the Joint Service Committee on Military Justice for consideration.

Thank you for your consideration of the committee's comments and recommendations.

Sincerely,

Karla N. Smith, Chair

Enclosure

Enclosure: DAC-IPAD Public Comment Regarding Rule for Courts-Martial 1001

1. Recommendation: The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(2)(B) to remove the word “directly” from the definition of victim impact.

R.C.M. 1001(c)(2)(B) currently states “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.” This proposed change recognizes that victim impact statements are not presented for evidentiary purposes and allows the victim to discuss more attenuated impact from the crime as is allowed in many civilian jurisdictions.

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

R.C.M. 1001(c)(2)(B) currently states “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.” The proposed change would insert the words “and the crime victim’s family” after the words “crime victim.” Some states explicitly allow a victim to discuss the impact of the crime on the victim’s family and a number of other states allow this, though not explicitly.

3. Recommendation: The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence.

The Joint Service Committee’s draft change to R.C.M. 1001(c)(3) in the 2023 draft Executive Order removes the restriction against crime victims recommending a specific sentence for the accused in all but capital cases and seems intended to expand what victims may say in their impact statements. However, without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation either “victim impact” or “matters in mitigation,” per the language of the rule. This could lead to needless litigation through the appellate courts.

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

R.C.M. 1001(c)(5)(A) currently allows a victim to provide an unsworn victim impact statement orally, in writing, or both. A number of states allow victims to provide impact statements through audio or video recordings or other digital media.

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

R.C.M. 1001(c)(5)(A) states that a victim may provide an unsworn victim impact statement. The Joint Service Committee’s proposed change to this section adds a sentence stating that the crime victim’s unsworn statement “may be made by the crime victim, by counsel representing the crime victim, or both.” However, 1001(c)(5)(B) still includes a limitation “Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement.” It seems the draft change was intended to remove the requirement that the victim show good cause in order for the victim’s counsel to deliver the victim impact statement.

6. Recommendation: The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

R.C.M. 1001(c)(5)(B) currently requires a crime victim who makes an unsworn statement to provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel after the announcement of findings. The rule provides that the military judge may waive this requirement for good cause shown. One of the Joint Service Committee’s proposed changes to R.C.M. 1001 would remove the following sentence from the discussion to R.C.M. 1001(c)(5)(B): “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).” The proposed removal of this sentence is consistent with the pending change to judge-alone sentencing and will allow crime victims more latitude in what they provide in their impact statements. Trial and defense counsel would still have the opportunity to rebut factual matters in the victim’s unsworn statement and to object to the courts consideration of information outside the scope of R.C.M. 1001(c)(2)(B).

Policy Subcommittee Victim Impact Statement Outline

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

A. Background

- FY20 NDAA Joint Explanatory Statement
- Survivors United Feb 2020 DAC-IPAD Meeting Public Comment

B. Relevant Law

- Article 6, UCMJ (FY14 NDAA): a victim of an offense has the right to be reasonably heard at a sentencing hearing relating to the offense.
- R.C.M. 1001(c) (predecessor R.C.M. 1001A effective June 17, 2015): implements Article 6b right to be heard at sentencing.
 - Victim impact defined as including “any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.”
 - If presented as an unsworn statement (the vast majority), VIS are not considered evidence and not subject to the Military Rules of Evidence. (Case law)
 - Information in statement must be within the scope of VIS—directly relating to or arising from the offense of which the accused has been found guilty. (Case law)
 - VIS may not include a recommendation for a specific sentence.

C. FY22 NDAA Change to Sentencing (effective for cases in which charged offenses were committed after December 27, 2023)

In the FY22 NDAA, Congress enacted a provision that will require that military judges serve as the sentencing authority in all special and general courts-martial, with the exception of capital cases. Currently, military judges serve as the sentencing authority in the vast majority of cases.

D. FY21 Courts-Martial Case Review

The staff reviewed FY21 courts-martial records of trial for cases involving a conviction for a wide array of sexual offenses, in which a victim provided a victim impact statement at sentencing. The staff also included cases in which the accused was found not guilty of a sexual assault offense or that offense was dismissed as part of a pretrial agreement but the accused was found guilty of an assault.

- Of 22 cases with a panel of members as the sentencing authority, the military judge limited the VIS in 7 cases (32%).
- Of 151 cases with a military judge as sentencing authority, the military judge limited the VIS in 13 cases (9%).

- 12 of the 13 VIS were limited due to being outside the scope of victim impact—not relating to or arising from the crime for which the accused was convicted.
- 4 of the 13 VIS were limited due to recommending a specific sentence.
- The remaining 138 cases with military judge as sentencing authority, no limits on VIS
 - In most cases, the military judge didn't ask if objections to VIS
 - 27 cases in which defense objected, the military judge either overruled or sustained the objection but allowed victim to read VIS and said would only consider as related to convicted offenses
 - Indications that TC, DC, and SVC/VLC limiting VIS prior to delivery
- PSC and staff review of 20 cases in which VIS limited by the military judge
 - In most cases, the military judge ruled in accordance with R.C.M. 1001(c)
 - Judges seemed to apply standard for victim impact differently
 - Larger issue is that the rule may be too narrow

E. Stakeholder Input

- Survivors United: Public Comment, Feb. 2020 DAC-IPAD meeting
 - Restrictions “severely limit” what a crime victim is allowed to say
 - Victim impact statements are “redlined” prior to delivery, military judges cut off victims during the delivery of their statements, and victims are not permitted to state their preference for a sentence
- Survivors United and Ryan Guilds: Speaking at Dec. 6, 2022 DAC-IPAD meeting (TBD)
- SVC/VLC Panel: Speaking at Dec. 6, 2022 DAC-IPAD meeting (TBD)
- Former Military Judges: Feb. 2020 DAC-IPAD meeting
 - Examples of times they had limited VIS—when contained information the judge had previously ruled inadmissible or when it recommended a specific sentence
 - Felt victims allowed broad latitude in what they say in VIS

F. Civilian Practice

Reviewed VIS law/rules for federal and state systems

- Most limit the VIS to financial, physical, psychological, or emotional harm to the victim related to the crimes of conviction, but don't require it be “directly” related.
- Many states explicitly allow the victim to discuss a sentence or disposition in their VIS.
- Some states require the VIS to be sworn or only in writing. However, the following states allow the victim to make a VIS through audio or video recording or other digital media: Arizona, California, Georgia, Indiana, Iowa, Utah.
- The following states explicitly allow the victim impact statement to include impact on the victim's family members: Alabama, Arizona, California, Delaware, Florida, Georgia, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Oklahoma, South Dakota, Tennessee, Texas. However, some states also allow this though not stated explicitly in their rules.

II. Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

A. Relevant Law

- R.C.M. 1001(c) defines a crime victim as “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual’s lawful representative or designee appointed by the military judge under these rules.”
- Service courts of criminal appeals have expanded who may be considered a victim
 - Parent of victim who died of a drug overdose (U.S. v. Miller, NMCCA 2022)
 - Depending on the facts of the case, in an adultery case, a non-offending spouse could be considered a victim (U.S. v. Dunlap, AFCCA 2020)
- FY21 review of courts-martial cases involving a victim impact statement show military judges are defining “crime victim” expansively and not confining to named victims in the charges.

B. Dec. 6, 2022 DAC-IPAD Public Meeting

- Survivors United/Ryan Guilds
- SVC/VLC Panel

III. Proposed JSC Changes to R.C.M. 1001

A. Proposed Changes

- R.C.M. 1001(c)(2)(D)(ii) would explicitly give the victim the right to be heard concerning any objections to the victim’s unsworn statement;
- R.C.M. 1001(c)(3): the provision restricting a victim from making a recommendation for a specific sentence has been removed (still applies in capital cases); and
- R.C.M. 1001(c)(5)(A) would now allow an unsworn victim impact statement to be made by the victim, the victim’s counsel, or both (the requirement to show “good cause” for the SVC/VLC to make the statement has been removed).
- Discussion section to R.C.M. 1001(c)(5)(B): The following sentence would be removed: “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).”

B. DAC-IPAD Public Comment to JSC

IV. Proposed response to Congress

[For discussion only]

A. Proposed response to Congress

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

- Proposed DAC-IPAD Response: Military judges are not limiting a victim's right to be heard at sentencing in the vast majority of cases. Based on the Committee's review of FY21 sexual offense courts-martial cases involving a victim impact statement, in 151 cases in which the military judge was the sentencing authority, the military judge limited a victim impact statement in 13 cases, or 9%. In those few cases in which the military judge has limited the victim impact statement, they have done so in accordance with R.C.M. 1001(c) in most instances.

The Committee notes, however, that in several of those 13 cases the military judge applied a narrow interpretation of the rule in limiting the victim impact statement. The Committee has determined that the standard should be clarified to allow for both direct and indirect impact on crime victims relating to or arising from the crime for which the accused was convicted. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001 should clarify the standard, incorporate useful aspects of rules commonly used in state jurisdictions, and allow crime victims to more fully inform the courts of how the accused's crimes have impacted them.

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

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

V. Proposed DAC-IPAD Recommendations

[For deliberation and vote on Dec. 7]

1. Recommendation: The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(2)(B) to remove the word “directly” from the definition of victim impact.

R.C.M. 1001(c)(2)(B) currently states “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.” This proposed change recognizes that victim impact statements are not presented for evidentiary purposes and allows the victim to discuss more attenuated impact from the crime as is allowed in many civilian jurisdictions.

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

R.C.M. 1001(c)(2)(B) currently states “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.” The proposed change would insert the words “and the crime victim’s family” after the words “crime victim.” Some states explicitly allow a victim to discuss the impact of the crime on the victim’s family and a number of other states allow this, though not explicitly.

3. Recommendation: The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence.

The Joint Service Committee’s draft change to R.C.M. 1001(c)(3) in the 2023 draft Executive Order removes the restriction against crime victims recommending a specific sentence for the accused in all but capital cases and seems intended to expand what victims may say in their impact statements. However, without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation either “victim impact” or “matters in mitigation,” per the language of the rule. This could lead to needless litigation through the appellate courts.

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

R.C.M. 1001(c)(5)(A) currently allows a victim to provide an unsworn victim impact statement orally, in writing, or both. A number of states allow victims to provide impact statements through audio or video recordings or other digital media.

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

R.C.M. 1001(c)(5)(A) states that a victim may provide an unsworn victim impact statement. The Joint Service Committee’s proposed change to this section adds a sentence stating that the crime victim’s unsworn statement “may be made by the crime victim, by counsel representing the crime victim, or both.” However, 1001(c)(5)(B) still includes a limitation “Upon good cause shown, the military judge may permit the crime victim’s counsel, if any, to deliver all or part of the crime victim’s unsworn statement.” It seems the draft change was intended to remove the requirement that the victim show good cause in order for the victim’s counsel to deliver the victim impact statement.

6. Recommendation: The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

R.C.M. 1001(c)(5)(B) currently requires a crime victim who makes an unsworn statement to provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel after the announcement of findings. The rule provides that the military judge may waive this requirement for good cause shown. One of the Joint Service Committee’s proposed changes to R.C.M. 1001 would remove the following sentence from the discussion to R.C.M. 1001(c)(5)(B): “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).” The proposed removal of this sentence is consistent with the pending change to judge-alone sentencing and will allow crime victims more latitude in what they provide in their impact statements. Trial and defense counsel would still have the opportunity to rebut factual matters in the victim’s unsworn statement and to object to the courts consideration of information outside the scope of R.C.M. 1001(c)(2)(B).

DAC-IPAD 5th Annual Report Timeline and CY 2023 Meeting Dates Recommendations

The DAC-IPAD’s 5th Annual Report is due to the SecDef, SASC, and HASC NLT March 30, 2023

The Committee will discuss and deliberate on the contents for the report on Day 2.

The Committee should also consider future meeting dates for CY 2023.

Below is a proposed timeline for the 5th Annual Report; Topics for the March meeting; and recommended dates for CY 2023 for the Committee’s consideration and discussion on Day 2.

5 th Annual Report Timeline	
December 7	Discuss/deliberate on content
Dec 8 – Jan 12	Staff compiles report; including subcommittee chapter input cleared through SC Chairs NLT January 12
January 13 – 31	Staff consolidates full report with SC input
February 1 – 15	Circulate first draft to full committee for comment
February 16 – 28	Staff makes revisions and finalizes report
March meeting	Committee deliberates on final report (any final adjustments)
March 12 or 13	Virtual Meeting to vote on report
March 13 – 29	Report finalized, signed, and transmitted to SD, HASC and SASC

Potential Topics for March Meeting; Question: 1-day or 2-day meeting?	
1-day Options	2-day Options
a.m.: Public Comment requests (LULAC)	Day 1 – presentations
Military Criminal Investigative Orgs (?)	
More courts-martial background?	Day 2 – (similar to current Day 2)
Other presenters?	March 2023 Report Deliberations
March 2023 Report Deliberations	SC Updates to full committee
p.m. March 2023 Report Deliberations	Closed: SC Meetings (?)
SC Updates to full committee	
Closed: SC Meetings (?)	

Calendar year 2023 Potential Dates			
March	June	September	December
March 1, 2	June 6, 7, 8	September 12, 13, 14	December 5, 6, 7
March 7, 8, 9	June 13, 14, 15	September 19, 20, 21	
	June 20, 21, 22		

EXECUTIVE SUMMARY

SUMMARY OF FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

INTRODUCTION

- I. Committee Establishment and Mission
- II. Composition of Committee
- III. Subcommittees
- IV. Previous Committee Reports
- V. Fifth Annual Report – March 2023

CHAPTER 1. UPDATE AND OBSERVATIONS RELATED TO THE OFFICE OF SPECIAL TRIAL COUNSEL

- I. Introduction
- II. Methodology
- III.
- IV. Conclusion

CHAPTER 2. ANALYSIS OF APPELLATE DECISIONS IN FISCAL YEAR 2021 SEXUAL ASSAULT CASES

- I. Introduction
- II. Methodology
- III.
- IV. Conclusion

CHAPTER 3. FINDINGS, ANALYSIS, AND RECOMMENDATIONS RELATED TO VICTIM IMPACT STATEMENTS IN SEXUAL ASSAULT CASES

- I. Introduction
- II. Methodology
- III.
- IV. Conclusion

CHAPTER 4. FINDINGS, ANALYSIS, AND RECOMMENDATIONS RELATED TO TOUR LENGTH AND RATING CHAIN STRUCTURE OF SPECIAL VICTIMS' COUNSEL AND VICTIMS' LEGAL COUNSEL

- I. Introduction
- II. Executive Summary
- III. Findings, Analysis and Recommendations
- IV. Conclusion

**CHAPTER 5. MEMBER OBSERVATIONS OF COURTS-MARTIAL AND
ADVANCED LITIGATION TRAINING AND EDUCATION**

- I. Background
- II. Courts-Martial Observation
- III. Advanced Litigation Courses
- IV. Conclusion

CHAPTER 6. WAY AHEAD

- I. Introduction
- II. 12-month Plan

APPENDIXES

- A. Committee Authorizing Statute, Amendments, and Duties
- B. Committee Charter, Balance Plan, and Terms of Reference
- C. Committee Members
- D. Subcommittees (Membership and Terms of Reference)
- E. Committee Recommendations to Date
- F. Committee Requests for Information
- G. Committee and Subcommittee Meetings and Presenters
- H. Summary of Public Comments and Materials
- I. Committee Professional Staff
- J. Acronyms and Abbreviations
- K. Sources Consulted

DAC-IPAD Fifth Annual Report March 2023

Discussion & Deliberations

December 7, 2022



Agenda

- Statutory requirement
- Decision #1: Format
- Decision #2: Content (by Chapter)
- Decision #3: Timeline



Statutory Requirement

Section 546(d) of NDAA for FY 2015

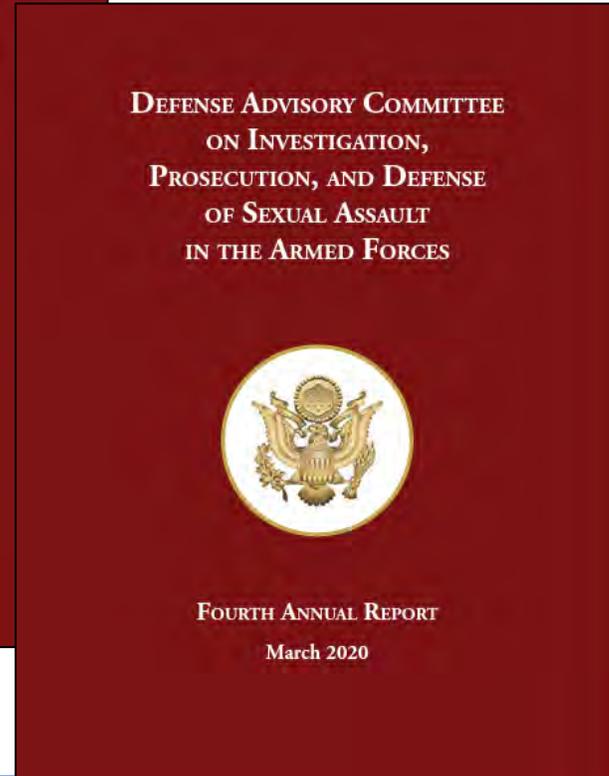
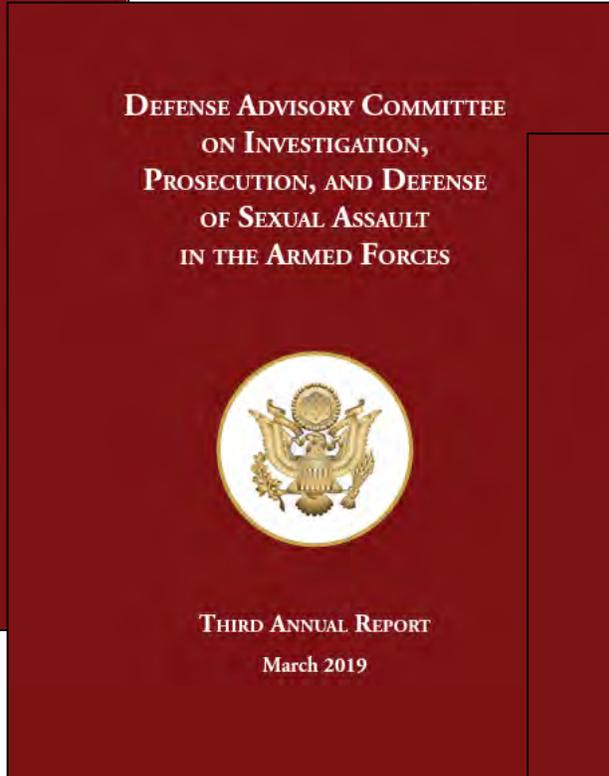
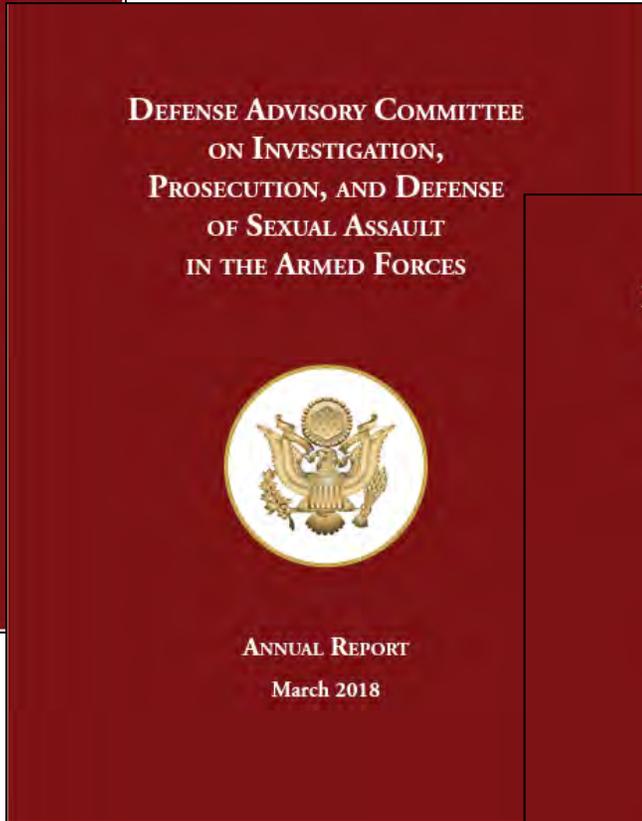
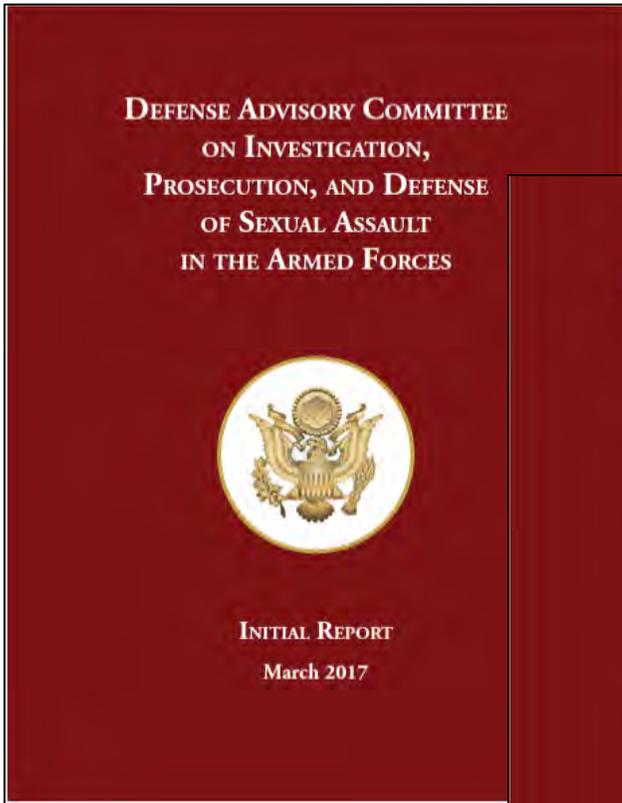
(d) ANNUAL REPORTS –

Not later than **March 30** each year, the Advisory Committee shall submit to the **Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives** a report describing the results of the activities of the Advisory Committee pursuant to this section during the preceding year.



Format

- March 2017 – First (Initial Report)
- March 2018 – Second (Annual Report)
- March 2019 – Third
- March 2020 – Fourth
- March 2021 – DoD Interim (COVID)
- March 2022 – DoD Interim (Staff)
- March 2023 – Fifth**



Defense Advisory Committee

CHAIR

Ms. Martha S. Baibford

MEMBERS

Major General Marcia M. Anderson, U.S. Army, Retired
 The Honorable Les T. Brisson
 Ms. Kathleen B. Cannon
 Ms. Margaret A. Garvin
 The Honorable Paul W. Grimm
 Mr. A. J. Kramer
 Ms. Jennifer Markowitz
 Mr. James F. Markley
 Chief Master Sergeant of the Air Force Rodney J. McKinley, U.S. Air Force, Retired
 Brigadier General James R. Schwenk, U.S. Marine Corps, Retired
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 Ms. Meghan A. Tolash
 The Honorable Reggie B. Walton

STAFF DIRECTOR

Colonel Steven B. Weir, Judge Advocate General's Corps, U.S. Army

DEPUTY STAFF DIRECTOR

Ms. Julie K. Cannon

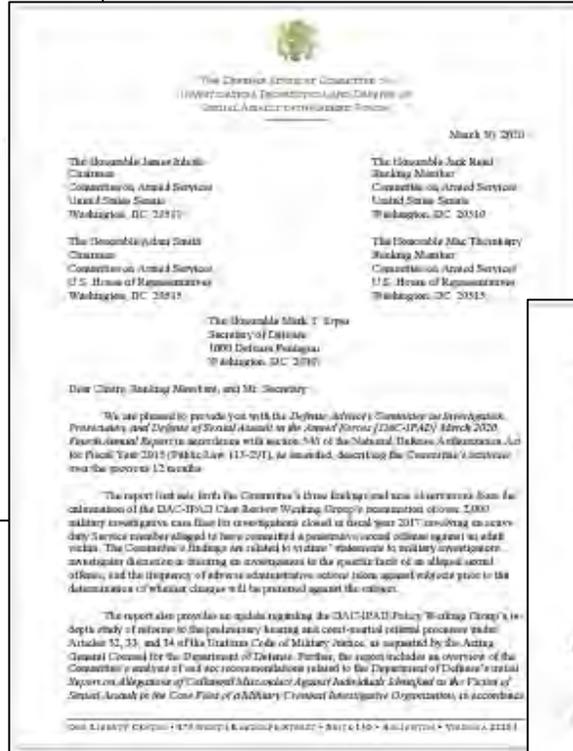
CHIEF OF STAFF

Mr. Dale L. Tredler

DESIGNATED FEDERAL OFFICER

Mr. Dwight H. Sullivan

Format



DEFENSE ADVISORY COMMITTEE ON MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE CENTRAL AMERICAN AND CARIBBEAN REGION, REPORT TO THE PRESIDENT

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Decision #1 - Format

- Recommendation: use same format
- Confirm process for signatures
- Decision:



Content

See Tab 10

- Executive Summary
- Summary of Findings, Observations, and Recommendations
- Introduction
- Chapter 1: OSTC Update (Special Projects Subcommittee)
- Chapter 2: Appellate Case Review Update (Case Review SC)
- Chapter 3: Victim Impact Statements Findings & Recs. (Policy SC)
- Chapter 4: SVC/VLC Report Findings & Recommendations
- Chapter 5: Courts-Martial & Litigation Course Observations Summary
- Chapter 6: Way Ahead
- Appendixes



Decision #2 - Content

See Tab 10

- Proposed Chapters: add or delete any?
- Summary of Findings:
 - From Ch. 1 (SPSC):
 - From Ch. 2 (CRSC):
 - From Ch. 3 (PSC):
 - From Ch. 4: SVC/VLC (18 months, Army Rating Chain)
 - From Ch. 5:
- Proposed Appendixes: add or delete any?
- Decisions:



Decision #3 – Approve a Timeline

5th Annual Report Timeline	
December 7	Discuss/deliberate on content
Dec 8 – Jan 12	Staff compiles report; including SC Chapter input cleared through SC Chairs (NLT Jan 12)
January 13 – 31	Staff consolidates full report w/ SC input
February 1 – 15	Circulate first draft to full committee for comment
February 16 – 28	Staff makes revisions and finalizes report
March meeting (TBD: March 1, 2, 7-9)	Committee deliberates on final report (staff will make final adjustments after meeting)
March 12 or 13	Virtual Meeting to vote on report
March 13-29	Report finalized, signed, and transmitted to Secretary of Defense, SASC and HASC

