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

Meeting Materials

June 11-12, 2024

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
35th Public Meeting

June 11-12, 2024
Preparatory Materials

Table of Contents

– *Summarizes the information gathered by the Subcommittee from an expert in military post-conviction appeals and multiple experts in wrongful conviction units.*

Tab 3c Military Service Responses to DAC-IPAD Request for Information (RFI) Set 2.11, Integrity Units *(74 pages)*

– Combined responses from the Military Services to questions addressing the feasibility and advisability of establishing a conviction integrity unit with the Department of Defense. The RFI sought responses from several judge advocate organizations within each Service:

  - Judge advocate headquarters, military justice policy division
  - Court of Criminal Appeals
  - Trial judiciary
  - Service OSTC
  - Trial services organization
  - Defense services organization
  - Victim legal services organization

Tab 4 **Materials relevant to the DAC-IPAD's study of the demographics of courts-martial panel members**

Tab 4a Staff-prepared background and methodology for the study conducted by the DAC-IPAD's Case Review Subcommittee. This statistical study focused on the following questions:

- *How do the demographics of servicemembers detailed to panels compare with overall service demographics?*
- *What are the demographics of servicemembers who are detailed to panels but excused due to challenges for cause, peremptory strikes, or randomization?*
- *Are minority servicemembers excluded at higher rates than white servicemembers from military courts-martial panels?*
- *How do the demographics of the venire compare with the demographics of the members ultimately selected to serve on the panel?*

Tab 4b *United States v. Keago*, 2024 CAAF LEXIS 256 (May 9, 2024) *(19 pages)*

– *This timely decision by CAAF provides information on the law applicable to defense challenges on grounds of implied bias. The CAAF reaffirmed precedent holding that "in close cases military judges are enjoined to liberally grant challenges for cause."*

Tab 4c Executive Summary, Findings, and Recommendations from the DAC-IPAD's *Report on Randomizing Court-Martial Panel Member Selection (December 2023) (5 pages)*

- This extract provides a summary of the Committee's assessment of the military's panel selection process. The DAC-IPAD made 10 recommendations that, when taken together, provide a road map for reducing subjectivity and the potential for bias, and establishing a transparent, objective process for randomly selecting panel members.

DAC-IPAD Staff-prepared list of issues relevant to the June 11-12, 2024, public meeting sessions with military and civilian practitioners

Purpose: This list describes the areas of focus at the DAC-IPAD's 35th public meeting and is intended to guide the Committee's review of the enclosed read-ahead materials.

Issue 1 UCMJ Article 6b, Rights of the victim of an offense under this chapter, 10 U.S.C. § 806b

1. Whether and how victims may assert their rights under Article 6b, UCMJ, at the court-martial.
2. Whether military appellate courts should apply ordinary legal standards for review of a victim's petition for a writ of mandamus—*abuse of discretion or legal error*—as is explicitly required under the federal Crime Victims' Rights Act, rather than the more stringent legal standard for issuance of an extraordinary writ under the All Writs Act, 28 U.S.C. § 1651(a).
3. Whether statutory changes are needed to ensure jurisdiction for the Court of Appeals for the Armed Forces (CAAF) over a victim's appeal of a lower court's decision on a petition for a writ of mandamus.
4. Whether to recommend a specific timeframe for the Courts of Criminal Appeals (CCAs) and CAAF to rule on a victim's petition for a writ of mandamus.

Issue 2 Scope of and procedures related to the psychotherapist-patient privilege in Military Rule of Evidence 513, 2024 Manual for Courts-Martial

1. Whether M.R.E. 513, psychotherapist-patient privilege, should be amended to include diagnosis and treatment.
2. Alternatively, whether sufficient procedures exist to protect a victim's rights and interests concerning non-privileged material, including diagnosis and treatment records, before and during a court-martial.

Issue 3 The feasibility and advisability of establishing conviction integrity units (CIUs) or changes to appellate review of sexual assault convictions in the military.

1. Whether there is a need for conviction integrity units within the military justice system.
2. The relevance and impact of the factual sufficiency review by Service Criminal Courts of Appeal.
3. Whether the Services should take other measures—in addition to, or in lieu of a CIU—to ensure the integrity of convictions in the military justice system.

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

35th PUBLIC MEETING

June 11-12, 2024

Location: Convene Hamilton Square
600 14th St NW, Washington, DC
20005

Tuesday, June 11, 2024	**Day 1**
9:30 a.m. – 11:30 a.m.	**Subcommittee Meeting: Policy** *(Closed)* *BGen(R) James Schwenk (Chair)* *MG(Ret) Marcia Anderson* *HON Suzanne Goldberg* *HON Jennifer O'Connor* *Judge Karla Smith (Committee Chair)* *DFO: Mr. Dwight Sullivan*
10:30 a.m. – 11:30 a.m	**Subcommittee Meeting: Special Projects** *(Closed)* *Ms. Meghan Tokash (Chair)* *Judge Paul Grimm* *Mr. A.J. Kramer* *Dr. Jenifer Markowitz Dr. Cassia Spohn* *Judge Reggie Walton* *DFO: Mr. Dave Gruber*
11:30 a.m. – 12:30 p.m.	**Lunch**
12:30 p.m. – 1:30 p.m.	**Administrative Session** *(Closed)*
1:30 p.m. – 1:35 p.m.	**Welcome and Introduction to Public Meeting** *Director, Mr. Pete Yob* *Designated Federal Officer, Mr. Dwight Sullivan*
1:35 p.m. – 2:35 p.m.	**Government Appellate Counsel from each Military Department** ***(60 minutes)*** *COL Chris Burgess, U.S. Army* *Col Matt Talcott, U.S. Air Force* *Col Joseph "Mac" Jennings, U.S. Marine Corps* *CAPT Anita Scott and Mr. Ted Fowles, U.S. Coast Guard* *Purpose: Discussion of enforcement mechanisms for Art. 6b rights and procedures for post-conviction review of courts-martial.* *Staff Lead: Ms. Terri Saunders*

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

35th PUBLIC MEETING

2:35 p.m. – 2:45 p.m..	**Break**
2:45 p.m. – 3:45 p.m.	**Defense Appellate Counsel from each Military Department** *(60 minutes)* *Mr. Jonathan Potter, U.S. Army* *Ms. Megan Marinos, U.S. Air Force* *Ms. Rebecca Snyder, U.S. Navy* *Mr. Tom Cook, U.S. Coast Guard* *Purpose: Discussion of enforcement mechanisms for Art. 6b rights and procedures for post-conviction review of courts-martial.* *Staff Lead: Ms. Terri Saunders*
3:45 p.m. – 4:45 p.m.	**Comparative Perspectives on Victims' Rights Litigation** *(60 minutes)* *Mr. Ryan Guilds, Survivors United* *Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute* *Purpose: To hear perspectives on the scope of Military Rule of Evidence 513, psychotherapist-patient privilege, and on mechanisms to enforce Art. 6b rights during the pretrial and trial phase of a case.* *Staff Lead: Ms. Terri Saunders*

4:45 p.m. **Public Meeting Adjourned**

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

35th PUBLIC MEETING

Wednesday, June 12, 2024	Day 2
9:00 a.m. – 9:30 a.m.	**Administrative Session** *(Closed)*
9:30 a.m. – 9:35 a.m.	**Welcome and Overview of Day 2** *Director, Mr. Pete Yob* *Designated Federal Officer, Mr. Bill Sprance*
9:35 a.m. – 11:00 a.m.	**Conviction Integrity Units: Best Practices in Sexual Assault Cases** *(90 minutes)* *Ms. Katie Monroe, Executive Director, Healing Justice* *Ms. Marissa Boyers Bluestine, Assistant Director, Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Carey Law School* *Purpose: To discuss best practices for establishing conviction integrity units and unique considerations in sexual assault cases.* *Staff lead: Ms. Nalini Gupta*
11:00 a.m. – 11:10 a.m.	**Break**
11:10 a.m. – 12:40 p.m.	**Demographics of Courts-Martial Panel Members for FY22: Presentation and Deliberations** *(90 minutes)* *Presenters: DAC-IPAD Staff, Ms. Kate Tagert, Ms. Stacy Boggess, Dr. Bill Wells, and Ms. Nalini Gupta* *Purpose: To present information gathered by Staff on the demographics of panel members detailed and empaneled in courts-martial completed in FY 2022.*
12:40 p.m. – 1:40 p.m.	**Lunch**
1:40 p.m. – 2:40 p.m.	**Committee Deliberations** *(60 minutes)*
2:40 p.m. – 2:50 p.m.	**Special Projects Subcommittee Update** *(10 minutes)*
2:50 p.m. – 3:00 p.m.	**Policy Subcommittee Update** *(10 minutes)*
3:00 p.m. – 3:15 p.m.	**Break**
3:15 p.m. – 3:45 p.m.	**Public Comment** *(30 minutes)*
3:45 p.m. – 4:00 p.m.	**Meeting Wrap-Up / Preview of Next Meeting** *(15 minutes)*

4:00 p.m. **Public Meeting Adjourned**

Differences Between Article 6b, UCMJ, and the Crime Victims' Rights Act Regarding Enforcement Mechanisms and Appellate Standards

1. Where the victim may assert a violation of rights.

Article 6b, UCMJ	CVRA
The victim must petition the Court of Criminal Appeals for a writ of mandamus to assert their rights. With some exceptions, this may not be done at the trial court.	The victim must first assert their rights at the District Court. If no relief, the victim may then petition the appellate court for a writ of mandamus.
M.W. v. United States: Neither Article 6b, nor Article 67 gives CAAF jurisdiction to review a victim's petition for a writ of mandamus.	

2. Timing of review for a victim's assertion of rights.

Article 6b, UCMJ	CVRA
"To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals."	"The district court shall take up and decide any motion asserting a victim's right forthwith."
"Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces…"	The court of appeals must decide the victim's application "forthwith within 72 hours after the petition has been filed," unless the litigants stipulate to a different time period. The proceedings may not be stayed or continued for more than five days.

3. Standard of review for a victim's petition for a writ of mandamus.

Article 6b, UCMJ	CVRA
Article 6b does not specify a standard of review. The Courts have held that the petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.	The CVRA explicitly states that the appellate courts will apply the ordinary standards of appellate review.

Article 6b, UCMJ, and Crime Victims' Rights Act (CVRA) Comparison Chart

Article 6b, UCMJ	18 U.S.C. § 3771, Crime Victims' Rights (CVRA)
(a) Rights of a Victim of an Offense Under this Chapter. A victim of an offense under this chapter has the following rights: (1) The right to be reasonably protected from the accused.	**(a) Rights of Crime Victims.** A crime victim has the following rights: (1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any of the following: (A) A public hearing concerning the continuation of confinement prior to trial of the accused. (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense. (C) A court-martial relating to the offense. (D) A post-trial motion, filing, or hearing that may address the finding or sentence of a court-martial with respect to the accused, unseal privileged or private information of the victim, or result in the release of the accused. (E) A public proceeding of the service clemency and parole board relating to the offense. (F) The release or escape of the accused, unless such notice may endanger the safety of any person.	(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.	(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any of the following: (A) A public hearing concerning the continuation of confinement prior to trial of the accused. (B) A sentencing hearing relating to the offense.	(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(C) A public proceeding of the service clemency and parole board relating to the offense.	
(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).	(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to receive restitution as provided in law.	(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.	(7) The right to proceedings free from unreasonable delay.
(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.	(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
(9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.	(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
	(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) -- and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.
	(b) Rights afforded. (1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

	(2) Habeas corpus proceedings. *[Note*: T*his section describes victims' rights in federal habeus corpus proceedings; there is no corollary in Article 6b.]*
	(c) Best efforts to accord rights. (1) Government. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a). (2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a). (3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.
	(e) Definitions. For the purposes of this chapter [this section]: **(1) Court of Appeals.** The term "court of appeals" means— **(A)** the United States court of appeals for the judicial district in which a defendant is being prosecuted; or **(B)** for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals. **(3) District court; court.** The terms "district court" and "court" include the Superior Court of the District of Columbia.
(b) Victim of an Offense Under this Chapter Defined. In this section, the term "victim of an offense under this chapter" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter. **(c) Appointment of Individuals to Assume Rights for Certain Victims.** In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal	**(2) Crime victim.** **(A)** In general. The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. **(B)** Minors and certain other victims. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any

guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.	other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.
(d) Rule of Construction. Nothing in this section (article) shall be construed— (1) to authorize a cause of action for damages; (2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages; or (3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).	**(d)(6) No cause of action.** Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.
	(d) Enforcement and limitations. **(1) Rights.** The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].
	(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.
(e) Enforcement by Court of Criminal Appeals. (1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.	**(3) Motion for relief and writ of mandamus.** The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to

	circuit rule or the Federal Rules of Appellate Procedure.
(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.	
(3)(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a). g (B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals. (C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.	The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.
	(4) Error. In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates. **(5)** Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if— (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged.

(4) Paragraph (1) applies with respect to the protections afforded by the following: (A) This section (article). (B) Section 832 (article 32) of this title. (C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background. (D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege. (E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege. (F) Military Rule of Evidence 615, relating to the exclusion of witnesses.	
	(f) Procedures to promote compliance. *[Note: this section discusses promulgation of regulations to enforce victims' rights. There is no corollary in Article 6b.]*
(f) Counsel for Accused Interview of Victim of Alleged Offense. (1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable. (2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.	

(2) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.

§806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges

(a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military appellate judge, military judge, or military magistrate to perform the duties of the position involved. To the extent practicable, the procedures shall be uniform for all armed forces.

(b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

§806b. Art. 6b. Rights of the victim of an offense under this chapter

(a) RIGHTS OF A VICTIM OF AN OFFENSE UNDER THIS CHAPTER.—A victim of an offense under this chapter has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.

(C) A court-martial relating to the offense.

(D) A post-trial motion, filing, or hearing that may address the finding or sentence of a court-martial with respect to the accused, unseal privileged or private information of the victim, or result in the release of the accused.

(E) A public proceeding of the service clemency and parole board relating to the offense.

(F) The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A sentencing hearing relating to the offense.

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

(9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

(b) VICTIM OF AN OFFENSE UNDER THIS CHAPTER DEFINED.—In this section, the term "victim of an offense under this chapter" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter.

(c) APPOINTMENT OF INDIVIDUALS TO ASSUME RIGHTS FOR CERTAIN VICTIMS.—In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.

(d) RULE OF CONSTRUCTION.—Nothing in this section (article) shall be construed—

(1) to authorize a cause of action for damages;

(2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages; or

(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS.—

(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3)(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a).

(B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals.

(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—

(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.

SUBCHAPTER II—APPREHENSION AND RESTRAINT

§807. Art. 7. Apprehension

(a) Apprehension is the taking of a person into custody.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

§808. Art. 8. Apprehension of deserters

Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Commonwealth, possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

§809. Art. 9. Imposition of restraint

(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§810. Art. 10. Restraint of persons charged

(a) IN GENERAL.—

(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—

(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

(A) to inform the person of the specific offense of which the person is accused; and

(B) to try the person or to dismiss the charges and release the person.

(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if applicable, the preliminary hearing report submitted under section 832 of this title (article 32).

§811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

18 USCS § 3771

Current through Public Law 118-51, approved April 24, 2024, with a gap of Public Law 118-50.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part II. Criminal Procedure (Chs. 201 — 238) > CHAPTER 237. Crime victims' rights (§ 3771)

§ 3771. Crime victims' rights

(a) Rights of crime victims. A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims" Rights and Restitution Act of 1990 (*42 U.S.C. 10607(c)* [now *34 USCS § 20141(c)*]) and provided contact information for the Office of the Victims" Rights Ombudsman of the Department of Justice.

(b) Rights afforded.

(1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.

(A) In general. In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.

(i) In general. These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims. In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation. This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person’s family member or other lawful representative.

(c) Best efforts to accord rights.

(1) Government. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.

(1) Rights. The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

(5) Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action. Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter [this section]:

(1) Court of Appeals. The term "court of appeals" means—

(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or

(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

(2) Crime victim.

(A) In general. The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

(B) Minors and certain other victims. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(3) District court; court. The terms "district court" and "court" include the Superior Court of the District of Columbia.

(f) Procedures to promote compliance.

(1) Regulations. Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

History

HISTORY:

(B) the information submitted during the sentencing proceeding; and

(C) any information required by rule or order of the Court of Criminal Appeals.

(f) LIMITS OF AUTHORITY.—

(1) SET ASIDE OF FINDINGS —

(A) IN GENERAL—If the Court of Criminal Appeals sets aside the findings, the Court—

(i) may affirm any lesser included offense; and

(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

(B) DISMISSAL WHEN NO REHEARING ORDERED.—If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

(C) DISMISSAL WHEN REHEARING IMPRACTICABLE.—

(i) IN GENERAL.—Subject to clause (ii), if the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

(ii) CASES REFERRED BY SPECIAL TRIAL COUNSEL.—If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

(2) SET ASIDE OF SENTENCE.—If the Court of Criminal Appeals sets aside the sentence, the Court may—

(A) modify the sentence to a lesser sentence; or

(B) order a rehearing.

(3) ADDITIONAL PROCEEDINGS.—If the Court of Criminal Appeals determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the president may prescribe. If the Court of Appeals for the Armed Forces determines that additional proceedings are warranted, the Court of Criminal Appeals shall order a hearing or other proceeding in accordance with the direction of the court of Appeals for the Armed Forces.

(g) ACTION IN ACCORDANCE WITH DECISIONS OF COURTS.—The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the appropriate authority to take action in accordance with the decision of the Court of Criminal Appeals.

(h) RULES OF PROCEDURE.—The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(i) PROHIBITION ON EVALUATION OF OTHER MEMBERS OF COURTS.—No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(j) INELIGIBILITY OF MEMBERS OF COURTS TO REVIEW RECORDS OF CASES INVOLVING CERTAIN PRIOR MEMBER SERVICE.—No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

§867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c)(1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to—

(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals;

(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

(C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)).

(2) In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him.

(3) In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review.

(4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based

on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges. Notwithstanding the preceding sentence, if a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

§867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§868. Art. 68. Branch offices

The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Criminal Appeals with one or more panels. That Assistant Judge Advocate General and any Court of Criminal Appeals established by him may perform for that command under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Criminal Appeals established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§869. Art. 69. Review by Judge Advocate General

(a) IN GENERAL.—Upon application by the accused or receipt of the record pursuant to section 864(c)(3) of this title (article 64(c)(3)) and subject to subsections (b), (c), and (d), the Judge Advocate General may—

(1) with respect to a summary court-martial, modify or set aside, in whole or in part, the findings and sentence; or

(2) with respect to a general or special court-martial, order such court-martial to be reviewed under section 866 of this title (article 66).

(b) TIMING.—

(1) To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than—

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

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

(2) The Judge Advocate General may, for good cause shown, extend the period for submission of an application, except that—

(A) in the case of an application for review of a summary court martial, the Judge Advocate may not consider an application submitted more than three years after the completion date referred to in paragraph (1)(A); and

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

(c) SCOPE.—

(1)(A) In a case reviewed under section 864 of this title (article 64), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(D)(i) Subject to clause (ii), if the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impracticable, the convening authority shall dismiss the charges.

(ii) If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

(2) In a case reviewed under section 865(b) of this title (article 65(b)), review under this section is limited to the issue of whether the waiver or withdrawal of an appeal was invalid under the law. If the Judge Advocate General determines that the waiver or withdrawal of an appeal was invalid, the Judge Advocate General shall send the case to the Court of Criminal Appeals.

(d) COURT OF CRIMINAL APPEALS.—

(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)(1) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

(2) The Court of Criminal Appeals may grant an application under paragraph (1) only if—

(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

(B) the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

Staff Prepared Background Paper:

Conviction Integrity Units and Postconviction Relief in the Military Justice System

Since the mid-2000s, dozens of jurisdictions across the United States have established conviction integrity or conviction review units (CIUs or CRUs). These units, generally housed within the district attorney's office, review limited categories of convictions, based on new evidence or claims of prosecutorial malfeasance. Even when an investigation does not lead to an exoneration, CIUs serve two important purposes. First, on the case level, they work to correct miscarriages of justice and free wrongly incarcerated individuals or correct consequences of a conviction for those who have already served out their sentences. Second, on the structural level, CIUs can help reinforce trust in the criminal justice system by creating a process that is transparent and self-correcting.

This paper provides background on CIUs so that the Case Review Subcommittee can assess the potential benefits and feasibility of a conviction integrity unit within the military justice system. The first section examines the role of CIUs in the civilian system and describes different models of conviction review. The second section discusses options for postconviction review currently available in the military.

I. CIUs in the Civilian Justice System

A. Overview

Generally, CIUs review convictions when appeals have been rejected and exhausted, but the convicted individual still claims innocence. These CIUs investigate preexisting evidence with new technology (such as DNA testing), new evidence not available at trial,[1] or errors in the case for which the prosecution was responsible, such as a *Brady* violation.[2]

As of June 2022, 97 jurisdictions in the United States had established a CIU, 51 of which had at least one investigation that resulted in an exoneration. Most CIUs operate on the local level within the district or state attorney's office. A number of states—Delaware, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Virginia—have statewide CIUs that operate out of the attorney general's office.[3] CIUs are much less common on the federal level; only the U.S. Attorney's offices of the District of Columbia and the Central District of California operate such units.[4] This owes largely to the different types of crimes prosecuted in

[1] JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 17 n.21 (Quattrone Ctr. for Fair Admin. of Just., Univ. Pennsylvania L. Sch., April 2016), 17–18, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship [Quattrone Report].

[2] *See, e.g.,* Lissa Griffin & Daisy Mason, *The Prosecutor in the Mirror: Conviction Integrity Units and* Brady *Claims*, 55 LOY. L.A.L. REV. 1005 (2022).

[3] *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last updated June 14, 2022).

[4] *Conviction Integrity Unit*, U.S. ATT'Y'S OFF. FOR D.C., https://www.justice.gov/usao-dc/page/file/1585756/download (last visited July 25, 2023); *Conviction Integrity Committee*, U.S. ATT'Y'S OFF. FOR C.D. CAL., https://www.justice.gov/usao-cdca/conviction-integrity-committee (last updated July 17, 2023).

federal court, where the sorts of evidence that most often lead to exoneration, such as reexamination of DNA evidence, are much less likely.[5]

In certain instances, "special project" CIUs might be established to investigate a similar error across many cases. For example, a special project CIU could be established to reexamine any cases in which evidence involving outdated methods of forensic science were used.[6]

The Quattrone Center for the Fair Administration of Justice, an organization at the University of Pennsylvania's law school that researches methods to prevent errors in the criminal justice system,[7] has published best practices for CIUs.[8] These include:

- Direct reporting to the district attorney or other head of office rather than being contained in another unit.
- Appropriate resources and training.
- Recusal of anyone who worked on the original case.
- Inclusion of at least one external defense attorney.
- Liberal acceptance of cases for review and avoidance of blanket policies that exclude certain cases from review.
- Vacating convictions when the evidence after review no longer supports conviction beyond a reasonable doubt and taking a conservative approach to refiling charges in such cases.
- Making evidence available for independent testing.
- Operating transparently with clear guidelines to petitioners and standards.
- Identifying and rectifying systemic issues.

B. Example: Queens, NY

Three cases from the Queens, NY, district attorney's office serve to illustrate the kinds of cases and evidence a CIU might consider. One, *Capers*, illustrates reexamination of non-forensic evidence. The office recommended the dismissal of a conviction that had been based on the testimony of an eyewitness who later recanted; evidence corroborated the recantation. In a second case, *Williams*, which illustrates the consideration of new evidence, the office vacated the conviction based on cell-signal history that confirmed an alibi for the convicted individual.[9] In a third case, which illustrates a systemic, proactive review, the Queens district attorney moved to

[5] Quattrone Report, *supra* note 1, at 17 n.21.

[6] *Id*. at 18.

[7] *About the Center*, QUATTRONE CTR., https://www.law.upenn.edu/institutes/quattronecenter/about-us.php (last visited July 31, 2023).

[8] *Quattrone Report, supra note* 1*,* at 2–4.

[9] *After Exhaustive Investigations, DA Katz Consents to Vacating Wrongful Convictions*, QUEENS DA, https://queensda.org/after-exhaustive-investigations-da-katz-consents-to-vacating-wrongful-convictions/ (Nov. 17, 2022) [Wrongful Convictions].

dismiss 60 convictions related to the work of former New York Police Department detectives who had since been convicted of misconduct-related crimes.[10]

Capers came to the Queens CIU's attention through the advocacy of the convicted individual's counsel.[11] *Williams* was investigated after Appellate Advocates, a nonprofit public-defender organization,[12] filed a motion based on newly discovered evidence.[13] The mass-dismissal case was a result of the Queens district attorney's having ordered a review of associated cases after news emerged of the detectives' convictions.

The Queens CIU follows these standards and processes:[14]

- Convicted individuals or their counsel submit a CIU Intake Form and claim either actual innocence or wrongful conviction. They provide potential evidence for their claims. The form requires information about the case but does not entail any special legal knowledge, facilitating potential pro se applications.[15]
- The CIU conducts an initial review including all records associated with the case and may reach out to the applicants or their counsel for more information.
- The CIU notifies the applicants or their counsel whether it will open an investigation into the case. The CIU opens investigations based on "a credible claim of actual innocence or wrongful conviction."
- The CIU prioritizes currently incarcerated individuals or those on parole, and it prioritizes "serious felonies," but it can also review any case in which actual innocence or wrongful conviction is claimed.
- When it opens an investigation, "[t]he CIU will conduct a thorough and deliberate investigation of the crime and the integrity of the evidence used to convict the defendant." This investigation may include new testing.
- If the investigation indicates actual innocence or wrongful conviction, the district attorney uses "appropriate legal and constitution grounds for relief." This can include a motion to dismiss the case, a plea agreement, or a retrial.
- The contents of the investigation are not shared with the applicants or their counsel.

C. Alternative Model: North Carolina Innocence Inquiry Commission

An alternative model to the standard CIU is an innocence commission—the best example being the North Carolina Innocence Inquiry Commission (NCIIC). The NCIIC was created in 2006 by the North Carolina state legislature and, unlike the standard CIU, has no structural ties

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[10] *Queens District Attorney Moves to Dismiss 60 Cases that Relied on Convicted NYPD Detectives*, QUEENS DA, https://queensda.org/queens-district-attorney-moves-to-dismiss-60-cases-that-relied-on-the-testimony-of-convicted-nypd-detectives/ (Nov. 8, 2021).

[11] Wrongful Convictions, *supra* note 9.

[12] *About*, APP. ADVOCS., https://appad.org/about-us/ (last visite.d July 31, 2023).

[13] *Supreme Court, Queens County: People v. Williams*, APP. ADVOCS., https://appad.org/court-wins/people-v-williams-supreme-court-queens-county/ (Nov. 17, 2022).

[14] *Conviction Integrity Unit*, QUEENS DA, https://queensda.org/conviction-integrity-unit/ (last visited July 31, 2023).

[15] *Conviction Integrity Unit (CIU) Submission Form/Request for Review*, QUEENS DA, https://queensda.org/wp-content/uploads/2021/02/QCD_Intake_form.pdf (last visited July 31, 2023).

to a prosecutor's office. Instead, the NCIIC "acts as a statewide independent clearing house for the investigation of actual innocence claims rather than leaving the administration of actual innocence claims to each local jurisdiction."[16] Under the NCIIC model, after an innocence claim is initiated and an investigation is completed, the case is presented by the Commission staff to the eight-member panel, who vote on whether there is sufficient evidence of factual innocence to merit judicial review. If at least five members vote in favor of judicial review, the Chief Justice of the North Carolina Supreme Court appoints a three-judge panel to hear evidence relevant to the Commission's recommendation. The three-judge panel rules as to whether the convicted person has proved by clear and convincing evidence that the convicted person is innocent of the charges.[17]

II. Current Postconviction Review in the Military

In the military justice system, a servicemember convicted at a special or general court-martial can appeal to the Service's court of criminal appeals (CCA). These courts of appeals automatically review any case that ends with the death penalty, at least two years of confinement, or a punitive discharge. They can also review other cases at their discretion.[18] If appeal at the CCA is unsuccessful, convicted servicemembers can appeal to the Court of Appeals for the Armed Forces (CAAF), which reviews only death penalty cases automatically and all other cases at its discretion. It also reviews any cases submitted by the Judge Advocate General (TJAG) for review.[19]

In "extreme cases," a convicted servicemember can submit a petition for a writ of coram nobis to the appropriate CCA even after the appeals process has been exhausted,[20] even when that CCA had already rendered a final judgment.[21] The Supreme Court has recognized that "the jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed."[22]

Another option for convicted servicemembers is to file a petition for a writ of habeas corpus in an Article III court. This option is limited by Supreme Court precedent under *Burns v. Wilson* (1953), which held that, although federal district courts may review habeas claims arising from a court-martial, "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."[23] Based on this precedent, the Tenth Circuit, which hears most habeas cases that arise

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[16] Quattrone Report, *supra* note 1, at 18.

[17] North Carolina Innocence Inquiry Commission Rules and Procedures (adopted May 25, 2007), available at https://innocencecommission-nc.gov/resources/.

[18] 10 U.S.C. § 866(b).

[19] 10 U.S.C. § 867(a).

[20] *U.S. v. Denedo*, 556 U.S. 904, 916–17 (2009).

[21] *Id.* at 906.

[22] *Id*. at 917.

[23] *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

from the military justice system, is hesitant to rule against a finding of a CCA. The Tenth Circuit tends to assume that either the CCA adjudicated the case adequately or, if not, the servicemember's ability to challenge their ruling in federal court was waived.[24] Another barrier to filing for habeas relief in federal court is the need to hire an attorney; servicemembers are provided only a military lawyer for the appeals process within the military justice system.[25]

The order in which these steps are to be taken is unclear, which has led to negative outcomes for convicted servicemembers challenging their convictions. In at least one case, the CAAF rejected a servicemember's coram nobis petition because he had not exhausted his ability to make a habeas claim, while a district court, citing *Burns*, dismissed his habeas claim because it found he had not exhausted his remedies in the military justice system.[26]

III. Additional Resources

JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (Quattrone Ctr. for Fair Admin. of Just., Univ. Pennsylvania L. Sch., Apr. 2016), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship

PROSECUTORS' CENTER FOR EXCELLENCE, CONVICTION REVIEW TODAY: A GUIDE FOR PROSECUTORS (Oct. 2020), *available at* https://pceinc.org/wp-content/uploads/2020/12/20201209-Conviction-Review-Final.pdf

[24] *See, e.g., Roberts v. Callahan*, 321 F.3d 994, 995 (10th Cir. 2003) ("If the grounds for relief that Petitioner raised in the district court were fully and fairly reviewed in the military courts, then the district court was proper in not considering those issues. … Likewise, if a ground for relief was not raised in the military courts, then the district court must deem that ground waived.").

[25] *U.S. v. Scott*, 51 M.J. 326, 329 (C.A.A.F. 1999) ("[T]he Sixth Amendment right to counsel codified under Article 27 applies to the pretrial, trial, and post-trial stages.").

[26] William R. Cauley, *Stuck Between a CAAF and a Hard Place: The Coram Nobis Petition of Private Ronald Gray and the Weakening of Military Justice*, 97 N.C. L. REV. 995, 996 (2018). The cases in question are *U.S. v. Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017) ("Appellant … has a remedy other than coram nobis to rectify the consequences of the alleged errors, namely a writ of habeas corpus in the Article III courts."); and *Gray v. Belcher*, No. 5:08-cv-03289-JTM, 2016 U.S. Dist. LEXIS 149574 (D. Kan. Oct. 26, 2016) ("[A]dherence to the preferred order of presentation outlined in *Burns* [first military courts, then Article III courts] will avoid injecting unnecessary procedural error that would only further delay final disposition of the case.").

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

MINUTES OF THE CASE REVIEW SUBCOMMITTEE MEETING
SEPTEMBER 18, 2023

(41 C.F.R. § 102-3.160, not subject to notice & open meeting requirements)

AUTHORIZATION

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

On October 18, 2022, the Case Review Subcommittee (CRSC) was established under the DAC-IPAD. The CRSC is tasked to support the DAC-IPAD by reviewing cases on an ongoing basis to provide information to the DAC-IPAD for development of advice to the Secretary of Defense.

EVENT

The CRSC held a meeting on September 18, 2023, from 1:00 a.m. to 5:00 p.m. At this meeting the CRSC received testimony from four attorney experts on avenues for post-conviction relief in military and civilian jurisdictions and best practices for establishing conviction integrity units (CIUs) and assessing the factual innocence of those convicted of crimes.

LOCATION

The Subcommittee meeting was held at One Liberty Center, 875 North Randolph Street, Suite 150, Arlington, Virginia 22203.

PARTICIPANTS

Participating Subcommittee Members
Ms. Martha S. Bashford, Chair
Ms. Meg Garvin*
Ms. Jennifer Gentile Long

Also Present
Dwight H. Sullivan, Designated Federal Official

Committee Staff
Ms. Stacy A. Boggess, Senior Paralegal
Ms. Nalini Gupta, Attorney-Advisor
Mr. Michael Libretto, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Mr. Pete Yob, Director

MEETING MINUTES

Chair Bashford opened the CRSC meeting at 1:01 p.m. A quorum was present.

Introduction of Meeting

Ms. Bashford opened the CRSC by introducing the four presenters:

- Ms. Julie Caruso Haines, an expert in post-conviction relief for Service members,
- Ms. Lindsey Guice Smith, Director of the North Carolina Innocence Inquiry Commission,
- Ms. Bonnie Sard, former Chief of the Conviction Integrity Program at the New York County District Attorney's Office ("DANY"),
- Mr. David Shanies, a New York civil rights attorney whose law firm specializes in wrongful convictions.

Testimony of Ms. Julie C. Haines on Post-Conviction Relief and Appellate Practice for Service Members

Ms. Haines is a practicing appellate attorney representing Service members before the military Courts of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces.

Ms. Haines began by explaining the two avenues for post-conviction relief for Service members convicted of crimes at special and general courts-martial. Ms. Haines stated that Article 66 is the first avenue of appellate review in the military Courts of Criminal Appeals (CCAs). Until recently, CCAs would conduct a de novo review of the findings at courts-martial. The reason for de novo review was that military verdicts are not required to be unanimous and that the military has other unique issues, like unlawful command influence, which may affect panel deliberations. Due to a change in the law, the new standard was changed from de novo review to "appropriate deference" to the military judge's finding of fact. The new appellate standard has not yet been defined but Ms. Haines expects there will be litigation on this issue.

Ms. Haines explained that the second avenue of appellate review is through Article 67 for relief at the Court of Appeals for the Armed Forces (CAAF). Ms. Haines explained that although the CCAs exercise mandatory review, CAAF is a court of discretionary review and reviews

questions of law but not fact. If CAAF denies a petition, under 28 U.S.C. § 1259, the appellant cannot petition the Supreme Court.

Ms. Haines went on to discuss an appellant's ability to request a new trial. Ms. Haines explained that within three years of the entry of judgement, an accused can petition the CCAs for a new trial due to newly discovered evidence or because there has been a fraud on the court. For cases involving new evidence, the evidence must not have been discoverable during trial in the course of due diligence and the evidence must produce a substantially more favorable result for the appellant. Ms. Haines believes that very few petitions for new trial are granted mainly because of the three year timeline and because the appellate courts generally find that the evidence was available at trial. Examples of petitions for fraud on the court include perjured testimony, forged documentary evidence, or issues with panel members. Finally, an appellant can petition the CCAs for post-conviction relief via a writ of habeas corpus, mandamus, or error coram nobis.

After exhausting potential appeals within the military courts, Ms. Haines, explained that Service members can seek relief in federal courts in the form of a writ or declaratory relief. Ms. Haines explained that most district courts rely on guidance from the Tenth Cirucuit when assessing whether they should review the legality of a courts-martial conviction or sentence. The Tenth Circuit relies on *Burns v. Wilson*, which states that federal courts should give relief only if the military courts failed to give adequate consideration to the issue or failed to apply the proper legal standards.

Ms. Long asked whether there were any concerns about not having enough military defense appellate attorneys. Ms. Haines did not believe that was a problem, but feels that the more deferential appellate standard will have a negative impact on appellants, especially given that the military does not have unanimous verdicts. Ms. Haines explained that recently CAAF held that unanimous verdicts were not a necessary feature of military convictions because of the "backstop" that a de novo factual sufficiency review afforded appellants. Ms. Haines also stated that unlawful command influence may affect convictions because of the rank differences in the deliberation room. Ms. Bashford then asked about the three year cap on asking for a new trial within the military justice system. Ms. Haines explained that if three years had passed then an appellant could file a writ, but generally the case would be dismissed for lack of jurisdiction and the appellant would need to seek relief in federal district court. Ms. Long asked Ms. Haines what improvements could be made to avoid the risk of false convictions. Ms. Haines believes that unanimous verdicts and conviction integrity units would be beneficial.

<u>Testimony of Bonnie Sard and Lindsey Guice Smith</u>

Ms. Smith is the Director of the North Carolina Innocence Inquiry Commission. Ms. Sard works for the Prosecutor's Center for Excellence and was the inaugural chief of the DANY's Conviction Integrity Program.

Ms. Sard provided a primer on post-conviction relief in the State of New York. Ms. Sard then explained that Cyrus Vance, the former District Attorney of New York, created the Conviction Integrity Program—the first of its kind in the country. Ms. Sard was appointed the Chief of the program and worked with an internal committee of senior prosecutors who conducted case

reviews and advised on best practices. The Conviction Integrity Program also relied on an external committee of criminal experts who advised on best practices for both front and back-end review. The frontend review consisted of ensuring that best practices were used in the first place so that the need for post-conviction relief was not necessary. These practices focused on discovery obligations, mandated trainings, and Brady materials. The backend review of cases focused on post-conviction relief.

Ms. Sard, as the Chief of the Conviction Integrity Program, reviewed all collateral attack motions filed by defendants claiming actual factual innocence. Additionally, DANY's Conviction Integrity Program had a website where defendants or attorneys could request review of a conviction if they were claiming actual innocence or there was a claim of significant injustice or irregularity with the trial. If a case warranted further review, it was assigned to a Assistant District Attorney (ADA), who were provided assistance by internal investigators. The majority of cases reviewed were identification cases, which generally involved a police lineup. After a re-investigation, the ADA would present their findings to the internal committee and a recommendation would be made to the elected District Attorney to determine whether the conviction should be vacated.

Ms. Lindsey Guice Smith introduced herself and explained that the North Carolina Innocence Inquiry Commission was a different model than internal District Attorney Conviction Integrity Units. Ms. Guice explained that her state agency was created in 2006 by the General Assembly to review actual factual innocence claims outside the regular appeals process. The Commission operates as a neutral and independent body and does not represent the convicted person or the state prosecutor's office. In order for a convicted person to have their case reviewed, they must waive their consitutional rights and procedural safeguards. The convicted person must cooperate with the Commission; otherwise, their case will be closed. The Commission has broad statutory authority to obtain information; they are authorized to use both criminal and civil procedures. For example, the agency can serve a potential witness with notice of a civil deposition; the agency also has access to all criminal evidence in a case. Ms. Smith emphasized that the Commission's investigations are completely confidential and the Commission has a truth-seeking function: it is seeking as much information as possible, even if the information is detrimental to the convicted person.

Ms. Smith explained that the Commisson's process begins with a initial staff review, if appropriate, the case proceeds to an investigation and formal inquiry. Staff conducts the investigation; then, the Commissioners hear the evidence as presented by the staff attorneys. If the Commissioners find there is sufficient evidence of factual innocence to merit judicial review, they will recommend the case be heard by a panel of three judges. At this point in the proceedings, the case is decided in an adverserial setting. Three judges preside and the prosecutor and defense counsel present evidence and arguments. The judges must determine that there is clear and convincing evidence of innocence for the defendant to be exonerated.

Ms. Bashford asked for the presenters' opinions on whether each Military Service should have their own unit/agency or consoldiated one. Ms. Smith explained that prosecutor offices across North Carolina were small, unlike DANY, so having separate offices would not be feasible. Ms.

Smith said the biggest question is whether the military would want a conviction integrity unit to be independent or to be tied to the prosecutor's office.

Ms. Long asked what trainings were provided so that an inexperienced counsel was not making credibility determinations of victims in sexual assault cases. Ms. Smith stated that her staff undergo extensive training throughout the year and that the Director makes any credibility determinations before sending the case to the Commissioners. Ms. Sard stated that only prosecutors with ten to fifteen years experience were assigned to review cases and that they would have undergone extensive training as part of their jobs.

Ms. Bashford asked what types of cases were reviewed. Ms. Smith stated that the Commission was only, by law, authorized to look at felony cases. Ms. Smith said the bulk of the cases they reviewed were homicides, sex offenses, and robberies. Ms. Sard stated that in New York there is not a threshold for the type of case they review, but the majority of cases were felonies. Ms. Smith went on to explain additional criteria used to review cases in addition to the claim of complete innocence. First, the evidence must be new and could not have been reasonably available at the time of trial. Second, there must be credible and verifiable evidence of innocence. Ms. Smith stated that they also take cases where there was a guilty plea.

Ms. Garvin asked about the budget of these programs. Ms. Smith stated that the state budget was $1.4 million and that they received $185,000 from a Bureau of Justice Assistance grant. Ms. Smith stated they get approximately 254 cases per year, and have had 15 exonerations since the Commission's inception. Ms. Sard did not know the budget for DANY. She explained that in the three years she was at the Conviction Integrity Program, a dozen or so cases were vacated.

Ms. Smith explained that victims' rights are also considered by the Commission and that victims have a right to be notified of and attend any Commission proceedings. Ms. Smith also explained that they recently hired a victim services coordinator. Additionally, the Commission provides some basic support to persons who are exonerated.

Ms. Bashford asked the panelists to explain why conviction integrity units are necessary when there is an appellate system. Ms. Smith explained that the appellate courts are not equipped to handle cases of factual innocence. Ms. Smith added that in 28 cases in which someone had previously been told that no physical existence existed, the Commission was able to identify the requested evidence. Ms. Sard agreed that appellate courts are not designed to hear cases of claims of innocence as they generally focus on the propriety of the trial and issues relating to the Fourth, Fifth, and Sixth Amendments.

Testimony of David Shanies

Mr. David Shanies is the owner of David Shanies Law Office and specializes in civil rights law and wrongful convictions.

Mr. Shanies began by providing information on three of his clients who were exonerated in the last three years, all of whom were Black and young. Mr. Shanies explained that in nearly all his cases there was some level of ineffective assistance of counsel. He further explained that

wrongful conviction units are still a very young concept and many units do not have well-defined policies, standards, or missions. For example, some units have a factual innocence requirement, but this standard is not always well-defined. For those reasons, Mr. Shanies believes that having a general and flexible standard for granting relief is advisable, even though that makes the process less defined. Mr. Shanies advised that another best practice is for conviction integrity units to have written procedures.

Mr. Shanies also emphasized that one of the factors that must be present for CIUs to be succesful is trust between the prosecutor, the defense counsel, and the decision maker. He said that he felt that it was problematic to have prosecutors make recommendations on overturning convictions because to some degree internal politics are implicated. On the other hand, it would be hard to have an outside agency involved because it is the prosecutors who understand these cases and who also have the power to move to vacate the convictions. Mr. Shanies also recommended that the internal process of review be completly confidential so that there can be honest colloboration between the attorney representing the accused and the prosecutors reviewing the cases.

Ms. Bashford asked whether there was a difference between exoneration and wrongful conviction. Ms. Shanies stated that exoneration is a difficult word, because in New York, the relief is a dismissal or the judgment is vacated but there is no certificate of innocence that comes along with those actions. Mr. Shanies explained that it's hard to define exoneration because of the lack of total certainty. He stated, "Where do we draw the line? How much evidence of innocence do we need? How reliable does it need to be?" Ms. Shanies stated for these reasons there needs to be clear standards and clear mandates.

Ms. Bashford asked whether these types of cases could be dealt with in the appellate courts. Mr. Shanies explained that appellate work was completley irrelevant to his work on wrongful convictions because the appeal comes soon afer the veridct and generally addresses only issues that appear on the face of the record. On the whole, Ms. Shanies concluded that it's very difficult to get post-conviction relief at the appellate level and that out of his clients who were eventually exonerated, none of them received relief from the appellate courts.

Ms. Bashford asked whether or not CIUs should be independent from the prosecutor's office. Mr. Shanies believes that in a hypothetical world independence would be preferable; however, in his opinion, the success of any of these programs is dependent on the values of the people who handle the cases.

Ms. Long asked Mr. Shanies about wrongful convictions in sexual assault cases. Mr. Shanies stated that looking at wrongful convictions for the first time when society is finally convicting men for these crimes could be perceived negatively. Mr. Shanies then stated that the standard applied to these cases should be actual innocence. He explained that he thought the three year cap on appellate review in the military for newly discovered evidence was restrictive and he had never had a case where newly discovered evidence was found in that time frame.

Ms. Bashford asked why Mr. Shanies believed that ineffective assistance of counsel happens in these types of cases. Ms. Shanies stated he felt that historically the quality of representation was

different than today, but that he feels having competent counsel for indigent clients is a problem that needs attention.

Ms. Garvin asked how to make the reviews more timely. Mr. Shanies stated that district attorneys should make them a priority and the people doing the work must feel empowered to do the work. Ms. Garvin asked how Mr. Shanies felt about victims receiving information in these types of cases and whether prosecutors notified them of the processes. Mr. Shanies explained that it was a delicate task and although transparency should be an important factor, confidentiality between the defense counsel and prosecutors was also an important part of the process.

Meeting Wrap-Up

The CRSC Members discussed the plan for updating the full DAC-IPAD at the September 2023 public meeting. Ms. Garvin suggested reaching out to an organization called Healing Justice which works with victims in cases with exonerations. The members also agreed to hear from DoD on the issue.

With no further comments or issues to address, the meeting concluded.

Mr. Sullivan closed the meeting at 4:26 p.m.

CERTIFICATION

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

Martha S. Bashford
Chair

MATERIALS

Read Ahead Materials Provided Prior to the Meeting

1. Case Review Subcommittee Meeting Agenda
2. Staff-prepared Background Paper on Conviction Integrity Units.
3. Suggested Questions for Presenters
4. Presenter Biographies

Defense Advisory Committee on the Investigation, Prosecution, and Defense Of Sexual Assault in the Military (DAC-IPAD)

Request for Information
Feasibility and Advisability of Conviction Integrity Units
6 February 2024

I. Purpose: The DAC-IPAD requests the below input to facilitate its analysis of the advisability and feasibility of establishing Conviction Integrity Units (CIUs) in the Department of Defense.

II. Background:

As the Judicial Proceedings Panel (JPP) reported in September 2017,[1] since 2012, Congress, the Department of Defense, and the White House have all worked to reform the military justice system to ensure that sexual assault cases are effectively prosecuted and that sexual assault victims are treated with dignity and compassion. The JPP noted that "[a]s constructive and important as these changes have been, they appear to have also produced an unintended negative consequence…they appear to have raised questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused."

Since the JPP issued its report in 2017, Congress has made subsequent amendments to the Uniform Code of Military Justice, including establishing independent Offices of Special Trial Counsel and revising the Service Courts of Criminal Appeals' factual sufficiency review standard. These amendments, combined with a convicted service members limited avenues to obtain post-conviction review and relief, support exploring the advisability and feasibility of establishing a CIU(s) within the Department of Defense.

In the past two decades, dozens of jurisdictions across the United States have established CIUs or conviction review units. These units, generally housed within a district attorney's office, review convictions whose integrity has been questioned, often due to newly discovered evidence, claims of prosecutorial malfeasance, or ineffective assistance of counsel. Even when an investigation does not lead to an exoneration, an independent reinvestigation of the case can settle doubts that have called the integrity of the process into question. In this way, CIUs serve two important purposes. First, on the case level, they work to correct miscarriages of justice and free wrongly incarcerated individuals or correct consequences of a conviction for those who have already served out their sentences. Second, on the structural level, CIUs help increase and reinforce trust in a criminal justice system.

The below RFIs are submitted in furtherance of the DAC-IPAD's consideration of the advisability and feasibility of establishing CIUs within the Department of Defense.

III. Point of Contact: The POC for this RFI is Ms. Kate Tagert, available at kate.tagert.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Mar 2024	Substantive Responses	Please provide a narrative response to each of the questions in Section V and VI below.

[1] Judicial Proceedings Panel, *Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (Sept. 2017*), available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf

V. The DAC-IPAD respectfully requests that the Judge Advocate Headquarters answer the below questions:

1. Has your Service ever considered establishing a CIU? If so, please explain what type of review, research, studies, and analysis occurred on the topic.

2. Does your service support establishing a CIU test program, either within each service or centrally located within the Department of Defense, to better assess their potential utility and feasibility? Please explain your response including any recommendations as to the construct, scope, and duration of the test program.

3. What, if any, processes are currently available within your service for convicted servicemembers to challenge their convictions besides appellate review? By way of example, the U.S. Army recently overturned the convictions of 110 servicemembers dating back to 1917 through the Army Board for Correction of Military Records. Are similar processes available in your service and if so, how frequently are they used by convicted servicemembers? How many convictions in the last ten years have been overturned through the same or similar process? Are there limitations in terms of the actions these boards can or will take as it relates to courts-martial convicitions?

VI. The DAC-IPAD respectfully requests narrative responses to the below questions from a knowledgeable representative of each of the following organizations within each service: (1) Judge Advocate Headquarters, (2) Service Court of Criminal Appeals (CCA), (3) Service Trial Judiciary, (4) Office of the Special Trial Counsel, (5) Trial Services Organization, (6) Defense Services Organization, (7) Victim Legal Services Organization. Please provide responses based on each organization's perspectives.

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

5. What capabilities/ expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

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

Request for Information, Set 2.11

Conviction Integrity Units

Date of Request: February 6, 2024

I. Background:

As the Judicial Proceedings Panel (JPP) reported in September 2017,[1] since 2012, Congress, the Department of Defense, and the White House have all worked to reform the military justice system to ensure that sexual assault cases are effectively prosecuted and that sexual assault victims are treated with dignity and compassion. The JPP noted that "[a]s constructive and important as these changes have been, they appear to have also produced an unintended negative consequence…they appear to have raised questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused."

Since the JPP issued its report in 2017, Congress has made subsequent amendments to the Uniform Code of Military Justice, including establishing independent Offices of Special Trial Counsel and revising the Service Courts of Criminal Appeals' factual sufficiency review standard. These amendments, combined with a convicted service members limited avenues to obtain post-conviction review and relief, support exploring the advisability and feasibility of establishing Conviction Integrity Units (CIUs) within the Department of Defense.

In the past two decades, dozens of jurisdictions across the United States have established CIUs or conviction review units. These units, generally housed within a district attorney's office, review convictions whose integrity has been questioned, often due to newly discovered evidence, claims of prosecutorial malfeasance, or ineffective assistance of counsel. Even when an investigation does not lead to an exoneration, an independent reinvestigation of the case can settle doubts that have called the integrity of the process into question. In this way, CIUs serve two important purposes. First, on the case level, they work to correct miscarriages of justice and free wrongly incarcerated individuals or correct consequences of a conviction for those who have already served out their sentences. Second, on the structural level, CIUs help increase and reinforce trust in a criminal justice system.

The below RFIs are submitted in furtherance of the DAC-IPAD's consideration of the advisability and feasibility of establishing CIUs within the Department of Defense.

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[1] Judicial Proceedings Panel, *Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (Sept. 2017*), available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf

II. Response from Judge Advocate Headquarters:[2]

1. Has your Service ever considered establishing a CIU? If so, please explain what type of review, research, studies, and analysis occurred on the topic.

USA JA HQ (Q1): All of the Services, through the Joint Service Committee, studied the possibility of a conviction integrity unit in coordination with the Military Justice Review Group (MJRG), an 18-month long comprehensive review of the UCMJ that resulted in the Military Justice Act of 2016. The MJRG Part II Report, MCM Recommendations (Discussion Draft) (Pre-decisional and Deliberative Work Product), included a recommendation regarding a Conviction Integrity Unit (CIU) through changes to the Rules for Courts-Martial. The MJRG draft discussion recommendation regarding a CIU was not adopted by Congress or the Secretary of Defense.

In addition, the Army has engaged with Congress through the National Defense Authorization Act legislative cycle on issues related to reassessment of evidence and finality of convictions, the primary concerns underlying CIU. In these engagements, Congress has expressed an intent to limit the authority of individuals and courts to overturn convictions.

Dating back to 2013, Congress strictly limited the Article 60, UCMJ post-conviction clemency powers of convening authorities to set aside findings or sentence adjudged at trial. More recently, Congress amended the Article 66, UCMJ standard for factual reviews by appellate courts, elevating the standard for setting aside findings for factual insufficiency. Both significant changes to the UCMJ followed two cases in which a sexual assault conviction was set aside, in one case by a convening authority pursuant to Article 60, UCMJ and in the other by a Service Court of Criminal Appeals applying the de novo factual insufficiency review in Article 66, UCMJ which drew intense scrutiny and immediate action by Congress in the subsequent legislative cycle. Notably, the Department unsuccessfully argued against the changes to Article 60 and Article 66, UCMJ providing both data indicating how rarely convening authorities used Article 60, UCMJ to set aside findings and how rarely Service Courts of Criminal Appeals set aside findings due to factual insufficiency. The Services unsuccessfully argued that these protections were vital to the rights of convicted servicemembers and to prevent wrongful convictions, particularly in light of non-unanimous verdicts.

In addition to the changes to Article 60 and 66, UCMJ Congress rejected a legislative proposal in FY22 to amend Article 73, UCMJ to allow convicted servicemembers who assert actual innocence to petition The Judge Advocate Generals for DNA testing or re-testing of evidence.[3]

Simultaneously, Congress has expressed a clear intent to expand appellate jurisdiction in the FY23-24 NDAAs, expanding jurisdiction for both direct appeals and access to the Supreme Court of the United States. These changes suggest that Congress sees the appellate courts as best positioned to address legal and factual errors in courts-martial convictions.

[2] The first set of 3 questions required responses by Judge Advocate Headquarters only.
[3] S. 2792, FY2022 NDAA proposed by Senator Hirono, member of SASC

While responding to the most recent post-conviction DNA testing legislative proposal, OTJAG examined current avenues of relief and the scope of requests for relief to determine if there were significant gaps and demands for relief outside appellate review.
First, OTJAG determined that between robust appellate jurisdiction, factual sufficiency appellate review, Article 73, UCMJ petitions for new trials, Article 74 UCMJ remission or suspension, habeas petitions and collateral review in federal courts, the presidential pardon process, the Army Clemency and Parole Board, and the Army Board for Correction of Military Records, there are multiple avenues of relief that have allowed for the setting aside of convictions or sentence relief based on legal reviews, factual reviews, clemency, and injustice.

Next, OTJAG pulled data on the demand for additional relief outside the military appellate courts. The data indicated that a very small percentage of eligible Soldiers sought to overturn their conviction outside the appellate process. Updated data below.

For context, from FY2020-FY2023, 1,814 Soldiers were convicted at a general or special court-martial.

Article 73, UCMJ: Since 2020, OTJAG has received 18 petitions for a new trial from 15 individuals. The petitions are assigned for review to reserve Judge Advocates attached to OTJAG who are all current attorneys with the Department of Justice. None of the petitions were determined to have alleged newly discovered evidence or fraud on the court, but instead typically reiterated the evidence admitted at trial.

Collateral Review in Federal District Courts: Convicted servicemembers may seek collateral review in federal district courts under extraordinary writs of habeas corpus or coram nobis Over the past four years, 40 Soldiers have challenged their court-martial conviction in federal district courts. Only one case has resulted in relief and that case involved a guilty plea, not an assertion of actual innocence.

Presidential Pardons: Since January 2020, OTJAG has processed 24 applications for a presidential pardon. Applications are forwarded to the Office of the Pardon Attorney, Department of Justice without recommendation. Servicemembers convicted at a court-martial may apply for a presidential pardon five years after release from confinement or, if no confinement was adjudged, the date of sentencing.

Army Clemency and Parole Board: Under authority of 10 USC 1552, DoDI 1325.7, and AR 15-130, the Army Clemency and Parole Board conducts a timely review of Soldiers convicted at court-martial and sentenced to any term of confinement. The board has authority to remit or suspend the unexecuted part of a court-martial sentence to confinement, upgrade an executed punitive discharge to an administrative discharge, upgrade an unexecuted dishonorable discharge to a bad conduct discharge and reduce or set aside another type of punishment. The ACPB consists of five members, including a civilian chairperson with extensive experience in criminal justice, an attorney from the Army Review Board legal office, and three active-duty field grade officers. In FY2020-2023, ACPB received 999 requests for sentencing clemency and granted 40.

USN JA HQ (Q1): The Navy has not formally considered establishing a CIU and has accordingly conducted no review, research, study, or analysis regarding the topic.

USMC JA HQ (Q1): We are unaware of formal consideration by the Marine Corps of establishing a CIU.

USAF JA HQ (Q1): To date, the Department of the Air Force (DAF) has not considered establishing a CIU. The DAF remains committed to a fair, transparent system at each stage of the court-martial process, including appellate and post-trial review.

USCG JA HQ (Q1): The Coast Guard, as an institution, has not. However, as a member of the Joint Service Committee on Military Justice and with membership on the Military Justice Review Group Part II, the Coast Guard did study the possibility circa 2015 through Rule for Courts-Martial. It was not adopted.

2. Does your service support establishing a CIU test program, either within each service or centrally located within the Department of Defense, to better assess their potential utility and feasibility? Please explain your response including any recommendations as to the construct, scope, and duration of the test program.

USA JA HQ (Q2): Army welcomes discussion of a CIU but believes that any CIU test program should require statutory authorization. In addition to the concerns regarding rejection of the MJRG proposal in 2015 and continued Congressional intent discussed above, Army believes that amendments to Article 76, UCMJ addressing the finality of a court-martial, amendments to Article 44, UCMJ addressing former jeopardy, and sufficient authorities for the Service Judge Advocate Generals to act on CIU findings may be advisable.

USN JA HQ (Q2): The Navy does not support a CIU test program within either the Department of the Navy or the Department of Defense. In our view, such a program is not necessary considering the following protections that Congress and the President afford an accused in the military justice system: under Article 66, UCMJ and R.C.M. 1203, automatic appeal of many convictions and the right to file a direct appeal of any conviction; the right to additional appellate review under Articles 67 and 67a, UCMJ, and R.C.M. 1204 and 1205; the right to petition for a new trial under Article 73 and R.C.M. 1210; and the right to request a Presidential pardon under Article 74. Further, unlike most jurisdictions, a military appellant is provided an independent appellate defense counsel at no cost.

USMC JA HQ (Q2): We do not support a CIU test program within either the Department of the Navy or the Department of Defense given the already broad—and recently expanded—rights and protections afforded to convicted servicemembers. Particularly noteworthy are the right to direct review of any conviction by the Court of Criminal Appeals, including a factual sufficiency review, and the right to representation by appellate defense counsel at no cost and without a showing of indigency..

USAF JA HQ (Q2): Recognizing that CIUs may offer an additional safeguard against wrongful convictions in certain jurisdictions, the DAF does not support establishing a CIU test program within the DAF or the DoD. The DAF has concerns about resourcing, funding, and utility of such a program. The DAF would suggest prior to a test program, a process be used wherein we study the efficacy of these programs in a system like the military justice system. For example, unlike many state and federal courts, the vast majority of our convictions do not rely solely upon forensic evidence. From a review of the information collected by the DAC-IPAD in their subcommittee, this appears a significant difference that is worth exploring. Also, it is possible the more robust appellate practice, to include representation and an ability to appeal all convictions, provides the protections one might see in a CIU.

USCG JA HQ (Q2): The Coast Guard does not endorse a CIU test program. The military provides multiple avenues to test the integrity of a conviction including robust appellant rights, appellate courts uniquely qualified to conduct factual sufficiency (a capacity beyond the right of civilian judicial systems), and other mechanisms to be further discussed. In addition, the Departments have Offices of Inspector General with broad authority to investigate abuses of civil rights and civil liberties and serious management problems within the department which could pertain to detecting and rectifying wrongful convictions. As such, the idea to test or initiate such a program has not been substantiated. Establishing a test program without a substantial basis is problematic and presents unclear use of limited resources.

3. What, if any, processes are currently available within your service for convicted servicemembers to challenge their convictions besides appellate review? By way of example, the U.S. Army recently overturned the convictions of 110 servicemembers dating back to 1917 through the Army Board for Correction of Military Records. Are similar processes available in your service and if so, how frequently are they used by convicted servicemembers? How many convictions in the last ten years have been overturned through the same or similar process? Are there limitations in terms of the actions these boards can or will take as it relates to courts-martial convictions?

USA JA HQ (Q3): In addition to the provisions of the UCMJ:

Army Clemency and Parole Board: Under authority of 10 USC 1552, DoDI 1325.7, and AR 15-130, the Army Clemency and Parole Board conducts a timely review of cases in which Soldiers were convicted at court-martial and sentenced to any term of confinement. The board has authority to adjust significant disparities in approved sentences, modify sentences when consistent with maintenance of good order and discipline and in the best interest of society and the prisoner, direct parole and mandatory supervised release, and restore to duty or re-enlist individuals who have demonstrated potential for military service. ACPB does not have authority to overturn convictions.

Army Board for Correction of Military Records (ABCMR): While 10 USC 1552 prohibits the ABCMR from setting aside convictions obtained under the UCMJ, this constraint does not apply to convictions obtained prior to May 4, 1950, under the Articles of War. In 2008, 28 convictions obtained in 1944 for African American Soldiers involved in a deadly confrontation at Fort Lawton were overturned as the courts-martial were deemed fundamentally unfair. In November

2023, the Secretary of the Army approved the ABCMR recommendation to set aside 110 convictions that resulted from the 1917 Houston Riots under a similar analysis.

ABCMR does have authority to upgrade punitive discharges adjudged at courts-martial under the UCMJ upon application of the former Servicemember.

Presidential Pardons: As discussed above, any Servicemember can apply for a Presidential pardon five years after release from confinement, or, if no confinement, the date of sentencing.

USN JA HQ (Q3): Like the Army, the Department of the Navy has established a corrections board pursuant to 10 U.S.C. § 1552, the Board for Correction of Naval Records (BCNR). For any records pertaining to courts-martial that were tried or reviewed under the UCMJ, that statute limits board authority only to either "correction of a record to reflect actions taken by reviewing authorities" or "action on the sentence of a court-martial for purposes of clemency." 10 U.S.C. § 1552(f). Therefore, while the BCNR can change a record for clemency purposes or to accurately reflect actions taken by convening and reviewing authorities, the BCNR has no authority to act directly upon a conviction under the UCMJ. Given its limited authority on court-martial review, BCNR has not overturned a conviction within the last 10 years. The BCNR has, however, routinely acted upon clemency requests with respect to a court-martial sentence.

USMC JA HQ (Q3): Information on the Board for Correction of Naval Records is available here:
https://www.secnav.navy.mil/mra/bcnr/Pages/default.aspx

Information on the Naval Discharge Review Board is available here:
https://www.secnav.navy.mil/mra/CORB/pages/ndrb/default.aspx

Information on the Naval Clemency and Parole Board is available here:
https://www.secnav.navy.mil/mra/CORB/Pages/NCPB/default.aspx

USAF JA HQ (Q3): The Board for Correction of Military Records (BCMR) does not have authority to reverse, set aside, or otherwise expunge a court-martial conviction arising from the Uniform Code of Military Justice (UCMJ). In accordance with Title 10, United States Code, §1552(f), actions by the BCMR are limited to corrections to the record to reflect actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.[4] The U.S. Army's recent overturning of the 110 convictions was possible only because those convictions predated the 1951 implementation of the UCMJ.

Presently, convicted DAF members have several avenues for potential post-conviction relief outside of the typical appellate process. These include a presidential pardon, upgrade of discharge characterization by the Discharge Review Board (DRB) or BCMR, clemency, restoration to duty/reenlistment, parole and mandatory supervised release by the Department of the Air Force Clemency and Parole Board (AFC&PB), substitution of an administrative

[4] 10 U.S.C.S. § 1552 (LexisNexis, Lexis Advance through Public Law 118-34, approved December 26, 2023)

discharge for a punitive discharge or dismissal by the Secretary under Article 74(b), UCMJ, and relief by the U.S. Court of Federal Claims (CFC)[5].

USCG JA HQ (Q3): Besides appellate review, the Coast Guard has residual clemency authority derived from Article 74(a), UCMJ. Except for adjudged dismissals, the Secretary of Homeland Security has delegated to the Commandant the authority to remit or suspend any part or amount of the executed part of any sentence. Residual clemency may not be granted while a case is being reviewed by the Coast Guard Criminal Court of Appeals, U.S. Court of Appeals for the Armed Forces, or the U.S. Supreme Court. The Coast Guard's governing instruction is here:

https://media.defense.gov/2024/Mar/01/2003403282/-1/-1/0/CI_5814_1A.PDF.

A Memorandum of Understanding between the Coast Guard and the Navy provides that Navy Clemency and Parole Board (NC&PB) reviews and makes determinations concerning clemency for Coast Guard members in confinement in Navy correctional facilities.

Furthermore, a servicemember may collaterally attack their conviction in federal district court. See Bergdahl v. United States, No. 1:21-cv-0418, ECF No. 25 at *3 (D.D.C. July 25, 2023) (citing Schlesinger v. Councilman, 420 U.S. 738, 745 (1975)). They can also request a Presidential pardon.

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA JA HQ (Q1): Conviction integrity is critical to fairness and trust in the military justice system. Hallmarks of the military justice system – including skilled defense at no cost to all accused, robust jurisdiction for appellate review, factual sufficiency review by appellate courts, additional avenues of collateral review in federal courts, rights to petition for a new trial, and multiple avenues for clemency - provide strong protections against wrongful convictions, but of course cannot ensure perfect results.

Finality of convictions is also critical to fairness and trust in the military justice system, for both victims and accused Soldiers. Reassessments of evidence outside the rules of court-martial, especially for offenses that rely on credibility determinations, would undermine faith in the process and could inhibit reporting and cooperation from victims.

Balancing these concerns, with an awareness of prior Congressional intent, requires that any CIU be narrowly limited to address actual gaps in current relief and scoped to reflect existing data on the demand for relief based on claims of factual innocence, not insufficiency of evidence.

[5] See Tucker Act, 28 U.S.C. § 1491; Bowling v. United States, 823 F.2d 1558, 1561 (Fed Cir. 1983)

USN JA HQ (Q1): The Navy does not generally favor the creation of a CIU within the Department of Defense. Many of the reasons that have led prosecution offices to create a CIU simply do not exist in a military jurisdiction. First, in comparison to those other jurisdictions, military caseloads are light enough that defense counsel have the ability to devote relatively more time to the preparation and presentation of each case. Second, military convictions arising from a guilty plea—which are most convictions—are accompanied by a robust colloquy between the accused and judge to ensure the accused is pleading guilty because they are in fact guilty. Third, recent changes to the UCMJ entitle the accused to appeal any guilty finding to the Service's Court of Criminal Appeals upon request. Fourth, and finally, that appeal before the Service's Court of Criminal Appeals may include a claim that facts developed at trial were insufficient to sustain a conviction. This factual sufficiency review is, at least at the federal level, unique to the military and serves as a powerful tool to ensure the integrity of any conviction.

USMC JA HQ (Q1): We do not support establishing a CIU within the Department of Defense. Convicted servicemembers enjoy appellate rights that are generally broader in many respects to those afforded in civilian jurisdictions. Additionally, most convictions in the Marine Corps follow a plea of guilty by the accused. Prior to accepting a plea of guilty, the military judge must engage in an extensive colloquy with the accused, under oath, to ensure that the plea is voluntary and that there is a factual basis for the plea. This drastically reduces the probability of wrongful convictions. Lastly, wherever housed, the CIU must be comprised of personnel with significant military justice experience. The services recently built Offices of Special Trial Counsel while also attempting the maintain parity in other organizations. An additional demand for personnel with significant military justice experience, who take years to develop, would necessarily drain talent from other organizations, including—ironically in this context—the Defense Services Organizations.

USAF JA HQ (Q1): As noted above, the JAG Headquarters does not support the establishment of a CIU to review military convictions. The DAF's key concerns involve the nature of military cases, which often do not hinge on forensic evidence or identity and thus would not benefit as much from re-examination. The DAF is concerned with resource allocation, given the specialized personnel and expertise required for a CIU. The Air Force JAG Corps Career Litigation Development Plan sustains a pipeline of experienced military justice practitioners across every aspect of the court-martial process; however, the stand-up of a CIU could pose resourcing constraints on the equitable development of personnel required for the fair administration of military justice. The establishment of a CIU could also create the appearance of diminishing trust in the fairness and impartiality of the military justice system, impacting morale and discipline. Finally, the military justice process (through appeals and administrative avenues) is differently situated than the civilian sector and is an effective avenue to safeguard against wrongful convictions. These factors collectively suggest that a CIU, while beneficial in a civilian context for rectifying wrongful convictions, may not align well with the operational, cultural, and legal frameworks of the services.

USCG JA HQ (Q1): It is neither feasible nor advisable for the Coast Guard to establish its own CIU. However, should DoD establish a CIU, the Coast Guard could assess whether and how to participate in what would be anticipated to be sparse occasions where review may be appropriate.

Among the concerns generally, CIUs would have unclear legal authority to grant relief. As such, it would serve to duplicate and question the military justice system's already strong protections to prevent wrongful convictions buttressed by the federal courts. These protections include, but are not limited to, defense counsel at no cost to the accused (even for offenses which other jurisdictions would qualify as an infraction or a petty offense); certain procedural rights to mount a defense without incurring costs which are solely available to indigent defendants in other jurisdictions (e.g., necessary expert assistance at government expense); robust jurisdiction for appellate review; factual sufficiency by appellate courts, additional avenues for collateral attack in federal courts; and avenues for clemency.

In contrast, the testimony presented to the DAC-IPAD highlights state cases involving wrongful convictions attributable to mistaken identity from police lineups and reliance on forensic evidence, particularly DNA. Such issues are rare in the military justice system; this observation includes military sexual assault cases, where the occurrence of sexual activity and the identities of the victims and accused are typically undisputed, shifting the focus to questions of consent.

The testimony concerning CIUs pertained to operation within state jurisdictions and the proposal seems to exclusively derive its rationale from state practices. To the Coast Guard's knowledge, it would be unprecedented for the military justice system to implement a procedure primarily rooted in state practices. Such deliberation therefore risks unknown hazards and unneeded complication. Of note, since 1949, as reflected in Article 36(a), UCMJ, Congress has intended that military justice procedures emulate the federal criminal justice system to the extent "practicable" and not inconsistent with UCMJ. This approach enables the military to select and adapt procedures that are "capable of being put into practice, done, or accomplished," considering the military's need for justice considering unique practical and logistics concerns.[6] Congress has reaffirmed this intent in Article 33 and Article 46, which again directs the military to look to federal procedure.[7] Accordingly, should DAC-IPAD wish to further explore the CIU concept, it is imperative that it consider the practices of the federal government and the Department of Justice.

In addition to being unfeasible, the proposal, as it stands, is inadvisable. Congress has recently enacted comprehensive legislation, supported by a wide-ranging Executive Order. The President's Executive Order noted the need to enhance the handling of sexual assault cases, referencing the work of the Independent Review Commission, which espoused the need to build

[6] Cf Hamdan v. Rumsfeld, 548 U.S. 557, 640 – 641 (2006) (Kennedy J, concurring) (citations omitted) (discussing the term "practicable" as used in Article 36(b) which is also used in Article 36(a)) ("'Practicable means 'feasible,' that is, 'possible to practice or perform' or 'capable of being put into practice, done, or accomplished.' Congress' chosen language, then, is best understood to allow for the selection of procedures based on logistics constraints, the accommodation of witness, the security of proceedings, and the like.")

[7] See Article 33, UCMJ (requiring Secretary of Defense to issue disposition guidance with appropriate consideration of the Principles of Federal Prosecution). See also Article 46(b), UCMJ (requiring subpoenas and other processes be similar to federal system).

confidence and trust in the system.[8] Introducing a CIU immediately would divert limited government resources and energy from implementing the new law effectively. It is prudent to allow the system time to stabilize, enabling material issues to crystallize through litigation. These issues can then be addressed with appropriate solutions, whether that involves a CIU or an alternative approach..

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA JA HQ (Q2): A CIU should not have any role in reassessing evidence of consent or credibility outside the court-martial process. The court-martial process is governed by rules of evidence and allows fact finders to adjudge credibility. A standard of factual innocence, which is appropriate for a CIU, does not involve a reassessment of evidence presented at trial. Instead, a claim of factual innocence must assert the complete innocence of any criminal responsibility for the offense for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and requires some credible, verifiable evidence of innocence that has not previously been presented at trial or considered by a hearing granted in the course of appellate review or other postconviction relief.

USN JA HQ (Q2): As you note, most military sexual assault cases involve questions of credibility, vice questions of the assailant's identity. Credibility seems most closely tied to issues of the factual sufficiency of the conviction. As discussed above, appellate courts will review the factual sufficiency of the conviction upon a challenge from the accused, which would limit the role of the CIU to cases that involve the identity of an offender. While recent changes in the law have removed the appellate court's de novo review of factual sufficiency, an accused may still raise the issue on appeal. They need only specify to the court the area or areas, where they believe the evidence presented at trial was not sufficient to support a finding of guilt beyond a reasonable doubt. With this incredibly powerful tool already available to an accused it is unclear what benefit a CIU could offer in cases of factual sufficiency, or where the credibility of witnesses was the central issue. Presumably, a case would not be raised at the CIU until at least one, if not two, appellate courts had reviewed the case and had an opportunity to review the accused's claims of factual insufficiency. There would appear to be no real role for the CIU on

[8] See The Office of the President, Fact Sheet: President Biden to Sign Executive Order Implementing Bipartisan Military Justice Reforms (July 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/fact-sheet-president-biden-to-sign-executive-order-implementing-bipartisan-military-justice-reforms/#:~:text=The%20Executive%20Order%20transfers%20key,of%20Military%20Justice%20(UCMJ). ("The historic reforms announced today will better protect victims and ensure prosecutorial decisions are fully independent from the chain of the command. They follow decades of tireless efforts by survivors, advocates, and Members of Congress, to strengthen the military justice system's response to gender-based violence and build on recommendations from the Independent Review Commission on Sexual Assault in the Military (IRC), which Secretary Austin established at President Biden's direction as one of his earliest acts in office."); see also U.S. Department of Defense, Independent Review Commission, Hard Truths and the Duty to Change, https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF ("Taken as a whole, the IRC's recommendations will present a comprehensive view of the problem, and offer targeted solutions for commanders of all ranks, the Services, and the Department to build trust and restore confidence in the military's ability to prevent and respond to sexual assault and sexual harassment.").

an issue of witness credibility or factual sufficiency in a case under the UCMJ where a trial court and at least one, if not two, appellate courts had already reviewed the evidence and the credibility of the witnesses and determined the conviction was supported by evidence beyond a reasonable doubt.

USMC JA HQ (Q2): Should Congress or the President direct the establishment of a CIU, it should be limited to reviewing claims of factual innocence, supported by newly discovered, credible, and verifiable evidence. Re-litigating issues of consent and credibility does not meet this standard. In some instances, such as an admission by the victim of providing false testimony at trial and in the absence of other direct evidence of the accused's guilt, investigation by the CIU may be warranted. A CIU should not be used, however, to merely scrutinize a victim's character.

USAF JA HQ (Q2): CIUs are most known for their work in re-examining cases where new forensic evidence can conclusively prove innocence or guilt, typically in contexts where the identity of the perpetrator is in question. However, the dynamics of military sexual assault cases present unique challenges to this model.

In these cases, the question is often not about identifying the accused, as both the victim and the accused are usually known persons, but rather about the complexities surrounding consent and the credibility of those involved. These are inherently subjective issues, deeply influenced by personal perceptions, memories, and interpretations of events. The assessment of consent and credibility relies heavily on witness testimony. Over time, witnesses' memories can fade, and their recollections can become less reliable due to factors such as coaching, bias, mistakes, or confusion. This inherent potential unreliability of witness testimony over time poses a significant challenge for CIUs in the context of sexual assault cases.

Moreover, the fact-finding process in such cases is often conducted by a trial judge or jury, who make determinations based on the credibility of the witnesses and the weight of their testimony, usually observed firsthand during the trial. This direct observation plays a crucial role in assessing the veracity and reliability of witness accounts, something that a CIU reviewing case files and records years later cannot replicate. Without the ability to observe witnesses in person and assess their demeanor, a CIU's ability to re-evaluate the credibility aspects of a case is severely limited.

USCG JA HQ (Q2): The CIU cannot properly serve a role in such cases. As previously noted, in military sexual assault cases, the occurrence of sexual activity and the identities of the victims and accused are typically undisputed, shifting the focus to questions of consent. Such issues are inherently subjective, and the American justice system has elected and adversarial system which placed its confidence in finders of facts who personally hear and observe the witnesses who are subject to cross examination.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA JA HQ (Q3): Army recommends establishment of a CIU within each Service.

USN JA HQ (Q3): Should Congress or other authority require the Services create a CIU, the Navy's recommendation would be to create a single CIU within the Department of Defense. As detailed in our response to question 8 below, we do not believe a CIU should have authority or jurisdiction to review convictions resulting from a guilty plea. Within the Navy, most convictions result through a plea agreement. In FY21, 130 of 154 convictions involved a plea agreement. In FY22, it was 134 of 157 convictions, and in FY23, 124 of 143. The Navy's three-year average of 22 annual convictions without plea agreements would be insufficient to justify a Service-level CIU, and suggests that any CIU should be based at the DoD level versus the individual Service.

USMC JA HQ (Q3): Should Congress or the President direct the establishment of a CIU, there should be a single CIU in the Department of Defense to promote uniformity and consolidate resourcing.

USAF JA HQ (Q3): Although the DAF does not support a CIU, if established we believe a single CIU within the DoD could enjoy advantages of uniformity and standardization, resource efficiency, and broader oversight..

USCG JA HQ (Q3): The Coast Guard defers to the Department of Defense but if a single CIU were established, it could be empowered to review Coast Guard courts-martial. In this scenario, the Coast Guard may seek a provision for DHS/Coast Guard representation for Coast Guard cases. A single CIU would streamline resources and ensure consistency in review. Should the DoD services establish separate CIUs, the Coast Guard could engage the Navy with the same caveats.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA JA HQ (Q4): Army recommends that the Judge Advocate Generals establish a separate independent organization at the Judge Advocate Headquarters Agency.

USN JA HQ (Q4): Should Congress or other authority require the Services create a CIU, our recommendation would be that such an organization be a part of the Judge Advocate Headquarters Agency, in the case of the Navy, within the Office of the Judge Advocate General, to assume the CIU functions of both the Navy and Marine Corps. In our view, such an organization should be independent of the prosecution functions of the Navy, to include the Office of Special Trial Counsel.

USMC JA HQ (Q4): Should Congress or the President direct the establishment of a CIU at the military department or service level, it should be established within the Office of the Judge Advocate General to assume cognizance over Navy and Marine Corps cases. This aligns with the Department of the Navy's combined appellate function.

USAF JA HQ (Q4): If created for each Service, the JAG Headquarters recommends positioning the CIU within the Air Force Judge Advocate General's (JAG) Corps, and providing the resources and funding necessary to meet the CIU requirements. The JAG Corps has a demonstrated history of providing oversight, resourcing, independence, and neutrality across the many actors in a court-martial, to include trial counsel, defense counsel, victims' counsel, trial judges, and appellate judges. The JAG Corps has the ultimate statutory authority for military justice within the service and any CIU would be appropriately housed within the JAG Corps.

USCG JA HQ (Q4): Considering the Coast Guard's response in # 3 and its limited case size, CIU functions could be carried out by collateral duty judge advocates and former commander(s) (in concert with the Inspector General if investigative assistance was needed) as part of a DoD construct.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA JA HQ (Q5): Army recommends that a CIU shall be composed of members with distinguished experience in military criminal law as military trial and appellate judges, investigators, prosecutors, defense counsel, appellate Government and defense counsel, and victim counsel. The members of a CIU shall serve a specified term as determined by regulations of the Secretary concerned. The Judge Advocate General shall designate a Director of the CIU. A member of the CIU shall not participate in the review of a claim if the member has prior involvement with the claimant or facts and circumstances surrounding the particular claim of factual innocence.

USN JA HQ (Q5): Should Congress or other authority require the DoD or the Services to create a CIU, our recommendation would be any CIU be staffed by experienced legal counsel with access to trained investigators and a sufficient budget to allow for forensic testing as needed and the retention of experts to review and ultimately opine on the results of those tests.

USMC JA HQ (5): Should Congress or the President direct the establishment of a CIU, it should be well-resourced and comprised of personnel with significant military justice and criminal investigation experience. Administrative support personnel are also required.

USAF JA HQ (Q5): The JAG Headquarters recommends that the CIU be staffed with lawyers with significant criminal trial experience (>10 years). If the CIU undertakes the function of deciding cases instead of merely investigating and making recommendations, it should be staffed with experienced practitioners who have served in commensurate justice roles, such as trial or appellate judges, who might constitute voting panels.

USCG JA HQ (Q5): Any CIU would reasonably be staffed with experienced criminal investigators and lawyers with significant and diverse experience in the military justice and former commanders who have demonstrated leadership excellence. Investigators should present diverse skills (e.g., digital evidence extraction and interview techniques). The presence of former commanders would be necessary to present viewpoints on the needs of the military to ensure good order and discipline, operational/fighting effectiveness, and fairness.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA JA HQ (Q6): The Army recommends that the appropriate standard is factual innocence. The term 'claim of factual innocence' means a claim on behalf of a living person convicted by trial by court-martial asserting the complete innocence of any criminal responsibility for the offense for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered by a hearing granted in the course of appellate review or other postconviction relief.

The Army also recommends a requirement for a claimant's waiver. No formal inquiry into a claim of innocence shall be made by the CIU unless the CIU first obtains a signed agreement from the claimant in which the claimant waives the procedural safeguards and privileges that would be applicable in a court-martial with regard to matters related to the claimant's claim of innocence, agrees to cooperate with the CIU, and agrees to provide full disclosure regarding all the CIU requirements. The claimant shall have the right to advice of defense counsel prior to the execution of the agreement and throughout the inquiry. Unless the claimant is otherwise expressly entitled to Government furnished counsel or related assistance, any representation by counsel, including related investigative or expert assistance, shall be at the claimant's own expense. If, at any point during a formal inquiry, a claimant refuses to comply with requests of the CIU or is otherwise deemed to be uncooperative by the CIU, the CIU shall discontinue the inquiry.

The CIU shall endeavor to locate and notify any victim in the case and explain the formal inquiry process. The CIU shall advise the victim that he or she has the right to present his or her views to the CIU.

USN JA HQ (Q6): Should Congress or other authority require the DoD or the Services create a CIU, our recommendation would be that acceptance of cases by the CIU be limited to those cases where there is newly discovered evidence that (1) could not have been discovered at the time of trial and (2) is reasonably likely to have led to a different outcome at trial. In our view, an assertion of innocence, on its own, should not be sufficient to trigger a CIU review. As expressed in the answer to question 8 below, a military accused can raise the issue of factual sufficiency on appeal before the Service's Criminal Court of Appeals. The CCA's review of the factual sufficiency of the conviction – or CAAF's review in cases where CAAF grants review – should be final. In instances where the accused does not raise the issue of factual sufficiency on

appeal, the issue should be considered forfeited in the absence of newly discovered evidence, not discoverable at the time of trial.

USMC JA HQ (Q6): Should Congress or the President direct the establishment of a CIU, an appropriate standard for the CIU to accept and review cases would be: (1) a case has completed or otherwise exhausted appellate review; (2) there is newly discovered evidence that is credible, verifiable, and that could not have been discovered at the time of the trial; and (3) the newly discovered evidence tends to show that the convicted person is factually innocent of the offense for which the person was convicted and any lesser included offenses.

USAF JA HQ (Q6): The JAG Headquarters would recommend the appropriate standards to be modeled substantially after successful civilian CIUs, notably requiring 1) assertion of actual innocence from the convicted (to include innocence of any lesser-included offenses); 2) newly discovered evidence that would likely have resulted in a different result at trial; and 3) the standard for a determination of innocence be clear and convincing evidence.

USCG JA HQ (Q6): The CIU would need a standard of actual innocence. There would need to be a credible threshold showing to prevent undue questioning of the justice system and the courts.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA JA HQ (Q7): Jurisdiction should be limited to cases in which appellate and Article 73, UCMJ relief has been exhausted or is time barred, in which the Soldier plead not guilty, and in which a punitive discharge and confinement over one year was adjudged. Priority should be given to any convicted Soldier still serving a term of imprisonment.

USN JA HQ (Q7): Should Congress or other authority require the DoD or the Services create a CIU, our recommendation would be that all convictions be reviewable, but that priority be given to those convictions where the accused is currently serving a sentence to confinement or received a punitive discharge as a part of their sentence. Given the relatively few convictions within the Navy (approximately 150 per year over the past three fiscal years) there would appear no reason to limit reviews to felony-type convictions. However, priority should be given to those currently experiencing the impacts of their conviction and sentence in terms of being currently confined or living with the effects of a punitive discharge.

USMC JA HQ (Q7): Should Congress or the President direct the establishment of a CIU, there is no logical basis to limit its authority to only specific types of cases, though priority should be given to cases in which the claimant remains confined. Availability of relief should not hinge on what type of offense a servicemember is convicted of or the resulting sentence. Most importantly, care should be taken not to exacerbate a divide between two classes: those accused of covered offenses, and those accused of non-covered offenses.

USAF JA HQ (Q7): Depending on the staffing and resources provided to the CIU, it may be necessary and appropriate to limit the number of eligible CIU cases to a certain class of serious offenses, whether determined by subject-matter or by length of confinement. Parameters for the CIU should be tailored to avoid unintended negative impacts to the timely and fair administration of military justice.

USCG JA HQ (Q7): A properly functioning CIU would need to at least address covered offenses, including culpable homicide, representing a broader category than sex offenses which is the focus of this Committee. The CIU could adversely and needlessly impact confidence in the military justice system and the need for finality. The principles of obedience, discipline, and duty are issues which concern the military justice system. These interests necessitate judicious consideration of the CIU's scope.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA JA HQ (Q8): No, the CIU should not have jurisdiction to review convictions that resulted from a guilty plea. The extensive colloquy required for a guilty plea in a court-martial provides confidence in actual guilt and should exclude jurisdiction over cases in which a guilty plea was accepted.

USN JA HQ (Q8): Should Congress or other authority require the DoD or the Services create a CIU, our recommendation would be that the CIU not be granted jurisdiction to review convictions that result from a guilty plea. In reaching this recommendation, it is important to note the extensive guilty plea inquiry necessitated by United States v. Care, 40 C.M.R. 247 (1969), which requires the military judge to explain the elements of each offense to the accused, as well as personally question the accused about what he or she did or did not do and what he or she intended in order to make a clear determination on the record that the accused's acts or omissions constitute the offense to which he or she is pleading guilty. Additionally, under the Uniform Code of Military Justice an accused is entitled to appellate review of his or her conviction as a matter of right and may raise allegations of factual sufficiency on appeal before the service's Court of Criminal Appeals. With that in mind, collateral review of a plea of guilty would not appear to be necessary or a reasonable use of limited resources.

USMC JA HQ (Q8): Should Congress or the President direct the establishment of a CIU, consistent with R.C.M. 1210(a) (see response to VI.9. below), the CIU should not have jurisdiction to review convictions that resulted from a guilty plea. As discussed above, prior to accepting a guilty plea, the military judge must engage in an extensive colloquy with the accused, under oath, to ensure that the plea is voluntary and that there is a factual basis for the plea. With the additional layer of protection of appellate review by right, to include assertions of factual insufficiency, this reasonably forecloses a later demonstration of actual innocence.

USAF JA HQ (Q8): No. To accept a guilty plea, the military judge is required to ensure there is a factual basis for the plea as elicited from facts provided by the accused. An accused is counseled during the guilty plea that they can only plead guilty if they are in fact guilty of the offenses to which they are pleading guilty. A CIU would not be the appropriate avenue for review of cases where an accused pled guilty.

USCG JA HQ (Q8): If the CIU has a standard of actual innocence, then a guilty plea should not preclude the review. If the standard is something lower, it should preclude the review considering the extensive colloquy for a military judge to accept an accused's plea of guilt and the accused's avenue for appellate review and clemency.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA JA HQ (Q9): Army recommends that a claim of factual innocence may be referred to the CIU by any court, agency, a claimant, or a claimant's counsel or other person or entity identified in regulations of the Secretary concerned. A CIU should determine which cases shall be accepted for preliminary and formal inquiry under standards established jointly by the Judge Advocates General; inquire into claims of factual innocence, with priority to be given to those cases in which the convicted person is currently incarcerated for the crime for which the person claims factual innocence; coordinate the investigation and review of cases accepted for preliminary and formal inquiry; maintain records of case investigations; and prepare written reports outlining CIU investigations and recommendations at the completion of each inquiry as to the claim of factual innocence. The CIU shall make recommendations to the Joint Services Committee on Military Justice or other appropriate entity regarding best practices and recurring or evolving issues in the area of wrongful convictions.

If, at the conclusion of the formal inquiry, the CIU concludes that there is clear and convincing evidence of the claimant's innocence, the CIU shall recommend appropriate relief with respect to the applicable portions of the findings and sentence. If the CIU determines relief is warranted, the CIU's opinion shall be documented and the opinion, findings of fact, and record of the CIU's inquiry shall be forwarded by the Director to the Judge Advocate General concerned or the Judge Advocate General's designee. In the event the CIU determines relief is not warranted, the CIU's opinion, findings of fact, and record of the inquiry will be maintained in accordance with regulations of the Secretary concerned. The claimant, claimant's counsel, and any victim shall be notified as soon as practicable of the CIU's decision. Evidence of criminal acts, professional misconduct, or other wrongdoings uncovered by the CIU shall be referred to the proper authority. The Director shall forward the CIU's recommendations on preventing wrongful convictions or other matters through the Judge Advocate General to the Joint Services Committee on Military Justice or other appropriate entity.

Upon a determination of the CIU there is clear and convincing evidence of the claimant's innocence the Judge Advocate General or his designee shall promptly take all necessary and appropriate action to effectuate the CIU's determination unless the Judge Advocate General

determines in writing that the decision of the CIU is incorrect in fact or law under standards jointly prescribed by the Judge Advocates General.

The Army recommends clarification of additional statutory authorities for The Judge Advocate Generals to take appropriate action on CIU recommendations.

USN JA HQ (Q9): Should Congress or other authority require the Services create a CIU, our recommendation would be that CIU have authority and responsibility to investigate the claims and file a petition (and argue in support of that petition) for a new trial. Should the accused be granted a new trial, we would recommend the accused be assigned a military defense counsel in accordance with standard practice. This would be consistent with current appellate practice where an appellate defense counsel who successfully argues for a new trial for their client, their representation comes to an end and the accused is assigned a trial defense counsel for the re-trial.

USMC JA HQ (Q9): Should Congress or the President direct the establishment of a CIU, the CIU's authority should be limited to investigating claims, and for cases meeting the requisite standard, filing a petition for a new trial in accordance with Article 73 and R.C.M. 1210, and as appropriate, arguing in support of that petition. Should the accused be granted a new trial, the accused should be detailed a military defense counsel consistent with existing requirements.

USAF JA HQ (Q9): If a CIU were to be established with appropriate statutory authority, it should investigate, review, and decide outcomes for cases that meet the most stringent criteria. Such authority would keep the CIU process entirely separate from the military justice system, thereby preserving continuity and eliminating conflicts of interest within each respective adjudicative function.

USCG JA HQ (Q9): Consideration should be given to the CIU have investigatory authority derived from being part of the Inspector General. This could ensure adequate investigative powers while avoiding duplication and inefficiency. The CIU would be able to advocate to the Secretary or other relevant authorities for clemency or alternative relief.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA JA HQ (Q10): Addition of language waiving the three-year period "for good cause shown" would provide additional protections against wrongful convictions in which new evidence is discovered more than three years after entry of judgment.

USN JA HQ (Q10): The current 3-year period is a sufficient amount of time in which an accused can petition for a new trial under Article 73. At some point, convictions must be final. The potential addition of language allowing for the waiver of that 3-year period for "good cause shown" would allow for convictions to be presumed final, while still allowing an accused an avenue to contest a potentially wrongful conviction.

USMC JA HQ (Q10): Three years is an appropriate limitation after which there is a strong presumption of finality. However, adding an exception "for good cause shown," would be reasonable and consistent with the concepts discussed in this RFI.

USAF JA HQ (Q10): The three-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court is sufficient. Convicted service members have broad appellate options, for example a petition for an extraordinary writ, in the rare case new evidence or fraud on the court is discovered after the expiration of the three-year period to petition for a new trial.

USCG JA HQ (Q10): The 3-year period is employed by Federal Rule of Criminal Procedure 33 which serves as the basis for Article 73, UCMJ. The Coast Guard lacks any information or data warranting challenging Congress' legislative judgment about this long-standing standard.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA JA HQ (Q11): Recommend referral of this question to the Inspector General of the Department of Defense (DoD IG). DoD IG has broad oversight and audit authorities over the Military Criminal Investigative Services.

USN JA HQ (Q11): The Navy is unaware of any existing programs within the Department of Defense to conduct DNA analysis post-conviction. Obviously, DNA analysis is conducted in many cases prior to trial with the results of said testing being made available to counsel for the accused in accordance with the Military Rules of Evidence regarding discovery.

USMC JA HQ (Q11): We are unaware of any existing programs within the Department of Defense to conduct post-conviction DNA analysis.

USAF JA HQ (Q11): The JAG Headquarters is not aware of any current programs that review cases to determine if DNA analysis could demonstrate innocence. However, these cases would be rare given the nature of DAF practice in courts-martial.

USCG JA HQ (Q11): The Coast Guard is not. Of note, in military sexual assault cases, which are the purview of this Committee, the identities of the accused and victims, along with the occurrence of sexual activity, are not typically contested. Consequently, these cases seldom hinge upon DNA evidence.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA JA HQ (Q12): Ongoing implementation of recommendations of the Internal Review Team on Racial Disparities in the Military Justice System will provide additional due process protections, oversight and transparency, and training and education across the investigative, administrative, non-judicial and judicial systems. Implementation of these recommendations will provide additional protections against wrongful convictions.

USN JA HQ (Q12): Each Service takes extensive steps to ensure the integrity of convictions under the UCMJ. These start with the appointment of military defense counsel and continue through the pretrial phase and ultimately through trial until a verdict and sentence are reached. Protections necessary to ensure the integrity of a conviction then continue with an appeal by right under Article 66, petition rights under Article 67 and 67a, and additional review authorities under Articles 73 and 74. Additionally, the Service's Board for Correction of Naval Records offers an additional opportunity for clemency. Given these extensive protections inherent within the military justice system, we do not believe additional protections are warranted.

USMC JA HQ (Q12): No. As previously discussed, broad rights, protections, and avenues of relief are afforded to servicemembers that are convicted of offenses under the UCMJ.

USAF JA HQ (Q12): The JAG Headquarters believes its appellate review process and other post-trial review functions are sufficiently fair, robust, and provide adequate opportunities for members to receive consideration.

USCG JA HQ (Q12): Yes. As highlighted in paragraph #1, Congress has enacted comprehensive legislative reforms which are buttressed by an extensive Executive Order. Introducing additional mechanisms risks diverting resources and energy best used in pursuing justice and effectively assessing what cases to prosecute. It is important to give the system time to stabilize and for material issues to crystalize through the litigation process. This would better inform the necessity of additional steps needs to ensure the integrity of convictions whether that be a CIU or alternative measures.

III. Response from Service Court of Criminal Appeals:

The Services did not provide a response from their Court of Criminal Appeals.

IV. Response from Service Trial Judiciary:

The Services did not provide a response from their Service Trial Judiciary.

V. Response from Office of Special Trial Counsel[9]:

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA OSTC (Q1): The military justice system has manty safeguards, many of which are unique to the military, to protect against and identify wrongful convictions: Skilled defense counsel at no cost to all accused, robust jurisdiction for appellate review, factual sufficiency review by appellate courts, additional avenues of collateral review in federal courts, rights to petition for a new trial, and multiple avenues for clemency. Based on the robust safeguards already in place, there do not appear to be significant gaps in current avenues of relief that would justify or necessitate the creation of CIUs.

USN OSTC (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, permits any convicted Sailor to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court within three years of the date of entry of judgment. If the Sailor's case is pending appeal, then the petition is forwarded to the appropriate appellate court. (Id.) Otherwise, the Judge Advocate General acts upon the petition. (Id.) In either case, the Sailor is entitled to, and will be provided, appellate defense counsel.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,[10] Illinois,[11] Pennsylvania,[12] Maryland,[13]

[9] Please note that, in the Coast Guard, the Office of the Chief Prosecutor performs the functions of the Office of the Special Trial Counsel and Trial Services Organization.
[10] "The investigation must lead to the discovery of new information or evidence that was not considered by the trier of fact" (https://www.gwinnettcounty.com/web/gwinnett/departments/districtattorney/convictionintegrityunit)
[11] "[T]here now exists credible, new evidence to support [the] claim of innocence" (https://www.lcsao.org/306/Conviction-Integrity-Unit)
[12] "Facts, evidence or information supporting the claim must meet the definition of 'new evidence'" (https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/)
[13] "The claim must be supported by new evidence not previously litigated" (https://www.montgomerycountymd.gov/SAO/other/integritydivision.html)

Michigan,[14] New York,[15] Ohio,[16] and the District of Columbia,[17] among others. Rule for Courts-Martial 1210(f) further defines the scope of "newly discovered evidence," and the definition itself is an executive function that does not require legislation.[18] In both the military and civilian systems, the burden is consistently on the accused to provide newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), a Sailor is entitled to appeal any finding of guilt to the service Court of Criminal Appeals (CCA). This appellate right exists for all convictions and sentences awarded at general and special courts-martial. (Id.) Summary court-martial "convictions" are also eligible for appellate review by the CCA. (Id.). On appeal, the CCA "may affirm only such findings of guilty as the [Court] finds correct in law, and in fact." (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

Portions of the 18 September 2023 subcommittee testimony referenced a prior right to "*de novo*" review of findings of guilt. But earlier versions of Article 66, UCMJ, did not provide for *de novo* review of factual sufficiency. Rather, case law directed the CCAs to apply the test of "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt." (United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). The current version of Article 66 codified language similar to the Turner standard, but it did not otherwise increase the standard of review from *de novo*. Further, the current "clear and convincing standard" under Article 66 is consistent with the standard outlined by American Bar Association Rule 3.8(h)[19] as well as those applied by CIUs in California,[20] Pennsylvania,[21] Michigan,[22] New York,[23] North Carolina,[24] and the District of Columbia, among others.[25]

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

[14] "The CIU investigates claims of factual innocence based on new evidence" (https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more)
[15] "New evidence has been discovered since the entry of a judgment" (https://www.nysenate.gov/legislation/laws/CPL/440.10)
[16] "New and credible evidence of innocence must exist" (https://www.ccprosecutor.us/who-we-are/divisions-and-units/)
[17] "[C]laimant must proffer new evidence of actual innocence capable of being investigated and potentially substantiated (https://www.justice.gov/usao-dc/page/file/1585756/download)
[18] RCM 1210 adopted the criteria set forth in United States v. Chadd, 32 C.M.R. 438, 442 (C.M.A. 1963) and is generally consistent with Fed. R. Crim. P. 33. United States v. Brooks, 49 M.J. 64, 68 (C.A.A.F. 1998).
[19] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_concduct/rule_3_8_special_responsibilities_of_a_prosecutor/
[20] https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf
[21] https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/
[22] https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more
[23] People v. Williams, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)
[24] https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html
[25] https://www.justice.gov/usao-dc/page/file/1585756/download

Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USMC OSTC (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, permits any convicted service member to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court within three years of the date of entry of judgment. If the convicted service member's case is pending appeal, then the petition is forwarded to the appropriate appellate court. (Id.) Otherwise, the Judge Advocate General acts upon the petition. (Id.) In either case, the convicted service member is entitled to, and will be provided, appellate defense counsel.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,[26] Illinois,[27] Pennsylvania,[28] Maryland,[29] Michigan,[30] New York,[31] Ohio,[32] and the District of Columbia,[33] among others. Rule for Courts-Martial 1210(f) further defines the scope of "newly discovered evidence," and the definition itself is an executive function that does not require legislation.[34] In both the military and civilian systems, the burden is consistently on the accused to provide newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), a convicted service member is entitled to appeal any finding of guilt to the applicable Court of Criminal Appeals (CCA). This appellate right exists for all convictions and sentences awarded at general

[26] "The investigation must lead to the discovery of new information or evidence that was not considered by the trier of fact" (https://www.gwinnettcounty.com/web/gwinnett/departments/districtattorney/convictionintegrityunit)
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and special courts-martial. (Id.) Summary court-martial "convictions" are also eligible for appellate review by the CCA. (Id.). On appeal, the CCA "may affirm only such findings of guilty as the [Court] finds correct in law, and in fact." (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

Portions of the 18 September 2023 subcommittee testimony referenced a prior right to "de novo" review of findings of guilt. But earlier versions of Article 66, UCMJ, did not provide for de novo review of factual sufficiency. Rather, case law directed the CCAs to apply the test of "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt." (United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). The current version of Article 66 codified language similar to the Turner standard, but it did not otherwise increase the standard of review from de novo. Further, the current "clear and convincing standard" under Article 66 is consistent with the standard outlined by American Bar Association Rule 3.8(h)[35] as well as those applied by CIUs in California,[36] Pennsylvania,[37] Michigan,[38] New York,[39] North Carolina,[40] and the District of Columbia, among others.[41]

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USAF OSTC (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, provides, any time within three years after the date of entry of judgment, an 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 still pending appeal, then the petition is forwarded to the appropriate appellate court. (Id.) Otherwise, the Judge Advocate General acts upon the petition. (Id.) In either case, the Accused is entitled to and will be

[35] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_concduct/rule_3_8_special_responsibilities_of_a_prosecutor/
[36] https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf
[37] https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/
[38] https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more
[39] People v. Williams, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)
[40] https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html
[41] https://www.justice.gov/usao-dc/page/file/1585756/download

provided appellate defense counsel. (See Department of the Air Force Instruction 51-201, Administration of Military Justice, 24 January 2024, Section 24G).
The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,[42] Illinois,[43] Pennsylvania,[44] Maryland,[45] Michigan,[46] New York,[47] Ohio,[48] and the District of Columbia,[49] among others. Rule for Courts-Martial 1210(f) further defines the scope of "newly discovered evidence," and the definition itself is an executive function that does not require legislation. In both the military and civilian systems, the burden is consistently on the Accused to provide the newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), an Accused is entitled to appeal any finding of guilt to the service Court of Criminal Appeals (CCA). For General and Special Courts-Martial, this appellate right is not tied to specified offenses, a minimum sentence, or any other jurisdictional limitations. (Id.) In fact, even summary court-martial "convictions" can be eligible for appellate review by the CCA. (Id.). On appeal, the CCA "may affirm only such findings of guilty as the [Court] finds correct in law, and in fact." (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

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by American Bar Association Rule 3.8(h)[50] as well as those applied by CIUs in California,[51] Pennsylvania,[52] Michigan,[53] New York,[54] North Carolina,[55] and the District of Columbia, among others.[56]

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67I, UCMJ.

Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USCG OSTC (Q1): The collective current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance to the legal and factual basis for every conviction and are sufficient to provide the same protective function as a CIU.

Under Article 66(b)(1), an Accused may appeal any finding of guilt to the Service's Court of Criminal Appeals (CCA). For General and Specials Courts-Martial, this right is not tied to specified offenses, a minimum sentence, or any other jurisdictional limitations. The same legal requirements exist for Summary Courts-Martial. On appeal, the Appellate Court may affirm only such findings of guilty as it finds correct in law, and in fact. (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the authority to conduct a factual sufficiency review. Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold "claim of innocence" standard for many state-level CIUs, e.g., Georgia,[57] Illinois,[58] Pennsylvania,[59] Maryland,[60] Michigan,[61] New York,[62] Ohio,[63] and the District of Columbia.[64]

[50] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_concduct/rule_3_8_special_responsibilities_of_a_prosecutor/
[51] https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf
[52] https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/
[53] https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more
[54] People v. Williams, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)
[55] https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html
[56] https://www.justice.gov/usao-dc/page/file/1585756/download
[57] See https://www.gwinnettcounty.com/web/gwinnett/departments/districtattorney/convictionintegrityunit
[58] See https://www.lcsao.org/306/Conviction-Integrity-Unit
[59] See https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/
[60] See https://www.montgomerycountymd.gov/SAO/other/integritydivision.html
[61] See https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more
[62] See https://www.nysenate.gov/legislation/laws/CPL/440.10
[63] See https://www.ccprosecutor.us/who-we-are/divisions-and-units/
[64]See https://www.justice.gov/usao-dc/page/file/1585756/download.

Finally, and of note, Rule for Courts-Martial 1210(f) defines the scope of "newly discovered evidence." In both the military and civilian systems, the burden is consistently on the Accused (or Defendant) to provide the newly discovered evidence.

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA OSTC (Q2): There is no role for CIUs in cases where consent and/or credibility are an issue for several reasons. First, these issues are determined by the trier of fact at the trial level. The factfinder, who can observe facial expressions and hear voice inflections of witnesses, is in the best position to assess credibility, resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from the evidence. Second, existing and robust military appellate processes already address a review of such issues.

Specifically, Article 66, UCMJ, provides all convicted offenders an avenue of appeal to litigate the factual sufficiency of issues such as consent and credibility. It should be noted that there is no equivalent appellate factual-sufficiency review corollary in civilian jurisdictions.

USN OSTC (Q2): As noted in the 18 September 2023 subcommittee testimony, CIUs are often focused on questions of identity. (See, e.g., Testimony of Mr. Shanies – "[A]ll of the cases that I've worked on that I can think of at this moment have been the wrong person.").

Questions of consent and credibility relate to the factual and legal sufficiency of a conviction. As discussed, Article 66, UCMJ, already enables Sailors to appeal the legal and factual sufficiency of any finding of guilt to the CCA. Following CCA review, legal sufficiency may also be raised before CAAF under Article 67, UCMJ.

If there is new evidence relating to consent or credibility, the issue could be raised in a petition for a new trial under Article 73, UCMJ.

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If there is new evidence relating to consent or credibility, the issue could be raised in a petition for a new trial under Article 73, UCMJ.

USCG OSTC (Q2): Credibility should be assessed by the fact finder. As to issues of consent, the court-martial process is governed by military rules of evidence, which largely mirror the federal rules of evidence, to allow fact finders to adjudicate such issues. Consequently, adequate safeguards already exist; thus, CIUs should not review issues of consent or credibility.

Finally, as noted in the Question 1 response, convicted Coast Guardsmen may consider issues of legal sufficiency in accord with Articles 66, 67, and 73 where appropriate.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA OSTC (Q3): Given the varying resourcing capabilities and mission objectives of each Service, allowing each Service to retain maximum flexibility in developing a Service-specific CIU would be optimal.

USN OSTC (Q3): If established, a single CIU should be created for the Department of Defense, to ensure consistency across services and to account for the likely limited number of cases eligible for consideration. Personnel assigned to this office could then work with service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

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USCG OSTC (Q3): Yes. Though the U.S. Coast Guard is a subcomponent of the Department of Homeland Security, all of its personnel are equally subject to the Uniform Code of Military

Justice and the same rules for courts-martial, military rules of evidence, and appellate rights apply to the Coast Guard as its sister services.

Practically, establishing one CIU could also provide for additional objectivity and impartiality by personnel who are not assigned to the branch of the convicted member seeking CIU relief.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA OSTC (Q4): If a Service CIU is mandated, Army OSTC recommends its placement in the Office of the Judge Advocate General.

USN OSTC (Q4): If created for each Service, the CIU should not be located under the Office of Special Trial Counsel (OSTC). These Offices are still in the first three months of full operational capability and are working to implement the sweeping military justice reforms provided by the Fiscal Year (FY) 2022, 2023, and 2024 National Defense Authorization Acts (NDAA). Adding additional responsibilities to OSTC would require redirecting resources and personnel away from the express mission to investigate and prosecute offenses under its authority.

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USCG OSTC (Q4): The CIU should be located outside the OCP's purview and prosecutorial mission. From a practical perspective, the OCP has already been tasked with executing a myriad of legislative mandates in the FY22, FY23, and FY24 NDAAs and will not attain Final Operating Capability until at least 2026.

The OCP is agnostic as to whether the Department of Homeland Security or some other entity at Coast Guard Headquarters establishes a CIU.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA OSTC (Q5): If CIUs are mandated, the Army OSTC recommends they consist of experienced investigators and military justice practitioners such as prosecutors, defense counsel, and appellate government and trial counsel.

USN OSTC (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

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USAF OSTC (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

USCG OSTC (Q5): The CIU should be comprised of experienced military justice practitioners, regardless of status as trial, defense, or special victim's counsel, who have served in litigation assignments and have handled felony-level matters. Such a CIU should also maintain its own staff of Coast Guard Investigative Service Special Agents and victim advocates.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA OSTC (Q6): If required to establish a CIU, each Service should be permitted to determine its own standard for accepting cases for review. Army OSTC would recommend the following minimum requirements: actual/factual innocence claims (i.e., no role in the criminal act); direct appeal and post-conviction appellate relief avenues have been exhausted; claim is supported by new, credible, and material evidence which was previously unevaluated on the merits by a court or trier-of-fact; and claim is presently capable of being investigated and substantiated.

USN OSTC (Q6): As noted above, factual sufficiency of a conviction is already eligible for review by the Service CCAs under Article 66, UCMJ. Similarly, legal sufficiency is reviewable

by both the CCAs and the Court of Appeals for the Armed Forces under Articles 66 and 67, UCMJ, respectively.

Assertions of actual innocence on grounds of newly discovered evidence would fall squarely within the eligibility requirements under Article 73, UCMJ.

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Assertions of actual innocence on grounds of newly discovered evidence would fall squarely within the eligibility requirements under Article 73, UCMJ.

USCG OSTC (Q6): The appropriate standard for a CIU might be factual sufficiency. However, as noted in prior responses, UCMJ Articles 66, 67, and 73 already provide bases for a convicted member to assert innocence to gain relief.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA OSTC (Q7): Yes. The CIU's authority to review convictions should be limited to those falling within Service defined parameters such as, at a minimum, contested convictions in which avenues of appeal and any post-conviction relief have been exhausted and in which a punitive discharge and confinement over one year was adjudged.

USN OSTC (Q7): Articles 66, 67, and 73, UCMJ, do not have offense-specific or sentence-specific limitations for review, ensuring that all convicted Sailors are entitled to the same process, regardless of offense. Implementing a CIU with such a standard would create a higher bar for review.

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USAF OSTC (Q7): Articles 66, 67, and 73, UCMJ, do not have offense-specific or sentence-specific limitations for review. Implementing a CIU with such a standard would create a higher bar for review.

USCG OSTC (Q7): UCMJ Articles 66, 67, and 73 do not have offense-specific or sentence-specific limitations for review. Implementing a CIU with such thresholds would create a higher bar for review. If a certain type of case or threshold is sought, jurisdiction should be limited to cases in which appellate and Article 73 relief has been exhausted or is time barred.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA OSTC (Q8): No. Given the thoroughness of military providence inquiries as compared to the minimal factual allocutions common in federal and state civilian courts, knowing and voluntary pleas of guilty in military courts-martial should be exempted from the jurisdiction of a CIU.

USN OSTC (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from the Sailor. (United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969)). In every guilty plea, the individual Sailor must describe why the Sailor's conduct meets each element of the charged offense. The Sailor must acknowledge their moral and legal right to plead not guilty, and then explain why they are in fact guilty.

USMC OSTC (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from the Sailor. (United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969)). In every guilty plea, the individual service member must describe why the service member's conduct meets each element of the charged offense. The service member must acknowledge their moral and legal right to plead not guilty, and then provide a factually based explanation for why they are in fact guilty. Furthermore, the military judge must affirmatively find that, based upon the service member's factually based explanation, the explanation establishes each and every element of each and every offense to which the service member has plead guilty.

USAF OSTC (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from facts provided by the Accused. (United States v. Moratalla, 82 M.J. 1 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247 (C.M.A. 1969)). In every guilty plea, the individual

Accused must describe why they believe they are guilty and why their conduct meets each element of the charged offense. The Accused must acknowledge their moral and legal right to plead not guilty, and then explain why they are in fact guilty.

USCG OSTC (Q8): No. The intent of a guilty plea is twofold: accused accountability and finality of a case. Vis-à-vis providency guides, stipulations of fact, and the military judge's benchbook (DA PAM 27-9), military judges engage accused members in lengthy colloquies. These colloquies ensure due process and normally far exceed similar inquiries conducted by federal and state civilian courts.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA OSTC (Q9): If an Army CIU is mandated, Army OSTC recommends that the CIU's case-specific conclusions and recommendations be communicated to the Army TJAG for action.

USN OSTC (Q9): If established, the DoD-level CIU should serve an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USMC OSTC (Q9): If established, the DoD-level CIU should only serve an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USAF OSTC (Q9): If established, the DoD-level CIU should perform an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USCG OSTC (Q9): If established, the CIU should perform an investigatory function and work with the appellate defense programs to generate meritorious petitions.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA OSTC (Q10): Yes.

USN OSTC (Q10): An expansion of the 3-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USMC OSTC (Q10): An expansion of the 3-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USAF OSTC (Q10): An expansion of the three-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USCG OSTC (Q10): A three-year period is a sufficient amount of time. However, if this initiative is advanced, a "for good cause shown" qualifier under Article 73 could cure this Committee's concern about time bars.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA OSTC (Q11): Army OSTC recommends this question be deferred to DoD IG for response.

USN OSTC (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USMC OSTC (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USAF OSTC (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USCG OSTC (Q11): There is no independent DNA review process within the Coast Guard. However, there is neither law nor policy that prohibits the Coast Guard's appellate defense from seeking assistance in DNA review.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA OSTC (Q12): No. There are numerous existing procedures and processes which ensure the integrity of convictions in the military justice system. The new Army OSTC, dedicated to the expert and independent evaluation and prosecution of cases based on facts and evidence, provides yet another dimension of protection against wrongful convictions by applying a heightened standard for referral to courts-martial as compared to historic practice.

USN OSTC (Q12): The recent and ongoing military justice reforms, including the standup of OSTC, are clear steps forward in ensuring the integrity of convictions and trust in the military justice system. The true impact of these changes will likely take several years to confirm, but there are multiple Due Process performance measures in place to analyze the effect of reform. The Department of Defense established these measures in accordance with the requirements of Section 547 of the FY22 NDAA, and they will be reported annually.

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USCG OSTC (Q12): The Coast Guard has professionalized the prosecution of offenses through OCP's establishment, the creation of a full-time judiciary, directing that special victim's counsel are at least second-tour judge advocates, and creating and maintaining several, full-time Special Assistant U.S. Attorney positions—all efforts that vastly improve the Coast Guard's military justice ecosystem.

The OCP welcomes all future opportunities to update this Committee on its continued progress, which will further assure all subjects' due process rights; and as a result, those improvements will lessen any justification or effort to establish a CIU.

VI. Response from Trial Services Organization[65]

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA TSO (Q1): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q1): Recommend against creating CIUs to review military cases. Although it is critical to ensure the integrity of the military justice system, this is already accomplished through

[65] Please note that, in the Coast Guard, the Office of the Chief Prosecutor performs the functions of the Office of the Special Trial Counsel and Trial Services Organization.

the significant scope of appellate review at the Courts of Criminal Appeals, which now includes giving any convicted person the right to request review. CIUs are feasible, but would require additional manning of military justice experienced counsel in a system which has already been stretched through other mandated growth (e.g., creation of OSTC).

USMC TSO (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, permits any convicted service member to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court within three years of the date of entry of judgment. If the convicted service member's case is pending appeal, then the petition is forwarded to the appropriate appellate court. (Id.) Otherwise, the Judge Advocate General acts upon the petition. (Id.) In either case, the convicted service member is entitled to, and will be provided, appellate defense counsel.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,[66] Illinois,[67] Pennsylvania,[68] Maryland,[69] Michigan,[70] New York,[71] Ohio,[72] and the District of Columbia,[73] among others. Rule for Courts-Martial 1210(f) further defines the scope of "newly discovered evidence," and the definition itself is an executive function that does not require legislation.[74] In both the military and civilian systems, the burden is consistently on the accused to provide newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), a convicted service member is entitled to appeal any finding of guilt to the applicable Court of Criminal Appeals (CCA). This appellate right exists for all convictions and sentences awarded at general and special courts-martial. (Id.) Summary court-martial "convictions" are also eligible for

[66] "The investigation must lead to the discovery of new information or evidence that was not considered by the trier of fact" (https://www.gwinnettcounty.com/web/gwinnett/departments/districtattorney/convictionintegrityunit)
[67] "[T]here now exists credible, new evidence to support [the] claim of innocence" (https://www.lcsao.org/306/Conviction-Integrity-Unit)
[68] "Facts, evidence or information supporting the claim must meet the definition of 'new evidence'" (https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/)
[69] "The claim must be supported by new evidence not previously litigated" (https://www.montgomerycountymd.gov/SAO/other/integritydivision.html)
[70] "The CIU investigates claims of factual innocence based on new evidence" (https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more)
[71] "New evidence has been discovered since the entry of a judgment" (https://www.nysenate.gov/legislation/laws/CPL/440.10)
[72] "New and credible evidence of innocence must exist" (https://www.ccprosecutor.us/who-we-are/divisions-and-units/)
[73] "[C]laimant must proffer new evidence of actual innocence capable of being investigated and potentially substantiated (https://www.justice.gov/usao-dc/page/file/1585756/download)
[74] RCM 1210 adopted the criteria set forth in United States v. Chadd, 32 C.M.R. 438, 442 (C.M.A. 1963) and is generally consistent with Fed. R. Crim. P. 33. United States v. Brooks, 49 M.J. 64, 68 (C.A.A.F. 1998).

appellate review by the CCA. (Id.). On appeal, the CCA "may affirm only such findings of guilty as the [Court] finds correct in law, and in fact." (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

Portions of the 18 September 2023 subcommittee testimony referenced a prior right to "de novo" review of findings of guilt. But earlier versions of Article 66, UCMJ, did not provide for de novo review of factual sufficiency. Rather, case law directed the CCAs to apply the test of "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt." (United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). The current version of Article 66 codified language similar to the Turner standard, but it did not otherwise increase the standard of review from de novo. Further, the current "clear and convincing standard" under Article 66 is consistent with the standard outlined by American Bar Association Rule 3.8(h)[75] as well as those applied by CIUs in California,[76] Pennsylvania,[77] Michigan,[78] New York,[79] North Carolina,[80] and the District of Columbia, among others.[81]

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ. Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USAF TSO (Q1): The Government Trial and Appellate Operations division does not have adequate background information to comment about the feasibility of a CIU at this time, nor does it have sufficient knowledge concerning the manning required for a CIU. The Air Force does not generally have an excess of experienced active-duty military justice experts available for assignment to a CIU. There likely would be costs to the system if the position for a new military justice focused organization had to be staffed with experienced military justice personnel without additional billet allocations.

USCG TSO (Q1): The collective current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance to the legal and factual basis for every conviction and are sufficient to provide the same protective function as a CIU.

[75] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_concduct/rule_3_8_special_responsibilities_of_a_prosecutor/
[76] https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf
[77] https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/
[78] https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more
[79] People v. Williams, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)
[80] https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html
[81] https://www.justice.gov/usao-dc/page/file/1585756/download

Under Article 66(b)(1), an Accused may appeal any finding of guilt to the Service's Court of Criminal Appeals (CCA). For General and Specials Courts-Martial, this right is not tied to specified offenses, a minimum sentence, or any other jurisdictional limitations. The same legal requirements exist for Summary Courts-Martial. On appeal, the Appellate Court may affirm only such findings of guilty as it finds correct in law, and in fact. (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the authority to conduct a factual sufficiency review. Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold "claim of innocence" standard for many state-level CIUs, e.g., Georgia,[82] Illinois,[83] Pennsylvania,[84] Maryland,[85] Michigan,[86] New York,[87] Ohio,[88] and the District of Columbia.[89]

Finally, and of note, Rule for Courts-Martial 1210(f) defines the scope of "newly discovered evidence." In both the military and civilian systems, the burden is consistently on the Accused (or Defendant) to provide the newly discovered evidence.

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA TSO (Q2): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q2): CIUs would have to assess consent and credibility issues based on a recording or transcript, a much worse position from which to make that assessment than the factfinder who actually observed the witness testimony. Again, the Courts of Criminal Appeals already perform this function.

USMC TSO (Q2): As noted in the 18 September 2023 subcommittee testimony, CIUs are often focused on questions of identity. (See, e.g., Testimony of Mr. Shanies – "[A]ll of the cases that I've worked on that I can think of at this moment have been the wrong person.").

Questions of consent and credibility relate to the factual and legal sufficiency of a conviction. As discussed, Article 66, UCMJ, already enables convicted service members to appeal the legal and factual sufficiency of any finding of guilt to the CCA. Following CCA review, legal sufficiency may also be raised before CAAF under Article 67, UCMJ.

[82] See https://www.gwinnettcounty.com/web/gwinnett/departments/districtattorney/convictionintegrityunit
[83] See https://www.lcsao.org/306/Conviction-Integrity-Unit
[84] See https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/
[85] See https://www.montgomerycountymd.gov/SAO/other/integritydivision.html
[86] See https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more
[87] See https://www.nysenate.gov/legislation/laws/CPL/440.10
[88] See https://www.ccprosecutor.us/who-we-are/divisions-and-units/
[89] See https://www.justice.gov/usao-dc/page/file/1585756/download.

If there is new evidence relating to consent or credibility, this issue can be raised in a petition for a new trial under Article 73, UCMJ.

USAF TSO (Q2): The cases that benefit the most from the type of re-review that CIU-type organizations provide are cases that turn on the identification of the accused. Very few courts-martial involve a dispute about the identification of an assailant. It is true for nearly all crimes prosecuted by the military, to include drug offenses, uniquely military offenses, and violent offenses.

USCG TSO (Q2): Credibility should be assessed by the fact finder. As to issues of consent, the court-martial process is governed by military rules of evidence, which largely mirror the federal rules of evidence, to allow fact finders to adjudicate such issues. Consequently, adequate safeguards already exist; thus, CIUs should not review issues of consent or credibility.

Finally, as noted in the Question 1 response, convicted Coast Guardsmen may consider issues of legal sufficiency in accord with Articles 66, 67, and 73 where appropriate.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA TSO (Q3): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q3): A joint DoD-wide CIU would theoretically require less manning from each service than individual-service CIUs, and would therefore be preferable. It would, however, be important to staff the CUI with experienced, military justice judge advocates from each service vice civilian counsel.

USMC TSO (Q3): If established, a single CIU should be created for the Department of Defense, to ensure consistency across services and to account for the likely limited number of cases eligible for consideration. Personnel assigned to this office could then work with service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USAF TSO (Q3): The Government Trial and Appellate Operations Division does not have an opinion on this matter because it is not familiar with how the CIU would be staffed. With that said, each service has its own appellate court and its own peculiarities. While efficiencies are occasionally gained from joint organizations, nuances are often lost.

USCG TSO (Q3): Yes. Though the U.S. Coast Guard is a subcomponent of the Department of Homeland Security, all of its personnel are equally subject to the Uniform Code of Military Justice and the same rules for courts-martial, military rules of evidence, and appellate rights apply to the Coast Guard as its sister services.

Practically, establishing one CIU could also provide for additional objectivity and impartiality by personnel who are not assigned to the branch of the convicted member seeking CIU relief.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA TSO (Q4): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q4): A CIU should be located outside the chain of command of the prosecutors, likely in the Office of the Judge Advocate General.

USMC TSO (Q4): If created for each Service, the CIU should not be located under the Office of Special Trial Counsel (OSTC). These Offices are still in the first three months of full operational capability and are working to implement the sweeping military justice reforms provided by the Fiscal Year (FY) 2022, 2023, and 2024 National Defense Authorization Acts (NDAA). Adding additional responsibilities to OSTC would require redirecting resources and personnel away from the express mission to investigate and prosecute offenses under its authority. Additionally, placing the CIU under the OSTC would, in effect, create a scenario where the OSTC would be checking its own work and would likely lead to distrust of any decision made by such an organization.

USAF TSO (Q4): The CIU should be in a JAG headquarters agency. Neither OSTC nor the IG has the personnel or breadth of focus to handle what a CIU office would be looking into. For example, appellate practice is not part of the authorization for the OSTC.

USCG TSO (Q4): The CIU should be located outside the OCP's purview and prosecutorial mission. From a practical perspective, the OCP has already been tasked with executing a myriad of legislative mandates in the FY22, FY23, and FY24 NDAAs and will not attain Final Operating Capability until at least 2026.

The OCP is agnostic as to whether the Department of Homeland Security or some other entity at Coast Guard Headquarters establishes a CIU.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA TSO (Q5): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q5): A CIU should be staffed by experienced military justice litigators. The minimum requirements should be similar to those required for the Appellate Judicial Screening

Board (O-5 select; 12+ years practicing law, 2+ years in litigation billet; litigation leadership tour).

USMC TSO (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

USAF TSO (Q5): The Air Force Government Trial and Appellate Operations Division does not have sufficient background knowledge of CIUs to suggest the level of experience or capabilities the CIU should be comprised of. At a minimum, it should be comprised of persons with appellate practice experience.

USCG TSO (Q5): The CIU should be comprised of experienced military justice practitioners, regardless of status as trial, defense, or special victim's counsel, who have served in litigation assignments and have handled felony-level matters. Such a CIU should also maintain its own staff of Coast Guard Investigative Service Special Agents and victim advocates.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA TSO (Q6): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q6): This should be a very high standard. Either evidence of demonstrable prosecutorial misconduct or the discovery of previously unavailable evidence that would likely have resulted in a different result at trial.

USMC TSO (Q6): As noted above, factual sufficiency of a conviction is already eligible for review by the Service CCAs under Article 66, UCMJ. Similarly, legal sufficiency is reviewable by both the CCAs and the Court of Appeals for the Armed Forces under Articles 66 and 67, UCMJ, respectively.

Assertions of actual innocence on grounds of newly discovered evidence would fall squarely within the eligibility requirements under Article 73, UCMJ.

USAF TSO (Q6): At a minimum, an assertion of actual innocence. The other grounds are already dealt with in the ordinary appellate process.

USCG TSO (Q6): The appropriate standard for a CIU might be factual sufficiency. However, as noted in prior responses, UCMJ Articles 66, 67, and 73 already provide bases for a convicted member to assert innocence to gain relief.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA TSO (Q7): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q7): So long as the standard for CIU review is demonstrable prosecutorial misconduct or the discovery of previously unavailable evidence, then there should not be a minimum punishment threshold for CIU review. Alternatively, CIU could use the previous threshold for automatic CCA review under Article 66, UCMJ (includes a sentence of death, dismissal, DD, BCD, or confinement of 1+ years).

USMC TSO (Q7): Articles 66, 67, and 73, UCMJ, do not have offense-specific or sentence-specific limitations for review, ensuring that all convicted Sailors are entitled to the same process, regardless of offense. Implementing a CIU with such a standard would create a higher bar for review.

USAF TSO (Q7): It could be overwhelming if every Airman or Guardian claiming innocence were automatically granted a reconsideration of their case. It's important to consider what incentives could deter every convicted Airman or Guardian from exploiting this system. In the absence of such incentives, there should be procedural safeguards in place to manage the number of applicants effectively.

USCG TSO (Q7): UCMJ Articles 66, 67, and 73 do not have offense-specific or sentence-specific limitations for review. Implementing a CIU with such thresholds would create a higher bar for review. If a certain type of case or threshold is sought, jurisdiction should be limited to cases in which appellate and Article 73 relief has been exhausted or is time barred.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA TSO (Q8): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q8): No. A guilty plea in the military already requires the accused to convince the Military Judge of his guilt and lack of defenses, thereby rendering CIU review unnecessary. While some guilty pleas are set aside on appeal for providency or other issues, they do not rise to the level of wrongful conviction requiring CIU review.

USMC TSO (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from the Sailor. (United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969)). In every guilty plea, the individual service

member must describe why the service member's conduct meets each element of the charged offense. The service member must acknowledge their moral and legal right to plead not guilty, and then provide a factually based explanation for why they are in fact guilty. Furthermore, the military judge must affirmatively find that, based upon the service member's factually based explanation, the explanation establishes each and every element of each and every offense to which the service member has plead guilty.

USAF TSO (Q8): No. The military system is uniquely meritorious for removing the risks of "innocent" guilty pleas. The providence inquiry, the comparatively light sentences, the lack of sentencing guidelines, the cumbersome plea agreement tools, the lack of repeat offenders, the types of cases handled, the case load for defense counsel—all work together to minimize the risk of an innocent guilty plea.

USCG TSO (Q8): No. The intent of a guilty plea is twofold: accused accountability and finality of a case. Vis-à-vis providency guides, stipulations of fact, and the military judge's benchbook (DA PAM 27-9), military judges engage accused members in lengthy colloquies. These colloquies ensure due process and normally far exceed similar inquiries conducted by federal and state civilian courts.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA TSO (Q9): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q9): A CIU should be limited to investigating whether a conviction was unjust and recommending appropriate action.

USMC TSO (Q9): If established, the DoD-level CIU should only serve an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USAF TSO (Q9): The Government Trial and Appellate Operations Division does not have sufficient background information or experience with CIUs to render an opinion.

USCG TSO (Q9): If established, the CIU should perform an investigatory function and work with the appellate defense programs to generate meritorious petitions.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA TSO (Q10): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q10): There should be no limitation in cases dealing with the discovery of previously unavailable evidence that would likely have resulted in a different result at trial. For other issues, Article 73 provides a sufficient period.

USMC TSO (Q10): An expansion of the 3-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USAF TSO (Q10): It is sufficient. This Division has not seen compelling evidence of innocence claims being raised and rejected because their new evidence is too old.

USCG TSO (Q10): A three-year period is a sufficient amount of time. However, if this initiative is advanced, a "for good cause shown" qualifier under Article 73 could cure this Committee's concern about time bars.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA TSO (Q11): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q11): No such programs currently exist.

USMC TSO (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USAF TSO (Q11): For decades, the current military justice has routinely used DNA. Miliary members accused of crimes with DNA evidence have both access to the evidence and to the experts necessary to utilize that evidence. To the knowledge of this Division, there are no specific programs to determine if DNA analysis could demonstrate innocence post-conviction.

USCG TSO (Q11): There is no independent DNA review process within the Coast Guard. However, there is neither law nor policy that prohibits the Coast Guard's appellate defense from seeking assistance in DNA review.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA TSO (Q12): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q12): There are no additional steps the services should take, as the Courts of Criminal Appeals adequately ensure the integrity of convictions in the military justice system.

USMC TSO (Q12): The recent and ongoing military justice reforms, including the standup of OSTC, are clear steps forward in ensuring the integrity of convictions and trust in the military justice system. The true impact of these changes will likely take several years to confirm, but there are multiple Due Process performance measures in place to analyze the effect of reform. The Department of Defense established these measures in accordance with the requirements of Section 547 of the FY22 NDAA, and they will be reported annually.

USAF TSO (Q12): No. The military justice process is exceptionally fair to those accused of crimes.

USCG TSO (Q12): The Coast Guard has professionalized the prosecution of offenses through OCP's establishment, the creation of a full-time judiciary, directing that special victim's counsel are at least second-tour judge advocates, and creating and maintaining several, full-time Special Assistant U.S. Attorney positions—all efforts that vastly improve the Coast Guard's military justice ecosystem.

The OCP welcomes all future opportunities to update this Committee on its continued progress, which will further assure all subjects' due process rights; and as a result, those improvements will lessen any justification or effort to establish a CIU.

VII. Response from Defense Services Organization[90]

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA DSO (Q1): (1) Feasibility: Establishing CIUs to review convictions is certainly feasible. If Congress or DoD wants to spend the required funds, investigative units could be established either under DoD or within individual services. When established, the criteria for the scope of their authority could also be established. It appears that the intent is that the CIUs will have no authority to provide relief but only to investigate and assist in seeking relief under existing statutes and regulations.

[90] The Coast Guard has a Memorandum of Understanding with the Navy that states the Navy Defense Service Offices will provide defense representation and services to Coast Guard members and in exchange the Coast Guard will provide the Navy Defense Service Offices with Coast Guard judge advocates to serve in defense roles. As such, the Coast Guard largely relies on the Navy to respond to these questions, with the exception of questions 3, 4, and 7.

(2) Advisability: However, establishing CIUs is not advisable. First, we must step back to see the reason for this proposal and its purpose. The RFI, dated 6 February 2024, explains the background for this proposal. The Judicial Proceedings Panel issued a report in 2017 that acknowledged that, after 5 years of reforms to ensure effective prosecutions and better treatment for alleged victims, the changes resulted in questions about the fairness of the military justice system. These doubts about the fairness of the military justice system are even greater now after more changes over the 7 years since the JPP report, including the establishment of OSTC and changes to the legal standard for the factual sufficiency review by the CCAs. The suggestion that a CIU would "help increase and reinforce trust" in the military justice system is dubious under the circumstances of the last two decades of mostly one-sided changes. Criminal justice systems must strike a difficult balance between competing interests. However, when such a system goes through 12 years of apparently one-sided (emphasis on victim's rights to the detriment of the military Accused) changes, the result is a system that is not only seen as unfair but is unfair. The only way to rebuild trust is to make structural changes that resets the balance in a way that is fair. There are a few ways to accomplish that: repeal some of the recent changes; make new changes that promote the defense at a level equal to the promotion of the prosecution over the past 12 years; or a combination of both. Acknowledging it will be difficult for Congress to repeal recent changes they made, this will likely require more of the
second option – changes promoting the defense.

(3) Alternative Reformations to Prevent Wrongful Convictions: One of the possible changes would be to correct the trend of sending judge advocates with limited or even no military justice experience to USATDS. Thirty years ago, when cases were less complicated, mature leaders in the Army JAG Corps, including SJAs, knew that the continued existence of the military justice system required defense counsel who were experienced and competent. The level of military justice experience by defense counsel is not what it used to be; for example, in Fall 2022, 42 out of 125 defense counsel had no military justice experience before coming to USATDS, including 20 who came straight from the Judge Advocate Officer Basic Course. This is a disturbing trend at a time when Congress has directed the services to increase the experience level of not only trial counsel but also defense counsel. A simple and effective change would be to require military justice experience for anyone to be assigned to USATDS, with the Chief of USATDS having the authority to approve exceptions based on other criminal justice experience. Another change that is even more monumental – but less monumental than the creation of OSTC – is the creation of an independent USATDS in the services, corresponding to the level of independence afforded to OSTC. If there is a continued belief that independence within the overall military justice enterprise is necessary, TDS positions in each of the services could similarly fall under one Chief in the grade of O-7 under the Service Secretary or Secretary of Defense. The American public has a more nuanced understanding of military justice than some government perspectives might suggest. When looking at a criminal justice system in the military, independence is most important (1) for the judiciary, (2) next most important for defense, and (3) least important for prosecution. While the actual need for an independent OSTC or TDS might be debated, when that decision was made with some level of independence created for the prosecution but not the judiciary or defense, that was not lost on the American public or military justice practitioners.

(4) Future Considerations: The creation of a CIU could be seen by some to be an attempt to give something de minimis to Defense which offers those with conflicting interests a nominal reference to demonstrate their purported assistance to accused servicemembers. Such a demonstration could be used to the detriment of the Defense to later justify further disproportionate resourcing of the prosecution side. USATDS does not support this, and it would be better not to have it, so the American public can see and feel the appropriate level of concern about the fairness of the military justice system.

USN DSO (Q1): The Navy, Marine Corps, and Coast Guard Defense Services Organizations believe CIUs should be instituted at the service-level to ensure the military justice system, at all levels, is effectively protecting the rights of service members accused of violations of the Uniform Code of Military Justice (UCMJ). CIUs are feasible as the yearly number of contested courts-martial yields a manageable load of cases for each CIU to review.

The declining number of contested courts-martial also makes CIUs advisable. As the number of courts-martial continues to decrease, the experience of military criminal investigators (MCI), military counsel, and the military judges involved in each case, will decrease. The reduced experience will create opportunities for mistakes at every level which would be prejudicial to the accused and result in unjust convictions. While legal errors not recognized and remedied at the trial level could be cured by the service courts of appeal or the Court of Appeals for the Armed Forces (CAAF), CIUs could identify errors in the investigative process which tainted the rest of the military justice process.

USMC DSO (Q1): This is certainly advisable given how many military sexual assault cases rely upon whether the members believe the testimony of the complaining witness. It may not be feasible for that very same reason, though, as it likely means detailed investigations into the persona character and circumstances of complaining witnesses.

USAF DSO (Q1): The Department of the Air Force Trial Defense Division: In an ideal world, it would be difficult to oppose introducing CIUs to help ensure the validity of courts-martial convictions and to increase faith in the military justice system overall. However, resources are fixed and the creation of CIUs, though theoretically feasible, would likely pull resources from an existing capability. Therefore, while the proposal is laudable, whether it is "advisable" depends on the opportunity costs. Without significant additional personnel and funding to introduce CIUs, the Department of the Air Force's Trial Defense Division would recommend utilizing existing resources to continue to improve trial and appellate defense capabilities.

The Department of the Air Force Appellate Defense Division: It is advisable and feasible to establish a CIU or CIUs to review cases in the military justice system that resulted in convictions. Other jurisdictions demonstrate feasibility, with the National Registry of Exonerations counting 101 CIUs nationwide administered by both state and federal prosecuting authorities as of 7 November 2023. Advisability arises from recent changes to the military justice

system. Courts-martial have historically been subject to uniquely robust appellate review under Article 66 of the Uniform Code of Military Justice (UCMJ), examining a fresh look at each convicted offense to determine whether the judges of the Courts of Criminal Appeals are convinced of an appellant's guilt beyond a reasonable doubt. This heightened scrutiny is not found in other criminal appeals in the United States. However, it cannot be assessed by the civilian judges of the United States Court of Appeals for the Armed Forces, and recent legislative changes have also limited it to only cases where, based on the record of what happened at the trial itself, a specifically identified deficiency of proof is identified. This narrowing of appellate review creates potential gaps in the post-trial examination of convictions' integrity in light of facts that are not available in a case's appellate record. As such, no other office in the DoD offers the review that a CIU would.

USCG DSO (Q1): The Navy, Marine Corps, and Coast Guard Defense Services Organizations believe CIUs should be instituted at the service-level to ensure the military justice system, at all levels, is effectively protecting the rights of service members accused of violations of the Uniform Code of Military Justice (UCMJ). CIUs are feasible as the yearly number of contested courts-martial yields a manageable load of cases for each CIU to review.

The declining number of contested courts-martial also makes CIUs advisable. As the number of courts-martial continues to decrease, the experience of military criminal investigators (MCI), military counsel, and the military judges involved in each case, will decrease. The reduced experience will create opportunities for mistakes at every level which would be prejudicial to the accused and result in unjust convictions. While legal errors not recognized and remedied at the trial level could be cured by the service courts of appeal or the Court of Appeals for the Armed Forces (CAAF), CIUs could identify errors in the investigative process which tainted the rest of the military justice process.

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA DSO (Q2): This question demonstrates that the creation of CIUs is not really intended to correct injustices but rather to provide an argument that the military justice system is now substantially fairer. The category of cases in which the most injustices occur are those sexual assault cases that should never have been referred to trial and fall between the cracks and result in a conviction. Those will be contentious cases that probably have a very vocal alleged victim, and it is unlikely that a CIU would recommend setting aside a conviction based on insufficient evidence. There are legitimate concerns that CIU will lack the autonomy to effectively address justice in those cases, especially if they under the direct supervision of OSTC/SECARMY or OTJAG Criminal Law. Avoiding those cases in CIU review will be an admission that the purpose of the CIUs is not to correct injustices, but rather to give an incorrect appearance that changes have been made to help the defense as much as the prosecution.

USN DSO (Q2): CIUs would be particularly valuable to upholding justice in cases where the central issue is consent. As recognized by the question, the credibility of the complaining witness is the key issue in "consent" cases. However, MCIs regularly do not take any investigative steps to gather evidence which might corroborate, or contradict, the complaining witness's allegations. In most cases, MCIs do not attempt to gather security camera footage, electronic key access logs, phone records, or other readily available evidence which might confirm the accused's presence at the scene or accurately reflect communication between parties. The absence of this evidence at the time of trial is often not considered a discovery violation by the trial court and can be explained away by a savvy trial counsel or ignored by a members. A CIU could provide relief to the accused in such cases by ordering a new trial and serve as a sharp rebuke to MCIs that do not conduct thorough investigations designed to find the truth in sexual assault cases.

USMC DSO (Q2): As stated above, this would require detailed investigations into the circumstances surrounding the alleged sexual assault that sometimes are not available during the criminal investigation. For example, in many cases, the complaining witness refuses to a consent search of a personal cell phone even though it may have some evidentiary value though falling short of the relevant legal standard at trial. Would a CIU conduct such searches? Under what authority?.

USAF DSO (Q2): The Department of the Air Force Trial Defense Division: This would depend on whether the standard is "actual innocence" or "a lack of evidence establishing proof beyond a reasonable doubt." Where the evidence at trial was limited to the recollections of the convicted service member and the alleged victim and whatever ancillary evidence was available to prosecutors, "actual innocence" would likely be an impossible standard in the majority of DAF cases which do not generally hinge on DNA evidence or other immutable factors. However, if permitted, a CIU could evaluate the evidence admitted regarding the nature of the allegation and credibility and assess whether the evidence was sufficient to establish guilt beyond a reasonable doubt.

The Department of the Air Force Appellate Defense Division: Assuming CIUs have a broad scope for review, CIUs can provide independent and transparent assessment of cases. The Service Courts of Criminal Appeals have been required to do this sort of fresh look at evidence for decades, even in cases where consent and credibility are at issue. CIUs can do the same and, even in cases where convictions are ultimately left undisturbed, provide a fresh look at cases that bolsters the underlying fairness—and perception of fairness—of the military justice process in a manner that at least parallels counterpart civilian systems.

USCG DSO (Q2): CIUs would be particularly valuable to upholding justice in cases where the central issue is consent. As recognized by the question, the credibility of the complaining witness is the key issue in "consent" cases. However, MCIs regularly do not take any investigative steps to gather evidence which might corroborate, or contradict, the complaining witness's allegations. In most cases, MCIs do not attempt to gather security camera footage, electronic key access logs, phone records, or other readily available evidence which might confirm the accused's presence at the scene or accurately reflect communication between parties. The absence of this evidence at

the time of trial is often not considered a discovery violation by the trial court and can be explained away by a savvy trial counsel or ignored by a members. A CIU could provide relief to the accused in such cases by ordering a new trial and serve as a sharp rebuke to MCIs that do not conduct thorough investigations designed to find the truth in sexual assault cases.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA DSO (Q3): If CIUs are established, then there should be multiple CIUs that fall under the DoD. Maintaining independence from the services is important to ensure the integrity of each CIU. Also, if CIUs do not produce results within a set timeframe, they should be discontinued. There is legitimate concern that, without proper oversight, these units could be staffed inadequately, leading to inefficiency and a lack of tangible results. There is little institutional incentive for the services to fill them with the best and brightest military justice has to offer, which is what would be needed for the CIU to be effective. Independence gained from organization under the DoD would more likely lead to perceptions of proper oversight, which would positively impact the quality of the personnel and the ultimate outcome of the effort to assist the wrongfully convicted and their advocates.

USN DSO (Q3): Separate CIUs should be created for each service to allow each CIU to focus on a smaller number of cases. Establishing the CIUs at the service level would mirror Congress's mandate that each service create their own independent organization to prosecute covered offenses. Additionally, this would allow each CIU to learn and appreciate the distinct cultures of their respective service, which would assist them in understanding how that unique service culture may have led to an unjust conviction.

USMC DSO (Q3): A single CIU for the entire DoD is the only reasonable solution. Otherwise, a Service would simply be investigating itself. In truth, though this is not feasible, it would be better for the Department of Justice, or some other entity wholly outside the DoD, to run the CIU.

USAF DSO (Q3): The Department of the Air Force Trial Defense Division: We recommend a single CIU for the Department of Defense. This would reduce any concerns about the appearance of institutional or cultural service biases that might affect the CIU's work and would place the financial and administrative burdens on the DoD, rather than the Judge Advocate General's Corps of the individual services.

The Department of the Air Force Appellate Defense Division: A single CIU should be created for the DoD, if feasible. Though statutory changes would be required to ensure such a CIU had authority to take action on convictions, such a construct would foster a one-stop shop for petitioners seeking review, establish uniformity across the DoD, and mitigate against any Service-specific root causes, such as cultural blind spots or deficiencies fostering prosecutorial misconduct or ineffective assistance by trial defense counsel.

USCG DSO (Q3): A single CIU should serve members from all services. First, a single CIU would be able to identify shortfalls and best practices across the services, streamlining aspects of the military justice system across the armed forces. Secondly, combining the services under one central CIU would enable a permanent standing CIU, whereas the Coast Guard's small docket would not be able to support a fully staffed CIU. Lastly, a single permanent civilian based CIU would also provide continuity over case review.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA DSO (Q4): If in each service, CIUs should fall under the Defense Appellate Division of that service. The missions are parallel, and their collaboration will make them both more effective. The resources for a CIU would have been better used to strengthen the Defense Appellate Divisions or more investigators for defense counsel in USATDS. If limited to the three options in the parentheses, the overwhelming recommendation for the CIU location would be with the Inspector General.

USN DSO (Q4): CIUs should be staffed by civilians and must be separate and distinct entities from any Office of Special Trail Counsel, JAG Corps or MCI units. By ensuring the CIUs are not a part of the JAG Corps or MCI units, it ensures there is no actual or apparent influence on the CIU in an effort to protect its reputation. Similar to the covered offense prosecution units, CIUs should report directly to each service Secretary.

USMC DSO (Q4): If each Service had its own CIU, it is at least an appearance of a conflict of interest that the CIU reside within or under the control of OSTC.

USAF DSO (Q4): The Department of the Air Force Trial Defense Division: The CIU is somewhat like the Board of Corrections of Military Records (BCMR), which appears to be an effective legal and equitable safety net for (mostly) administrative errors or injustices. It resides in the Air Force Review Boards Agency. Therefore, if the CIU is created in the Air Force, it should be assigned to a version of that agency that would be expanded to take on this important duty.

The Department of the Air Force Appellate Defense Division: If created for each Service, the CIU should be separate from the Office of Special Trial Counsel and Judge Advocate Headquarters, in particular separate from the Judge Advocate Headquarters' government appellate unit. This would ensure unbiased reviews of the cases and would require the CIU to report to either the Inspector General or Service secretary. Regardless of where located, an effective CIU would require authority to scrutinize prosecution and investigative files that may otherwise be subject to privilege. Though this would ordinarily be feasible by locating the CIU within the Judge Advocate Headquarters Agency, doing so now would not necessarily suffice in light of the independent prosecutorial authority of the Office of Special Trial Counsel. These files must be subject to examination because, notwithstanding the military justice system's

robust discovery rules requiring disclosure to the defense, files or key disclosures, such as those arising from a witness interview, may have been omitted and that omission may go undiscovered absent scrutiny from an entity like a CIU.

USCG DSO (Q4): Not applicable per response to Question 3.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA DSO (Q5): The CIUs should be comprised of mostly experienced criminal investigations personnel and some experienced defense trial and appellate counsel. They should have access to experts in many of the fields commonly seen in Courts-Martial. The inclusion of experienced trial counsel or representatives from victim support services may not be necessary for the CIU's primary functions.

USN DSO (Q5): CIUs should be comprised of civilians with significant practical experience as military and civilian criminal trial and defense counsel and military and civilian criminal investigators. It is important for the CIU members to have several years of practical experience to draw from in reviewing convictions. What might appear to be proof beyond a reasonable doubt or a substantially complete investigation to a novice would be considered inadequate to an expert. Further, the CIUs should be staffed by attorneys and criminal investigators to ensure a broader viewpoint than would be provided by a unit comprised solely of attorneys. As stated above, the criminal investigations which precede courts-martial are rife with skipped investigative steps which result in missing evidence.

USMC DSO (Q5): A CIU should have experienced trial and defense counsel and criminal investigators with a heavy emphasis on investigators. Victim advocates and liaisons and victims legal counsel should have no role whatsoever in a CIU, aside from experienced trial and defense counsel who have merely served in a victims' legal counsel billet. It is an appearance of a conflict of interest to have victim advocates in a CIU that is primarily tasked with undermining victim' allegations of sexual assault.

USAF DSO (Q5): The Department of the Air Force Trial Defense Division: The CIU should include attorneys with significant experience as trial and defense counsel. Former victims' counsel would also be appropriate. The CIU should also include at least one non-lawyer who is not an advocate for any person or group. The goal is to create a group focused on evaluating the validity of the conviction in a particular case without regard to the outside implications or collateral consequences that might result from reaching any particular decision.

The Department of the Air Force Appellate Defense Division: The CIU should have full-time staff comprised of experienced litigators, particularly those individuals with significant defense counsel experience, which is a recognized best practice according to both the Innocence Project

and the University of Pennsylvania Carey Law School's Conviction Review/Integrity Units Resource Center. It should also be comprised of experienced criminal investigators. Necessary capabilities would include the staffing and budget to timely assess and, as warranted, conduct further investigation of cases, an easy-to-navigate public-facing interface for cases to be brought to the CIU's attention, and the ability to scrutinize prosecution and investigative files that might otherwise be subject to privilege.

USCG DSO (Q5): CIUs should be comprised of civilians with significant practical experience as military and civilian criminal trial and defense counsel and military and civilian criminal investigators. It is important for the CIU members to have several years of practical experience to draw from in reviewing convictions. What might appear to be proof beyond a reasonable doubt or a substantially complete investigation to a novice would be considered inadequate to an expert. Further, the CIUs should be staffed by attorneys and criminal investigators to ensure a broader viewpoint than would be provided by a unit comprised solely of attorneys. As stated above, the criminal investigations which precede courts-martial are rife with skipped investigative steps which result in missing evidence.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA DSO (Q6): This is another demonstration of why this proposal is not advisable. Requiring the assertion of actual innocence is a must, but it would not weed out many cases. Newly discovered evidence is already covered by RCM 1210. Understanding that the CIU may simply find the evidence to seek a new trial, the problem with requiring newly discovered evidence is that the evidence is already found and the CIU may not be needed any more. Insufficiency of evidence is already covered within the appellate process. USATDS strongly recommends repealing the recent change to Article 66 that limited the legal standard for factual sufficiency. That is the most honest and effective way to correct injustices and restore the trust in the military justice system that has been lost.

USN DSO (Q6): The appropriate standard for CIUs to accept and review cases should be as low as an assertion by the accused of insufficiency of evidence to sustain a conviction. While this would be the minimum assertion needed for CIU review, an accused could also assert actual innocence or the discovery of new evidence which would likely have resulted in a different result at trial. By setting the bar to entry low, it would correct the FY21 NDAA change to Article 66.

Cases should also be referred to the CIU from appellate defense counsel who are already reviewing the case and may be in the best position to identify an issue that merits CIU review.

USMC DSO (Q6): The vast majority of sexual assault convictions allege Assignments of Error at the Services' Courts of Criminal Appeals for "actual innocence" or "insufficiency of the evidence." The only feasible standard would be a "newly discovered" evidence standard which is already addressed in requesting a new trial by the Judge Advocate General. Insufficiency of the evidence is the best standard, but some quantum of evidence would have to trigger such a review. Would that be before or after appellate review? Such an investigation could just prolong an Accused's appellate process. I also do not believe the court-martial system is structured to properly handle a Certificate of Innocence, see In re Gilpin, 81 M.J. 702 (N-M. Ct. Crim. App. 2021).

USAF DSO (Q6): The Department of the Air Force Trial Defense Division: The CIU should accept review over cases where the applicant asserts actual innocence; new evidence that may have resulted in a different result at trial; decriminalization of the offense for which the applicant was convicted (e.g., abusive sexual contact based on a non-sexual touching); and under an umbrella standard of "when justice so demands in the discretion of the CIU," which would allow for review under unanticipated circumstances (e.g., glaring insufficiency of the evidence leading to an unjust result).

The Department of the Air Force Appellate Defense Division: A CIU should accept and review cases presenting (1) any plausible assertion of actual innocence, (2) newly discovered evidence that would likely have resulted in a different result at trial, or (3) insufficiency of evidence.

USCG DSO (Q6): The appropriate standard for CIUs to accept and review cases should be as low as an assertion by the accused of insufficiency of evidence to sustain a conviction. While this would be the minimum assertion needed for CIU review, an accused could also assert actual innocence or the discovery of new evidence which would likely have resulted in a different result at trial. By setting the bar to entry low, it would correct the FY21 NDAA change to Article 66.

Cases should also be referred to the CIU from appellate defense counsel who are already reviewing the case and may be in the best position to identify an issue that merits CIU review.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA DSO (Q7): Because of the lasting effect of collateral consequences, limiting to covered offenses is more effective than length of confinement. There are wrongful convictions of sexual assault with low confinement (some with no confinement), which is actually a red flag for a bad conviction.

USN DSO (Q7): CIUs should have jurisdiction to review all cases that were referred to a Special Court-Martial. While the majority of current contested courts-martial are covered offenses, trial departments focused solely on good order and discipline crimes will likely result in an increase in contested courts-martial convened by traditional convening authorities. These cases will be vastly investigated by uniformed law enforcement officers, i.e. Masters-at-Arms or Criminal Investigative Division. They will all be prosecuted by junior, inexperienced trial counsel who do not have the recognized training and skill to be members of the covered offense prosecution units, i.e. OSTC. Accordingly, these cases will carry the same, if not higher, danger of unjust convictions as covered offenses. While they may not result in the harsh burden of sex offender registration, they do end military careers, disqualify accused from their hard-earned veterans' benefits, and have long-term employment benefits.

USMC DSO (Q7): A CIU should have jurisdiction to review some, but not all the covered offenses. Covered offenses resulting in more than one year of confinement and a punitive discharge and all offenses resulting in sex-offender registration in any jurisdiction should be eligible for CIU investigation.

USAF DSO (Q7): The Department of the Air Force Trial Defense Division: Unlike civilian convictions, court-martial convictions necessarily result in the termination of employment and preclude future service. In addition, they generally result in a loss of earned veteran benefits. Therefore, CIU should have jurisdiction over all convictions at Special or General Courts-Martial.

The Department of the Air Force Appellate Defense Division: A CIU should have jurisdiction to review all convictions that present either (1) any plausible assertion of actual innocence, (2) newly discovered evidence that would likely have resulted in a different result at trial, or (3) insufficiency of evidence.

USCG DSO (Q7): In addition to the Navy's response, CIUs should have jurisdiction over both general and special courts-martial. A guilty finding at either of these levels represents a federal conviction and warrants such review.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA DSO (Q8): No, the appellate process in the military already scrutinizes guilty pleas sufficiently and much more than in the civilian systems.

USN DSO (Q8): CIUs should have jurisdiction to review convictions that resulted from a guilty plea only in circumstances where there is an assertion of newly discovered evidence that would have reasonably changed the accused's decision to plead guilty or that the accused suffered from the ineffective assistance of counsel in making the decision to plead guilty.

USMC DSO (Q8): Only in the instance of newly discovered Evidence and probably only in limited circumstances. It is not unheard of for an Accused to take a plea to escape potential consequences of a more serious allegation. However, if that would result in the voiding of the Plea Agreement, then an Accused might find himself facing other charges that he wanted to avoid by entering into the Plea Agreement. A CIU should not place someone in a worse legal position.

USAF DSO (Q8): The Department of the Air Force Trial Defense Division: This would be appropriate under the above standard of "when justice so demands in the discretion of the CIU." This is because, generally, the protections afforded a military accused should preclude a guilty plea absent the actual guilt of the accused. However, it is impossible to foresee all situations so a guilty plea should not automatically preclude review though such review would likely be very rare.

The Department of the Air Force Appellate Defense Division: A CIU should have jurisdiction to review convictions that resulted from a guilty plea but under more limited circumstances than contested allegations that resulted in a conviction. Because of the heightened inquiry in the military justice system before a guilty plea will be accepted, the colloquy by the military judge and subsequent review by the Service Court of Criminal Appeals would adequately address sufficiency of the evidence. Similarly, claims of actual innocence would ordinarily be raised in the course of appellate review, albeit under the hard-to-meet rubric of ineffective assistance of counsel in advising the member to plead guilty. A CIU should be able to still consider guilty pleas for plausible claims of newly discovered evidence under appropriate circumstances. If Article 73, UCMJ, remains unchanged, newly discovered evidence that would likely have resulted in a different result should also be considered because it likely would have changed whether the member entered a guilty plea at the outset.

USCG DSO (Q8): CIUs should have jurisdiction to review convictions that resulted from a guilty plea only in circumstances where there is an assertion of newly discovered evidence that would have reasonably changed the accused's decision to plead guilty or that the accused suffered from the ineffective assistance of counsel in making the decision to plead guilty.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA DSO (Q9): The scope of responsibility should include investigation. If the appellate process is done, it should also include assisting in submitting a petition for a new trial. It should not include representation at a rehearing, which is provided by trial defense counsel in USATDS.

USN DSO (Q9): The CIU's authority and responsibility should be limited to reviewing the case, conducting any needed investigation to evaluate the assertion of actual innocence or the reliability of newly discovered evidence, and order a new trial. The CIU would be the appropriate authority to order a new trial as they would review the case under a different jurisdiction and mandate than the service appellate courts and CAAF. The CIU should not be responsible for representing the accused at a new trial.

USMC DSO (Q9): CIU should be limited to an investigation and some process for mandating that the Service Secretary dismiss the conviction with prejudice or potentially remand for additional proceedings. Where the matter fits in with Article 76, UCMJ, finality is an open question.

USAF DSO (Q9): The Department of the Air Force Trial Defense Division: Similar to the BCMR, the CIU should be vested with plenary authority to ensure justice. This could include setting aside a finding of guilt and dismissing charges with or without prejudice, directing the Clemency and Parole Board to take some specified action, or other actions required to correct an unjust conviction. If this plenary authority is deemed too broad, vesting the CIU with power to order a mandatory DuBay hearing to find facts related to the concerns raised by the CIU for consideration by the appropriate court of criminal appeals for purposes of determining whether a new trial is justified could be a suitable compromise solution.

The Department of the Air Force Appellate Defense Division: A CIU should be authorized to investigate convictions that meet applicable criteria. A CIU should also be authorized to vacate convictions where there is clear and convincing evidence of actual innocence, where discovered evidence would likely have resulted in a different result at trial, and where evidence is insufficient to support the conviction beyond a reasonable doubt. If a conviction is vacated, rehearings should be authorized, with prosecuting authorities taking into consideration the disposition guidance prescribed by Article 33, UCMJ, and presently located in Appendix 2.1 of the Manual for Courts-Martial. A CIU should not provide representation of the convicted service member, as doing so would call into question the CIU's function as providing an impartial second look at convictions.

USCG DSO (Q9): The CIU's authority and responsibility should be limited to reviewing the case, conducting any needed investigation to evaluate the assertion of actual innocence or the reliability of newly discovered evidence, and order a new trial. The CIU would be the appropriate authority to order a new trial as they would review the case under a different jurisdiction and mandate than the service appellate courts and CAAF. The CIU should not be responsible for representing the accused at a new trial.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA DSO (Q10): It must be considered that evidence does not last forever, so some general rule for a time limitation makes sense, but there could be an exception for when justice requires that would require the approval of TJAG. A period of 5 years would match the default statute of limitations, making it a better standard for an accused.

USN DSO (Q10): The 3-year period provided by Article 73 is sufficient time. However, extending it to 5 years would provide more time to each convicted accused to discover new evidence without unnecessarily extending the time period.

USMC DSO (Q10): There should be no limitation on a CIU action if someone could be actually innocent.

USAF DSO (Q10): The Department of the Air Force Trial Defense Division: There should not be a time limitation based on when the member was convicted. It would be reasonable to require the convicted member to timely submit the petition for review after the discovery of the new evidence or fraud on the court.

The Department of the Air Force Appellate Defense Division: There should not be any time limitation for a petition under Article 73, UCMJ; however, that deficiency might be mitigated with the creation of a CIU.

USCG DSO (Q10): The 3-year period provided by Article 73 is sufficient time. However, extending it to 5 years would provide more time to each convicted accused to discover new evidence without unnecessarily extending the time period.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA DSO (Q11): USATDS is not aware of any such programs.

USN DSO (Q11): No programs, outside review by appellate defense counsel, currently exist to review cases to determine if DNA analysis could demonstrate innocence.

USMC DSO (Q11): The Innocence Project seems to be the most well-known advocacy group.

USAF DSO (Q11): The Department of the Air Force Trial Defense Division: To the knowledge of current DAF Trial Defense Division leadership, there are no programs of this sort that review convictions in the military justice system.

The Department of the Air Force Appellate Defense Division: The Appellate Defense Division is not aware of any DoD or Department of the Air Force programs that exist that review cases to determine if DNA analysis could demonstrate innocence.

USCG DSO (Q11): No programs, outside review by appellate defense counsel, currently exist to review cases to determine if DNA analysis could demonstrate innocence.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA DSO (Q12): Some have already been listed but will be reiterated here and propose additional steps to ensure the integrity of convictions. First, there must be a requirement for military justice experience before being assigned as a defense counsel in USATDS. Second, USATDS and OSTC should have a similar level of independence. Third, Article 52 should be amended to require a unanimous finding for guilt, with a vote below three-fourths resulting in a finding of not guilty. If a non-unanimous vote is three-fourths or greater, then additional votes are permitted, until there is a finding of guilty or not guilty or until it becomes clearly futile and a mistrial as to that offense is declared. After such a mistrial, the offense can be referred for another trial. In summary, upon the first vote, unanimous = guilty, less than three-fourths = not guilty, and anything else results in further discussion and votes until it results in a unanimous or less than three-fourths vote or a hung jury and mistrial. Fourth, a change that has been discussed for a long time and should not be controversial is making the probable cause determination of the preliminary hearing officer binding. If there is new evidence, another Article 32 may be ordered. This is even more appropriate with OSTC prosecutors rather than commanders making the decisions to prefer and refer covered offenses. Something meaningful must stand between prosecutors and a case going to trial. Fifth, integrity of convictions would be enhanced if the trial and appellate judiciary was more independent. With the judiciary being filled with senior judge advocates hopefully with military justice experience, it should not be difficult making the move to trial and appellate judiciary a one-way street (available on for assignments within the trial or appellate judiciary), so judges do not have to worry about future assignments. Finally, fixing current flaws in the system which arise pre-conviction would enhance the integrity of convictions, as they would prevent many wrongful convictions which appellate review occasionally remedies 12-24 months after conviction. Flaws include discovery practices and accountability related to discovery violations, the need for more defense investigators, and post-trial processing, which if done inefficiently delays appellate review of potential wrongful convictions and would similarly interfere with the goals of the CIUs.

USN DSO (Q12): Yes, there are two things:

Restore a Robust Factual Sufficiency Review: It is important for military justice to produce convictions in which the public can have confidence. In that regard, conviction integrity units, at least in theory, are a step in the right direction. But that step should not been viewed as taking the place of continued, robust factual sufficiency review, given the role such review has historically played, and should continue to play, in maintaining the public's confidence in the military justice system.

Factual sufficiency and the convening authority's clemency powers were historically meant to serve as checks on the military justice system. Those checks were deemed necessary in a process where (1) the person who selects the charges also selects the members and initially grants or denies the defense's requests for expert assistance and witnesses; (2) unanimous verdicts are not required; and (3) the military is an inherently coercive environment. See United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2022) (justifying the lack of unanimous verdicts, in part, due to "factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight"); United States v. Finch, 64 M.J. 118, 129 (C.A.A.F. 2006) (recognizing "the military environment is inherently coercive").

Both of these checks have been eroded in recent years. The clemency power has essentially been removed from sexual assault cases. And the factual sufficiency standard, with which court-martial convictions are reviewed by the service courts of criminal appeals, was amended by the National Defense Authorization Act for Fiscal Year 2021. While the old factual sufficiency standard was fair—requiring "a fresh, impartial look at the evidence"—the new factual sufficiency standard has been interpreted as a "presumption . . . that an appellant is, in fact, guilty," United States v. Harvey, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 2023), which is a far more difficult burden for any convicted servicemember to overcome on appeal.

Although this interpretation is currently being reviewed by the Court of Appeals for the Armed Forces, what remains of factual sufficiency review should be not be curtailed further [sic]. Notably, we have recently seen convictions for making false sexual assault allegations in cases on Article 66 review. See, e.g., United States v. Daugherty, No. 202000133, 2021 CCA LEXIS 417 (N-M. Ct. Crim. App. Aug. 18, 2021) (unpublished) (appellant admitted that to avoid getting in trouble for missing a training class after a night of drinking, she fabricated a rape allegation, during the investigation of which a military suspect was identified and interrogated and his car and cell phone were searched). The fact that false allegations occur points to the importance of preserving the already curtailed Article 66 factual sufficiency powers.

Properly Resource Defense Counsel: In an adversarial system it is critical to properly resource both sides of the aisle. Government investigators, including a CIU, may have a limited perspective on how to view the evidence. It is essential that the defense is provided appropriate resources at the trial level to make sure they can properly represent the accused and challenge the government's theory. Section 549D of the FY-22 NDAA require each secretary of a military

department to ensure that military defense counsel have timely and reliable access to and funding for defense investigators, expert witnesses, trial support, pre-trial and post-trial support, paralegal support, counsel travel, and other necessary resources. It also requires military defense counsel to be well-trained, experienced and highly skilled.

The services must continue to recruit, train, and develop military defense counsel to ensure the integrity of the military justice system. Several years ago, the services stood up the Victims' Legal Counsel Program, aimed at providing alleged victims of covered offenses their own military attorneys. This effort resulted in experienced military justice attorneys being detailed to this program. At present, the services' focus is on the establishment of prosecution units to handle covered offenses. These units have been staffed with many of the most experienced counsel in each service, leaving the defense bar to be staffed with less experienced counsel, especially at the junior officer level. This has created an uneven playing field. The services must recognize that the rights of the accused must never take second place to the desire to secure more convictions or protect victims' rights. The defense must also be properly resourced with investigators and other expert consultants to properly counter the government investigator's theory of the case.

USMC DSO (Q12): Ensuring that the Services have enough defense investigators would help. A thorough investigation is integral to the process. Additional Government criminal investigators would probably also help, too. The NCIS caseload is generally too high and the investigators too inexperienced. Making Article 32 Preliminary Hearings binding would also prevent bad cases from going to trial. Finally, ensure that the Government adheres to the standards in R.C.M. 701 and 703 for discovery practices. The R.C.M. 707 clock should also only stop when the Government has certified that it has met its initial discovery obligation. Lax discovery practice is a breeding ground for cases lacking factual sufficiency or cases where an accused is actually innocent.

USAF DSO (Q12): The Department of the Air Force Trial Defense Division: The creation of the Office of Special Trial Counsel has the potential of instilling increased legal rigor in the prosecution of offenses at courts-martial, which should further reduce the likelihood of wrongful convictions. Though additional post-trial review through a CIU might be feasible, outside of that we recommend taking time to allow the myriad recent changes time to play out before making additional, substantive changes to the military justice system.

The Department of the Air Force Appellate Defense Division: One potential change is to require unanimous panel verdicts to convict in general and special courts-martial, which is presently the subject of study by the DoD pursuant to the Fiscal Year 2024 National Defense Authorization Act. The Services should focus on fostering neutral investigations by Military Criminal Investigative Organizations, assessing the alleged offense without any orientation towards proving the offense, and adopting best practices to mitigate the risk of unreliable confessions, to include limiting interview duration, prohibiting the presentation of false evidence employed to persuade the subject to confess, and training investigators to avoid what studies call

"minimization" meant to lessen the anxiety associated with confessing or implying leniency. A process to expunge fingerprint and DNA data in cases of actual innocence would further reinforce the integrity of those convictions that are upheld.

USCG DSO (Q12): Yes, there are two things:

Restore a Robust Factual Sufficiency Review: It is important for military justice to produce convictions in which the public can have confidence. In that regard, conviction integrity units, at least in theory, are a step in the right direction. But that step should not been viewed as taking the place of continued, robust factual sufficiency review, given the role such review has historically played, and should continue to play, in maintaining the public's confidence in the military justice system.

Factual sufficiency and the convening authority's clemency powers were historically meant to serve as checks on the military justice system. Those checks were deemed necessary in a process where (1) the person who selects the charges also selects the members and initially grants or denies the defense's requests for expert assistance and witnesses; (2) unanimous verdicts are not required; and (3) the military is an inherently coercive environment. See United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2022) (justifying the lack of unanimous verdicts, in part, due to "factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight"); United States v. Finch, 64 M.J. 118, 129 (C.A.A.F. 2006) (recognizing "the military environment is inherently coercive").

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Properly Resource Defense Counsel: In an adversarial system it is critical to properly resource both sides of the aisle. Government investigators, including a CIU, may have a limited perspective on how to view the evidence. It is essential that the defense is provided appropriate resources at the trial level to make sure they can properly represent the accused and challenge the government's theory. Section 549D of the FY-22 NDAA require each secretary of a military department to ensure that military defense counsel have timely and reliable access to and funding for defense investigators, expert witnesses, trial support, pre-trial and post-trial support, paralegal support, counsel travel, and other necessary resources. It also requires military defense counsel to be well-trained, experienced and highly skilled.

The services must continue to recruit, train, and develop military defense counsel to ensure the integrity of the military justice system. Several years ago, the services stood up the Victims' Legal Counsel Program, aimed at providing alleged victims of covered offenses their own military attorneys. This effort resulted in experienced military justice attorneys being detailed to this program. At present, the services' focus is on the establishment of prosecution units to handle covered offenses. These units have been staffed with many of the most experienced counsel in each service, leaving the defense bar to be staffed with less experienced counsel, especially at the junior officer level. This has created an uneven playing field. The services must recognize that the rights of the accused must never take second place to the desire to secure more convictions or protect victims' rights. The defense must also be properly resourced with investigators and other expert consultants to properly counter the government investigator's theory of the case.

VIII. Response from Victim Legal Services Organization

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA VLSO (Q1): Army SVC concurs with the OTJAG response.

USN VLSO (Q1): Outside concerns from 2017, as cited in the Conviction Integrity Unit (CIU) Request for Information (RFI) Background, Navy Victims' Legal Counsel (VLCP) is not aware of a demonstrated need for CIUs in the military justice system. In the alternative, Navy VLCP recommends a Department of Defense (DoD) Best Practices Committee to identify and correct issues upstream, thereby avoiding the potential for a downstream wrongful conviction. Navy VLCP supports best practices that promote confidence and integrity in the military justice system for victims, parties, and the public. The CIU RFI Background referenced a 2017 Judicial Proceedings Panel report noting concerns related to the fairness of the accused. The RFI Background listed changes since 2017, specifically the establishment of Offices of Special Trial Counsel (OSTC) and revision of Service Courts of Criminal Appeals' factual sufficiency review standard and concluded convicted service members have "limited avenues to obtain post-conviction review and relief."

From a victims' rights perspective, the appellate process is robust and defense-friendly; adding in a CIU to the limited number of convictions in the military justice system would only further create uncertainty for victims by extending the finality of their case.[91] Navy VLCP observes the current military justice system supports integrity in convictions with a generous appellate process that ensures a conviction has met all legal requirements. Several sufficient avenues of relief for convicted service members already exist; several distinct options are available to convicted service members. In general, Navy VLCP supports CIUs in civilian jurisdictions (e.g. jurisdictions with a large volume of convictions and/or politically sensitive District Attorney's Offices). Without showing a true need in the military justice system, instituting a CIU could be an imprudent use of resources with the detrimental consequence of harming victims by prolonging the uncertainty of their case.

USMC VLSO (Q1): Conviction Integrity Units (CIUs) are neither advisable nor feasible. Establishing CIUs is inadvisable because CIUs would add both delay and complexity to an already lengthy, uncertain, and traumatizing investigation, trial, and post-trial process for victims. In addition, the factfinding function of CIUs duplicates both the appellate authority and obligations of military courts of criminal appeals under Article 66 of the UCMJ, and the obligations of trial counsel under Rule 3.8 of the rules of professional responsibility[92] for judge advocates.

From a feasibility perspective, the structure of our counsel, courts, and appellate review processes does not lend itself to the creation of CIUs. There are, however, other limited means by which an accused can bring new evidence to bear in support of a request for a new trial. For example, Article 73 of the UCMJ limits the right of an accused to petition the Judge Advocate General for a new trial to the three-year period following entry of judgment. Thus, if established, a CIU may require additional statutory authority for the Courts of Criminal Appeals, Court of Appeals for the Armed Forces, or both.

USAF VLSO (Q1): The Air Force Victims' Counsel Division would not recommend implementing CIUs in the military justice system. Implementation of CIUs would prolong the conclusion of the military justice process for victims of crime; legal and factual sufficiency reviews are conducted at our appellate level. Additionally, for the most part, the cases we handle do not involve questions of the accused's identity. The majority of AF cases center on consent or credibility, therefore, we do not believe a CIU would serve its purpose.

USCG VLSO (Q1): Establishing Conviction Integrity Units (CIUs) is contrary to efforts to encourage victims to participate in the military justice process. The CIU adds length and uncertainty to the post-trial process and prolongs the stress and uncertainty of case finality. A

[91] See Laurie L. Levenson, *Symposium Article: Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. Cal. L. Rev. 545, 553 (2014) ("Victims want to move on with their lives and a criminal judgment can provide some closure to help with that process. Although victims rarely can be made whole, a final resolution can assist them to put a criminal experience behind them.")

[92] JAGINST 5803.1E (PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL).

CIU will create another hurdle for victims to overcome when trying to hold their assailant accountable.

The military is beginning a large-scale effort to professionalize the military justice process by consolidating prosecutors in a single supervisory structure. The new Office of the Chief Trial Counsel will provide increased scrutiny and expertise over how cases are prosecuted. There is no demonstrated need for another layer of review for the small number of cases in the military.

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA VLSO (Q2): Army SVC concurs with the OTJAG response.

USN VLSO (Q2): Navy VLCP submits a Best Practices Committee is the proper forum rather than a CIU to address these factors. A CIU should focus on the factors that contribute to wrongful convictions, "eyewitness misidentification, invalidated/improper forensic science, false confessions, informants/snitches, government misconduct, and ineffective legal counsel.[93] In a Department of Justice (DOJ), National Institute of Justice (NIJ) study, eyewitness misidentification was a contributing factor in [sic][94]

USMC VLSO (Q2): Determinations related to consent and credibility rest properly with the finder of fact at trial—whether by military judge or members—and, in the case of review by the Courts of Criminal Appeals pursuant to Article 66 of the UCMJ, with the appellate judges reviewing a case. This is especially true in light of the fact that credibility and consent in sexual assault cases almost always involve litigation of the sexual predisposition and mental health of victims—both of which are the subject of substantial statutory and regulatory protections for victims under Article 6b of the UCMJ, rules 412 and 513 of the Military Rules of Evidence, and other law. A CIU is not the proper forum for evaluating these matters.

A CIU could also impair the work of the Service appellate courts. Even in instances where Appellate Defense Counsel assigned to represent an accused identify no specific assignments of error for a particular case, the service-level courts still receive a brief on the merits of the case and review the record of trial for legal and factual sufficiency. These reviews are automatic in all cases in which the punishment imposed includes a bad-conduct or dishonorable discharge, or greater than six months of confinement. Beyond the service-level courts, appellants have an additional opportunity to petition the Court of Appeals for the Armed Forces for further legal sufficiency review on issues raised at the Service appellate courts. These forums present sufficient protection for the accused.

[93] See Seri Irazola, Erin Williamson, Julie Stricker, & Emily Niedzwiecki, ICF Inc., *Study of Victim Experiences of Wrongful Conviction* (Sept. 2013), *available at* https://www.ojp.gov/pdffiles1/nij/grants/244084.pdf [hereinafter Study of Victim Experiences of Wrongful Convictions].
[94] *Id.*

USAF VLSO (Q2): The Air Force Victims' Counsel Division does not believe it would have a role.

USCG VLSO (Q2): The CIU should not have any role in assessing credibility of sexual assault and domestic violence victims after a conviction. Credibility and consent are properly determined within the legal protections of a courtroom. It is the fact finder's responsibility, and the accused should not have the opportunity to relitigate these issues outside the courtroom. The types of evidence allowed in these cases is controlled by complex caselaw that protect the victim's privacy and litigation of these issues should remain within the established judicial system.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA VLSO (Q3): Army SVC concurs with the OTJAG response.

USN VLSO (Q3): Navy VLCP submits a Best Practices Committee is the better alternative than a CIU to address issues and concerns within the military justice system. However, if a CIU were created, then Navy VLCP notes a single DoD CIU would be sufficient due to the relatively small number of convictions. Additionally, having a sole CIU avoids disparity among service CIUs and the resultant conflicts among the services.

USMC VLSO (Q3): If established, CIUs should exist at the Department of Defense level to ensure uniform fairness across the Services in the review process, and in establishing rules and procedures to safeguard victim rights.

USAF VLSO (Q3): The Air Force Victims' Counsel Division does not believe a CIU should be created, but if it is, there should be a single CIU created for the Department of Defense. This would ensure uniformity and fairness across the services.

USCG VLSO (Q3): If a CIU were created, a single DoD CIU would be sufficient due to the relatively small number of convictions. Additionally, having a sole CIU avoids disparity among service.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA VLSO (Q4): Army SVC concurs with the OTJAG response.

USN VLSO (Q4): Please see the answer to Question 3 above.

USMC VLSO (Q4): Any entity established to review the integrity of convictions should fall under either the Department of Defense General Counsel, or the Department of Defense Office of the Inspector General to ensure appropriate oversight and autonomy.

USAF VLSO (Q4): The Victims' Counsel Division has no opinion on where a CIU should be located if created for each Service.

USCG VLSO (Q4): The Department of Defense General Counsel.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA VLSO (Q5): Army SVC concurs with the OTJAG response.

USN VLSO (Q5): Navy VLCP supports a Best Practices Committee over establishment of a CIU. For either model, CIU or Best Practices Committee, victim counsel representation would be critical. Including representatives from victims' counsel programs allows for the inclusion of victims' rights in the process.

When a CIU evaluates a case, victim notification should be mandatory. A DOJ NIJ study found the impact of a wrongful conviction might equal or be worse than the original victimization.[95] This highlights the need for a victims' rights perspective on the CIU, ideally a representative from various services' victims' counsel programs. Victims' counsel would be particularly cognizant of issues like privacy and notification. In a CIU, victims' privacy can be maintained through protective orders and the utilization of a privilege or redaction log.[96] NIJ further recommends if the final determination is a wrongful conviction, then victim notification should be made by officials in the original case and with a victim service provider.[97] Additionally, the study recommends all victims receive access to independent legal counsel.[98]

[95] *Id.*
[96] *Guidelines for Collaboration and Engagement: Prosecutors and Defense Counsel Working Together in Joint Post-Conviction Investigations,* Quattrone Ctr. for the Fair Admin. of Justice, Univ. of Pennsylvania Carey L. Sch. (Mar. 2022) *available at* https://www.law.upenn.edu/institutes/quattronecenter/guidelines-for-collaboration-and-engagement.php [hereinafter Guidelines for Collaboration and Engagement].
[97] Study of Victim Experiences of Wrongful Conviction, *supra* note 93.
[98] *Id.*

USMC VLSO (Q5): Establishment of a CIU should be guided in principle by the best practices recommended by the Innocence Project[99], particularly to include its recommendations related to cases involving allegations of prosecutorial misconduct, appropriate standards of review, staffing, and periodic auditing and reporting on results. In the military justice system, that staffing should be comprised of a civilian director; a military attorney deputy with substantial military justice litigation experience; several staff attorneys with experience as trial counsel, defense counsel, and victims' legal counsel; sufficient administrative and paralegal support to assist with administration, research, preparation, and case docketing; and sword and duly authorized investigative and law enforcement personnel to advise on and oversee necessary investigative follow-up. Any actual follow-on investigations should be conducted by the cognizant military criminal investigative organization with oversight and advice by the three CIU members described. The CIU staff should also be a civilian Victim-Witness Assistance Coordinator assigned to the unit to notify victims of the commencement of such a review, coordinate with cognizant victims' legal counsel, and enable participation and input from the victim of the crime for which the accused was convicted.

USAF VLSO (Q5): The Victims' Counsel Division does not believe a CIU should be created, but if it is, victims' counsel should be part of the unit and the CIUs should have established victim protections, notice requirements, and an ability to be heard.

USCG VLSO (Q5): A CIU in DoD should include a forensic psychiatrist who specializes in victimology and Victim Advocates to assist with the trauma of having a conviction reviewed, yet again.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA VLSO (Q6): Army SVC concurs with the OTJAG response.

USN VLSO (Q6): Navy VLCP supports a Best Practices Committee over establishment of a CIU. For a case to be accepted by a CIU, Navy VLCP recommends some new evidence of innocence be required. This position aligns with a NIJ research study where to proceed with a CIU case, all prosecutors required some new evidence of innocence (including the consideration of non-forensic evidence).[100]

[99] https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf.
[100] Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 Alb. L. Rev. 898, (2019-2020).

USMC VLSO (Q6): The mere assertion of actual innocence, without more, should not constitute a sufficient basis for review by a CIU. However, actual innocence should be an essential element of any claim presented to a CIU. Where there is newly-discovered evidence, that evidence should be viewed through the lens of a well-established evidentiary and processional standard similar, for example, to that cited by the CIU of the State of Michigan, which anchors its evaluations in the Rules of Professional Responsibility:

"(f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted, the prosecutor shall:

1. promptly disclose that evidence to an appropriate court or authority, and;
2. if the conviction was obtained in the prosecutor's jurisdiction,

i. promptly disclose that evidence to the defendant unless a court authorizes delay, and;

ii. undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.

(g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction."

The Marine Corps VLCO also concurs substantially with the submission of our Navy colleagues on this matter and adopts their recommendations here. As indicated in the Navy submission, the creation of any CIU should include careful consideration of the best practices of existing CIUs and organizations frequently litigating matters before those units.

Insufficiency of evidence should not be entitled to further review because that standard has already been applied during routine appellate litigation in the Service Courts of Criminal Appeals.

USAF VLSO (Q6): The Victims' Counsel Division does not believe a CIU is needed in the military justice system.

USCG VLSO (Q6): The USCG SVC Program recommends that some newly discovered evidence that would likely have resulted in a different result at trial be required.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA VLSO (Q7): Army SVC concurs with the OTJAG response.

USN VLSO (Q7): Navy VLCP supports a Best Practices Committee over establishment of a CIU. For a Best Practices Committee, Navy VLCP recommends modeling the District Attorneys Association of the State of New York's (DAASNY) Best Practices Committee with the addition of victims' rights counsel to mirror the unique inclusion of victims' counsel in the military justice system. Established in 2009, the DAASNY's Best Practices Committee has become a national model for "developing innovative strategies aimed at improving the criminal justice system and preventing wrongful convictions."[101] Additionally, the Prosecutors' Center for Excellence has a National Best Practices Committee that supports best practices committees across the country.[102] See the answer to Question 12 for additional information on Best Practices Committees.

USMC VLSO (Q7): If established, a CIU should be able to review any case, regardless of the nature of charges or quantum of punishment authorized or awarded.

USAF VLSO (Q7): The Victims' Counsel Division does not believe a CIU is needed in the military justice system.

USCG VLSO (Q7): The USCG SVC Program recommends only cases involving murder or manslaughter, where a case of mistaken identity is much more likely, and sentences are significantly longer.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA VLSO (Q8): Army SVC concurs with the OTJAG response.

USN VLSO (Q8): Navy VLCP supports a Best Practices Committee over establishment of a CIU. However, if a CIU was instituted, Navy VLCP would not support a CIU having jurisdiction to review convictions from guilty pleas. The military justice system currently ensures the veracity of guilty prior to accepting a guilty plea. Accepted CIU cases for review should be narrowly tailored in criteria.

[101] David Hoovler, *District Attorneys Association of the State of New York letter to Governor Cuomo* (Nov. 4, 2019) *available at* https://www.nysenate.gov/sites/default/files/submitted_testimony_-_district_attorneys_association_of_the_state_of_new_york.pdf; See also Kristine Hamann, *Statewide Best Practices Committees for Prosecutors: Leveraging Experience and New Evidence to Benefit the Criminal Justice System*, The Prosecutor (Oct./Nov./Dec. 2013) *available at* http://ndaa.org/wp-content/uploads/Oct-Nov-Dec13_Statewide_best_practices.pdf [hereinafter Statewide Best Practices].

[102] PROSECUTORS' CENTER FOR EXCELLENCE, *National Best Practices Committee*, https://pceinc.org/national-best-practices-committee/ (last visited Feb. 29, 2024).

USMC VLSO (Q8): Yes. A plea of guilty should not be a bar to a claim of actual innocence. However, CIU of a case involving a plea of guilty should include assessment of the evidence to determine whether any newly-discovered evidence would likely have resulted in a different result at trial.

USAF VLSO (Q8): No, accused are afforded extra protections in this area by the military justice system under R.C.M. 910(e); "military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."

USCG VLSO (Q8): The only time a guilty plea should be reviewed is if there is significant evidence of coercion or prosecutorial misconduct that likely impacted the accused decision to enter a plea deal.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA VLSO (Q9): Army SVC concurs with the OTJAG response.

USN VLSO (Q9): See answer to Question 7 above.

USMC VLSO (Q9): The scope of CIU authority to investigate should be coextensive with that of the agencies which investigated and prosecuted the accused. If established, a CIU should be authorized to investigate and, if a case meets applicable standards, to recommend remedy to an appropriate authority (for example, the Judge Advocate General). Any investigations incident to the work of a CIU should be conducted by either CIU or MCIO personnel not connected with the original case or the personnel who investigated and prosecuted that case.

In cases where these investigations result in newly discovered evidence or other fatal flaw in a case which shows by clear and convincing evidence that a conviction is unjust or would likely have led to a different result at trial, an appropriate court or officer should have statutory authority to set aside a conviction and, if necessary, forward a case for an independent prosecutorial determination by the relevant service trial services organization or office of special trial counsel on whether a rehearing or retrial is appropriate.

USAF VLSO (Q9): The Victims' Counsel Division does not believe a CIU is needed in the military justice system.

USCG VLSO (Q9): The CIU should be limited to referring the case back to the service Judge Advocate Generals.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA VLSO (Q10): Army SVC concurs with the OTJAG response.

USN VLSO (Q10): The 3-year period is a sufficient amount of time for an accused to petition for a new trial. Extending the time period contributes to prolonged uncertainty for crime victims and ultimately delays the finality of the case for the victim.

USMC VLSO (Q10): The three-year period for requesting a new trial is not sufficient. Where newly-discovered evidence or fraud on the court meets an appropriate threshold placing the validity of a conviction in substantial doubt, that period should be extended. This is especially true in cases where the evidence discovered is dispositive (e.g. DNA evidence which conclusively excludes the accused as the perpetrator).

USAF VLSO (Q10): Generally, yes, the three-year rule is sufficient. It gives the convict an opportunity for redress while allowing reasonable finality for the crime victim. However, this time-period should not apply in the event newly discovered evidence becomes available that would likely have resulted in a different result at trial.

USCG VLSO (Q10): Extending or eliminating the time limitation for an accused to petition for a new trial is certainly easier to implement than creating a CIU. The processes, personnel and authority already exist. However, extending the time contributes to prolonged uncertainty for crime victims and ultimately delays the finality of the case.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA VLSO (Q11): Army SVC concurs with the OTJAG response.

USN VLSO (Q11): Not that Navy VLCP is aware of, therefore we defer to other entities in the military justice system.

USMC VLSO (Q11): The VLCO is unaware of any such programs. This question is better suited for the cognizant Military Criminal Investigative Organizations.

USAF VLSO (Q11): The Victims' Counsel Division is not aware of any such post-conviction programs.

USCG VLSO (Q11): Not that the USCG SVC Program is aware.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA VLSO (Q12): Army SVC concurs with the OTJAG response.

USN VLSO (Q12): "Crime victims are the first to get hurt…but often the last to be remembered."[103] While the focus on wrongful convictions centers on the convicted service member, victims' rights cannot be set aside and forgotten.

Establishing an inclusive DoD Best Practices Committee would address problems upstream by taking a "front-end approach to prevent future problems" while CIUs "address failures on the back-end."[104] A DoD Best Practices Committee ideally would include trial counsel and victims' counsel from across the services. The power in a Best Practices Committee is its ability to address specific matters, both emergent and ongoing; draft new model policy and procedural recommendations through calculated assessment; collaborate in a meaningful way with law enforcement; share information among services; and learn from wrongful convictions.[105] To date, the national Prosecutors' Center for Excellence (PCE) lists 20 statewide prosecutor-led Best Practices Committees.[106] The PCE acknowledges, "The most reliable way to reduce wrongful convictions is to conduct a proper investigation and prosecution in the first instance."[107]

Specific examples of Best Practices Committees work:

• Colorado – advised on body-worn cameras, interrogation recordings, proffer agreements. Collaborated with Innocence Project on the issue of identification procedures[108]

• Missouri – adopted best practices and policies for DWI, Identification, Custodial Interrogations, Victims' Rights, and Forensics[109]

• New York - developed identification procedures and protocols for video recording interrogations adopted by NY police departments, and created a prosecutor's ethics guide later adopted by other states[110]

[103] Guidelines for Collaboration and Engagement, *supra*, note 96.
[104] Daniel Kroepsch, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 Geo. J. Legal Ethics 1095 (2016) [hereinafter Prosecutorial Best Practices Committees].
[105] Statewide Best Practices Committees *supra* note 101.
[106] PROSECUTORS' CENTER FOR EXCELLENCE, *The Role of the Modern Prosecutor: Spearheading Innovation* (Oct. 2020) *available at* https://pceinc.org/wp-content/uploads/2020/10/20201013-National-Report-Final.pdf.
[107] *Id.*
[108] Prosecutorial Best Practices Committees, *supra* note 104.
[109] Kristine Hamann & Rebecca Rader Brown, *Best Practices for Prosecutors, A National Movement*, A.B.A. Criminal Justice Journal (Spring 2016) *available at* https://pceinc.org/best-practices-prosecutors-nationwide-movement/.
[110] Prosecutorial Best Practices Committees, *supra* note 104.

• North Carolina – developed an ethics manual, guidelines for post-trial relief motions and police use of force case, trained on open-file discovery, advised on body-worn cameras[111]

• Pennsylvania – drafted statewide guidelines on the disclosure of potential credibility issues involving police witnesses[112]

USMC VLSO (Q12): Any steps taken within the Department of Defense to ensure conviction integrity should necessarily include careful consideration of the best practices in place across civilian jurisdictions in which CIUs are authorized. Those practices must incorporate clear and coherent means by which victims are notified and heard during any investigation, recommendation, or result incident to the work of the CIU.

USAF VLSO (Q12): The services have sufficient appellate processes to ensure the integrity of convictions.

USCG VLSO (Q12): If CIUs are adopted robust resources will be needed to ensure victim support throughout the process. Additional funding should be provided to ensure victims and their legal counsel can participate in person at any hearing. Victims should be provided SAPRR, mental health, and SVC services.

[111] *Id.*
[112] *Id.*

INTRODUCTION

The DAC-IPAD has long been concerned about the fairness, and perception of fairness, of the military justice system, including the fairness of panels that determine the guilt of accused Service members.[1] In 2022, the Committee received public comments from Service members who expressed concern about military panels' lack of diversity. One African American Service member accused of a sexual offense noted that his panel consisted of all white males,[2] an experience that resonated with that of Committee members who had participated in courts-martial.[3] The Committee also received testimony that women were systematically excluded from serving on panels, often owing to their training as victims' advocates or their own experience with sexual assault.[4]

The concerns raised to the DAC-IPAD about the underrepresentation of minorities on military panels mirror concerns about the diversity of civilian juries.[5] Researchers investigating civilian judicial systems have found that jury diversity has many benefits. For example, diverse juries "had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements" than homogenous juries.[6] In addition, diverse juries bolster public perceptions of the legitimacy and fairness of the criminal justice system;[7] conversely, homogenous juries are perceived less positively by the public.[8]

In response to these concerns, the Case Review Subcommittee undertook a multiyear study of the demographics of military panel members serving on contested sexual assault courts-martial in fiscal years (FYs) 2021 and 2022. This report is the first known analysis of the race, ethnicity, and gender of military personnel who are chosen by a convening authority to be part of the venire—a process known as detailing—as well as of the demographics of those members who are ultimately selected to serve on the panel.[9]

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[1] *See* 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 OFFENSE IN THE MILITARY Recommendation 38 (Dec. 2020).

[2] *See* Transcript of DAC-IPAD Meeting 368 (Sept. 21, 2022) (public comment of Mr. Arvis Owens).

[3] *See* Transcript of DAC-IPAD Meeting 76-78 (Dec. 6, 2022) (comments of Members Bill Cassara and Jen Markowitz); *id.* at 62-64 (comment of Judge Walton).

[4] *See* Transcript of DAC-IPAD Meeting 132 (Dec. 6, 2022) (testimony of Mr. Ryan Guilds).

[5] Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, Diversity & Inclusion, Spring 2015, Vol. 2, No. 2.

[6] Sonia Chopra, *Preserving Jury Diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/Wheeler Motion at Trial (and Why You Should)*, The Trial Lawyer, Summer 2014, at 13 (*citing* Samuel Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 (4) J. Personality & Soc. Psychol. 597 (2006)).

[7] Leslie Ellis & Shari Seidman Diamond, Race, *Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 (3) Chicago-Kent Law Review 1033 (2003).

[8] Joshi, *supra* note X.

[9] Section 549F of the FY22 NDAA directed the Comptroller General to submit to Congress a report on racial disparities in all facets of the military justice system, including panel selection. This study was completed in May 2024 but did not include any data or analysis on the demographics of military panels.

The analysis of the demographic composition of military details and panels is of particular importance during this critical period of change. As part of the National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Congress amended Article 25, Uniform Code of Military Justice (UCMJ), to require by 2024 the random selection of panel members to the maximum extent possible.[10] In September 2023, the Court of Appeals for the Armed Forces issued its opinion in *United States v. Jeter*, which held that a convening authority could not—"even in good faith"—"use race as a criterion for selection to make the members panel more representative of the accused's race."[11] In addition, in December 2023 the DAC-IPAD released a report—undertaken in conjunction with this study—that made recommendations to remove subjectivity and the potential for bias from the process used by the convening authority to determine the eligibility of panel members.[12] In the context of these recent changes in law and policy, as well as the potential for additional changes, this report provides important baseline data on panel member demographics to facilitate future comparisons.

The first chapter of this report provides an overview of the panel selection process. The second chapter details the Committee's methodology for reviewing FY21 and FY22 sexual assault case documents and collecting and analyzing demographic information. The third, fourth, and fifth chapters provide the study's results and analysis, with a particular focus on the following questions:

- How do the demographics of Service members detailed to panels compare with overall Service demographics?
- What are the demographics of Service members who are detailed to panels but excused owing to challenges for cause, peremptory strikes, or randomization?
- Are minority Service members excluded from military courts-martial panels at higher rates than white Service members? and
- How do the demographics of the venire compare with the demographics of the members ultimately selected to serve on the panel?

As its recommendations make clear, the Committee believes it is vital that the Services continue to analyze the demographics of military panel members, as well as other key participants in the court-martial process. These continuing analyses will facilitate a better understanding of the effects of *Jeter*, randomization, and any other changes on the fairness, and perception of fairness, of the military justice system.

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

[11] *U.S. v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023).

[12] DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, RANDOMIZING COURT-MARTIAL PANEL MEMBER SELECTION: A REPORT ON IMPROVING AN OUTDATED SYSTEM (Dec. 2023) [hereinafter RANDOMIZING REPORT].

CHAPTER 1. OVERVIEW OF THE PANEL SELECTION PROCESS

The DAC-IPAD has written extensively about the history and background of the court-martial panel member selection process, most recently in its December 2023 report *Randomizing Court-Martial Panel Member Selection: A Report on Improving an Outdated System*.[13] To provide context for the current study's methodology, this chapter provides another overview of court-martial member selection and describes recent changes to the process, including to the law governing the use of race and gender when selecting a panel.

I. The Role of the Convening Authority in Panel Member Selection

When commanders convene a court-martial, they must detail Service members to serve as panel members. Article 25, UCMJ, dictates that the convening authority shall detail members that, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[14]

To accomplish this task, subordinate commanders typically provide a list of nominees to the convening authority's staff judge advocate. The staff judge advocate then prepares a package for the convening authority: it includes the list of nominees, member questionnaires for each nominee, and a roster of every eligible Service member under that command. Using this information, the convening authority selects Service members to detail to the court-martial; this second list may include Service members who were not nominated by the subordinate commanders and Service members from other commands.

The staff judge advocate then drafts a court-martial convening order (CMCO), which creates the court-martial and details the selected members to the court-martial panel.[15] The CMCO may be amended before trial to remove members who are no longer available.[16]

In all noncapital cases, the accused may elect to be tried by a court-martial composed of a military judge alone or by a court-martial composed of a military judge and members. In those cases when an enlisted accused elects trial by court-martial composed of a military judge and members, the accused may request that the panel be composed of all officers or that the panel include at least one-third enlisted representation.[17] Depending on the request, the convening

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[13] *See* RANDOMIZING REPORT, *supra* note XX, at Chapter 2; *see also* DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, APPELLATE REVIEW STUDY 23 (2023), *available at* https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Appellate-Review-Study_Final.pdf.

[14] Art. 25(e)(2), UCMJ.

[15] *See* R.C.M. 504(a); R.C.M. 503(a)(1).

[16] Pursuant to recent changes to R.C.M. 911, prior to the assembly of the court-martial, the military judge randomly assigns numbers to the members detailed by the convening authority. The military judge will then require a certain number of detailed members to be present at an initial session according to their randomly assigned number; the other detailed members are temporarily excused, allowing them to perform their regular military duties until they are notified to appear in court. Previously, all detailed members that had not been excused were required to appear at the initial session. R.C.M. 911.

[17] R.C.M. 903(a)(1).

authority may need to (1) detail additional members and relieve those previously detailed to ensure the proper proportion of officers and enlisted members, (2) withdraw the charges and refer them to a court-martial that includes the proper proportion of officers and enlisted members, or (3) advise the court-martial to proceed in the absence of officers or enlisted members if eligible personnel cannot be detailed because of physical conditions or military exigencies.[18]

II. The Use of Race and Gender in Panel Member Selection

The Court of Military Appeals—the predecessor court to the Court of Appeals for the Armed Forces (CAAF)—held that an accused does not have a right to a court-martial panel drawn from a representative cross-section of the population; indeed, Article 25, UCMJ, which outlines specific criteria for the convening authority to consider when deciding who is best qualified to serve on a panel, contemplates this very result.[19] Accordingly, an accused Service member does not have a constitutional or statutory right to have members of their race or gender included on their court-martial panel.[20] While the Fifth Amendment protects against "intentional racial discrimination through exclusion[,] . . . the mere fact a court-martial panel fails to include minority representation violates neither the Fifth Amendment" nor the UCMJ.[21]

Under previous precedent established in *United States v. Crawford*, the convening authority was permitted to depart from Article 25 factors in one particular situation: "when seeking *in good faith* to make the panel more representative of the accused's race or gender."[22] The Court of Military Appeals stated that if such a step constitutes discrimination, "it is discrimination in favor of, not against, an accused."[23] Therefore, until September 2023, if an accused was Black, a convening authority could intentionally select Black Service members to serve on the court-martial panel. Similarly, if the accused was female, the convening authority could intentionally select female Service members to serve on the panel.[24] In testimony received by the DAC-IPAD in September 2023—prior to the CAAF decision in *United States v. Jeter*—several former general courts-martial convening authorities stated that they considered the demographics of Service members during panel selection to promote those panels' racial, ethnic, and gender diversity.[25]

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[18] R.C.M. 503(a)(2) (Discussion).

[19] *U.S. v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988) (noting that "Article 25 of the Uniform Code contemplates that a court-martial panel will not be a representative cross-section of the military population"); *U.S. v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988).

[20] *U.S. v. Bess*, 80 M.J. 1, 7 (C.A.A.F. 2019) (citing *Powers v. Ohio*, 499 U.S. 400, 404 (1991)).

[21] *Bess*, 80 M.J. at 4.

[22] *U.S. v. Reisbeck*, 77 M.J. 154, 164 (C.A.A.F. 2018) (emphasis added) (discussing *U.S. v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964)).

[23] *Crawford*, 35. C.M.R. at 13.

[24] *Reisbeck*, 77 M.J. at 163; *see also U.S. v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988).

[25] Transcript of DAC-IPAD Public Meeting 125-26 (Sept. 19, 2023) (testimony of Major General Bibb), 128 (testimony of Major General Hodne).

However, in the case *United States v. Jeter*, decided in September 2023, the CAAF found that *Crawford* was abrogated by the Supreme Court's 1986 holding in *Batson v. Kentucky*.[26] In addition to noting that the *Crawford* holding was "unmoored from any statutory authority,"[27] the CAAF, relying on the Supreme Court's conclusion that "a person's race simply is unrelated to his fitness as a juror,"[28] held that "it is impermissible to exclude *or intentionally include* prospective members based on their race."[29] As a result, whenever an accused makes a prima facie showing that race played a role in the panel selection process, a presumption will arise that the panel was not properly constituted, which the government may then seek to rebut.[30] Given CAAF's similar jurisprudence on the use of race and the use of gender in member selection, it is likely that the *Jeter* decision will be extended to prohibit the intentional inclusion of women on court-martial panels.

III. Voir Dire

After assembly of the court-martial, the military judge and counsel examine the venire through voir dire, the purpose of which is "to obtain information for the intelligent exercise of challenges" of members.[31] "Voir dire protects an accused's right to an impartial trier of fact by exposing possible biases, both known and unknown, on the part of potential jurors."[32] Under Rule for Courts-Martial (R.C.M.) 912(f)(1)(N), "a member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[33] This rule encompasses both actual bias and implied bias.[34] Actual bias is a subjective standard viewed "through the eyes of the military judge or court members"[35] that asks whether a challenged member's bias is "such that it will not yield to the evidence presented and the judge's instructions."[36] Implied bias, on the other hand, is an objective standard viewed through the eyes of the public, and the criterion is whether the system's appearance of fairness would be questioned if the challenged member served on the panel.[37]

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[26] *U.S. v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023).

[27] *Id*. at 72.

[28] *Id*. (citing *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

[29] *Jeter*, 84 M.J. at 73 (emphasis added).

[30] *Id*. at 70.

[31] R.C.M. 912, Discussion.

[32] *U.S. v. Commisso*, 76 M.J. 315, 321 (C.A.A.F 2017) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984)).

[33] R.C.M. 912(f)(1)(N).

[34] *U.S. v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

[35] *U.S. v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999).

[36] *Napoleon*, 46 M.J. at 283.

[37] *U.S. v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015).

Under the liberal grant mandate, military judges must err on the side of granting an accused's challenge for cause when the judge finds the question to be a close one.[38] The liberal grant mandate is a response to two unique aspects of the military justice system: the small number of peremptory challenges in courts-martial (generally limited to one per side) as compared to those in most civilian courts, and the perils associated with the convening authority's broad power to appoint panel members.[39]

After challenges for cause have been exercised, the court uses a computer program to assign each remaining member a random number. The parties may then choose to exercise their peremptory challenge. Generally, the parties do not need to provide a reason for their peremptory challenge, although both civilian and military jurisdictions have adopted procedures to prohibit the use of peremptory challenges to exclude a person from venire on the basis of race or gender.[40] In federal civilian practice the objecting party must make a prima facie case of purposeful discrimination, but in the military no prima facie showing is required; the challenging party must then articulate a reasonable racially neutral explanation for the challenge.[41] After the challenged members are excused, the military judge impanels the required number of members in the order established by the random number generator.

IV. Impending Changes and Recommendations Relating to Panel Member Selection

In 2021, the Independent Review Commission on Sexual Assault in the Military (IRC) issued a report aimed at reducing distrust in the commander-centric military justice system.[42] Among its suggestions for change, the IRC recommended that Article 25 be modified to establish random selection of panel members, "taking into account practical realities of location and availability."[43] The IRC noted that such a change would "enhance the perception and reality of a fair and impartial panel." The IRC was not the first to reach this conclusion—as detailed in the DAC-IPAD's report on randomization, other commissions have made similar recommendations, dating back to the inception of the UCMJ.[44] Shortly after the release of the IRC Report, Congress, as part of the FY23 NDAA, amended Article 25 to require the random selection of panel members "to the maximum extent possible," but did not eliminate the requirement that the convening authority select and detail those members who are, "in his opinion, best qualified."[45]

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[38] *U.S. v. Keago, No. 23-0021, 2024 C.A.A.F LEXIS 256 (C.A.A.F. May 9, 2024)* (citing *U.S. v. Cay*, 64 M.J. 274, 277 (C.A.A.F. 2007)).

[39] *U.S. v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).

[40] *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1993); *U.S. v. Norfleet*, 53 M.J. 262, 272 (C.A.A.F 2000).

[41] *Norfleet*, 53 M.J. at 272.

[42] INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 17 (July 2021) [IRC REPORT], *available at* https://media.defense.gov/2021/ Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF.

[43] *Id*. at 54.

[44] *See* RANDOMIZING REPORT, *supra* note XX, at Chapter 3.

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

Congress directed the President to prescribe regulations implementing this change by December 2024.

In December 2023, the DAC-IPAD released a report with 10 recommendations aimed at improving trust and ensuring transparency in the panel selection process.[46] One of those recommendations was that Congress take the additional step of eliminating from Article 25 the requirement that the convening authority select and detail the subjectively "best qualified" members and, instead, implement a randomized court-martial panel selection process using limited objective criteria to determine members' eligibility.[47] The Committee also recommended that Congress remove the qualifying words "to the maximum extent possible" from the FY23 NDAA's randomization requirement.[48] As of the date of this report, the DAC-IPAD's recommendations on panel selection have not been adopted.

[46] *See* RANDOMIZING REPORT, *supra* note XX, at 7.

[47] *Id*. at Recommendation 53, Recommendation 59 (recommending that Congress retain the requirement that no accused Service member be tried by a court-martial in which any member is junior to the accused in rank or grade); Recommendation 60 (recommending Congress amend Article 25 to add a two-year time-in-service requirement for court-martial panel member eligibility).

[48] *Id*. at Recommendation 54.

CHAPTER 2. METHODOLOGY

On March 1, 2023, the Department of Defense's Defense Legal Services Agency requested all FY21 and FY22 cases with charges preferred and tried to findings, dismissed, or resolved by any alternate means, including the following documents relevant to this study:

- Excel spreadsheet identifying all cases with charges preferred;
- Court-martial convening orders;
- Transcripts of voir dire and panel selection proceedings;
- Statements of Trial Results; and
- Entries of Judgment.

The DAC-IPAD staff received and examined the documents on a rolling basis throughout the spring and summer of 2023 and identified 283 contested cases that met the following criteria:

- The accused was tried by a court-martial with members; and
- A finding was made on any Article 120, 120b, or 120c, UCMJ, offense ("sexual assault offense").[49]

The staff, who had to rely entirely on the information provided by the Services, could not independently verify that the cases provided by the Services constituted the entire universe of cases meeting the above criteria.

After review and consultation with the Services,[50] the staff excluded 23 of the 283 cases because certain documents or audio files were not available. For the remaining cases, the Army, Navy, and Marine Corps provided the staff with the records of trial for further review.[51] For the Air Force cases, the DAC-IPAD staff was able to complete an analysis only of FY21 cases because of complications in receiving documents and because of the time required to listen to audio files.[52]

[49] These cases include any attempt, conspiracy, or solicitation to commit any of these designated offenses.

[50] The Coast Guard cases were not analyzed for this study because too few courts-martials were held to make reliable and sound findings.

[51] The Air Force provided requested documents as opposed to the full records of trial. For acquittals the DAC-IPAD also needed to request audio files to record necessary information.

[52] The DAC-IPAD will issue a supplemental report on the Air Force FY22 cases in its next annual report.

Table XX. Number of Courts-Martial Reviewed and Included in Study

Service	Number of Courts-Martial
Army	124
Navy	48
Marine Corps	39
Air Force / Space Force*	49
Total	260

*FY21

Case Data

The DAC-IPAD staff first recorded information about the findings of the court-martial—information it categorized as "case data." These data included the following:

- The finding on any Article 120, UCMJ, rape and sexual assault offense; any Article 120b, UCMJ, rape or sexual assault of a child offense; or any Article 120c, UCMJ, other sexual misconduct offense, and[53]
- For those cases resulting in a guilty verdict, whether the finding of guilt was for a penetrative offense.

Case data also consisted of information relating to the accused and to the structure of the court-martial, including

- The rank of the accused; and
- Whether the accused, if an enlisted member, requested an all-officer panel or a panel with enlisted representation.

Individual Data

After compiling the case data, the DAC-IPAD staff examined the record of trial for information related to panel members, judges, lead prosecutors, and defense counsel.[54] The staff compared the names listed on the convening orders with the names of the detailed members listed in the trial transcripts or described in the audio files. Service members were identified as detailed members at a court-martial if their names were included on the convening order and they appeared on the record at the court-martial.

For cases with a guilty finding on a sexual assault offense, the records of trial generally contained a written transcript. The staff reviewed the voir dire proceedings and determined whether the detailed members were impaneled or excused. For those excused, the staff recorded

[53] If the accused was convicted of *any* Article 120, 120b, or 120c UCMJ offense the case was considered a guilty verdict regardless of other sexual assault offenses that may have been an acquittal. If no sexual assault offense was a guilty finding the case was considered an acquittal even if a finding of guilty on a non-sexual offense occurred. Although the DAC-IPAD has previously tracked case data in sexual assault cases, this project was dedicated to research questions related to panel selection and not offense-based data on all sexual assault courts-martial.

[54] Lead civilian defense counsel were not recorded because the Services would not have their demographic information. Only lead counsel for the government or defense were considered in this data.

the basis for excusal—whether that was a challenge for cause, a peremptory challenge, or the order established by the random number generator.[55]

In cases resulting in a full acquittal—which constituted most of the cases reviewed—and cases resulting in a sentence of less than six months' confinement, the records of trial did not contain a written transcript of the trial proceedings.[56] To determine which members were detailed, impaneled, or excused in these cases, the DAC-IPAD staff requested audio recordings from the Services, listened to the audio portion on voir dire, and confirmed the names heard against the written convening orders in the record of trial.

In total, the staff reviewed 260 cases—comprising 4,376 detailed panel members—and recorded 43,000 data points to shape the findings in this report. The DAC-IPAD staff conducted extensive quality control on the data to ensure that the information recorded was accurate and complete before requesting race and ethnicity data from the Services.

Race and Ethnicity: Aggregation and Coding for Analysis

After recording the data points described above, the DAC-IPAD requested from each Service the race, gender, and ethnicity of the panel members, judges, and military counsel identified in the source documents. The staff requested that the categories of race and ethnicity be compliant with the minimum categories set forth in the 1997 Office of Management and Budget (OMB) Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting.[57] The race and ethnicity categories applicable at the time—prior to their revision in March 2024[58]—were "American Indian or Alaska Native," "Asian," "Black or African American," "Native Hawaiian or Other Pacific Islander," and "White." The two minimum OMB ethnicity standards were "Hispanic or Latino" and "Not Hispanic or Latino."

Despite the DAC-IPAD's request, the race and ethnicity data provided by the Services did not comply with the OMB minimum categories. The Services' responses differed substantially; at one extreme, one Service provided up to 70 variations of race and ethnicity categories.[59] As a

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[55] Supra

[56] A complete record of proceedings and testimony is only required in cases with a "sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." 10 U.S.C. Sec. 854, Article 54, UCMJ.

[57] *See* Office of Management and Budget, Statistical Policy Directive No. 15: Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58, 782 (Oct. 30, 1997) [OMB Directive 15].

[58] In March 2024, OMB approved changes to the federal government's standards on race and ethnicity. These changes were based on OMB's *Initial Proposals to Updating OMB's Race and Ethnicity Statistical Standards* which recommended that questions about race and ethnicity be asked in one question for federal statistical assessment because, "[e]vidence suggests that the use of separate race and ethnicity questions confuses many respondents who instead understand race and ethnicity to be similar, or the same concepts. For example, a large and increasing percentage of Hispanic or Latino respondents on the decennial census and American Community Survey (ACS) over the past several decades are either not reporting a race or are selecting Some Other Race (SOR); this is after responding to the ethnicity question…" 88 Fed. Reg. 5375, 5379 (Jan. 27, 2023). *See also*, Office of Management and Budget, Revisions to OMB's statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 89 Fed. Reg. 22, 182 (Mar. 29, 2024).

[59] See Appendix A of Appendix X.

result, the staff could not compare or analyze race and ethnicity data across Services without recoding it into simpler categories.[60]

In addition, across the Services, not all detailed members could be found in the personnel databases,[61] and some members' race and/or ethnicity were described as "unknown," "other," "declined to respond," "group not on list."[62] Dr. Williams Wells, the DAC-IPAD criminologist, generally excluded from this study Service members whose race and/or ethnicity was unknown.[63]

Table XX. Detailed Service Members Excluded from Analysis

Service	Members Excluded	%
Army (N=1965)	136	6.9%
Navy (N=859)	126	14.7%
Marine Corps (N=661)	99	15.0%
Air Force / Space Force (N=891)*	211	23.7%
Total (N=4,376)	572	13.1%

*FY21

To allow for a comprehensive and more meaningful analysis, the staff, along with Dr. Wells, aggregated and coded the information provided by the Services into two blended race/ethnicity categories:[64] "white, not Hispanic" and "minority race and/or Hispanic."[65] This aggregation was particularly important to capture the military's Hispanic population, since the data provided did not always include information about the race of these Service members. For example, if a Service member was listed as Hispanic and their race was unknown, they were considered a minority for purposes of this study. However, if a Service member's race was listed as white but their ethnicity was unknown, they were excluded from this study because they could have been

[60] For the most recent report on the many issues associated with the collection of race and ethnicity by Service, *see* GAO, *Military Justice: Increased Oversight, Data Collection, and Analysis Could Aid Assessment of Racial Disparities*, GAO-24-106386, (Washington, D.C.: May 2024).

[61] Reasons attributable to some unknown personnel maybe due to Service members' changing their last names, incorrect spelling of names on convening orders or in trial transcripts. The DAC-IPAD does not know why race and/or ethnicity of personnel is missing from databases.

[62] For a complete understanding of the exclusion of detailed personnel due to data issues reference Appendix B in the Service Data Reports located in Appendix XX-XX.

[63] *See*, Mary R. Rose and Jeffrey B. Abramson, *Data, Race and the Courts: Some Lessons on Empiricism form Jury Representation Cases*, 2015 Mich. St. L. Rev. 911, 923 (2011).

[64] See Appendix xx-xx for a complete list of the different race and ethnicity variances provided by each Service. These appendices in the Service specific data reports also provide information on how racial and ethnic information was re-coded for this analysis.

[65] Although this was not based on the March 2024 revisions to OMB Directive 15, it is largely consistent with the changes which combine race and ethnicity for purposes of statistics.

an ethnic minority.[66] For overall military demographic data for comparative purposes Dr. Wells used information provided by the Services or the Defense Manpower Data Center on race and ethnicity.[67] Dr. Wells could not rely on DoD's demographics report because it does not publish both the race and ethnicity of Servicemembers by Service.[68] For additional information on the demographics used by Dr. Wells for overall Service representation see Appendix X.

[66] For an in-depth discussion on the issue of the disproportionate number of missing cases for the Hispanic population, *see* Mary R. Rose and Jeffrey B. Abramson, *Data, Race and the Courts: Some Lessons on Empiricism form Jury Representation Cases*, 2015 Mich. St. L. Rev. 911, 923 (2011).

[67] See Appendix X.

[68] Dept. of Def., *2022 Demographics: Profile of the Military Community* (2022).

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Nixon KEAGO, Midshipman
United States Navy, Appellant

No. 23-0021
Crim. App. No. 202100008

Argued October 12, 2023—Decided May 9, 2024

Military Judges: Ryan J. Stormer (arraignment, motions), Aaron C. Rugh (trial), and Angela J. Tang (entry of judgment)

For Appellant: *Lieutenant Colonel Matthew E. Neely*, USMC (argued); *Lieutenant Megan E. Horst*, JAGC, USN (on brief).

For Appellee: *Captain Tyler W. Blair*, USMC (argued); *Colonel Joseph M. Jennings*, USMC, *Lieutenant Commander Paul S. LaPlante*, JAGC, USN, and *Brian K. Keller*, Esq. (on brief).

Amicus Curiae in Support of Neither Party: *Brenner M. Fissell*, Esq., *Franklin D. Rosenblatt*, Esq., *Rachel E. VanLandingham*, Esq., and *James A. Young*, Esq. (on behalf of the National Institute of Military Justice) (on brief).

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON and Judge JOHNSON joined. Judge SPARKS filed a separate opinion, concurring in part and dissenting in part. Judge MAGGS filed a separate dissenting opinion.

Judge HARDY delivered the opinion of the Court.[1]

The Government charged Appellant with multiple offenses related to his alleged sexual assaults of three victims. At the panel selection phase of his general court-martial, Appellant challenged fourteen potential panel members for actual and implied bias. The military judge granted six of Appellant's challenges but denied the other eight. Before this Court, Appellant argues that the military judge erred in denying both his actual bias and implied bias challenges against three of the panel members. We first hold that the military judge did not abuse his discretion in denying Appellant's challenges for actual bias. We also hold, however, that the voir dire responses of two of the members presented close cases of implied bias. Because the liberal grant mandate requires military judges to excuse potential panel members in close cases, the military judge erred by denying those two challenges. Accordingly, the judgment of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) is reversed.

I. Background

A. Procedural History

The Government charged Appellant, a midshipman at the United States Naval Academy, with specifications of attempted sexual assault, sexual assault, burglary, and obstruction of justice in violation of Articles 80, 120, 129, and 131b, Uniform Code of Military Justice (UCMJ),[2] related to alleged sexual assaults of three of Appellant's fellow

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[1] The Court heard oral argument in this case at the U.S. Naval Undersea Museum, Keyport, Washington, as part of the Court's "Project Outreach." Project Outreach seeks to expand awareness of the military justice appellate process by taking appellate hearings to military bases around the country. We thank the participants.

[2] More specifically, the Government charged Appellant with violations of Articles 80, 129, and 131b, UCMJ, 10 U.S.C. §§ 880, 929, 931b (2018), and Articles 120, UCMJ, 10 U.S.C. § 920 (2012 & Supp. IV 2013-2017), and Article 129, UCMJ, 10 U.S.C. § 929 (2012).

midshipmen. During panel selection, Appellant challenged fourteen potential panel members for both actual and implied bias. The military judge granted six of Appellant's challenges but denied the other eight. Before the NMCCA, Appellant argued that the military judge erred in denying Appellant's challenges against four of his panel members. *United States v. Keago*, No. NMCCA 202100008, 2022 CCA LEXIS 397, at *9-12, 2022 WL 2437886, at *3-5 (N-M. Ct. Crim. App. July 5, 2022) (per curiam) (unpublished). The NMCCA disagreed. *Id.* at *15-16, 2022 WL 2437886, at *6. Upon Appellant's petition, we granted review to determine whether the military judge erred in denying actual and implied bias challenges against three of Appellant's panel members: LCDR Charlie, LCDR Mike, and LT Sierra.[3] *United States v. Keago*, 83 M.J. 252, 252-53 (C.A.A.F. 2023) (order granting review).

B. Appellant's Actual and Implied Bias Challenges

After the convening authority detailed the potential panel members to Appellant's court-martial, they completed the Northern Judicial Circuit's standard member court-martial questionnaire in writing. To minimize exposure to COVID-19, the military judge presiding over Appellant's court-martial declined to conduct group voir dire and instead ordered the potential panel members to complete a supplemental questionnaire in writing. Prior to trial, the military judge conducted an in-person voir dire session during which the military judge, trial counsel, and defense counsel had the opportunity to ask additional questions of individual members. The statements that formed the basis of Appellant's challenges were made by the challenged panel members either in their questionnaire responses or during the individual voir dire.

1. LCDR Charlie

Appellant challenged LCDR Charlie on multiple grounds, asserting his statements and background

[3] To preserve the panel members' privacy, this opinion presents their names as pseudonyms.

demonstrated both actual and implied bias. Appellant pointed primarily to: (1) statements LCDR Charlie made about the presumption of innocence and Appellant's right to remain silent; (2) LCDR Charlie's service as a fleet mentor for the Naval Academy's Sexual Assault Prevention Response Program and comments he made about the problem of sexual assault in the military; and (3) the fact that LCDR Charlie's mother had once been the victim of a kidnapping and attempted rape. Our analysis in this opinion focuses on the first of these categories.

With respect to the presumption of innocence, Appellant argues that LCDR Charlie's answers during voir dire established that—rather than accepting that Appellant was innocent until proven guilty—LCDR Charlie believed the Government had already proven part of its case. For example, on the supplemental questionnaire, LCDR Charlie stated: "The fact that there are charges suggests that something happened. I understand that false sexual assault accusations don't make it very far under scrutiny." He also expressed his belief that "since we are at the court-martial stage, a flimsy or easily proven[]false accusation would have been dropped by now." During the in-person voir dire, LCDR Charlie further explained his view stating that "the fact that you get through charges in a proceeding like this means that it is not a simple he said/she said . . . I feel like something had to have happened."

With respect to Appellant's right to remain silent, Appellant argues that LCDR Charlie's statements demonstrated that—despite Appellant's constitutional right not to testify in his own defense—LCDR Charlie would consider Appellant's decision not to do so during LCDR Charlie's deliberations. LCDR Charlie repeatedly expressed his desire to hear Appellant's testimony and stated that Appellant's failure to put on a case would be "self-defeating." He also agreed that Appellant "should testify to prove his innocence," and that "it would help to see some other sort of evidence or witness to corroborate his innocence." Even when LCDR Charlie agreed that he would not hold

Appellant's refusal to testify against him, he still stated that it would "come to mind that he didn't."

2. LCDR Mike

Appellant challenged LCDR Mike on the grounds that her statements about consent and victim credibility demonstrated her actual and implied bias. With respect to consent, Appellant argued that LCDR Mike's answers suggested that she would not follow the law because she expressed the view that consent for a sexual encounter must be clear and unequivocal. LCDR Mike further stated that she could not imagine a sexual encounter where one party honestly believed there was consent, but the other party did not consent. With respect to victim credibility, Appellant argued that LCDR Mike's statements suggested that she would be biased in favor of the prosecution. LCDR Mike stated that "we should err on the side of believing rather than on the side of disbelieving" alleged sexual assault victims, and that as a panel member she should "believe over disbelie[ve]" someone who makes a claim of sexual assault. Appellant further noted that when given the chance to respond to Appellant's challenge of LCDR Mike, the Government offered "no argument" in opposition.

3. LT Sierra

Appellant challenged LT Sierra for actual and implied bias based on his wife's experience as a victim of sexual assault and LT Sierra's negative views about sexual assault. LT Sierra testified that his wife was raped ten to fifteen years prior by a drunk ex-boyfriend in high school. The rape was never reported to law enforcement. Upon learning of the incident, LT Sierra "didn't necessarily do a deep dive into the details and things like that," but he did help his wife move through the traumatic event by providing emotional support. LT Sierra stated that he had always found sex crimes to be distasteful and cringeworthy, but learning of his wife's rape strengthened those feelings and made them "more personal."

II. Governing Law

" 'As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.' " *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). The President has operationalized this right through Rule for Courts-Martial (R.C.M.) 912(f)(1), which authorizes specific grounds for excusing panel members for cause. As relevant here, R.C.M. 912(f)(1)(N) provides that a servicemember "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." We have held that this language encompasses the two types of bias: actual and implied. *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003).

A. Actual Bias

Actual bias is known as "bias in fact." *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020) (internal quotation marks omitted) (citation omitted). "It is 'the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.' " *Id.* (quoting *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007)). The test for actual bias is whether a member's personal bias "will . . . yield to the military judge's instructions and the evidence presented at trial." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citing *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). An actual bias challenge is evaluated based on the totality of the circumstances. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)). "Because a challenge based on actual bias involves judgments regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great deference." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F.1996)). Accordingly, we review a military judge's

actual bias determinations for an abuse of discretion. *Hennis*, 79 M.J. at 384.

B. Implied Bias

Implied bias is " 'bias attributable in law to the prospective juror regardless of actual partiality.' " *Id*. at 385 (quoting *United States v. Wood*, 299 U.S. 123, 134 (1936)). The test for implied bias is "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Woods*, 74 M.J. 238, 243-44 (C.A.A.F. 2015) (internal quotation marks omitted) (citation omitted). In asking that question, courts consider "the totality of the circumstances, and assume the public [is] familiar with the unique structure of the military justice system." *Id*. at 244. Because the test for implied bias is an objective one that is only partially based on the military judge's credibility determinations and findings of fact, military appellate courts "review implied bias challenges pursuant to a standard that is 'less deferential than abuse of discretion, but more deferential than de novo review.' " *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015) (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)).

C. The Liberal Grant Mandate

Military judges must err on the side of granting defense challenges for cause.[4] *Clay*, 64 M.J. at 277. This "liberal grant mandate" recognizes that "the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings," and is intended to address "certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils that are not encountered elsewhere." *Peters*, 74 M.J. at 34 (alteration in original omitted) (internal quotation marks omitted) (citations omitted). This Court has held that,

[4] This Court has found "no basis for application" of the liberal grant mandate to the Government's challenges for cause. *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).

under the liberal grant mandate, if the military judge finds an implied bias challenge to be a close question, the challenge should be granted. *Id.*

III. Discussion

Appellant argues that the military judge erred by denying the actual and implied challenges against LCDR Charlie, LCDR Mike, and LT Sierra. We address each argument in turn.

A. Actual Bias

Considering the deferential standard of review, we need not linger long on Appellant's actual bias challenges. With respect to each challenged member, the military judge correctly cited the relevant actual bias law, made express findings of fact that were not clearly erroneous, recognized the liberal grant mandate, and placed his reasoning on the record. Considering the "great deference" due to military judges with respect to their actual bias determinations, *Clay*, 64 M.J. at 276, we hold that the military judge did not abuse his discretion when he denied Appellant's challenges for actual bias.

B. Implied Bias

Appellant also argues that the military judge erred in concluding that LCDR Charlie, LCDR Mike, and LT Sierra should not be excused based on their implied biases. Based on the specific facts presented in this case, we hold that LCDR Charlie and LCDR Mike presented a close case of implied bias and should have been excused under the liberal grant mandate.

1. Standard of Review

As stated above, we review a military judge's implied bias analysis under a standard of review "that is less deferential than abuse of discretion, but more deferential than de novo review." *Peters*, 74 M.J. at 33 (internal quotation marks omitted) (citations omitted). We acknowledge that this Court's implied bias case law has not been entirely clear about how appellate courts should apply this somewhat ambiguous standard. We have said that while "it is

not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference from appellate courts." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (citing *Clay*, 64 M.J. at 277). We have also said that when a military judge fails to conduct an implied bias analysis, the standard of review shifts toward de novo. *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016). Further complicating the issue is how the liberal grant mandate factors into this review.

We interpret our case law as dictating a sliding standard of appellate review for implied bias challenges that falls somewhere on a spectrum between de novo and abuse of discretion based on the specific facts of the case. A military judge who cites the correct law and explains his implied bias reasoning on the record will receive greater deference (closer to the abuse of discretion standard), while a military judge who fails to do so will receive less deference (closer to the de novo standard). Accordingly, the more reasoning military judges provide, the more deference they will receive. *Rogers*, 75 M.J. at 273.

Furthermore, we reaffirm the Court's statements about the applicability of the liberal grant mandate. In *Clay*, the Court held that "in close cases military judges are *enjoined* to liberally grant challenges for cause." 64 M.J. at 277 (emphasis added). Then, in *Peters*, we made clear that military judges are "*mandated* to err on the side of granting a challenge," and further explained that this means that "if after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." 74 M.J. at 34 (emphasis added). Based on this language, military judges retain their discretion to determine whether a challenge for cause constitutes a "close case" of bias. However, when a case is close, the

liberal grant mandate prohibits military judges from denying the challenge.[5]

Reviewing the record in this case, the military judge began his ruling on Appellant's challenges on strong ground. He both accurately recited the law of implied bias, and explicitly stated that he had applied the liberal grant mandate when analyzing Appellant's actual and implied bias challenges to each of the three members. This, however, was the extent of reasoning presented by the military judge with respect to the implied bias challenges. Although the military judge provided thorough explanations for his decision on Appellant's *actual* bias challenges, he provided no explanations for his denial of Appellant's *implied* bias challenges. As noted above, the tests for actual bias and implied bias are not the same. The military judge provided no "analysis as to why, given the specific factors in this case, the balance tipped in favor of denying the challenge." *Peters*, 74 M.J. at 35. Without the benefit of knowing "how, and with what nuance, the military judge applied the principles embodied in the implied bias doctrine," *Clay*, 64 M.J. at 278, our standard of review moves significantly closer to de novo. *See Rogers*, 75 M.J. at 273 ("As the military judge did not perform an implied bias analysis on the record, our review of her analysis will move more toward a de novo standard of review.").

[5] We recognize that some cases from this Court and our predecessor suggest a more limited application of the liberal grant mandate. *See, e.g.*, *United States v. Townsend*, 65 M.J. 460, 464 (C.A.A.F. 2008) (stating that a military judge's decision to apply the liberal grant mandate will only be overturned if he clearly abuses his discretion); *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993) (holding that although trial courts must grant challenges for cause liberally, appellate courts should only reverse a military judge's ruling on a challenge for cause for a clear abuse of discretion). We view those cases to be of little precedential value after the Court's recent decisions in *Peters* and *Clay*.

2. LCDR Charlie and LCDR Mike Present Close Cases of Implied Bias

Applying a less deferential standard of review, several factors lead us to conclude that the two challenged members presented a close case of implied bias. Although we expressly discuss only the most concerning issues raised by Appellant with respect to LCDR Charlie and LCDR Mike, the other issues presented by Appellant contribute to the totality of the circumstances we considered in determining that Appellant's implied bias challenges should have been granted under the liberal grant mandate.

First, LCDR Charlie appeared to enter the court-martial—prior to the presentation of any evidence—believing that the Government had already established some portion of its case against Appellant. LCDR Charlie stated that "a flimsy or easily proven[]false accusation would have been dropped by now," and that "the fact that you get through charges in a proceeding like this means that it is not a simple he said/she said . . . I feel like something had to have happened." LCDR Charlie also made concerning comments about Appellant's right to remain silent, noting that he would like to see Appellant testify to prove his innocence, and that he would think about a refusal to testify during panel deliberations. In addition to these statements, towards the end of the defense questioning and after reassuring the parties that he understood Appellant did not have to testify, LCDR Charlie still stated, "I would like to hear the Defense's side of the story." A reasonable member of the public might wonder how Appellant could receive a fair trial from LCDR Charlie, who appeared to be confused about Appellant's presumption of innocence and right to remain silent.

In response, the Government notes that LCDR Charlie also made other statements that are inconsistent with or at least mitigate these statements. This is true, but those conflicting statements do not convince us that it is not a close case whether LCDR Charlie "convincingly demonstrated a departure from" his initial view on the presumption of innocence and the right to remain silent. *Woods*, 74

M.J. at 244. The Government also points to Appellant's answers to boilerplate questions in the supplemental questionnaire as proof that LCDR Charlie understood the Government's burden of proof and that he followed all the military judge's instructions. But we cannot treat these generic responses as dispositively establishing that LCDR Charlie understood the law. *See Clay*, 64 M.J. at 278 (concluding that the military judge erred in denying the appellant's implied bias challenge even though the challenged member "stated any number of times that he presumed Appellant was innocent and would look at the evidence objectively"); *Rogers*, 75 M.J. at 274-75 (concluding that the military judge erred in denying the appellant's implied bias challenge even though the challenged member had stated that she would be able to follow the instructions given by the military judge and the law). As this Court has noted before, a potential panel member's predictable answers to leading questions are not enough to rebut the possibility of bias, especially when some of those questions lead to more problematic responses. *Nash*, 71 M.J. at 89.

Second, LCDR Mike's comments suggested that she did not believe that mistake of fact was a viable defense to a sexual assault charge. During voir dire, LCDR Mike agreed that a person "needs to essentially give sort of clear and unequivocal consent for sexual activity." When questioned further by trial counsel, LCDR Mike stated that she could not imagine a situation where "one person is not consenting but the other person honestly believes that they are consenting." Given the facts of this case, a reasonable member of the public might be concerned that Appellant—who asserted a mistake of fact defense—may not receive a fair trial from a member who repeatedly expressed doubt about the legitimacy of such a defense. This concern would only be exacerbated by the fact that the Government offered "no argument" in opposition to Appellant's challenge to LCDR Mike's participation on the panel.

In our view, LCDR Charlie's and LCDR Mike's statements—which suggested critical misunderstandings about Appellant's fundamental constitutional rights—establish

that it was at least a close case whether a reasonable member of the public would have significant questions about the fairness of Appellant's panel. *See Rogers*, 75 M.J. at 271 (holding that a member's "uncorrected misunderstanding of a relevant legal issue would cause an objective observer to have substantial doubt about the fairness of [the accused's] court-martial panel"). We acknowledge that what might appear as potential bias based on a "cold appellate record," might not have appeared so close when witnessed by the "military judge observing members in person and asking the critical questions that might fill any implied bias gaps left by counsel." *Clay*, 64 M.J. at 277. But here, the military judge never asked any clarifying questions or offered any corrections about these issues that might have filled the gaps left by trial and defense counsel. Without the benefit of the military judge's reasoning and applying a standard of review closer to de novo, we conclude that Appellant's challenges presented a close case of implied bias. Because military judges are required to apply the liberal grant mandate and excuse members in close cases, the military judge erred by failing to do so.

IV. Decision

The judgment of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The findings and sentence are set aside. The record is returned to the Judge Advocate General of the Navy. A rehearing is authorized.

Judge SPARKS, concurring in part and dissenting in part.

As an initial matter, I agree with the Court that the military judge did not err in denying the actual bias challenges. However, the Court has applied a standard of review for implied bias challenges that has long been unhelpful and is itself in need of review. Moreover, its application here has led the Court to conclude, erroneously in my view, that the military judge erred by denying the challenges at issue in this case.

I. Implied Bias Standard of Review

Traditionally, this Court's standard of review for a challenge for cause premised on implied bias is "less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (internal quotation marks omitted) (citation omitted). This is a vague and confusing standard found nowhere else in the law that does not provide the precision needed for proper appellate review. Because our implied bias standard of review is too vague to be workable, what has developed is a subjective "I know it when I see it" approach to implied bias review.

Further confusing matters, although a military judge is not obligated to place his or her implied bias analysis on the record, doing so "warrants increased deference from appellate courts." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017). Conversely, a military judge who fails to place sufficient reasoning on the record regarding his or her implied bias ruling is given less deference, and " 'the analysis logically moves more towards a de novo standard of review.' " *Id.* at 96 (quoting *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016)). This sliding scale standard of deference does not inform a military judge what he or she must put on the record to receive increased deference.

Here, the military judge stated that he considered the liberal grant mandate but then applied no additional analysis to his implied bias rulings. The majority's opinion holds that the military judge's implied bias rulings were not sufficiently detailed to receive increased deference. The majority appears to be discarding the widely held

presumption that the military judge knows the law and will apply it absent some indication in the record. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (holding that "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary").

We should admit that we are not affording any discretion to the military judge and review implied bias conclusions de novo. This makes sense as our Court has explained:

> Implied bias exists when most people in the same position as the court member would be prejudiced. To test whether there is substantial doubt about the fairness of the trial, we evaluate implied bias objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. This review is based on the "totality of the circumstances."

United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008) (internal quotation marks omitted) (citations omitted). An appellate court is in as good or better position than a military judge to determine how the public would view the appearance of the members' impartiality. A de novo standard of review would provide clarity and replace the confusing "more deference" versus "less deference" or "more than de novo but less than abuse of discretion" standards military appellate courts currently use.

I grudgingly accept that the Court is not yet prepared to accept my views on the implied bias standard of review, but even under the current framework, I find that these are not close cases, and a reasonable, objective, and fully informed member of the public would not have an adverse or unfavorable view of the military justice system regarding the challenged members in this case.

II. Application

a. Lieutenant Commander (LCDR) Charlie

Appellant argues that an informed member of the public "might well ask why the military judge retained LCDR [Charlie]" when he described his mother's attempted rape as " 'indelible' " in light of his strong belief that victims have had to fight against institutional apathy to receive

justice and his assumption that " 'something had to have happened' " for this case to be at trial. I disagree, as a fully informed member of the public would be aware that "the Court observed no particular emotional reaction to [LCDR Charlie's] recitation of having learned that his mother was kidnapped by someone somewhere in 1975." The military judge did not err in declining to find implied bias, given that the " 'indelible' " conversation with LCDR Charlie's mother was about an event five decades before, LCDR Charlie lacked emotion and details about the event, and given the lack of similarity between it and the charged offenses—sexual assaults of multiple women in their sleep. Further, a fully informed member of the public would understand that the military judge found that LCDR Charlie's statement that "something had to have happened" for the court-martial to take place was a literal answer and did not indicate he believed something illegal must have happened. Under these facts, LCDR Charlie's inclusion on the panel would not cause the public to perceive unfairness in the military justice system. Accordingly, the military judge did not err when he declined to excuse LCDR Charlie based on implied bias.

b. LCDR Mike

Appellant argues that LCDR Mike's inclusion on the panel was error because she displayed implied bias: (1) in favor of alleged victims; (2) by believing a person convicted of sexually assaulting multiple women should automatically receive a lengthy confinement sentence; and (3) by being predisposed to finding lack of consent. Here, the military judge did not err in rejecting an implied bias challenge. LCDR Mike shared a general sentiment about sex assault reporting, but her belief that during the "initial stages" of the investigative phase people "should err on the side of believing" a report and "should investigate"—had no relation to her understanding of the burden of proof at trial. Further, LCDR Mike stated she could set aside her views on lengthy confinement and be open to other sentences including no punishment. And she stated she did not feel compelled to vote for any sentence based on the charges. Taken in context, LCDR Mike's inclusion on the

panel would not cause the public to perceive unfairness in the military justice system.

In conclusion, these are not close cases of implied bias, and the military judge did not err when he declined to excuse the members.

Judge MAGGS, dissenting.

I would affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA). For the reasons explained by Judge Sparks in Part II of his separate opinion, the military judge did not err when he declined to excuse the challenged members for implied bias, and the NMCCA properly affirmed his decision. I therefore respectfully dissent.

I write separately to note that implied bias cases are difficult because our precedents require military judges to decide them using vague and questionable standards. To determine whether implied bias exists, a military judge must rely on nothing more than intuition to estimate "the risk that the public will perceive that the accused received something less than a court of fair, impartial members." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008). Judge Stucky aptly described this test as "ambiguous" and raised serious questions about whether it is inconsistent with the Rules for Courts-Martial (R.C.M.) and the doctrines governing implied bias in other federal courts. *United States v. Woods*, 74 M.J. 238, 245-46 (C.A.A.F. 2015) (Stucky, J., concurring in the result). In addition, when applying this hazy test for implied bias, a military judge must follow this Court's "liberal grant mandate." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). Under this mandate, "if after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." *Id.* Senior Judge Sullivan properly questioned the liberal grant mandate on grounds that it also lacks express support in the R.C.M. and that a "qualitative standard of liberality is nearly impossible to ensure." *United States v. Downing*, 56 M.J. 419, 424-25 (C.A.A.F. 2002) (Sullivan, S.J., concurring in the result). And when decisions on implied bias are appealed, precedent imposes an unusual standard of review that is described as being " 'less deferential than abuse of discretion, but more deferential than de novo review.' " *Peters*, 74 M.J. at 33 (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)). In his separate opinion in the present case, Judge Sparks

appropriately asks whether this Court has followed, and is even capable of following, this imprecise standard.

Given this situation, reconsideration of the test for implied bias, the liberal grant mandate, and the standard of review might benefit the military justice system. But until a party asks this Court to revisit our precedents—or until amendments to the Uniform Code of Military Justice or R.C.M. supersede them—we must simply do our best to apply their holdings. That is what the military judge and the NMCCA did in this case, and, in my view, their decisions were correct.

EXECUTIVE SUMMARY

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

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

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

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

Congress agreed that changes to the panel selection process were necessary, and in the National Defense Authorization Act (NDAA) for Fiscal Year 2023 it amended Article 25 to require random selection of panel members, to the maximum extent practicable, by December 2025, under regulations prescribed by the President.[2] However, Congress did not remove the requirement that convening authorities select those members they subjectively consider "best qualified" to perform the duty, using the selection criteria of age, education, training, experience, length of service, and judicial temperament.[3] The Committee believes that a true randomized selection process is incompatible with allowing the convening authority to select members on the basis of this subjective determination. To make random selection meaningful, the Committee

1 Independent Review Commission on Sexual Assault in the Military, Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military 33 (July 2021) [IRC Report], *available at* https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF; *id.* at Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System, Recommendation 1.7 d: Random Selection of Panel Members, at 54.

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

3 10 U.S.C. § 825 (2021) (Art. 25).

recommends that Congress take the additional step of eliminating from Article 25 the requirement that the convening authority select and detail those members they consider best qualified and, instead, require them to detail only those members identified through a randomized selection process.

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

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

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

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

RECOMMENDATIONS AND FINDINGS

Recommendation 53: Congress should amend Article 25(e) to remove the requirement for the convening authority to detail members who "in his opinion, are best qualified" based on "age, education, training, experience, length of service, and judicial temperament."

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

Finding 2: The Article 25(e) criteria and "best qualified" mandate result in courts-martial panels composed primarily of officers and senior enlisted Service members. There is no longer a military justification to support this composition. Seniority relative to the accused sufficiently accounts for the military's hierarchical rank structure.

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

Finding 3: Removal of the subjective "best qualified" criteria, along with implementation of a process to randomize member selection, will help eliminate the perception that the convening authority is selecting those members most likely to reach a certain result and thus will increase trust and confidence in the military justice system.

Finding 4: Randomizing the court-martial member selection process is not compatible with the Article 25(d) requirement for the convening authority to select members who are "best qualified" according to existing criteria.

Finding 5: Officers and enlisted members of all grades are qualified to serve on courts-martial panels.

Recommendation 55: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial, pursuant to the requirement in Article 25(e)(4), to provide for a randomized court-martial panel member selection process utilizing the Military Services' personnel and pay systems to select the members. This process should preclude the convening authority or other members of command or the judge advocate office from hand selecting members. In addition to the statutory qualification requirements, the randomized selection process should provide for diversity of members based on grade.

Finding 6: The Military Services have the capability to use their personnel and pay systems to generate a randomized pool of Service members for court-martial duty based on objective criteria. This technology will enable increased efficiency, fairness, and objectivity in the panel selection process.

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

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

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

Recommendation 57: Congress should amend Article 25 to explicitly give convening authorities the authority to determine whether randomly selected Service members are available prior to being detailed to a court-martial panel and retain the authority in Article 25 to exempt or excuse individuals for operational requirements or personal reasons after they have been detailed.

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

Recommendation 58: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial to provide a transparent method for convening authorities to document availability and excusal determinations.

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

Recommendation 59: Congress should retain the requirement in Article 25(e)(1) that when it can be avoided, no accused Service member may be tried by a court-martial in which any member is junior to the accused in rank or grade.

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

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

Finding 12: A minimum length of service requirement is supported by specific military purposes: to ensure that initial military training is completed and to give Service members a greater understanding of military culture.

Finding 13: A minimum length of service requirement of two years eliminates the need to require a minimum age for serving as a panel member.

Recommendation 61: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial to establish uniform criteria for automatic exemption from serving as a court-martial member. For example, federal courts require jury members to be proficient in English, have no disqualifying mental or physical condition, and not be subject to felony charges or be convicted of a felony. The amendment should delegate authority to each Military Department Secretary to promulgate regulations that establish additional bases for automatic exemption. To ensure maximum transparency, any additional exempting criteria established by the Military Departments should be made public through the Federal Register and by other appropriate means.

Finding 14: Federal courts require jury members to be proficient in English, have no disqualifying mental or physical condition, and not be subject to felony charges or be convicted of a felony. Department of Defense accession regulations ensure that all Service members are proficient in English and have no disqualifying mental or physical condition.

Recommendation 62: Congress should amend Article 25(e)(2) and (3) to remove the requirement that the convening authority detail panel members at the time the court-martial is convened. Instead, it should provide that the convening authority must detail panel members within a reasonable time prior to the swearing in of the detailed members and the assembly of the court-martial.

Finding 15: The requirement to detail members at the time a case is referred to court-martial often results in excusal and replacement of a significant number of the originally and subsequently detailed members, creates an administrative burden, and does not serve a military purpose, given the length of time from referral to empanelment and the low percentage of courts-martial in which the accused elects to be tried by members.

Finding 16: Providing the flexibility to detail members later in the process will enable the convening authority to determine more accurately the appropriate number of qualified members to detail to a specific court-martial.