



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

November 17, 2022

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

Dear Colonel Hernandez:

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

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

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

Sincerely,

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

Karla N. Smith, Chair

Enclosure

Topic #1: Preamble

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

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

DAC-IPAD Questions:

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

Topic #2: OSTC determination to “exercise authority”

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

DAC-IPAD Questions:

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

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

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

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

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

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

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

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

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

DAC-IPAD Comment:

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

DAC-IPAD Questions:

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

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

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

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

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

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

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

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

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

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

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

DAC-IPAD Comment and recommendation:

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

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

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

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

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

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

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

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

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

(d) Sex-related offenses.

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

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

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

DAC-IPAD Questions:

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

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

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

Topic #6: Preferral of charges by special trial counsel

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

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

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

DAC-IPAD Comment and recommendation:

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

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

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

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

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

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

(c) Disposition of preferred specifications.

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

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

(3) Deferral.

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

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

DAC-IPAD Comment and Questions:

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

DAC-IPAD Questions:

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

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

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

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

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

Topic #8: Randomization when selecting panel members

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DAC-IPAD Comment and Questions:

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

8a. What is the purpose of this recommendation?

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

Topic #9: Victim Impact Statements

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

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

DAC-IPAD Comments and Questions:

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

Questions:

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

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

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

Current and draft R.C.M. 1001:

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

DAC-IPAD Comments and Questions:

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

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

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

Topic #9: Victim Impact Statements (continued)

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

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

DAC-IPAD Question:

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

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

DAC-IPAD Comments and Question:

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

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

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

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

DAC-IPAD Comments and Questions:

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

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

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

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

Summary of DAC-IPAD Comments, Questions and Recommendations:

Topic #1: Preamble

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

Topic #2: OSTC determination to “exercise authority”

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

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

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

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

Topic #4: Reporting an offense

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

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

Topic #5: Initial disposition by OSTC

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

Topic #6: Preferral of charges by special trial counsel

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

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

Topic #7: Disposition of charges by special trial counsel

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

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

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

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

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

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

Topic #8: Randomization when selecting panel members

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

8a. What is the purpose of this recommendation?

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

Topic #9: Victim Impact Statements

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

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

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

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

Topic #9: Victim Impact Statements (continued)

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

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

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

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

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

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

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

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

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

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

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

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