

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



REPORT ON VICTIM IMPACT STATEMENTS
AT COURTS-MARTIAL PRESENTENCING
PROCEEDINGS

March 2023

Defense Advisory Committee

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



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March 2023



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

March 30, 2023

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

The Honorable Roger Wicker
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

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

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

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with the *Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings* prepared by the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces [DAC-IPAD]. This report provides the Committee's responses to the questions posed in the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 and five recommendations to the Joint Service Committee on Military Justice (JSC) to amend Rule for Courts-Martial (R.C.M.) 1001(c).

In the JES, Congress expressed concern that military judges are interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing and asked the DAC-IPAD to assess whether military judges are appropriately permitting victims to be heard at sentencing and appropriately permitting other witnesses to testify about the impact of the crime.


This stand-alone report details the Committee's work and conclusion that it is the R.C.M. 1001(c) standards, not the decisions of military judges, that inappropriately limit victim impact statements, and that military judges generally do permit individuals who have suffered harm resulting from the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

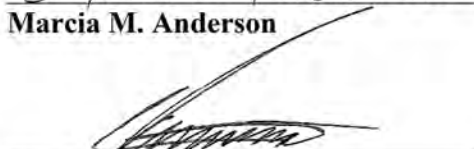
The report also details the Committee's five recommendations to amend R.C.M. 1001(c) to provide victims wider latitude in their impact statements. In making these recommendations, the Committee concluded that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. With military judges soon to be serving as the sentencing authority, there is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions.

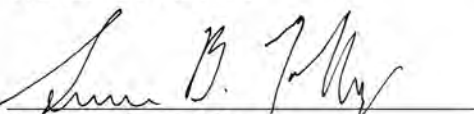
The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

Respectfully submitted,


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

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EXECUTIVE SUMMARY

In the Joint Explanatory Statement (JES) accompanying Section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), Congress expressed concern that military judges are interpreting Rule for Courts-Martial (R.C.M.) 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims. Congress requested the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) assess whether military judges are appropriately permitting victims to be heard at sentencing and whether military judges are appropriately permitting other witnesses to testify about the impact of the crime.

To respond to these questions, Committee members and staff reviewed records of trial from courts-martial cases tried in FY21 involving victim impact statements; spoke to Service victims' counsel program managers, Service trial defense chiefs, an attorney who represents victims in military and civilian court proceedings, former military judges, and members of Survivors United—a victim advocacy group that initially brought these issues to the attention of Congress; and reviewed federal and state laws and rules regarding victim impact statements.

The Committee noted that in the three years since Congress requested that the DAC-IPAD review this issue, the procedures for implementing victim impact statements have matured, the appellate courts further defined and clarified the rules governing these statements, and Congress enacted an important change to courts-martial sentencing that requires military judges to serve as the sentencing authority in all special and general courts-martial, except in capital cases.

At the conclusion of its review, the Committee determined that it is the R.C.M. 1001(c) standards, not the decisions of military judges, that inappropriately limit victim impact statements. The Committee further concluded that military judges generally do permit individuals who have suffered harm resulting from the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

The Committee makes five recommendations to amend R.C.M. 1001(c) to provide victims wider latitude in their impact statements. The Committee recommended amending the definition of victim impact to provide a broader standard; allowing the victim to make a specific sentence recommendation in noncapital cases; allowing submission of an unsworn victim impact statement by audiotape, videotape, or other electronic means; allowing the victims' counsel to deliver the victim impact statement without having to show good cause; and removing the requirement that the victim provide a proffer of their impact statement prior to delivery.

The Committee concluded that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. The Committee members determined that with military judges soon to be serving as the sentencing authority, there is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions.

SUMMARY OF RESPONSES TO CONGRESS AND RECOMMENDATIONS

Responses to the questions posed in the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) and recommendations to the Joint Service Committee on Military Justice (JSC) to amend Rule for Courts-Martial 1001(c):

JES Question 1: Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

DAC-IPAD Response: In the vast majority of cases, military judges do not limit a victim's right to be heard at sentencing. Of the 173 FY21 sexual offense courts-martial cases reviewed involving a victim impact statement, the military judge limited a victim's statement in 20 (12%) cases. In the 151 cases in which the military judge was the sentencing authority, the judge limited a victim impact statement in 13 (9%) cases. In those cases in which the judge took such action, they generally did so in accordance with R.C.M. 1001(c).

The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges. For example, some judges permit victims to address only their experience specific to the crime for which the accused was convicted and other judges allow a victim to address the impact of their interaction with the accused, which includes the crime and the surrounding circumstances.

The Committee has determined that this standard is too narrow and should be clarified. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001(c) should clarify the standard, incorporate aspects of civilian practice, and allow crime victims to more fully inform the courts about how the accused's crimes have impacted them.

JES Question 2: Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

DAC-IPAD response: Military judges generally do permit individuals who have suffered harm as a result of the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

Since Congress posed this question in the FY20 NDAA Joint Explanatory Statement almost three years ago, the Service appellate courts have adopted an expansive view of who may be considered a crime victim. In addition, the Committee's FY21 courts-martial case review revealed that military judges generally apply a broad definition of crime victim in determining who may provide a victim impact statement at presentencing proceedings.

Recommendations:

Recommendation 43: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words “or indirectly” to the definition of victim impact, amending the section as follows:

“For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly *or indirectly* relating to or arising from the offense of which the accused has been found guilty.”

Recommendation 44: The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases.

Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to allowing the statement orally, in writing, or both.

Recommendation 46: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the “upon good cause shown” clause to be consistent with the JSC’s proposed change to R.C.M. 1001(c)(5)(A).

Recommendation 47: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

I. INTRODUCTION AND BACKGROUND

A. Introduction

In the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), Congress requested that the DAC-IPAD study the issue of victim impact statements at sentencing. The relevant JES provision states:

[T]he conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.¹

In January 2021, the DAC-IPAD was suspended pending the Secretary of Defense's zero-based review. The reconstituted DAC-IPAD held its first meeting on April 21, 2022, and assigned the victim impact statement project to the Policy Subcommittee (PSC) at the June 21-22, 2022 public meeting.² The PSC reported its findings and recommendations to the DAC-IPAD at the December 7, 2022, public meeting, and the DAC-IPAD voted to adopt five of the six proposed recommendations.³

In December 2021, Congress enacted an important change to courts-martial sentencing in the FY22 NDAA that requires military judges to serve as the sentencing authority in all special and general courts-martial, with the exception of capital cases, effective for cases in which the charged offenses are committed after December 27, 2023.⁴

1 The JES accompanies Sec. 535. Extension of Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces of the National Defense Authorization Act for Fiscal Year 2020 [FY20 NDAA], Pub. L. No. 116-92.

2 *Transcript of DAC-IPAD Public Meeting* 157 (June 22, 2022) (all DAC-IPAD public meeting transcripts are available at <https://dacipad.whs.mil/>).

3 *See Transcript of DAC-IPAD Public Meeting* (Dec. 7, 2022).

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

B. Background

Congress enacted Article 6b of the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA).⁵ Article 6b codifies the rights of crime victims and incorporates many of the provisions of the federal Crime Victims' Rights Act.⁶ Among other rights, it provides a victim of an offense the right to be reasonably heard at a sentencing hearing relating to the offense.⁷ A provision in the FY15 NDAA specifies that when a victim of a sexual offense has the right to be heard, the victim may exercise that right through counsel, including a victims' counsel.⁸

The Article 6b right for a victim to be heard at sentencing was initially implemented through Rule for Courts-Martial (R.C.M.) 1001A, effective June 17, 2015, which was subsequently incorporated into R.C.M. 1001(c).⁹ Prior to Article 6b, there was no independent right of a victim in a military court-martial to provide a victim impact statement.

5 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [FY14 NDAA], § 1701, as amended in the National Defense Authorization Act for Fiscal Year 2015 [FY15 NDAA], § 531(f).

6 18 U.S.C. § 3771.

7 10 U.S.C. § 806b (2021) (Art. 6b, UCMJ).

8 FY 15 NDAA § 534(c); Special victims' counsel is the designation used by the Army and Air Force, while victims' legal counsel is the designation used by the Navy, Marine Corps, and Coast Guard.

9 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) [2019 MCM], Rule for Courts-Martial [R.C.M.] 1001(c).

II. LEGAL FRAMEWORK OF VICTIM IMPACT STATEMENTS

A. Rule for Courts-Martial 1001(c)

R.C.M. 1001(c) provides the parameters for victim impact statements and lists specific limitations. Victim impact statements “may only include victim impact and matters in mitigation.”¹⁰ The discussion to R.C.M. 1001(c) states that a military judge may reasonably limit the form of the statement if there are numerous victims.¹¹ A crime victim’s right to be heard is independent of whether the victim testifies during findings or sentencing. In non-capital cases, the victim may make a sworn or unsworn statement, or both, and the statement may be oral, in writing, or both.¹²

The rule defines a crime victim as “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual’s lawful representative or designee appointed by the military judge under these rules.”¹³ Victim impact is defined as including “any financial, social, psychological, or medical impact on the crime victim *directly relating to or arising from the offense of which the accused has been found guilty*”¹⁴ (emphasis added).

If the victim makes an unsworn statement, the victim may not be cross-examined; however, the prosecution or defense may rebut any statements of fact.¹⁵ A military judge may permit the victim’s counsel to deliver an unsworn victim impact statement “upon good cause shown.”¹⁶

The discussion to R.C.M. 1001(c)(5) further states:

A victim’s statement should not exceed what is permitted under R.C.M. 1001(c)(3). A crime victim may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3). Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).¹⁷

B. Uses of and Limitations on Victim Impact Statements

1. Use of Unsworn Statements

In *United States v. Tyler*, the Court of Appeals for the Armed Forces (CAAF) clarified that victim impact statements not made under oath (unsworn statements) are not evidence and thus are not subject to the Military Rules of Evidence.¹⁸ CAAF held that “either party may comment on properly admitted unsworn victim statements” in presentencing argument.¹⁹ The Court further stated, however, that the military judge has an obligation to ensure that the contents of a victim impact statement comports with the definition of victim impact in R.C.M. 1001(c).²⁰

10 2019 MCM, R.C.M. 1001(c)(3).

11 2019 MCM, R.C.M. 1001(c)(1) discussion.

12 2019 MCM, R.C.M. 1001(c)(2)(D)(ii). The victim is limited to a sworn statement in capital cases.

13 2019 MCM, R.C.M. 1001(c)(2)(A). This definition comes from Article 6b, UCMJ.

14 2019 MCM, R.C.M. 1001(c)(2)(B).

15 2019 MCM, R.C.M. 1001(c)(5)(A).

16 2019 MCM, R.C.M. 1001(c)(5)(B).

17 2019 MCM, R.C.M. 1001(c)(5) discussion.

18 *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021).

19 *Id.*

20 *Id.*

For a court-martial with a panel of members as sentencing authority, the military judge provides the following standardized instruction regarding unsworn statements, including victim impact statements:

The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.²¹

2. Definition of a Crime Victim

While not addressed by R.C.M. 1001(c) or the United States Court of Appeals for the Armed Forces (CAAF), the Military Department Courts of Criminal Appeals have held that a person does not need to be a named victim on the charge sheet or a named victim's designee under Article 6b to be considered a crime victim for purposes of R.C.M. 1001(c).²² The individual must have suffered the requisite direct physical, emotional, or pecuniary harm and the court must not just look at the type of offense of which the accused was convicted but must further determine "whether that offense is the source of the harm discussed by the victim."²³

3. Scope of Victim Impact Statements

R.C.M. 1001(c) provides that victim impact must directly relate to or arise from an offense of which the accused has been found guilty.²⁴

In *United States v. Hamilton*, CAAF cautioned military judges, particularly in cases with panel members as the sentencing authority, to "be mindful of information that is not attributable to the offenses for which an accused is being sentenced."²⁵ The Military Departments' Courts of Criminal Appeals have further held that the scope of victim impact must relate to or arise from the offenses for which the accused has been convicted.²⁶

21 *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 90 (Feb. 29, 2020).

22 *United States v. Miller*, NMCCA No. 201900234 (f rev) (N-M. Ct. Crim. App. 2022) citing *United States v. Hamilton*, 78 M.J. 335 (C.A.A.F. 2019) which found that the mother of a child pornography victim was a crime victim for purposes of R.C.M. 1001A in light of the crimes committed against her daughter and "the resulting financial and psychological hardships suffered by the family." In *United States v. Miller*, NMCCA held that the mother of a soldier who had died as a result of a drug overdose could properly be considered a victim and provide a victim impact statement, though the accused had not been convicted of an offense relating to the soldier's death, but had provided the soldier the needle he used to administer the fatal overdose. See also *United States v. Dunlap*, No. ACM 39567, 2020 CCA LEXIS 148 (A.F. Ct. Crim. App. May 4, 2020) holding that the spouse of the accused who had been convicted of adultery could properly be considered a victim under Article 6b, UCMJ, and provide a victim impact statement.

23 *In re A.J.W.*, 80 M.J. 737 (N-M. Ct. Crim. App. 2021).

24 2019 MCM, R.C.M. 1001(c)(2)(B).

25 *United States v. Hamilton*, 78 M.J. 335, 340 n. 6 (C.A.A.F. 2019).

26 In determining the scope of proper victim impact, "the victim is not necessarily bound by the facts the accused admitted to during providency or in the stipulation of fact." However, victim impact statements are not unfettered and must be within the scope of "victim impact" as defined under R.C.M. 1001(c). *In re A.J.W.*, 80 M.J. 737, 743 (N-M. Ct. Crim. App. 2021); *United States v. Hamilton*, 77 M.J. 579, 585-86 (A. F. Ct. Crim. App. 2017), *aff'd*, 78 M.J. 335 (C.A.A.F. 2019); The right to be reasonably heard does not "transform the sentencing hearing into an open forum to express statements that are not otherwise permissible under R.C.M. 1001." *United States v. Roblero*, 2017 CCA LEXIS 168 at *18 (A.F. Ct. Crim. App. Feb. 17, 2017) (unpublished); *United States v. DaSilva*, 2020 CCA LEXIS 213 (A.F. Ct. Crim. App. June 25, 2020) (unpublished). A victim impact statement that was "well-focused on [the victim's] own general lack of trust in others as a result of appellant's maltreatment" was not outside the scope of victim impact though the accused was acquitted of the sexual assault specifications involving the victim. *United States v. Stanley*, 2020 CCA LEXIS 264, 269 (A.C.C.A. 2020). A statement that shows a victim's "state of mind...upon learning of the offense that Appellant committed" did not qualify as victim impact, as it "did not include direct 'financial, social, psychological, or medical impact' that [the victim] suffered and was therefore improper for consideration...." *United States v. McInnis*, 2020 CCA LEXIS 194 (A.F.C.C.A. 2020).

In addition, if the victim impact statement can be interpreted more broadly than the rules allow, the judge must either limit the statement or instruct the members on how the statement should be interpreted to ensure that the accused is not sentenced for a crime for which they were not found guilty.²⁷

4. Sentence Recommendation

R.C.M. 1001(c)(3) provides that a victim impact statement may not include a recommendation for a specific sentence.²⁸

5. Form of the Victim Impact Statement

In *United States v. Edwards*, CAAF found that R.C.M. 1001 requires that unsworn statements be either oral, written, or both, and “a video including acoustic music and pictures is neither oral nor written and thus violates the rule.”²⁹ CAAF did not address the question of whether a pre-recorded video of the victim providing an unsworn victim impact statement would violate R.C.M. 1001(c), though the lower court found that this would be permissible under the rule.³⁰ Further, because the trial counsel produced the video, it should not have been admissible at sentencing. CAAF clarified that “the right to make an unsworn statement solely belongs to the victim or the victim’s designee and cannot be transferred to trial counsel.”³¹

27 *In re A.J.W.* at 744.

28 2019 MCM, R.C.M. 1001(c)(3). The NMCCA held that it was error for a military judge to allow a victim to state the accused “needs a significant amount of jail time” in her impact statement as it constituted a recommendation for a specific sentence. *United States v. Mellette*, 81 M.J. 681, 700 (N-M. Ct. Crim. App. 2021), *rev’d on other grounds*, *United States v. Mellette*, 2022 CAAF LEXIS 544 (C.A.A.F. 2022).

29 See *United States v. Edwards*, 82 M.J. 239, 241 (C.A.A.F. 2021).

30 *Id.* at 241; *United States v. Edwards*, 2021 CCA LEXIS 106, 2021 WL 923079 (A.F.C.C.A., Mar. 10, 2021).

31 *Id.* at 241, citing *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019); *United States v. Barker*, 77 M.J. 377, 378 (C.A.A.F. 2018).

III. FY 2021 COURTS-MARTIAL CASE REVIEW

A. *Introduction and Methodology*

To help analyze whether military judges are interpreting R.C.M. 1001(c) too narrowly, the Committee reviewed courts-martial documents for cases resulting in a guilty verdict in FY21 for one of the following offenses:

- Article 120: rape, sexual assault, aggravated sexual contact, abusive sexual contact, or attempts to commit one of these offenses
- Article 120b: rape, sexual assault, or sexual abuse of a child under 16, or attempts to commit one of these offenses [not including cases with attempted conduct without any real child involved—e.g., sting operations undertaken by law enforcement]
- Article 120c: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure; or attempts to commit one of these offenses
- Article 93: sexual harassment offenses³²
- Article 93a: abuse of training leadership position or recruiter position involving sexual activity with a trainee or recruit
- Article 117a: wrongful broadcast or distribution of intimate visual images
- Article 128: assault, but only in cases with a referred related specification of an Article 120, 120b, or 120c offense and either the accused was found not guilty of the Article 120, 120b, or 120c offense or this Article 120, 120b, or 120c offense was dismissed as part of a pretrial agreement

For cases with one or more victims providing a victim impact statement under R.C.M. 1001(c) during presentencing, the staff collected the following data: whether the sentencing authority was a military judge or panel of members, whether the military judge limited the victim impact statement in some way, and whether the victim, victims' counsel, or someone else delivered the victim impact statement, if it was read aloud.

For cases in which the military judge limited the victim impact statement in some way, the DAC-IPAD reviewed relevant portions of the record of trial to determine whether in that action the military judges in these cases acted in accordance with R.C.M. 1001(c).

Only two cases involved a sworn victim impact statement; all others were unsworn.

The following tables present data from the FY21 review of victim impact statements.

³² Sexual harassment has traditionally been charged under Article 93, Cruelty and Maltreatment. In the FY22 NDAA, Congress directed the President to proscribe regulations establishing sexual harassment as an offense punishable under Article 134 of the UCMJ. FY22 NDAA, Pub. L. No. 117-81, §539D 135 Stat. 1541 (2021).

B. FY 2021 Courts-Martial Data

1. Cases with a victim impact statement (VIS). Victims provided impact statements in almost three quarters of the FY21 cases involving a conviction of one of the previously listed offenses. In another 30 cases (12%), a victim testified under oath in the government's sentencing case.

Service	VIS	No VIS
Army (N=140)	96 (69%)	44 (31%)
Navy (N=27)	18 (67%)	9 (33%)
Marine Corps (N=19)	15 (79%)	4 (21%)
Air Force (N=51)	40 (78%)	11 (22%)
Coast Guard (N=4)	4 (100%)	0 (0%)
Total (N=241)	173 (72%)	68 (28%) ^a

^a In 30 cases, one or more victims provided sworn testimony in the government's sentencing case pursuant to R.C.M. 1001(b)(4).

2. Form and delivery of victim impact statements. The majority of victim impact statements were provided orally or both orally and in writing. Of those impact statements provided orally, the majority were delivered by the victim, with smaller percentages delivered by the victims' counsel or another representative.

Service	Written	Oral or Both	Delivered By		
			Victim	VC	Other
Army (N=96)	5 (5%)	91 (95%)	74 (81%)	13 (14%)	4 (4%)
Navy (N=18)	4 (22%)	14 (78%)	12 (86%)	1 (7%)	1 (7%)
Marine Corps (N=15)	2 (13%)	13 (87%)	11 (85%)	2 (15%)	0
Air Force (N=40)	8 (20%)	32 (80%)	30 (94%)	2 (6%)	0
Coast Guard (N=4)	1 (25%)	3 (75%)	2 (67%)	1 (33%)	0
Total (N=173)	20 (12%)	153 (88%)	129 (84%)	19 (12%)	5 (3%)

3. Sentencing forum. In the vast majority of cases reviewed, a military judge was the sentencing authority. As already mentioned, military judges will be the sentencing authority in all non-capital cases in which the offenses occurred on or after December 27, 2023.

Service	Judge Alone	Members
Army (N=96)	91 (95%)	5 (5%)
Navy (N=18)	14 (78%)	4 (22%)
Marine Corps (N=15)	13 (87%)	2 (13%)
Air Force (N=40)	31 (78%)	9 (22%)
Coast Guard (N=4)	2 (50%)	2 (50%)
Total (N=173)	151 (87%)	22 (13%)

4. Cases in which a military judge limited a victim impact statement. Military judges allowed victims to provide their victim impact statements uninterrupted in the vast majority of cases. Military judges were more likely to limit victim impact statements in cases with members as the sentencing authority.

Service	Judge Alone	VIS Limited	Members	VIS Limited
Army (N=96)	91	8 (9%)	5	0 (0%)
Navy (N=18)	14	1 (7%)	4	4 (100%)
Marine Corps (N=15)	13	1 (8%)	2	0 (0%)
Air Force (N=40)	31	3 (10%)	9	3 (33%)
Coast Guard (N=4)	2	0 (0%)	2	0 (0%)
Total (N=173)	151	13 (9%)	22	7 (32%)

C. Reviewer Comments

In 138 of the 151 cases (91%) with a military judge as sentencing authority, the military judge placed no limits on the victim impact statements.

- In most cases, the military judge did not ask if there were objections to the statements.
- In 27 cases, the defense objected and the military judge either overruled the objection or sustained the objection but allowed the victim to read the full statement, stating that they would consider only those portions allowed by the rule.
- In several cases, the record of trial indicated that victims' counsel or trial counsel worked with the victim to limit the statement before it was delivered to avoid a defense objection.

In 13 judge-alone sentencing cases, the military judge limited a victim impact statement.

- In 12 of the 13 cases, the military judge limited the statement because the military judge determined that it was outside the scope of victim impact. An example of this is a case in which the victim discussed her difficulty finding a job after leaving the military and her resulting financial problems in her victim impact statement. The military judge ruled that this information was outside the scope of victim impact.
- In four of the 13 cases, the military judge limited the statement because the military judge determined that it recommended a specific sentence. Some military judges seemed to interpret the restriction on victims from recommending a "specific" sentence as precluding any reference to sentencing. In one case, the victim's impact statement consisted only of one sentence stating he hoped the accused went to jail "for a very long time." The military judge in that case would not allow the victim impact statement on the view that it impermissibly recommended a sentence.
- In most cases, the military judge ruled in accordance with R.C.M. 1001(c), but some military judges applied the standard for victim impact more narrowly than others.

Conclusion: This data, coupled with the records of trial, indicate that it is the standards in R.C.M. 1001(c) rather than the decisions of military judges that inappropriately limit VIS.

IV. STAKEHOLDER INPUT REGARDING VICTIM IMPACT STATEMENTS

A. *Survivors United*

At the February 14, 2020, DAC-IPAD public meeting,³³ Ms. Jennifer Elmore, a representative from Survivors United—a nonprofit organization dedicated to assisting survivors in military sexual assault cases—provided a public comment regarding victim impact statements at sentencing. She told the Committee that restrictions placed on victim impact statements “severely limit” what a crime victim is allowed to say,³⁴ listing the following examples: victim impact statements are “redlined” prior to delivery; military judges cut off victims during the delivery of their statements; and victims are not permitted to state their preference for a sentence.³⁵

Survivors United members had earlier spoken to legislators about these restrictions, and their accounts were the impetus for the victim impact provision in the FY20 NDAA JES.³⁶

At the December 6, 2022, DAC-IPAD public meeting, Dr. Breck Perry and Ms. Adrian Perry—founding members of Survivors United—together with Mr. Ryan Guilds, an attorney who has represented victims in military and civilian trials, provided information to the Committee regarding victim impact statements.³⁷ The Perrys recounted that during the trial of the officer accused of sexually abusing their young daughters, the military judge allowed only one parent to provide a victim impact statement, a limitation that caused them a great deal of pain.³⁸ Dr. Perry, who ultimately provided the statement, asserted that the military judge interrupted him on several occasions while he was delivering the statement to stop him from making certain statements, struck out some passages, told him to revise it; and later prevented him from delivering the remainder of his statement.³⁹ Dr. Perry also noted that the military judge told him he could not face the accused while delivering his statement, but instead had to face the jury.⁴⁰

Ms. Perry strongly objected to limitations being placed on victim impact statements and stated it was “insulting for a victim to have that moment tarnished after everything that they have endured and the silence that they’ve had to face for so long throughout the duration of the investigation and the criminal proceedings leading up to sentencing.”⁴¹ As a positive example of how victim impact statements should be incorporated into trials, she pointed to the USA Olympics gymnastics sexual abuse case, in which the judge allowed all of the victims to speak freely to the court in describing the impact of the defendant’s crimes on them.⁴²

33 This meeting was held prior to the reconstitution of the DAC-IPAD. See *supra* note 2.

34 *Transcript of DAC-IPAD Public Meeting* 291 (Feb. 14, 2020) (all DAC-IPAD public meeting transcripts are available at <https://dacipad.whs.mil/>).

35 *Id.*

36 See *supra* note 1.

37 See generally *Transcript of DAC-IPAD Public Meeting* (Dec. 6, 2022).

38 *Id.* at 104, 108 (testimony of Ms. Adrian Perry) (the referenced trial took place September 2017).

39 *Id.* at 112 (testimony of Dr. Breck Perry).

40 *Id.* at 111-112.

41 *Id.* at 107 (testimony of Ms. Adrian Perry).

42 *Id.*

Mr. Guilds stated that he believes the appellate courts have since adopted a broader interpretation of who may be considered a victim; in his view, parents or others in the Perrys' position would now be allowed to provide victim impact statements.⁴³ Some of victims he has represented felt limited in their ability to speak directly to the accused during their impact statement; unable to request an appropriate sentence; forbidden to express too much emotion; and blocked from describing the impact on them in detail "in ways that don't fit the defense narrative."⁴⁴ He noted that often these limitations are self-imposed by well-meaning victims' counsel or prosecutors to prevent the victim from being interrupted by defense objection.⁴⁵

Mr. Guilds also expressed concern about the practice of military judges in "whittling down" victim impact statements in court.⁴⁶ He provided the example of an accused who pleads guilty to a physical assault rather than a sexual assault as part of a plea agreement and a victim who wishes to describe what she experienced—a sexual assault—and its impact, but cannot do so because the accused pled guilty only to the physical assault and under the rule the sexual assault is outside the scope of victim impact.⁴⁷ Mr. Guilds stated that these limitations "undermine the value and power of the victim impact statement and serve to reinforce the survivor sense of powerlessness, and they are not necessary to protect the accused[']s rights."⁴⁸

Finally, Mr. Guilds commented that victims should be allowed to discuss the effects of the investigation, pretrial, and trial processes, topics currently not within the scope of victim impact under R.C.M. 1001(c).⁴⁹ In his view, there should be a presumption that unless a constitutional right is at stake, a victim should be allowed to say what they want in their impact statement.⁵⁰

B. Victims' Counsel

At the December 6, 2022, DAC-IPAD public meeting, a panel of Service victims' counsel program managers presented information and answered questions regarding victim impact statements. The panel informed the Committee they supported changes that would broaden the scope of R.C.M. 1001(c) to allow crime victims to speak more fully about the impact of the crime and to recommend a specific sentence for the accused.⁵¹ Some program managers agreed that the transition to judge-alone sentencing will likely result in fewer limitations on victim impact statements.

One program manager pointed out the irony that in the process of reviewing an impact statement, hearing argument over its contents, and ordering redaction of some portion of it, the military judge has reviewed the statement in full in order to rule on the defense objections, but the victim is not allowed to speak the redacted words.⁵² He noted the presumption that military judges will apply the law and ignore those portions of the statement that are not permitted under the rules.⁵³

43 *Id.* at 130-131 (testimony of Mr. Ryan Guilds).

44 *Id.* at 100.

45 *Id.*

46 *Id.*

47 *Id.* at 121.

48 *Id.* at 101.

49 *Id.* at 122.

50 *Id.* at 140-141

51 *Id.* at 175-177 (testimony of COL Carol Brewer, Chief, Special Victims' Counsel Program, U.S. Army); 177-178 (testimony of LtCol Iain Pedden, Chief, Victims' Legal Counsel Program, U.S. Marine Corps).

52 *Id.* at 178-179 (testimony of LtCol Pedden).

53 *Id.*

The victims' counsel program managers provided follow up responses confirming that they assist their clients with editing their impact statements to ensure they comply with R.C.M. 1001(c) and to avoid objections from defense counsel and interruptions from the military judge.⁵⁴ All agreed that it was ultimately the victim's choice what to include in the impact statement, but it is the victims' counsel's role to ensure it is an informed choice.⁵⁵ In addition, most of the program managers indicated that, with the victim's permission and when it makes sense, they discuss potentially objectionable material in the victim impact statement with trial and defense counsel in order to prepare their clients. In some cases this may result in the victim editing objectionable material from the statement, but in other cases the victim and victims' counsel choose to keep the material in the statement and allow counsel to argue for its inclusion.⁵⁶

C. Military Judges

At the February 14, 2020, DAC-IPAD public meeting, a panel of several former military judges provided information to the Committee regarding their experiences with victim impact statements, as well as other topics.⁵⁷ In general, the former judges stated that they limited a victim's impact statement when it contained information they previously ruled inadmissible,⁵⁸ as well as when the statement recommended a particular sentence for the accused.⁵⁹ One former judge stated that he did not recall ever limiting a victim impact statement and two judges commented that victims' counsel did a good job helping to prepare the statement and modifying it so that it would comply with the rules.⁶⁰ Overall, the panel believed victims were allowed broad latitude in what they could say in their impact statements.⁶¹

A panel of former military judges also spoke at the February 22, 2023 DAC-IPAD public meeting and provided information on victim impact statements.⁶² All of the former judges agreed that with judge-alone sentencing, there is no reason that victims should not have the ability to speak freely during their impact statements, though one judge cautioned that the victim's impact statement should relate only to the crimes for which the accused was convicted.⁶³ The military judges agreed that there is little to no risk of prejudice as the military judge can easily set aside information contained in the statement that is potentially unduly prejudicial to the accused and decide the sentence based only on admissible information.⁶⁴ One judge suggested that with judge-alone sentencing, there may no longer be a need to apply the rules of evidence in sentencing proceedings.⁶⁵ One judge also commented that with the forthcoming sentencing parameters, there is even less of a concern that a victim impact statement would affect the sentence.⁶⁶

⁵⁴ See Service Victims' Counsel Responses to DAC-IPAD Follow Up Questions (Jan. 31, 2023).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Transcript of DAC-IPAD Public Meeting* 142-149 (Feb. 14, 2020).

⁵⁸ *Id.* at 145, 149.

⁵⁹ *Id.* at 147, 148.

⁶⁰ *Id.* at 147.

⁶¹ *Id.* at 147-148.

⁶² See *Transcript of DAC-IPAD Public Meeting* (Feb. 22, 2023).

⁶³ *Id.* at 162 (testimony of LtCol (ret.) Michael Libretto, U.S. Marine Corps).

⁶⁴ *Id.*

⁶⁵ *Id.* at 123-24 (testimony of LTC (ret.) Stefan Wolfe, U.S. Army).

⁶⁶ *Id.* at 124-25 (testimony of Cmdr (ret.) Will Wieland, U.S. Navy).

D. Military Defense Counsel

At the February 21, 2023 DAC-IPAD public meeting, the Committee asked the Services' trial defense organization chiefs to comment on the DAC-IPAD's recommendations regarding victim impact statements.⁶⁷ The defense representatives expressed that they have fewer concerns about what victims say in their impact statements with military judges serving as the sentencing authority than with panel sentencing.⁶⁸ However, several defense representatives were concerned about the recommendation that would allow victims to recommend a specific sentence because, in their view, victims are biased and typically do not fully understand the principles of sentencing and what would be an appropriate sentence in a particular case.⁶⁹ Several representatives expressed confidence in the ability of military judges to consider only the information permissible under the rules and to disregard information that is not permissible.⁷⁰ However, several representatives stressed the need for clear guidance on the process for objecting to information contained in the impact statement if defense counsel do not have an opportunity to review and object prior to its presentation.⁷¹

⁶⁷ See *Transcript of DAC-IPAD Public Meeting* (Feb. 21, 2023).

⁶⁸ *Id.* at 102 (testimony of COL Sean McGarry, Chief, Trial Defense Service, U.S. Army); 109 (testimony of Col Brett Landry, Chief, Trial Defense Division, U.S. Air Force).

⁶⁹ *Id.* at 102 (testimony of COL McGarry); 102-03 (testimony of Capt Mark Holley, Director, Defense Service Office Operations, U.S. Navy); 109 (testimony of Col Landry).

⁷⁰ *Id.* at 109 (testimony of Col Landry).

⁷¹ *Id.* at 103 (testimony of Capt Holley); 105 (testimony of Col Valerie Danyluk, Chief Defense Counsel of the Marine Corps, U.S. Marine Corps); 110 (testimony of LCDR Jennifer Saviano, Chief of Defense Services, U.S. Coast Guard).

V. FEDERAL AND SELECT STATE LAW REGARDING VICTIM IMPACT STATEMENTS

The Committee compared federal and state law pertaining to victim impact statements with R.C.M. 1001(c). The most salient points included the following:

- Most civilian jurisdictions limit victim impact to financial, physical, psychological, or emotional harm to the victim related to the crimes of which the accused is convicted, but they do not explicitly require that it be “directly” related.
- Many states explicitly allow the victim to discuss a sentence or disposition.
- Some states require the victim impact statement to be sworn or only in writing. However, six states allow the victim to make a victim impact statement through audio or video recording or other digital media: Arizona, California, Georgia, Indiana, Iowa, and Utah.
- Fifteen states explicitly allow the victim impact statement to include the impact on the victim’s family members: Alabama, Arizona, California, Delaware, Florida, Georgia, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas. Some other states allow such statements as a matter of practice, even though their rules do not specify this scope.

Several DAC-IPAD members relayed their experiences with victim impact statements in their jurisdictions with the consensus that federal and state jurisdictions allow victims much broader latitude in their statements than the military.⁷² One member noted that civilian jurisdictions have largely discontinued the practice of “redlining” or restricting victim impact statements,⁷³ stating that the victim impact statement is recognized as the victim’s right of allocution similar to the defendant’s right of allocution.⁷⁴ Two members observed that many civilian jurisdictions allow the victim to speak to or recommend a sentence for the defendant.⁷⁵

72 *Transcript of DAC-IPAD Public Meeting 78* (Dec. 7, 2022) (comment of Hon. Reggie Walton, U.S. District Judge, District of Columbia; DAC-IPAD member) (“I’ve never seen [these limitations] in a federal court proceeding.”); 79-80 (comment of Hon. Paul Grimm, U.S. District Judge, District of Maryland; DAC-IPAD member); 81-82 (comment of Hon. Karla Smith, Circuit Court Judge, Montgomery County, MD; DAC-IPAD Chair); *Transcript of DAC-IPAD Public Meeting 119* (Dec. 6, 2022) (comment of Ms. Martha Bashford, former Chief, New York County District Attorney’s Office Sex Crimes Unit; DAC-IPAD member).

73 *Transcript of DAC-IPAD Public Meeting 75* (Dec. 7, 2022) (comments of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute; DAC-IPAD member).

74 *Id.* at 74-75.

75 *Id.* at 124-125 (comment of Hon. Reggie Walton); 127 (comments of Ms. Meg Garvin).

VI. JOINT SERVICE COMMITTEE PROPOSED CHANGES TO R.C.M. 1001(C)

On October 19, 2022, the Joint Service Committee on Military Justice (JSC) of the Department of Defense released for public comment its draft executive order with numerous proposed changes to the Manual for Courts-Martial (MCM).⁷⁶ This draft included the following proposed changes to R.C.M. 1001(c) regarding victim impact statements:

1. R.C.M. 1001(c)(2)(D)(ii) would explicitly give the victim the right to be heard concerning any objections to the victim's unsworn statement;
2. the provision in R.C.M. 1001(c)(3) restricting a victim from making a recommendation for a specific sentence would be removed (except for capital cases);
3. R.C.M. 1001(c)(5)(A) would allow an unsworn victim impact statement to be made by the victim, the victim's counsel, or both, without a requirement to show "good cause" for the victims' counsel to make the statement; and
4. the following sentence would be removed from the discussion section to R.C.M. 1001(c)(5)(B): "Upon objection by either party or sua sponte, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)."

On December 12, 2022, the DAC-IPAD submitted a public comment to the JSC with five recommendations for amending R.C.M. 1001(c). These five recommendations are also included in this report as DAC-IPAD Recommendations 41–45.⁷⁷

⁷⁶ Joint Service Committee on Military Justice draft Executive Order and Annex to the draft Executive Order, *available at* <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>

⁷⁷ See DAC-IPAD public comment to the Joint Service Committee on Military Justice at Appendix F.

VII. ANALYSIS, RESPONSES TO CONGRESS, AND RECOMMENDATIONS

A. Analysis

Being able to provide a statement to the court at sentencing can be extremely empowering and freeing for a victim, and it's a moment that can open the very first door to hopeful healing for survivors.

—Adrian Perry, co-founder of Survivors United⁷⁸

The DAC-IPAD heard from stakeholders about unnecessary limitations on victim impact statements and reviewed courts-martial cases completed in FY21 to determine how military judges are resolving issues with impact statements. The Committee found that victims are subject to routine editing of their impact statements before those statements are delivered. At times, this editing occurs in the courtroom, with defense counsel highlighting objectionable portions of the statement and the military judge ordering the statement to be redacted. More often, it appears, victims' counsel and trial counsel assist victims in pre-editing impact statements to avoid objections in court. The result is the same: crime victims are not able to fully describe the impact on them of the accused's crimes.

Committee members with experience with victim impact statements in sentencing proceedings in civilian jurisdictions noted that civilian courts rarely limit the victim impact statement prior to its delivery and rarely are objections made to the statement during its delivery. More deference is provided to the victim in detailing the impact of the crime. The Committee was unable to identify any unique military concern that would justify the unduly limiting nature of R.C.M. 1001(c). The Committee also noted that in the majority of cases reviewed by Policy Subcommittee members and staff, that military judges allowed victims to deliver their victim impact statements without interruption, noting that they would only consider those portions of the statement permitted by R.C.M. 1001(c).

The Committee believes it is the best practice for military judges to allow victims to provide their impact statements without interruption and to resolve objections by trial or defense counsel at the conclusion of the impact statement.

The Committee concluded that a primary source of the problem is the overly narrow scope of R.C.M. 1001(c) and the recommendations to amend R.C.M. 1001(c) reflect the DAC-IPAD's belief that a crime victim should have greater latitude in providing information to the court in their victim impact statement. The Committee also noted, based on the review of FY21 cases, that the restriction on victims from recommending a "specific" sentence may have been interpreted by some military judges and counsel to preclude any reference to sentencing.

The recommended changes coincide with the FY22 NDAA requirement that military judges serve as sentencing authorities in all but capital cases. Military judges, by virtue of their training, experience, and temperament, can be as trusted as their civilian counterparts to adhere to the rules in appropriately assessing and considering the information provided in victim impact statements. Adoption of these recommendations would more closely align military practice with the practice in most civilian jurisdictions for victim impact statements.

⁷⁸ *Transcript of DAC-IPAD Public Meeting* 108-109 (Dec. 6, 2022) (testimony of Ms. Adrian Perry).

B. Responses to Congress

The Committee provides the following responses to the two questions posed by Congress in the FY20 NDAA JES.

JES Question 1: Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

DAC-IPAD Response: In the vast majority of cases, military judges do not limit a victim's right to be heard at sentencing. Of the 173 FY21 sexual offense court-martial cases reviewed involving a victim impact statement, the military judge limited a victim's statement in 20 cases (12%). In the 151 cases in which the military judge was the sentencing authority, the judge limited a victim impact statement in 13 cases (9%). In those cases in which the judge took such action, they generally did so in accordance with R.C.M. 1001(c).

The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges. For example, some judges permit victims to address only their experience specific to the crime for which the accused was convicted and other judges allow a victim to address the impact of their interaction with the accused, which includes the crime and the surrounding circumstances.

The Committee has determined that this standard is too narrow and should be clarified. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001(c) should clarify the standard, incorporate aspects of civilian practice, and allow crime victims to more fully inform the courts about how the accused's crimes have impacted them.

JES Question 2: Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

DAC-IPAD response: Military judges generally do permit individuals who have suffered harm as a result of the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

Since Congress posed this question almost three years ago in the FY20 NDAA Joint Explanatory Statement, the Service appellate courts have adopted an expansive view of who may be considered a crime victim. In addition, the Committee's FY21 court-martial case review revealed that military judges generally apply a broad definition of crime victim in determining who may provide a victim impact statement at presentencing proceedings.

C. Recommendations

The Committee provided five recommendations to the JSC to amend R.C.M. 1001(c).

Recommendation 43: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words “or indirectly” to the definition of victim impact, amending the section as follows:

“For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly *or indirectly* relating to or arising from the offense of which the accused has been found guilty.”

This proposed change recognizes that victim impact statements are not presented for evidentiary purposes and allows the victim to discuss more attenuated impacts of the crime, as is permitted in many civilian jurisdictions.

Recommendation 44: The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases.

The JSC’s draft change to R.C.M. 1001(c)(3) in the 2023 draft executive order removes the restriction against crime victims recommending a specific sentence for the accused in all but capital cases and appears to expand what victims may say in their impact statements; however, without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so on the grounds that such a recommendation is not covered by “victim impact” or “matters in mitigation,” as the rule requires. This additional language would mirror the wording in R.C.M. 1001(d)(2)(A).

Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to allowing the statement orally, in writing, or both.

R.C.M. 1001(c)(5)(A) currently allows a victim to provide an unsworn victim impact statement orally, in writing, or both. Addition of the new language makes it clear that digital media are permissible means of submitting a victim impact statement; aligns courts-martial with proceedings in some states that allow victims to provide impact statements through audio or video recordings or other digital media; and, importantly, enables victims to submit impact statements when they cannot be physically present or do not wish to speak during the presentencing proceedings.

Recommendation 46: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the “upon good cause shown” clause to be consistent with the JSC’s proposed change to R.C.M. 1001(c)(5)(A).

R.C.M. 1001(c)(5)(A) states that a victim may provide an unsworn victim impact statement. The JSC’s proposed change to this section adds a sentence specifying that the crime victim’s unsworn statement “may be made by the crime victim, by counsel representing the crime victim, or both.” However, R.C.M. 1001(c)(5)(B) still includes the previous limitation, as it reads “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.” This requirement to show good cause is what the JSC’s draft change was intended to remove.

Recommendation 47: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

R.C.M. 1001(c)(5)(B) currently requires a crime victim who makes an unsworn statement to provide a written proffer of the matters to be addressed in the statement to trial counsel and defense counsel after the announcement of findings. The rule provides that the military judge may waive this requirement for good cause shown. Often, victims' written statements are edited by military judges or by victims' counsel or trial counsel before they are delivered. In most civilian jurisdictions, victims deliver their impact statements unedited.

This recommendation is consistent with the JSC's proposed change to R.C.M. 1001(c)(5)(B) that would remove the following sentence from the discussion section: "Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)." The proposed removal of this sentence is consistent with the pending change to judge-alone sentencing and will allow crime victims more latitude in their impact statements. Trial and defense counsel will still have the opportunity to rebut factual claims in the victim's unsworn statement and to object to information outside the scope of R.C.M. 1001(c)(2)(B).

VIII. CONCLUSION

The Committee concludes that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. There is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions. The DAC-IPAD's proposed amendments to R.C.M. 1001(c), taken together with the Joint Service Committee's proposed amendments, will go a long way toward achieving such broadening. With judge-alone sentencing soon to be mandated in all but capital cases, it is the Committee's intent that military judges—as well as the appellate courts in their review of judicial rulings—will adopt a more expansive view, within constitutional limitations, of the victims' right to be heard at sentencing.

APPENDIX A. AUTHORIZING STATUTE AND AMENDMENTS

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SECTION 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES. (PUBLIC LAW 113–291; 128 STAT. 3374; 10 U.S.C. 1561 NOTE)

(a) ESTABLISHMENT REQUIRED.—

- (1) IN GENERAL.—The Secretary of Defense shall establish and maintain within the Department of Defense an advisory committee to be known as the “Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces” (in this section referred to as the “Advisory Committee”).
- (2) DEADLINE FOR ESTABLISHMENT.—The Secretary shall establish the Advisory Committee not later than 30 days before the termination date of the independent panel established by the Secretary under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1758), known as the “judicial proceedings panel”.

(b) MEMBERSHIP.—The Advisory Committee shall consist of not more than 20 members, to be appointed by the Secretary of Defense, who have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Advisory Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as a member of the Advisory Committee.

(c) DUTIES.—

- (1) IN GENERAL.—The Advisory Committee shall advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- (2) BASIS FOR PROVISION OF ADVICE.—For purposes of providing advice to the Secretary pursuant to this subsection, the Advisory Committee shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in paragraph (1).

(d) ANNUAL REPORTS.—Not later than March 30 each year, the Advisory Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives a report describing the results of the activities of the Advisory Committee pursuant to this section during the preceding year.

(e) TERMINATION.—

- (1) IN GENERAL.— Except as provided in paragraph (2), the Advisory Committee shall terminate on the date that is five years after the date of the establishment of the Advisory Committee pursuant to subsection (a).

(2) CONTINUATION.—The Secretary of Defense may continue the Advisory Committee after the termination date applicable under paragraph (1) if the Secretary determines that continuation of the Advisory Committee after that date is advisable and appropriate. If the Secretary determines to continue the Advisory Committee after that date, the Secretary shall submit to the President and the congressional committees specified in subsection (d) a report describing the reasons for that determination and specifying the new termination date for the Advisory Committee.

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL.—Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually thereafter” after “reports”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

SECTION 537. MODIFICATION OF DEADLINE FOR ESTABLISHMENT OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

Section 546(a)(2) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291; 128 Stat. 3374; 10 U.S.C. 1561 note) is amended by striking “not later than” and all that follows and inserting “not later than 90 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016.”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019

SEC. 533. AUTHORITIES OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended—

(1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

“(d) AUTHORITIES.—

“(1) HEARINGS.—The Advisory Committee may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the committee considers appropriate to carry out its duties under this section.

“(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of the Advisory Committee, a department or agency of the Federal Government shall provide information that the Advisory Committee considers necessary to carry out its duties under this section. In carrying out this paragraph, the department or agency shall take steps to prevent the unauthorized disclosure of personally identifiable information.”.

SEC. 547. REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS.

- (a) **REPORT.**—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
 - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
 - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).
- (b) **COVERED INDIVIDUAL DEFINED.**—In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

SEC. 535. EXTENSION OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

Section 546(f)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended by striking “five” and inserting “ten”.

Joint Explanatory Statement:

The conferees request the DAC-IPAD review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim’s case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.

Further, the conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.

SEC. 540I. ASSESSMENT OF RACIAL, ETHNIC, AND GENDER DISPARITIES IN THE MILITARY JUSTICE SYSTEM.

- (a) IN GENERAL.—The Secretary of Defense shall provide for the carrying out of the activities described in subsections (b) and (c) in order to improve the ability of the Department of Defense to detect and address racial, ethnic, and gender disparities in the military justice system.
- (b) SECRETARY OF DEFENSE AND RELATED ACTIVITIES.—The activities described in this subsection are the following, to be commenced or carried out (as applicable) by not later than 180 days after the date of the enactment of this Act:
 - (1) For each court-martial carried out by an Armed Force after the date of the enactment of this Act, the Secretary of Defense shall require the head of the Armed Force concerned—
 - (A) to record the race, ethnicity, and gender of the victim and the accused, and such other demographic information about the victim and the accused as the Secretary considers appropriate;
 - (B) to include data based on the information described in subparagraph (A) in the annual military justice reports of the Armed Force.
 - (2) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall issue guidance that—
 - (A) establishes criteria to determine when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed; and
 - (B) describes how such a review should be conducted.
 - (3) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall—
 - (A) conduct an evaluation to identify the causes of any racial, ethnic, or gender disparities in the military justice system;
 - (B) take steps to address the causes of such disparities, as appropriate.
- (c) DAC-IPAD ACTIVITIES.—
 - (1) IN GENERAL.—The activities described in this subsection are the following, to be conducted by the independent committee DAC-IPAD:
 - (A) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year addressed.
 - (B) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

- (C) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

(2) INFORMATION FROM FEDERAL AGENCIES.—

- (A) IN GENERAL.—Upon request by the chair of the committee, a department or agency of the Federal Government shall provide information that the committee considers necessary to conduct reviews and assessments required by paragraph (1), including military criminal investigative files, charge sheets, records of trial, and personnel records.

- (B) HANDLING, STORAGE, AND RETURN.—The committee shall handle and store all records received and reviewed under this subsection in accordance with applicable privacy laws and Department of Defense policy, and shall return all records so received in a timely manner.

- (3) REPORT.—Not later than one year after the date of the enactment of this Act, the committee shall submit to the Secretary of Defense, and to the Committees on Armed Services of the Senate and the House of representatives, a report setting forth the results of the reviews and assessments required by paragraph (1). The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

(4) DEFINITIONS.—In this subsection:

- (A) The term “independent committee DAC-IPAD” means the independent committee established by the Secretary of Defense under section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374), commonly known as the “DAC-IPAD”.
- (B) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.
- (C) The term “completed”, with respect to a case, means that the case was tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.
- (D) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.
- (E) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

H. Rept. 116-120 on H.R. 2500

Title V—Military Personnel Policy Items of Special Interest

Appointment of Guardian ad Litem for Minor Victims

The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

APPENDIX B. COMMITTEE CHARTER AND TERMS OF REFERENCE

Charter

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

1. Committee's Official Designation: The committee shall be known as the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).
2. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("the FY 2015 NDAA") (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., App) and 41 C.F.R. § 102-3.50(a), established this non-discretionary Federal advisory committee.
3. Objectives and Scope of Activities: Pursuant to section 546(c)(1) of the FY 2015 NDAA, the DAC-IPAD shall provide independent advice and recommendations 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 ongoing review of cases.
4. Description of Duties: Pursuant to sections 546(c)(2) and (d) of the FY 2015 NDAA, the DAC-IPAD, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel of the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and the House of Representatives, a report describing the results of the activities of the DAC-IPAD pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The purpose of providing advice to the Secretary of Defense pursuant to this section, the DAC-IPAD shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in section 546(c)(1) of the FY 2015 NDAA. The DAC-IPAD will also focus on matters of special interest to the DoD, as determined by the Secretary of Defense, the Deputy Secretary of Defense, or the GC DoD, as the DAC-IPAD's sponsor.

Pursuant to section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283), not later than September 30, 2019 and once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual offenses that involved suspicion of or adverse action against a covered individual as described in paragraphs (1) and (2).

The term "covered individual" means an individual who is identified in the case files of a military criminal investigative organization as a victim of a sexual offense that occurred while that individual was serving on active duty as a member of the Armed Forces. The term 'suspected of,' when used with respect to a covered individual suspected of collateral misconduct or crimes as described in subsection (a), means that

an investigation by a military criminal investigative organization reveals facts and circumstances that would lead a reasonable person to believe that the individual committed an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

Pursuant to the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92) Joint Explanatory Statement, the conferees request the DAC-IPAD:

- (1) Review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases when the evidence in the victim’s case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.
- (2) On a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under Rule for Courts-Martial (RCM) 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.

The Joint Explanatory Statement summarized the conferees’ concern as follows: [T]he conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted RCM 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

5. Agency or Official to Whom the Committee Reports: The DAC-IPAD reports to the Secretary of Defense and the Deputy Secretary of Defense, through the GC DoD, who may act upon the DAC-IPAD’s advice and recommendations in accordance with DoD policy and procedures.
6. Support: The DoD, through the Office of the GC DoD, provides support for the Committee’s functions and ensures compliance with the requirements of the FACA, the Government in the Sunshine Act (“the Sunshine Act”) (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.
7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating costs for the DAC-IPAD, to include travel, meetings, and contract support, are approximately \$2,600,000. The estimated annual personnel cost to the DoD is 15.0 full-time equivalents.
8. Designated Federal Officer: The DAC-IPAD’s Designated Federal Officer (DFO) shall be a full-time or permanent part-time DoD civilian officer or employee, or active duty member of the Armed Forces, designated in accordance with established DoD policy and procedures.

The DAC-IPAD’s DFO is required to attend all DAC-IPAD and subcommittee meetings for the entire duration of each meeting. However, in the absence of the DAC-IPAD’s DFO, a properly approved Alternate DFO, duly designated to the DAC-IPAD in accordance with DoD policy and procedures, shall attend the entire duration of all DAC-IPAD and subcommittee meetings.

The DFO, or Alternate DFO, calls all DAC-IPAD and subcommittee meetings; prepares and approves all meeting agendas; and adjourns any meeting when the DFO, or Alternate DFO, determines adjournment to be in the public’s interest or required by governing regulations or DoD policy and procedures.

9. Estimated Number and Frequency of Meetings: The DAC-IPAD shall meet at the call of the DFO, in consultation with the DAC-IPAD's Chair and the GC DoD. The estimated number of meetings is at least one per year.
10. Duration: The need for this advisory committee is on a continuing basis through February 28, 2026; however, the DAC-IPAD is subject to renewal every two years.
11. Termination: In accordance with sections 546(e)(1) and (2) of the FY 2015 NDAA, as modified by section 535 of the FY 2020 NDAA, the DAC-IPAD will terminate on February 28, 2026, ten years after the DAC-IPAD was established, unless the DoD renews the DAC-IPAD in accordance with DoD policy and procedures.
12. Membership and Designation: Pursuant to section 546(b) of the FY 2015 NDAA, the DAC-IPAD will be composed of no more than 20 members who must have extensive experience and subject matter expertise in the investigation, prosecution, or defense of allegations of sexual offenses. DAC-IPAD members may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as DAC-IPAD members.

Authority to invite or appoint individuals to serve on the DAC-IPAD rests solely with the Secretary of Defense or the Deputy Secretary of Defense ("the DoD Appointing Authority") for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authority, may serve more than two consecutive terms of service on the DAC-IPAD, to include its subcommittees, or serve on more than two DoD Federal advisory committees at one time. DAC-IPAD members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. DAC-IPAD members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members. The DoD Appointing Authority shall appoint the DAC-IPAD's leadership from among the membership previously appointed to serve on the DAC-IPAD in accordance with DoD policy and procedures, for a term of service of one-to-two-years, with annual renewal, which shall not exceed the member's approved appointment.

All members of the DAC-IPAD are expected to exercise their best judgment on behalf of the DoD, without representing any particular point of view and to discuss and deliberate in a manner that is free from conflicts of interest. Except for reimbursement of official DAC-IPAD related travel and per diem, DAC-IPAD members serve without compensation.

13. Subcommittees: The DoD, when necessary and consistent with the DAC-IPAD's mission and DoD policy and procedures, may establish subcommittees, task forces, or working groups ("subcommittees") to support the DAC-IPAD. Establishment of subcommittees shall be based upon a written determination, including terms of reference (ToR), by the DoD Appointing Authority or the GC DoD.

All subcommittees operate under the provisions of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures. If a subcommittee's duration exceeds that of the DAC-IPAD, and the DoD does not renew the DAC-IPAD, then the subcommittee terminates when the DAC-IPAD does.

Subcommittees shall not work independently of the DAC-IPAD and shall report all of their recommendations and advice solely to the DAC-IPAD for its thorough deliberation and discussion at a properly noticed and open meeting, subject to the Sunshine Act. Subcommittees have no authority to make decisions and recommendations, orally or in writing, on behalf of the DAC-IPAD. Neither the subcommittee nor any of its members may provide updates or report directly to the DoD or to any Federal officer or employee, whether orally or in writing, on behalf of the DAC-IPAD. If a majority of DAC-IPAD members are appointed to a particular subcommittee, then that subcommittee may be required to operate pursuant to the same FACA notice and openness requirements governing the DAC-IPAD's operations.

Individual appointments to serve on DAC-IPAD subcommittees, which may be no more than 15 members, shall be approved by the DoD Appointing Authority for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member shall serve more than two consecutive terms of service on a subcommittee without prior approval from the DoD Appointing Authority. Subcommittee members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as RGE members. The DoD Appointing Authority shall appoint subcommittee leadership from among the membership previously appointed to serve on a subcommittee in accordance with DoD policy and procedures, for a term of service of one-to-two-years, with annual renewal, not to exceed the member's approved appointment.

All members of a subcommittee are appointed to exercise their own best judgment on behalf of the DoD, without representing any particular point of view, and to discuss and deliberate in a manner free from conflicts of interest. Except for reimbursement for official travel and per diem related to the DAC-IPAD or its subcommittees, subcommittee members shall serve without compensation.

14. Recordkeeping: The records of the DAC-IPAD and its subcommittees shall be managed in accordance with General Records Schedule 6.2, Federal Advisory Committee Records, or other approved agency records disposition schedule, and the appropriate DoD policy and procedures. These records will be available for public inspection and copying, subject to the Freedom of Information Act (5 U.S.C. § 552).
15. Filing Date: February 16, 2022

TERMS OF REFERENCE

These terms of reference establish the objectives for the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

I. Objectives and Scope:

Pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA) (Pub. L. No. 113-291), as amended by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. No. 114-92), the DAC-IPAD shall provide independent advice and recommendations 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 ongoing review of cases.

II. Methodology:

A. Regulatory Compliance.

All DAC-IPAD assessments will be conducted in compliance with the Federal Advisory Committee Act (FACA) (5 U.S.C., App) and the General Services Administration, Federal Advisory Committee Management Final Rule (41 C.F.R. Part 102-3).

B. Tasking Authority.

All work performed by the DAC-IPAD, as designated by the Secretary of Defense and defined in statute, is based upon these Terms of Reference or written tasks assigned to the DAC-IPAD by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD General Counsel (DoD GC) unless otherwise provided for by statute or Presidential directive. These Terms of Reference and all written tasks must be provided to the DoD Advisory Committee Management Officer and are subject to public review.

C. Access to Records.

The DAC-IPAD is authorized to access and review, consistent with law, documents and records from the Department of Defense and Military Departments and any other Federal department or agency which the Committee deems necessary. The DAC-IPAD is authorized to meet with and interview DoD and other personnel the Committee determines necessary to complete its tasks. Committee members may be required to execute a non-disclosure agreement, consistent with FACA.

D. Collection of Information through Meetings, Visits, and Observations.

The Committee may hold meetings and gather information through interviews, presentations, oral or written testimony, roundtable/panel discussions, document reviews, military installation or other site visits, court-martial observations, or other means, as necessary.

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E. *Input from Government Agencies, Experts, and Other Entities.*

As appropriate, the Committee may seek input from other Federal agencies, non-Federal entities, and other sources with pertinent knowledge or experience.

F. *Input from Members the Public.*

The Committee will consider all submissions by organizations or members of the public that are relevant to its mission and received either in writing or orally during public meetings in compliance with FACA.

III. Statutory Deliverables:

A. *Annual Report.*

Pursuant to section 546(d) of the FY15 NDAA, the DAC-IPAD, not later than March 30 of each year, will submit to the Secretary of Defense through the DoD GC, and to the Committees on Armed Services of the Senate and the House of Representatives, a report describing the results of the activities of the DAC-IPAD during the preceding year.

B. *Biennial Collateral Misconduct Report.*

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. No. 115-232), as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY 21 NDAA) (Pub. L. No. 116-283), not later than September 30, 2019, and once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was suspected of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual offenses that involved suspicion of or adverse action against a covered individual as described in paragraphs (1) and (2).

The term “covered individual” means an individual who is identified in the case files of a military criminal investigative organization as a victim of a sexual offense that occurred while that individual was serving on active duty as a member of the Armed Forces. The term “suspected of,” when used with respect to a covered individual suspected of collateral misconduct or crimes as described in subsection (a), means that an investigation by a military criminal investigative organization reveals

DAC-IPAD TERMS OF REFERENCE

facts and circumstances that would lead a reasonable person to believe that the individual committed an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

C. DAC-IPAD Studies.

Pursuant to section 546(c)(2) of the FY15 NDAA, the DAC-IPAD shall study issues identified in its ongoing reviews of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

IV. Deliverables Requested by Joint Explanatory Statement:

The Joint Explanatory Statement accompanying the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. No. 116-92) requested two assessments by the DAC-IPAD:

(1) *Assessment of Alternative Justice Programs.*

Review, as appropriate, whether other justice programs (*e.g.*, restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases where the evidence in the victim's case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.

(2) *Victim Impact Statement Assessment.*

On a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under Rule for Courts-Martial (RCM) 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001. The assessment should recognize:

- The importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense.
- That Members of Congress have received complaints that some military judges have interpreted RCM 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

The DAC-IPAD will provide the DoD GC with a recommended date for completion of those two assessments.

V. Deliverable Requested by DoD GC:

Pursuant to the DAC-IPAD Charter filed on February 16, 2022, the DAC-IPAD will address matters of special interest to DoD, as directed by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC, as the DAC-IPAD's sponsor, including:

DAC-IPAD TERMS OF REFERENCE

Appellate Case Review.

In a January 28, 2022, memorandum to the DAC-IPAD Staff Director, the DoD GC requested that the DAC-IPAD conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study. The DAC-IPAD's report should include an analysis of the most commonly recurring issues and any recommendations for reforms and should:

- Consider the efficacy of the military appellate system's handling of those cases.
- Identify any recommended training and education improvements for military justice practitioners suggested by the study.

The DAC-IPAD should determine the optimal study design to analyze the issues set out above. In developing a study design, the DAC-IPAD should note two recent changes to the law that affect the Courts of Criminal Appeals' reviews of findings and sentences:

- Section 542(b) of the FY 21 NDAA modified the factual sufficiency standard of review that the Courts of Criminal Appeals apply when reviewing findings of guilty entered on or after January 1, 2021.
- In conjunction with the enactment of sentencing reform to move largely to parameter-based sentencing in special and non-capital general court-martial cases, section 539E of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. No. 117-81) modified the Courts of Criminal Appeals' sentence appropriateness review standard to be applied in cases where all offenses resulting in a finding of guilty occur after December 27, 2023.

The DAC-IPAD will provide the DoD GC with a recommended date for completion of that review.

VI. Support:

The DoD, through the Office of the DoD GC, provides support for the Committee's functions and ensures compliance with the requirements of the FACA, the Government in the Sunshine Act (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.



Caroline Krass
General Counsel

Date:

MAY 23 2022

APPENDIX C. DAC-IPAD POLICY SUBCOMMITTEE TERMS OF REFERENCE

These terms of reference (ToR) establish the mission and objectives of the Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

- I. Mission Statement:** The mission of the Policy Subcommittee is to assess and provide independent advice to the DAC-IPAD in order for it to make recommendations to the Secretary of Defense and Deputy Secretary of Defense (“the DoD Appointing Authority”), through the Department of Defense General Counsel (DoD GC), related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of DoD policies, Military Department (MILDEP) policies, and Uniform Code of Military Justice (UCMJ) provisions applicable to such allegations.
- II. Issue Statement:** Section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, as amended by section 537 of the NDAA for FY 2016, provides that the DAC-IPAD will provide the Secretary of Defense independent advice and recommendations on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, and that, as a basis for such advice, the DAC-IPAD will review cases involving allegations of sexual misconduct on an ongoing basis.
- III. Objectives and Scope:** The Policy Subcommittee will address the following specific objectives:
1. Reviewing and assessing policies promulgated by the DoD and the MILDEPs, and UCMJ provisions related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
 2. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Policy Subcommittee in writing by the DoD Appointing Authority or the DoD GC.
- The Policy Subcommittee will develop conclusions and recommendations on the matters above for consideration and use by the DAC-IPAD as it deems appropriate.
- IV. Methodology:** The Policy Subcommittee must comply with the DAC-IPAD Charter and the DAC-IPAD ToR (May 23, 2022) in the undertaking and execution of all projects, tasks, studies, and reports. Additionally, in support of the Policy Subcommittee’s ToR and the work conducted in response to them:

1. The Policy Subcommittee is authorized to access all non-sealed, non-privileged, unclassified case documents (including records of trial, investigation case files, prosecutorial case files, and staff judge advocate advice), records, and personnel from the DoD and MILDEPs it deems necessary to complete its task. Policy Subcommittee participants may be required to execute non-disclosure agreements where required by law.

All requests will be consistent with applicable laws; applicable security classifications; DoDI 5105.04, “Department of Defense Federal Advisory Committee Management Program”; and the Policy Subcommittee’s ToR. As special government employee members of a DoD Federal advisory committee, the Policy Subcommittee members will not be given any access to DoD networks, to include DoD email systems.

Once material is provided to the Policy Subcommittee, it becomes a permanent part of the DAC-IPAD’s records. All data/information provided to the Subcommittee is subject to public inspection unless the originating

Component or MILDEP office properly marks the data/information with the appropriate classification and Freedom of Information Act exemption categories before the data/information is released to the Case Review Subcommittee.

2. The Policy Subcommittee may conduct interviews and site visits, as appropriate, and in accordance with the DAC-IPAD Charter.
3. The Policy Subcommittee may seek input from other sources with pertinent knowledge or experience, as appropriate.

V. Deliverables: The Policy Subcommittee will complete all tasks, projects, studies, and reports as assigned to it in writing by the DoD Appointing Authority or the DoD GC.

As a subcommittee of the DAC-IPAD, the Policy Subcommittee will not work independently of the DAC-IPAD's charter and will report its recommendations, including providing interim updates, to the full DAC-IPAD in a properly noticed and open public meeting for full deliberation and discussion and committee approval, subject to the

Government in the Sunshine Act (5 U.S.C. § 552b) (Sunshine Act) exemptions, as appropriate. The Policy Subcommittee and the DAC-IPAD will operate in conformity with, and pursuant to, the DAC-IPAD's charter, the Federal Advisory Committee Act (FACA), the Sunshine Act, other applicable Federal statutes and regulations, and DoD policies and procedures. The Policy Subcommittee does not have the authority to make decisions on behalf of the DAC-IPAD nor can it report directly to any Federal representative. The members of the Policy Subcommittee and the DAC-IPAD are subject to certain Federal ethics laws, including Title 18, United States Code, § 208, governing conflicts of interest, and the Standards of Ethical Conduct regulations in 5 C.F.R, Part 2635.

VI. Support: The DoD, through the Office of the DoD GC, provides support for the Policy Subcommittee's functions and ensures compliance with the requirements of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures. Under the authority of the DoD GC, the DAC-IPAD Executive Director will support and coordinate all Policy Subcommittee activities.

APPENDIX D. DAC-IPAD MEMBER PROFESSIONAL BIOS



Marcia Anderson was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin starting in 1998 until her retirement in 2019. In this role she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson recently retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy Commanding General of the Army’s Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of \$8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.



Martha Bashford served in the New York County District Attorney’s Office starting in 1979 until her retirement in 2020. At the time of her retirement, she was the chief of the New York County District Attorney’s Office Sex Crimes Unit, which was the first of its kind in the country. She served in this role starting in 2011. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI’s Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (*summa cum laude*) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.



William E. Cassara is a former Army prosecutor, defense counsel and appellate counsel, with more than 30 years of military law experience. Mr. Cassara holds a law degree from University of Baltimore and an undergraduate degree in business administration from Florida State University. He is a former professor at the University of Baltimore School of Law and the University of South Carolina School of Law. Mr. Cassara has been in private military law practice since 1996 focusing on court-martial appeals, discharge upgrades, security clearance and all other administrative military law matters.



Margaret “Meg” Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar

Association's Criminal Justice Section Victims Committee, as co-chair of the Oregon Attorney General's Crime Victims' Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General's Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.



Suzanne Goldberg has served in the U.S. Department of Education's Office for Civil Rights since day one of the Biden-Harris administration as Acting Assistant Secretary (January – October 2021) and Deputy Assistant Secretary for Strategic Operations and Outreach. Goldberg brings extensive experience in civil rights leadership, with expertise in gender and sexuality law, and many years as a university administrator and faculty member. Before joining the U.S. Department of Education, Goldberg was the inaugural Executive Vice President for University Life at Columbia University and on the faculty of Columbia Law School, where she is on a public service leave from her role as the Herbert and Doris Wechsler Clinical Professor of Law at Columbia Law School. She founded the Law School's Sexuality and Gender Law Clinic, the first of its kind in the nation, and was co-founder and co-director of the Law School's Center for Gender and Sexuality Law. Goldberg earlier served as a senior staff attorney with Lambda Legal, a national legal organization committed to the full recognition of the civil rights of LGBT people and people living with HIV. Goldberg holds a law degree with honors from Harvard University and a bachelor's degree with honors from Brown University and was a Fulbright Fellow at the National University of Singapore.



Judge Paul W. Grimm is a Professor of the Practice and Director of the Bolch Judicial Institute at Duke Law School. Prior to joining Duke Law School, Judge Grimm served as a federal judge for 25 years. In 2012 he was appointed as a District Judge for the United States District Court for the District of Maryland. Previously, he was appointed to the Court as a Magistrate Judge in February 1997 and served as Chief Magistrate Judge from 2006 through 2012. In September, 2009 he was appointed by the Chief Justice of the United States to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure. Additionally, Judge Grimm is an adjunct professor of law at the University of Maryland School of Law, where he teaches evidence, and also has taught trial evidence, pretrial civil procedure, and scientific evidence. He also has been an adjunct professor of law at the University of Baltimore School of Law, where he taught a course regarding the discovery of and pretrial practices associated with electronically stored evidence.

Before joining the Court, Judge Grimm was in private practice in Baltimore for thirteen years, during which time he handled commercial litigation. He also served as an Assistant Attorney General for the State of Maryland, an Assistant State's Attorney for Baltimore County, Maryland, and a Captain in the United States Army Judge Advocate General's Corps. While on active duty in the Army, Judge Grimm served as a defense attorney and prosecutor while assigned to the JAG Office at Aberdeen Proving Ground, Maryland, and thereafter as an action officer in the Office of the Judge Advocate General of the Army (Administrative Law Division), The Pentagon. In 2001, Judge Grimm retired as a Lieutenant Colonel from the United States Army Reserve.

Judge Grimm received his undergraduate degree from the University of California Davis (summa cum laude), his J.D. from the University of New Mexico School of Law (magna cum laude, Order of the Coif) and his LLM from Duke Law School.



A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr. Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers. He is a member of the Judicial Conference of the United States' Advisory Committee on Evidence Rules and the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.



Jennifer Gentile Long (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.



Jenifer Markowitz is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a national protocol and training standards for sexual assault medical- forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board

member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.



Jennifer O'Connor is Vice President and General Counsel of Northrop Grumman Corporation. Prior to joining Northrop Grumman, Ms. O'Connor served as the General Counsel for the Department of Defense. In that role, she was the chief legal officer of the Department and the principal legal advisor to the Secretary of Defense. Earlier in her career, she served in numerous positions and agencies throughout the federal government. Her past positions include service in the Obama administration as Deputy Assistant to the President and Deputy White House Counsel responsible for the litigation, oversight and investigations portfolios; Senior Counsel at the Department of Health and Human Services; and as Counselor to the Commissioner of the Internal Revenue Service. Ms. O'Connor also worked in the Clinton Administration as Deputy Assistant Secretary for Policy at the Department of Labor, Special Assistant to the President in the Office of the White House Deputy Chief of Staff; Special Assistant to the President in the Office of Cabinet Affairs; and as Deputy Director of the White House Office of Management and Administration. Ms. O'Connor received a Bachelor of Arts degree from Harvard University, a Masters in Public Administration from Columbia University's School of International Public Affairs, and a Juris Doctor degree from Georgetown University.



BGen James (Jim) Schwenk was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of "don't ask, don't tell," for the provision of benefits to same-sex spouses of military personnel, in the review of the murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.



Judge Karla N. Smith was appointed to the Circuit Court for Montgomery County, Maryland in December 2014 by Governor Martin O'Malley. Judge Smith served on the District Court of Maryland from August 2012 until her appointment to the Circuit Court. In addition, Judge Smith serves as the Judiciary's representative on the State Council on Child Abuse and Neglect; the Operations Subcommittee of the Judiciary Committee on Equal Justice; and she represents the Circuit Court on the Montgomery County Domestic Violence Coordinating Council (DVCC).

Prior to her appointment, Judge Smith worked as a prosecutor for over 15 years. For five years, Judge Smith served as the Chief of the Family Violence Division of the Montgomery County State's Attorney's Office. Additionally, she sat on the Montgomery County Child Fatality Review Team; the Multidisciplinary Case Review Team for Child Abuse and Neglect; the Elder and Vulnerable Adult Abuse Task Force, which she chaired; the Interagency Sex Offender Management Team; Domestic Violence Case Review Team; and the Montgomery County Teen Dating Taskforce. It was during this time that Judge Smith was integral to the development of the Montgomery County Family Justice Center and the drafting and passage of a criminal child neglect statute that was signed into law in 2011.

Judge Smith received her Bachelor of Arts degree from the University of Maryland and her Juris Doctor from the University of Virginia. A life-long resident of Montgomery County and a product of Montgomery County Public Schools, Judge Smith currently lives in Bethesda with her husband and three sons.



Cassia Spohn is a Regents Professor in the School of Criminology and Criminal Justice at Arizona State University and an Affiliate Professor of Law at ASU's Sandra Day O'Connor College of Law. She is a Fellow of the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Western Society of Criminology. She is the recipient of numerous academic awards, including the University of Nebraska Outstanding Research and Creative Activity Award, the W.E.B. DuBois Award for Contributions to Research on Crime and Race/Ethnicity, the Lifetime Achievement Award from the American Society of Criminology's

Division on Corrections and Sentencing, and Arizona State University's Faculty Achievement Award for Defining-Edge Research in the Social Sciences. Dr. Spohn's research interests include the correlates of federal and state sentencing outcomes, prosecutorial decision making, the intersections of race, ethnicity, gender, crime and justice, and sexual assault case processing decisions. She is the author of eight books, including *How Do Judges Decide: The Search for Fairness and Justice in Punishment* and *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System*. She is the author of more than 140 peer-reviewed publications. She currently is working on a National Science Foundation-funded project evaluating the impact of Arizona's recent ban on peremptory challenges and a series of papers on the imposition of life sentences in the U.S. District Courts.



Meghan Tokash is a trial attorney with the Human Trafficking Prosecution Unit, Criminal Section, Civil Rights Division at Department of Justice. Prior to her current position, she served as an Assistant United States Attorney at the Department of Justice. Previously, she served as a special victim prosecutor in the U.S. Army Judge Advocate General's Corps for eight years, litigating cases related to homicide, rape, sexual assault, domestic violence and child abuse. She worked in the Army's first Special Victim Unit at the Fort Hood Criminal Investigation Division Office. She deployed to Iraq as the senior trial counsel for U.S. Forces Iraq, and prosecuted special victim cases across U.S. Army Europe and U.S. Army Central Command. Ms. Tokash was an attorney advisor for the Judicial Proceedings Panel prior to her 2017 appointment by Secretary of Defense Ash Carter to serve on the Defense Advisory Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces. In 2021, Ms. Tokash served on the 90-day Independent Review Commission on Sexual Assault in the Military that was established by Secretary of Defense Lloyd Austin at the direction of President Biden.



Judge Walton was born in Donora, Pennsylvania. In 1971, he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission's recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary's Criminal Law Committee, on which he served until 2011. In 2007, Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

APPENDIX E. DAC-IPAD RECOMMENDATIONS TO DATE

DAC-IPAD Recommendation 1 – (March 2018) The Secretary of Defense, the Secretary of Homeland Security, and the Services take action to dispel the misperception of widespread abuse of the expedited transfer policy, including addressing the issue in the training of all military personnel.

DAC-IPAD Recommendation 2 – (March 2018) The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it.

DAC-IPAD Recommendation 3 – (March 2018) The DoD-level and Coast Guard equivalent Family Advocacy Program (FAP) policy include provisions for expedited transfer of active duty Service members who are victims of sexual assault similar to the expedited transfer provisions in the DoD Sexual Assault Prevention and Response (SAPR) policy and consistent with 10 U.S.C. § 673.

DAC-IPAD Recommendation 4 – (March 2018) The DoD-level military personnel assignments policy (DoD Instruction 1315.18) and Coast Guard equivalent include a requirement that assignments personnel or commanders coordinate with and keep SAPR and FAP personnel informed throughout the expedited transfer, safety transfer, and humanitarian/compassionate transfer assignment process when the transfer involves an allegation of sexual assault.

DAC-IPAD Recommendation 5 – (March 2019) In developing a uniform command action form in accordance with section 535 of the FY19 National Defense Authorization Act (NDAA), the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should ensure that the standard set of options for documenting command disposition decisions is based on recognized legal and investigatory terminology and standards that are uniformly defined across the Services and accurately reflect command action source documents.

DAC-IPAD Recommendation 6 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should require that judge advocates or civilian attorneys employed by the Services in a similar capacity provide advice to commanders in completing command disposition/action reports in order to make certain that the documentation of that decision is accurate and complete.

DAC-IPAD Recommendation 7 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should provide uniform guidance to the Services regarding the submission of final disposition information to federal databases for sexual assault cases in which, after fingerprints have been submitted, the command took no action, or took action only for an offense other than sexual assault.

DAC-IPAD Recommendation 8 – (March 2019) The uniform standards and criteria developed to implement Article 140a, Uniform Code of Military Justice (UCMJ), should reflect the following best practices for case data collection:

- a. Collect all case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process, such as the initial report of investigation, the commander's report of disciplinary or administrative action, the charge sheet, the Article 32 report, and the Report of Result of Trial.

- b. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD.
- c. Develop one electronic database for the storage and analysis of standardized source documents, and locate that database in the centralized military justice data office/organization within DoD.
- d. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible.
- e. Have data entered from source documents into the electronic database by one independent team of trained professionals whose full-time occupation is document analysis and data entry. This team should have expertise in the military justice process and in social science research methods, and should ensure that the data are audited at regular intervals.

DAC-IPAD Recommendation 9 – (March 2019) The source documents referenced in DAC-IPAD Recommendation 8 should contain uniformly defined content covering all data elements that DoD decides to collect to meet the requirements of Articles 140a and 146, UCMJ.

DAC-IPAD Recommendation 10 – (March 2019) The data produced pursuant to Article 140a, UCMJ, should serve as the primary source for the Military Justice Review Panel's periodic assessments of the military justice system, which are required by Article 146, UCMJ, and as the sole source of military justice data for all other organizations in DoD and for external entities.

DAC-IPAD Recommendation 11 – (March 2019) Article 140a, UCMJ, should be implemented so as to require collection of the following information with respect to allegations of both adult-victim and child-victim sexual offenses, within the meaning of Articles 120, 120b, and 125, UCMJ (10 U.S.C. §§ 920, 920b, and 925 (2016)):

- a. A summary of the initial complaint giving rise to a criminal investigation by a military criminal investigative organization (MCIO) concerning a military member who is subject to the UCMJ, and how the complaint became known to law enforcement;
- b. Whether an unrestricted report of sexual assault originated as a restricted report;
- c. Demographic data pertaining to each victim and accused, including race and sex;
- d. The nature of any relationship between the accused and the victim(s);
- e. The initial disposition decision under Rule for Court-Martial 306, including the decision to take no action, and the outcome of any administrative action, any disciplinary action, or any case in which one or more charges of sexual assault were preferred, through the completion of court-martial and appellate review;
- f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;
- g. Whether a victim declined to participate at any point in the military justice process;
- h. Whether a defense counsel requested expert assistance on behalf of a military accused, whether those requests were approved by a convening authority or military judge, and whether the government availed itself of expert assistance; and
- i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.

DAC-IPAD Recommendation 12 – (March 2019) The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that:

- a. The Services use the same uniform standards and definitions to refer to common procedures and substantive offenses in the Manual for Courts-Martial, as required by Article 140a; and
- b. The Services develop a plan to transition toward operating one uniform case management system across all of the Services, similar to the federal judiciary's Case Management/ Electronic Court Filing (CM/ECF) system.

DAC-IPAD Recommendation 13 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:

- a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.
- b. The victim's commander and senior enlisted leader, at both the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the subject's identity or other facts of the case—thereby enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
- c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the subject not being held accountable for his or her actions and the absence of evidence should the victim later decide to unrestrict his or her report.

DAC-IPAD Recommendation 14 – (March 2019) The Secretary of Defense (in consultation with the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) establish a working group to review whether victims should have the option to request that further disclosure or investigation of a sexual assault report be restricted in situations in which the member has lost the ability to file a restricted report, whether because a third party has reported the sexual assault or because the member has disclosed the assault to a member of the chain of command or to military law enforcement. The working group's goal should be to find a feasible solution that would, in appropriate circumstances, allow the victim to request that the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes; it should also consider whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This working group should consider developing such a policy with the following requirements:

- a. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
- b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.

- c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request.
- d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.
- e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault.

DAC-IPAD Recommendation 15 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) revise the DoD expedited transfer policy (and the policy governing the Coast Guard with respect to expedited transfers) to include the following points:

- a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should focus on that goal when they make decisions regarding such requests.
- b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery (e.g., proximity to the subject or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).
- c. The requirement that a commander determine that a report be credible is not aligned with the core purpose of the expedited transfer policy. It should be eliminated, and instead an addition should be made to the criteria that commanders must consider in making a decision on an expedited transfer request: "any evidence that the victim's report is not credible."

DAC-IPAD Recommendation 16 – (March 2019) Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five workdays.

DAC-IPAD Recommendation 17 – (March 2019) The Services track and report the following data in order to best evaluate the expedited transfer program:

- a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final.
- b. Data on the number of accused transferred; the grade and job title of the accused; the sex and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final.
- c. Data on victim participation in investigation/prosecution before and after an expedited transfer.
- d. Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers and accused Service members who are transferred under this program.

- e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.
- f. Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- g. Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- h. Data on victim satisfaction with the expedited transfer program.
- i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.

DAC-IPAD Recommendation 18 – (March 2019) The Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.

DAC-IPAD Recommendation 19 – (March 2020) The Department of Defense should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Military Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 [of the FY19 NDAA] by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles:

a. Definition of “sexual offense”:

- The definition of “sexual offense” for purposes of reporting collateral misconduct should include
 - Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
 - Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
 - Attempts, conspiracies, and solicitations of all of the above.
- The definition of sexual offense should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child); Article 120c, UCMJ (Other sexual misconduct); Article 130, UCMJ (Stalking); or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual offense incident.”¹
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should read as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual offense, and directly related to the incident that formed the basis of the sexual offense allegation. The collateral misconduct must have

1 Dep’t of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Glossary (March 28, 2013, Incorporating Change 3, May 24, 2017), 117.

been discovered as a direct result of the report of the sexual offense and/or the ensuing investigation into the sexual offense.”

- Collateral misconduct includes (but is not limited to) the following situations:
 - The victim was in an unprofessional or adulterous relationship with the accused at the time of the assault.²
 - The victim was drinking underage or using illicit substances at the time of the assault.
 - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
- To ensure consistency across the Military Services, collateral misconduct, for purposes of this report, should *not* include the following situations (the list is not exhaustive):
 - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of a sexual offense.
 - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
 - The victim engaged in misconduct after reporting the sexual offense.
 - The victim had previously engaged in an unprofessional or adulterous relationship with the subject, but had terminated the relationship prior to the assault.
 - The victim engaged in misconduct that is not close in time to the sexual offense, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
 - The victim is suspected of making a false allegation of a sexual offense.
 - The victim engaged in misconduct during the reporting or investigation of the sexual offense (such as making false official statements during the course of the investigation).

c. Methodology for identifying sexual offense cases and victims:

- To identify sexual offense cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the MCIOs.
- A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.³
- Each Military Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Military Service’s MCIO.

d. Time frame for collection of data:

- The Military Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and

2 For purposes of this report, an “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.

3 This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group.

should include only closed cases as defined above. For example, the Department's report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.

e. Definition of “covered individual”:

- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual offense in the case files of a military criminal investigative organization.” This definition should be clarified as follows: “an individual identified in the case files of an MCIO as a victim of a sexual offense while in title 10 status.”
- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

f. Replacement of the term “accused”:

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term “suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.⁴
- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:
 - The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - Another witness in the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - In the course of the sexual offense investigation, an analysis of the victim’s phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- This definition of “suspected of” does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions has occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
 - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

g. Definition of “adverse action”:

- The term “adverse action” applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.

⁴ Cf. *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article 31(b) prior to interrogation “is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense”) (internal citations omitted).

- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
 - Letter of reprimand (or Military Service equivalent) or written record of individual counseling in official personnel file;
 - Imposition of nonjudicial punishment;
 - Preferral of charges; or
 - Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Military Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Military Service equivalent), or reclassification.

h. Methodology for counting “number of instances”:

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse action, under the most serious collateral misconduct identified in the adverse action.
- For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

DAC-IPAD Recommendation 20 – (March 2020) Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.

DAC-IPAD Recommendation 21 – (March 2020) For purposes of the third statistical data element required by section 547, the Department of Defense should report not only the percentage of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are suspected of collateral misconduct and then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim’s receiving an adverse action for collateral misconduct once they are suspected of such misconduct.

DAC-IPAD Recommendation 22 – (March 2020) The Department of Defense should include in its report data on the number of collateral offenses that victims were suspected of by type of offense (using the methodology specified in section h of Recommendation 19) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.

DAC-IPAD Recommendation 23 – (March 2020) To facilitate production of the future collateral misconduct reports required by section 547, the Military Services should employ standardized internal documentation of sexual offense cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.

DAC-IPAD Recommendation 24 – (June 2020) Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) enhance funding and training for SVCs/VLCs appointed to represent child victims, including authorization to hire civilian highly qualified experts (HQEs) with experience and expertise in representing child victims, including expertise in child development, within the SVC/VLC Programs.

DAC-IPAD Recommendation 25 – (June 2020) In conjunction with Recommendation 24, the Judge Advocates General of the Military Services including the Coast Guard and the Staff Judge Advocate to the Commandant of the Marine Corps develop a cadre of identifiable SVCs/VLCs who have specialized training, experience, and expertise in representing child victims of sex-related offenses by utilizing military personnel mechanisms such as Additional Skill Identifiers.

DAC-IPAD Recommendation 26 – (June 2020) The Department of Defense Office of the Inspector General and the Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) assess whether the MCIOs and FAPs currently are providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported, and if necessary take corrective action.

DAC-IPAD Recommendation 27 – (June 2020) Congress amend 10 U.S.C. § 1044e to expand SVC/VLC eligibility to any child victim of a sex-related offense committed by an individual subject to the UCMJ.

DAC-IPAD Recommendation 28 – (June 2020) Congress amend the UCMJ to authorize the military judge to direct the appointment of an SVC/VLC for a child victim of a sex-related offense and/or of an independent best interest advocate to advise the military judge when they find that the child's interests are not otherwise adequately protected.

DAC-IPAD Recommendation 29 – (June 2020) The Secretary of Defense and the Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) develop a child victim advocate capability within each of the Services to support certain child victims of sexual offenses. The child victim advocate should reside within the SVC/VLC Programs and work as part of the SVC/VLC team in order to ensure that the child's legal interests are fully represented and protected. The child victim advocate should have expertise in social work, child development, and family dynamics.

DAC-IPAD Recommendation 30 – (June 2020) Congress amend Article 6b, UCMJ, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests; any such representative should be appointed as early as possible in the military justice process.

DAC-IPAD Recommendation 31 – (June 2020) Provided that the Department of Defense adopts and implements DAC-IPAD Recommendations 24–30, it is not advisable or necessary to establish a military guardian ad litem program within the Department of Defense for child victims of alleged sex-related offenses in courts-martial.

DAC-IPAD Recommendation 32 – (October 2020) Congress amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.

DAC-IPAD Recommendation 33 – (December 2020) The Secretary of Defense designate the military personnel system as the primary data system in the DoD for the collection of demographic information such as race and ethnicity. All other DoD systems that collect demographic data regarding military personnel, such as the military criminal investigative system and the military justice system, should obtain demographic information on military personnel from the military personnel system.

DAC-IPAD Recommendation 34 – (December 2020) The Secretary of Defense direct each Military Department to record race and ethnicity in military criminal investigative organization databases, military justice databases, and military personnel databases using the same racial and ethnic categories. The Secretary of Defense should direct each Military Department to report race using the following six categories: *American Indian or Alaskan Native*, *Asian*, *Black or African American*, *Native Hawaiian or Other Pacific Islander*, *More Than One Race/Other*, and *White*, and to report ethnicity using the following two categories: *Hispanic or Latino* and *Not Hispanic or Latino*.

DAC-IPAD Recommendation 35 – (December 2020) Congress authorize and appropriate funds for the Secretary of Defense to establish a pilot program operating one uniform, document-based data system for collecting and reporting contact and penetrative sexual offenses across all of the Military Services. The pilot program, which should cover every sexual offense allegation made against a Service member under the military's jurisdiction that is investigated by a military criminal investigative organization (MCIO), will record case data from standardized source documents provided to the pilot program by the Military Services and will include demographic data pertaining to each victim and accused—including race and ethnicity.

DAC-IPAD Recommendation 36 – (December 2020) The Secretary of Defense direct the Military Departments to record and track the race, ethnicity, sex, gender, age, and grade of the victim(s) and the accused for every investigation initiated by military law enforcement in which a Service member is identified as a subject through the final disposition within the military justice system.

DAC-IPAD Recommendation 37 – (December 2020) The Secretary of Defense direct the Military Departments to record, beginning in fiscal year 2022, the race and ethnicity of military police and criminal investigators, trial counsel, defense counsel, victims' counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges involved in every case investigated by military law enforcement in which a Service member is the subject of an allegation of a contact or penetrative sexual offense. The source information for these data should be collected from the military personnel databases and maintained for future studies by the DAC-IPAD on racial and ethnic disparities in cases involving contact and penetrative sexual offenses.

DAC-IPAD Recommendation 38 – (December 2020) The Secretary of Defense direct the newly established Military Justice Review Panel to determine whether to review and assess, by functional roles and/or on an individual case basis, the race and ethnicity demographics of the various participants in the military justice process, including military police and criminal investigators, trial counsel, defense counsel, victims' counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges.

DAC-IPAD Recommendation 39 – (December 2020) Once the Department of Defense has implemented new data collection processes as recommended in this report and as required pursuant to Article 140a, UCMJ, the Secretary of Defense direct the newly established Military Justice Review Panel to determine whether to review and assess racial and ethnic disparities in every aspect of the military justice system as part of its charter for periodic and comprehensive reviews. This review and assessment of racial and ethnic disparities should include, but not be limited to, cases involving sexual offenses.

DAC-IPAD Recommendation 40 – (December 2020) The Secretary of Defense direct the Military Justice Review Panel to assess whether a uniform training system on explicit and implicit bias should be developed for all military personnel who perform duties in the military justice system, including military police and criminal investigators, trial counsel, defense counsel, victims' counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate judges.

DAC-IPAD Recommendation 41 – (August 2022) All of the Services should adopt an 18-month minimum assignment length for SVC/VLC serving in their first tour as a judge advocate, and a 24-month minimum for all other SVCs/VLCs, with appropriate exceptions for personal or operational reasons.

DAC-IPAD Recommendation 42 – (August 2022) The Army should establish an independent supervisory rating structure for SVCs outside of the OSJA and local command.

APPENDIX F. COMMITTEE PUBLIC COMMENTS TO THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE



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

December 12, 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) provides the enclosed public comment, including five recommendations for amending Rule for Courts-Martial (R.C.M.) 1001(c), to the Joint Service Committee on Military Justice for consideration.

Thank you for your consideration of the Committee's comments and recommendations.

Sincerely,

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

Karla N. Smith, Chair

Enclosure

Enclosure: DAC-IPAD Public Comment Regarding Rule for Courts-Martial 1001

Public Comment:

The DAC-IPAD Committee members heard from stakeholders and reviewed numerous courts-martial cases involving victim impact statements.

Based on the testimony and case reviews, the Committee found that victims are subject to routine editing of their impact statements: either before trial by well-meaning victims' counsel and trial counsel who pre-edit the impact statements to avoid objections in court, or by military judges in the courtroom, or a combination. The result is the same – crime victims are not able to fully describe the impact on them of the accused's crimes. This is very different from civilian jurisdictions in which crime victims are largely able to express impact without such editing.

The Committee has concluded that a primary source of the problem is that R.C.M. 1001(c) is too narrow in scope. The following five recommendations to expand the scope of the rule coincide with the requirement that military judges serve as sentencing authorities in all but capital cases. Military judges, by virtue of their training, experience, and temperament, are trusted to appropriately assess the information provided in victim impact statements according to the rules.

Recommendations:

Recommendation #1:

The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words “or indirectly” to the definition of victim impact, amending the section as follows:

“For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly *or indirectly* relating to or arising from the offense of which the accused has been found guilty.”

This proposed change recognizes that victim impact statements are not presented for evidentiary purposes and allow the victim to discuss more attenuated impact from the crime similar to many civilian jurisdictions.

Recommendation #2:

The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence.

The JSC's draft change to R.C.M. 1001(c)(3) in the 2023 draft Executive Order removes the restriction against crime victims recommending a specific sentence for the accused in all but capital cases and appears to expand what victims may say in their impact statements; however, without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so if the military judge does not consider the recommendation to be “victim impact” or “matters in mitigation,” per the language of the rule. This additional language would mirror the language in R.C.M. 1001(d)(2)(A).

Recommendation #3:

The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to providing the statement orally, in writing, or both.

R.C.M. 1001(c)(5)(A) currently allows a victim to provide an unsworn victim impact statement orally, in writing, or both. Addition of the language makes it clear that digital media is a permissible means to submit a victim impact statement; aligns courts-martial with a number of states that allow victims to provide impact statements through audio or video recordings or other digital media; and importantly, provides victims the ability to submit impact statements when they are not available or do not wish to speak during the presentencing proceedings.

Recommendation #4:

The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the “upon good cause shown” clause to be consistent with the JSC’s proposed change to R.C.M. 1001(c)(5)(A).

R.C.M. 1001(c)(5)(A) states that a victim may provide an unsworn victim impact statement. The JSC’s proposed change to this section adds a sentence stating that the crime victim’s unsworn statement “may be made by the crime victim, by counsel representing the crime victim, or both.” However, R.C.M. 1001(c)(5)(B) still includes the limitation “Upon good cause shown, the military judge may permit the crime victim’s counsel, if any, to deliver all or part of the crime victim’s unsworn statement.” It appears the draft change was intended to remove the requirement that the victim show good cause for the victim’s counsel to deliver the victim impact statement.

Recommendation #5:

The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

R.C.M. 1001(c)(5)(B) currently requires a crime victim who makes an unsworn statement to provide a written proffer of the matters to be addressed in the statement to trial counsel and defense counsel after the announcement of findings. The rule provides that the military judge may waive this requirement for good cause shown. Often, victims’ written statements are “redlined” by military judges or by well-meaning victims’ counsel or trial counsel prior to their delivery. In most civilian jurisdictions, victims deliver their impact statements unedited.

The JSC’s proposed change to R.C.M. 1001(c)(5)(B) would remove the following sentence from the discussion section: “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).” The proposed removal of this sentence is consistent with the pending change to judge-alone sentencing and will allow crime victims more latitude in their impact statements. Trial and defense counsel will still have the opportunity to rebut factual matters in the victim’s unsworn statement and to object to information outside the scope of R.C.M. 1001(c)(2)(B).

APPENDIX G. DAC-IPAD PUBLIC MEETINGS, PREPARATORY SESSIONS, AND PRESENTERS

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
DAC-IPAD PUBLIC MEETING 22 April 21, 2022 Virtual	<p>Committee briefing of Charter and Bylaws for the reconstituted DAC-IPAD.</p> <p>Professional staff presentation on summary of events since last meeting that occurred while the Committee was suspended, including Fort Hood Report; IRC report and DoD implementation; FY22 NDAA provisions update; and the March 2022 DAC-IPAD report.</p> <p>Committee deliberations to formulate a strategic plan and a timeline for implementation of current statutory tasks, assigned tasks, and additional tasks for consideration.</p>

<p>DAC-IPAD PUBLIC MEETING 23</p> <p>June 21-22, 2022</p> <p>Arlington, VA</p>	<p>Committee deliberations for establishing their terms of reference, and subcommittees.</p> <p>Committee review of the current statutory and assigned tasks.</p> <p>Professional staff presentations on Appellate Decisions in Military Sexual Assault Cases; Data Review; FY20 NDAA Joint Explanatory Statement; Office of Special Trial Counsel Update; and SVC/VLC Report Overview.</p> <p>Panel presentation from civilian prosecutors who provided their perspectives on best practices for establishing an independent prosecutorial office. Panel members included:</p> <p><i>Ms. Sherry Boston, District Attorney, Office of the DeKalb County District Attorney, Decatur, Georgia</i></p> <p><i>Ms. Parisa Dehghani-Tafti, Commonwealth's Attorney for Arlington County and the City of Falls Church, Virginia</i></p> <p><i>Ms. Fara Gold, Senior Counsel on Sexual Misconduct to the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice</i></p> <p><i>Ms. Sharon Marcus-Kurn, Chief, Sex Offense and Domestic Violence Section, United States Attorney's Office for the District of Columbia</i></p> <p><i>Mr. Eric Rosenbaum, Chief, Special Victims Bureau, Major Crimes Division, Queens County District Attorney's Office</i></p> <p>Briefing from <i>Colonel Elizabeth Hernandez, U.S. Air Force, Chair, Joint Service Committee</i> on the R.C.M. amendment process to implement FY22 NDAA Military Justice Reforms.</p> <p>Offices of Special Trial Counsel panel presentation from:</p> <p><i>Honorable John P. "Sean" Coffey, General Counsel, Department of the Navy</i></p> <p><i>Vice Admiral Darse E. "Del" Crandall, Jr., Judge Advocate General, U.S. Navy</i></p> <p><i>Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps</i></p> <p><i>Honorable Peter J. Beshar, General Counsel, Department of the Air Force</i></p> <p><i>Lieutenant General Charles L. Plummer, The Judge Advocate General, U.S. Air Force</i></p> <p><i>Major General Rebecca Vernon, The Deputy Judge Advocate General, U.S. Air Force</i></p> <p><i>Honorable Carrie F. Ricci, General Counsel, Department of the Army</i></p> <p><i>Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army</i></p>
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<p>DAC-IPAD PUBLIC MEETING 24</p> <p>September 21, 2022</p> <p>Pentagon City, VA</p>	<p>Professional staff briefings on recent court-martial observation; professional training course observation; UCMJ appellate process; and FY2021 appellate case data.</p> <p>Panel presentation and discussion on the UCMJ appellate process with panel member Major Steven Dray, Associate Professor, Criminal Law, U.S. Army.</p> <p>Panel presentations on the current practice of military appellate process from the Government and Defense Appellate Divisions. Panel members included:</p> <p>Government Appellate Division Panel:</p> <p><i>MAJ Dustin Morgan, (former) Government Appellate Division, U.S. Army</i></p> <p><i>Maj Brittany Speirs, Government Appellate Division, U.S. Air Force</i></p> <p><i>Mr. Brian Keller, Deputy Director, Appellate Government Division, U.S. Navy</i></p> <p><i>CAPT Anita Scott, Chief, Military Justice, U.S. Coast Guard</i></p> <p>Defense Appellate Division Panel:</p> <p><i>MAJ Rachel Gordienko, Branch Chief (II), Defense Appellate Division, U.S. Army</i></p> <p><i>Maj Jenna Arroyo, Defense Appellate Division, U.S. Air Force</i></p> <p><i>Ms. Rebecca Snyder, Deputy Director, Appellate Defense Division, U.S. Navy</i></p> <p><i>Mr. Thomas Cook, Chief, Legal Assistance & Defense Services, U.S. Coast Guard</i></p>
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<p>DAC-IPAD PUBLIC MEETING 25</p> <p>December 6-7, 2022</p> <p>Pentagon City, VA</p>	<p>Panel presentation and discussion on the UCMJ courts-martial panel selection process. Panel members included:</p> <p><i>Colonel Christopher Kennebeck, Chief, Criminal Law, OTJAG, U.S. Army</i> <i>Captain Andrew House, SJA, U.S. Naval Academy, U.S. Navy</i> <i>Colonel Shannon Sherwin, SJA, Air Education & Training Command, U.S. Air Force</i> <i>Colonel Christopher G. Tolar, Deputy SJA to the Commandant of the Marine Corps, U.S. Marine Corps</i> <i>Commander Kismet Wunder, Legal Services Command, U.S. Coast Guard</i></p> <p>Panel presentation and discussion on victim's impact statements at sentencing. Panel members included:</p> <p><i>Ms. Adrian Perry, Victim Advocate, Survivors United</i> <i>Dr. Breck Perry, Victim Advocate, Survivors United</i> <i>Mr. Ryan Guilds, Special Victims' Counsel, Arnold & Porter LLP</i></p> <p>Panel presentation and discussion on victim impact statements at sentencing with Special Victims' Counsel/Victims' Legal Counsel. Panel members included:</p> <p><i>Colonel Carol A. Brewer, Chief, SVC Program, U.S. Army</i> <i>Captain Daniel Cimmino, Chief, VLC Program, U.S. Navy</i> <i>Colonel Tracy Park, Chief, VC Program, U.S. Air Force</i> <i>Lieutenant Colonel Iain D. Pedden, Chief, VLC Program, U.S. Marine Corps</i> <i>Ms. Elizabeth Marotta, Chief, Office of Member Advocacy, U.S. Coast Guard</i></p> <p>Panel presentation and discussion on the Offices of Special Trial Counsel update. Panel members included:</p> <p><i>Honorable Carrie F. Ricci, General Counsel, Department of the Army</i> <i>Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army</i> <i>Honorable John P. "Sean" Coffey, General Counsel, Department of the Navy</i> <i>Vice Admiral Darse E. "Del" Crandall, Jr., Judge Advocate General, U.S. Navy</i> <i>Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps</i> <i>Honorable Peter J. Beshar, General Counsel, Department of the Air Force</i> <i>Lieutenant General Charles L. Plummer, The Judge Advocate General, U.S. Air Force</i></p> <p>Professional staff briefings on the DAC-IPAD and GAO Racial Disparity Reports; and Case Review, Special Projects and Policy Subcommittee updates.</p> <p>Committee deliberations on the DAC-IPAD March 2023 annual report.</p>
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<p>DAC-IPAD PUBLIC MEETING 26</p> <p>February 21-22, 2023</p> <p>Arlington, VA</p>	<p>Briefing from <i>Captain Anita Scott, U.S. Coast Guard, Joint Service Committee Member</i>, on the FY23 NDAA Military Justice provisions.</p> <p>Panel presentation on Article 25 criteria and court-martial panel selection process. Panel members from the trial defense organizations included:</p> <p><i>COL Sean McGarry, U.S. Army</i> <i>CAPT Mark Holley, U.S. Navy</i> <i>Col Valerie Danyluk, U.S. Marine Corps</i> <i>Col Brett Landry, U.S. Air Force</i> <i>LCDR Jennifer Saviano, U.S. Coast Guard</i></p> <p>Panel discussion with <i>Colonel Tyesha Lowery Smith, U.S. Army</i> on the current status of military sentencing guidelines development and implementation.</p> <p>Panel presentation and discussion with former military judges on Article 25 and victim impact statements at sentencing. Panel members included:</p> <p><i>LTC(R) Stefan Wolfe, U.S. Army</i> <i>CAPT(R) Marcus Fulton, U.S. Navy</i> <i>CDR(R) Will Weiland, U.S. Navy</i> <i>LtCol(R) Michael Libretto, U.S. Marine Corps</i> <i>COL(R) W. Shane Cohen, U.S. Air Force</i></p> <p>Professional staff briefings on subcommittee updates and the 5th annual report development.</p> <p>Committee deliberations on the 5th annual report.</p>
<p>DAC-IPAD PUBLIC MEETING 27</p> <p>March 14, 2023</p> <p>Virtual</p>	<p>Discussion, Deliberations, and Voting:</p> <p><i>5th Annual Report</i> <i>Report on Victim Impact Statements</i> <i>Study on Appellate Review</i></p> <p>DAC-IPAD Subcommittee: Special Projects Update</p>

POLICY SUBCOMMITTEE PREPARATORY SESSIONS	
SESSION DATE AND LOCATION	TOPICS AND PRESENTERS
Policy Subcommittee Preparatory Session 1 November 9, 2022 Virtual	Policy Subcommittee discussion of administrative matters; victim impact statement study; FY20 NDAA Joint Explanatory Statement request to review Alternative Justice; and strategic planning for the PSC.
Policy Subcommittee Preparatory Session 2 December 1, 2022 Virtual	Policy Subcommittee discussion on the topic of victim impact statements at presentencing proceedings.
Policy Subcommittee Preparatory Session 3 December 7, 2022 Pentagon City, VA	Policy Subcommittee discussion on the topic of victim impact statements at presentencing proceedings; FY20 NDAA Joint Explanatory Statement request to review Alternative Justice in the military justice system; uniform policy for providing information to victims' counsel; and additional policy issues for the PSC to consider.
Policy Subcommittee Preparatory Session 4 January 24, 2023 Virtual	Policy Subcommittee discussion on the victim impact statements at presentencing proceedings report; the FY20 NDAA Joint Explanatory Statement request to review Alternative Justice in the military justice system; and Article 25, court-martial panel selection criteria.
Policy Subcommittee Preparatory Session 5 February 1, 2023 Virtual	Policy Subcommittee discussion on the FY20 NDAA Joint Explanatory Statement request to review Alternative Justice in the military justice system.

Policy Subcommittee Preparatory Session 6 February 21, 2023 Arlington, VA	Policy Subcommittee discussion on the Victim Impact Statement report; Alternative Justice; and the proposed Article 25 study. Panel presentation and discussion on Article 25 criteria and randomized panel selection. Panel members included: <i>Colonel Brett Landry, U.S. Air Force, Chief, Trial Defense Division</i> <i>Colonel Sean McGarry, U.S. Army, Chief, Trial Defense Service</i> <i>Captain Mark Holley, U.S. Navy, Director, Defense Service Office Operations</i> <i>Colonel Valerie Danyluk, U.S. Marine Corps, Chief Defense Counsel</i> <i>Lieutenant Commander Jennifer Saviano, U.S. Coast Guard, Chief of Defense Services</i>
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APPENDIX H. DAC-IPAD PROFESSIONAL STAFF

PROFESSIONAL STAFF

Colonel Jeff A. Bovarnick, USA, JAG Corps, Director

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

Ms. Amanda Hagy, Senior Paralegal

Mr. R. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst

Ms. Meghan Peters, Attorney-Advisor

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Ms. Eleanor Magers Vuono, Attorney-Advisor

COMMITTEE CONSULTANTS

Dr. Alice Falk, Editor

Ms. Laurel Prucha Moran, Graphic Designer

Dr. William “Bill” Wells, Criminologist

APPENDIX I. ACRONYMS AND ABBREVIATIONS

A.F.C.C.A.	Air Force Court of Criminal Appeals
C.A.A.F.	Court of Appeals for the Armed Forces
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DFO	Designated Federal Officer
DoD	Department of Defense
FACA	Federal Advisory Committee Act
FY	fiscal year
GC DoD	General Counsel for the Department of Defense
GCM	general court-martial
GCMCA	general court-martial convening authority
JAG	judge advocate general
JES	Joint Explanatory Statement
JSC	Joint Service Committee
MCM	Manual for Courts-Martial
MILDEPs	Military Departments
MRE	Military Rules of Evidence
MJ	military judge
N/n	number
NDAA	National Defense Authorization Act

N.M.C.C.A. Navy-Marine Corps Court of Criminal Appeals

PSC Policy Subcommittee

R.C.M. Rule or Rules for Courts-Martial

RFI request for information

SA sexual assault

SJA staff judge advocate

SPCMCA special court-martial convening authority

SPCM special court-martial

SPSC Special Projects Subcommittee

SVC special victims' counsel

ToR Terms of Reference

UCMJ Uniform Code of Military Justice

USA United States Army

USAF United States Air Force

U.S.C. United States Code

USCG United States Coast Guard

USMC United States Marine Corps

USN United States Navy

VIS victim impact statement

VLC victims' legal counsel

APPENDIX J. SOURCES CONSULTED

1. Legislative Sources

a Enacted Statutes

10 U.S.C. § 806b (2021) (Article 6b, Uniform Code of Military Justice)

18 U.S.C. § 3771 (Uniform Code of Military Justice)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019)

National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021)

2. Judicial Decisions

United States v. Tyler, 81 M.J. 108 (C.A.A.F. 2021)

United States v. Miller, NMCCA No. 201900234 (2022)

United States v. Hamilton, 78 M.J. 335 (C.A.A.F. 2019)

United States v. Dunlap, ACM No. 39567 (2020)

In re A.J.W., 80 M.J. 737, 744 (2021)

United States v. Hamilton, 77 M.J. 579, 585-86 (A. F. Ct. Crim. App. 2017)

United States v. Roblero, CCA Lexis 168 (A.F. Ct. Crim. App. 2017)

United States v. DaSilva, CCA Lexis 213 (A.F. Ct. Crim. App. 2020)

United States v. Stanley, CCA Lexis 264, 269 (A.C.C.A. 2020)

United States v. McInnis, CCA Lexis 194 (A.F.C.C.A. 2020)

United States v. Mellette, 81 J.J. 681, 700 (2021); CAAF Lexis 544 (C.A.A.F. 2022)

United States v. Edwards, 82 M.J. 239, 241 (C.A.A.F. 2021)

United States v. Barker, M.J. 377, 378 (C.A.A.F. 2018)

3. Rules and Regulations

a Executive Orders

Manual for Courts-Martial, United States (2019 edition)

Joint Service Committee on Military Justice draft Executive Order and Annex

b Military Services

Military Judges' Benchbook, Department of the Army Pamphlet (2020)

4. Meetings and Hearings

a. Public Meetings of the DAC-IPAD

Transcript of DAC-IPAD Public Meeting (February 14, 2020)

Transcript of DAC-IPAD Public Meeting (June 22, 2022)

Transcript of DAC-IPAD Public Meeting (December 6, 2022)

Transcript of DAC-IPAD Public Meeting (December 7, 2022)

Transcript of DAC=IPAD Public Meeting (February 21, 2023)

Transcript of DAC=IPAD Public Meeting (February 22, 2023)

5. Letters and Emails

a. Department of Defense

DAC-IPAD Public Comment to the Joint Service Committee on Military Justice (2022)

