THE MILITARY JUSTICE REVIEW PANEL

2024 Comprehensive Review and Assessment of the Uniform Code of Military Justice

December 2024

Military Justice Review Panel

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Jeri K. Somers

**Larry Morris served as a member of the MJRP from November 2022 through May 2024.*

The Military Justice Review Panel: 2024 Comprehensive Review and Assessment of the Uniform Code of Military Justice

December 2024

THE MILITARY JUSTICE REVIEW PANEL
ARTICLE 146, UNIFORM CODE OF MILITARY JUSTICE

December 20, 2024

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

Dear Chairs and Ranking Members,

Pursuant to 10 U.S.C. § 946, Article 146, Uniform Code of Military Justice (UCMJ), and on behalf of the Military Justice Review Panel (MJRP), I enclose our first independent periodic review and assessment of the operation of the UCMJ. We will send this report to the Secretary of Defense, the Service Secretaries, and each of the Services' senior judge advocates, among others. The members of the MJRP would like to express our sincere appreciation for the opportunity to use our collective expertise for this critical effort.

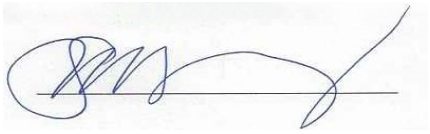
Respectfully submitted,

Elizabeth L. Hillman, Chair

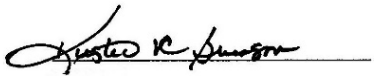
Encl:
As stated

Tara Osborn, Vice-Chair

Benes Z. Aldana



Steven M. Barney



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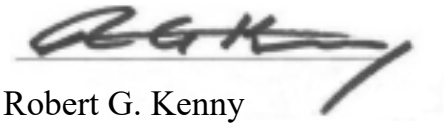

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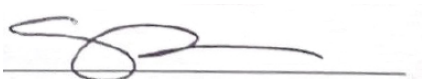

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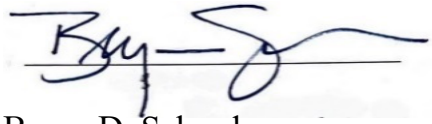

Bryan D. Schroder

Jeri K. Somers

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Overview

The challenges of national security demand a separate and strong military justice system.[1] Justice, accountability, fairness, and transparency are the core principles of that system. Any reforms to our military justice system must balance the unique requirements of the military and emerging challenges of national security with the unchanging need to do justice. The Military Justice Review Panel (MJRP) recognizes both the profound impact of the many changes to military law adopted in recent years and the potential risk to national security of seeking to replicate the practices of civilian criminal justice in the Armed Forces.

Military law strengthens the national security of the United States in times of war and in peace. Today, national security demands that military law be effective in hostile and diverse environments. They include regional and global conflicts, focused deployments and mass mobilizations, counterinsurgencies and engagements with near-peer adversaries, and battlefields shaped by autonomous, cyber, biological, and other new weapons. If the rapid pace and extent of change to military law results in too much complexity and rigidity, it will erode the flexibility essential to effectiveness in the wide range of contemporary—and future—conflicts in which the nation will rely on our Armed Forces to compete and win.

This Panel began its work at a time of increased focus on transparency and trust.[2] Sexual misconduct and interpersonal violence, which undermine both good order and public trust in the military, have been of special concern. Commands that fail to address misconduct and hold perpetrators accountable diminish public trust and military effectiveness. The 2021 Independent Review Commission on Sexual Assault in the Military (IRC) recommendations were intended to restore confidence in the military's response to criminal misconduct,[3] and a 2023 amendment adding deterrence and accountability to the purposes of military law in the Manual for Courts-Martial (MCM) Preamble further emphasized the importance of enhancing confidence in military justice.[4]

The swift pace and broad scope of changes to military law since 2016 have left the Department of Defense (DoD) and Military Departments struggling to promulgate Service regulations, train counsel, and track compliance with new rules and authorities. Moreover, insufficient data collection, management, and analysis have prevented a full understanding of the impact of recent changes. Aware of these challenges, this Comprehensive Review identifies discrete issues for improvement, highlights areas requiring additional study, and makes recommendations to ensure that the Services operate a just, efficient system of military justice that strengthens national security while promoting good order and discipline. The MJRP found that recent reforms intended to increase trust and transparency have, in some cases, instead done the opposite. The extent of change and the complexity of the new systems that govern the

1 "The purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Manual for Courts-Martial, United States (2024 ed.) [2024 MCM], "Nature and purpose of military law, Manual for Courts-Martial," Part I, Preamble, I-1.

2 H.R. Rep. No. 114-537 (Report of the House of Representatives Committee on Armed Services on H.R. 4909), at 5 (May 4, 2016) (describing the comprehensive reforms in the MJA2016 as "improving transparency" and reflecting a commitment to "making the military justice system just, efficient, and effective"), *available at* https://www.congress.gov/114/crpt/hrpt537/CRPT-114hrpt537.pdf.

3 Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military 9, 14 (July 2021) [IRC Report], *available at* https://media.defense.gov/2021/ Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF.

4 2024 MCM, *supra* note 1, at I-1.

investigation, prosecution, and adjudication of reports of sexual assault, sexual harassment, domestic violence, and other "covered" offenses have made coordination and analysis more difficult for commanders and judge advocates alike.[5] This Report seeks to strike a balance between allowing the new system to fulfill its promise and the imperative to promote and sustain discipline, efficiency, and justice in the U.S. Armed Forces.

Findings and Recommendations

Beginning on October 20, 2022, the MJRP held 14 public meetings and nonpublic sessions to develop projects, adopt business rules, and obtain data from within and beyond DoD. MJRP members met with trial counsel, defense counsel, victims' counsel, military and civilian judges, the service Judge Advocates General (TJAGs) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), the Sentencing Parameters and Criteria Board (SPCB), and representatives of the new Offices of Special Trial Counsel (OSTCs) at bases and posts across the country. Civilian practitioners and advocacy groups, academics, members of the media and policymakers addressed the Panel. Members also visited military installations to observe courts-martial firsthand and hear from commanders, senior enlisted leaders, court reporters, military judges, chaplains, and others engaged in and affected by military justice.[6]

This Report's 20 recommendations and 21 findings are organized into four chapters. All findings and recommendations were the consensus opinion of the Panel, and all except for the two that are noted in the summary below were unanimously approved by those members present for the vote.

Chapter 1, "The Structure of the Military Justice System," assesses the impact—to the greatest extent possible, given the grave limitations of available data—of recent changes affecting the investigation, prosecution, and adjudication of crimes under the Uniform Code of Military Justice (UCMJ), including Article 140a and the creation of a new forum, the Article 16(c)(2)(A) "judge-alone special court-martial." More accurate data and greater transparency are needed to enhance trust and confidence in the system, and to enable the MJRP to conduct future assessments of the operation of military law. Although one member believes Congress has already required DoD to address this fundamental problem, the MJRP recommends that Congress require, and DoD immediately adopt, new tools to improve data collection and access to court-martial filings and records. This is needed to address both eroding trust among the public and declining clarity among military justice practitioners as to processes, requirements, and resources.

RECOMMENDATION 1: By January 1, 2026, Congress statutorily require DoD to establish a single, uniform, centralized military justice database.[7]

RECOMMENDATION 2: By January 1, 2027, the Secretary of Defense implement a single, uniform, centralized military justice database with full operational capability.

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5 Covered offenses are offenses charged under the following UCMJ articles: 117a, Wrongful broadcast or distribution of intimate visual images; 118, Murder; 119, Manslaughter; 119a, Death or injury of an unborn child; 120, Rape and sexual assault; 120a, Mail deposit of obscene material; 120b, Rape and sexual assault of a child; 120c, Other sexual misconduct; 125, Kidnapping; 128b, Domestic violence; 130, Stalking; 132, Retaliation; 134, Child pornography; and 134, Sexual harassment (note: sexual harassment will be a covered offense effective Jan. 2025).

6 Members observed courts-martial at Joint Base McGuire–Dix–Lakehurst, NJ, in November 2022; Fort Moore, GA, in February 2023; and Fort Drum, NY, and Fort Richardson, AK, in April 2023.

7 This Recommendation was not unanimously approved. The one dissenting Member believes that additional congressional action is unnecessary because the law already requires DoD to establish a uniform, centralized military justice database. DoD's position, however, is that having issued plans for this statutory requirement, it is in compliance with the law even though it has not yet established the required database.

RECOMMENDATION 3: The Secretary of Defense direct collection of the full scope of information required by Article 140a to begin no later than January 1, 2026.

RECOMMENDATION 4: The Secretary of Defense adopt electronic filing and integrated public dockets for use by all the Military Departments and the U.S. Court of Appeals for the Armed Forces no later than January 1, 2026.

RECOMMENDATION 5: By January 1, 2026, Congress statutorily require DoD to provide public access to pretrial, trial, and appellate court-martial records at the time of filing.[8]

RECOMMENDATION 6: The Secretary of Defense direct public access to pretrial, trial, and appellate court-martial records at the time of filing and in accordance with Article 140a, to begin no later than July 1, 2025.

RECOMMENDATION 7: The Secretary of Defense provide personnel and technology to support a single, uniform, centralized military justice database, expanded data collection, and an electronic filing system with public-facing integrated dockets.

RECOMMENDATION 8: In order to assess Article 16(c)(2)(A), "judge-alone special courts-martial," the Secretary of Defense direct the collection of the following data points:

- The number of Article 16(c)(2)(A) special courts-martials, if any, that involve offenses committed when the accused is deployed or aboard a vessel.
- The number of accused who are administratively separated after conclusion of Article 16(c)(2)(A) special courts-martial.
- The number of Article 16(c)(2)(A) special courts-martial that are conducted after an accused refuses nonjudicial punishment.

Chapter 2, "Pretrial and Trial Processes," focuses on plea agreements and pre-referral judicial authorities, as the Panel has previously reviewed and made recommendations on preliminary hearings and other pretrial and trial matters. The Panel considered changes to Article 53a that would give more discretion to the military judge to reject a plea agreement, but declined to recommend amending the statute until appellate courts consider the issue and until more sentencing data become available.

Chapter 3, "Punitive Articles," assesses six covered offenses for which the new Offices of Special Trial Counsel have exclusive referral authority: (1) Article 117a, Wrongful broadcast or distribution of intimate visual images; (2) Article 125, Kidnapping; (3) Article 128b, Domestic violence; (4) Article 130, Stalking; (5) Article 132, Retaliation; and (6) Article 134, Sexual harassment. The MJRP notes with concern, and will continue to analyze all available data regarding, the volume of domestic violence and sexual harassment complaints and the complicated, overlapping statutory and regulatory authorities for these crimes. The Panel recommends clarification of elements, processes, and data collection requirements.

RECOMMENDATION 9: Congress revise Article 117a, Wrongful broadcast or distribution of intimate visual images, to clarify the elements of the crime.

8 As was true of Recommendation 1, one dissenting Member believes that additional congressional action is unnecessary because the law already requires DoD to facilitate public access to docket information, filings, and records. Since it has prescribed "uniform standards and criteria" for public access, DoD maintains that it is in compliance with Article 140(a) even though DoD policy limits public access to a subset of cases, and even though that access is provided only post-trial. *See Pro Publica, Inc. v. Butler*, 2024 U.S. Dist. LEXIS 38500, *3-4 (S.D. Cal. Mar. 4, 2024).

Finding 1: Article 117a, Wrongful broadcast or distribution of intimate visual images, is the second most frequently investigated offense among the covered offenses assessed by the MJRP. Despite the number of investigations, few cases have been referred to trial.

Finding 2: Article 117a, Wrongful broadcast or distribution of intimate visual images, is a long and complicated statute that consists of a single sentence with more than 300 words. Prosecution of Article 117a has led to significant appellate litigation over the text and interpretation of the statute.

Finding 3: Article 117a, Wrongful broadcast or distribution of intimate visual images, requires a "reasonably direct and palpable connection to a military mission or military environment." Because of the military nexus element, offenses against civilian victims cannot be prosecuted unless there is a connection to the military. Nonconsensual broadcast of intimate visual images also cannot be prosecuted under Article 134 due to the doctrine of preemption. Thus, some cases involving broadcast or distribution of intimate visual images by a servicemember, particularly those with a civilian victim, currently cannot be prosecuted within the military justice system.

RECOMMENDATION 10: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 125, Kidnapping, from the report of an allegation through final disposition.

Finding 4: Military law enforcement agencies reported a few hundred investigations of kidnapping, but few cases were referred to trial and most resulted in no reported action taken.

Finding 5: A large number of kidnapping investigations appear to have been conducted by military police. The data do not indicate whether military police were the only military law enforcement agency to conduct the investigation, or whether some cases also were investigated by military criminal investigative organizations.

Finding 6: The Army reported a disproportionately higher number of kidnapping investigations than the other Services, raising concerns about inconsistent data collection protocols.

RECOMMENDATION 11: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 128b, Domestic violence, from the report of an allegation through final disposition.

Finding 7: Domestic violence is the most frequently investigated offense among the covered offenses assessed by the MJRP. The Army reported a disproportionately higher number of domestic violence investigations than the other Services, raising concerns about inconsistent data collection protocols.

Finding 8: The Army and Air Force report that military police investigated more domestic violence allegations than did military criminal investigative organizations; the Navy and Marine Corps report that domestic violence was primarily investigated by military criminal investigative organizations.

Finding 9: Data deficiencies preclude the MJRP from determining whether Article 128b, Domestic violence, allegations are being appropriately investigated and processed.

RECOMMENDATION 12: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 130, Stalking, from the report of an allegation through final disposition, with separate data fields to differentiate between cyberstalking and physical stalking.

Finding 10: The data on Article 130, Stalking, fails to differentiate between cyberstalking and physical stalking.

RECOMMENDATION 13: The Secretary of Defense direct the evaluation of Service regulations and protocols for investigating Article 130, Stalking, to determine whether military criminal investigative organizations or military police are receiving appropriate and necessary training for, or have appointed experts for, investigating cyberstalking.

RECOMMENDATION 14: The Secretary of Defense promulgate policies that distinguish between conduct under Article 132, Retaliation, and reprisal under 10 U.S.C. §1034, the Military Whistleblower Protection Act, and clarify responsibility for investigating allegations under these authorities.

Finding 11: DoD policies addressing retaliation fail to provide clear guidance on the investigation and prosecution of criminal retaliation under Article 132, Retaliation, and reprisal under 10 U.S.C. §1034, the Military Whistleblower Protection Act. Current policies assign responsibility for investigating allegations of retaliation among multiple entities in an unclear and convoluted manner.

RECOMMENDATION 15: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 132, Retaliation, from the report of an allegation through final disposition, with separate data fields that identify the type of retaliation and differentiate between administrative and criminal complaints.

Finding 12: The small number of investigations and prosecutions of criminal retaliation is inconsistent with concerns about the prevalence of retaliation reported in workplace climate surveys.

RECOMMENDATION 16: Congress amend the law so that a commander's decision as to whether a formal complaint of sexual harassment is "substantiated" does not prevent the Office of Special Trial Counsel from exercising authority over sexual harassment under Article 134.

RECOMMENDATION 17: DoD establish a uniform definition for a "substantiated" complaint of sexual harassment and require the commander to consider the elements of the Article 134 offense of "sexual harassment" when determining whether the complaint must be forwarded to the relevant Office of Special Trial Counsel or can be appropriately handled by the command.

RECOMMENDATION 18: Congress require, and Secretary of Defense immediately direct, the collection of data on allegations of sexual harassment punishable under Article 134 separately from and in addition to the collection of data on sexual harassment not punishable under Article 134. The data collected for both criminal and noncriminal sexual harassment should be uniform and include formal, informal, anonymous, and confidential reports of sexual harassment involving members of the Armed Forces as follows:

(1) The number of formal reports.
    (a) Number of formal substantiated reports.
    (b) Number of formal unsubstantiated reports.
    (c) Number of other dispositions for formal reports.
    (d) Number of cases referred to the Offices of Special Trial Counsel.
(2) The number of informal reports.
    (a) Number of informal substantiated reports.
    (b) Number of informal unsubstantiated reports.
    (c) Number of other dispositions for informal reports.
(3) The number of anonymous reports.
    (a) Number of anonymous substantiated reports.
    (b) Number of anonymous unsubstantiated reports.
    (c) Number of other dispositions for anonymous reports.

(4) The number of confidential reports.
(5) A synopsis of each substantiated report.
(6) The action taken in the case of each substantiated report, including the type of disciplinary or administrative sanction imposed, if any, such as—
    (a) conviction and sentence by court-martial;
    (b) imposition of nonjudicial punishment under section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice); or
    (c) administrative separation or other type of administrative action imposed.

RECOMMENDATION 19: The Secretary of Defense direct effective coordination and correlation of the reporting, investigation, case evaluation, and prosecution of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment.

Finding 13: The reporting, investigation, and disposition of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment, require effective collaboration between many entities: commanders, Offices of Special Trial Counsel (OSTCs), staff judge advocates (SJAs), military criminal investigative organizations (MCIOs), military police, civilian law enforcement authorities, victim support organizations, DoD and Service inspectors general (IGs), sexual assault response coordinators (SARCs), victim advocates (VAs), and Military Equal Opportunity (MEO) and Sexual Harassment/Assault Response and Prevention (SHARP) representatives. The complexity of these cases demands an organized and coordinated response, including a sorting system for processing these cases beginning with an allegation through investigation to final action, so that the appropriate law enforcement agency investigates the alleged crime.

Finding 14: The Services do not collect and maintain uniform, comprehensive data on the reporting and processing of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment, offenses in a retrievable data system.

Chapter 4, "Sentencing and Post-Trial Processes," assesses the many new sentencing practices enacted by the Military Justice Act of 2016 (MJA16) and subsequent legislation, all of which have brought military sentencing processes closer to federal sentencing processes.[9] The MJRP's review focused on four key aspects of sentencing: the process through which the sentencing judge receives information on which to adjudge a sentence, the scope and method of permissible victim impact statements, the authorities available to the sentencing judge, and the requirement for the judge to explain the reasons for imposing a particular sentence. The MJRP considered the dissimilarities that persist between federal and military sentencing and found that the distinctive practices remaining in military sentencing are appropriate.

Finding 15: The current adversarial presentencing process in the military is preferable to federal presentencing procedures. In the military system, counsel decide what, if any, evidence in aggravation or extenuation and mitigation to present to the military judge. The reasons to maintain the military presentencing process are as follows:

- There is no existing independent structure within DoD or the Services to conduct a presentencing report;
- Many aspects of the federal presentencing report are inapplicable to Service members; and

9 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 [FY17 NDAA], §§ 5001–5542, 130 Stat. 2000 (2016).

- Trial and defense counsel have an extensive amount of information readily available to present to the military judge.

Finding 16: The current military practice of sentencing after findings of guilt without unreasonable delay is preferable to the federal bifurcated sentencing process. Under Rule for Court Martial (R.C.M.) 906(b)(1), the parties already are authorized to request a continuance between the two phases of trial, which military judges may grant within their discretion upon a showing of reasonable cause.

Finding 17: The current military practice of allowing the parties to decide what information, if any, to present to the military judge at sentencing is preferable to mandating information. The parties are best situated to determine the information they want to offer for the military judge's consideration based on the facts and circumstances of individual cases. Counsel should fully develop the record with information in aggravation, extenuation, and mitigation to ensure that a thorough record is available for correctional institutions and for direct and collateral review authorities, including clemency and parole boards and boards of record corrections.

Finding 18: Applying the Military Rules of Evidence to presentencing evidence (subject to relaxation upon defense request) is appropriate because it enhances the reliability of the information considered by the military judge.

Finding 19: Under the MCM amendments effective 2023, victim impact statements remain limited to financial, social, psychological, or medical impacts relating to, or arising from, the offense of which the accused has been found guilty. The MJRP will continue to assess whether this limitation remains warranted now that sentencing is determined by a military judge instead of a panel.

Finding 20: The current authorized punishments available to the military judge are sufficient.

Finding 21: The current requirement in R.C.M. 1002(a)(2)(B) that directs a military judge to provide a written statement of the factual basis for the sentence only when the sentence adjudged falls outside applicable sentencing parameters is sufficient.

RECOMMENDATION 20: Congress require, and the Secretary of Defense direct, military justice data management systems to collect uniform, comprehensive, case-specific sentencing data. At a minimum, the data should include

(a) The specific offense under a punitive article for each specification for which there was a conviction.

(b) Comprehensive sentencing data, including the length of confinement and whether multiple sentences to confinement run concurrently or consecutively.

(c) The applicable sentencing parameter for each offense.

(d) Comprehensive demographic information for the accused, including but not limited to date of birth, sex, gender identity, sexual orientation, race, ethnicity, education, religious preference, time in service, rank, and pay grade.

(e) Comprehensive demographic information for victims, including but not limited to date of birth, sex, gender identity, sexual orientation, race, ethnicity, education, religious preference, and, as applicable, time in service, rank, and pay grade.

Prior Recommendations

The MJRP issued memoranda on four topics before submitting this Comprehensive Review to the congressional Committees on Armed Services:

- On January 19, 2023, the MJRP issued *Restitution as an Authorized Portion of a Court–Martial Sentence*. The Panel declined to endorse the IRC's recommendation that restitution orders be authorized as part of court-martial sentences. The Panel instead suggested study of other ways to compensate victims for limited out-of-pocket expenses incurred as a direct result of a Service member's crimes.[10]
- On April 19, 2023, the MJRP issued *Judicially Issued Military Protective Orders*. The Panel recommended against authorizing these orders as part of the military justice system, and instead recommended additional education on the processes to obtain protective orders in local jurisdictions and the expansion of victims' counsel's representation and assistance through the Expanded Legal Assistance Program.[11]
- On June 21, 2023, the MJRP issued *Interim Assessment of Preliminary Hearings and Prosecution Standards*, concluding that Article 32 hearings are currently of limited utility to the prosecution, defense, and referral authority. On the related issue of the standard by which a convening authority or special trial counsel should refer a case to trial, the Panel recommended adopting a standard for prosecution consistent with the United States Attorney General's Justice Manual.[12]
- On December 8, 2023, the MJRP issued *Assessment of Article 32, UCMJ, Preliminary Hearings*, recommending that Congress amend Article 32 with a package of reforms that would (1) allow for a reasonable level of discovery at the preliminary hearing while retaining victim protections, (2) require a certification process for the preliminary hearing officer, and (3) preclude referral if the preliminary hearing officer determines that a charge lacks probable cause, subject to a right of appeal to a military judge and without prejudice to the government referring the charge anew.[13]

The MJRP also declined to endorse or adopt the findings of the Department of Defense Legal Services Agency's *Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report* (DLSA Report),[14] which was completed at the direction of the DoD Office of General Counsel before the MJRP was established.[15]

The DLSA Report addressed two statutory requirements: (1) an assessment of five years of statutory changes to the UCMJ, and (2) an assessment of fiscal year (FY) 2020 court-martial sentencing data from cases applying offense-based sentencing. For the first requirement, the DLSA staff summarized the 2019 and 2020 military justice reports from the Services. For the second requirement, the DLSA staff collected FY20 sentencing data from general and special courts-martial with offense-based sentencing. The DLSA Report was limited by its reliance on sentencing data based on a single year, which occurred during the COVID pandemic, which dramatically affected courts-martial. The DLSA Report noted that although the FY20 data were informative, multiple years of data should be

10 *Available at* https://mjrp.osd.mil/sites/default/files/20230119_Restitution_Response_MJRP-GC.pdf.

11 *Available at* https://mjrp.osd.mil/sites/default/files/20230419_MJRP_Judicially-Issued-Mil-Protective-Orders.pdf.

12 *Available at* https://mjrp.osd.mil/sites/default/files/20230621_MJRP_Interim-Assessment-Prelim-Hearings-Pros-Standards.pdf; *see also* U.S. Dep't. of Justice, Justice Manual, § 9-27.000 (Principles of Federal Prosecution), *available at* https://www.justice.gov/jm/justice-manual.

13 *Available at* https://mjrp.osd.mil/sites/default/files/20231208_Assessment-Article32_MJRP-GC.pdf.

14 Dep't of Def. Legal Services Agency, *Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report* (Dec. 2021) [DLSA Report]; *available at* https://mjrp.osd.mil/sites/default/files/Recent%20Amendments%20and%20Sentencing%20Report%20(December%202021%20Final%20w%20App).pdf.

15 10 U.S.C. § 946(f)(1) and (2) (Art. 146, UCMJ).

collected and analyzed to guide the development of sentencing parameters. It also cautioned that a comprehensive review of sentencing would require a comparison of plea agreement and non–plea agreement cases.[16]

The Sentencing Parameters and Criteria Board informed the MJRP that the DLSA Report was of limited use in crafting initial sentencing parameters. While Congress required the SPCB to consider the FY20 data, the SPCB reported that it relied primarily on other sources of information when developing initial sentencing parameters. The SPCB noted that the sentencing parameters will continue to evolve as more information is received and as sentencing practice develops in the field.

Conclusion

These Findings and Recommendations reflect the Panel's assessment of a system of military law in the midst of tremendous change. That system, and this assessment, suffers from data collection, management, and analysis so limited that critical questions about justice, accountability, and fairness remain unanswered. The MJRP recognizes the dedication of those who have implemented recent changes and looks forward to the greater transparency and overall improvements that its Recommendations are intended to create. The impacts that many of the changes adopted over the past decade will have on the rights of Service members, as well as victims, will remain important questions to be addressed in future assessments conducted by the MJRP.

16 DLSA Report, *supra* note 14, at 20.

CHAPTER 1. STRUCTURE OF THE MILITARY JUSTICE SYSTEM

I. INTRODUCTION

Eight years after the passage of Article 140a, UCMJ, the military justice system still lacks a uniform approach to data collection and management. As a result, neither DoD, the Military Departments, the MJRP, Congress, nor the American public has access to accurate military justice data. Without access to such data, it is impossible to answer fundamental questions about the military justice system. The Panel's work provides ample evidence of this failure, including the Services' inability to respond to numerous requests for information (RFIs) because they lacked the data sought. Indeed, the data that they provided frequently raised additional questions instead of providing answers.

For example, when the Panel examined the offense of kidnapping, the lack of data inhibited its ability to determine how the Services investigated the offense. In the civilian justice system, the Federal Bureau of Investigation typically coordinates kidnapping investigations, owing in part to the unique jurisdictional issues raised by the offense (such as interstate transportation of a victim and the need to coordinate federal, state, tribal, and local law enforcement). By contrast, it appears that many, if not most, of the kidnapping cases reported in the military are investigated by military police. As a result, the Panel was unable to determine what criminal conduct was being reported as "kidnapping" and whether military law enforcement has the required resources and training to investigate this serious offense. Without accessible, accurate data, we can neither examine nor understand fundamental aspects of the system, including the investigation and disposition of serious offenses.

Here, we examine two changes to the UCMJ made by the Military Justice Act of 2016:[17] the addition of Article 140a, requiring the collection of data and public accessibility to docket information, filings, and records, and of Article 16(c)(2)(A), providing a new authority for judge-alone special courts-martial. These changes sought to strengthen case management, data collection, and public access to court-martial information, and to introduce a new tool for adjudicating criminal offenses.

Article 140a required DoD to prescribe uniform standards and criteria to improve its data collection and also directed public access to court-martial dockets, filings, and records. While DoD has promulgated data collection standards to the Services, it has not adopted a centralized database to enable system-wide analysis of military justice information as contemplated by Congress.[18] It also has not created a publicly accessible electronic filing system to give the public access to trial records and to enhance the transparency of courts-martial.

DoD's practices and policies are incongruent with an organization that recognizes the importance of data as a strategic asset critical to the national defense.[19] For example, DoD does not gather the full scope of information required at every stage of the military justice system, and instead limits data collection to cases with preferred charges.[20] Public access to court-martial information is similarly hampered: under current policy, DoD withholds

17 FY17 NDAA, *supra* note 9, at §5504 and subsequent amendments.

18 Memorandum from U.S. Dep't of Def. General Counsel to Secretaries of the Military Departments, *Military Justice Case Management, Data Collection, and Accessibility Standards* IV.B (Jan. 13, 2023) [DoD Article 140a Standards]. The 2023 policy rescinded previous guidance dated December 17, 2018. See also Appendix E, "Current DoD Military Justice Data Collection," for detailed information on the drawbacks inherent to the DoD's present practices.

19 U.S. Dep't of Def., *Executive Summary: DoD Data Strategy* (Sept. 30, 2020) [DoD Data Strategy], *available at* https://media.defense.gov/2020/Oct/08/2002514180/-1/-1/0/DOD-DATA-STRATEGY.PDF.

20 DoD Article 140a Standards, *supra* note 18.

trial records until several weeks after a Service member is convicted.[21] If a case ends with a full acquittal, DoD policy permits the Services to refuse to release any records at all.[22]

DoD's policies on data collection and public access to court-martial records are shortsighted at a time when trust in the operation and effectiveness of military justice continues to suffer.[23] The present lack of reliable data and public access means that the MJRP, Congress, and the public are unable to properly evaluate the operation of the system. The MJRP therefore recommends that Congress direct the creation of a single, uniform, centralized military justice database and direct DoD to adopt electronic filing and integrated public dockets.

The MJRP likewise concludes that the judge-alone special court-martial authorized by Article 16(c)(2)(A) may prove to be a valuable tool. But without sufficient information on cases tried in this forum, we lack a full understanding of the impact of this new statutory authority.

II. ARTICLE 140a, UCMJ

A. Background and Purposes

Article 140a directs the Secretary of Defense to prescribe uniform standards and criteria for the Military Services to:

(1) Collect and analyze military justice data;

(2) Process and manage cases;

(3) Produce and distribute records of trial in a timely, efficient, and accurate manner; and

(4) Facilitate public access to docket information, filings, and records.[24]

Article 140a requires DoD to maintain uniform policies for these purposes at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of federal and state courts.[25]

In addition, Article 140a requires (1) protection of personally identifiable information (PII) of victims and minors; (2) exemption from public release for classified, sealed, or judicially protected information; and (3) restrictions of access "appropriate to judicial proceedings and military records."[26] Finally, whether a case ends with an acquittal or a conviction, the statute mandates that all special and general court-martial records must be preserved for not less than 15 years.

21 *Id.*

22 *Id.* DoD may withhold records until 45 days after certification of the record of trial, and no release is required for an acquittal.

23 The IRC Report, *supra* note 3, highlights the lack of trust in the military justice system.

24 10 U.S.C. § 940a (Art. 140a).

25 *Id.* at Art. 140a(a).

26 *Id.* at Art. 140a(b).

B. Legislative History

DoD drafted the text of Article 140a as one of many legislative reforms to be adopted by Congress after DoD's internal review by the Military Justice Review Group of the military justice system as a whole.[27] According to the Conference Report for the National Defense Authorization Act (NDAA) for Fiscal Year 2017, the purpose of Article 140a is "to standardize the collection of data necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system . . . should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level[.]"[28]

Congress enacted DoD's proposal for Article 140a verbatim in the MJA16.[29] The MJRG Report emphasized the importance of public accessibility:

> Utilizing the experience of federal and state systems, there are significant opportunities to improve . . . the concept of accessibility. The civilian courts have developed systems that balance public access with the need to protect privacy, sensitive financial data, and classified information. There are well-developed models in the civilian sector which can be applied in a balanced manner to provide timely access to dockets, filings, and rulings.[30]

The MJRG Report also emphasized the importance of data collection and of public access to court-martial information at every stage of every trial, not just those that end in convictions:

> At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.[31]

C. Analysis of and Recommendations on DoD's Military Justice Data Collection

Article 140a(a)(1) requires DoD to prescribe uniform standards and criteria for the collection of data concerning substantive offenses and procedural matters at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes.[32] DoD issued guidance requiring the Services to collect data in cases with preferred charges, but it still has no centralized database to enable system-wide analysis of military justice information.[33]

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27 Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations 16 (Dec. 22, 2015) [MJRG Report], *available at* https://ogc.osd.mil/Links/Military-Justice-Review-Group/; H.R. Rep. No. 114-537, *supra* note 2, at 5; *see also* H.R. Rep. No. 114-840 (Conference Report to Accompany S. 2943) p.1541 (Nov. 30, 2016) (describing the purpose of the reforms in the Military Justice Act of 2016), *available at* http://docs.house.gov/billsthisweek/20161128/CRPT-114HRPT-S2943.pdf.

28 H.R. Rep. No. 114-840, *supra* note 27.

29 MJRG Report, *supra* note 27, at 1197. Despite DoD's initial request for Article 140a authority, DoD did not request funding at that time. The MJRP is not aware of a DoD request for funding since that time. While all recognize the potential benefits of a single, centralized system, some uniformed senior leaders consider that system attainable only through either centralized resourcing or the adoption of a pre-existing platform.

30 *Id.* at 1012.

31 *Id.* at 1014–15.

32 H.R. Rep. No. 114-840, *supra* note 27 (describing the need to standardize the collection of data necessary for evaluation and analysis).

33 Dep't of Def. General Counsel, Memorandum to Secretaries of the Military Departments, *Plans Required by Section 547 of the National Defense Authorization Act for Fiscal Year 2022* (Dec. 23, 2022). According to DoD's Section 547 Plans, data on referred cases will be collected by 2026 and data

RECOMMENDATION 1: By January 1, 2026, Congress statutorily require DoD to establish a single, uniform, centralized military justice database.[34]

RECOMMENDATION 2: By January 1, 2027, the Secretary of Defense implement a single, uniform, centralized military justice database with full operational capability.

- The MJRP, DoD, Congress, and members of the public cannot reliably assess the military justice system without accurate information on offenses, investigations, and outcomes.
- DoD's inability to produce information about criminal offenses from the time of reporting through investigation and disposition makes quantitative assessments of the military justice system extremely difficult and undermines transparency and trust.
- The disjointed data collection efforts of DoD and the Services lack a sense of urgency and provide little hope that useful data will be available soon.
- The existing Service databases are not readily accessible and do not produce standardized information.
- DoD's outdated data collection practices are also inconsistent with the general DoD Data Strategy, which includes data as a critical element of national security.[35]

RECOMMENDATION 3: The Secretary of Defense direct collection of the full scope of information required by Article 140a to begin no later than January 1, 2026.

- DoD's policy to collect data only in cases with preferred charges is inconsistent with Article 140a's purpose and frustrates efforts to thoroughly assess the military justice system.
- The result is a lack of transparency and an inability to assess cases in which an alleged offense is reported but formal charges are never preferred.
- To enhance transparency and improve assessments, the Secretary of Defense must direct collection of the full scope of information at every stage of every case, from reporting of an offense through ultimate disposition.

D. Analysis of and Recommendations on Public Access to Dockets, Filings, and Trial Records

Article 140a(a)(4) directs DoD to prescribe uniform standards and criteria to facilitate public access to docket information, filings, and records, using, insofar as practicable, the best practices of federal and state courts. Congress enacted Article 140a in response to criticisms of the inaccessibility of court-martial records and the lack of transparency in the military justice system.[36] The law was intended, in part, to ensure that victims and their counsel have appropriate access to trial information and case filings to enforce their rights.[37] However, there are

collection will expand to include pretrial information by 2030.

34 This Recommendation was not unanimously approved. The one dissenting Member believes that additional congressional action is unnecessary because the law already requires DoD to establish a uniform, centralized military justice database. DoD's position, however, is that having issued plans for this statutory requirement, it is in compliance with the law even though it has not yet established the required database.

35 DoD Data Strategy, *supra* note 19.

36 MJRG Report, *supra* note 27, at 36; *see also* H.R. Rep. No. 114-840, *supra* note 27, at 1541 (describing the need for public access to military justice information at all stages of court-martial proceedings).

37 MJRG Report, *supra* note 27, at 36.

many additional reasons why court records should be publicly available at the time of filing: improved transparency educates the military and the public about the court-martial process, thereby building trust in the system; better public awareness supports accountability and deters misconduct; and more accurate media reporting serves the public good, increases efficiency, and enables policymakers to recommend and develop informed policies to improve the system.

1. Electronic Filing Systems and Dockets

State and federal courts began adopting electronic filing (e-filing) systems with integrated public dockets in the late 1990s and early 2000s.[38] For example, the federal judiciary uses an e-filing system called Case Management/ Electronic Case Files (CM/ECF).[39] CM/ECF serves each of the 204 separate federal, appellate, district, and bankruptcy courts. The CM/ECF system enables clerks to reduce their time spent on filing records and instead focus on quality control and ensuring the accuracy of electronic entries. The federal judiciary makes CM/ECF documents available through a public-facing interface called Public Access to Court Electronic Records, or PACER.[40]

DoD's Office of Military Commissions website also offers public access to commission motions and pretrial rulings, with protections for classified and sealed materials.[41] Further, numerous federal agencies have adopted e-filing systems for hearings, trials, and appeals, including the Board of Veterans Appeals, Federal Communications Commission, National Labor Relations Board, Federal Trade Commission, and Federal Election Commission.

2. Court-Martial Dockets and Filing Practice

The Military Services have not yet adopted e-filing or integrated public dockets.[42] For example, the Air Force has a form of e-filing, but access is limited to military counsel.[43] Air Force defense counsel must distribute filings to civilian defense counsel. There is no mechanism for civilian defense counsel or victims' counsel to access the Air Force e-filing system.

The Services' current online dockets include limited information about ongoing courts-martial, typically only a calendar with a list of upcoming cases, locations, the offenses charged, the name of the judge and counsel, and sometimes a range of trial dates. Military dockets do not include Article 32 hearings or timely public access to filings, motions, or court orders. Even after a court-martial ends, the Services do not consistently update their dockets.

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38 Most state courts use e-filing systems. For example, in the California Courts of Appeal, litigants use an application called TrueFiling to upload a PDF of the document they must file in a particular case. The experiences of civilian courts demonstrate that e-filing improves efficiency in the filing and retrieval of court documents, strengthens storage security, and eliminates delays in notice of filings.

39 *See* "Electronic Filing (CM/ECF)," Administrative Office of the U.S. Courts, https://www.uscourts. gov/court-records/electronic-filing-cmecf.

40 PACER is the oldest, most integrated, and largest case management and e-filing system in the United States. It includes pretrial information and collects, manages, and tracks documents and filings for ongoing cases. PACER contains a massive amount of information, tracking more than 47 million cases and containing more than 600 million documents. Two million cases and tens of millions of additional documents are added annually. PACER also covers 197 courts of appeals, district courts, and bankruptcy courts, in addition to other tribunals. Anyone can access PACER to view federal court records, but they must register for an account and some fees may apply. About 75% of PACER uses do not pay a fee because fees are waived if an individual accrues $30 or less in a quarter. The cost to access a single document is capped at $3.00. *See* "PACER: Public Access to Court Electronic Records," Administrative Office of the U.S. Courts, https://pacer.uscourts.gov/.

41 *See* Dep't. of Def., Office of Military Commissions Website, https://www.mc.mil/.

42 *See* Services' narrative responses to MJRP Request for Information (RFI) on Article 140a, UCMJ (Oct. 30, 2023), *available at* Appendix F.

43 Air Force response to MJRP RFI on Article 140a, UCMJ (Oct. 30, 2023), *available at* Appendix F.

RECOMMENDATION 4: The Secretary of Defense adopt electronic filing and integrated public dockets for use by all the Military Departments and the U.S. Court of Appeals for the Armed Forces no later than January 1, 2026.

- E-filing will improve the efficiency of courts-martial and provide a more reliable system for processing and managing trial records.
- E-filing and contemporaneous publication of trial and appellate motions, orders, and records are the standard in federal agencies and in federal courts.
- A single, centralized e-filing and docketing system for all court-martial filings and records would ease efforts to collect and analyze military justice data, thereby enabling better assessment of the system by policymakers.[44]
- Increased public access to contemporaneous court-martial filings would improve transparency and foster greater trust in the military justice system.

RECOMMENDATION 5: By January 1, 2026, Congress statutorily require DoD to provide public access to pretrial, trial, and appellate court-martial records at the time of filing.[45]

RECOMMENDATION 6: The Secretary of Defense direct public access to pretrial, trial, and appellate court-martial records at the time of filing and in accordance with Article 140a, to begin no later than July 1, 2025.

- DoD does not currently make court-martial records available at all stages of the military justice system.
- Public access to court-martial information, filings, and records is not timely or complete, even when personally identifiable information is redacted and when classified and sealed materials are properly withheld.
- Court-martial records are not released until several weeks after trial, and then only when there is a conviction. Even in cases with a conviction, the Services redact information pertaining to charges on which the accused was acquitted. This redaction impairs the public's ability to properly evaluate the prosecution of a Service member or the nature of criminal charges. In addition, Appendix H shows that, while the available data was incomplete, at least one Service did not provide public access to court-martial records within the time allotted by DoD policy.
- The Panel heard from attorneys, academics and members of the media who discussed the public's inability to access court-martial records in a timely fashion (or at all). Additional assessment of DoD's policies can be found at Appendix I.
- The resulting lack of transparency contributes to distrust and disinformation about the military justice system, and makes it difficult for the MJRP, Congress, DoD, and the public to assess the functioning of the military justice system.

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44 An electronic system can be programmed to automatically perform optical character recognition (OCR) on scanned documents. OCR makes text on a scanned document readable to the computer system, thereby enabling researchers to pull data from filings automatically rather than manually working through bulky records of trial.

45 As was true of Recommendation 1, one dissenting Member believes that additional congressional action is unnecessary because the law already requires DoD to facilitate public access to docket information, filings, and records. Since it has prescribed "uniform standards and criteria" for public access, DoD maintains that it is in compliance with Article 140a even though its policy limits public access to a subset of cases, and even though that access is provided only post-trial. *See Pro Publica, Inc. v. Butler*, 2024 U.S. Dist. LEXIS 38500, *3–4 (S.D. Cal. Mar. 4, 2024).

RECOMMENDATION 7: The Secretary of Defense provide personnel and technology to support a single, uniform, centralized military justice database, expanded data collection, and an electronic filing system with public-facing integrated dockets.

- In federal and state courts, information technology professionals—not lawyers—manage electronic filing, dockets, and data collection systems.
- DoD must create data information positions and adopt modern technology for these purposes. It cannot rely on prosecutors and judges for whom data management is an extra duty.

III. ARTICLE 16(c)(2)(A), UCMJ, JUDGE-ALONE SPECIAL COURTS-MARTIAL

A. Background

The Military Justice Act of 2016 introduced a new type of court-martial under Article 16(c)(2)(A): a special court-martial (SPCM) consisting of a military judge alone who is limited in the type of punishment that may be imposed. When recommending this change, the Military Justice Review Group noted that

> The judge-alone special court-martial will provide the convening authority with a greater range of disposition options, which may prove particularly useful when addressing cases involving a request for court-martial arising out of a non-judicial punishment or summary court-martial refusal, and in deployed environments where operational demands may make it difficult to assemble a panel to address cases involving minor misconduct.[46]

The MJA16 amended Article 16, UCMJ, to create the new forum: "A special court-martial consisting of a military judge alone if the case is so referred by the convening authority, subject to [Article 19] and such limitations as the President may prescribe by regulation."[47]

Article 19, UCMJ, as amended, sets forth the limitations on Article 16(c)(2)(A) SPCMs: "Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to [this forum]."[48]

Article 19 also permits the use of military magistrates to preside over this forum: "If charges and specifications are referred to [an Article 16(c)(2)(A) SPCM], the military judge, with the consent of the parties, may designate a military magistrate to preside over the special court-martial."[49]

Rule for Courts-Martial (R.C.M.) 201 imposes the additional limitation that no specification may be tried at an Article 16(c)(2)(A) SPCM if, before arraignment, the accused objects and the military judge determines that

> (1) "The maximum authorized confinement for the offense it alleges would be greater than two years if the offense were tried by a general court-martial, with

46 MJRG Report, *supra* note 27, at 222.

47 10 U.S.C. § 816(c)(2)(A) (Art. 16(c)(2)(A), UCMJ).

48 10 U.S.C. § 819(b) (Art. 19(b), UCMJ).

49 10 U.S.C. § 819(c) (Art. 19(c), UCMJ). In response to a request for information issued by the MJRP, the Services reported that none currently uses military magistrate judges to preside over Article 16(c)(2)(A) SPCMs.

> the exception of a specification alleging wrongful use or possession of a controlled substance in violation of Article 112a(b) or an attempt thereof under Article 80," *or*
>
> (2) "The specification alleges an offense for which sex offender notification would be required" under DoD regulations.[50]

DoD regulations limit the circumstances under which a Service member can be administratively separated under "other than honorable conditions" following conviction at a court-martial that could have – but did not – impose a punitive discharge. Since an Article 16(c)(2)(A) SPCM is not authorized to impose a punitive discharge, DoD's regulatory limitations on a later administrative separation do not apply.[51]

B. Stakeholder Perspectives on Article 16(c)(2)(A) SPCMs

The MJRP heard and received information from the Services regarding the utility of the new forum for commanders, judges, and counsel. The information received suggests that Article 16(c)(2)(A) SPCMs are used primarily in two contexts: as part of a plea agreement, or when an accused refuses nonjudicial punishment (in which case a conviction at the court-martial may result in an administrative separation hearing).

Stakeholders noted two major benefits to commanders. First, the forum provides a tool for commanders to respond to situations in which the misconduct warrants limited punishment but not the possibility of significant confinement or a bad-conduct discharge.[52] Second, the forum eases administrative burdens for commanders because they do not need to provide significant numbers of personnel from other functional areas and can preserve their ability to accomplish the mission without interruption.[53] The forum also enables more expeditious processing of cases: there is no need to convene a panel or voir dire the panel members, the military judge does not need to provide instructions to the panel, and the forum avoids the possibility of lengthy deliberations caused by divided opinions among the finder of fact.[54]

Regardless of these benefits, former military judges appearing before the Panel cautioned that cases referred to Article 16(c)(2)(A) can still raise complex issues with serious implications for the accused.[55]

50 2024 MCM, *supra* note 1, R.C.M. 201(f)(2)(E).

51 DoD Instruction (DoDI) 1332.14, "Enlisted Administrative Separations," Sec. 4.3.(b)(3)(d) (Aug. 1, 2024)."

52 Services' responses to MJRP RFI on Article 16(c)(2)(A), Judge-Alone SPCMs (Oct. 30, 2023), *available at* Appendix G.

53 *Id*.

54 *Id*.

55 The Court of Appeals for the Armed Forces recently held that Article 16(c)(2)(A) special courts-martial (SPCMs), do not violate the Fifth Amendment due process rights of accused Service members, because the forum cannot adjudge more than six months' confinement or a bad-conduct discharge. *United States v. Wheeler*, 2024 CAAF LEXIS 479, __ M.J. __ (C.A.A.F. Aug. 22, 2024).

C. Analysis of and Recommendation on Article 16(c)(2)(A) Special Courts-Martial

RECOMMENDATION 8: In order to assess Article 16(c)(2)(A) "judge-alone special courts-martial," the Secretary of Defense direct the collection of the following data points:

- The number of Article 16(c)(2)(A) special courts-martials, if any, that involve offenses committed when the accused is deployed or aboard a vessel.
- The number of accused who are administratively separated after conclusion of Article 16(c)(2)(A) special courts-martial.
- The number of Article 16(c)(2)(A) special courts-martial that are conducted after an accused refuses nonjudicial punishment.

- The MJRP received limited data on Article 16(c)(2)(A) SPCMs from the Services.
- Specifically, not all the Services could provide data on how often Article 16(c)(2)(A) SPCMs involved offenses committed in another country, how often an accused was administratively separated after the conclusion of Article 16(c)(2)(A) SPCMs, or how often Article 16(c)(2)(A) SPCMs were conducted after an accused refused nonjudicial punishment.
- Without this information, the MJRP was unable to fully assess the value of Article 16(c)(2)(A) SPCMs.

The MJRP was able to analyze the following data from FY21 to FY23 based on information obtained in response to the Panel's RFI (see Appendix G), as well as information available from public sources:

- The number of Article 16(c)(2)(A) SPCMs completed by the Services;
- The proportion of total courts-martial that were Article 16(c)(2)(A) SPCMs, and the proportion of special courts-martial that were Article 16(c)(2)(A) SPCMs;
- The median number of days between the date of preferral and date the sentence was adjudged for Article 16(c)(2)(A) SPCMs; and
- The top offenses referred to Article 16(c)(2)(A) SPCMs.[56]

On the basis of these limited data, the MJRP offers the following general observations:[57]

- The five Services reported a total of 205 Article 16(c)(2)(A) SPCMs from FY21 to FY23. The Army completed the most Article 16(c)(2)(A) SPCMs over the three fiscal years, at 92, and the Coast Guard completed the fewest over the same time period, at 8.
- Across the Army, Navy, Marine Corps, and Air Force, the proportion of total courts-martial (including summary courts-martial) that were Article 16(c)(2)(A) SPCMs ranged from 1.7% (Air Force in FY21) to 7.5% (Marine Corps in FY22). The proportion of special courts-martial that were Article 16(c)(2)(A) SPCMs ranged from 4.9% (Air Force in FY21) to 23.6% (Army in FY21).
- Across the five Services, the median number of days between date of preferral and date sentence was adjudged for Article 16(c)(2)(A) SPCMs ranged from 64 to 177.

56 Further information on the number of Article 16(c)(2)(A) SPCMs that involved plea agreements is available at Table 2.1, *infra*.

57 Tables containing the data submitted by the Services are included at Appendix J.

- The three offenses most commonly referred to Article 16(c)(2)(A) SPCMs, when aggregated by all five Services across the three fiscal years, were Article 92 (Failure to obey order or regulation), Article 112a (Wrongful use, possession, etc. of controlled substances), and Article 128 (Assault).

CHAPTER 2. PRETRIAL AND TRIAL PROCESSES

I. INTRODUCTION

This chapter evaluates two changes made by the Military Justice Act of 2016: (1) the formalization of plea agreement processes and structure under Article 53a, UCMJ, and (2) the implementation of pre-referral judicial authority under Article 30a, UCMJ.

In its review of plea agreements, the Panel looked closely at a recent amendment to Article 53a that reduces the sentencing discretion of the military judge. Under the new article, military judges may reject a plea agreement they find "plainly unreasonable" only if it results in a sentence outside the applicable sentencing parameter. The MJRP considered whether to recommend an amendment to allow a military judge to reject a "plainly unreasonable" sentence regardless of the parameter. The Panel declined to recommend such an amendment until the appellate courts have time to consider the issue and there are more data available about sentencing under the new Article 53a.

The changes to Article 30a offer promising tools to efficiently resolve legal issues before referral. Complementary changes to the UCMJ[58] and to the Stored Communications Act[59] have enhanced the ability of both the government and the accused to obtain evidence before referral and during the initial investigation of a case. Amendments made to R.C.M. 309 in 2023 also permit the accused and named victim to petition a military judge to review certain matters. While these changes appear to be positive, the Panel needs additional time to assess their effects. The Panel will make additional observations about pre-referral legal matters in future reports.

II. PLEA AGREEMENTS UNDER ARTICLE 53a, UCMJ

A. Background

Plea agreements—formerly known as pretrial agreements—historically worked far differently in the military than in the civilian courts. Governed by Rules for Courts-Martial 705 and 910,[60] an agreement typically saw the convening authority refer the case to a designated level of court-martial, dismiss certain charges, or limit the amount of punishment the convening authority would approve after the sentence was adjudged in exchange for the accused's plea of guilty to certain charges and specifications.[61] If the agreement and guilty plea were accepted, the military judge or members would then adjudge a sentence without knowing what limitations the convening authority had agreed to place on the sentence.[62] Under this system, the accused would receive the lesser of the sentence adjudged or the sentence previously approved by the convening authority in the pretrial agreement.[63]

58 10 U.S.C. § 846(d), Art. 46, UCMJ, provides for the issuance of subpoenas, warrants, and orders before referral and during an investigation of a UCMJ offense. Since January 1, 2019, Article 30a proceedings have most often involved pre-referral applications for subpoenas and warrants or orders for electronic communications.

59 18 U.S.C. §§ 2701–2712.

60 Manual for Courts-Martial, United States (2016 ed.) [2016 MCM], Rule for Courts-Martial [R.C.M.] 705 and 910.

61 *Id*. at paras. (b)(1)–(2).

62 2016 MCM, *supra* note 60, R.C.M. 910(f)(3).

63 *See* MJRG Report, *supra* note 27, at 484; *see also id*. at 481–84, for an expanded history of pretrial agreements in the military.

The resulting uncertainty often inured to the benefit of the accused. For example, a military judge might sentence the accused to less confinement than envisioned by the pretrial agreement, or might decline to adjudge a punitive discharge even in cases in which that punishment was available.[64] Before the MJA16 changes to Article 53a, a pretrial agreement could not require that an accused receive certain punishments, but it could require that any punishments beyond a specified limitation be disapproved, suspended, or mitigated (e.g., a dishonorable discharge might be changed to a bad-conduct discharge). Because there were no prescribed sentencing ranges or parameters, the sentence that an accused could receive typically ranged from no punishment all the way up to the cap contained in the pretrial agreement.

B. The Creation of Article 53a, UCMJ, and Other Recent Changes

1. The Military Justice Act of 2016

In its 2015 report, the Military Justice Review Group compared the military model for pretrial agreements to the process in the federal system.[65] The MJRG proposed the creation of the new Article 53a,[66] which was enacted by MJA16.[67]

The MJRG recommended that if a plea agreement contained a sentencing range or sentencing limitation, the military judge should be required to sentence accordingly unless to do so would be "plainly unreasonable or otherwise unlawful."[68] The MJRG made no recommendation on whether to allow the parties to negotiate an agreement that would bind the military judge to a specific sentence to confinement.

The reforms to the plea agreement process were designed to act in concert with other MJA16 amendments.[69] While judge-alone sentencing and sentencing parameters and criteria were not included in MJA16, they were ultimately enacted in the FY22 NDAA, effective for cases in which the offenses occurred on or after December 27, 2023.[70]

2. FY22 NDAA Changes to Sentencing Proceedings

In the FY22 NDAA, Congress amended Article 53 to establish that military judges would sentence the accused in all but capital cases.[71] In addition, Congress amended Article 56 to direct the President to create sentencing parameters and criteria to provide more consistency.[72] The majority of UCMJ offenses have now been assigned

64 *Id*. at 483–84.

65 *Id*. at 481–90.

66 *Id*. at 488 (MJRG Recommendation 53a.1: "Enact a new Article 53a to provide statutory authority and basic rules for (1) the construction and negotiation of charge and sentence agreements; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of sentence agreements with respect to the military judge's sentencing authority.").

67 FY17 NDAA, *supra* note 9, at § 5237.

68 MJRG Report, *supra* note 27, at 34.

69 *Id*. at 487 (MJRG Recommendation 53a.2: "In the new Article 53a, provide that the military judge shall accept any lawful sentence agreement submitted by the parties, except that: (1) in the case of an offense with a sentencing parameter under Article 56, the military judge may reject the agreement only if it proposes a sentence that is both outside the sentencing parameter and plainly unreasonable; and (2) in the case of an offense without a sentencing parameter, the military judge may reject the agreement only if it proposes a sentence that is plainly unreasonable.").

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

71 *Id.*; Art. 53(b)(1), UCMJ. This amendment applies to cases in which the offenses resulting in conviction were committed on or after December 27, 2023. See Chapter 3, *infra*, for a more in-depth discussion of recent changes to military sentencing practices.

72 *Id.*; Art. 56(c)(2), UCMJ. This change also applies to cases in which the offenses resulting in conviction were committed on or after December 27,

parameters—that is, suggested confinement ranges for applicable offenses.[73] The amended Article 56 directs the military judge to sentence the accused within the applicable parameter when the President has established one.[74] The military judge may sentence outside the parameter only if they find specific facts warranting a departure and provide a written justification for it.[75]

3. Plea Agreements Under Article 53a, UCMJ

Article 53a was enacted in MJA16 and went into effect on January 1, 2019.[76] Article 53a is implemented by Rules for Courts-Martial 705 and 910.[77]

The new plea agreement process maintains the roles of the convening authority and accused as the parties to the agreement for "non-covered" offenses. For "covered" offenses, the special trial counsel, rather than the convening authority, negotiates and approves the plea agreement.[78]

Article 53a was also amended in the FY22 NDAA to provide that the military judge "shall accept a plea agreement submitted by the parties," except that

- In the case of an offense with a sentencing parameter, the military judge may reject a plea agreement if the proposed sentence is outside the parameter and the military judge determines it is "plainly unreasonable";[79] and
- In the case of an offense for which a parameter has not been set, the military judge may reject any proposed sentence they find "plainly unreasonable."[80]

Previous iterations of Article 53a did not contain language requiring the military judge to accept a plea agreement; this was left to R.C.M. 705 and R.C.M. 910.[81]

R.C.M. 705 provides that plea agreements may limit the maximum, minimum, or maximum and minimum punishment that may be adjudged by the court-martial.[82] The most recent change to the rule allows the plea agreement to contain a specified sentence that "shall be imposed by the court-martial."[83] For plea agreements designating the military judge as sentencing authority—required for cases in which the offenses were committed on or after December 27, 2023—the plea agreement must provide separate confinement limitations for each specification.[84]

2023.

73 2024 MCM, *supra* note 1, at Appendix 12b.

74 Art. 56(c)(2)(A), UCMJ; for offenses in which the President has established sentencing criteria—typically military offenses committed in time of war or conflict—the military judge must consider certain criteria in determining an appropriate sentence (e.g., the age, experience, and mental capacity of the accused).

75 Art. 56(c)(2)(B), UCMJ.

76 FY17 NDAA, *supra* note 9, at § 5237.

77 2024 MCM, *supra* note 1, R.C.M. 705, 910.

78 See *supra* note 5 for a list of covered offenses.

79 FY22 NDAA, *supra* note 70, at § 539E(b)(2); Art. 53a(b)(1), UCMJ.

80 FY22 NDAA, *supra* note 70, at § 539E(b)(2); Art. 53a(b)(2), UCMJ.

81 *See* 10 U.S.C. § 853a (2019) (Art. 53a, UCMJ); *see also* Manual for Courts-Martial, United States (2019 ed.) [2019 MCM], R.C.M. 705, 910.

82 2024 MCM, *supra* note 1, R.C.M. 705(d)(1).

83 *Id.*, R.C.M. 705(d)(1)(D).

84 *Id.*, R.C.M. 705(d)(2)(A)(i).

These sentencing limitations cannot override mandatory minimum punishments, except that

- A mandatory dishonorable discharge may be reduced to a bad-conduct discharge, and
- The sentence may be less than the mandatory minimum, upon the recommendation of the trial counsel, if the accused provides "substantial assistance" in the investigation or prosecution of another accused.[85]

Under this new process, the military judge is made aware of the sentence limitations in the plea agreement before the plea is accepted,[86] and must sentence accordingly unless certain exceptions apply.[87] For example, if the accused agrees to accept a punitive discharge as part of a plea agreement, the military judge must adjudge the punitive discharge.

If a military judge rejects a plea agreement, they must issue a statement explaining the basis, give the accused the opportunity to withdraw their plea, and inform the accused that if they do not withdraw their plea, the military judge may impose any lawful punishment.[88]

4. 2023 Amendment to R.C.M. 705

Although the MJRG proposed allowing negotiated confinement ranges, a 2023 amendment to R.C.M. 705 provides that a plea agreement may contain a specific sentence.[89] For example, a plea agreement can now include a sentencing "range" in which the minimum length of confinement is identical to the maximum length, leaving the military judge no discretion in the matter.

5. Effect of the New Plea Agreement Process

Proponents of the new plea agreement process describe it as bringing greater certainty to sentencing, which can benefit the government, the accused, and the victims of crime. Critics tend to voice several concerns: first, that specified sentences greatly reduce the discretion previously granted to military judges, thus removing a traditional safeguard against injustice; second, that both victims[90] and accused Service members[91] will have little incentive to present their views on punishment if they know that the military judge is obligated to adjudge a specific sentence; and third, that giving the government power to negotiate the sentence undermines congressional intent to retain the military judge as the sentencing authority in a court-martial. Although this new rule allowing specified sentences enshrines what had been happening in practice in at least some of the Military Services, it also runs counter to the

85 *Id.*, R.C.M. 705(d)(5).

86 *Id.*, R.C.M. 910(f)(3).

87 *Id.*, R.C.M. 910(f)(5). A military judge must accept the plea agreement unless the terms are not understood by the accused, the agreement contains a provision that has not been accepted by both parties, or the negotiated sentence is outside the designated parameter for that offense and is "plainly unreasonable." Military judges are also required to reject sentences that are less than the mandatory minimum, are prohibited by law, or are inconsistent with regulations prescribed by the President. Art. 53a(c); 2024 MCM, *supra* note 1, R.C.M. 910(f)(8).

88 2024 MCM, *supra* note 1, R.C.M. 910(f)(7).

89 Executive Order No. 14,103, "2023 Amendments to the Manual for Courts Martial, United States," 88 Fed. Reg. 50535 (August 2, 2023) [E.O. 14,103], *available at* https://jsc.defense.gov/Military-Law/Executive-Orders/.

90 R.C.M. 705(e)(3)(B) requires that the views of a victim be solicited before a plea agreement can be signed. While the government is not bound by the victim's wishes, they must be considered if submitted. Article 6b and R.C.M. 1001(c) also grant crime victims the right to be reasonably heard at the sentencing hearing regarding the offenses for which the accused has been convicted.

91 R.C.M. 1001(a) and R.C.M. 1001(d) contemplate that the accused will present evidence in extenuation and mitigation during the sentencing proceeding and give the accused the right to make either a sworn or unsworn statement if desired.

intent of the MJRG in creating a new framework for plea agreements with the military judge as the sentencing authority.[92]

In its evaluation of these effects, the Panel examined how plea agreements work in the federal system, reviewed the case law from military appellate courts, and looked at the data—limited as they are—provided by the Services regarding sentencing over the past three years.

A crime victim has the right to be reasonably heard at the sentencing hearing regarding the offenses for which the accused has been convicted.[93] While not evidence per se, a victim impact statement enables a victim to inform the court about the impact that the crime has had on them.[94] The military judge may take this information into account in determining an appropriate sentence for the accused. Regardless of whether a victim supports or does not support the terms of a plea agreement, if one exists it may limit the influence of what the victim relays to the military judge in their victim impact statement during the sentencing portion of the case. In addition, a recent change to R.C.M. 1001(c), which governs victim impact statements, allows a victim to recommend a specific sentence during their impact statement.[95] Similarly, the accused has a right to submit matters in extenuation and mitigation during sentencing.[96] Arguably, however, the 2023 amendment to R.C.M. 705 renders meaningless the accused's presentation of extenuation and mitigation evidence, if the plea agreement binds the military judge to a particular sentence.

C. Plea Agreements in the Federal System

Plea agreements in federal courts are governed by Federal Rule of Criminal Procedure 11(c), which allows the parties to agree to a sentence in two ways.[97] In most cases, the government recommends a particular sentence or sentencing range as part of the plea agreement, but that recommendation does not bind the court.[98] Much less common is the second method, known informally as a "C plea," in which the government and defendant agree to a specific sentence or sentencing range that is binding on the judge if the plea is accepted.[99]

When the parties agree to enter a C plea, the judge may accept the agreement, reject it, or defer a decision until they have reviewed the presentencing report.[100] Several civilian judges who spoke to the Panel during its April 2024 meeting stated that C plea agreements are rarely used and are, at best, disfavored.

Regardless of the type of plea, the U.S. Sentencing Guidelines Manual allows agreements to be accepted if the court is satisfied that the sentence is either within the applicable sentencing guideline range or is outside the guideline range for "justifiable reasons." If outside the guideline range, the sentence must be justified in detail on a statement of reasons form.[101]

92 *See* MJRG Report, *supra* note 27, at 486.

93 10 U.S.C. § 806b(a)(4)(A) (2024) (Art. 6b(a)(4)(A)); 2024 MCM, *supra* note 1, R.C.M. 1001(c).

94 2024 MCM, *supra* note 1, R.C.M. 1001(c).

95 *Id.*, R.C.M. 1001(c)(3).

96 *Id.*, R.C.M. 1001(a)(B).

97 Fed. R. Crim. P. 11(c).

98 Fed. R. Crim. P. 11(c)(1)(B).

99 Fed. R. Crim. P. 11(c)(1)(C).

100 Fed. R. Crim. P. 11(c)(3).

101 U.S. Sent'g Comm'n, Guidelines Manual §5K2.0, comment (n.5) (Nov. 2024); *see also* Fed. R. Crim. P. 6B1.2(b)–(c).

In short, federal judges are required to find that every sentence is within guidelines or is otherwise justified. Even in the rare cases in which the parties agree to a specified and binding sentence, the statute grants federal courts the discretion to reject such agreements.

D. Case Law

Article 53a does not grant similar discretion to military judges when the parties have agreed to a specified sentence. The Service courts of criminal appeal have issued several opinions regarding the military judge's discretion in cases in which the plea agreement specifies a particular portion of a sentence, although the reported cases did not involve specified sentences to confinement. The cases cited below also did not consider the congressional changes to Article 53a, which further restrict the discretion of military judges when the agreed-on sentence is within a sentencing parameter and require that military judges "*shall* accept a plea agreement submitted by the parties" unless certain exceptions apply.[102] There is significant concern among Panel members that the common law discretion historically afforded to military judges will not survive these recent changes.

Because guilty pleas involve "the waiver of bedrock constitutional rights and privileges,"[103] military judges have been "empowered to decline to accept terms contained in plea agreements that violate public policy, appellate case law, or fail to adhere to basic notions of fundamental fairness."[104] Military judges were therefore required to reject, in their entirety, plea agreements that transformed the sentencing proceeding into an "empty ritual."[105]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) was the first to take up the issue of specified sentences, in *United States v. Rivero*.[106] It held that R.C.M. 705 does not require "a range of punishment" as opposed to "an exact or specified sentence,"[107] and further opined that specified sentences do not violate public policy or render sentencing proceedings an "empty ritual."[108] Although the plea agreement in *Rivero* contained a range of 8 to 15 years of confinement, the accused still "presented a robust sentencing case," which included several witnesses and eight defense exhibits.[109] The judge retained discretion over other aspects of the punishment, including whether to recommend any suspension of punishment or other clemency.[110] Most notably, the NMCCA stated that military judges are still required to reject plea agreements resulting in sentences that "violate public policy, appellate case law, or fail to adhere to basic notions of fundamental fairness."[111]

102 Art. 53a(b), UCMJ; emphasis added. For a list of those exceptions, see p. 26 & note 87 *supra*.

103 *United States v. Soto*, 69 M.J. 304, 306 (C.A.A.F. 2011) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

104 *United States v. Alkazahg*, 81 M.J. 764 (N-M. Ct. Crim. App. 2021) (citing *Soto*, 69 M.J. at 307; *United States v. Hall*, 26 M.J. 739, 743 (N-M. Ct. Mil. Rev. 1988)).

105 *United States v. Allen*, 25 C.M.R. 8, 11 (C.M.A. 1957). There, after pleading guilty in accordance with a pretrial agreement, the accused presented no sentencing evidence and did not make an unsworn statement. Defense counsel also declined to make a sentencing argument, leading the Court of Military Appeals to find ineffective assistance of counsel.

106 *United States v. Rivero*, 82 M.J. 629 (N-M. Ct. Crim. App. 2022).

107 *Id.* at 632–33.

108 *Id.* at 633–34.

109 *Id.* at 633.

110 *Id.* at 634. The *Rivero* court noted that under the new rules, a military judge's recommendation as to suspension is significant because it "restores much of a convening authority's historically broad, but now relatively limited, clemency power." *Id.*

111 *Id.*

The NMCCA reiterated its position the following year in *United States v. Kerr*.[112] The Service member in *Kerr* was a decorated Marine diagnosed with traumatic brain injury and post-traumatic stress disorder following a combat deployment to Afghanistan. Although the plea agreement required that a bad-conduct discharge be adjudged, the NMCCA set aside that portion of the sentence as inappropriately severe. While the military judge recommended suspension of the bad-conduct discharge, the NMCCA opined that he "could have, and should have, simply rejected the plea agreement in its entirety."[113] The *Kerr* court further stated, "Given the current plea agreement process, where minimum and maximum punishments are often the same, the role of trial judges (and appellate judges) as ultimate assessors of sentence appropriateness has become all the more important."[114]

Most recently, in *United States v. Avellaneda*, the NMCCA considered a plea agreement that allowed for only one possible sentence: reduction of the accused from the grade of E-8 to E-6.[115] The NMCCA again held that "the existence of a bargained-for specific sentence in a plea agreement does not deprive an accused of complete sentencing proceedings."[116] Despite the specified sentence, the accused submitted numerous character letters and made an unsworn statement. The military judge subsequently recommended that the convening authority suspend the accused's grade reduction below the grade of E-7.[117] The NMCCA again noted that "a military judge remains the ultimate assessor of sentence appropriateness" and that although the judge "had the power to reject [the plea agreement], he did not."[118]

The Air Force Court of Criminal Appeals (AFCCA) has also recently held, in two separate cases, that a plea agreement term requiring a dishonorable discharge is permissible and does not violate public policy.[119] In both opinions, the AFCCA echoed the language from pre-MJA16 cases and reiterated that military judges "must reject any plea agreement" that violates public policy by impermissibly making sentencing proceedings into an "empty ritual."[120]

E. Data

In an October 30, 2023, request for information, the MJRP asked the Services to provide total numbers of general, special, Article 16(c)(2)(A) special, and summary courts-martial (SCMs) held for fiscal years 2021–23, as well as the total number of those cases involving plea agreements.[121]

In a previous version of the RFI, the MJRP asked a robust set of questions regarding plea agreements. Because the Services indicated an inability to answer most of those questions, the Panel then sent a pared-down RFI. Some

112 *United States v. Kerr*, 2023 CCA LEXIS 434 (N-M. Ct. Crim. App. Oct. 17, 2023).

113 *Id.* at *8–9.

114 *Id*. While the Kerr court's assessment of the importance of the trial judge is laudable, it must have struck them as odd that they were exercising line-item veto authority to remedy a sentencing issue that could have been corrected below if the trial judge had that authority.

115 *United States v. Avellaneda*, 84 M.J. 656 (N-M. Ct. Crim. App. 2024).

116 *Id*. at 660.

117 *Id*. *See also United States v. Colletti*, order denying reconsideration (N-M. Ct. Crim. App. 2024) (the court noted that Congress had adopted the MJRG's proposal to create Article 53a, which allows the parties to a plea agreement to bargain for a specific sentence limitations).

118 *Avellaneda*, 84 M.J. at 662.

119 *United States v. Kroetz*, 2023 CCA LEXIS 450 (A.F. Ct. Crim. App. Oct. 27, 2023); *United States v. Reedy*, 2024 CCA LEXIS 40 (A.F. Ct. Crim. App. Feb. 2, 2024).

120 *Kroetz*, 2023 CCA LEXIS 450 at *7, 8, 15, 17; *Reedy*, 2024 CCA LEXIS 40 at *8, 14. The "empty ritual" language originated with *United States v. Allen*; *supra* note 105.

121 *See* MJRP RFI on Plea Agreements (Oct. 30, 2023), and Services' responses, *available at* Appendix K.

of the questions on the original RFI asked for information that the Services' case management systems should have been able to produce, such as the number of cases in which a plea agreement required referral to a particular forum.[122]

The data show that the Services frequently use plea agreements, but some Services do so more than others.[123]

- The Navy uses plea agreements most frequently—in 72% of general courts-martial (GCMs) and 91% of special courts-martial in FY23.
- The Army and Air Force use them less frequently:
  - Army, FY23: 43% of GCMs and 46% of SPCMs
  - Air Force, FY23: 34% of GCMs and 61% of SPCMs
- The Marine Corps used plea agreements more frequently in FY23 than in the two previous years:
  - FY23: 66% in GCMs and 73% in SPCMs
  - FY22: 53% in GCMs and 52% in SPCMs
  - FY21: 44% in GCMs and 48% in SPCMs

TABLE 2.1. COURTS-MARTIAL AND PLEA AGREEMENT DATA (FY2021–FY2023)

FY21

	Army	Navy	Marine Corps	Air Force	Coast Guard
No. GCMs	394	110	119	175	11
No. GCMs w/PAs	190 (48%)	58 (53%)	52 (44%)	52 (30%)	0 (0%)
No. SPCMs	127	75	110	119	Unavailable
No. SPCMs w/PAs	71 (56%)	64 (85%)	53 (48%)	79 (66%)	Unavailable
No. SPCM "short-martials"	38	9	15	7	14
No. SPCM "short-martials" w/PAs	35 (92%)	2 (22%)	4 (27%)	5 (71%)	14 (100%)
No. SCMs	105	26	101	92	8
No. SCMs w/PAs	35 (33%)	Unavailable	Unavailable	47 (51%)	8 (100%)

FY22

	Army	Navy	Marine Corps	Air Force	Coast Guard
No. GCMs	335	81	94	141	7
No. GCMs w/PAs	155 (46%)	51 (63%)	50 (53%)	52 (37%)	1 (14%)
No. SPCMs	111	94	90	118	Unavailable
No. SPCMs w/PAs	72 (65%)	80 (85%)	47 (52%)	74 (63%)	Unavailable
No. SPCM "short-martials"	32	5	23	15	4
No. SPCM "short-martials" w/PAs	12 (38%)	3 (60%)	7 (30%)	14 (93%)	4 (100%)
No. SCMs	47	9	106	109	4
No. SCMs w/PAs	37 (79%)	Unavailable	Unavailable	61 (56%)	4 (100%)

122 *See* DoD Article 140a Standards, *supra* note 18.

123 *See* Services' responses to MJRP RFI on Plea Agreements (Oct. 30, 2023), *available at* Appendix K.

FY23

	Army	Navy	Marine Corps	Air Force	Coast Guard
No. GCMs	356	85	83	146	14
No. GCMs w/PAs	154 (43%)	61 (72%)	55 (66%)	49 (34%)	0 (0%)
No. SPCMs	119	76	86	84	Unavailable
No. SPCMs w/PAs	55 (46%)	69 (91%)	63 (73%)	51 (61%)	Unavailable
No.# SPCM "short-martials"	22	4	15	13	7
No. SPCM "short-martials" w/PAs	10 (45%)	0	4 (27%)	9 (69%)	7 (100%)
No. SCMs	34	34	56	131	2
No. SCMs w/PAs	31 (91%)	Unavailable	Unavailable	77 (59%)	2 (100%)

The MJRP also requested narrative responses for the following questions:[124]

1. For fiscal years 2021, 2022, or 2023, are you aware of any cases in which the military judge rejected a plea agreement? If so, please provide the case name, if known.

The Services responded either that they were unaware of any instances in which a military judge rejected a plea agreement during this time frame or that they do not track this information.[125] The Marine Corps mentioned the case of *United States v. Raines*, in which a military judge attempted to strike a single provision from a plea agreement that would have required him to adjudge a bad-conduct discharge.[126] Following a petition for mandamus, the NMCCA held that the military judge did not have such "line-item veto" authority, but rather was required to accept or reject the entire agreement.[127]

2. Is it standard practice for the government to obtain the victim's views on a plea agreement prior to entering into the agreement? If so, how frequently is it the case that the government proceeds with the plea agreement against the victim's wishes?

The Services cited the requirement in R.C.M. 705 and their Service regulations that the government obtain the victim's views on a plea agreement prior to accepting the agreement.[128] All the Services stated that they do not track whether the government proceeds with a plea agreement against the victim's wishes, but the Army noted, without citing empirical data, that it is rare to proceed against the victim's wishes. The Coast Guard stated that there was no case "in recent memory" in which the government in a Coast Guard case proceeded against the victim's wishes.[129]

Refer to Appendix K for a summary of plea agreement data for FY21 through FY23, as well as narrative responses from the Military Services.

124 *Id.*

125 *See id.*

126 *See* Marine Corps response to MJRP RFI on Plea Agreements (Oct. 30, 2023), *available at* Appendix K. *See also supra* note 113.

127 *United States v. Raines*, 82 M.J. 608, 613 (N-M. Ct. Crim. App. 2022).

128 *See* Services' responses to MJRP RFI on Plea Agreements (Oct. 30, 2023), *available at* Appendix K.

129 *See id.*, Army and Coast Guard responses. It is not clear whose memory is cited.

F. Stakeholder Perspectives

1. Trial Defense Organizations (October 24, 2023)

The panelists agreed that plea agreement procedures provide more certainty than did the old pretrial agreements and reduce exposure for the accused, as well as creating efficiencies in the trial process.[130] The panelists also agreed that as the new system has progressed, they have seen confinement minimums rising but confinement maximums coming down, creating a narrower range.[131] But they opined that the narrowing of sentencing ranges in plea agreements has led to a decrease in advocacy skills and trial preparation for both trial and defense counsel.[132] Counsel will likely markedly reduce their time spent preparing for a case in which the plea agreement specifies a particular sentence or provides a narrow range for confinement.[133]

In the view of two of the defense panelists, the drawbacks of the new system outweigh the advantages, as they believe that commanders are acting on behalf of the prosecutors or have taken over the role of military judges in determining an appropriate sentence.[134] One counsel also felt that the new system disincentivizes plea agreements because there is no opportunity for the accused to "beat the deal," and often the sentence put forth by the government is unreasonable.[135] However, other defense presenters noted that their clients prefer the new system because it provides certainty, though it is not clear how the certainty of the new system benefits the accused other than perhaps making the government more likely to accept an agreement at all.

2. Senior Trial Counsel (October 25, 2023)

The prosecution panelists agreed that plea agreements provide more predictability and, because they now enable the government to establish a minimum confinement sentence, put the government on a better footing.[136] In providing a minimum sentence, the government can appropriately value the case as a whole, even if some specifications are dismissed as part of the agreement.[137]

Counsel conceded that narrowing the sentencing range reduces judicial discretion but pointed out that it provides predictability to the accused, the victim, and the government and prevents anomalous results.[138] The panelists suggested that this predictability fosters transparency and faith in the military justice system.

130 *See Transcript of MJRP Meeting* 8 (Oct. 24, 2023) (testimony of LTC Michael Korte, U.S. Army); 23 (testimony of LCDR Jordi Torres, U.S. Navy); 26 (testimony of Col Brett Landry, U.S. Air Force); 29 (testimony of LtCol A. Louis Evans, U.S. Marine Corps); and 32 (testimony of LCDR Nick Hathaway, U.S. Coast Guard). Presumably, the accused's exposure is reduced because the absence of a possible defense windfall makes the government more inclined to enter into a plea agreement.

131 *Id*. at 23 (testimony of LTC Korte).

132 *Id*. at 8–9, 24 (testimony of LTC Korte); 31 (testimony of Col Landry).

133 *Id*.

134 *Id*. at 25–27 (testimony of LCDR Torres); 27–28 (testimony of LtCol Evans).

135 *Id*. at 28 (testimony of LtCol Evans).

136 *See Transcript of MJRP Meeting* 16, 33–36 (Oct. 25, 2023) (testimony of LTC John Olson, U.S. Army); 17, 39 (testimony of Col Matt Talcott, U.S. Air Force); 29–30, 52 (testimony of LCDR Nick DeRenzo, U.S. Coast Guard); 41–42 (testimony of CDR Bryan Davis, U.S. Navy); and 48 (testimony of Col Nicholas Gannon, U.S. Marine Corps).

137 *Id*.

138 *Id*. at 36 (testimony of LTC Olson); 39 (testimony of Col Talcott); 41, 43–44 (testimony of CDR Davis); 48, 51–52 (testimony of Col Gannon).

While several counsel agreed that the narrowing of sentencing ranges may result in less advocacy at sentencing, they suggested that this factor would be less important now that military judges serve as the sentencing authority.[139] One counsel countered that he had not seen a loss in advocacy skills, stating, apparently as a personal observation, that generally defense counsel want to provide the best advocacy possible as their clients are sitting next to them and prosecutors want to show the victims that they are fighting for them.[140]

3. Former Military Judges (January 16, 2024)

One of the panelists, a former Air Force military judge with experience with both old pretrial agreements and new plea agreements, agreed that the new system provides a larger degree of certainty for all parties.[141] However, a former Army military judge disagreed that there was more certainty under the new system or that the change was positive. He pointed out that when convening authorities and staff judge advocates are determining the proper sentencing range for a plea agreement, they may not have all the facts necessary to make an appropriate determination.[142] The third panelist—a former Navy military judge—opined that the military judge's role under the new system is to safeguard the process and ensure that the plea is provident.[143]

One of the panelists suggested that the value of the military judge in sentencing may be not in determining the exact amount of confinement, but rather in ensuring that the proceeding is fair and all of the terms of the agreement are lawful.[144] Another former judge noted that while many of the recent changes to the military justice system have removed authority from military commanders, the new plea agreement process provides commanders more power to affect the sentence of an accused.[145] The former Navy judge agreed with the trial and defense counsel panelists that the new plea agreement structure has led to a decline in the effort expended by both parties to present sentencing evidence and a decline in the quality of sentencing cases. In his view, plea agreements that stipulate a specific sentence provide little incentive to work hard to present a sentencing case.[146]

4. Victims' Counsel (January 16, 2024)

The victims' counsel all stated that they and their clients appreciated the predictability and certainty provided by the new plea agreements.[147] The victims' counsel said that victims are invariably given the opportunity to provide input regarding whether the plea agreement should be accepted, but some observed that the weight given the victim's input varies from case to case.[148] The Marine Corps panelist expressed concern that the Rules for Courts-Martial do not provide a remedy if the trial counsel or staff judge advocate fail to consult with the victim.[149]

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139 *Id*. at 37 (testimony of LTC Olson); 39 (testimony of Col Talcott); 49–50 (testimony of Col Gannon); 53 (testimony of LCDR DeRenzo).

140 *Id*. at 46 (testimony of CDR Davis).

141 *See Transcript of MJRP Meeting* 13 (Jan. 16, 2024) (testimony of Lt Col Mark Rosenow, U.S. Air Force, ret.).

142 *Id*. at 16–17 (testimony of COL James Barkei, U.S. Army, ret.).

143 *Id*. at 42 (testimony of RADM Charles Purnell, U.S. Navy, ret.).

144 *Id.* at 14 (testimony of Lt Col Rosenow).

145 *Id*. at 16 (testimony of COL Barkei).

146 *Id*. at 42 (testimony of RADM Purnell).

147 *Id*. at 106 (testimony of Lt Col Jasmine Candelario, U.S. Air Force); 106 (testimony of COL Evah McGinley, U.S. Army); 107–08 (testimony of CDR Sara de Groot, U.S. Navy); 109–10 (testimony of CDR Michael Crowe, U.S. Coast Guard); and 115 (testimony of Col Iain Pedden, U.S. Marine Corps).

148 *Id*. at 110–15.

149 *Id*. at 115 (testimony of Col Pedden).

5. Government Appellate Counsel (January 17, 2024)

Government appellate counsel stated that they thought the new plea agreements provided more certainty and transparency to the parties, as all interested parties know what the actual sentence will be before trial.[150]

6. Defense Appellate Counsel (January 17, 2024)

Defense appellate counsel confirmed that specific sentences or portions of sentences have become more common in plea agreements than when the new plea agreements were first introduced.[151] The Air Force participant noted that the Air Force sees less narrowing of the range of sentences than the other Services, adding that Air Force regulations previously—before the change in R.C.M. 705—prohibited negotiating for a specific sentence.[152]

7. Civilian Judges

Several civilian judges with prior military experience told the Panel that they do not favor plea agreements with specified sentences. They noted that binding C pleas, while authorized by the Federal Rules of Criminal Procedure, are rarely used.[153]

G. Analysis of Plea Agreements Under Article 53a, UCMJ

Since there is little data available on how Article 53a affects sentencing, and because the question of how much discretion is afforded to military judges to reject unfair plea agreements remains unresolved by the appellate courts, the Panel declines to recommend immediate changes to plea agreement procedures.

Nevertheless, the Panel is concerned that military judges lack the same statutory authority as their federal counterparts to reject a plea agreement that they find "plainly unreasonable," even in cases in which the sentence is within the applicable parameter. Such discretion is unlikely to be exercised often, but withholding it in deference to recently created sentencing parameters may invite injustice. That possibility is perhaps compounded by the recent amendment to R.C.M. 705 that allows the parties to agree to a specific sentence that is binding on the military judge. There is substantial concern on the Panel that this change, which favors certainty for the parties over transparency, tends to drive sentencing considerations out of open court by rendering the public sentencing proceeding irrelevant while reducing the military judge's ability to act as a safeguard against unfairness. The change is particularly suspect given that in many cases the special trial counsel—the same individual who referred charges to court-martial—will determine the specified sentence binding the military judge.

The primary purposes of this Panel include promoting fairness and transparency in order to restore confidence in the military justice system. The recently adopted plea agreement process should be carefully evaluated in that light.

150 *See Transcript of MJRP Meeting* 8 (Jan. 17, 2024) (testimony of Col Matt Talcott, U.S. Air Force); 10–11 (testimony of LTC Jacqueline DeGaine, U.S. Army); and 11 (testimony of CAPT Ted Fowles (ret.), U.S. Coast Guard).

151 *Id*. at 79, 91–92 (testimony of CAPT Art Gaston, U.S. Navy); 85, 91 (testimony of LTC Autumn Porter, U.S. Army); and 92 (testimony of COL Thomas Cook (U.S. Army, ret.), U.S. Coast Guard).

152 *Id*. at 81, 90 (testimony of Lt Col Allen Abrams, U.S. Air Force).

153 The civilian judges met with the MJRP in a not-for-attribution setting and no transcript was made.

H. Possible Future Study: The Effects of Sentencing Parameters on Plea Agreements

The MJRP proposes to compare sentencing data in plea agreement cases for FY21 through FY23, prior to the implementation of sentencing parameters, with sentencing data in plea agreement cases beginning in FY24 and future years. A review of these data may show the effects, if any, of sentencing parameters on the upper and lower ranges of sentences in plea agreements.

III. PRE-REFERRAL JUDICIAL AUTHORITY UNDER ARTICLE 30a, UCMJ

A. The Military Justice Act of 2016

Congress established the military judiciary in 1968, redesignating law officers as military judges, to enhance the judges' independence and to give them functions and powers more closely aligned with those of federal district judges.[154] Since that time, the military practice has attempted to strike a balance between the military judge's role and the authority of commanders and convening authorities.[155] One vestige of the traditional role of convening authorities was that before January 1, 2019, a convening authority had to refer a case and convene a court-martial before a military judge could preside over the proceedings.[156]

MJA16 expanded the role of the military judge by establishing Article 30a, which grants military judges statutory authority to act on specified legal matters *before* referral.[157] In *Report of the Military Justice Review Group*, the MJRG argued that an expansion of military judicial authority would appropriately place more responsibility for court-martial procedure in an independent trial judiciary, rather than permit only a commander to resolve—before referral—legal issues that were more appropriate for a judge to adjudicate and that often required judicial review in any event.[158] In addition, the MJRG explained that the earlier opportunity for a military judge to make rulings, including timely corrections prior to referral, would enhance the efficiency of the court-martial process by reducing the delays that result from postponing judicial review until after charges are referred.[159]

As enacted, Article 30a, UCMJ, authorizes military judges to rule on a non-exhaustive list of four legal matters before a convening authority or special trial counsel has referred charges to court-martial.[160] Military judges may designate military magistrate judges to preside at pre-referral proceedings; however, the Services have not established

154 *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); *United States v. Norfleet*, 53 M.J. 262, 268–69 (C.A.A.F. 2000).

155 Colonel Timothy P. Hayes, Jr., & Lieutenant Colonel Christopher E. Martin, U.S. Army, *Independent but Invested; The Army's Trial Judiciary Turns Fifty*, 2019 Army Law. 77, 77 (2019) ("When MJA 1968 was enacted, it was applauded for taking a 'major step toward providing judges who are both legally trained and free from influence by the local military "brass" to preside over both general and special courts-martial,' and because it 'raised the standard of due process within the military justice system.'" (citations omitted)).

156 In the 2016 MCM, *supra* note 60, military judges had a limited role to act on speedy trial matters and on probable cause searches, pursuant to R.C.M. 707, Speedy trial, and Military Rule of Evidence (M.R.E.) 315(d)(2), Probable cause searches.

157 Several other provisions of MJA16 and recommendations of the MJRG enhance the power of military judges to enforce orders and rulings, preside at plea hearings, and sentence an accused.

158 MJRG Report, *supra* note 27, at 306–07. Importantly, Article 30a, Proceedings conducted before referral, does not change the role of the convening authority in making some pretrial decisions—e.g., whether to authorize a search of a suspect's person or property—subject to judicial review before or after referral. *See also* Fansu Ku, *From the Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 Mil. L. Rev. 49 (2009).

159 MJRG Report, *supra* note 27, at 307.

160 Effective December 27, 2023, Article 24a provides judge advocates in the role of special trial counsel—rather than commanders—exclusive authority to prefer and refer designated offenses to a court-martial.

military magistrates—as authorized by Article 26a, UCMJ—to preside at special courts-martial or Article 30a proceedings.

Congress revised Article 30a in the FY20 NDAA to emphasize that Article 30a proceedings are limited to those issues included in the statute or prescribed by the President.[161] At the same time, Congress expanded Article 30a to authorize judicial review of pretrial confinement, requests for individual military counsel, and matters concerning the mental responsibility or mental capacity of the accused.[162] The language of Article 30a permits the President to designate additional matters for review by a military judge, as long as those matters would be subject to consideration by a military judge in a general or special court-martial.[163]

B. The Reach of Pre-Referral Judicial Authority in the Military

The 2024 Manual for Courts-Martial specifies a total of 10 legal matters that may be reviewed by military judges before referral.[164] As detailed below, among these are requests to obtain evidence held by the government and/or third parties, matters referred by an appellate court, and matters relating to specific rights of the accused or a named victim of a charged UCMJ offense. In each instance, the rule does not affect the preexisting authority of a commander to act on some of these matters before a referral decision has been made.

1. Requests for pre-referral investigative subpoenas under R.C.M. 703(g)(3)(C).
2. Requests for pre-referral warrants or orders for electronic communications and related information.
3. Requests for relief from subpoenas or other process.
4. Pre-referral matters referred by an appellate court, including matters listed in Article 6b(e), when a victim—as defined in Article 6b, UCMJ—has asserted a violation of their rights at the Article 32 proceeding or trial court concerning Military Rule of Evidence (M.R.E.) 412, 513, 514, or 615.
5. Pre-referral matters under Article 6b(c), appointment of a representative to assume the rights of the victim if incompetent.
6. Challenges to continued pretrial confinement of an accused, under the provisions of R.C.M. 305(j).
7. Inquiries concerning the mental capacity or mental responsibility of an accused, pursuant to R.C.M. 706(b)(1) and R.C.M. 909 (mental capacity).
8. Requests for an individual military counsel under the provisions of R.C.M. 506(b).
9. A victim's petition for relief seeking compliance with Articles 32 and 6b.

161 National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 [FY20 NDAA], § 531, 133 Stat. 1198 (Dec. 20, 2019). The implementing rule limits the matters that may be considered and ruled upon by a military judge to those matters specified in R.C.M. 309(b). *See* 2024 MCM, *supra* note 1, R.C.M. 309(a)(2).

162 FY20 NDAA, *supra* note 161, at § 531. Before this revision, the statutorily prescribed legal matters were limited to pre-referral investigative subpoenas, pre-referral warrants or orders for electronic communications, pre-referral matters referred by an appellate court, and pre-referral matters under subsection (c) and (e) of § 806b of Article 6b.

163 10 U.S.C. § 830a (2024) (Art. 30a, UCMJ).

164 *See* E.O. 14,103, *supra* note 89, at 50,705. R.C.M. 309(b)(6)–(10) were added to the Manual for Courts-Martial by E.O. 14,103. *See In re DD*, 2022 CCA LEXIS 453 (A.F. Ct. Crim. App. July 28, 2022) (holding that Article 30a requires the President to *prescribe regulations* concerning procedures for pre-referral matters but does not create a statutory right to judicial review before referral).

10. Requests for pre-referral deposition orders under the provisions of R.C.M. 702.

The Discussion accompanying Rule 309 provides additional considerations for the 10 listed legal issues. In determining whether to issue a ruling or order, a military judge may consider chain of command recommendations as to disposition of a charged offense or offenses, representations of counsel or a federal law enforcement officer, the frequency or severity of a charged offense or offenses, and any other matter they deem relevant. Regarding defense counsel's access to such rulings or orders, the defense may request that the trial counsel or other counsel for the government make an application for an investigative subpoena or a warrant for electronic communications, and the defense may be heard on the matter at the discretion of the military judge.[165]

C. Other Relevant Statutory Changes

A critically significant aspect of Article 30a is the ability to effectively leverage various investigative tools authorized by other statutes. The Stored Communications Act (SCA), which governs when and how law enforcement agencies may obtain customers' electronic communications or other records from electronic communication services and remote computing services, provides one such tool.[166] Amendments to the SCA, passed as part of MJA16, recognize courts-martial as "courts of competent jurisdiction,"[167] enabling military judges to issue investigative subpoenas and warrants or orders for electronic communications.[168] Article 30a, in turn, permits military judges to act on these applications early in a case—before preferral and during an investigation, if needed—instead of predicating judicial authority on a referral decision.

Before the SCA was amended, in practice certain types of evidence remained unavailable to military investigators during an investigation and even after preferral of charges. Primary search authority resided with commanders under M.R.E. 315[169] or, if prescribed in DoD or Service regulations, a military judge or magistrate. As a result, the government could not obtain stored electronic communications held by a provider of electronic services, such as Facebook or Google, because these items were beyond the reach of UCMJ authority, absent an order from a military judge. After referral, providers could disregard the order of a military judge, because courts-martial were not considered "courts of competent jurisdiction" under the SCA.

Military practitioners—keenly aware of the digital landscape in which key witnesses and suspects often operate—explained the limits of legal process for obtaining evidence, pre-MJA16:

> The combination of the [Stored Communications Act's] definition of a court of competent jurisdiction and the Sixth Circuit holding in *Warshak*[170] (requiring a warrant for stored communications) severely limits the means by which military investigators and prosecutors may compel disclosure of records of private electronic

165 *See* 2024 MCM, *supra* note 1, R.C.M. 309, Discussion accompanying subparagraphs (b)(1) and (2).

166 Thomas Dukes & Albert C. Rees, Jr., *Cyberlaw Edition: Military Criminal Investigations and the Stored Communications Act*, 64 A.F. L. Rev. 103, 106 (2009) (explaining that military criminal investigative organizations will want to obtain evidence governed by the Stored Communications Act in many, if not most, criminal investigations involving offenses under the UCMJ).

167 18 U.S.C. §§ 2701–2713.

168 Military judges can also rule on challenges to subpoenas and warrants, and to enforce those orders where needed.

169 *See* 2024 MCM, *supra* note 1, M.R.E. 315(c) and (d). An impartial commander who has control over the place where the property or person to be searched may be found may authorize a search of military personnel and property situated on or in a military installation, encampment, vessel, aircraft, vehicle under their control, and nonmilitary property within a foreign country.

170 *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

> communication from providers such as Yahoo!, Google or Facebook. The only reliable method is a probable cause–based search warrant issued by a court of competent jurisdiction, as defined by the Act. . . . [A]s long as the crimes being investigated are not military specific offenses, which the local Federal District Court would not have jurisdiction over, judge advocates should advise investigators to work with the local United States Attorney's office in order to obtain a search warrant from the Federal Magistrate.[171]

As noted here and in other military scholarship, the difficulties in obtaining digital evidence were manifold before MJA16. As a result, trial counsel often had limited information about the ubiquitous usage of digital media by defendants and key witnesses. For example, the subscriber information that a trial counsel subpoenaed might be incomplete, inaccurate, and unverifiable. The most accurate, and often the only admissible, evidence might be the digital content that is available only with an order from a military judge or a federal magistrate. As one Army practitioner observed, both Article 30a and the amendments to the SCA "have heralded the beginning of a new era in evidence collection and case development" by enabling investigators, trial counsel, and the defense to obtain important evidence early in the life of a case.[172]

The Military Justice Act of 2016 also enhanced military judges' ability to authorize the production of witnesses and documentary evidence. Article 46—implemented through R.C.M. 703—provides that each party is entitled to the production of any witness whose testimony on a matter at issue would be relevant and necessary.[173] Before MJA16 went into effect, trial counsel and investigators could, under Article 46, obtain some evidence before referral by using a subpoena duces tecum.[174] However, traditional subpoena power—including that needed to compel the production of witnesses—applied after referral to court-martial. MJA16 expanded the use of subpoenas under Article 46 and R.C.M. 703, and also authorized new procedures in R.C.M. 703A concerning the issuance of warrants before and after referral to court-martial. Alongside these important changes to the rules for the production of witnesses and evidence, Article 30a and R.C.M. 309 authorize military judges to provide law enforcement with access to these evidence-gathering tools long before referral.

D. Comparison with Federal Practice

Pre-referral judicial authority in Article 30a has some analogues in federal civilian courts. The Federal Magistrates Act of 1968, codified at 28 U.S.C. § 636, grants magistrates the authority to carry out some judicial functions before trial and to preside at misdemeanor cases with the consent of the parties. These functions are often set out in local district court rules and may include the ability to issue search and arrest warrants, conduct preliminary examinations, and in felony matters hear pretrial motions and hold evidentiary hearings, probation/supervised release hearings, and guilty plea hearings.[175] Notable distinctions between the military and federal systems include the method of appointment and length of tenure for magistrates and military judges who perform analogous pre-referral proceedings. United States magistrate judges are appointed to eight-year terms by the federal judges of each

171 Major Sam C. Kidd, U.S. Air Force, *Military Courts Declared Incompetent: What Practitioners (Including Defense Counsel) Need to Know about the Stored Communications Act*, 40 The Reporter 17, 21 (2013).

172 Captain Ethan B. Murphy, U.S. Army, *Practice Note, Using R.C.M. 703A to Build a Better Case*, 2020 Army L. Rev. 44, 45 (2020).

173 10 U.S.C. § 846 (2024) (Art. 46, UCMJ).

174 Alternatively, trial counsel may obtain evidence for investigations concerning select UCMJ offenses by using an Inspector General of the Department of Defense (DoD IG) subpoena.

175 Kent Sinclair, Jr., Practice Before Federal Magistrates § 8.02 (2024 ed.).

U.S. district court.[176] By comparison, the Service Judge Advocates General certify and designate military judges for detail to courts-martial (and Article 30a proceedings) for a term of three years or more.[177]

E. Analysis of Pre-referral Judicial Authority Under Article 30a, UCMJ

Pre-referral judicial authority in Article 30a, UCMJ, appears to be an effective tool for more efficiently resolving legal issues before referral; however, more time is needed to assess the effects of pre-referral proceedings provided in the 2023 amendments to the Manual for Courts-Martial that added R.C.M. 309(b)(6)–(10). The Services do not centrally manage or collect uniform data on pre-referral judicial proceedings; as a result, the data provided by the Services concerning the frequency and type of proceedings held under Article 30a are insufficient for the Panel to make an assessment.[178]

Nevertheless, the comments of practitioners and scholars on military law indicate that Article 30a is most often used to obtain evidence through the issuance of subpoenas and warrants. This is a welcome development in the practice of military justice. It appears that Article 30a proceedings do not often involve the enforcement of victims' rights or matters referred by an appellate court, but defense counsel have begun leveraging Article 30a to seek their clients' release from pretrial confinement before referral. Data permitting, in future reports the Panel will assess in greater depth how the 2023 amendments to the Manual for Courts-Marital are affecting practice, as well as the impact of those proceedings on courts-martial. Importantly, the Panel believes that Article 30a, as implemented, accords with the MJRG's proposal to increase access to the trial judiciary rather than create standing courts. Commanders and convening authorities should continue to have the power to authorize searches and act on certain matters before referral. This facet of the military justice system—the coexistence of command and judicial authority—continues to function effectively.

176 *See* 28 U.S.C. § 631.

177 2024 MCM, *supra* note 1, R.C.M. 502(c)(3).

178 *See* Appendix L.

CHAPTER 3. PUNITIVE ARTICLES

I. INTRODUCTION

The Military Justice Act of 2016 made significant changes to criminal offenses in the UCMJ.[179] Congress added four new punitive articles, redesignated several Article 134 offenses as enumerated offenses, and renumbered and modified other punitive articles.[180] Subsequent NDAAs added three additional punitive articles to the UCMJ.[181] This chapter assesses six of the new or migrated punitive articles that are now "covered offenses" under the exclusive authority of the newly established Office of the Special Trial Counsel:[182]

- Article 117a, Wrongful broadcast or distribution of intimate visual images
- Article 125, Kidnapping
- Article 128b, Domestic violence
- Article 130, Stalking
- Article 132, Retaliation
- Article 134, Sexual harassment

The MJRP examined these six offenses, many of which involve interpersonal violence, to determine how the Services are investigating, processing, and disposing of these crimes under the new statutory framework. The MJRP requested three years of information about the prevalence of these six punitive articles from the law enforcement entities tasked with their investigation and the judge advocates who prosecute these crimes. The MJRP discovered that the Services do not adequately collect or manage data on these punitive articles. Because data requirements and collection capabilities vary between the law enforcement and legal entities that investigate and prosecute these offenses, a rigorous statistical analysis of the data is not possible.

However, the MJRP's assessment of these six punitive articles leads the Panel to recommend improvements to DoD policies, with a focus on DoD's substandard data collection practices. The MJRP recommends that

- Congress revise Article 117a, Wrongful broadcast or distribution of intimate visual images, to clarify the elements of the crime;

179 Articles 77 through 133 of the UCMJ are enumerated punitive articles that cover common law offenses, such as murder and rape, as well as military offenses, such as desertion or disobeying an order. Article 134, UCMJ—the "general article"—covers three categories of offenses not specifically set out in the enumerated articles of the UCMJ: Conduct prejudicial to good order and discipline (clause 1), Conduct of a nature to bring discredit upon the armed forces (clause 2), and non-capital crimes and offenses that violate federal civilian law (clause 3).

180 Under the MJA16, 36 of the 53 presidentially designated Article 134 offenses became enumerated offenses. Congress migrated these offenses because criminality did not rely on proving that the offense was prejudicial to good order and discipline or service discrediting under clauses 1 and 2, respectively. *See* David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J. 1, 93 (2017).

181 These articles include 10 U.S.C. § 917a (2021) (Art. 117a, UCMJ), 10 U.S.C. § 928b (2021) (Art. 128b, UCMJ), and 10 U.S.C. § 934 (Art. 134, UCMJ).

182 FY22 NDAA, *supra* note 70, at §§ 531–539C. The FY22 NDAA mandated that each Military Department create an Office of the Special Trial Counsel, transferring prosecutorial decision-making authority from commanders to specialized, independent judge advocates. Although the military justice reforms in the FY22 NDAA apply to the Coast Guard, Section 532 does not. Nevertheless, to align with the intent of the legislation, the Coast Guard established the Office of the Chief Prosecutor, led by an O-7 flag officer. Mirroring the DoD-mandated structure, the Chief Prosecutor of the Coast Guard serves as the Lead Special Trial Counsel with accompanying disposition authorities for covered offenses. However, the Chief Prosecutor also supervises all military prosecutors (both special trial counsel and trial counsel) and executes all UCMJ prosecutions (both covered and uncovered offenses) within the Coast Guard. This dual function of the Chief Prosecutor takes account of the unique organizational characteristics of the Coast Guard in accordance with 10 U.S.C. § 824a (Art. 24a, UCMJ) and 10 U.S.C. § 1044f.

- The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 125, Kidnapping; Article 128b, Domestic violence; Article 130, Stalking; Article 132, Retaliation; and Article 134, Sexual harassment, from the report of an allegation through final disposition. DoD should be able to differentiate between the different types of offenses (e.g., physical stalking vs. cyberstalking, criminal vs. noncriminal sexual harassment) and identify the investigative entity (whether military criminal investigative organization or military police);
- The Secretary of Defense direct the evaluation of Service regulations and protocols for investigating Article 130, Stalking, to determine whether MCIOs or military police are receiving appropriate and necessary training for, or have appointed experts for, investigating cyberstalking;
- The Secretary of Defense promulgate policies that distinguish between conduct under Article 132, Retaliation, and reprisal under 10 U.S.C. § 1034, the Military Whistleblower Protection Act, and clarify responsibility for investigating allegations under these authorities; and
- The Secretary of Defense direct effective coordination and correlation of the reporting, investigation, case evaluation, and prosecution of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment.

The MJRP further recommends that Congress amend the definition of the covered offense of sexual harassment to remove the statutory preconditions on the exercise of OSTC authority. Under current law, the commander must first substantiate a formal complaint of sexual harassment before the OSTC gains exclusive jurisdiction to prosecute the Article 134 offense. The MJRP believes that the commander's role—in consultation with a judge advocate—should be to assess allegations of sexual harassment to determine whether (1) the allegation is a formal complaint; (2) the allegation is substantiated; and (3) the alleged conduct meets the elements of the offense of Article 134 sexual harassment. If the commander determines that all three factors are satisfied, the commander shall refer the case to the OSTC. If any of the factors is not satisfied, the matter can be properly handled by the command. This sorting process allows the command to handle noncriminal sexual harassment using appropriate administrative tools while sending criminal allegations to the OSTC. There is no need for the commander's determination to be a jurisdictional limitation for the OSTC.

Section II of this chapter explains the Panel's methodology for gathering military justice and law enforcement data on the six new or migrated offenses. Sections III through VIII examine the specified punitive articles in numerical order, highlighting statutory shortcomings, policy conflicts, and other limitations that undermine the effective handling of criminal complaints. The chapter concludes with a combined assessment of Articles 128b, 132, and 134, UCMJ, which share certain coordination challenges and data collection difficulties. The Panel recommends that DoD and Congress address these issues with the goal of fostering increased trust in the investigation, prosecution, and defense of these covered offenses.

II. METHODOLOGY

A. MJRP Requests for Information

The MJRP issued RFIs to organizations that investigate and prosecute the six punitive articles for this study: (1) military law enforcement agencies, which include military criminal investigative organizations, installation law enforcement, and military police,[183] and (2) the Offices of the Judge Advocates General for the Army, Air

183 The Services have two types of law enforcement agencies: military criminal investigative organizations (MCIOs) and other military law enforcement

Force, Navy, and Coast Guard, as well as the Staff Judge Advocate to the Commandant of the Marine Corps. The RFIs requested three years of data (FY21–FY23)[184] from law enforcement and military justice databases on the investigation, adjudication, and outcome of cases involving the six punitive articles.[185]

Specifically, the RFIs asked military law enforcement agencies to identify which organization investigated alleged violations of the six punitive articles, and report outcomes[186] for cases investigated and closed during the three years from FY21 through FY23.[187] The RFIs separately asked the TJAGs and SJA to CMC to provide court-martial data for cases involving the six punitive articles, including the number of preferrals and referrals categorized by type of court-martial.[188]

The MJRP also solicited information from policy advisors and program managers about these new or migrated offenses. The Panel visited several military installations to speak with prosecutors, defense counsel, victims' counsel, and military judges, as they sought to devise effective processes and protocols for these offenses.

B. Responses to the RFIs

Military investigative agencies and judge advocates use different databases and case management systems. Whereas the MCIOs track offenses from reporting through investigation,[189] the military justice databases typically include only cases with preferred charges. Furthermore, MCIO databases track outcomes only if the command notifies the MCIO of actions taken. Given the disparities between the data collection and reporting requirements and the capabilities of the MCIOs and TJAGs, it is impossible to accurately correlate the law enforcement and military justice data received.

The MJRP was unable to independently verify the accuracy of the RFI responses, because the Military Departments also use different data collection methodologies. For example, the MJRP noted discrepancies between the reported number of law enforcement investigations and the reported dispositions.[190] The Services explained that the reported

agencies, most significantly, military police (MPs). MCIO agencies include the Army Criminal Investigation Division (CID), Naval Criminal Investigative Service (NCIS), and Air Force Office of Special Investigations (AFOSI). NCIS investigates cases in the Marine Corps and the Navy. AFOSI investigates cases in the Air Force and the Space Force. Military law enforcement agencies, including the Army Directorates of Emergency Services and Provost Marshal Offices, Naval Security Forces, Air Force Security Forces, and the Marine Corps Provost Marshal Office and Criminal Investigative Division, provide support to military installations. Likewise, the Coast Guard Investigative Service (CGIS) and Coast Guard Police Department provide support to a limited number of installations.

184 Investigations and cases were selected from this period because most of the new punitive articles went into effect on January 1, 2019. The MJRP selected FY21 as the start date to allow sufficient time for the cases in database systems to be investigated, tried, and closed.

185 These data are required to be collected by DoD policy. *See* DoD Article 140a Standards, *supra* note 18.

186 Possible outcomes are no action (when a commander decides not to take *criminal or administrative* action on the reported offense), administrative separation, other administrative action, nonjudicial punishment (NJP); summary court-martial (SCM), special court-martial (SPCM), Article 16(c)(2)(A) SPCM, and general court-martial (GCM).

187 The RFIs requested aggregated data by offense and not by subject. Unlike the other Military Departments, the Department of the Navy reported by subject and punitive article and not number of punitive articles investigated. As a result, NCIS's number of punitive articles investigated and disposed of may be lower than those provided by the other Military Departments. *See* MJRP RFI on Punitive Articles (Oct. 30, 2023) and Services' responses (Military Justice), *available at* Appendix M; MJRP RFI on Punitive Articles (Nov. 2, 2023) and Services' responses (Military Law Enforcement), *available at* Appendix N.

188 The preferral of charges marks the first formal step against an accused in the military justice process. Preferral informs the accused of the criminal offenses they are alleged to have committed. *See* 2024 MCM, *supra* note 1, R.C.M. 307–308. After preferral and, in some cases, after an Article 32 preliminary hearing, an authorized commander or a special trial counsel may refer a case to a court-martial.

189 The numbers of cases presented in this report include only those reports for which an investigation was conducted.

190 For example, in the law enforcement data the number of reported allegations investigated did not necessarily equal the total number of dispositions provided.

data may contain errors owing to inaccuracies of command action reports, operator error, or system limitations. After reviewing the law enforcement and TJAG responses, the MJRP concludes that the Services were unable to accurately retrieve and respond with the requested information.

Despite these significant data challenges, the information provided offers some insights into the prevalence and disposition of allegations involving the six new or migrated punitive articles. The frequency of domestic violence and sexual harassment investigations, for example, highlights potential challenges for the OSTCs as they begin to exercise authority over these offenses.

III. ARTICLE 117a, UCMJ, WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES

Article 117a, UCMJ, criminalizes the nonconsensual distribution of sexually explicit visual material.[191] Congress first considered this crime under the Protecting the Rights of Individuals Against Technological Exploitation (PRIVATE) Act in 2017,[192] but the new punitive article was not adopted until the FY18 NDAA.[193] Article 117a is a covered offense under the authority of the OSTC.

In two recent court opinions, the U.S. Court of Appeals for the Armed Forces (CAAF) described the text of Article 117a as "long" and "complicated."[194] The fourth element of the offense requires a "reasonably direct and palpable connection to a military mission or military environment."[195] This element was added in response to First Amendment concerns raised by the Department of Justice.[196] The language of the statute has generated appellate litigation and may hinder prosecutions with civilian victims when the images are disseminated on electronic platforms[197] unrelated to the military or are shared only with other civilians.[198]

In *United States v. Grijalva*, 84 M.J. 433 (C.A.A.F. 2024), the appellant was convicted under Article 134, UCMJ, for broadcasting intimate visual images of a civilian to a civilian website without the victim's consent. On appeal, the appellant argued that the preemption doctrine prohibited the government from charging him under Article 134, UCMJ, because Congress specifically addressed the wrongful broadcast or distribution of visual images in Article 117a, UCMJ.[199] In response, the government argued that Congress enacted Article 117a with the purpose

191 These types of crimes are colloquially known as "revenge porn" and include cases in which consent to the image may originally have been provided. Prior to Article 117a, Article 120c prohibited the nonconsensual broadcast and distribution of the "private area," but this prohibition did not apply in cases when the image was originally taken with consent. Before Article 117a was legislated, nonconsensual pornography was charged under Article 134.

192 The PRIVATE Act, introduced on April 6, 2017, passed the U.S. House of Representatives unanimously by a vote of 418–0, but failed to pass in the Senate. The text of the act is available at https://www.congress.gov/bill/ 115th-congress/house-bill/2052.

193 National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 [FY18 NDAA], § 533, 131 Stat. 1283 (2017).

194 *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022) (describing Article 117a as "prolix" and "complicated"); *United States v. Grijalva*, 84 M.J. 433 (C.A.A.F. 2024) (describing Article 117a as "long" and "complicated.")

195 2024 MCM, *supra* note 1, Part IV, para. 55a.b(6).

196 *See* Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Mac Thornberry, Chairman, H. Comm. on the Armed Services, & Sen. John McCain, Chairman, S. Comm. on the Armed Services (Nov. 8, 2017), *available at* https://www.justice.gov/ola/page/file/1010611/dl.

197 These include, but are not limited to, websites, social media, and messaging applications.

198 Major Joshua B. Fix, *The Revenge of Preemption*, The Army Lawyer, no. 3 (2021) (noting "Because of the direct-and-palpable element, it is unlikely the military would be able to prosecute a Service member who sent intimate images of a civilian to the civilian's friends or family. Similarly, Article 117a probably does not apply to intimate images of a civilian posted on a website unrelated to the military."), *available at* https://tjaglcs.army.mil/ Periodicals/ The-Army-Lawyer/tal-2021-issue-3/Post/4534/No-1-The-Revenge-of-Preemption.

199 Brief on Behalf of Appellant, *United States v. Grijalva*, Crim. App. Dkt. No. 1482, at 9 (citing *United States v. Anderson*, 68 M.J. 378, 386–87 (C.A.A.F. 2009) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, para. 60.c(5)(a) ("The preemption doctrine prohibits

of protecting Service members, and thus the new statute could not preempt prosecutions under Article 134 in cases involving civilian victims with no military nexus.[200]

CAAF agreed with the appellant and held that the government could not prosecute the nonconsensual broadcast of intimate visual images under Article 134.[201] The CAAF decision may generate further litigation as to whether charged conduct has a "direct and palpable connection to a military mission or military environment," especially in cases involving civilian victims. In another recent case, CAAF found that a military connection could be established if the images reached a Service member even if the images were uploaded to a civilian website.[202]

A. Law Enforcement Data on Wrongful Broadcast or Distribution of Intimate Visual Images

TABLE 3.1. MILITARY LAW ENFORCEMENT INVESTIGATIONS AND REPORTED DISPOSITIONS: ARTICLE 117a, WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES (FY2021–FY2023)

FY21–FY23	Investigations by MCIOs	Investigations by Military Police	Total No. of Investigations	Total No. of Dispositions Reported	No Action		Other Admin Action		Admin Sep		NJP		SCM		SPCM		GCM	
					No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Army	245	7	252	310	122	39%	53	17%	75	24%	44	14%	3	1%	2	1%	11	4%
Navy	42	2	44	34	10	29%	3	9%	6	18%	10	29%	0	0%	3	9%	2	6%
Marine Corps	21	15	36	30	9	30%	4	13%	3	10%	10	33%	1	3%	2	7%	1	3%
Air Force	33	24	57	41	0	0%	19	46%	2	5%	10	24%	2	5%	3	7%	5	12%
Coast Guard	12	N/A	12	10	4	40%	3	30%	1	10%	1	10%	0	0%	0	0%	1	10%
Total	353	48	401	425	145	34%	82	19%	87	20%	75	18%	6	1%	10	2%	20	5%

Military law enforcement investigated 401 allegations of Article 117a in FY21–FY23, and MCIOs, as opposed to military police, conducted most of the Article 117a investigations.[203]

application of Article 134 to conduct covered by Articles 80 through 132.")); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) ("[S]imply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended [through direct legislative language or express legislative history] the other punitive article to cover a class of offenses in a complete way.")), *available at* https://www.armfor.uscourts.gov/briefs/2023Term/Grijalva230215AppellantBrief.pdf.

200 Brief on Behalf of Appellee, *United States v. Grijalva*, Crim. App. Dkt. No. 1482, at 15, *available at* https://www.armfor.uscourts.gov/newcaaf/briefs/2023Term/Grijalva230215AppelleeBrief.pdf.

201 *United States v. Grijalva*, 84 M.J. 433 (C.A.A.F. 2024) (finding that the Court sees no congressional intent to allow conduct already punishable by Article 117a, UCMJ, to also be punishable by Article 134, UCMJ, and that the elements of both offenses are "implicitly the same").

202 *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022). This case involved a Service member victim who had been "put in contact" with the images, thereby establishing the necessary connection.

203 The Air Force was the only Service reporting that its MCIO has exclusive jurisdiction over these cases. Army CID reported that these cases are in the purview of the military police, while the Navy/Marine Corps reported that an investigation of Article 117a warrants NCIS notification and, depending on the facts and circumstances, might result in the initiation of an NCIS investigation. *See* Services' responses (Military Justice) to MJRP RFI on Punitive Articles (Oct. 30, 2023), *available at* Appendix M; Services' responses (Military Law Enforcement) to MJRP RFI on Punitive Articles (Nov. 2,

B. Military Justice Data on Wrongful Broadcast or Distribution of Intimate Visual Images

TABLE 3.2. LEGAL DATABASE REPORTING OF PREFERRED AND REFERRED COURTS-MARTIAL: ARTICLE 117a, WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES (FY2021–FY2023)

FY21–FY23	No. of Cases Preferred	No. of Cases Referred to GCM	No. of Cases Referred to SPCM	No. of Cases Referred to Art 16(c)(2)(A) SPCM
Army	26	22	6	2
Navy	18	4	12	0
Marine Corps	8	0	4	0
Air Force	21	10	6	0
Coast Guard	1	0	0	1
Total	74	36	28	3

Judge advocates preferred 74 charges involving Article 117a, resulting in 67 referrals to courts-martial over the three-year period studied.

C. Analysis of and Recommendation on Article 117a

Article 117a has generated the second-highest number of investigations among the new punitive articles and covered offenses assessed by the Panel, after only domestic violence. The prevalence of this crime in the United States[204] and the comparatively large number of Article 117a investigations conducted by MCIOs raise the question of why there are so few referrals and convictions in the military.[205] The confusing statutory language and military nexus requirement, in addition to other unknown factors, may account for the low numbers of courts-martial and convictions. For example, are prosecutors declining cases involving civilians because there is no evidence of a military nexus?

The MJRP recommends that Congress revise Article 117a to clarify the elements of the crime. Congress may want to consider whether to eliminate the military nexus element, in light of the opinion of constitutional law experts that properly drafted statutes do not run afoul of the First Amendment.[206]

2023), *available at* Appendix N.

204 Amanda Lenhart, Michele Ybarra, & Myeshia Price Feeney, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* Data & Society Research Institute Data Memo 4 (Dec. 13, 2016), *available at* https://datasociety.net/pubs/oh/Nonconsensual _Image_Sharing/.

205 Although the data are unreliable, the Services report that 67 cases involving Article 117a were referred to courts-martial between FY21 and FY23. The number of convictions is unknown.

206 Mary Anne Franks, *Redefining "Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. (2017), https://scholarship.law.ufl.edu/flr/vol69/iss5/2.

RECOMMENDATION 9: Congress revise Article 117a, Wrongful Broadcast or Distribution of Intimate Visual Images, to clarify the elements of the crime.

Finding 1: Article 117a, Wrongful broadcast or distribution of intimate visual images, is the second most frequently investigated offense among the covered offenses assessed by the MJRP. Despite the number of investigations, few cases have been referred to trial..

Finding 2: Article 117a, Wrongful broadcast or distribution of intimate visual images, is a long and complicated statute that consists of a single sentence with more than 300 words. Prosecution of Article 117a has led to significant appellate litigation over the text and interpretation of the statute.

Finding 3: Article 117a, Wrongful broadcast or distribution of intimate visual images, requires a "reasonably direct and palpable connection to a military mission or military environment." Because of the military nexus element, offenses against civilian victims cannot be prosecuted unless there is a connection to the military. Nonconsensual broadcast of intimate visual images also cannot be prosecuted under Article 134 due to the doctrine of preemption. Thus, some cases involving broadcast or distribution of intimate visual images by a servicemember, particularly those with a civilian victim, currently cannot be prosecuted within the military justice system.

IV. ARTICLE 125, UCMJ, KIDNAPPING

Congress migrated kidnapping from Article 134, UCMJ, to Article 125, UCMJ. Although no substantive modifications were made to the elements of the crime, Congress subsequently designated kidnapping a covered offense under the authority of the OSTC.

A. Law Enforcement Data on Kidnapping

TABLE 3.3. MILITARY LAW ENFORCEMENT INVESTIGATIONS AND REPORTED DISPOSITIONS: ARTICLE 125, KIDNAPPING (FY2021–FY2023)

FY21–FY23	Investigations by MCIOs	Investigations by Military Police	Total No. of Investigations	Total No. of Dispositions Reported	No Action		Other Admin Action		Admin Sep		NJP		SCM		SPCM		GCM	
					No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Army	115	83	198	253	145	57%	34	13%	50	20%	10	4%	1	0.4%	5	2%	8	3%
Navy	7	1	8	3	2	67%	0	0%	0	0%	0	0%	0	0%	0	0%	1	33%
Marine Corps	7	2	9	10	3	30%	0	0%	2	20%	3	30%	0	0%	1	10%	1	10%
Air Force	7	16	23	8	2	25%	2	25%	0	0%	1	13%	0	0%	0	0%	3	38%
Coast Guard	2	N/A	2	2	1	50%	0	0%	1	50%	0	0%	0	0%	0	0%	0	0%
Total	138	102	240	276	153	55%	36	13%	53	19%	14	5%	1	0.4%	6	2%	13	5%

There were few investigations of kidnapping except in the Army, which reported 198 investigations. Across the Services, the MCIOs investigated most kidnapping allegations; military police investigated 43% of the time. Most kidnapping allegations resulted in no action by the command (55%).[207]

B. Military Justice Data on Kidnapping

TABLE 3.4. LEGAL DATABASE REPORTING OF PREFERRED AND REFERRED COURTS-MARTIAL: ARTICLE 125, KIDNAPPING (FY2021–FY2023)

FY21–FY23	No. of Cases Preferred	No. of Cases Referred to GCM	No. of Cases Referred to SPCM	No. of Cases Referred to Art 16(c)(2)(A) SPCM
Army	21	17	1	1
Navy	7	4	2	0
Marine Corps	2	2	0	0
Air Force	8	7	0	1
Coast Guard	0	0	0	0
Total	38	30	3	2

The offense of kidnapping had few referrals.

C. Analysis of and Recommendation on Kidnapping

Military law enforcement investigated 240 kidnapping allegations across the Services between FY21 and FY23. Most of the investigations resulted in no action and, even when charges were preferred, many were not referred to a court-martial. Because kidnapping is a serious offense with a maximum punishment of confinement for life without eligibility for parole and a dishonorable discharge, the Secretary of Defense should reconsider policies that task military police, rather than MCIOs, with the investigation of this crime.[208]

RECOMMENDATION 10: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 125, Kidnapping, from the report of an allegation through final disposition.

Finding 4: Military law enforcement agencies reported a few hundred investigations of kidnapping, but few cases were referred to trial and most resulted in no reported action taken.

Finding 5: A large number of kidnapping investigations appear to have been conducted by military police. The data do not indicate whether military police were the only military law enforcement agency to conduct the investigation, or whether some cases also were investigated by military criminal investigative organizations.

207 Kidnapping offenses resulted in the highest number of no action dispositions across the six punitive articles reviewed. The other offenses resulted in no action by the command at rates between 33% and 47%.

208 Without undertaking a case review, the MJRP cannot speculate on what type of conduct these kidnapping cases encompass. For instance, the MJRP does not know how many of these cases involve the limited restraint of a person for a short time or involve more violent acts of kidnapping.

Finding 6: The Army reported a disproportionately higher number of kidnapping investigations than the other Services, raising concerns about inconsistent data collection protocols.

V. ARTICLE 128b, UCMJ, DOMESTIC VIOLENCE

Domestic violence, Article 128b, UCMJ, is now an enumerated offense with elements tailored to the unique characteristics of family and intimate partner violence.[209] Before Congress enacted Article 128b, domestic violence was typically charged as an assault under Article 128, UCMJ. Domestic violence offenses may include violations of protective orders, intimidation or threats, strangulation, or suffocation.

It is unclear whether the creation of Article 128b has improved the investigation and disposition of the crime of domestic violence. In 2019, the Inspector General of the Department of Defense (DoD IG) concluded that military law enforcement personnel did not "thoroughly investigate and document their response to domestic violence incidents."[210] Similarly, when discussing proper documentation practice, Army officials admitted that first responders did not necessarily have adequate training or experience to "read a scene" or "to correctly identify domestic violence incidents and domestic offender-victim relationships."[211]

Data provided to the MJRP indicate that military police, not MCIOs, conduct a substantial number of domestic violence investigations. It may be that law enforcement data do not properly count domestic violence complaints. As recently as 2021, the Government Accountability Office (GAO) issued an in-depth report on the deficiencies of the statutory requirements to collect and report domestic violence data.[212] GAO concluded that DoD's inability to track domestic violence allegations ultimately hampers its response to domestic abuse and violence. According to the GAO report, DoD has yet to develop a statutorily required database to track domestic violence crimes under the UCMJ and related command actions despite being directed to do so over 20 years ago.[213]

209 The John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 532, 132 Stat. 1636, 1759–60 (2018), established the stand-alone offense of domestic violence punishable under Article 128b, UCMJ, effective January 1, 2019. The President amended the Manual for Courts-Martial in 2022 to include the elements of the offense. Exec. Order No. 14,062, "2022 Amendments to the Manual for Courts-Martial, United States," 87 Fed. Reg. 4763 (Jan. 31, 2022) [E.O. 14,062], *available at* https://www.govinfo.gov/content/pkg/ FR-2022-01-31/pdf/2022-02027.pdf. The National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 531(d), 137 Stat. 136, 259–60 (2024), amended Article 128b and Article 130 to include dating partners.

210 U.S. Dep't of Def., Evaluation of Military Services' Law Enforcement Responses to Domestic Violence Incidents, Report No. DODIG-2019-075 (Apr. 19, 2019). *See also* DoDI 6400.06, "DoD Coordinated Community Response to Domestic Abuse Involving DoD Military and Certain Affiliated Personnel" 80 (Dec. 15, 2021; Change 3, July 11, 2024) ("For purposes of this issuance, an offense under the U.S.C., the UCMJ, or State or local law involving the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person, who is a: Current or former spouse; Person with whom the alleged abuser shares a child in common; Current or former intimate partner with whom the alleged abuser shares or has shared a common domicile; or Person who is or has been in a social relationship of a romantic or intimate nature with the accused and determined to be an intimate partner").

211 U.S. Army Audit Agency, Army Domestic Abuse Reporting and Prevention, Report A-2023-0058-FIZ, 10 (2023) [Army Domestic Abuse Report].

212 U.S. Gov't Accountability Off., Domestic Abuse: Actions Needed to Enhance DOD's Prevention, Response, and Oversight, GAO-21-289 (May 6, 2021) [GAO Domestic Abuse Report], *available at* https://www.gao.gov/products/gao-21-289.

213 *Id.* at 28.

A. Law Enforcement Data on Domestic Violence

TABLE 3.5. MILITARY LAW ENFORCEMENT AGENCIES INVESTIGATIONS AND REPORTED DISPOSITIONS: ARTICLE 128b, DOMESTIC VIOLENCE (FY2021–FY2023)

FY21–FY23	Investigations by MCIOs	Investigations by Military Police	Total No. of Investigations	Total No. of Dispositions Reported	No Action		Other Admin Action		Admin Sep		NJP		SCM		SPCM		GCM	
					No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Army	2357	3740	6097	8349	3978	48%	1909	23%	1542	18%	578	7%	11	0.1%	97	1%	234	3%
Navy	123	27	150	66	34	52%	8	12%	5	8%	11	17%	1	2%	3	5%	4	6%
Marine Corps	100	52	152	99	38	38%	16	16%	19	19%	8	8%	0	0%	11	11%	7	7%
Air Force	105	784	889	130	0	0%	67	52%	7	5%	20	15%	3	2%	11	8%	22	17%
Coast Guard	122	N/A	122	95	50	53%	20	21%	17	18%	8	8%	0	0%	0	0%	0	0%
Total	2807	4603	7410	8739	4100	47%	2020	23%	1590	18%	625	7%	15	0.2%	122	1%	267	3%

Domestic violence is the most often investigated of the covered offenses assessed by the MJRP. MCIOs and military police investigated 7,410 allegations of domestic violence between FY21 and FY23.[214] The Army had the greatest number of domestic violence allegations, followed by the Air Force. The Marine Corps and the Navy combined recorded just 302 investigations during the three-year period from FY21 to FY23.[215] In the Army and the Air Force, military police investigated more domestic violence allegations than did MCIOs, whereas in the Navy and the Marine Corps, these matters were primarily investigated by MCIOs.

Military law enforcement data indicate that the Services may be incorrectly coding domestic violence cases. This systemic error may explain the large discrepancy between the numbers reported by the Army and those reported by the Navy and the Marine Corps. In 2023, the Secretary of the Army published an audit on domestic abuse reporting and prevention. The audit found that the Army's law enforcement database did not properly identify cases of domestic violence, which were regularly coded as simple assault.[216] It is possible that the Army sought to self-correct these errors when it reported domestic violence in response to the MJRP's RFI.[217] The MJRP is also concerned that the Navy and Marine Corps statistics on Article 128b may not accurately represent physical domestic violence,

214 The Air Force reported that MCIOs investigate domestic violence allegations involving aggravated assault resulting in grievous bodily harm or any assault involving strangulation or suffocation, while MPs investigate all other allegations. The Army reported that both MCIOs and MPs have purview over allegations of Article 128b violations. The Navy reported that NCIS should be notified of Article 128b investigations and, depending on the severity of the offense, the case may be investigated by NCIS. *See* Services' responses (Military Justice) to MJRP RFI on Punitive Articles (Oct. 30, 2023), *available at* Appendix M; Services' responses (Military Law Enforcement) to MJRP RFI on Punitive Articles (Nov. 2, 2023), *available at* Appendix N.

215 Even accounting for the fact that the Navy provided investigative numbers by investigation and not by UCMJ article, the discrepancy is still substantial.

216 Army Domestic Abuse Report, *supra* note 211, at 9 (The Army "[d]idn't correctly identify and record 2,836 (81 percent) of 3,492 domestic violence incidents per policy.").

217 *Id.* at 10. The audit suggests that CID had to "significantly scrub" records to identify domestic violence incidents between FY19 and FY21. Presumably, given the findings of the audit, cases were coded properly after FY21.

especially in light of previous reports that found the rate of physical domestic abuse to be significantly higher within the Navy and the Marine Corps between FY15 and FY19.[218]

B. Military Justice Data on Domestic Violence

TABLE 3.6. LEGAL DATABASE REPORTING OF PREFERRED AND REFERRED COURTS-MARTIAL: ARTICLE 128b, DOMESTIC VIOLENCE (FY2021–FY2323)

FY21–FY23	No. of Cases Preferred	No. of Cases Referred to GCM	No. of Cases Referred to SPCM	No. of Cases Referred to Art 16(c)(2)(A) SPCM
Army	174	133	26	10
Navy	27	12	10	0
Marine Corps	59	14	28	0
Air Force	82	55	23	3
Coast Guard	2	1	0	0
Total	344	215	87	13

Judge advocates preferred 344 cases involving Article 128b offenses from FY21 to FY23. Of those charges preferred, 91.6% were referred to trial; most were sent to general courts-martial.

C. Analysis of and Recommendation on Domestic Violence

The creation of Article 128b as a stand-alone offense should—in theory—facilitate more accurate data collection on domestic violence. Data collection and reporting on domestic violence are particularly important because the Lautenberg Amendment[219] and DoD policy prohibit Service members convicted of an Article 128b offense at a general or special court-martial from possessing firearms; summary court-martial convictions and nonjudicial punishment do not trigger the same firearms prohibition. A comprehensive assessment of Article 128b should consider whether the quality of military law enforcement investigations is sufficient to ensure that special trial counsel (STCs) can make sound prosecutorial decisions.

The lack of reliable information on domestic violence also may affect how the OSTC manages these cases. The OSTC must review and assess *all* domestic violence cases to determine whether the offense is covered and whether to prefer charges or defer the case back to the command for alternative disposition. One STC reported being surprised by the "shocking number" of domestic violence cases under their review. Before domestic violence was a covered offense for the OSTC, many cases were presumably handled by local law enforcement or commanders and not provided to military prosecutors.[220] The sheer volume of domestic violence allegations presents challenges for the STCs, who must review every allegation reported to military police, MCIOs, commands, and civilian law enforcement agencies. STCs may have to conduct their own investigations and may need to review prior allegations

218 GAO Domestic Abuse Report, *supra* note 212, at 22.

219 18 U.S.C. § 922(g)(9). As part of the Gun Control Act of 1968, 18 U.S.C. §§ 921–30, the Lautenberg Amendment prohibits offenders convicted of a misdemeanor crime of domestic violence from shipping, transporting, possessing, or receiving firearms or ammunition.

220 Although DoDI 6400.06 requires commanders to notify law enforcement of all domestic violence cases, the site visits indicate that previously commands may have been handling some cases of domestic violence without the assistance of judge advocates.

of domestic violence within a family. Additional complications can arise when cases are deferred back to the command.

The ability of STCs to successfully prosecute Article 128b offenses will depend, in large part, on the quality of domestic violence investigations provided to them. The complexity of domestic violence investigations and prosecutions, including the number of entities involved—commands, STCs, MCIOs, military police, civilian law enforcement, civilian prosecutors, and victim support organizations (military and civilian)—calls for an organized and coordinated response to cases. To assist prosecutors' evaluation of the facts and circumstances in these cases, DoD should prescribe and implement plans to ensure that domestic violence investigations are properly investigated.

RECOMMENDATION 11: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 128b, Domestic violence, from the report of an allegation through final disposition.

Finding 7: Domestic violence is the most frequently investigated offense among the covered offenses assessed by the MJRP. The Army reported a disproportionately higher number of domestic violence investigations than the other Services, raising concerns about inconsistent data collection protocols.

Finding 8: The Army and Air Force report that military police investigated more domestic violence allegations than did military criminal investigative organizations; the Navy and Marine Corps report that domestic violence was primarily investigated by military criminal investigative organizations.

Finding 9: Data deficiencies preclude the MJRP from determining whether Article 128b, Domestic violence, allegations are being appropriately investigated and processed.

VI. ARTICLE 130, UCMJ, STALKING

Congress relocated stalking from Article 120a, UCMJ, to Article 130, UCMJ.[221] As recommended by the Military Justice Review Group, the elements of the offense were amended to align more closely with federal law by addressing cyberstalking as wrongful conduct and including threats to intimate partners.[222]

A. Law Enforcement Data on Stalking

TABLE 3.7. MILITARY LAW ENFORCEMENT INVESTIGATIONS AND REPORTED DISPOSITIONS: ARTICLE 130, STALKING (FY2021–FY2023)

FY21–FY23	Investigations by MCIOs	Investigations by Military Police	Total No. of Investigations	Total No. of Dispositions Reported	No Action		Other Admin Action		Admin Sep		NJP		SCM		SPCM		GCM	
					No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Army	79	55	134	191	93	49%	38	20%	37	19%	12	6%	1	1%	3	2%	7	4%
Navy	15	5	20	7	1	14%	1	14%	1	14%	4	57%	0	0%	0	0%	0	0%
Marine Corps	7	4	11	10	6	60%	2	20%	0	0%	1	10%	0	0%	1	10%	0	0%
Air Force	14	51	65	13	4	31%	5	38%	0	0%	2	15%	0	0%	1	8%	1	8%
Coast Guard	9	N/A	9	9	5	56%	2	22%	2	22%	0	0%	0	0%	0	0%	0	0%
Total	124	115	239	230	109	47%	48	21%	40	17%	19	8%	1	0.4%	5	2%	8	3%

Military law enforcement investigated 239 allegations of Article 130 in FY21–FY23.[223] Nearly 50% of all investigations for stalking resulted in no action being taken by the command.

221 FY17 NDAA, *supra* note 9, at § 5401(11). Article 130 was previously the offense of housebreaking.

222 MJRG Report, *supra* note 27, at 877–78.

223 The Air Force reported that all Article 130 investigations associated with physical violence are investigated by its MCIO and all others by its MPs. The Army reported that its MCIO investigates these cases and the Navy reported that Article 130 would warrant NCIS notification and might result in an initiation of an NCIS investigation. *See* Services' responses (Military Justice) to MJRP RFI on Punitive Articles (Oct. 30, 2023), *available at* Appendix M; Services' responses (Military Law Enforcement) to MJRP RFI on Punitive Articles (Nov. 2, 2023), *available at* Appendix N.

B. Military Justice Data on Stalking

TABLE 3.8. LEGAL REPORTING OF PREFERRED AND REFERRED COURTS-MARTIAL: ARTICLE 130, STALKING (FY2021–FY2023)

FY21–FY23	No. of Cases Preferred	No. of Cases Referred to GCM	No. of Cases Referred to SPCM	No. of Cases Referred to Art 16(c)(2)(A) SPCM
Army	19	18	1	1
Navy	7	4	3	0
Marine Corps	4	0	3	0
Air Force	9	7	2	0
Coast Guard	0	0	0	0
Total	39	29	9	1

Judge advocates preferred 39 cases involving Article 130 to courts-martial from FY21 to FY23. Most of those cases were referred to general courts-martial, with 10 cases referred to special courts-martial.

C. Analysis of and Recommendations on Stalking

The MJRP was unable to effectively assess Article 130, because the RFI responses did not differentiate between cyberstalking and physical stalking.[224] The 2021 IRC Report criticized the lack of data on cybercrimes, finding that "DoD and the Services lack the ability to track the prevalence of cyber-harassment, online stalking and retaliation, and other technology-facilitated abuse[.]"[225] The military is not unique in this regard—the prevalence of cyberstalking is difficult to assess, because the data vary widely due to underreporting, differences in data collection methodologies, and the failure of federal databases, like those of the Services, to differentiate between cyberstalking and other forms of stalking.[226]

Because of its many gaps, the information on cyberstalking offenses raises more questions than it answers. However, one concern highlighted by the data is the number of investigations conducted by military police instead of MCIOs. MCIOs are typically the military law enforcement agencies tasked with investigating more serious crimes.[227] Cyberstalking investigations can be complex, necessitating the acquisition of digital information across a vast array of technology platforms. Military police may not be trained or equipped to obtain evidence necessary for a successful investigation and disposition of Article 130.

224 The MJRP does not know if the Services' different databases can generate Article 130 data for offenses involving cyberstalking. However, the MJRP can confirm that sentencing data were provided only by article and not by specific offense.

225 IRC Report, *supra* note 3, at 25 (Recommendation 3.3 a: Collect Data to Measure the Problem of Cyberharassment (and Related Harms)).

226 David M. Adamson et al., *Cyberstalking, A Growing Challenge for the U.S. Legal System*, Rand Research Report (June 29, 2023), *available at* https://www.rand.org/pubs/research_reports/RRA2637-1.html. Researchers in this study needed to search the Federal Judicial Center's Integrated Database under the most general form of 18 U.S.C. § 2261. After identification of those cases, researchers needed to review the docket filings to determine which cases involved cyberstalking.

227 Judicial Proceedings Panel, Report on Sexual Assault Investigations in the Military (Sept. 2017), *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/08_JPP_Report _Investigations_Final_20170907.pdf.

RECOMMENDATION 12: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 130 "Stalking" from the report of an allegation through final disposition with separate data fields to differentiate between cyberstalking and physical stalking.

Finding 10: The data on Article 130, Stalking, fails to differentiate between cyberstalking and physical stalking.

RECOMMENDATION 13: The Secretary of Defense direct the evaluation of Service regulations and protocols for investigating Article 130 "Stalking" to determine whether military criminal investigation organizations or military police are receiving appropriate and necessary training for, or have appointed experts for, investigating cyberstalking.

VII. ARTICLE 132, UCMJ, RETALIATION

Retaliation under Article 132, UCMJ, is now a covered offense under the authority of the OSTC.[228] Article 132 prohibits any adverse personnel action, the withholding of a favorable personnel action, or the threat thereof, in retaliation for reporting a criminal offense, making a protected communication,[229] or planning to do so.

In 2015, the MJRG recommended that Congress create a stand-alone offense for retaliation in alignment with federal obstruction of justice statutes that prohibit retaliatory conduct for reporting a criminal offense.[230] The MJRG proposed expanding protections for victims and others who provide truthful information about crimes to law enforcement, but did not suggest incorporating other types of retaliatory conduct.[231] Congress, however, chose not to limit Article 132 to retaliation for reporting *criminal* activity. Rather, Congress expanded the scope of the offense to include reprisal for reporting fraud, waste, and abuse, conduct already prohibited by the Military Whistleblower Protection Act (MWPA), 10 U.S.C. § 1034.[232] By placing protected communications within the ambit of the new punitive article, Congress effectively criminalized much of the conduct contemplated by 10 U.S.C. § 1034, which has no criminal provisions.

228 Section 5450 of the FY17 NDAA, *supra* note 9, established the stand-alone offense of retaliation punishable under Article 132, UCMJ, effective January 1, 2019. Exec. Order No. 13,825, "2018 Amendments to the Manual for Courts-Martial, United States," 83 Fed. Reg. 9889 (Mar. 1, 2018), *available at* https://www.govinfo. gov/content/pkg/FR-2022-01-31/pdf/ 2022-02027.pdf, amended the Manual for Courts-Martial to include the elements of the offense.

229 Article 132 defines a protected communication as "(A) A lawful communication to a Member of Congress or an Inspector General," or "(B) A communication to a covered individual or organization in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of . . . (i) A violation of law or regulation, [or] (ii) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public." 10 U.S.C. § 932 (2016).

230 MJRG Report, *supra* note 27, at 979–81. Previous regulations prohibited professional retaliation for reporting a criminal offense, as well as social retaliation and maltreatment. Violation of any Service regulation prohibiting retaliation could be prosecuted under Articles 92 or 134, UCMJ. For a thorough discussion of the development of the military's response to retaliation, see a report by the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel, Judicial Proceedings Panel, Report on Retaliation Related to Sexual Assault Offenses (Feb. 2016) [JPP Retaliation Report], *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/ 01_JPP_Reports/04_JPP_Retaliation_Report_ Final_20160211.pdf.

231 The MJRG indicated that other retaliatory conduct addressed through regulation should continue to be prosecuted under Article 92, UCMJ. MJRG Report, *supra* note 27, at 981.

232 The MWPA prohibits (1) retaliatory personnel action as a reprisal for making a protected communication (or preparing or being perceived as making or preparing a protected communication) and (2) the restriction of communications with members of Congress or an inspector general. 10 U.S.C. § 1034 (2016), Protected Communications; Prohibition of Retaliatory Personnel Actions.

The MJRP finds that DoD's policies concerning these two overlapping statutes[233] fail to provide clear guidance on the investigation and prosecution of criminal retaliation and confusingly distribute responsibility for reports of retaliation among multiple entities. Current policy directs the DoD IG and the Service IGs to investigate whistleblower reprisal complaints that could violate Article 132—without first referring the complaint to the OSTC. Thus, military prosecutors cannot fulfill their statutory obligation to determine, in the first instance, whether an allegation of retaliation is a covered offense. The MJRP recommends that the Secretary of Defense promulgate policies for reporting, investigating, and prosecuting retaliation to distinguish conduct punishable under Article 132 from reprisal under 10 U.S.C. § 1034, and account for the new OSTCs' authority.

The lack of uniform data collection on retaliation further impedes DoD's response, as well as the MJRP's ability to review and assess this new punitive article.[234] To better understand the prevalence of retaliation in the Armed Forces and its impact on commands, the Panel recommends that the Secretary of Defense immediately require the Services to collect data on both criminal and administrative retaliation complaints and transfer the information to a centralized database.[235]

A. Overlap of Criminal and Administrative Frameworks Addressing Retaliation

Before the enactment of Article 132, law enforcement agencies investigated a wide range of retaliatory behavior—including reprisal, threatening behavior, physical assault, maltreatment, and social ostracism.[236] However, like claims of sexual harassment, allegations of retaliation were typically addressed through administrative processes, with disposition typically at the lowest level possible.

Several military authorities share responsibility for investigating and processing administrative retaliation complaints (as opposed to criminal allegations). For example, commands investigate allegations of social retaliation;[237] the DoD IG and Service IGs evaluate and investigate whistleblower reprisal complaints;[238] and sexual assault response

233 See Appendix O for a side-by-side comparison of Article 132 and 10 U.S.C. § 1034.

234 In February 2016, the JPP issued a report on retaliation in the military, which included 13 recommendations for improving "the processes for reporting, investigating, monitoring, resolving, tracking, and preventing retaliation." JPP Retaliation Report, *supra* note 230, at 1. Although limited to sexual assault–related retaliation, the JPP report raised concerns about the lack of data on the prevalence of retaliation in the military. The JPP identified 10 data points vital to a robust information collection initiative, including the type of complaint (social vs. professional retaliation), the recipient of the complaint, whether the complaint was actionable under the UCMJ, and the outcome of the allegation. Shortly after the JPP issued its report, DoD published its retaliation strategy. *See* U.S. Dep't of Def., Retaliation Prevention and Response Strategy: Regarding Sexual Assault and Harassment Reports (RPRS) (Apr. 2016) [RPRS], *available at* https://www.sapr.mil/sites/default/files/DoD_Retaliation_ Strategy.pdf. Like the JPP report, however, the RPRS was limited in scope, as it applied only to retaliation complaints related to sexual assault and harassment.

235 *See* discussion of Article 140a recommendations, *supra* Chapter 1, Section II.

236 Retaliatory behavior was previously investigated as a violation of Article 92 (Failure to obey an order or regulation), Article 93 (Cruelty and maltreatment), Article 109 (Destruction of property), Article 128 (Assault), Article 120a (Stalking) (renumbered as Article 130), Article 134 (Obstructing justice) (renumbered as Article 131b), or Article 134 (General article).

237 Commanders may not investigate reprisal allegations that fall within the ambit of 10 U.S.C. § 1034. *See* U.S. Dep't of Def., DoD Retaliation Prevention and Response Strategy Implementation Plan 32 n.25 (Jan. 2017), *available at* https://sapr.mil/public/docs/reports/Retaliation/DoD_RPRS_Implementation_Plan.pdf.

238 DoDI 7050.09, "Uniform Standards for Evaluating and Investigating Military Reprisal or Restriction Complaints" (Oct. 12, 2021), and DoD Directive (DoDD) 7050.06, "Military Whistleblower Protection" (Apr. 17, 2015; incorporating Change 1, Oct. 12, 2021), implement the requirements of 10 U.S.C. § 1034 and establish standards for the evaluation and investigation of whistleblower complaints by the IGs. Upon receiving a reprisal complaint, an IG must determine whether there is sufficient evidence to warrant an investigation and, if so, must initiate an investigation. The Service IGs must notify the DoD IG of all reprisal allegations. Once an investigation is complete, the Service Secretary is required to take corrective or disciplinary action as appropriate. A reprisal complaint must be filed no later than one year after the Service member becomes aware of the personnel action that is the basis for the claim. There is no comparable filing deadline for restriction complaints under § 1034.

coordinators (SARCs), victim advocates (VAs), and military equal opportunity advisors (EOAs) generally process, but do not investigate, claims alleging retaliation in connection with a report of sexual assault.[239]

In narrative responses to RFIs, the Army and Air Force reported that MCIOs and military police investigate only those Article 132 violations that occur during the commission of another crime. Retaliation complaints unrelated to other crimes are investigated by the command. The Coast Guard reported that the Coast Guard Investigative Service (CGIS) may decline to investigate an Article 132 complaint, depending on the severity of the allegation, the availability of resources, and whether an offense implicates civil rights or prohibited harassment policies.

B. Analysis of and Recommendation for Reforming DoD Policies on Retaliation

The MJRP concludes that DoD policies for investigating and processing violations of Article 132, Retaliation, and 10 U.S.C. § 1034 are outdated, inconsistent, unclear, and overly complicated. Relevant DoD instructions and directives either fail to mention Article 132 or do not account for the role of the OSTCs when assigning investigatory responsibilities. DoD's approach to allegations of criminal retaliation under Article 132 appears to conflict with the congressional grant of "exclusive" authority to the OSTCs to determine whether an Article 132 violation is a covered offense. It appears that in practice, the Service IGs and DoD IG retain concurrent jurisdiction over allegations of retaliation, even though the IGs are not criminal investigative agencies.

This confusing array of overlapping statutory obligations makes it difficult to (1) distinguish administrative retaliation from criminal conduct and (2) delineate the proper roles and responsibilities of the various officials and organizations that address retaliatory conduct. In theory, the availability of multiple channels for reporting this crime should help foster a climate that does not tolerate reprisal. In practice, however, the proliferation of organizations authorized to receive retaliation complaints may impede response efforts by oversaturating the field and creating confusion for victims who may not understand the implications of filing a complaint with one entity or another.

For example, to report retaliation related to a claim of sexual assault, Army Regulation 600-20 identifies no fewer than 11 separate points of contact. As the data in the tables below indicate, retaliation complaints are often reported to more than one entity, suggesting that either individuals are being instructed to file their complaints elsewhere or complaints are being transferred from one organization to another. By inserting obstacles into the reporting process, DoD may be deterring victims of retaliation from coming forward.

239 Sexual assault response coordinators (SARCs), victim advocates (VAs), and military equal opportunity advisors (EOAs) may receive reports alleging retaliation, educate retaliation reporters about the resources available, and transfer a retaliation complaint to an appropriate authority. In accordance with DoDI 6495.02, vol. 3, "Sexual Assault Prevention and Response: Retaliation Response for Adult Sexual Assault Cases" (June 24, 2022; Change 1 effective July 26, 2024), Service members alleging retaliation related to an unrestricted report of sexual assault can make an official report of retaliation by completing DD Form 2910-2, "Retaliation Reporting Statement for Unrestricted Sexual Assault Cases." SARCs or designated SAPR VAs must upload DD Form 2910-2 into the Defense Sexual Assault Incident Database (DSAID) within 48 hours of reporting. The Lead SARC will facilitate review of retaliation reports at monthly, multidisciplinary Case Management Group (CMG) meetings. The CMG Chair may receive updates on reprisal allegations from the IGs and, if necessary, may establish a high-risk response team when a retaliation reporter's safety is at risk.

RECOMMENDATION 14: The Secretary of Defense promulgate policies that distinguish between conduct under Article 132, Retaliation, and reprisal under 10 U.S.C. § 1034, the Military Whistleblower Protection Act, and clarify responsibility for investigating allegations under these authorities.

Finding 11: DoD policies addressing retaliation fail to provide clear guidance on the investigation and prosecution of criminal retaliation under Article 132, Retaliation, and reprisal under 10 U.S.C. § 1034, the Military Whistleblower Protection Act. Current policies assign responsibility for investigating allegations of retaliation among multiple entities in an unclear and convoluted manner.

C. Collecting and Reporting Retaliation Data

Congress has directed different DoD organizations to collect data on retaliation, thus making limited data available to the public.[240] The FY23 Sexual Assault Prevention and Response Office (SAPRO) report, for example, indicates that 72 complaints of retaliation, implicating 48 individuals, were made to SARCs, Sexual Assault Prevention and Response (SAPR) VAs, Service IGs, commanders, MCIOs, the DoD IG, and others.[241] Of those 72 complaints, 40 were reported through multiple channels and the remainder were referred to the DoD IG.[242] Only eight retaliation investigations were completed during the reporting period.[243]

In its semiannual report to Congress, the DoD IG provided statistics from FY23 indicating that the IG closed four reprisal investigations, only one of which was substantiated.[244] In a separate report to SAPRO, the DoD IG reported receiving 76 complaints of reprisal related to an allegation of sexual assault.[245] The DoD IG evaluated and closed 73 complaints without investigation because the office either lacked jurisdiction or determined there was no prima facie case.[246] The remaining complaints were withdrawn, meaning that in FY23 the DoD IG did not substantiate a single sexual assault–related retaliation complaint, or find that a complaint was unsubstantiated.[247]

240 Section 543 of the FY17 NDAA, *supra* note 9, instructs the Service Secretaries to collect information on retaliation complaints related to a report of sexual assault. This information is published annually in an appendix to the Sexual Assault Prevention and Response Office (SAPRO) report. Likewise, § 405(b)(20) of the Inspector General Act of 1978, 5 U.S.C. §§ 401–424, requires the DoD IG to submit semiannual reports to Congress with information on whistleblower reprisal investigations.

241 U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2023, Appendix B: Statistical Data on Sexual Assault, 39–40 (May 2024) [FY23 SAPRO Report, App. B], *available at* https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY23/FY23_ Appendix_B.pdf. The data also indicate that SARCs and SAPR VAs received 60% of all sexual assault-related retaliation complaints. *Id.* at 39.

242 *Id.* at 39, 42.

243 *Id.* at 42.

244 DoD IG, Semiannual Report to Congress: October 1, 2023, Through March 30, 2024, at 10 (Aug. 2024), *available at* https://media.defense.gov/2024/Aug/14/2003525007/-1/-1/1/SAR_SPRING%202024 _SIGNED_ 20240814.PDF.

245 FY23 SAPRO Report, App. B, *supra* note 241, at 44.

246 *Id.*

247 *Id.*

1. Law Enforcement Data on Retaliation

TABLE 3.9. MILITARY LAW ENFORCEMENT INVESTIGATIONS AND REPORTED DISPOSITIONS: ARTICLE 132, RETALIATION (FY2021–FY2023)

FY21–FY23	Investigations by MCIOs	Investigations by Military Police	Total No. of Investigations	Total No. of Dispositions Reported	No Action		Other Admin Action		Admin Sep		NJP		SCM		SPCM		GCM	
					No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Army	6	2	8	12	4	33%	2	17%	4	33%	2	17%	0	0%	0	0%	0	0%
Navy	1	1	2	0	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Marine Corps	0	0	0	0	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Air Force	1	19	20	1	0	0%	1	100%	0	0%	0	0%	0	0%	0	0%	0	0%
Coast Guard	1	N/A	1	1	0	0%	1	100%	0	0%	0	0%	0	0%	0	0%	0	0%
Total	9	22	31	14	4	29%	4	29%	4	29%	2	14%	0	0%	0	0%	0	0%

Because the RFI requested the number of times the offenses were investigated, investigations may be counted multiple times if there was more than one offense for the same article.

Military law enforcement entities investigated 31 allegations of Article 132 violations in FY21–FY23. This is the lowest number of investigations among the covered offenses the Panel assessed. The Air Force investigated 20 allegations of Article 132—the most of any Service. Military police investigated retaliation more than twice as often as the MCIOs, although these data sets are skewed by the Air Force, which had a disproportionately higher number of investigations as compared to the other Services.

2. Military Justice Data on Retaliation

TABLE 3.10. LEGAL DATABASE REPORTING OF PREFERRED AND REFERRED COURTS-MARTIAL: ARTICLE 132, RETALIATION (FY2021–FY2023)

FY21–FY23	No. of Cases Preferred	No. of Cases Referred to GCM	No. of Cases Referred to SPCM	No. of Cases Referred to Art 16(c)(2)(A) SPCM
Army	0	0	0	0
Navy	1	0	0	0
Marine Corps	2	1	0	0
Air Force	0	0	0	0
Coast Guard	0	0	0	0
Total	3	1	0	0

Judge advocates preferred three cases involving Article 132. Over the entire three-year period, only one was referred to a court-martial.

3. Analysis of and Recommendation for Collecting and Reporting Retaliation Data

The MJRP concludes that data collection on retaliatory conduct punishable under Article 132 lacks the granularity and specificity necessary for the Panel to make informed assessments. The infrequent reporting of Article 132 allegations stands in contrast to the expansive nature of the statute, which echoes the language of 10 U.S.C. § 1034 and includes all whistleblower complaints, including those in which the underlying allegation amounts to noncriminal conduct. One inference from the small numbers in the retaliation statistics is that the bulk of retaliation complaints are being processed administratively by the command, the Service IGs, the DoD IG, or other entities, and not by law enforcement or judge advocates.

Only administrative retaliation data are tracked with any regularity. The annual SAPRO report, for example, does not include criminal reprisal or data on IG- or command-directed investigations unrelated to sexual assault. The DoD IG's semiannual reports to Congress are similarly limited. Rather than providing information on the number of reprisal and restriction complaints received, the semiannual reports focus on the number of retaliation complaints closed during any given reporting period. In addition, the data do not distinguish retaliation complaints by type, making it difficult to assess the nature and scope of retaliation in the military.

RECOMMENDATION 15: The Secretary of Defense prescribe and implement uniform standards for collecting and reporting data on Article 132, Retaliation, from the report of an allegation through final disposition, with separate data fields that identify the type of retaliation and differentiate between administrative and criminal complaints.

Finding 12: The small number of investigations and prosecutions of criminal retaliation is inconsistent with concerns about the prevalence of retaliation reported in workplace climate surveys.

VIII. ARTICLE 134, UCMJ, SEXUAL HARASSMENT

The MJRP assessed the new criminal offense of sexual harassment under Article 134, UCMJ, which took effect on January 26, 2022.[248] The Panel reviewed how commands are disposing of sexual harassment allegations, and what is expected to change when sexual harassment becomes a covered offense under the authority of the OSTCs in January 2025. As part of this review, the MJRP also evaluated how the Services collect data on sexual harassment investigations and outcomes.

A. Criminal and Administrative Frameworks Addressing Sexual Harassment

Congress made sexual harassment a stand-alone criminal offense under Article 134, as well as a covered offense,[249] albeit only for formal complaints substantiated by a commander. Conduct proscribed under Article 134, Sexual harassment, includes unwelcome sexual advances, demands or requests for sexual favors, or other conduct of a sexual nature that either (1) causes a person to believe that their job, pay, career, benefits, or entitlements are conditioned

248 Section 539D of the FY22 NDAA, *supra* note 70, required the President to criminalize sexual harassment as a specified Article 134, UCMJ, offense and established the elements of that offense. E.O. 14,062, *supra* note 209, amended the Manual for Courts-Martial by creating the stand-alone offense of sexual harassment punishable under Article 134, UCMJ, effective January 26, 2022.

249 The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 [FY23 NDAA], § 541, 136 Stat. 2395 (2022). Section 541(b) established formal, substantiated allegations of criminal sexual harassment as covered offenses beginning January 1, 2025.

upon submission to such conduct; (2) causes a person to believe that submission to, or rejection of, such conduct may be used as a basis for decisions affecting their job, pay, career, benefits, or entitlements; or (3) is so severe or pervasive as to create a hostile or abusive work environment.[250] The conduct must also meet the terminal element of an Article 134 offense.[251]

At the same time, DoD retains the administrative framework for processing sexual harassment complaints through commands, regardless of whether the allegation is criminal or noncriminal. In addition, the OSTCs' authority over criminal sexual harassment will be governed by DoD and Service policies that are still under development.

1. Sexual Harassment as a Criminal Offense

Before Congress codified sexual harassment as a stand-alone offense under Article 134, sexual harassment was prosecuted under various UCMJ provisions: Article 92 (Failure to obey an order or regulation); Article 93 (Cruelty and maltreatment); Article 117a (Wrongful broadcast or distribution of intimate visual images); Article 133 (Conduct unbecoming an officer); or Article 134, Clause 1 or 2 (Service discrediting conduct or conduct prejudicial to the good order and discipline in the Armed Forces).[252] When the President amended the Manual for Courts-Martial in 2022, sexual harassment was added as a specified offense punishable under Article 134, UCMJ.[253] Congress later defined criminal sexual harassment under Article 134 as a covered offense, requiring the OSTCs and the Coast Guard's Office of the Chief Prosecutor, beginning January 1, 2025, to exercise authority over a subset of allegations of criminal sexual harassment.[254]

Only some allegations of criminal sexual harassment fall under the OSTCs' authority, because at the time of reporting, sexual harassment allegations must first meet statutory preconditions at the command level before being sent to the OSTC to determine whether the allegation is a covered offense.[255] Those statutory preconditions require (1) the filing of a "formal complaint" (2) that must be "substantiated" by the command.[256] However, the statute does not define the terms *formal complaint* or *substantiated*. At present, DoD Instruction (DoDI) 1020.03, "Harassment Prevention and Response in the Armed Forces," defines *formal complaint*[257] but does not define *substantiated*.

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250 2024 MCM, *supra* note 1, pt. IV, para. 107a.b(3).

251 "That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces." *Id.*, para. 107a.b(4).

252 10 U.S.C. § 892 (Art. 92, UCMJ, Failure to obey order or regulation); 10 U.S.C. § 893 (Art. 93, UCMJ, Cruelty and maltreatment); 10 U.S.C. § 917a (Art. 117a, UCMJ, Wrongful broadcast or distribution of intimate visual images); 10 U.S.C. § 933 (Art. 133, UCMJ, Conduct unbecoming an officer); and 10 U.S.C. § 934 (Art. 134, UCMJ, General article (Service discrediting conduct)).

253 E.O. 14,062, *supra* note 209. The President established a two-year maximum possible term of confinement for this offense, making it a felony.

254 Section 533 of the FY22 NDAA, *supra* note 70, specified the covered offenses over which a special trial counsel has authority to prefer or refer charges, and § 531 amended 10 U.S.C. § 824 to establish special trial counsel with prosecution authority over covered offenses. Sexual harassment was added as a crime over which the special trial counsel has prosecution authority in the FY23 NDAA, *supra* note 249, § 541. Congress also provided the OSTC authority over criminal sexual harassment allegations that are known or related to other covered offenses. Thus, the OSTC has authority over allegations of criminal sexual harassment that were not formally made or substantiated by the command, so long as they are "known or related" to another covered offense. The MJRP notes there is no requirement to notify the OSTC of criminal sexual harassment allegations that may be known or related to a covered offense at the time the allegation is reported, despite an OSTC-notification requirement applying to all other covered offenses. Art. 24a(c)(2)(B), UCMJ. *See also* 2024 MCM, *supra* note 1, R.C.M. 301(c); R.C.M. 303A(c)–(d).

255 2024 MCM, *supra* note 1, R.C.M. 301(c).

256 Section 541 of the FY23 NDAA, *supra* note 249, amended the definition of a covered offense under Article 1(17) to add formal and substantiated allegations of sexual harassment punishable under Article 134, UCMJ, effective January 1, 2025.

257 DoDI 1020.03, "Harassment Prevention and Response in the Armed Forces" 20 (Feb. 8, 2018; Change 2 effective Dec. 20, 2022) defines a "formal complaint" as "[a]n allegation submitted in writing to the staff designated to receive such complaints in Military Department operating instructions

Thus, while the FY23 NDAA directed the Service Secretaries to prescribe regulations for substantiating a formal complaint, the Services may choose to adopt different policies in the absence of uniform guidance for "substantiating" a formal complaint of sexual harassment.[258]

Under the current scheme, sexual harassment allegations remain under command authority from the time of reporting until the commander determines that the allegation constitutes a formal, substantiated complaint of sexual harassment punishable under Article 134, UCMJ. Commanders receive legal advice on criminal sexual harassment allegations from their command legal advisors but not from the STCs certified with special victim expertise and authorized to prosecute covered offenses. Only after the commander substantiates the formal complaint will the OSTC have authority to determine if a violation of Article 134 has been alleged. If so, the OSTC will decide whether to prefer charges or to defer the offense back to the command for a disposition other than general or special court-martial.[259]

2. Sexual Harassment as an Administrative Matter

Administrative processes, rooted in military equal opportunity policies, have long governed sexual harassment allegations. Commanders are required to investigate and respond to complaints of sexual harassment pursuant to 10 U.S.C. § 1561[260] and DoDI 1020.03.[261] These rules place responsibility with commanders—not judge advocates—to resolve sexual harassment complaints and take appropriate action using the full range of administrative, nonjudicial, and judicial remedies, from corrective training to court-martial.[262] These rules also allow some complaints to be raised and addressed informally by lower-level commanders, without senior-level commanders becoming aware of an allegation.

DoD policy has not been updated to reflect recent amendments to 10 U.S.C. § 1561 or Article 134, UCMJ, that make sexual harassment a crime and require formal complaints to be investigated by independent

and regulations; or an informal complaint, which the commanding officer or other person in charge of the organization, determines warrants an investigation." *See infra* note 261.

258 FY23 NDAA, *supra* note 249, at § 541(b)(1)(B).

259 See Appendix P for a flow chart of the path that a sexual harassment complaint takes to become a covered offense.

260 10 U.S.C. § 1561, Complaints of sexual harassment: independent investigation. This statute establishes the foundation for the military response to sexual harassment. As amended by Section 543 of the FY22 NDAA, *supra* note 70, it defines sexual harassment as that conduct constituting criminal sexual harassment, replacing the old definition that prohibited conduct not criminalized under Article 134, UCMJ, and requires formal complaints of sexual harassment to be investigated by trained independent investigators outside the immediate chain of command of the complainant and the subject. See Appendix Q for a side-by-side comparison of Article 134 and 10 U.S.C. § 1561.

261 DoDI 1020.03, *supra* note 257, establishes and defines three categories of sexual harassment complaints: informal, formal, and anonymous. A formal complaint is (1) a written allegation submitted to a designated staff member or (2) an informal complaint that the commander determines warrants an investigation. An informal complaint is an allegation submitted to a person in a position of authority that is not processed as a formal complaint through the office designated to receive harassment complaints. Anonymous complaints are allegations of harassment received by a commander or supervisor from an unknown or unidentified source. Congress recently added a requirement to add a confidential reporting option. *See* U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2023, Appendix F: Sexual Harassment Assessment (May 2024) [FY23 SAPRO Report, App. F], *available at* https://www.sapr.mil/sites/ default/files/public/docs/reports/AR/FY23/ FY23_Appendix _F.pdf. Each Service has implemented confidential reporting options pursuant to a DoD requirement for confidential reporting pilot programs.

262 Beginning January 1, 2025, commanders will no longer have authority to take disciplinary action on formal complaints of criminal sexual harassment that are substantiated, unless the OSTC defers authority back to the commander for action other than referral to a general or special court-martial.

investigators—despite a statutory obligation to do so by June 2023.[263] Instead, the formal, informal, and anonymous complaint definitions established in DoDI 1020.03 still apply to the Services.[264]

3. Analysis of and Recommendations for Reforming DoD Policies on Criminal Sexual Harassment under Article 134

The MJRP recommends that Congress amend the law to clarify that the commander's responsibility to substantiate formal reports of sexual harassment does not prevent the OSTC from exercising authority over sexual harassment under Article 134. This change would align OSTC authority over criminal sexual harassment with its authority over other covered offenses. Treating sexual harassment differently from other covered offenses risks sending a message that this crime is less important. Furthermore, mixing administrative prerequisites with criminal prosecution requirements creates significant challenges for the fair administration of justice. The problems with the new statutory language and DoD's hybrid approach to investigations may be a disservice to victims of sexual harassment and may introduce jeopardy to military accused who were punished through earlier administrative actions.

The MJRP further recommends that DoD adopt a uniform definition of *substantiated* that requires commanders to consider whether an allegation meets the elements of the Article 134 offense of sexual harassment. Doing so will alleviate concerns that the OSTCs will be inundated by sexual harassment complaints should Congress amend the law as proposed.

RECOMMENDATION 16: Congress amend the law so that a commander's decision as to whether a formal complaint of sexual harassment is "substantiated" does not prevent the Office of Special Trial Counsel from exercising authority over sexual harassment under Article 134.

RECOMMENDATION 17: DoD establish a uniform definition for a "substantiated" complaint of sexual harassment and require the commander to consider the elements of the Article 134 offense of "sexual harassment" when determining whether the complaint must be forwarded to the relevant Office of Special Trial Counsel or can be appropriately handled by the command.

- Criminal sexual harassment punishable under Article 134, UCMJ, is one of the only covered offenses requiring command discretionary determinations to control whether the OSTC has authority over the reported offense.
- Changes to the law on sexual harassment and DoD policy confusingly combine criminal and administrative processes for complaints of sexual harassment.

263 Section 543 of the FY22 NDAA, *supra* note 70, amended 10 U.S.C. § 1561 (requiring the Secretary of Defense to update regulations). The Department of the Air Force and the Marine Corps updated sexual harassment policy in 2024, but the Army and Navy have not.

264 The Services still process sexual harassment complaints using the definition established in DoDI 1020.03, *supra* note 257, the old definition of sexual harassment from 10 U.S.C. § 1561 that commingles criminal and noncriminal conduct. This definition of sexual harassment is broader than the criminal definition and includes "[a]ny deliberate repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the Armed Forces." *Id.* at 22. Conduct that may constitute sexual harassment under the old definition includes sexual jokes, sexually explicit profanity, sexually oriented marching cadences, whistling in a sexually suggestive manner, and using terms of endearment such as "honey," "babe," "sweetheart," "stud," or "hunk." Service equal opportunity representatives all support retention of a definition of sexual harassment that is more expansive than the criminal definition, while the Coast Guard policy uses the definition of criminal sexual harassment. Conduct prohibited by regulation can be prosecuted as a violation of a lawful order. 10 U.S.C. § 892 (Art. 92, UCMJ).

- How DoD policy defines "substantiated" complaints of sexual harassment will affect whether the allegation falls under the authority of the OSTC or the command. DoD has not updated the policy definition of *substantiated*.
- The ability of the OSTC to successfully prosecute a formal, substantiated complaint of Article 134, sexual harassment, will be affected by the quality of the initial investigation. DoD and Service policies have not been updated to reflect the criminal definition of sexual harassment or the training required for criminal sexual harassment investigators.
- Criminal sexual harassment allegations that are not formal complaints and are not substantiated by the command will not be evaluated by independent, experienced STCs.
- There are no statutory or policy requirements for promptly notifying the OSTC of criminal sexual harassment allegations that could be known or related to a covered offense.

B. Collecting and Reporting Sexual Harassment Data

Congress requires DoD to report annually on "information and data collected through formal and informal reports of sexual harassment involving members of the Armed Forces."[265] The annual report must include the number of substantiated and unsubstantiated sexual harassment reports.[266] In these reports, DoD uses the broad definition of sexual harassment in 10 U.S.C. § 1561 that was in effect through FY23—a definition that encompasses both criminal and noncriminal sexual harassment.[267] Neither the statute nor DoD policy requires DoD to collect and report criminal and noncriminal sexual harassment information separately.[268] The statute also does not require the collection of information on anonymous and confidential complaints.

The OSTCs have expressed concern about the anticipated number of criminal sexual harassment cases. However, no data are available on how many allegations of criminal sexual harassment are likely to be referred to the OSTC for evaluation. DoD representatives acknowledge that accurate data collection on criminal sexual harassment will require new databases which are not yet in existence and for which no timelines have been established.[269]

265 FY18 NDAA, *supra* note 193, at § 537(a)(13). The sexual harassment reporting requirement began with the March 1, 2020, report.

266 For substantiated allegations of sexual harassment, the DoD report must include a synopsis of each allegation and the action taken, including disciplinary or administrative sanctions such as court-martial convictions and sentence, nonjudicial punishment, and administrative separation or other administrative action.

267 FY23 NDAA, *supra* note 249, at § 541(f) (requiring annual reports on covered offense data); FY23 SAPRO Report, App. F, *supra* note 261. For FY23, DoD reported a total of 2,980 complaints of sexual harassment, of which 1,372 were substantiated by commanders; of the substantiated complaints, 882 were formal, 420 were informal, and 70 were anonymous. FY23 SAPRO Report, App. F, *supra* note 261, at 2. These complaints were not separated into criminal and non-criminal allegations.

268 DoD's Harassment Prevention and Response Program oversees DoD data collection and analysis. DoDI 1350.02, "DoD Military Equal Opportunity Program" (Sept. 4, 2020; Change 1 effective Dec. 20, 2022), implements the DoD Military Equal Opportunity Program and establishes data collection requirements for sexual harassment. DoDI 1020.03, *supra* note 256, also provides data collection and reporting requirements. The Secretaries of the Military Departments establish sexual harassment policies. Information and data on formal reports are provided by Service Military Equal Opportunity (MEO) and Army Sexual Harassment/Assault Response and Prevention (SHARP) offices, and only allegations investigated by administrative command investigations are included in the report. FY23 SAPRO Report, App. F, *supra* note 261.

269 *See also* FY23 SAPRO Annual Report, App. F, *supra* note 261, at 15 (confirming that DoD is in the process of acquiring a new case management system).

1. Law Enforcement and Military Justice Data on Article 134, UCMJ, Sexual Harassment

The MJRP requested data on Article 134 sexual harassment cases from the Services' law enforcement and legal databases. The information received includes only eight months of FY22 and all of FY23.[270] During that time, most MCIOs did not consider criminal sexual harassment to be within their purview unless it was related to another offense under investigation.[271] The Coast Guard Investigative Service is the only law enforcement entity that evaluated all allegations of sexual harassment before deciding to investigate select cases and send the rest to the command.[272] The military justice data may include allegations investigated by commands as well as by law enforcement.

a. Law Enforcement Data on Sexual Harassment

TABLE 3.11 . MILITARY LAW ENFORCEMENT INVESTIGATIONS AND REPORTED DISPOSITIONS: ARTICLE 134, SEXUAL HARASSMENT (JANUARY 26, 2022, THROUGH SEPTEMBER 30, 2022, AND FY2023)

FY22–FY23	Investigations by MCIOs	Investigations by Military Police	Total No. of Investigations	Total No. of Dispositions Reported	No Action		Other Admin Action		Admin Sep		NJP		SCM		SPCM		GCM	
					No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Army	12	38	50	89	34	38%	18	20%	22	25%	15	17%	0	0%	0	0%	0	0%
Navy	4	1	5	2	0	0%	1	50%	0	0%	1	50%	0	0%	0	0%	0	0%
Marine Corps	0	0	0	0	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Air Force	0	0	0	0	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Coast Guard	40	N/A	40	21	6	29%	6	29%	2	10%	7	33%	0	0%	0	0%	0	0%
Total	56	39	95	112	40	36%	25	22%	24	21%	23	21%	0	0%	0	0%	0	0%

Law enforcement investigated 95 allegations of criminal sexual harassment across the Services over a 20-month period. The CGIS, the Coast Guard's only law enforcement agency, conducted 42% of these investigations. This disproportion is likely attributable to the Coast Guard policy requiring CGIS to review all criminal sexual harassment allegations to determine which are appropriate for law enforcement review. Criminal sexual harassment was not under the purview of the other MCIOs during FY22 to FY23. Command action for these allegations may have included a decision to take no action, administrative action, or nonjudicial punishment. Lack of data on SPCM and GCM dispositions may be explained by the length of time required to complete a court-martial.

270 Article 134, UCMJ, Sexual harassment, was not effective until January 26, 2022.

271 AFOSI and CID will investigate an allegation of sexual harassment if it is related to another offense under their purview. NCIS does not investigate sexual harassment. CGIS receives all reports of sexual harassment and exercises discretion in whether to investigate based on the severity of the conduct. *See* Services' responses (Military Justice) to MJRP RFI on Punitive Articles (Oct. 30, 2023), *available at* Appendix M; Services' responses (Military Law Enforcement) to MJRP RFI on Punitive Articles (Nov. 2, 2023), *available at* Appendix N.

272 *See id.*; U.S. Coast Guard, Commandant Instruction (COMDTINST) 5350.06, "Harassing Behavior Prevention, Response, and Accountability" (Feb. 2023).

b. Military Justice Data on Sexual Harassment

TABLE 3.12. MILITARY JUSTICE DATABASE REPORTING OF PREFERRED AND REFERRED COURTS-MARTIAL: ARTICLE 134, SEXUAL HARASSMENT (JANUARY 26, 2022, THROUGH SEPTEMBER 30, 2022, AND FY2023)

FY22–FY23	No. of Cases Preferred	No. of Cases Referred to GCM	No. of Cases Referred to SPCM	No. of Cases Referred to Art 16(c)(2)(A) SPCM
Army	12	2	3	1
Navy	4	1	2	0
Marine Corps	6	0	2	1
Air Force	4	0	3	1
Coast Guard	1	1	0	0
Total	27	4	10	3

All Services preferred at least one criminal sexual harassment charge, and commands referred cases to both GCMs and SPCMs.

2. Analysis of and Recommendation for Collecting and Reporting Sexual Harassment Data

The MJRP concludes that DoD's collection of criminal sexual harassment information is inadequate. Data are collected using the broad definition of sexual harassment in 10 U.S.C. § 1561 that combines criminal and noncriminal conduct. The sexual harassment data provided to the MJRP represent only a portion of criminal sexual harassment allegations—primarily those allegations that were identified as serious enough to warrant a court-martial. The number of criminal sexual harassment allegations is simply unknown, because there is no requirement to separate criminal and noncriminal allegations for data collection and reporting purposes. Information based on generalized allegations of sexual harassment is not helpful to those developing policy and processes for the new Article 134 sexual harassment offense.

DoD has been directed to change the way sexual harassment is reported and processed.[273] Collection of accurate data on both criminal and noncriminal sexual harassment is imperative to the success of this effort. DoD's plans to develop a new DoD harassment case management system should include collection of the full range of sexual harassment data, from reporting through investigation and disposition. Although Congress mandates annual reports on sexual harassment in the military, there is no requirement to collect Article 134 criminal sexual harassment data separately from administrative claims.

The MJRP recommends that criminal sexual harassment data be collected and reported separately from noncriminal sexual harassment, and that the Secretary of Defense require collection of this data immediately. These reports should identify the number and severity of allegations of criminal sexual harassment. The failure to separately

273 FY23 SAPRO Report, App. F, *supra* note 261, at 15 (stating that DoD policy changes will include procedures for independent investigation of formal complaints, including referral to law enforcement, training policy for independent investigators, a requirement for initiation of involuntary separation for substantiated sexual harassment allegations, inclusion of confidential reporting as a reporting option, and development of "an acquisition strategy to leverage commercial off-the-shelf technology for a Department-wide MEO data collection and reporting solution").

collect data on criminal and noncriminal sexual harassment allegations precludes any meaningful evaluation of the military's response to this behavior.

RECOMMENDATION 18: Congress require, and Secretary of Defense immediately direct, the collection of data on allegations of sexual harassment punishable under Article 134 separately from and in addition to the collection of data on sexual harassment not punishable under Article 134. The data collected for both criminal and noncriminal sexual harassment should be uniform and include formal, informal, anonymous, and confidential reports of sexual harassment involving members of the Armed Forces as follows:

(1) The number of formal reports.
  (a) Number of formal substantiated reports.
  (b) Number of formal unsubstantiated reports.
  (c) Number of other dispositions for formal reports.
  (d) Number of cases referred to the Offices of Special Trial Counsel.
(2) The number of informal reports.
  (a) Number of informal substantiated reports.
  (b) Number of informal unsubstantiated reports.
  (c) Number of other dispositions for informal reports.
(3) The number of anonymous reports.
  (a) Number of anonymous substantiated reports.
  (b) Number of anonymous unsubstantiated reports.
  (c) Number of other dispositions for anonymous reports.
(4) The number of confidential reports.
(5) A synopsis of each substantiated report.
(6) The action taken in the case of each substantiated report, including the type of disciplinary or administrative sanction imposed, if any, such as—
  (a) conviction and sentence by court-martial;
  (b) imposition of nonjudicial punishment under section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice); or
  (c) administrative separation or other type of administrative action imposed.

IX. COMBINED ANALYSIS OF AND RECOMMENDATION ON SEXUAL HARASSMENT, RETALIATION, AND DOMESTIC VIOLENCE

As discussed in Sections V, VII, and VIII, the reporting, investigation, case evaluation, and prosecution of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment, present significant coordination challenges. The eventual disposition of these offenses involves several entities with responsibilities that often overlap. As a result, it is not clear whether the proper officials and organizations are investigating and prosecuting these crimes. The MJRP recommends that DoD develop an effective sorting process for funneling such complex cases to the appropriate investigative entities.

RECOMMENDATION 19: The Secretary of Defense direct effective coordination and correlation of the reporting, investigation, case evaluation, and prosecution of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment.

Finding 13: The reporting, investigation, and disposition of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment, require effective collaboration between many entities: commanders, Offices of Special Trial Counsel (OSTCs), staff judge advocates (SJAs), military criminal investigative organizations (MCIOs), military police, civilian law enforcement authorities, victim support organizations, DoD and Service inspectors generals (IGs), sexual assault response coordinators (SARCs), victim advocates (VAs), and Military Equal Opportunity (MEO) and Sexual Harassment/Assault Response and Prevention (SHARP) representatives. The complexity of these cases demands an organized and coordinated response, including a sorting system for processing these cases beginning with an allegation through investigation to final action, so that the appropriate law enforcement agency investigates the alleged crime.

Finding 14: The Services do not collect and maintain uniform, comprehensive data on the reporting and processing of Article 128b, Domestic violence; Article 132, Retaliation; and Article 134, Sexual harassment, offenses in a retrievable data system.

CHAPTER 4. SENTENCING AND POST-TRIAL PROCESSES

I. INTRODUCTION

The Military Justice Review Panel evaluated changes to sentencing rules and procedures brought about by the MJA16 and subsequent legislation. This chapter describes the evolution of military sentencing and compares current military practices to those of federal and state systems while remaining mindful of the unique aspects of military justice, including its worldwide jurisdiction, the importance of efficiency and justice, and the core purpose of maintaining good order and discipline.

The MJRP evaluated recent changes to military sentencing—in particular, the transition from panel member sentencing to judge-alone sentencing in all but capital cases—and considered whether adopting aspects of the civilian sentencing model would better support the purposes of military justice. When making this assessment, the Panel considered the Article 36, UCMJ, mandate that the President, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," insofar as they are not contrary to or inconsistent with the UCMJ.[274] Further, "all rules and regulations made under this article shall be uniform insofar as practicable."[275] The Panel found that the current rules, practices, and procedures governing military sentencing processes better serve the needs of the military than would those employed in civilian courts.

For this review, the MJRP compared procedures governing sentencing in general and special courts-martial with those of civilian criminal courts. The Panel identified four main topics for review:

(1) The processes through which the sentencing judge receives evidence and information on which to adjudge a sentence;

(2) The scope and method of permissible victim impact statements;

(3) The authorities available to the judge to fashion an appropriate sentence; and

(4) The requirement that the judge explain the reasons for imposing a particular sentence.

The Panel identified the following dissimilarities between federal civilian and military sentencing:

- Federal district courts rely significantly on independently produced presentencing reports that provide the sentencing authority with data and a recommendation for fashioning a sentence. In contrast, the military presentencing process relies on the trial counsel and defense counsel to present evidence that supports their respective arguments for a more or less severe sentence.
- Federal court sentencing typically occurs months after a guilty finding. In military practice, the presentencing hearing generally begins immediately after findings are announced. The delay in federal court is due in large part to the time needed for a probation officer to conduct the required presentencing investigation and report.

274 10 U.S.C. § 836(a) (Art. 36(a), UCMJ).

275 *Id.*

- Whereas the rules of evidence do not apply to presentencing evidence in federal court, the same military rules of evidence that govern admissibility of evidence during the merits phase of a court-martial apply equally during presentencing unless and until the defense requests that the rules of evidence be relaxed.
- In the federal system, judges have wide discretion to allow a victim broad opportunity to be heard during the presentencing hearing. In contrast, the Rules for Courts-Martial and associated military appellate case law generally limit a victim's statement to comments relevant to sentencing. This limitation is a common source of appellate litigation.
- Court-martial punishments and case disposition options in military courts differ from those available to federal judges.
- While federal district court judges are required to explain the reasons for imposing a sentence in every case, military judges are required to provide a factual basis only for sentences that fall outside applicable sentencing parameters.

Section II of this chapter summarizes recent developments in military sentencing, while sections III through VI compare current military and civilian sentencing procedures, explore stakeholder perspectives, and discuss the utility of adopting civilian sentencing practices. The chapter concludes with a critical evaluation of the data deficiencies that impeded the Panel's assessment of military sentencing.

II. BACKGROUND ON MILITARY SENTENCING PRACTICE

There have been many significant changes to the military justice system over the past decade, including to sentencing rules. First, recent changes to the UCMJ modified the sentencing authority in special and general courts-martial. Before passage of the MJA16, the same authority who determined the findings of the court also determined the sentence. Thus, if a panel of members determined that an accused was guilty of any of the charged offenses, then the same members determined the sentence. If the accused elected to be tried by a military judge alone and was convicted, the judge would also determine the sentence. In either situation, when adjudging the sentence, the court-martial imposed a unitary sentence containing one combined punishment for all offenses that resulted in a conviction.

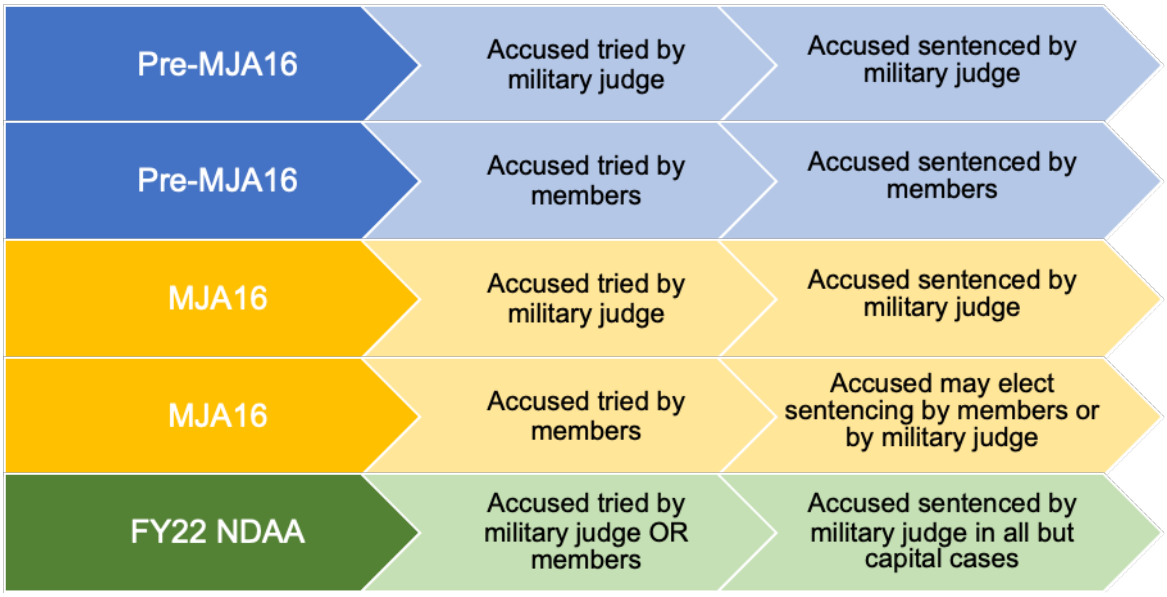
The MJA16 changed this practice and provided the accused more flexibility in choosing the sentencing forum in special and general courts-martial. Under the MJA16 rules, if the accused elected to be tried by a panel of members, then that accused, upon conviction, could elect to be sentenced by members or by military judge alone.[276]

Most recently, with the implementation of the FY22 NDAA, an accused no longer has a choice regarding the sentencing authority. In all non-capital cases involving offenses committed on or after December 28, 2023, a military judge determines the sentence. Giving sentencing authority to the military judge for all non-capital cases is consistent with the practice in federal civilian proceedings and of most states, which rely exclusively on judges rather than juries to adjudicate non-capital sentences. The only caveat is that the rules governing plea agreements in courts-martial allow the accused and government to negotiate a specific sentence that the judge is bound to accept if the sentence falls within an applicable parameter.[277]

276 If the accused elected to be tried by military judge alone during the guilt or innocence phase, then, as before, the sentencing authority would continue to be the military judge.

277 *See* discussion, *supra* Chapter 3.II.B.3.

FIGURE 5.1. RECENT CHANGES TO MILITARY SENTENCING AUTHORITIES



The changes in sentencing authority also brought changes to the rules governing how sentences are adjudged. Before the MJA16, the sentencing authority, whether a panel of members or military judge, could impose only a unitary sentence. Current rules, in contrast, require the judge to announce a term of confinement and fine, if any, for each offense for which the accused was convicted, a practice known as segmented sentencing.[278] The other forms of punishment, such as forfeiture of pay and allowances, reduction in rank, and punitive discharges, continue to be announced as a unitary sentence for all offenses.[279] The MJA16 also amended Article 56 by adding statutory factors to guide the imposition of the sentence.[280] These factors are similar to those in 18 U.S.C. § 3553 that federal judges are required to consider.

278 *See* 2024 MCM, *supra* note 1, R.C.M. 1002(b)(1).

279 *Id.*, R.C.M. 1002(b)(3).

280 The factors outlined in Article 56(c)(1), UCMJ, are as follows:
(A) the nature and circumstances of the offense and the history and characteristics of the accused;
(B) the impact of the offense on—
(i) the financial, social, psychological, or medical wellbeing of any victim of the offense; and
(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;
(C) the need for the sentence—
(i) to reflect the seriousness of the offense;
(ii) to promote respect for the law;
(iii) to provide just punishment for the offense;
(iv) to promote adequate deterrence of misconduct;
(v) to protect others from further crimes by the accused;
(vi) to rehabilitate the accused; and
(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;
(D) the sentences available under this chapter; and
(E) the applicable sentencing parameters or sentencing criteria set forth in regulations prescribed by the President pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022.

Following the MJA16 changes, as part of the FY20 NDAA Congress directed the Secretary of Defense to establish nonbinding sentencing "parameters" for UCMJ offenses to "provide the sentencing authority with a suggested range of punishments, including suggested ranges of confinement, that will generally be appropriate for a violation of each offense."[281] In the FY22 NDAA, Congress established an additional sentencing principle under Article 56(c)(1): consideration of "the applicable sentencing parameters or criteria set forth in regulations prescribed by the President."[282] The Military Sentencing Parameters and Criteria Board has authority to formulate sentencing parameters.[283] Under the new language in Article 56(c)(2)(A), if the accused in a special or general court-martial has been convicted of an offense for which the President has established a sentencing parameter, the military judge will sentence the accused for that offense "within the applicable parameter" unless they make specific findings of fact that warrant a deviation and include in the record a written statement specifying the factual basis for the sentence that is outside the parameters.[284]

III. PRESENTENCING PROCESSES AND PROCEDURES

A. Overview

1. The Military Presentencing Process

Under the UCMJ and its implementing rules, sentencing information is developed and presented in an adversarial hearing at which the Military Rules of Evidence apply and counsel are responsible for determining what, if any, information to introduce to inform the military judge's sentence. R.C.M. 1001(a)(2) expressly states that "[a] sentence shall be adjudged in all cases without unreasonable delay." Thus, the presentencing process begins immediately after findings in nearly all cases. This compressed schedule requires counsel to prepare for both the merits and sentencing phases before the trial begins. While the R.C.M.s do not provide a right to delay between findings and presentencing, military judges have wide discretion in granting continuance requests made by counsel, allowing for a delay upon a showing of reasonable cause.[285]

The presentencing process begins with the trial counsel informing the court-martial of the accused's service data on the charge sheet. Although R.C.M. 1001 allows for the presentation of a substantial amount of sentencing information, counsel can elect not to present any evidence at all. Indeed, the only information required to be presented to the military judge is the service data from the charge sheet related to the pay and service of the accused and the duration and nature of any pretrial restraint.[286] Trial counsel may, but is not required to, present personnel records and character of prior service, evidence of prior convictions, evidence in aggravation, and evidence of

281 FY20 NDAA, *supra* note 161, at § 537(a).

282 FY22 NDAA, *supra* note 70, at § 539.

283 Section 539E(e)(4)(F)(iii) of the FY22 NDAA, *id.*, directed the Military Sentencing Parameters and Criteria Board to consider fiscal year 2020 offense-based sentencing data. See Executive Summary, *supra* pages 10-11, for an explanation of the SPCB development of parameters and the limitations of the DLSA Report. The DLSA Report was limited by its reliance on sentencing data based on a single year, which occurred during the COVID pandemic, which dramatically affected behavior and therefore courts-martial.

284 In cases for which the parties have entered into a plea agreement with a sentence to confinement that is outside applicable sentencing parameters, the military judge may reject the plea agreement if the military judge determines that the proposed sentence is plainly unreasonable. 10 U.S.C. § 853a(b)(1) (Art. 53a(b)(1), UCMJ).

285 2024 MCM, *supra* note 1, R.C.M. 906(b)(1). A reason for a continuance may include insufficient opportunity to prepare for trial. R.C.M. 906(b)(1) Discussion.

286 *Id.*, R.C.M. 1001(b)(1)).

rehabilitative potential.[287] Notably, all evidence presented by the trial counsel is subject to the Military Rules of Evidence unless and until the defense requests that the rules be relaxed.[288]

Following the presentation of evidence by the government, the defense may elect to present matters in extenuation and mitigation—matters about the offense or about the accused that could lessen the punishment to be adjudged; however, the defense is not required to present any information at all. Reasons for the defense not presenting extenuating or mitigating evidence include strategic goals, a pretrial agreement with a very low or specified sentence, the wish to abide by the accused's wishes, or counsel's inexperience or lack of time or effort to prepare.

2. The Civilian Presentencing Process

In the federal civilian system, presentencing proceedings are governed both by Rule 32 of the Federal Rules of Criminal Procedure and by the Federal Sentencing Guidelines Manual. Although the civilian system has some of the same adversarial characteristics as the military justice system, the process relies heavily on independently drafted presentencing reports produced by federal probation officers. Federal Rule of Criminal Procedure 32 requires the presentence investigation to

> (A) Identify all applicable sentencing guidelines and policy statements of the U.S. Sentencing Commission;
>
> (B) Calculate the defendant's offense level and criminal history category;
>
> (C) State the resulting sentencing range and the kinds of sentences available; and
>
> (D) Identify any factors relevant to the appropriate kind of sentence, or the appropriate sentence within the applicable guideline range, and identify any basis for departing from the applicable sentencing range.

Rule 32 also requires that the presentencing report contain the following information: "The defendant's history and characteristics, including any prior criminal record, the defendant's financial condition, any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment, verified information that assesses the financial, social, psychological and/or medical impact of any victim of the offense, the nature and extent of non-prison programs and resources available to the defendant, sufficient information on which to order restitution, and any other information the court requires."[289] The probation officer tasked with producing the presentence report is given wide investigative authority, including the authority to interview the defendant and incorporate any findings into the report.

Although Federal Rule of Criminal Procedure 32 requires an extensive amount of information, the quality of the report reflects the experience, effort, and attention of the probation officer completing it. Once it is complete, the prosecution and defense are given an opportunity to object to any of the report's contents and submit evidence in support of those objections.

The preparation of these reports can require considerable time, infrastructure, and resources.[290] Moreover, in the federal civilian system, there is a significant delay between the merits and sentencing phases of the trial. Following a

287 *Id.*, R.C.M. 1001(b)(2)–(5).

288 If the military judge relaxes the Military Rules of Evidence upon defense request, the military judge may allow the government to introduce evidence not subject to the rules in rebuttal and surrebuttal—but only to the same degree that such evidence has been offered by the defense. *Id.*, R.C.M. 1001(d)(3) and R.C.M. 1001(e).

289 Fed. R. Crim. P. 32(d)(2).

290 For example, as of 2018, there were 677 United States district court judges and 537 United States magistrate judges in the United States. "Just the

guilty verdict, probation officers conduct the presentence investigation and prepare a presentencing report to inform the decision of the sentencing judge.

B. Stakeholder Perspectives

The MJRP requested narrative responses from each of the Services' Judge Advocate Headquarters and military justice functional organizations (Offices of the Special Trial Counsel and prosecution, defense, and victim legal services) concerning the advisability and feasibility of adopting a bifurcated presentencing process[291] like that of the federal courts with independently produced presentencing reports. Many of the Headquarters and military justice organizations opposed any further changes in sentencing processes and procedures, pointing to a need to evaluate the impact of recently implemented changes. Beyond their concern about further altering a system that has seen so many substantial changes in the past decade, the responses received raised three primary considerations: (1) structure and resources, (2) the efficiency of the military justice system, and (3) the quantity and quality of information provided to the sentencing authority.

1. Impacts of a Bifurcated Presentencing Process on Structure and Resources

All of the Services' Judge Advocate Headquarters believed that adopting a presentencing report construct similar to the federal process is neither advisable nor feasible because of structure and resource limitations. No independent entity exists within the Department of Defense or the individual Services with the resources to conduct a presentencing investigation and prepare a report. The responses from nearly all military justice practitioners were similar. They noted that such a capability, if created, would have to be independent from both trial and defense organizations, requiring the establishment and resourcing of a separate entity.[292] Finally, the organizations submitted that "presentencing reports would require additional infrastructure and growth at a time when the military justice system has recently expanded to add victim counsel, the Office of Special Trial Counsel and complementary defense assets, and defense investigators."[293]

2. Impacts of a Bifurcated Presentencing Process on Efficiency

The Services' Judge Advocate Headquarters and their respective military justice organizations (OSTCs and prosecution, defense, and victim legal services) offered mixed perspectives on the advisability of bifurcating the sentencing phase of a trial from the merits phase. Most of the JAG Headquarters agencies, trial services organizations, and victims' counsel organizations stated that bifurcating the sentencing phase of a trial from the merits phase would be inefficient. They commented on the significant travel undertaken by practitioners and witnesses to courts-martial, noting that if proceedings were bifurcated, these participants would likely be required to travel twice, once for the findings phase and again for the sentencing phase. They also noted the challenges for

Facts: Magistrate Judges Reach the Half Century Mark," United States Courts (Feb. 20, 2019), https://www.uscourts.gov/news/2019/02/20/just-facts-magistrate-judges-reach-half-century-mark#a1. To assist these judges in their pretrial, sentencing, post-trial, and probationary decisions, the United States Probation and Pretrial Services System employs 8,100 officers and support personnel. "The U.S. Probation and Pretrial Services System," Court and Community, U.S. Probation and Pretrial Services (Jan. 2003), *available at* https://www.govinfo.gov/content/pkg/GOVPUB-JU10-PURL-LPS40954/pdf/GOVPUB-JU10-PURL-LPS40954.pdf.

291 *Bifurcation* in this context means a distinct separation in time—days or weeks—between the findings phase and sentencing phase of a court-martial. This time would be used for preparation of a presentencing report, or for counsel to prepare for the sentencing hearing by using the actual, rather than the anticipated, results at findings.

292 Service Judge Advocate Headquarters responses to Question 1 of MJRP RFI on Military Justice Sentencing (Feb. 29, 2024), *available at* Appendix R.

293 *Id*. at R-4 (Army Headquarters [HQ] Response).

commands if a convicted Service member were returned to the unit while waiting to be sentenced. They pointed out that the military justice system is intended to be efficient to maintain good order and discipline. They suggested that the delay associated with bifurcated proceedings would strain unit resources and further discourage victim participation.

However, some Headquarters and prosecutorial agencies acknowledged positive aspects of bifurcation. For contested and complex cases, bifurcating the sentencing hearing could assist government trial and defense counsel who currently must simultaneously prepare for a lengthy findings case and for several sentencing cases, while anticipating the possible findings of the court-martial.[294] They noted that counsel are primarily focused on the merits of the case leading up to trial; this emphasis, combined with the possibility of a full acquittal, may induce counsel to put less time and effort into preparing a sentencing case than they would if it were their sole focus after a verdict.

The defense service organizations viewed bifurcation far more positively because they believed it affords more opportunity to prepare for sentencing and increases the efficiency of the system.[295] Defense counsel observed that the findings and sentencing phases of a court-martial are both adversarial, and defense counsel must prepare a presentencing case while also contesting the charges on the merits. Additional feedback highlighted a way in which the current process is inefficient: the government is responsible for producing sentencing witnesses, who may or may not be necessary depending on the outcome of the findings phase. A bifurcated hearing would eliminate this unnecessary expenditure of funds if an accused were found not guilty. Another response noted that in complex cases with multiple charges, proceeding immediately into sentencing often requires defense counsel to prepare several different sentencing cases that anticipate possible outcomes. Character witnesses may be willing to submit a letter or testify on behalf of an accused who is convicted of one charged offense but not if he or she is convicted of another. The defense organizations observed that a system that allows for, or encourages, bifurcation would alleviate many of these difficulties and would have the secondary benefit of enabling defense counsel to focus solely on the merits phase of the court-martial before they turn their attention to sentencing proceedings with a clear understanding of the offenses for which their clients are to be sentenced. Finally, the defense organizations posited that the new judge-alone sentencing process eliminates any reason to force an accused into a rushed sentencing proceeding.

3. Quantity and Quality of Information Presented to the Military Judge

Several of the military justice functional organizations noted that the current process relies too heavily on the experience and preparation of the trial and defense counsel litigating these matters, whose effectiveness can be further limited by a lack of time to prepare. One organization viewed uniform presentencing reports as a positive advance in eliminating unnecessary variables during sentencing.[296] Another common observation was that the application of the rules of evidence during sentencing is unnecessary and inconsistent with federal practice.[297]

The organizations noted that the federal rules allow for liberal introduction of sentencing evidence and that the presiding judge is given discretion to weigh such evidence accordingly.[298] Similarly, many perceived the restrictions

294 *Id*. at R-18 (Navy Trial Service Organization [TSO] Response).

295 The defense service organizations provided their views in a series of not-for-attribution conversations and also in the narrative responses to the MJRP's Request for Information. *See generally* Services' responses to MJRP RFI on Military Justice Sentencing (Data) (Oct. 30, 2023), *available at* Appendix S.

296 Appendix R, at R-20 (Marine Victims' Legal Counsel [VLC] Response).

297 *E.g., id.* at R-13 (Air Force Victims' Legal Counsel [VLC] Response).

298 *Id.*

placed on the government's sentencing case as compared to the defense's as unfair and unnecessary, recommending that the government's sentencing rules be like those in federal courts.[299]

Other responses highlighted that many aspects of federal presentencing reports are inapplicable in the military justice system, or that the information contained in them can be presented by counsel.[300] For example, the feedback noted that most Service members have no prior criminal history, which is often a significant portion of presentencing reports, and that a convicted Service member's employment history and demographics are mostly captured in their military records. Several of the organizations indicated that to the extent background information on an accused's life is relevant, the current sentencing rules allow the defense wide latitude to present that information to the sentencing authority. Similarly, the feedback noted that the components of the presentencing report in the federal system pertaining to victim impact likewise do not require specialized analysis within the military justice framework: the military has robust procedures for determining the crime's impact on victims, who are often military members themselves and for whom extensive data is already available. Finally, some respondents suggested that an independent investigation into the accused's background and character would be unlikely to produce information that is not already within the hands of the parties, or available to them through use of their investigative assets (e.g., military criminal investigative organizations or defense investigators).

C. Analysis of and Findings on Presentencing Procedures and Processes

On the basis of the information received, the Panel concludes that adopting a presentencing process similar to the federal system's independently produced presentencing reports is neither advisable nor feasible in the military. The Panel notes that Article 40, UCMJ, and R.C.M. 906(b)(1) allow counsel to request a continuance between findings and presentencing in those instances when reasonable cause exists. Although these authorities are not regularly employed, in those complex contested cases for which counsel believe a delay after findings is warranted, they may request that the military judge delay the presentencing proceedings to allow time to prepare, keeping in mind that R.C.M. 1001(a)(2) directs that "[a] sentence shall be adjudged in all cases without unreasonable delay." Accordingly, the Panel advises against adopting the federal presentencing process and concludes that current rules provide sufficient flexibility to ensure that counsel are prepared to present an effective presentencing case.

The MJRP also considered whether military sentencing practice would be enhanced by (1) requiring more standardized information to be presented by the government to the military judge and (2) removing the applicability of the rules of evidence to the presentencing process. For the reasons outlined below, the Panel found that such changes are not necessary.

The adversarial process that currently exists allows the parties to present information they believe to be relevant and necessary to support their respective proposed sentences. R.C.M. 1001(b)(1) *requires* the pay and service data of the accused, and the duration and nature of any pretrial restraint, to be provided to the military judge before they adjudge a sentence. Beyond that basic information, it is up to the discretion of the trial counsel and defense counsel to present additional information in aggravation, extenuation, or mitigation.[301] The Panel believes that the parties

299 *See* Fed. R. Evid. 1101(d)(3).

300 Appendix R, at R-3, 17 (Air Force TSO Response).

301 Such information may, and often does, include (1) the Official Military Performance File (e.g., Enlisted Record Brief, Officer Record Brief, or Service Record Book (including officer and noncommissioned officer evaluation and fitness reports)); (2) current status of promotion, assignment, and qualification orders; (3) award orders and other citations and commendations; (4) records of nonjudicial punishment from any file in which the record is properly maintained by regulation; (5) written reprimands or admonitions required by regulation to be maintained in the service record of the accused; (6) reductions for inefficiency or incompetence; (7) bars to continued service; (8) evidence of civilian convictions; (9) personnel records,

are best situated to make those determinations based on the facts and circumstances of the individual case rather than requiring introduction of that information in all cases. The Panel encourages the Services to train trial and defense counsel on the compilation and presentation of evidence relevant to sentencing.

The Panel carefully considered the position of some of its members that the rules of evidence need not apply to sentencing proceedings. These members base their position on Federal Rule of Evidence 1101(d), which recognizes that due process does not require confrontation or cross-examination at sentencing. Because judges are capable of disregarding information that should not be considered and therefore would not be improperly influenced by such information, these members would recommend that the Military Rules of Evidence be relaxed at sentencing regardless of whether the defense first makes such a request. However, because the MJRP recommends that counsel remain responsible for deciding what evidence to present, the Panel as a whole recommends maintaining the applicability of the Military Rules of Evidence to presentencing evidence. Doing so ensures the reliability of the information considered by the military judge while providing the defense the option of relaxing those rules so the accused can present a complete case in extenuation and mitigation, with the understanding that the government may be permitted to meet that evidence with similarly "relaxed" evidence.

Finding 15: The current adversarial presentencing process in the military is preferable to federal presentencing procedures. In the military system, counsel decide what, if any, evidence in aggravation or extenuation and mitigation to present to the military judge. The reasons to maintain the military presentencing process are as follows:

- There is no existing independent structure within DoD or the Services to conduct a presentencing report;
- Many aspects of the federal presentencing report are inapplicable to Service members; and
- Trial and defense counsel have an extensive amount of information readily available to present to the military judge.

Finding 16: The current military practice of sentencing after findings of guilt without unreasonable delay is preferable to the federal bifurcated sentencing process. Under R.C.M. 906(b)(1), the parties already are authorized to request a continuance between the two phases of trial, which military judges may grant within their discretion upon a showing of reasonable cause.

Finding 17: The current military practice of allowing the parties to decide what information, if any, to present to the military judge at sentencing is preferable to mandating information. The parties are best situated to determine the information they want to offer for the military judge's consideration based on the facts and circumstances of individual cases. Counsel should fully develop the record with information in aggravation, extenuation, and mitigation to ensure that a thorough record is available for correctional institutions and for direct and collateral review authorities, including clemency and parole boards and boards of record corrections.

Finding 18: Applying the Military Rules of Evidence to presentencing evidence (subject to relaxation upon defense request) is appropriate, because it enhances the reliability of the information considered by the military judge.

including the marital status of the accused, the number and ages of dependents, and any financial obligations maintained within official military records (e.g., orders of support); (10) record of restitution provided to any victim of an offense; (11) information about substance abuse and records of any civilian or military treatment program (e.g., substance abuse) attended by the accused; (12) information about mental health conditions and records of any civilian or military treatment; and (13) any relevant family history.

IV. SCOPE OF VICTIM IMPACT STATEMENTS

A. Overview

Military law and policy provide rights and protections to victims of sexual assault and other offenses. In some areas, these protections exceed those available to crime victims in civilian criminal justice systems to account for the unique military environment.[302] However, the rules governing victim impact statements (VISs) during military sentencing proceedings are more restrictive than the rules in federal civilian courts. R.C.M. 1001(c) explicitly limits VISs at sentencing to permit only information concerning mitigation for the accused, a recommendation of a specific sentence in non-capital cases, and impacts on the victim from the crime that fall into four designated categories: financial, social, psychological, or medical.[303] These restrictions were developed at a time when panel members routinely acted as the sentencing authority, but they have remained in place despite the change to judge-alone sentencing in non-capital cases.

1. The Current Military Process

Article 6b(a)(4)(B), UCMJ, guarantees victims the right to be heard at sentencing; R.C.M. 1001(c) regulates how victims may exercise this right. R.C.M. 1001 defines a victim as "an individual who has suffered direct physical, emotional, or pecuniary harm as the result of the commission of an offense of which the accused was found guilty, or the individual's lawful representative or designee[.]"[304] In a non-capital court-martial, a victim has a right to make a sworn and/or unsworn impact statement during the sentencing phase.[305] A victim may be heard at the court-martial in three ways:

- The government may call a victim to testify about aggravation evidence as part of their sentencing case;
- The defense may call a victim to provide mitigation evidence; or
- A victim may exercise their independent right to be heard through their own VIS, either orally or in writing.[306]

A victim's right to make a statement is not dependent on whether they testified during findings or were called to testify by the government or defense at sentencing.[307] Therefore, VISs at sentencing serve a purpose distinct from a victim's testimony in government or defense sentencing cases and are intended to also ensure a victim's right to be heard in their own voice.

302 For example, qualifying victims are entitled to a detailed military victim counsel with whom they have attorney-client privilege, provided at no cost to the victim; victims, when making a sexual assault complaint, have the option to make a restricted report, which does not trigger a criminal investigation or prosecution but does enable the victim to receive some military services for victims; victims may request and receive an expedited transfer to distance themselves from the accused and put the victim in a new location closer to family or other support networks; victim advocates within commands advocate for them and assist them with available services; and measures are in place to prevent or respond to command or peer reprisals against victims.

303 2024 MCM, *supra* note 1, R.C.M. 1001(c)(2)(B); R.C.M.1001(c)(3).

304 *Id.*, R.C.M. 1001(c)(2)(A).

305 In capital cases, a victim's "right to be reasonably heard" is limited to making only a sworn statement. *See id.*, R.C.M. 1001 (c)(2)(D)(i) and Discussion.

306 *Id.*, R.C.M. 1001(b)(4); R.C.M. 1001(c)(2)(C); R.C.M. 703(b)(2); R.C.M. 1001(c)(3)–(5).

307 *Id.*, R.C.M. 1001(c)(1).

a. Victim Impact Statements During the Panel Member Sentencing Era

When R.C.M.s were first promulgated to address the victim's right to be heard at sentencing,[308] the law allowed members to act as the sentencing authority in cases in which members determined findings. When members decided the sentence, it was prudent to limit the content of a victim's statement to allow only matters to be heard that directly related to specific findings of guilt and specific categories of victim impact.[309] The 2019 Manual for Courts-Martial, R.C.M. 1001(c)(3), limited a VIS to "victim impact and matters in mitigation."[310] R.C.M. 1001(c)(2)(B) defined "victim impact" as "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."[311] The rule addressed the concern at the time that irrelevant information could unfairly prejudice the sentencing decision of members. R.C.M. 1001(c)(5)(B) further required a victim who presented an unsworn statement to "provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel." The military judge could waive this requirement for good cause shown, and "permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement" upon a further showing of good cause.[312]

b. DAC-IPAD Report and Changes to Rules on Victim Impact Statements

In the Joint Explanatory Statement accompanying Section 535 of the FY20 NDAA, Congress directed the Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to study whether military judges were interpreting R.C.M. 1001(c) too narrowly and limiting what victims were permitted to say at sentencing hearings.[313] Congress was concerned that limitations on victim statements could mean that the sentencing authority might not be fully informed of the impact of the crime on the victim. In March 2023, the DAC-IPAD issued a report concluding that R.C.M. 1001(c) inappropriately limited victim impact statements.[314] The DAC-IPAD made five recommendations for amendments to the rule that would allow crime victims wider latitude:

- 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."
- The JSC draft an amendment to the rule by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases.

308 *See* Exec. Order No. 13,696, "2015 Amendments to the Manual for Courts Martial, United States," 80 Fed. Reg. 35,783 (June 22, 2015), *available at* https://jsc.defense.gov/Portals/99/Documents/EO13696.pdf.

309 2024 MCM, *supra* note 1, R.C.M. 1001(c)(2)(B).

310 2019 MCM, *supra* note 81, R.C.M. 1001(c)(3).

311 *Id.*, R.C.M. 1001(c)(2)(B).

312 *Id.*, R.C.M. 1001(c)(5)(B).

313 H.R. Rep. No. 116-331 (Conference Report to Accompany S. 1790) 1212–13 (Dec. 9. 2019).

314 *See* Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings (Mar. 2023) [DAC-IPAD VIS Report], *available at* achieve their intended purpose, the DAC-IPAD recommended that the JSC draft additional amendments allowing crime victims "to exercise their right of allocution without unnecessary limitation." DAC-IPAD VIS Report at 22.

- The JSC draft an amendment to the rule 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.
- The JSC draft an amendment to the rule to remove the "upon good cause shown" clause.
- The JSC draft an amendment to the rule 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.[315]

Following the DAC-IPAD recommendations, the President amended R.C.M. 1001(c) to expand the permissible scope of victim impact statements.[316] The amended rule, effective December 27, 2023, appears in the 2024 MCM and includes new language (1) allowing a victim to request or recommend a specific sentence in a non-capital case; (2) broadening the scope of victim statements by no longer requiring them to be "directly" relating to or arising from the offense—thus, for example, a victim may now discuss the impact of the crime on others, including family members; (3) allowing a victim's unsworn statement to be made by the victim, victim's counsel, or both; and (4) removing the requirement for victims to submit a written proffer of their unsworn impact statement to trial and defense counsel before delivering it.[317] However, the 2024 MCM retained the prohibition on victims' speaking on matters outside of the defined areas in R.C.M. 1001(c)(2)(B): financial, social, psychological, or medical impacts.[318]

In the 2024 MCM, the Discussion for R.C.M. 1001(c)(5) also states that a victim statement should not include any content other than matters in mitigation; financial, social, psychological, or medical impacts relating to or arising from the offense of which the accused has been found guilty; and a recommendation of a specific sentence in non-capital cases. The Discussion explains, "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 these permitted areas.[319] This limitation could affect a victim's perception of whether they are treated fairly by the military justice process.

c. Judge-alone Sentencing Mitigates Concern of Prejudice

For offenses occurring after December 27, 2023, the law requires judge-alone sentencing in all non-capital cases.[320] Military judges are presumed to know and apply the law correctly. Therefore, the exposure of a judge to information in a victim impact statement that is not germane at sentencing should not prejudice the accused. In the context of sentencing, military judges are presumed to separate relevant from nonrelevant information and disregard what is irrelevant when adjudging an appropriate sentence.

Recent case law sheds light on how the R.C.M. restrictions affect victim impact statements, and on the lack of harm that results when judges are exposed to material outside the categories allowed by the rules. Military appellate courts typically find, in judge-alone sentencing cases, that errors in allowing victims to include matters that exceed the authorized scope are not prejudicial to the accused, because judges are presumed to know the law and can disregard

315 *Id.* at 3 (emphasis in original).

316 *See* E.O. 14,103, *supra* note 89, Annex 3, 88 Fed. Reg. at 50,706–07.

317 2024 MCM, *supra* note 1, R.C.M. 1001(c).

318 *Id.*, R.C.M. 1001 (c)(3), which also notes that in addition to victim impact as defined in R.C.M. 1001(c)(2)(B), victim statements may include matters in mitigation and, in non-capital cases, a recommendation for a specific sentence.

319 *Id.*, R.C.M. 1001(c)(5) Discussion.

320 FY22 NDAA, *supra* note 70, at § 539E.

information that is unfairly prejudicial to an accused or otherwise inadmissible.[321] Substantially all of the recent military appellate cases challenging the scope of a victim's impact statement have been decided in this manner.

The resolution of these appellate cases under harmless error analysis does not reveal how the R.C.M. limitations may create issues at trial that are never reviewed by appellate courts. For instance, there may be cases when a trial judge sustains a defense objection to the victim's statement or *sua sponte* rules that the victim exceeded the limits of R.C.M 1001(c)(3). In those cases, the rules direct the military judge to curtail the victim's ability to be heard to ensure that their statement remains within the scope of the rules.[322] Furthermore, appellate case law does not consider the likelihood that victims may self-censor their statements to avoid exceeding the scope of the R.C.M. or to avoid creating a trial or appellate issue.

2. Victim Statements in Federal Civilian Sentencing Proceedings

The federal Crime Victims' Rights Act (CVRA) governs victims' right to be heard at sentencing in federal cases.[323] Neither the CVRA nor the Federal Rules of Criminal Procedure include any categorical or relevance restrictions on victim impact statements.[324] Federal Rule of Criminal Procedure 32(i)(4)(B) states, "Before imposing a sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard."[325] The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing. The federal rules do not provide any categories or limitations that restrict the victim's right to be heard at sentencing.

Federal civilian judges who provided information to the Panel noted that while they will consider only matters that are material to their sentencing decision, they let victims speak freely at sentencing, even allowing a victim to ask for a sentence that cannot be imposed by the court. These judges emphasized that broad victim statements likely have an impact on defendants in a way that is distinct from other parts of the sentencing process, including incarceration. They also expressed their hope that an approach of admitting everything when it comes to victim impact statements leads to healing for the victims after they leave the courtroom. Sentencing in state courts reflects this common practice, as crime victims receive wide latitude to express their sentiments, even on matters not material to a judicial decision on an appropriate sentence.

B. Stakeholder Perspectives

Victim organizations believe that the current limitations on victim impact statements under the R.C.M.s are unnecessary, given the implementation of judge-alone sentencing. In response to the Panel's RFIs and during roundtable discussions, victims' counsel suggested that the CVRA be the model for enhancing a victim's ability to be heard at sentencing, allowing a scope similar to what is permitted for an accused when making an unsworn

321 These appellate claims may result in findings of error but generally do not require any sentencing relief. *See, e.g.*, *United States v. Cunningham*, 83 M.J. 367 (C.A.A.F. 2023) (finding error but no prejudice when the victim impact statement contained music and photographs); *United States v. Schneider*, 2024 CCA LEXIS 288, 2024 WL 3427201 (A.F. Ct. Crim. App. July 16, 2024) (presuming that the military judge did not consider portions of a victim impact statement for improper purposes); *United States v. Greene-Watson*, 2023 CCA LEXIS 542, 2023 WL 8943232 (A.F. Ct. Crim. App. July 16, 2024) (holding that any error in admitting a victim impact statement containing potential recalcitrance evidence was not prejudicial when the military judge considered the evidence for the limited purpose articulated on the record at trial).

322 Neither victims nor the government have access to military appellate courts to challenge these rulings.

323 18 U.S.C. § 3771.

324 *Id.*; Fed. R. Crim. P. 32(i)(4)(B).

325 *See also* Fed. R. Crim. P. 60(a)(3), Right to Be Heard on Release, a Plea, or Sentencing.

statement during the sentencing phase of their court-martial. The victims' counsel mentioned their clients' view that their victim impact statements at sentencing proceedings can be empowering and provide some degree of closure at the end of a trial process that can be lengthy and traumatizing. Indeed, these views are generally recognized and accepted by civilian courts.[326]

C. Analysis of and Finding on Victim Impact Statements

There are tangible benefits for both the justice system and victims when they are allowed to speak freely in their victim impact statements. Scholars generally accept that victim impact statements promote the public interest and other social goals, including improving the accuracy of sentencing, enhancing victims' well-being and satisfaction, and promoting public trust in law enforcement.[327] Some argue that they can promote the social goal of reducing reoffending.[328]

Recent changes to the MCM have expanded the scope of victims' statements, yet impact statements remain limited to financial, social, psychological, or medical impacts relating to or arising from the offense for which the accused has been found guilty. Because sentencing is now determined by a military judge instead of a panel, the MJRP questions whether this limitation remains warranted. Accordingly, and because the MCM changes have been in effect for less than a year, the MJRP will continue to assess whether this limitation is warranted.

Finding 19: Under the MCM amendments effective 2023, victim impact statements remain limited to financial, social, psychological, or medical impacts relating to, or arising from, the offense of which the accused has been found guilty. The MJRP will continue to assess whether this limitation remains warranted now that sentencing is determined by a military judge instead of a panel.

V. ADDITIONAL SENTENCING AUTHORITIES

Crafting an appropriate sentence is one of the most demanding and consequential duties of a military judge. Guided by the statutory sentencing factors enumerated in Article 56(c)(1), as well as by the purposes of military law, military judges may select from an array of punishments to arrive at a sentence that is "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces."[329] In practice, the types of punishment available to courts-martial differ from those permitted in federal civilian and state jurisdictions. Whereas military sentences are limited to the nine types of punishment authorized by the President in R.C.M. 1003,[330] civilian sentencing contemplates a wider variety of options, including conditional sentences, restitution, and diversionary programs.

326 "Victim impact statements are meant 'to force the defendant to confront the human cost of his crime,' *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1016 (9th Cir. 2006), and it is unavoidable that some victims will use charged language against the defendant in doing so." *United States v. Harrell*, 2023 U.S. App. LEXIS 10810, at *5 (9th Cir. May 3, 2023).

327 Tali Gal & Ruthy Lowenstein Lazar, *Sounds of Silence: A Thematic Analysis of Victim Impact Statements*, 27 Lewis & Clark L. Rev. 147, 158 (2023). Other researchers analyzed the statements of victims in the case of Larry Nassar, a doctor who was convicted of using his position of trust to sexually victimize scores of young athletes, many of whom explained what prompted them to come forward and deliver impact statements. *See* Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing*, 107 Marq. L. Rev. 861, 878 (2024). Some of these victims spoke because they thought it would be healing for them and important in helping them to regain agency by preventing their abuser from controlling them. *Id.*

328 Gal & Lazar, *supra* note 327, at 158.

329 10 U.S.C. § 856(c)(1) (Art. 56(c)(1), UCMJ).

330 The President's authority to prescribe the punishments available to sentencing authorities derives from Article 36, UCMJ.

A. Military Sentencing Options

In accordance with R.C.M. 1003, military judges may impose any of the following punishments: reprimands, forfeitures, fines, a reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, a punitive separation, and death.[331] Segmented sentencing procedures require a military judge, guided by the applicable sentencing parameters and criteria, to separately announce the term of confinement and fine, if any, for each offense of which the accused was convicted.[332] If confinement is adjudged for more than one offense, the military judge must also specify whether the terms of confinement are to run consecutively or concurrently.[333] A fine "normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted."[334] Although restitution may not be imposed as punishment in a court-martial sentence, a promise to provide restitution to a victim is a permissible term of a plea agreement.[335] Punishments other than confinement or a fine—typically adjudged as uniquely military punishments—must be a single, unitary component of the sentence.[336]

In addition to mandatory minimum punishments for specified offenses set forth in statute, maximum limits for confinement, forfeitures, and punitive discharge are listed in Part IV of the Manual for Courts-Martial.[337] The MCM also permits increased punishment under various circumstances, such as when an accused has a record of previous convictions or is found guilty of multiple specifications.[338] Notably, the punishments authorized by the President in R.C.M. 1003 are subject to the jurisdictional limitations applicable to specific types of courts-martial. Special courts-martial, for example, may not adjudge confinement for more than one year, forfeitures exceeding two-thirds pay per month, or a dismissal or dishonorable discharge.[339]

After the military judge adjudges the sentence, the convening authority may take action to reduce, commute, or suspend the sentence adjudged in accordance with the provisions of Article 60a. Before 2014, the convening authority's ability to grant sentence relief was expansive. However, the FY14 NDAA significantly curtailed the convening authority's clemency powers.[340] Under the current version of Article 60a, the convening authority may

331 Under the Articles of War, more obscure punishments included "flogging, ear cropping, being marked with indelible ink, confinement in dark holes, dunking in water, and forced labor with a ball and chain." MJRG Report, *supra* note 27, at 50.

332 10 U.S.C. § 856(c)(4) (Art. 56(c)(4), UCMJ).

333 *Id.* When authorized, confinement for life may be with or without eligibility for parole. 2024 MCM, *supra* note 1, R.C.M. 1003(b)(7). A sentence to solitary confinement or to confinement with hard labor is prohibited. *Id.*

334 *Id.*, R.C.M. 1003(b)(3) Discussion.

335 *Id.*, R.C.M. 705(c)(2)(C).

336 *See id.*, R.C.M. 1003(b). A reprimand is a punitive censure issued, in writing, by the convening authority. Forfeiture of pay and allowances may be adjudged in accordance with the limitations set forth in R.C.M. 1003(b)(2). Restriction to specified limits and hard labor without confinement are authorized at the rates designated in R.C.M. 1003(b)(5–6). The latter is reserved for enlisted Service members only. Unlike officers, enlisted Service members may also be reduced in grade to the lowest or any intermediate pay grade. A court-martial may adjudge three types of punitive separation: a dismissal, a bad-conduct discharge, and a dishonorable discharge. A dishonorable discharge is reserved for either felony-level offenses or military offenses requiring severe punishment.

337 *Id.*, R.C.M. 1003(c).

338 *Id.*, R.C.M. 1003(d).

339 *Id.*, R.C.M. 201(f)(2)(B)(i).

340 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). The FY14 NDAA eliminated the convening authority's ability to "disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." The convening authority retained the authority to provide such relief "[u]pon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense." Subject to certain limitations, the convening authority could also approve, disapprove, commute, or suspend a sentence pursuant to a pretrial agreement under R.C.M. 705.

suspend a sentence to confinement in excess of six months or a punitive separation only upon recommendation of the military judge.[341] The convening authority may reduce, commute, or suspend, in whole or in part, any other sentence, except for a sentence to death.[342]

B. Civilian Sentencing Options

Civilian jurisdictions offer a wide range of sentencing options not available to military courts-martial. Over the past four decades, alternative sentencing dispositions—including suspended sentences, probation, treatment programs, community service, restitution, and deferred entry of judgment—have become common among "problem-solving courts" and treatment courts, such as drug courts, veterans' treatment courts, and youthful offender courts.[343] Alternative-to-incarceration programs generally target low-level offenders and require an accused to plead guilty to the offense.[344] These programs are distinct from diversion programs and typically result in probation or a sentence to time served.[345] Participants who fail to abide by the terms of the program may return to the regular court system for further adjudication.[346] Civilian jurisdictions can also employ alternative forms of confinement, such as home detention and electronic monitoring.

C. Stakeholder Perspectives

The MJRP requested narrative responses from each of the Services' Judge Advocate Headquarters and military justice functional organizations (OSTCs and prosecution, defense, and victim legal services) concerning the advisability and feasibility of providing additional sentencing authorities to military judges.[347] The RFIs requested stakeholder perspectives on the following changes: (1) the ability to *suspend* all or part of a sentence, (2) the ability to *defer* all or part of a sentence, (3) the ability to *reduce* an officer member in pay grade and/or lineal number, (4) the ability to *sentence* a convicted Service member *to a rehabilitative program* (e.g., substance or alcohol abuse treatment) in lieu of or in addition to other punishments, and (5) the ability to *impose a conditional sentence* whereby a finding of guilty would be vacated upon the successful completion of specified conditions (e.g., successful completion of a rehabilitative program, no additional misconduct, favorable performance).

While the Service defense service organizations (DSOs) largely support greater sentencing alternatives, most OSTCs, trial service organizations, and victims' legal counsel found the proposed sentencing alternatives neither advisable nor feasible. Several organizations cautioned against further changes to sentencing procedures given the recent reforms to Articles 53 and 56. Their view is that additional time is necessary to understand the full impact of recent reforms on the sentencing process.

341 Article 60a(c), UCMJ.

342 Article 60a(b), UCMJ.

343 Other alternatives include conditional sentences, supervised release, intermittent confinement (custody for intervals of time, such as weekends), shock incarceration (brief jail time followed by a suspended sentence), home detention, and electronic monitoring. The Supreme Court recognized the value of alternative sentencing in both *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007).

344 United States Sentencing Commission, Federal Alternative-to-Incarceration Court Programs 5 (Sept. 2017), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf. A panel of professionals, including judges, prosecutors, defense attorneys, probation officers, and mental health providers, determines an appropriate sentence and oversees compliance for the duration of the program, which typically lasts from 12 to 24 months. *Id.*

345 *Id*. at 6.

346 *Id*. at 5–6.

347 *See* Services' responses to MJRP RFI on Military Justice Sentencing (Feb. 29, 2024), *available at* Appendix R.

D. Analysis of and Finding on Current Authorized Punishments

The Panel finds the current authorized punishments sufficient and does not recommend granting military judges the authority to suspend or defer all or part of a sentence, reduce an officer member in pay grade and/or lineal number, sentence a convicted Service member to a rehabilitative program, or adjudge a conditional sentence. While additional sentencing options could allow for more tailored sentences or rehabilitative alternatives, those goals are already largely met through available means. Convening authorities, for example, have wide discretion to direct participation in rehabilitative programs, and military judges can recommend that a sentence be suspended. Ultimately, conditional sentencing would require additional resources and could harm mission readiness, given the logistical demands of returning a convicted Service member for a rehearing after service of a conditional sentence. Accordingly, the Panel advises against broadening the scope of a military judge's recommendation authority under R.C.M. 1109(f) or permitting military judges to impose alternative punishments not currently authorized in R.C.M. 1003.

Finding 20: The current authorized punishments available to the military judge are sufficient.

VI. SENTENCE EXPLANATION REQUIREMENTS

A. Overview

Federal district courts and several state courts require judges to articulate the basis for the sentence adjudged. 18 U.S.C. § 3553(c), part of the Sentencing Reform Act of 1984, requires federal judges to "state in open court the reasons for [their] imposition of the particular sentence." Many state courts follow this protocol, requiring judges to explain the basis for the sentence imposed. Underlying these rules is a belief that the explanation fosters greater transparency and accountability in sentencing and can provide much-needed clarification for defendants and victims alike. Under the UCMJ, there is no corresponding requirement for military judges to provide a sentence explanation in every case.

1. Military Practice

The 1951 Manual for Courts-Martial authorized the court to formulate "a brief statement of the reasons for the sentence" for the benefit of the convening authority.[348] This provision was eliminated in 1969 because of the potential for improper command influence. The Drafters' Analysis to the 1969 MCM noted that the provision "could lead a court member to believe that he must justify his action to the convening authority."[349] While this concern is no longer germane in the era of judge-alone sentencing, two commentators have stated that "[t]here is still an unmistakable cultural reluctance within the armed forces trial judiciary to deviate from the bare requirement to announce a sentence without elaboration."[350] Such reluctance is not the sole province of the military, however, as

348 Manual for Courts-Martial, United States (1951 ed.), para. 76.b.(4). See *United States v. Green*, 64 M.J. 289, 290 (C.A.A.F. 2007) (discussing judicial comments during sentencing).

349 Dep't of the Army, "Analysis of Contents, *Manual for Courts-Martial*, United States, 1969, Revised Edition," Pamphlet 27-2, ch. 13, para. 74*f*(4), at 13-4 (1970), *available at* https://tile.loc.gov/storage-services/service/ll/llmlp/analysis_manual-1969/analysis_manual-1969.pdf. *See also id.*, para. 76*b*(4), at 13-9. The "Analysis" acknowledged, however, that a military judge could still "set out the reasons for his decision by means of . . . a memorandum of decision." *Id.*, para. 74*f*(4), at 13-4.

350 Christopher E. Martin & Timothy P. Hayes, Jr., *Court-Martial Sentences: Time for More Transparency*, 49 Hofstra L. Rev. 63, 76 (Fall 2020). There are also empirical data suggesting that military judges are discouraged from placing comments about a sentence on the record. *Id.* at 101 ("A recent

civilian judges might be equally hesitant to articulate their sentencing rationales were they not required to do so by § 3553(c).

2. Federal Civilian Practice

Under federal law, a district court judge must provide an explanation for the sentence imposed at the time of sentencing. As discussed in Chapter 2, if the sentence is "of the kind, and within the range" of the applicable sentencing guidelines but the range exceeds 24 months, a federal judge must explain "the reason for imposing a sentence at a particular point within the range."[351] If the sentence "is not of the kind, or is outside the range" of the federal sentencing guidelines, the judge must (1) state "the specific reason for the imposition of a sentence different from that described" and (2) provide a written statement of reasons (SOR) in accordance with 28 U.S.C. § 994(w)(1)(B).[352]

In practice, most sentences fall outside the federal sentencing guidelines and require a written SOR. In FY23, sentences imposed by federal district court judges fell within applicable guidelines only 42.4% of the time.[353] According to the U.S. Sentencing Commission, the remaining 57.6% of sentences deviated from the guidelines owing to downward departures (24.0%), downward variances (30.1%), upward departures (0.5%), and upward variances (3.0%).[354] Statistics for FY22 were roughly similar, with 41.9% of federal sentences falling within the applicable guidelines.[355]

The MJRP identified and reviewed federal appellate cases challenging the sufficiency of sentence explanations over the preceding two years. In FY23, 4,249 federal appeals involved cases in which the sentence imposed was at least one of the reasons for appeal.[356] Of the 418 cases reversed or remanded, only 51 (1.2% of 4,249) involved a

survey of twenty-five Army judges indicated that eighty-eight percent of responding judges had never commented on the record about their announced sentence. Eighty-three percent of the judges who had never commented gave as their rationale that they were discouraged from doing so by other members of the trial judiciary." (citations omitted)).

351 18 U.S.C. § 3553(c)(1).

352 18 U.S.C. § 3553(c)(2).

353 United States Sentencing Commission, 2023 Sourcebook of Federal Sentencing Statistics at Table 29 (Sentence Imposed Relative to the Guideline Range) (2024) [Sentencing Commission 2023 Sourcebook], *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/ 2023_Sourcebook.pdf.

354 *Id.* A departure differs from a variance. "Departures are sentences outside of the guideline range authorized by specific policy statements in the *Guidelines Manual*," while "Variances are sentences outside of the guideline range that are not imposed within the guidelines framework." United States Sentencing Commission, *Primer on Departures and Variances* 1 (Oct. 2024), *available at* https://www.ussc.gov/sites/default/files/pdf/training/primers/ 2024_Primer_Departure_Variance.pdf. The facts supporting a departure may also support a variance. The direction of the departure or variance—upward or downward—results in a sentence that is either above or below the applicable guideline range. Grounds for departure are listed in the *Guidelines Manual* and are classified as encouraged, discouraged, or prohibited. "The authorized and prohibited grounds for departures are based on various circumstances of the offense, specific personal characteristics of the offender, and certain procedural history of the case." *Id.* at 5. Bases for downward departures from the guidelines in FY23 were § 5K1.1 Substantial Assistance (10.2%), § 5K3.1 Early Disposition Program (10.0%), Other Government Motion (2.1%), and Non-Government Departure (1.7%). Sentencing Commission 2023 Sourcebook, *supra* note 353, at Table 29.

355 United States Sentencing Commission, 2022 Sourcebook of Federal Sentencing Statistics at Table 29 (Sentence Imposed Relative to the Guideline Range) (2023) [Sentencing Commission 2022 Sourcebook], *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/ 2022-Annual-Report-and-Sourcebook.pdf. Sentences imposed in FY22 deviated from the guidelines because of downward departures (25.5%), downward variances (29.8%), upward departures (0.6%), and upward variances (2.3%). Bases for downward departures from the guidelines were § 5K1.1 Substantial Assistance (10.4%), § 5K3.1 Early Disposition Program (10.4%), Other Government Motion (2.3%), and Non-Government Departures (2.4%).

356 Sentencing Commission 2023 Sourcebook, *supra* note 353, at Table A-6 (Reasonableness Issues Appealed in Cases Where the Original Sentence as Reversed or Remanded).

procedural reasonableness challenge to the court's explanation of the chosen sentence.[357] In FY22, this proportion was less than 1%.[358]

While federal appellate courts review sentencing decisions for reasonableness under an abuse-of-discretion standard, compliance with § 3553(c)'s sentence explanation requirement is a procedural matter that is conceptually distinct from a sentencing authority's subjective reasonableness analysis.[359] In *Rita v. United States*, the Supreme Court declared that the § 3553(c) requirement to state the reasons for a particular sentence amounted to "sound judicial practice."[360] The Court "d[id] not insist on a full opinion in every case."[361] Rather, the majority found "[t]he appropriateness of brevity or length, conciseness or detail, when to write, [and] what to say" dependent on the circumstances.[362] At a minimum, "the sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[363]

Since *Rita*, appellants in federal court have consistently questioned the procedural sufficiency of such pronouncements, largely in conjunction with substantive issues about the application of the § 3553(a) sentencing factors or concerns that the court improperly calculated the guidelines range. The federal circuit courts of criminal appeals have been reluctant to find sentence explanations procedurally unsound when a trial judge has placed more than a de minimis explanation on the record. The courts have warned, however, that boilerplate language that is insufficiently individualized does not satisfy the requirements of § 3553(c).[364]

B. Stakeholder Perspectives

The MJRP solicited opinions from active and retired federal judges concerning the advisability and feasibility of requiring military judges to announce the basis for sentences imposed in all cases. The feedback suggested that both defendants and victims can benefit from a greater understanding of a judge's sentencing decision. Some participants noted that appellate litigation often concerns the application of the § 3553(a) factors or the calculation of the sentencing guidelines themselves rather than the procedural sufficiency of the sentence explanation. Finally, some judges noted that proper consideration of the sentencing factors requires information that might not be available immediately after the announcement of findings.

The MJRP also heard from former military judges on this issue. Some agreed that explaining the basis for the sentence imposed could enhance transparency. Others suggested that a thorough sentence explanation could benefit appellate review.

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357 *Id.*

358 Sentencing Commission 2022 Sourcebook, *supra* note 355, at Table A-6. Of the 4,946 appeals in which the sentence imposed was at least one of the reasons for appeal, 421 were reversed or remanded. Only 33 of these, or 0.07% of 4,946, involved compliance with 18 U.S.C.§ 3553(c).

359 Gall v. United States, 552 U.S. 38, 46 (2007). Sentences within the guidelines range are presumptively reasonable. There is no corresponding presumption of unreasonableness for sentences outside the guidelines range. While federal judges must consider the degree of deviation from the applicable guidelines range, the Supreme Court has expressly rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.* at 47. The Court has also rejected an "extraordinary circumstances" test to justify a sentence outside the guidelines range. *Id.*

360 *Rita v. United States*, 551 U.S. 338, 356 (2007).

361 *Id.*

362 *Id.*

363 *Id.*

364 *See United States v. Colon-Cordero*, 91 F.4th 41, 52 (1st Cir. 2024) (citing *United States v. Reyes-Correa*, 81 F.4th 1, 10–11 (1st Cir. 2023)).

C. Analysis of and Finding on Sentence Explanations

The Panel finds the requirement in R.C.M. 1002(a)(2)(B) is sufficient and does not recommend mandating that military judges also explain on the record, either orally or in writing, the basis for the sentence adjudged when the sentence is within the applicable sentencing parameters. First, most court-martial cases are disposed of through plea agreements. Pursuant to R.C.M. 705, an accused may enter into an agreement with the convening authority or special trial counsel to plead guilty in exchange for a limitation on the minimum and/or maximum punishment that may be adjudged. Alternatively, a plea agreement may contain a specified sentence that must be imposed by the court-martial. When the parties agree on such limitations, the military judge has no authority to adjudge a different sentence, absent a finding that the agreement is "plainly unreasonable" in cases without an applicable sentencing parameter. Thus, there is no need for a military judge to provide an additional basis for the sentence imposed. Second, R.C.M. 1002(a)(2)(B) already requires military judges to provide "a written statement of the factual basis for the sentence" when they depart from applicable sentencing parameters. Third, unlike federal appellate courts, service courts of criminal appeals are granted the authority to review sentences for appropriateness. These appellate courts are permitted to lower a sentence that they consider to be inappropriately severe on the basis of the record before them.[365] Fourth, imposing a procedural requirement like § 3553(c) could place an undue burden on military judges and give rise to unnecessary appellate litigation. Even now, military judges are not immune from challenges to their sentencing decisions.[366] Such challenges can stem from *sua sponte* remarks by military judges that implicate a reliance on improper sentencing considerations.[367] Nonetheless, no rule prohibits a military judge from explaining the factual basis for the sentence adjudged or making other relevant and appropriate comments about the case before adjournment.

Finding 21: The current requirement in R.C.M. 1002(a)(2)(B) that directs a military judge to provide a written statement of the factual basis for the sentence only when the sentence adjudged falls outside applicable sentencing parameters is sufficient.

VII. DATA LIMITATIONS

A. Overview

In addition to the foregoing assessments, the MJRP had intended to (1) review demographic data of Service members sentenced for offenses to confirm or refute perceptions of inequalities and (2) assess the recently implemented sentencing parameters to determine whether they are consistent with historical sentences and are

365 Article 66(e) provides the criminal courts of appeals the authority to review sentences to, among other things, determine whether the sentence is inappropriately severe or plainly unreasonable. This review is conducted de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). However, this case law predates the changes to Article 66 and the subparagraph pertaining to sentence appropriateness that now conditions the review, in part, on the established sentencing parameters. It is yet to be determined how the authority to find a sentence to be plainly unreasonable will intersect with the limitation that judges can find a sentence inappropriately severe only when it is above the established sentencing range. There are also some common law limitations on what the courts of criminal appeals can do, in addition to the statutory limits from Article 66.

366 Article 66(e), UCMJ, states that the courts of criminal appeals may review a sentence to determine whether it violates the law, is inappropriately severe, is the result of an incorrect application of applicable sentencing parameters, or is plainly unreasonable. In a capital case, the Service courts may also review a sentence of death or life imprisonment without eligibility for parole to determine whether it is otherwise appropriate.

367 *See, e.g.*, *United States v. Green*, 64 M.J. 289, 292 (C.A.A.F. 2007) (questioning whether the military judge's personal religious views influenced the sentence in light of remarks made prior to announcement of the sentence); *United States v. Barnes*, 60 M.J. 950, 958 (N-M. Ct. Crim. App. 2005) (examining "whether the military judge's comments before the pronouncement of sentence displayed a deep-seated antagonism that deprived the appellant of his right to a fair trial").

appropriately framed for their primary purpose—to create a more structured sentencing system that balances consistency in sentencing with the importance of individualized consideration of each accused.[368] In support of these planned studies, the Panel requested basic sentencing data from each of the Services from fiscal years 2021 through 2023.[369]

The data received from the Services proved to be unhelpful or inaccurate to varying degrees. For example, three of the Services could identify offenses only by the UCMJ article, without differentiating between the various offenses within the article.[370] This lack of specificity prevented the Panel from making meaningful comparisons or identifying trends or disparities in sentencing. In addition, when cross-referencing the data provided by the Services in response to the MJRP RFI with the corresponding records of trial, the Panel discovered many inaccuracies in the data provided.

The most significant problem with the requested data related to the terms of confinement. The Panel therefore lacked confidence that the data provided were reliable enough to accurately assess the newly established sentencing parameters. Because of these data deficiencies, the Panel was compelled to forgo these assessments until such time as the data obtained are complete, specific, and reliable. These problems are a direct result of the Services' noncompliance with the data collection requirements of Article 140a, UCMJ, as described in Chapter 2 of this report. Deficiencies in military justice data deprive the MJRP of a valuable tool necessary to fulfill its statutory mandate under Article 146, UCMJ.

B. Analysis of and Recommendation on Sentencing Data Collection

Robust and accurate data are critical to increasing transparency and accountability in the sentencing process and helping to build and maintain trust in the military justice system. Robust and accurate data collection is also vital for a thorough analysis of sentencing in the military justice system. Access to reliable data will enable the MJRP to identify the strengths and weaknesses of military sentencing and to make appropriate evidence-based recommendations in the future.

368 MJRG Report, *supra* note 27, at 511.

369 *See* MJRP RFI on Military Justice Sentencing (Data) (Oct. 30, 2023), *available at* Appendix S. The requested data were name and date of birth of the accused; sex of the accused; race of the accused; ethnicity of the accused; rank of the accused; all charges and specifications for which there was a finding of guilty (accounting for all offenses, including those with aggravating circumstances listed in Manual for Courts-Martial, United States (2023 ed.), Appendix 12C; the pleas of the accused to the charges and specifications for which there was a guilty finding; confinement term adjudged for each specification for which there was a guilty finding; whether a reduction in rank was adjudged and, if so, to what rank; whether any financial penalties were adjudged and, if so, the type and amount; whether a punitive discharge was adjudged and, if so, the type of discharge; whether the decision to adjudge a discharge resulted from a term of a plea agreement; and whether any other punishments were adjudged and, if so, the nature of the punishment.

370 For example, for an Article 120 offense, some Services were unable to specify if the conviction was for rape or for abusive sexual contact.

RECOMMENDATION 20: Congress require, and the Secretary of Defense direct, military justice data management systems to collect uniform, comprehensive, case-specific sentencing data. At a minimum, the data should include

(a) The specific offense under a punitive article for each specification for which there was a conviction.

(b) Comprehensive sentencing data, including the length of confinement and whether multiple sentences to confinement run concurrently or consecutively.

(c) The applicable sentencing parameter for each offense.

(d) Comprehensive demographic information for the accused, including but not limited to date of birth, sex, gender identity, sexual orientation, race, ethnicity, education, religious preference, time in service, rank, and pay grade.

(e) Comprehensive demographic information for victims, including but not limited to date of birth, sex, gender identity, sexual orientation, race, ethnicity, education, religious preference, and, as applicable, time in service, rank, and pay grade.

APPENDIX A. AUTHORIZING STATUTE

10 U.S.C. § 946. ART. 146. MILITARY JUSTICE REVIEW PANEL

(a) Establishment. The Secretary of Defense shall establish a panel to conduct independent periodic reviews and assessments of the operation of this chapter. The panel shall be known as the "Military Justice Review Panel" (in this section referred to as the "Panel").

(b) Members.

(1) Number of members. The Panel shall be composed of thirteen members.

(2) Appointment of certain members. Each of the following shall appoint one member of the Panel:

(A) The Secretary of Defense (in consultation with the Secretary of the department in which the Coast Guard is operating when it is not operating as a service in the Navy).

(B) The Attorney General.

(C) The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps.

(3) Appointment of remaining members by secretary of defense. The Secretary of Defense shall appoint the remaining members of the Panel, taking into consideration recommendations made by each of the following:

(A) The chairman and ranking minority member of the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(B) The Chief Justice of the United States.

(C) The Chief Judge of the United States Court of Appeals for the Armed Forces.

(4) Establishment of staggered terms. Notwithstanding subsection (e), members of the Panel appointed to serve on the Panel to fill vacancies that exist due to terms of appointment expiring during the period beginning on August 1, 2030, and ending on November 30, 2030, shall be appointed to terms as follows:

(A) Three members designated by the Secretary of Defense shall serve a term of two years.

(B) Three members designated by the Secretary of Defense shall serve a term of four years.

(C) Three members designated by the Secretary of Defense shall serve a term of six years.

(D) Four members designated by the Secretary of Defense shall serve a term of eight years.

(c) Qualifications of Members. The members of the Panel shall be appointed from among private United States citizens with expertise in criminal law, as well as appropriate and diverse experience in investigation, prosecution, defense, victim representation, or adjudication with respect to courts-martial, Federal civilian courts, or State courts.

(d) Chair. The Secretary of Defense shall select the chair of the Panel from among the members.

(e) Term; Vacancies.

(1) Term. Subject to subsection (b)(4) and paragraphs (2) and (3)of this subsection, each member shall be appointed for a term of eight years, and no member may serve more than one term.

(2) Vacancy. Any vacancy in the Panel shall be filled in the same manner as the original appointment. A member appointed to fill a vacancy in the Panel that occurs before the expiration of the term of appointment of the predecessor of such member shall be appointed for the remainder of the term of such predecessor.

(3) Availability of reappointment for certain members. Notwithstanding paragraph (1), a member of the Panel may be appointed to a single additional term if–

(A) the appointment of the member is to fill a vacancy described in subsection (b)(4); or

(B) the member was initially appointed–

(i) to a term of four years or less in accordance with subsection (b)(4); or

(ii) to fill a vacancy that occurs before the expiration of the term of the predecessor of such member and for which the remainder of the term of such predecessor is four years or less.

(f) Reviews and Reports.

(1) Initial review of recent amendments to ucmj. During fiscal year 2021, the Panel shall conduct an initial review and assessment of the implementation of the amendments made to this chapter during the preceding five years. In conducting the initial review and assessment, the Panel may review such other aspects of the operation of this chapter as the Panel considers appropriate.

(2) Sentencing data collection and report. During fiscal year 2020, the Panel shall gather and analyze sentencing data collected from each of the armed forces from general and special courts-martial applying offense-based sentencing under section 856 of this title (article 56). The sentencing data shall include the number of accused who request member sentencing and the number who request sentencing by military judge alone, the offenses which the accused were convicted of, and the resulting sentence for each offense in each case. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps shall provide the sentencing data in the format and for the duration established by the chair of the Panel. The analysis under this paragraph shall be included in the assessment required by paragraph (1).

(3) Periodic comprehensive reviews. During fiscal year 2024 and every eight years thereafter, the Panel shall conduct a comprehensive review and assessment of the operation of this chapter.

(4) Periodic interim reviews. During fiscal year 2028 and every eight years thereafter, the Panel shall conduct an interim review and assessment of such other aspects of the operation of this chapter as the Panel considers appropriate. In addition, at the request of the Secretary of Defense, the Panel may, at any time, review and assess other specific matters relating to the operation of this chapter.

(5) Reports. With respect to each review and assessment under this subsection, the Panel shall submit a report to the Committees on Armed Services of the Senate and the House of Representatives. Each report–

(A) shall set forth the results of the review and assessment concerned, including the findings and recommendations of the Panel; and

(B) shall be submitted not later than December 31 of the calendar year in which the review and assessment is concluded.

(g) Hearings. The Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers appropriate to carry out its duties under this section.

(h) Information from Federal Agencies. Upon request of the chair of the Panel, a department or agency of the Federal Government shall provide information that the Panel considers necessary to carry out its duties under this section.

(i) Administrative Matters.

(1) Members to serve without pay. Members of the Panel shall serve without pay, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Panel.

(2) Staffing and resources. The Secretary of Defense shall provide staffing and resources to support the Panel.

(j) Chapter 10 of Title 5. Chapter 10 of title 5 shall not apply to the Panel.

(Added Pub. L. No. 101-189, div. A, title XIII, §1301(c), Nov. 29, 1989, 103 Stat. 1574 ; amended Pub. L. No. 103-337, div. A, title IX, §924(c)(1), Oct. 5, 1994, 108 Stat. 2831 ; Pub. L. No. 104-106, div. A, title XV, §1502(a)(1), Feb. 10, 1996, 110 Stat. 502 ; Pub. L. No. 106-65, div. A, title X, §1067(1), Oct. 5, 1999, 113 Stat. 774 ; Pub. L. No. 107-296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314 ; Pub. L. No. 112-239, div. A, title V, §532, Jan. 2, 2013, 126 Stat. 1726 ; Pub. L. No. 114-328, div. E, title LXII, §5521, Dec. 23, 2016, 130 Stat. 2962 ; Pub. L. No. 115-91, div. A, title V, §531(k), Dec. 12, 2017, 131 Stat. 1386 ; Pub. L. No. 117-286, §4(a)(46), Dec. 27, 2022, 136 Stat. 4310 ; Pub. L. No. 118-31, div. A, title V, §532, Dec. 22, 2023, 137 Stat. 260.)

EDITORIAL NOTES

Amendments

2023–Subsec. (b)(4). Pub. L. No. 118-31, §532(a), added par. (4).

Subsec. (e). Pub. L. No. 118-31, §532(b), amended subsec. (e) generally. Prior to amendment, text read as follows: "Each member shall be appointed for a term of eight years, and no member may serve more than one term. Any vacancy shall be filled in the same manner as the original appointment."

2022–Subsec. (j). Pub. L. No. 117-286 substituted "Chapter 10 of Title 5" for "Federal Advisory Committee Act" in heading and "Chapter 10 of title 5" for "The Federal Advisory Committee Act (5 U.S.C. App.)" in text.

2017–Subsec. (f)(1). Pub. L. No. 115-91, §531(k)(1), substituted "fiscal year 2021" for "fiscal year 2020".

Subsec. (f)(2). Pub. L. No. 115-91, §531(k)(2), substituted "The analysis under this paragraph shall be included in the assessment required by paragraph (1)." for "Not later than October 31, 2020, the Panel shall submit to the Committees on Armed Services of the Senate and the House of Representatives through the Secretary of Defense a report setting forth the Panel's findings and recommendations on the need for sentencing reform."

Subsec. (f)(5). Pub. L. No. 115-91, §531(k)(3), added par. (5)and struck out former par. (5). Prior to amendment, text read as follows: "Not later than December 31 of each year during which the Panel conducts a review and assessment under this subsection, the Panel shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the results of such review and assessment, including the Panel's findings and recommendations."

2016–Pub. L. No. 114-328 amended section generally. Prior to amendment, section related to establishment, membership, and duties of Code committee.

2013–Subsec. (c)(2)(B), (C). Pub. L. No. 112-239 added subpar. (B) and redesignated former subpar. (B) as (C).

2002–Subsec. (c)(1)(B). Pub. L. No. 107-296 substituted "of Homeland Security" for "of Transportation".

1999–Subsec. (c)(1)(A). Pub. L. No. 106-65 substituted "and the Committee on Armed Services" for "and the Committee on National Security".

1996–Subsec. (c)(1)(A). Pub. L. No. 104-106 substituted "Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives" for "Committees on Armed Services of the Senate and House of Representatives".

1994–Subsec. (b)(1). Pub. L. No. 103-337 substituted "Court of Appeals for the Armed Forces" for "Court of Military Appeals".

STATUTORY NOTES AND RELATED SUBSIDIARIES

Effective Date of 2017 Amendment

Amendment by Pub. L. No. 115-91 effective immediately after the amendments made by div. E (§§5001-5542) of Pub. L. No. 114-328 take effect as provided for in section 5542 of that Act (10 U.S.C. 801 note); see section 531(p) of Pub. L. No. 115-91, set out as a note under section 801 of this title.

Effective Date of 2016 Amendment

Amendment by Pub. L. No. 114-328 effective on Jan. 1, 2019, as designated by the President, with implementing regulations and provisions relating to applicability to various situations; see section 5542 of Pub. L. No. 114-328 and Ex. Ord. No. 13825, set out as notes under section 801 of this title.

Effective Date of 2002 Amendment

Amendment by Pub. L. No. 107-296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security; see section 1704(g)of Pub. L. No. 107-296, set out as a note under section 101 of this title.

Termination of Reporting Requirements

For termination, effective Dec. 31, 2021, of provisions in subsec. (c) of this section requiring submittal of annual report to Congress; see section 1061 of Pub. L. No. 114-328, set out as a note under section 111 of this title.

Full Functionality of Military Justice Review Panel

Pub. L. No. 117-81, div. A, title V, §549E, Dec. 27, 2021, 135 Stat. 1726, provided that: "Not later than 30 days after the date of the enactment of this Act [Dec. 27, 2021], the Secretary of Defense shall establish or reconstitute, maintain, and ensure the full functionality of the Military Justice Review Panel established pursuant to section 946 of title 10, United States Code (article 146 of the Uniform Code of Military Justice)) [sic]."

APPENDIX B. MJRP MEMBERS' BIOGRAPHIES

Benes Z. Aldana is a retired U.S. Coast Guard Captain (O-6), became President and CEO of The National Judicial College (NJC) in 2017. He holds the historic distinction of being the first Asian Pacific American chief trial judge in the U.S. military, following roles as an appellate judge, trial judge, and prosecutor. He graduated from the Honors Program, receiving his B.A. in Political Science from Seattle University, and earned his J.D. from the University of Washington School of Law. Recently, he completed the Judicial Leadership Executive Program at Harvard Law School Executive Education.

Aldana served as chief counsel for the Legal Engagements Division at U.S. Africa Command (AFRICOM) in Stuttgart, Germany, where he worked with African militaries and international organizations to advance the rule of law and human rights. During his tenure, he developed AFRICOM's Rule of Law Pillars, a framework to guide military support for legal systems, and organized the first accountability colloquium for African military leaders, fostering discussions on rule of law and human rights in military operations.

As Chief Legal Officer for the Eighth Coast Guard District in New Orleans, Aldana led the Coast Guard's largest field legal office, covering 26 states and the Gulf of Mexico. His work combatting illegal fishing and environmental violations earned him the Department of Homeland Security Excellence Award. Following 9/11, he contributed to key anti-terrorism investigations at Guantanamo Bay and later, as a DOJ trial attorney, secured over $200 million in pollution response costs and penalties. His Coast Guard career also included commanding the Personnel Support Services Unit in Seattle and serving as Executive Officer of Base Seattle, supporting over 3,800 personnel. His military service earned him multiple honors, including the Department of Defense Meritorious Service Medal.

Appointed by the Secretary of Defense, he currently serves on the congressionally mandated Military Justice Review Panel, which is tasked with assessing and recommending improvements to the military justice system to ensure it operates fairly, effectively, and in alignment with constitutional principles and evolving legal standards.

In the legal community, Aldana is known for his advocacy for diversity and inclusion through leadership roles in the ABA and other associations. He has chaired the ABA Commission on Sexual Orientation and Gender Identity and served as past president of both the National Asian Pacific American Bar Association (NAPABA) Judicial Council and the Asian Bar Association of Washington. His other contributions to the ABA include chairing the Solo, Small Firm and General Practice Division, serving as assembly speaker for the Young Lawyers Division, and membership in the ABA House of Delegates, Standing Committee on Judicial Independence, and Rule of Law Initiative Board.

His work has earned him numerous awards, including the Daniel Inouye Trailblazer Award, NAPABA's "Best Lawyer Under 40," the ABA Outstanding Young Military Service Lawyer Award, and recently, the ABA Spirit of Excellence Award. In 2024, under his leadership, the NJC became the first organization to receive the prestigious ABA Justice and Rule of Law Award.

Under Aldana's transformative leadership, the NJC has seen unprecedented growth, including record-breaking enrollment in 2020 driven by innovative online programming that addressed challenges like the COVID-19 pandemic and social justice issues. His initiatives include the pioneering Judicial Academy for aspiring judges, from which 32 graduates have ascended to the bench—more than half of them women and people of color. He has also introduced courses on contemporary topics like artificial intelligence, climate science, and anti-racism, demonstrating his commitment to evolving judicial education to meet modern needs.

Steven M. Barney is a retired Captain with the U.S. Navy, with over 30 years of practice specializing in criminal justice. After graduating from Saint Michael's College, Captain (Retired) Barney graduated from Suffolk University Law School in 1990. He is a 2001 graduate of the U.S. Navy War College.

During his distinguished military career, he served in nearly every level of judge advocate service to include Fleet Judge Advocate, Staff Judge Advocate, and Executive Assistant to the Judge Advocate General of the Navy. Following his military service, he served as General Counsel and Professional Staff Member of the U.S. Senate Committee on Armed Services from 2013 to 2017. He most recently served as Commissioner of the National Commission on Military, National, and Public Service.

Barney is an advocate for adults with intellectual and developmental disabilities, and with autism. He served as chief executive officer of a nonprofit that supports disabled adults live independently, with dignity. He served on the board of directors of The Arc of Plymouth and Upper Cape Cod, and of Living Independently Forever, Inc. in Massachusetts. As a brother of a person with disabilities he engages in outreach to support siblings of people with disabilities.

Kirsten V.C. Brunson is a retired Colonel with the U.S. Army, with over 23 years of practice specializing in criminal justice and criminal and administrative investigations. She has presided over 180 felony and misdemeanor criminal trials.

In 1987 she graduated from the University of Maryland with a degree in Criminology and in 1991 she graduated from the University of California-Los Angeles Law School. During her career, she has served as a legal advisor to the U.S. Army Criminal Investigative Division; Deputy Chief, Defense Appellate Division; Regional Defense Counsel; and, Circuit Judge. In addition, she is a past chair of the Military & Veterans Committee, National Association of Women Judges, a member of the Military Women's Foundation Hall of Fame, and was awarded the Superior Public Service Medal for her volunteer work with several military family support organizations.

John Ewers is a (fourth generation) Washington, D.C. native and a Gonzaga College High School graduate. Major General Ewers was commissioned a Marine second lieutenant in 1984 and certified as a judge advocate in 1986. His early career included service as a prosecutor and defense counsel. From 1996-99, he presided over more than 500 courts-martial as a military trial judge.

As a senior officer, Major General Ewers led the DOD's busiest military justice litigation office; served as SJA to 1st Marine Division (OIF I) and I Marine Expeditionary Force; and was a Circuit Military Judge. His non-legal service included command of a Recruit Training Battalion and leadership of a Provincial Reconstruction Team in Al Anbar, Iraq. He was also a Fellow at the Center for Strategic and International Studies. Before being promoted to major general in 2014 and serving as the SJA to the Commandant of the Marine Corps, he was the Deputy SJA to CMC and the Assistant Judge Advocate General of the Navy for Military Justice.

In 2018, after 34 years of service, Major General Ewers retired from the Marine Corps. His military awards include the Distinguished Service Medal, four Legions of Merit, the Bronze Star, four Meritorious Service Medals, the Combat Action Ribbon, and Purple Heart.

Since retirement, Major General Ewers has taught trial advocacy at American University's Washington College of Law as an adjunct professor, served as the (pro bono) General Counsel of the Iwo Jima Association of America and provided pro bono services in immigration cases.

Major General Ewers received a B.A. in philosophy/political science from the University of Delaware, a J.D., *cum laude*, from Georgetown University Law Center, and a Master of Laws as an honor graduate of the Judge Advocate General School, U.S. Army. He is also a distinguished graduate of the Marine Corps Command and Staff College. He resides in Washington D.C. with his wife, Elisa Catalano, and has two sons, John Scalley Ewers and Lloyd Wills Ewers.

Will A. Gunn is the Vice President for Legal Affairs and General Counsel for the Legal Services Corporation (LSC). In 2009, he was appointed by President Barack Obama as the General Counsel for the U.S. Department of Veterans Affairs, a position in which he served for five years. Subsequently, he was an attorney with a solo law practice, assisting military members facing adverse actions.

In 1980, he graduated from the U.S. Air Force Academy with military honors and in 1986 he graduated cum laude from Harvard Law School, where he served as President of the Harvard Legal Aid Bureau. He also holds an LL.M in environmental law from George Washington University, a Masters in National Resource Strategy from the National Defense University, and a Masters in Ministry (with a focus on Leadership) from Lancaster Bible College.

Will served as an active-duty Air Force officer and in 2002, he was promoted to the rank of colonel. In 2003, he was selected as the first-ever Chief Defense Counsel for the DoD Office of Military Commissions. In that role, he established an office that defends detainees brought before military commissions at the Guantanamo Prison Camp. He is a former White House Fellow and after retiring from the Air Force in 2005, he served as President and CEO of Boys & Girls Clubs of Greater Washington, DC. He has chaired the American Bar Association (ABA) 2021 National Law Day commemoration, the ABA Commission on Racial and Ethnic Diversity and the ABA Commission on Youth at Risk.

He has served on several boards, is a deacon in his local church, and has received numerous awards including an honorary doctorate from Nova Southeastern University and the Harvard Legal Aid Bureau's Outstanding Alumni Award.

Elizabeth L. Hillman is president and CEO of the National 9/11 Memorial & Museum, which remembers and honors the nearly 3,000 victims of the September 11, 2001 terrorist attacks and shares the inspiring story of those who risked their lives to save others. Before coming to the 9/11 Memorial & Museum, Hillman was the 14th president of Mills College, the first women's college west of the Rockies. At Mills, she reduced tuition, spearheaded a transformative merger with Northeastern University, and led the college through the COVID-19 crisis. Earlier, Hillman served as provost and academic dean at the University of California Hastings College of the Law (now UC Law San Francisco), where she was also a professor of law, and as a law professor at Rutgers. She began her career as a space operations officer in the U.S. Air Force and served on active duty for seven years, including two as an instructor of history at the U.S. Air Force Academy.

She holds a BS in electrical engineering from Duke University, an MA in history from the University of Pennsylvania, a JD from Yale Law School, and a PhD in history from Yale University. Dr. Hillman serves on the board of the Alliance of Downtown New York and is a member of the American Law Institute, Council on Foreign Relations, and the American Academy of Arts and Sciences.

Bruce E. Kasold was appointed as a Judge of the United States Court of Appeals for Veterans Claims (USCAVC) by the President of the United States on December 13, 2003. Judge Kasold took the oath of office on December 31, 2003. He became Chief Judge on August 7, 2010 and served in that role until August 6, 2015. In 2016, he entered

retired-senior status, subject to recall. He subsequently served almost two years as the Chief Operating Officer and Acting President of the Pentagon Federal Credit Union Foundation, which assists veterans in need. In August 2020 he joined FINRA (Financial Industry Regulatory Authority) as a senior hearing officer, retiring in April 2024. He remains a senior judge, subject to recall on the USCAVC.

Before his appointment to the bench, Judge Kasold served as Chief Counsel for the Secretary of the Senate and Senate Sergeant at Arms. In that non-partisan position, he advised Senate leaders on general legal matters and issues at the forefront of the nation's political landscape, including the electoral college, impeachment of the President, and historical management of an evenly divided Senate. Judge Kasold also served as Chief Counsel for the Senate Committee on Rules and Administration, where his work included marshaling the Senate's largest series of campaign finance hearings in a decade and conducting an investigation of allegations of state election fraud.

Prior to working in the Senate, Judge Kasold was a commercial and government contracts litigation attorney with the law firm Holland & Knight. Judge Kasold is also a retired United States Army Lieutenant Colonel, with service in the Air Defense Artillery and Judge Advocate General's Corps.

Judge Kasold earned a Bachelor of Science degree from the United States Military Academy, and a Juris Doctor, cum laude, from the University of Florida. He also holds an LL.M. from Georgetown University and an LL.M. equivalent from the Judge Advocate General's Graduate School. He is admitted to practice before the United States Supreme Court, the Florida Supreme Court, and the District of Columbia Court of Appeals. He is a member of the Florida Bar, the District of Columbia Bar, the Federal Bar Association, and the Order of the Coif. Judge Kasold is married to the former Patricia Ann Gatz.

Robert G. Kenny is a partner in the Transactional Group of Hoagland, Longo, Moran, Dunst, and Doukas, and a member of the firm's Executive Committee, charged with management and leadership, as well as the professional oversight of the firm's attorneys.

Bob's practice focuses on the defense of general negligence matters, including professional liability cases involving the defense of lawyers, architects, engineers, accountants, doctors, dentists, nurses, hospitals, nursing homes, long term care facilities, assisted living facilities and skilled nursing facilities. He also represents various professionals before the State Licensing Boards and credential review boards. Further, his vast litigation experience includes defending products liability matters, construction, and labor and EEO matters. Bob served as a Municipal Attorney, and his experience includes many investigations with regard to allegations of discrimination in the workplace, harassment, hiring and firing of employees, and related labor and employment matters. He has represented state, county and municipal entities in litigated matters. He also concentrates on complex business disputes and recently obtained a multi-million-dollar verdict in favor of an oppressed shareholder. In addition, Bob focuses on estate litigation and most recently successfully defended an estate valued at $20 million.

Prior to joining the firm, Bob served a four-year active duty tour with the Judge Advocate General's Corps of the United States Air Force. He served as an Assistant Staff Judge Advocate, Area Defense Counsel and Circuit Trial Counsel. He was responsible for advising commanders on military, federal and state criminal and civil law matters including military justice, operations law, law of armed conflict, rules of engagement, mobilization, deployment, foreign criminal jurisdiction, standards of conduct, and federal labor and employment law. Upon separation from active duty, he remained a member of the United States Air Force Reserve. He retired from the Air Force in 2015 as a Major General, serving as the Mobilization Assistant to the Judge Advocate General of the United States Air Force, Headquarters United States Air Force, Washington, D.C. In 2014 he performed the Duties of The Judge Advocate General of the Air Force, the only Reserve Officer ever to do so.

In his U.S. Air Force position, Major General Kenny was responsible for the professional oversight of more than 900 Reserve Judge Advocates and Paralegals in the Judge Advocate General's Corps, assigned to more than 200 offices at every level of command. He was responsible for the development of Corps-wide policies affecting all Air Force Reserve component members, and managed the recruitment, training, utilization, and deployment of Reserve legal forces worldwide. Further, he assisted the Judge Advocate General in the professional supervision and management of 4,400 Active- Duty, Guard, and Reserve personnel assigned to the Judge Advocate General's Corps. In addition to overseeing a vast array of military justice, international, operational law, and civil law functions, including litigation affecting Air Force interests, he provided legal advice to the Chief of the Air Force Reserve and Commander, Air Force Reserve Command. He was deployed on four occasions to the Persian Gulf area of operational responsibility in support of Operation Southern Watch, and was deployed to a classified location for Operation Enduring Freedom. He received the Reginald C. Harmon Award as the 1998 Outstanding Reserve Judge Advocate of the United States Air Force.

He served as an adjunct member of the Judge Advocate General's School faculty as an instructor at the Advanced Trial Advocacy Course, the Trial/Defense Advocacy Course, and the Total Force Operations Law Course.

Steven H. Levin is a retired US Army Lieutenant Colonel and former Assistant United States Attorney with over 30 years of practice in criminal justice. After graduating from the University of North Carolina at Chapel Hill, he attended Wake Forest University School of Law during which time he participated in both the university's ROTC program and the North Carolina Army National Guard. Steve is also a graduate of the US Army War College.

During his active duty military career, Steve served as a trial counsel, trial defense counsel, and government appellate counsel. As an Army reservist, Steve taught in the criminal law department at the Judge Advocate General's Legal Center and School. He also served as a military judge at both the trial and appellate levels for ten years, presiding over dozens of felony trials and authoring dozens of appellate decisions for the Army Court of Criminal Appeals.

Upon his retirement, Steve was awarded the Legion of Merit.

In addition to his day job in the Investigations and White-Collar Defense Practice Group at Steptoe LLP, Steve is active in his community. He previously chaired the Criminal Injuries Compensation Board for the State of Maryland and currently serves as an Adjunct Professor at the University of Maryland Francis King Carey School of Law, where he teaches Military Justice.

Steve has a lovely wife, Dr. Jill Baldinger, two mostly well-behaved children, Julia and David, and a dog named Summer.

Tara A. Osborn is a retired Army colonel and military lawyer who served as the 21st Chief Trial Judge of the U.S. Army. In that position, she presided over felony criminal trials, which included capital cases, oversaw the Army's worldwide judicial operations, and led all active duty and reserve judges of the Army Trial Judiciary. Before her appointment to the trial bench, she completed a U.S. Army War College fellowship as Special Counsel to the Assistant Attorney General, Civil Division, at the U.S. Department of Justice.

Colonel Osborn retired from the military in 2017, having served nearly 30 years on active duty, with over two decades of trial experience and with significant leadership experience in interagency policy and field operational assignments. She served at all levels of the Army Trial Judiciary; as a strategic planner on the Joint Staff in Washington, DC; Deputy Staff Judge Advocate and Staff Judge Advocate of the forward-deployed 2nd Infantry Division in Korea; litigation attorney with the U.S. Army Litigation Division and the Department of Defense

Office of General Counsel; Chief of Criminal Law for III Corps and Fort Hood, Texas, and prosecutor with 1st Armored Division in Germany. She is a combat veteran of the Persian Gulf War with service in Iraq as an armored brigade legal advisor and operations officer. Her awards include the Legion of Merit, the Bronze Star Medal, the Valorous Unit Award, and the U. S. Department of State Superior Honor Award.

After retiring from the Army, she has been an active leader in the American Bar Association (ABA). She is the ABA National Military Judicial Fellow, an ABA President-appointed judicial advisor to the Standing Committee on Ethics and Professional Responsibility, a Fellow of the American Bar Foundation, and Past Chair of the ABA's National Conference of Specialized Court Judges. In 2018, she joined the faculty of the National Judicial College at the University of Nevada where she continues to teach military law, jurisdiction, and capital litigation to judges from across the country. She holds degrees from the University of South Carolina (B.A. and J.D.), the University of Virginia (M.P.A.), and the U.S. Army Judge Advocate General's School (LL.M.), and Professional Certificates in Judicial Development and in Judicial Executive Leadership from the National Judicial College and Harvard Law School.

James Robert Redford is a judge on the Michigan Court of Appeals. Judge Redford has served on the Court since his appointment in 2018 and his subsequent election in 2020.

Prior to his service on the Court, he was the Director of the Michigan Veterans Affairs Agency and previously served as Michigan Governor Rick Snyder's Chief Legal Counsel from January 2015 until February 2016. Prior to serving in Governor Snyder's administration, Judge Redford was a Kent County Circuit Judge from 2003 until 2015. Before being elected to the trial bench, he was in private practice with Plunkett Cooney, served as an Assistant United States Attorney in the U.S. Attorney's Office for the Western District of Michigan, and was on active duty in the United States Navy Judge Advocate General's Corps for five years. In addition to his active duty military service, he served in the Navy Reserves for twenty-three years in a variety of assignments including commanding officer of the Navy Reserve Trial Judiciary and five years as a trial judge in the Navy & Marine Corps Trial Judiciary. Judge Redford transferred to the retired–reserve list in August 2012 at the rank of Captain.

Judge Redford has been active in many bar and community organizations. He has served on and been chair of the Michigan Supreme Court Model Civil Jury Instructions Committee. He is an Eagle Scout and has been a member of the Boy Scouts of America for over fifty years. He has also served on several nonprofit boards including the Boy Scouts of America, Gerald R. Ford Council and the West Michigan Shores Council of the Girl Scouts of America.

Judge Redford received his Bachelor of Science in Business Administration from John Carroll University in Cleveland, Ohio in 1982, and his Juris Doctor from the University of Detroit School of Law in 1985.

Bryan Schroder is currently retired. From 2017-2021, he was the United States Attorney for the District of Alaska. He led Alaska's federal litigators through a period of complex and unprecedented challenges, overseeing improvements to the delivery of justice to rural Alaska, and directing the U.S. Attorney's Office's response to the COVID-19 epidemic in Alaska.

In addition to these responsibilities, CAPT(R) Schroder was chosen for the Attorney General's Advisory Committee (AGAC), a select group of U.S. Attorneys that took on the most important and pressing issues to the Department of Justice. As the only AGAC member from the West Coast, CAPT(R) Schroder was assigned specific coordination duties with DOJ's Environment and Natural Resources Division, capitalizing on his experience as an environmental crimes prosecutor, and maritime & environmental law attorney in the U.S. Coast Guard.

Prior to becoming U.S. Attorney, CAPT Schroder spent 12 years as an assistant U.S. attorney leading investigations and prosecutions into major violations of federal law, including violent crime, fraud, tax evasion, environmental crimes, and fisheries violations. Before the Department of Justice, he had a 24-year career in the U.S. Coast Guard – both at sea, conducting fisheries patrols in the Bering Sea, and as an attorney. He retired at the rank of Captain. During his service, he was assigned to the U.S. State Department at the U.S. Mission to the United Nations (USUN), where he worked with the UN Security Council and was the U.S. negotiator on Security Council Resolution 1379 (Children and Armed Conflict). He is also a plank holder at U.S. Northern Command, assigned as NORTHCOM's first Deputy Staff Judge Advocate in 2002.

CAPT(R) Schroder is also an experienced appellate advocate, arguing cases to the 9th Circuit Court of Appeals and the EPA Board of Environmental Appeals. He currently serves as Co-chair of the Alaska Bar Association's Arctic Law Section.

CAPT(R) Schroder graduated from the U.S. Coast Guard Academy in 1981 and the University of Washington School of Law in 1991.

Jeri K. Somers is an arbitrator and mediator, focusing on the areas of government contracts matters, construction matters, and other industry disputes. Judge Somers is also a member of the Military Justice Review Panel, established pursuant to 10 U.S.C. § 946, and the Department of State Foreign Services Grievance Board.

Prior to retiring from the U.S. Civilian Board of Contract Appeals in 2021, Judge Somers presided over high-stakes trials with millions of dollars at stake, and issued decisions in cases arising under the Contract Disputes Act, and other unique statutory schemes. As chair, she was also responsible for the management of the CBCA, which has worldwide jurisdiction, and its budget. Judge Somers is widely known and respected in the government contracts community. Before her appointment as chair of the CBCA, she served as vice chair from 2008 until 2017. Prior to the creation of the CBCA in 2007, Judge Somers, served as an administrative judge on the Department of Transportation Board of Contract Appeals.

Judge Somers' impressive record across her 35 years in legal practice began when she served in the US Air Force as a lawyer in the Judge Advocate General Corps. While on active duty, Judge Somers provided legal advice on international law of war issues, served as a prosecutor and defense counsel, and ultimately litigated cases before the Armed Services Board of Contract Appeals.

After transitioning to the Reserves, Judge Somers served in the US Department of Justice (DOJ)'s Commercial Litigation Branch, where she litigated on behalf of the US in the Court of Federal Claims and in appeals before the United States Court of Appeals for the Federal Circuit, including some of the most high-profile government contracts cases of the era. She then spent six years as an AUSA in the Eastern District of Virginia (Alexandria division), litigating all manner of disputes, including one of the last "Scanwell" bid protest cases in US District Court. She also worked as a lawyer in private practice before her appointment to the DOT Board in 2003. Meanwhile, Judge Somers served for many years as the Staff Judge Advocate for the DC Air National Guard and provided critical guidance to the Commanding General during the attacks of September 11, 2001. Prior to retiring in 2008, with the rank of Lieutenant Colonel, Judge Somers served as a military judge in the USAF Reserves.

She has been a professorial lecturer in law at the George Washington University Law School since 2009, where she also serves on the school's Government Contracts Advisory Board, and as an adjunct professor at the American University Washington College of Law since 2018. She is actively involved in the American Bar Association's Public Contract Law Section.

APPENDIX C. PROFESSIONAL STAFF

This list includes current and former professional staff.

Mr. Louis P. Yob, Director
Mr. Michael D. Libretto, Deputy Staff Director
Ms. Jennifer D. Campbell, Chief of Staff
Ms. Gina M. Acevedo, Attorney-Advisor
Ms. Magdalena A. Acevedo, Attorney-Advisor
Ms. Stacy A. Boggess, Senior Paralegal
Ms. Cameike N. Cecil, Senior Paralegal
Ms. Breyana N. Franklin, Communication Specialist
Ms. Theresa A. Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda L. Hagy, Senior Paralegal
Mr. Joseph M. Jennings, Attorney-Advisor
Mr. R. Chuck Mason, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Mr. Blake A. Morris, Senior Paralegal
Ms. Meghan Peters, Attorney-Advisor
Ms. Stayce D. Rozell, Senior Paralegal
Ms. Terri A. Saunders, Attorney-Advisor
Ms. Rebekah Stuyvesant, Administrative Officer
Ms. Kate Tagert, Attorney-Advisor
Ms. Eleanor Magers Vuono, Attorney-Advisor
COL Jeff Bovarnick (former Director)
Mr. Dale Trexler (former Chief of Staff)

COMMITTEE CONSULTANTS

Dr. Alice Falk, Editor
Ms. Laurel Prucha Moran, Graphic Designer
Dr. William "Bill" Wells, Criminologist

STUDENT INTERNS

Evie Ankele
Yonah Berenson
Henry Bieze
Annabelle Duval
Rachael Flannery
Mya Koffie
J Rivera
Abigail Sackett
Vanessa Strobbe
Connor Wasik

APPENDIX D. MJRP BACKGROUND AND UCMJ HISTORY

The Military Justice Review Panel (MJRP) is a permanent blue-ribbon panel chartered to conduct comprehensive reviews of the Uniform Code of Military Justice (UCMJ) every eight years and interim reviews at the midpoint of each eight-year cycle. Article 146 of the UCMJ, enacted as part of the Military Justice Act of 2016 (MJA16), directed the Secretary of Defense (SecDef) to establish the MJRP in response both to increased public interest in military justice and to congressional interest in securing periodic assessments from an independent body composed of experts with extensive experience in military law and criminal justice.[1]

The Military Justice Review Group (MJRG), which was created by the SecDef in response to a request from senior uniformed leadership, completed a comprehensive review of the UCMJ in 2015. The MJRG recommended changes to enhance fairness and efficiency, strengthen the structure of the military justice system, increase transparency and independent review of military justice, expand victims' rights, reform sentencing, and incorporate best practices from federal criminal proceedings.[2] It recognized the need for expert, independent assessments of military justice, but also recommended that such periodic reviews not be conducted so frequently that they create instability in the practice of military law.[3] From that recommendation, Congress authorized the MJRP in the National Defense Authorization Act for Fiscal Year 2017.[4]

Delays in establishing the MJRP hampered the start of the periodic reviews and assessments mandated by Congress. The SecDef did not provide the names of Panel appointees to the General Counsel of the Department of Defense (DoD GC) until April 13, 2022, nearly six years after Congress directed the Panel's establishment. More than five months later, the Panel was officially sworn in. It was not until August 28, 2023, that DoD, required by statute to provide staffing and resources to support the Panel, hired the MJRP's first dedicated staff member, a civilian executive director. The MJRP's permanent staff of attorneys, paralegal specialists, administrative support, and data personnel are still being assembled through ongoing hiring efforts as we issue this first Comprehensive Review.

Shifts in the nation's understanding of rights and due process have reshaped how military law has pursued its fundamental goals and continue to evolve today. In 1775, the Second Continental Congress adopted the Articles of War and set out discipline, efficiency, and justice as the three goals of the military justice system.[5] During the nearly 250 years since, military justice has evolved to more fully realize these interrelated purposes.[6] The reforms of the past decade have emphasized trust and transparency as the military seeks to deter misconduct and ensure accountability in all matters. Today, military law is grounded in the knowledge that a disciplined force depends on laws and regulations that are fair and recognized as such by the American public and by those who serve.[7]

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1 10 U.S.C. § 946; National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 [FY17 NDAA] § 5504, 130 Stat. 2000, 2961 (2016) and subsequent amendments. H.R. Rep. 114-840 (Conference Report to Accompany S. 2943) (2016) (describing the purpose of the reforms in the Military Justice Act of 2016), *available at* https://dair.nps.edu/bitstream/123456789/3856/1/SEC809-RL-16-0487.pdf.

2 Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations 4 (Dec. 22, 2015) [MJRG Report], *available at* https://ogc.osd.mil/Links/Military-Justice-Review-Group/.

3 *Id*. at 1024, 1257.

4 FY17 NDAA, *supra* note 1.

5 MJRG Report, *supra* note 2, at 16.

6 H.R. Rep. No. 114–537 (Report of the House of Representatives Committee on Armed Services on H.R. 4909), at 5 (2016) (describing the purpose of the reforms in the Military Justice Act of 2016 as reflecting the "sustained commitment to making the military justice system just, efficient, and effective"), *available at* https://www.congress. gov/114/crpt/hrpt537/CRPT-114hrpt537.pdf.

7 MJRG Report, *supra* note 2, at 16.

Good order and discipline within an efficient system were the primary focus of military justice in the 18th and 19th centuries.[8] In the earliest years of the nation, the rights of the American soldier were of minimal importance compared to the need for effective control over those who served.[9] Starting in the 20th century, the law evolved to provide greater due process protections for Service members.[10] The most significant reforms of the last century were in response to abuses within the military justice system. The execution of Black soldiers after riots in Houston, Texas, during World War I led to the creation of appellate boards of review and other legislative reforms that improved the fairness of military proceedings.[11]

Nearly two million American Service members were court-martialed during World War II, leading to public perceptions of widespread unfairness. In 1946, the War Department created an Advisory Committee on Military Justice. After hearing testimony from military officers, generals, and judge advocates, the committee concluded that the system lacked trained legal officers, provided ineffective defense counsel, imposed excessive sentences, and performed inadequate pretrial investigations, leading Congress to adopt the Uniform Code of Military Justice in 1950.[12]

The UCMJ explicitly recognized justice as a critical purpose of military law, and the need for fairness has informed every debate about it since.[13] When millions of Americans were drafted during the Korean War, an Army review committee acknowledged that protecting individual rights would promote public confidence in military justice.[14] A decade later, during the Vietnam War, Army Chief of Staff General William Westmoreland appointed a committee that found, "To the extent that military justice is administered fairly and impartially—that is to say, to the extent that military justice works—morale and discipline will be maintained and enhanced."[15]

In some respects, Service members now have greater protections than their civilian counterparts, in recognition of the unique military setting in which Service members—often young and far from family and friends—find themselves when accused of a crime.[16] Article 31 of the UCMJ—enacted 16 years before the Supreme Court decided *Miranda*—requires rights advisements for Service members even when they are not in custody.[17] Accused Service members have received free military defense counsel for all offenses since 1950, 13 years before *Gideon v.*

8 Harry M. Ward, George Washington's Enforcers: Policing the Continental Army (2006), 35; Letter from John Adams to James Warren, Sept. 25, 1776, Founders Online, https://founders.archives.gov/documents/ Adams/06-05-02-0020.

9 Jonathan Lurie, Military Justice in America: The U.S. Court of Appeals for the Armed Forces, 1775–1980 1 (1992).

10 MJRG Report, *supra* note 2, at 19 (citing *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring, recognizing that the modern military justice system is "notably more sensitive to due process concerns than the one prevailing through most of our country's history")).

11 Fred L. Borch, *Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917–1920*, Army Law., March 2017, at 1–5.

12 "Report of War Department Advisory Committee on Military Justice" 4 (Dec. 13, 1946), *available at* https://tile.loc.gov/storage-services/service/ll/llmlp/report-war-dept-advisory-committee/report-war-dept-advisory-committee.pdf; Charles Elston, *Report to Accompany H.R. 2575*, Report No. 1034, 80th Cong., 1st sess. (July 22, 1947), *available at* https://tile.loc.gov/storage-services/service/ll/llmlp/Vol-I_HR-80-1034/Vol-I_HR-80-1034.pdf.

13 Lurie, *supra* note 9, at 127.

14 Ad Hoc Committee to Study the Uniform Code of Military Justice, *Report to the Hon. William R. Brucker, Secretary of the Army* 2 (Jan. 18, 1960), *available at* https://tile.loc.gov/storage-services/service/ll/llmlp/ Powell_report/Powell_report.pdf.

15 Committee for the Evaluation of the Effectiveness of the Administration of Military Justice, *Report to General William C. Westmoreland, Chief of Staff, U.S. Army* 6–7 (June 1, 1971), 6-7, *available at* https://tile.loc.gov/storage-services/service/ll/llmlp/Report_General-Westmoreland/Report_General-Westmoreland.pdf.

16 MJRG Report, *supra* note 2, at 18.

17 10 U.S.C. § 831 (Art. 31(b), UCMJ); Ronald K. Van Wert, *Right to Counsel: Miranda and the Military*, 19 Hastings L. J. 1441 (1968).

Wainwright applied less sweeping protections for civilians.[18] The military victims' counsel programs, created to protect victims' legal rights, are regarded as a model for civilian programs.[19]

18 *Lawyer Counsel in Special Courts-Martial*, 23 Wash. & Lee L. Rev. 142, 143 (1966).

19 Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Report on tour lengths and rating chain structure for Services' Special Victims' Counsel/victims' legal counsel (SVC/VLC) programs 2 n.3 (Aug. 10, 2022) ("SVC/VLC program managers routinely present the details of the program at bar association events throughout the country"), *available at* https://dacipad.whs.mil/images/Public/08-Reports/10-DAC-IPAD_SVC-VLC_Report_20220815_Final_ Complete.pdf.

APPENDIX E. CURRENT DOD MILITARY JUSTICE DATA COLLECTION

Limitations and Criticisms of Military Justice Data Collection

In October 2023, the Military Justice Review Panel (MJRP) requested from the Services a subset of information from the 155 data fields that must, by Department of Defense (DoD) policy, be collected for every case with preferred charges.[1]

The Services could not provide much of the information sought and explained that limited staff resources and inadequate database capabilities made it difficult to answer the requests for information (RFIs). Responding to some of the RFIs would reportedly have required tremendous time and the manual review of hundreds of individual records of trial. For example, the Army and Air Force could not respond to a question about the number of days between certification of the record of trial and publication of trial records on the docket. The Army explained that because this information exists in two separate databases, answering the question would require time-consuming analysis of more than 1,500 individual cases.[2] As a result, the MJRP could not assess whether the Army or Air Force complies with DoD policy that requires publication of trial documents within 45 days of certification of the record of trial.[3]

The Services also acknowledged that some of the reported data contain errors, largely due to mistakes made by those entering information into the databases.[4] Furthermore, most information about criminal investigations is not collected in military justice databases and must instead be obtained from law enforcement agency databases.

DoD's inadequate data collection has been the subject of numerous independent studies and reports:

- In 2015, the Military Justice Review Group echoed criticism from the Response Systems Panel about the difficulty of gathering and analyzing military justice data.[5]
- The Judicial Proceedings Since FY 2012 Amendments Panel (JPP) highlighted DoD data deficiencies in multiple reports. The April 2016 *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* described the difficulty of assessing sexual assault cases in the military because DoD does not collect sufficient detail about dispositions, charges, outcomes, and punishments.[6]
- In 2019, a Government Accountability Office (GAO) report to Congress found that the Services "do not collect and maintain consistent information about race and ethnicity in their investigations, military justice,

1 The requests for information, and the Service responses, are located at Appendixes F, G, K, L, M, N, R, and S to this Report. For the 155 data fields required by DoD policy, see Memorandum from Dep't of Def. General Counsel to Secretaries of the Military Departments, *Military Justice Case Management, Data Collection, and Accessibility Standards* IV.B (Jan. 13, 2023) [DoD Article 140a Standards].

2 *See* Army and Air Force Responses to Question A-4, MJRP RFI on Article 140a, UCMJ (Oct. 30, 2023), *available at* Appendix F.

3 DoD Article 140a Standards, *supra* note 1.

4 *See* Service Responses to MJRP RFIs on Article 140a, *available at* Appendix F. For additional examples of the Services' difficulties producing military justice data, see descriptions in Chapters 1, 3, and 4 of this Report.

5 Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations 36 (Dec. 22, 2015) [MJRG Report], *available at* https://ogc.osd.mil/Links/Military-Justice-Review-Group/.

6 Judicial Proceedings Panel, Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses 4 (April 2016), *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_ Reports/ 01_JPP_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf.

and personnel databases," adding: "This limits the military services' ability to collectively or comparatively assess these demographic data to identify any racial or ethnic disparities in the military justice system within and across the services."[7]

- In 2020, the DAC-IPAD issued a *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military*, which contained multiple recommendations for improving data collection practices.[8]
- In 2021, the 90-Day Independent Review Commission on Sexual Assault in the Military (IRC) found that "DoD needs to improve data collection, including qualitative research and quantitative survey tools[.]"[9]
- In 2022, Deputy Secretary of Defense Kathleen Hicks established an Internal Review Team (IRT), which concluded:

> Effective oversight and transparency cannot be accomplished using current data collection methods. Inadequate data collection, lack of analysis, and lack of feedback for all participants, at all critical nodes in the investigative and military justice systems, impede oversight and transparency. Without complete and consistent data collection, commanding officers do not have an accurate sight-picture of investigative and military justice outcomes across their organizations. As a result, commanding officers are unable to make data-informed decisions and take data-informed corrective actions to address anomalies. . . . [I]ncomplete data is not helpful in providing an understanding of where problems may lie in an organization, or how to solve them.[10]

- In May 2024, GAO issued "Military Justice: Increased Oversight, Data Collection, and Analysis Could Aid Assessment of Racial Disparities," a report recommending that DoD improve data collection and analysis, designate an office to oversee related efforts, and comprehensively assess the military justice process to identify areas of possible disparity, among other actions.[11]

DoD Initiatives Under Way: Section 547 and Individual Service Databases

On December 23, 2022, the General Counsel of the Department of Defense (DoD GC) submitted three plans to Congress to improve data collection as directed by Section 547 of the National Defense Authorization Act for Fiscal Year 2022.[12] The plans propose development of a single document management system for DoD but will limit

7 U.S. Gov't Accountability Office, Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities 22 (May 2019), *available at* https://www.gao.gov/assets/700/699380.pdf.

8 Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military (Dec. 2020), *available at* https://dacipad.whs.mil/images/Public/08Reports/09_DACIPAD_RaceEthnicity_Report_20201215_Web_Final.pdf.

9 Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military 32 (July 2021), *available at* https://media.defense.gov/2021/Jul/02/2002755437/ -1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF.

10 U.S. Dep't of Defense, *Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems* 23 (Aug. 31, 2022), *available at* https://media.defense.gov/2023/Jun/08/2003238260/-1/-1/1/IRT-REPORT.PDF.

11 U.S. Gov't Accountability Office, Military Justice: Increased Oversight, Data Collection, and Analysis Could Aid Assessment of Racial Disparities (May 23, 2024), *available at* https://www.gao.gov/ products/GAO-24-106386.

12 Memorandum from Dep't of Def. General Counsel to Secretaries of the Military Departments, *Plans Required by Section 547 of the National Defense Authorization Act for Fiscal Year 2022* (Dec. 23, 2022).

data collection to a subset of military justice information. Data will be collected only in cases involving at least one of four "qualifying" events: (1) imposition of nonjudicial punishment; (2) preferral of charges; (3) imposition of pretrial confinement; or (4) a military judge's action pursuant to Article 30a, UCMJ.

These are significant limitations, because criminal allegations often do not involve any of these four "qualifying" events. The DoD GC delegated to the Military Justice Support Group within the Defense Legal Services Agency the responsibility for developing uniform standards for this data collection, in coordination with working groups from the Services. DoD has not published a timeline for when these plans might be implemented or determined how they will be funded. Some uniformed senior leaders have voiced serious concerns about the availability of funding for a centralized system and believe that any such system must be accompanied by centralized resourcing, or adopting a pre-existing platform.

APPENDIX F. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON ARTICLE 140a, UCMJ

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Information on Article 140a, UCMJ 30 October 2023

I. Purpose: The Military Justice Review Panel (MJRP) respectfully requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess changes to the structure, pretrial and trial procedures, punitive articles, and post-trial and sentencing procedures of the military justice system since the passage of the Military Justice Act of 2016.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Ms. Eleanor Magers Vuono, available at 202-441-9362 or eleanor.m.vuono.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Dec 2023	All Questions	Military Justice/Criminal Law Divisions

V. Information Requested

Please provide answers to the following questions on Article 140a, UCMJ.

A. Data Collection; Case Processing and Management; Production and Distribution of Records of Trial

1. Please provide a narrative description of the military justice case processing and management systems you currently use to track reported UCMJ offenses and outcomes. If you are in the process of acquiring or developing new systems, please explain the new systems currently in development and the anticipated date the new systems will become operational.
2. Please describe the personnel requirements currently needed to manage and process your service's military justice cases and data collection requirements. In addition, please explain which individual (for example, trial counsel, paralegal, military judge) is responsible for the following tasks: 1. inputting data fields into the military justice case management systems; 2. providing properly redacted court-martial filings and motions to the parties and the public; 3. certifying the record of trial; and 4. producing and providing the record of trial to the parties and the public.

3. The MJRP has requested statistics and information on cases dating back to FY21 but has been informed that some data is difficult or time-consuming to produce. Please explain the constraints on your ability to collect and produce data and statistics from your case management systems.
    a. What are the challenges you face in collecting and producing data? Are the challenges primarily technical, is the problem a matter of limited personnel and resources, or some other reason or a combination of reasons?
    b. What solutions (technical or otherwise) would enhance your ability to respond to data requests from the MJRP and other entities tasked with assessing the military justice system?
    c. Are there data fields listed in the DoD GC Policy guidance dated January 17, 2023, that you do not collect? If so, which data do you not collect and do you have a projected date for compliance?
    d. Do you limit your data collection to the 155 data fields in the DoD GC Policy guidance dated January 17, 2023? If you collect additional data fields beyond the 155 fields required by the 2023 DoD GC policy, please explain what additional information you collect.
    e. Are there situations where you collect data, but your systems are unable to produce the data in a reportable format for analysis? If yes, please explain the limitations on your ability to report on that information.
    f. Do you limit your data collection only to cases in which there are preferred charges? Or do you also track information for every case opened by law enforcement through disposition, as originally required by the 2018 DoD GC policy guidance issued by Mr. Paul Ney?
    g. Do you collect data on every outcome of a criminal allegation, even if the result is administrative action, including NJP or a reprimand?
4. Please provide the below data for all courts-martial completed in fiscal years 2021, 2022, and 2023, with separate tabs for each fiscal year:
    a. The median and the mean number of calendar days from entry of judgment until certification of the record of trial counting both the day of entry of judgment and the day of certification of the record of trial.
    b. The median and the mean number of calendar days from entry of judgment until publication of the court-martial information on the docket or other public-facing system, counting both the day of entry of judgment and the date of publication on the docket.

B. Public Access to Court-Martial Dockets and Information

1. Please describe the process and systems used by military and civilian counsel to file motions and/or pleadings in a court-martial. Do you use an electronic filing system akin to e-filing in the federal and state courts? Have you considered the feasibility of an e-filing system? If you are in the process of acquiring or developing an e-filing system, please explain what is in development and the anticipated date the new system will become operational.
2. Please provide the policies, rules of court, and regulations that govern the obligations of trial counsel to redact Personally Identifiable Information (PII) when filing motions, pleadings, and briefs in a court-martial or on appeal.
    a. For the Services that require PII to be redacted from motions before filing, are there logistical or practical reasons not to publicly release those redacted records at the time of filing?

b. For the Services that only redact PII from court records, motions, and orders after certification of the record of trial, what are the logistical and practical reasons not to require redaction of PII at the time of filing?

3. The federal courts adhere to the "Privacy Policy for Electronic Case Files" in compliance with the E-Government Act of 2002, *available at* https://www.uscourts.gov/rules- policies/judiciary-policies/privacy-policy-electronic-case-files. That policy governs redaction of PII in court filings, redactions in electronic transcripts, and lists documents in a criminal case that shall not be included in the public case file and should not be made available to the public. What would be the impact if DoD adopted a similar privacy policy to require properly redacted court-martial records be made publicly available at the time of filing or within one business day, with an exception for information that was classified, subject to a judicial protective order, or ordered sealed?

4. Please provide your service rules implementing the new DoD GC policy guidance dated January 17, 2023. If new rules are still under development, please explain the expected date of publication.

5. Please explain your policy for publicizing information about a court-martial in which there was a full acquittal on all charges and specifications. What criteria are used and who is responsible for deciding which acquittals are made available to the public via a public-facing website or other forum? Please provide the names of all the courts-martial in which there was an acquittal on all charges and specifications and for which the records were made available to the public for each of the Fiscal Years 2021, 2022, and 2023.

MILITARY SERVICE RESPONSES – INFORMATION ON ARTICLE 140a, UCMJ

The following information reflects each of the Military Services' responses to Section A, Questions 1–4 and Section B, Questions 1–5.

The Coast Guard restricted disclosure of its RFI response, so it is not included within this appendix.

V. Information Requested

Please provide answers to the following questions on Article 140a, UCMJ.

A. Data Collection; Case Processing and Management; Production and Distribution of Records of Trial

Question 1. Please provide a narrative description of the military justice case processing and management systems you currently use to track reported UCMJ offenses and outcomes. If you are in the process of acquiring or developing new systems, please explain the new systems currently in development and the anticipated date the new systems will become operational.

Army Response to Question A-1:

MJO:

MJO (Military Justice Online) is a web-based application that ITD (Information Technology Division) developed to provide worldwide GCMCAs (General Court-Martial Convening Authorities) and SPCMCAs (Special Court-Martial Convening Authorities) a more effective and convenient means to create, record, track, and administer military justice actions. After users enter information in the system, they can generate all related paperwork with relative ease. Additionally, administrators can further tailor their documents by customizing MJO templates. Customized reports are also available. Admin users can delete and restore actions.

ACMIS:

ACMIS (Army Courts Martial Information System) is a secure, web-based management tool that OTJAG (Office of The Judge Advocate General) and ITD (Information Technology Division) developed to give USALSA (United States Army Legal Services Agency) Clerks of Court and field judges the ability to monitor, track, and document every step required to maintain official CMCRs (Courts Martial Case Reports)—from case initiation through case review to final outcome. After a field judge captures CMCR information, ACMIS subsequently sends that CMCR to the Clerk of Court's office for approval. Other ACMIS features include viewing current cases, viewing all cases, retiring a record, creating a writ, viewing a writ, administrative functions, generating reports, as well as a search function and an advanced search function.

Navy and Marine Corps Response to Question A-1:

The Navy's Court-Martial Reporting System, or NCORS, reached initial operating capability in July 2023 and is intended to track courts-martial from pre-preferral to final disposition, including appellate review, within the Department of the Navy. NCORS is a web-based application available to users throughout the Department of the Navy. Full operational capability is slated for summer 2024.

Prior to the standup of NCORS, the Navy and Marine Corps utilized the "Wolverine" Military Justice Case Management System. Within the Navy, that platform remains in use as an archive to collect court-martial data,

but all new active cases are submitted to NCORS. The Marine Corps continues to utilize Wolverine while awaiting NCORS full operational capability.

As required by JAGINST 5800.9E, the Navy and Marine Corps also utilize the Quarterly Criminal Activity, Disciplinary Infractions and Courts-Martial Report (QCAR) to track data related to nonjudicial punishments and summary courts-martial. Using a spreadsheet, QCAR collects 35 separate data points for each NJP or summary court-martial. The spreadsheet is filled out quarterly by all Navy commands, and then forwarded through chains of command to the Criminal Law Division (Code 20) which aggregates those spreadsheets into a single product and provides the data to the Judge Advocate General. The instruction is currently under revision to further clarify reporting requirements and enhance the accuracy of the information collected.

Air Force Response to Question A-1:

The Automated Military Justice Analysis and Management System (AMJAMS) has served as a military justice database for the Department of the Air Force (DAF) since July of 1974, but the web-version of AMJAMS dates from 1996. It collects detailed data during all stages of courts-martial and nonjudicial punishment (NJP) military justice actions on offenses, procedural matters, and processing timelines, as well as information on the participants in the investigatory, court-martial, appellate, and NJP processes. It is an essential instrument for advising commanders and leaders on NJP and court-martial actions and the timely processing of cases, which are key components of readiness. The tools, reports, and information from AMJAMS provide effective management and analysis tools for use by practitioners at installations, headquarters, major commands, the judiciary, and the appellate divisions. The capability to collect NJP and courts-martial military justice data facilitates immediate case management and historical reviews of cases, trends, and issues. AMJAMS supports efforts to eliminate or highlight excessive processing delays and provides the capability to monitor the status (and upcoming tasks) of NJP and courts-martial military justice actions from the investigation stage through completion of the appellate process. It also allows the user to print standard legal AF and DoD forms associated with NJP and courts-martial actions.

Additionally, AMJAMS supports schedule and event entries, such as a courts-martial hearing, rehearing, and *Dubay* hearings for the trial judiciary and judiciary personnel. The system also enables access to information with a public-facing, web-based docket and it pushes detailed updates on pending and recently completed courts-martial.

AMJAMS is also used as a resource to track the status of courts-martial records of trial (ROT) as they are assembled, forwarded for review under Article 65 and Article 66, Uniform Code of Military Justice (UCMJ), and ultimately closed. The system provides users with the ability to monitor each courts-martial case—via reports—to ensure it meets applicable post-trial processing requirements (*e.g.,* meets the time standards enumerated in *United States v. Moreno*, 63 MJ 129 (C.A.A.F. 2006)). The system and an accompanying checklist are also used to ensure each ROT is complete before it is permanently staged or forwarded to appellate courts for review. Errors and incomplete ROTs are monitored and documented by the Appellate Records Branch at the Military Justice Division of the Air Force Judiciary (AFLOA/JAJM). Installation staff judge advocates are provided with a listing of any errors or incompleteness to ensure that lessons learned are provided via a detailed receipt for each ROT. Inspectors from the Inspections and Standardization Directorate (AF/JAI) are also provided with these error receipts to assist them in identifying common problems with NJP and courts-martial military justice processes across the DAF.

The DAF pursued a contract for a new Disciplinary Case Management System (DCMS) to replace AMJAMs in FY20. The DCMS contract was awarded in FY21 to Appian Corporation to begin the implementation and covers the cost of licensing, cloud hosting, and sustainment of the system. The JAG Corps secured funding in FY22 for the first four iterations of the DCMS program and has been granted funding for the next five years to cover the remaining costs. DCMS began replacing AMJAMS in FY23 through a phased plan.

DCMS is expected to serve as the core to multiple, self-contained database modules that would support other discrete practice areas including an Appellate Module, Administrative Discharge Module, Foreign Criminal Jurisdiction Module, Victim and Witness Assistance Program Module, Office of Special Trial Counsel (OSTC) Module, etc.

DCMS-AMJAMS went live in the summer of 2023 and was rebranded as DCMS-AMJAMS, so as not to confuse it with the DCMS-OSTC module effort that was also under way. DCMS-AMJAMS use by installations followed incrementally. Rollout of the system was completed in a phased approach—by command—and it included multiple training sessions to ensure users were comfortable with an entirely new platform. All new cases are expected to be entered into DCMS-AMJAMS. Cases already entered into legacy AMJAMS would get closed in legacy AMJAMS. Migration of the data from legacy AMJAMS into DCMS-AMJAMS is scheduled for the Spring of 2024.

Question 2. Please describe the personnel requirements currently needed to manage and process your service's military justice cases and data collection requirements. In addition, please explain which individual (for example, trial counsel, paralegal, military judge) is responsible for the following tasks: 1. inputting data fields into the military justice case management systems; 2. providing properly redacted court-martial filings and motions to the parties and the public; 3. certifying the record of trial; and 4. producing and providing the record of trial to the parties and the public.

Army Response to Question A-2:

The personnel requirements differ greatly depending on the size of the Army installation. Larger installations naturally have larger OSJAs (more paralegal specialists, paralegal NCOs, more attorneys) and a larger caseload.

1. Inputting data fields into the military justice case management systems: The responsibility is shared between the trial counsel, the paralegal specialist, the paralegal NCO, and the MJ OPS NCO. Normally, the actual data input into the case management system is performed by the paralegal specialist. However, the trial counsel will always verify the input.
2. Inputting data fields into the Army Court-Martial Information System: The military judge in every special or general courts-martial that included at least one Article 39a session provides data to the Army Court of Criminal Appeals Clerk of Court through the Court-Martial Case Report (CMCR). Clerks review it and accept it, which generates a number in ACMIS. Once the record of trial is received, the data goes through multiple reviews for correctness.
3. Providing properly redacted court-martial filings and motions to the parties and the public: Trial counsel and counsel for the accused, in conjunction with the court reporter and others as designated by the SJA (usually paralegal specialists), normally perform the redactions of court-martial filings and motions. The paralegal specialists normally upload the documents into the Army Court-Martial Public Record System (ACMPRS), under the supervision of the MJ OPS NCO, trial counsel, and chief of justice.
4. Certifying the record of trial: The court reporter who recorded the court-martial proceedings will certify the record of trial and transcript.
5. Producing and providing the record of trial to the parties and the public:

Producing the record of trial (ROT) to the **accused** and **crime victim:** The defense counsel must notify the accused of their right to receive a copy of the ROT. The defense counsel will notify the court reporter, in writing, whether the accused elects to receive a copy of the ROT or elects to have the record given to the defense counsel. Notice to

the court reporter must include an address for delivery of the ROT. The trial counsel (or Special Victims' Counsel) must notify each crime victim of their right to receive a copy of the ROT. If a crime victim elects to receive a copy of the ROT, such counsel will notify the court reporter. Notice to the court reporter must include an address for delivery of the ROT.

Information is made publicly available as follows: Scheduling information, including the name of the accused, the charges, and the location of the proceeding, is added to the U.S. Army Electronic Docket System (eDocket), a public website, by the installation clerk of court or court reporter immediately upon entry into eDocket. For safety reasons, the military judge's name only begins appearing on the day of the proceeding. Once a court-martial is completed and the findings and sentence, if applicable, have been announced, a summary of the court-martial results is generated and reviewed by the Trial Counsel and Chief of Military Justice, submitted for approval to the supervising Staff Judge Advocate before a final quality review by the Criminal Law Division, Office of The Judge Advocate General for publication in ACMPRS. Once certification of the record of trial is completed, the redacted record of trial is approved by the installation Staff Judge Advocate or delegee (typically Chief of Military Justice) and uploaded to ACMPRS. This process typically takes about 45 days or less. Access to Army court records is free to the public and does not require user fees.

Navy and Marine Corps Response to Question A-2:

Data entry for each case (whether for NCORS, Wolverine, or QCAR) is carried out by legal personnel in the field. Each case has an assigned legalman (including, for purposes of this response, Marine Corps legal services specialists) or civilian paralegal who primarily performs data entry and management for the case. Likewise, redactions of filings and motions is also performed in the field, primarily by the assigned case paralegal under the direction of the trial counsel. In accordance with Rule for Courts-Martial 1112(c), the court reporter prepares and certifies the record of trial. If the court reporter is unavailable to do so, the military judge will certify the record of trial. Once the record of trial and any related post-trial action is complete, the record is forwarded to the Military Justice Administration Division, Code 40, which handles, among other duties, the redaction and release of the record to the public. With respect to the four items identified above:

1. Trial Counsel, legalman, or paralegal
2. Military Justice Administration Division, Code 40
3. Court Reporter
4. The court reporter—in accordance with Rule for Courts-Martial 1112(e)—provides the record of trial to the parties while the Military Justice Administration Division, Code 40, provides the record to the public.

Air Force Response to Question A-2:

The Judge Advocate General (JAG) Corps has approximately 1,318 judge advocates and 920 paralegals on active duty, who are assigned to various roles in support of military justice functions, on an annual basis.[1] Company grade officers (O-1 to O-3) make up approximately 44% (580) of the JAG Corps. Approximately 28% (367) are majors (O-4) and approximately 19% (249) are lieutenant colonels (O-5). Colonels (O-6) and above, including one lieutenant general (O-9), one major general (O-8), and two brigadier generals (O-7), comprise approximately 9% (126) of the Corps. All judge advocates and paralegals begin their careers with the ability to perform as trial counsel

1 Reservists in a full-time status are also considered "active duty." Here, the term "active duty" is meant to encompass only the full-time Regular Air Force (RegAF).

and military justice technicians in support of military justice functions. These trial counsel and military justice technicians at the base legal offices are primarily responsible for inputting data, providing properly redacted court-martial filings and motions to the parties and the public; certifying the record of trial; and producing and providing the record of trial to the parties. Although these base-level professionals have the primary responsibility, they are supervised in their performance of these tasks by several echelons of senior personnel, to include district military counsel: supervisory base- and Numbered Air Force (NAF)/Major Command (MAJCOM)/Field Command (FLDCOM)–level legal offices. Moreover, the Military Justice and Policy Directorate (AF/JAJM) is the Office of Primary Responsibility (OPR) exercising release authority for Records of Trial and ensuring DAF compliance with Article 140a.

Question 3. The MJRP has requested statistics and information on cases dating back to FY21 but has been informed that some data is difficult or time consuming to produce. Please explain the constraints on your ability to collect and produce data and statistics from your case management systems.

a. What are the challenges you face in collecting and producing data? Are the challenges primarily technical, is the problem a matter of limited personnel and resources, or some other reason or a combination of reasons?

b. What solutions (technical or otherwise) would enhance your ability to respond to data requests from the MJRP and other entities tasked with assessing the military justice system?

c. Are there data fields listed in the DOD GC Policy guidance dated January 17, 2023, that you do not collect? If so, which data do you not collect and do you have a projected date for compliance?

d. Do you limit your data collection to the 155 data fields in the DOD GC Policy guidance dated January 17, 2023? If you collect additional data fields beyond the 155 fields required by the 2023 DOD GC policy, please explain what additional information you collect.

e. Are there situations where you collect data, but your systems are unable to produce the data in a reportable format for analysis? If yes, please explain the limitations on your ability to report on that information.

f. Do you limit your data collection only to cases in which there are preferred charges? Or do you also track information for every case opened by law enforcement through disposition, as originally required by the 2018 DOD GC policy guidance issued by Mr. Paul Ney?

g. Do you collect data on every outcome of a criminal allegation, even if the result is administrative action, including NJP or a reprimand?

Army Response to Question A-3:

a. Shifting priorities, additional Congressional and oversight data collection requirements, implementation of the Office of the Special Trial Counsel (OSTC), and limited resources challenge the Army's ability to meet data collection and data reporting requirements.

After the initial DoD directive based on Article 140a, Congress imposed additional immediate data collection requirements including collateral misconduct, Safe to Report, Section 549G annual reports on race and ethnicity, Section 549F racial disparity studies of 10 elements of military justice, and a plan for a Section 547 "document based" database development (arising from DAC-IPAD recommendation with DLSA recommended data dictionary of over 600 data elements for collection and creation of Service level

databases for command investigations). Further, to support implementation of the transfer of authorities to the OSTC, available manpower and funding was focused on amending military justice databases to ensure seamless and timely adjudication of covered, known, and related offenses and the new set of users, personnel assigned to the OSTC. Congressional requests for data since Article 140a have addressed additional data elements, including victim preference for military or civilian prosecution, victim declinations, workload analysis for military justice practitioners, and investigative and prosecution data on potential covered offenses. Additionally, advisory committees requested the Services provide up to nine key documents in pdf format for every case with charges preferred in FY21–22 —for the Army, over 1,342 cases to date— and demographic data on court personnel and panel members detailed and empaneled for every FY21–22 sexual assault court-martial. On 15 December 2023, the DoD GC directed the Services to collect, effective immediately, 43 measures to assess the changes after the FY22 NDAA. Many of these data points are new, not previously included in Article 140a guidance. The Army, like the other Services, has worked diligently to meet all of the newly imposed requirements and requests while simultaneously making improvements to military justice databases for practitioners.

Most recently, the Internal Review Team on Racial Disparities in Military Justice recommended full implementation of the Section 547 database, including new databases for Service level collection of administrative investigations, with complementary dashboards to provide timely data to commanders and other stakeholders. Approval of this recommendation, and funding strategies, is pending before the Deputy Secretary of Defense. For funding context, the initial feasibility estimate for the first fiscal year of implementation of the Section 547 database is $75M while the annual Army budget for expenditures of military justice database improvements has ranged between $1.03M and $1.4M for the past five fiscal years.

b. Consensus on key consistent and predictable data elements for collection, stability in reporting requirements, additional resourcing, coordination between advisory committees on data requests and study topics, and phased implementation of new requirements would enhance the Army's ability to respond to data requests from the MJRP.

c. See attached data dictionaries from MJO and ACMIS for data elements collected [no attachments are included in this appendix].

d. See attached data dictionaries from MJO and ACMIS for data elements collected.

e. If a data element is not captured in a searchable field in the database or the field is text free form, collection of that element will involve a multi-step analysis or a case-by-case review.

f. DA Form 4833, Commanders Report of Disciplinary or Administrative Action, is required by policy to be completed for every law enforcement investigation with Soldier Subject. The forms are maintained in the ALERTS law enforcement database but are not a searchable field for custom reporting.

g. DA Form 4833, Commanders Report of Disciplinary or Administrative Action, is required by policy to be completed for every law enforcement investigation with a Soldier Subject. The forms are maintained in the ALERTS law enforcement database but are not a searchable field for custom reporting. DD Form 3114, Uniform Command Disposition Report, is required by statute to be completed for every report of adult sexual assault, regardless of outcome, and entered into the Defense Sexual Assault Incident Database (DSAID) for inclusion in the Annual Report to Congress.

Navy and Marine Corps Response to Question A-3:

a. Challenges encountered in collecting and producing data are both technical in nature and a matter of limited personnel and resources. Not all data fields in NCORS allow users to create reports reflecting or

analyzing those fields. When MJRP, or another body, seeks information focusing on one of those fields, NCORS identifies relevant cases, but extracting the actual data currently requires a manual review of case files and/or records of trial. Further, in some cases, Requests for Information (RFIs) seek a level of granularity that cannot be obtained through a query of NCORS. For example, a query of the number of days between two events for a specific case is readily available through a simple review of the case in NCORS. However, currently NCORS does not have the capability to calculate this value on its own. Therefore, it cannot then calculate this value for ALL cases and arrive at an average number of days between two specific events. This data is within NCORS, but it requires a manual review of all cases within NCORS to first obtain the individual value for each case and then an average for all cases. Similar challenges exist within Wolverine, with regard to Marine Corps data and Navy data from prior fiscal years, requiring either manual review or complicated spreadsheet analyses to answer questions in the format they are asked.

b. As NCORS reaches full operational capability, our ability to respond to data requests will expand and improve. That said, predictable data elements for collection and reporting, additional resourcing, coordination between advisory committees on data requests and study topics, and phased implementation of new requirements would enhance our ability to respond to data requests from MJRP and other advisory committees.

c. No. NCORS allows for the collection of all data fields listed in the DOD GC Policy, with minor caveats (e.g., with regard to DIBRS codes). Wolverine allows for the collection of the vast majority of data fields listed in the DOD GC Policy, with the remaining capability to be supplied by the move to NCORS.

d. No. In addition to the 155 data fields identified in the DOD GC Policy, NCORS collects and tracks additional information necessary for the efficient management of the case by practitioners at the installation and appellate level (e.g., practitioner case progress notes).

e. Any data input into NCORS is retrievable. However, at this time, while we await full operational capability, there are instances where NCORS collects data, but not in a reportable field or at the granularity required to answer all questions. Where information is not reportable, retrieval requires back-end support from NCORS developers.

f. NCORS collects data on all cases that are received for review by prosecution offices regardless of whether charges are ultimately preferred or not. NCORS does not track information for every case opened by law enforcement. Individual reports to law enforcement are tracked by law enforcement, and law enforcement databases remain the official system of record for this information.

g. NCORS and QCAR track only courts-martial and NJPs to completion. Other administrative data associated with outcomes of a criminal allegation that are not a result of courts-martial or NJP (e.g. administrative separations) are collected within Department personnel systems.

Air Force Response to Question A-3:

a. Constraints on statistics and information vary depending upon the request. Requests for certain documents frequently require an enterprise-wide effort to locate, evaluate, and duplicate records that are ordinarily retained at the installation level. Those documents must get collected, inventoried, and assembled which is frequently time-consuming. Constraints on data collection and statistics arise when the requests seek matters not ordinarily collected or not ordinarily collected in the format sought, thereby requiring the DAF to create a new record that does not yet exist in the form requested. Constraints also arise from the technology used to extract data and statistics. AMJAMS is a legacy system and extraction of information frequently requires large-scale SQL queries that are subsequently narrowed and dissected to gather the

desired datapoints. The queries can be difficult or time consuming because the legacy system may not lend itself to such activity and/or the quantity of data produced requires less-automated processes to assemble. While the initial, launch version of DCMS-AMJAMS may lack some desired extraction capabilities, we anticipate the development of more robust features as the system spirals out in development. Moreover, DCMS-AMJAMS offers document management capabilities while legacy AMJAMS does not; hence, we hope to collect routine MJRP-desired documents within the system in the future to further expedite DAF responses in the future.

b. More personnel and resources to respond to public requests for DAF records must be budgeted by Congress. AMJAMS-DCMS, as it acquires capabilities, will also greatly enhance the DAF's ability to collect data and documents in the future. We anticipate some initial laborious collection efforts and technical growing pains but expect the steady state delivery of information sought from the system once its development matures. Regarding solutions or challenges, we do acknowledge that any change in requirements requires developers to re-accomplish previously completed work which is both time-consuming and costly. The initial requirements for DCMS contemplated MJA-16 but did not contemplate the creation of OSTC or a second overhaul of military justice processes so soon after 2018; as such, reconstructing elements of DCMS-AMJAMS does erode the ability to develop new, desired capabilities. There is no technical solution to account for a transforming military justice system, but it is an acknowledged challenge.

c. To date DCMS-AMJAMS records all data elements outlined in the DOD IG Policy up to the actions taken by the appellate courts. The appellate court data elements will be included in the DCMS-Appellate module that will be developed in 2024. However, all prescribed data elements for the appellate process are currently available in legacy AMJAMS and will be migrated to DCMS-Appellate / DCMS-AMJAMS once the DCMS-Appellate module has been built, tested and fielded.

d. There are more fields than listed on the DoD GC Policy guidance. DCMS-AMJAMS was built as a case management database and there are a variety of fields that allow installations to manage their cases, comply with due process requirements and track support to victims and witnesses.

e. DCMS-AMJAMS is a brand-new data system released beginning in September 2023 with full implementation across the AF scheduled for December 2023. As a new data system, the focus of developers was to initially get the functionality and data collection accomplished along with basic reporting capabilities needed for the management of cases. Upon full implementation, the development team will be working on expanding the system's ability to produce reports and to provide an ad hoc query capability. Efforts have already begun on the ad hoc query capability with an anticipated release date of July 1, 2024.

f. Not every case opened by law enforcement is entered into legacy AMJAMS or DCMS-AMJAMS; only those cases involving DAF military personnel. Air Force case management systems collect data pertaining to investigations, NJP imposed pursuant to Article 15, UCMJ, trials by court-martial, and related military justice activity. New cases must be opened in the system as investigations within one duty day of any personnel in the legal office becoming aware of the case. These requirements are reflected in DAFI 51-201, *Administration of Military Justice*, 14 April 2022, Chapter 31.

g. Disposition of every case opened in legacy AMJAMS or DCMS-AMJAMS is tracked in the respective system; however, administrative actions are not tracked with the same granularity as UCMJ actions. Administrative action in a case is disposed of as "Other Administrative Action" whether it is a letter of reprimand, letter of counselling, or verbal counselling.

Tracking the disposition of individual allegations can get complicated because of the way layperson reports transform into criminal allegations, then into criminal specifications, and are ultimately disposed of by

command. An allegation of misbehavior may constitute an offense never contemplated by the complainant and the text and format of the offense may undergo changes (minor or major) as the case evolves. Legacy AMJAMS tracks the offenses reported to the installation legal office and the case disposition. DCMS-AMJAMS attempts to track the lifecycle of the investigated allegations through the military justice process until they reach disposition; unlike legacy AMJAMS, it tracks both the overall charge and all specifications (legacy AMJAMS cannot track the overall charge, only the specification). The enhanced lifecycle capabilities of DCMS-AMJAMS will allow the system to automatically generate both Statement of Trial Results and Entries of Judgment.

Finally, DAF systems track the outcome of investigated criminal cases of DAF military personnel, but it does not necessarily track minor misconduct at the unit level that may get addressed by immediate supervisors (e.g., a counseling for arriving to work late).

Dispositions are tracked is AMJAMS-DCMS.

Question 4. Please provide the below data for all courts-martial completed in Fiscal Years 2021, 2022, and 2023, with separate tabs for each fiscal year:

a. The median and the mean number of calendar days from entry of judgment until certification of the record of trial counting both the day of entry of judgment and the day of certification of the record of trial.

b. The median and the mean number of calendar days from entry of judgment until publication of the court-martial information on the docket or other public-facing system, counting both the day of entry of judgment and the date of publication on the docket.

Army Response to Question A-4:

a. The mean number of calendar days from EOJ to certification.

FY23 – 109

FY22 – 86

FY21 – 67

Note: Data above based on cases received by the Army Court of Criminal Appeals in the requested FY. This data would not include SPCM acquittals and any cases that were withdrawn/dismissed prior to findings.

b. Calculation of this data is impracticable without a case-by-case analysis of over 1,500 individual completed cases across the requested fiscal years. The Entry of Judgement date is maintained in the Army Court-Martial Information System (ACMIS), and the date of publication of court-martial information that is made accessible to the public is maintained in a separate database, Army Court-Martial Public Record System (ACMPRS). These systems are independent of each other and do not presently communicate. Moreover, there are insufficient shared data fields to complete a reliable merge of the two databases. Addition of information that would allow for calculation of this data has been added to the list of possible improvements subject to prioritized funding and resource availability.

Navy and Marine Corps Response to Question A-4:

a. Based on a review of dates entered in NCORS, the median and mean number of days from entry of judgment to certification of the record of trial for FY21, FY22, and FY23 is:

FY21	Median:	4	Average:	8.2
FY22	Median:	3.5	Average:	4.9
FY23	Median:	2	Average:	3.9

b. The Navy does not track the days between entry of judgment and publication of the court-martial information on a public-facing system. While both dates are known, the date of publication is not recorded in NCORS. This data is available through manually cross-referencing multiple information systems, identifying relevant dates and extrapolating the median and mean number of calendar days.

Air Force Response to Question A-4:

Pending AMJAMS query and analysis.

B. Public Access to Court-Martial Dockets and Information

Question 1. Please describe the process and systems used by military and civilian counsel to file motions and/or pleadings in a court-martial. Do you use an electronic filing system akin to e-filing in the federal and state courts? Have you considered the feasibility of an e-filing system? If you are in the process of acquiring or developing an e-filing system, please explain what is in development and the anticipated date the new system will become operational.

Army Response to Question B-1:

The Army courts do not use an e-filing system. Motions and responses are filed with the court and are considered filed with the court when the moving party or responding party has provided the signed original, including any exhibits, to the clerk or court reporter, judge, and opposing counsel (in person or electronically). Motions and responses sent by mail, courier, or another carrier are not considered filed until physically received. Counsel must provide a hard copy of the signed motion or response, to include exhibits, to the court reporter not later than one duty day prior to the next Article 39(a) session or trial.

The Army has not comprehensively studied the feasibility of an e-filing system.

Navy and Marine Corps Response to Question B-1:

All counsel participating in a court-martial in the Department of the Navy, military or civilian, submit their motions and pleadings as required by the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice, Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure or local circuit court guidance. Submissions are often accomplished electronically through email or a file sharing system, but it may also be accomplished by providing the military judge with a paper copy of the pleading. The Department has not comprehensively studied the feasibility of an e-filing system akin to that used in the federal and state courts.

Air Force Response to Question B-1:

In accordance with the Uniform Rules of Practice Before Department of the Air Force Courts-Martial (Uniform Rules), Rule 3.6, written motions are electronically filed (e-filed) by the established date in the Scheduling Order or other order of the military judge. Access to the DAF e-filing system is limited to counsel and permissions are managed by the Air Force Trial Judiciary. In addition to e-filing, the military judge may also require written motions to be provided to the Court via e-mail or other method. In the absence of deadlines established by the military judge, motions will be filed in accordance with the deadlines set forth in the applicable Rules for Courts-Martial (RCMs) or Military Rules of Evidence (MREs). Every motion, pleading or other document submitted to the Court by a party will be signed by at least one counsel of record. Trial counsel will notify any representative appointed under Article 6b, UCMJ, of any relevant hearings and Court rulings.

In cases with civilian defense counsel, until there is an ability for those unaffiliated with the DoD to access the e-filing site, the assigned military defense counsel will be responsible for transmitting information to and from the civilian defense counsel. If no military defense counsel is assigned, it will be trial counsel's responsibility. Similarly, trial counsel will also be responsible for transmitting information to and from any civilian counsel and/or sister-service counsel representing persons of limited standing.

Question 2. Please provide the policies, rules of court, and regulations that govern the obligations of trial counsel to redact Personally Identifiable Information (PII) when filing motions, pleadings, and briefs in a court-martial or on appeal.

a. For the Services that require PII to be redacted from motions before filing, are there logistical or practical reasons not to publicly release those redacted records at the time of filing?

b. For the Services that only redact PII from court records, motions, and orders after certification of the record of trial, what are the logistical and practical reasons not to require redaction of PII at the time of filing?

Army Response to Question B-2:

The Army Court of Criminal Appeals Rules of Appellate Procedure, the Rules of Practice before Army Courts-Martial, and Enclosure 3 and 4 of Policy Memorandum 23-01.

a. Release of motions redacted by counsel at the time of filing risks violations of the Privacy Act. Currently the Rules of Practice before Army Courts-Martial only require the alleged victim's name be redacted from motions before filing. The victim's name is substituted with "AV"—alleged victim. The current policy for release of records allows for quality control of redactions prior to public release.

b. There are no significant logistical or practical reasons why counsel could not be required to submit both a clean and a redacted copy of records, motions, and orders at the time of filing.

Navy and Marine Corps Response to Question B-2:

See the attached SECNAVIST 5211.5, JAG/CNLSC Instruction 5211.11, JAGMAN paragraph 0141A, the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice, and Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure.

a. Redacting PII from motions prior to filing would not ensure compliance with the Privacy Act and make those records releasable at the time of filing. The PII redaction requirements for filing are significantly

narrower than the PII redaction requirements of the Privacy Act, as many categories of information are functionally necessary to the filing. Before release, those (and all court-martial records) must be reviewed by individuals with sufficient training and experience to ensure those records comply with the requirements of the Privacy Act in addition to being free from PII. That is not feasible given the nature of military courts-martial.

b. The Navy-Marine Corps Trial Judiciary Uniform Rules of Practice call on trial participants "to eliminate or minimize the use of Personally Identifiable Information (PII) to the maximum extent possible in all pleadings and documents." Further, unnecessary PII is to be redacted in all documents that are transmitted electronically, including discovery materials. The Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure contain similar provisions. The Office of the Judge Advocate General Military Justice Administration Division (Code 40) is the release authority for court-martial records. While court-martial participants are directed to redact sensitive PII (such as social security numbers, home addresses, telephone numbers, e-mail addresses, dates of birth, financial account numbers, and full names of victims and witnesses) in motions and filings, those redactions and other PII are reviewed by FOIA and Privacy Act subject matter experts within Code 40 prior to the public release of any court-martial record to ensure compliance with legal standards and to safeguard the privacy interests of all involved.

Air Force Response to Question B-2:

According to the Uniform Rules, Rule 3.6(A), PII must be redacted in court-martial filings. The redaction of PII offers the trial court greater flexibility in handling documents. Additional redactions may be required before the documents get published to the public-facing Article 140a website in order to comply with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the Privacy Act of 1974, 5 U.S.C. § 552a. Given the requirements to redact PII, comply with the Privacy Act and FOIA, and emulate best practices of Federal courts (which places the redaction requirement on individual counsel not on the courts), practitioners are taught to generally avoid using Privacy Act matters to the maximum extent possible.

a. The requirements of the Privacy Act and FOIA are much more onerous than simply the redaction of PII; while there is some overlap between the two, they are two distinct categories of information. Releasing documents publicly immediately after filing may not provide time for thorough supervisory review and confirmation that all data that is not permitted to be released publicly under the Privacy Act and FOIA has been properly redacted (nor ensure consistency of additional redactions in the same case). The inadvertent revelation of Privacy Act matters on a public-facing website could result in the platform being taken down entirely during remediation. The impact on technology operations can be catastrophic. As a result, redacted documents are checked and the posting of them is extended to a limited number of personnel who are appointed in writing and undergo additional training each year. It should be noted that the Federal court's Public Access for Court Electronic Records (PACER) system, which makes documents filed electronically available to the public, has exposed considerable sensitive personal data in the past. One study of PACER found that in a sample of 2.7 million records, 1,600 unredacted Social Security numbers were accessible to the public.[2] If this occurred within the DAF's public facing system, the Privacy Act could potentially permit 1,600 lawsuits against DoD. Relief from the requirements of the Privacy Act would be welcome and would align our Article I courts with Article III courts.

b. See answer to B2a above.

2 Letter from Carl Malamud, President, Public.Resource.Org, to Hon. Lee Rosenthal, Chair, Judicial Conference of the U.S. Committee on Rules of Practice and Procedure (Oct. 24, 2008) *available at* https://tinyurl.com/j97h47o.

Question 3. The federal courts adhere to the "Privacy Policy for Electronic Case Files" in compliance with the E-Government Act of 2002, available at https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files. That policy governs redaction of PII in court filings, redactions in electronic transcripts, and lists documents in a criminal case that shall not be included in the public case file and should not be made available to the public. What would be the impact if DoD adopted a similar privacy policy to require properly redacted court-martial records be made publicly available at the time of filing or within one business day, with an exception for information that was classified, subject to a judicial protective order, or ordered sealed?

Army Response to Question B-3:

A requirement to publicly release records at the time of filing or within one day would have significant resourcing impacts for the Army to ensure that filings have been properly redacted.

The timeline set forth in the Privacy Policy for Electronic Case Files appears to permit 31 calendar days from delivery of the trial transcript by the court reporter to the clerk of court (or longer if the court so orders) to perform the attorney's requested redactions, and then file the redacted transcript with the clerk of court. Current Army policy requiring properly redacting filings and trial-level court documents (as defined by Policy Memorandum 23-01) require approximately the same amount of time as the Privacy Policy for Electronic Case Files allow.

Navy and Marine Corps Response to Question B-3:

A requirement to publicly release records at the time of filing or within one day would have significant resourcing impacts to ensure that filings have been properly redacted. The Department of the Navy does not use an e-filing system and has not studied the use of such a system. Courts-martial are designed to operate in various austere environments with limited personnel making it impractical to support and manage an e-filing system. Likewise, same day publication of court documents would not allow for the appropriate review of those documents by FOIA and Privacy Act subject matter experts and may result in the unintended disclosure of prohibited material.

Air Force Response to Question B-3:

Adopting a privacy policy similar to the federal courts' "Privacy Policy for Electronic Case Files" for the Department of Defense (DoD) court-martial records, with requirements for redaction and public availability of records within a short time frame, may enhance transparency in the military justice system. However, rapid public release of records would still require the meticulous adherence to privacy laws and regulations to prevent accidental disclosure of Privacy Act matters that are not publicly releasable under the Privacy Act and FOIA. As discussed above, the issue of liability—and the interruption to IT operations—is heightened with the Privacy Act.

Question 4. Please provide your service rules implementing the new DoD GC policy guidance dated January 17, 2023. If new rules are still under development, please explain the expected date of publication.

Army Response to Question B-4:

Please see attached Army TJAG signed Policy Memorandum 23-01 – Public Access to Court-Martial Dockets, Filings, and Records Pursuant to Article 140a, Uniform Code of Military Justice (UCMJ) on 16 October 2023. The signed policy is posted on the Army JAGCNet site at: https://www.jagcnet2.army.mil/Sites/JAGC.nsf/homeDisplay.xsp?tag=TJAG+Policy+Memo.

Navy and Marine Corps Response to Question B-4:

See JAGINST 5813.2A, attached.

Air Force Response to Question B-4:

DAF published an updated version of its *Article 140a Redaction Guide* in March of 2023 which implements the new DoD GC policy guidance dated January 17, 2023. Compliance with the *Guide* is required by DAFI 51-201, para 34.13.

Question 5. Please explain your policy for publicizing information about a court-martial in which there was a full acquittal on all charges and specifications. What criteria are used and who is responsible for deciding which acquittals are made available to the public via a public facing website or other forum? Please provide the names of all the courts-martial in which there was an acquittal on all charges and specifications and for which the records were made available to the public for each of the Fiscal Years 2021, 2022, and 2023.

Army Response to Question B-5:

Policy Memorandum 23-01 provides that, upon receipt of a request by a member of the public, the Army may make publicly accessible filings and trial-level court documents (as defined in Policy Memorandum 23-01) from completed courts-martial in which there were no findings of guilt. The Chief, Office of the Judge Advocate General Criminal Law Division will make the final decision as to whether the requested item will be publicly accessible.

In making this decision, the approval authority will balance the public interest in disclosure of the records against the privacy interests of the accused, minors, and victims of crime. See Policy Memorandum 23-01.

Items made publicly accessible under this process should be posted to the Army Court-Martial Public Record System (ACMPRS) or the Army Court of Criminal Appeals Appellate Library. When items are posted, the SJA or Chief of GAD or DAD will notify the requestor and, as appropriate, the accused, the victim(s), and counsel.

For Fiscal Years 2021, 2022, and 2023, no records of a courts-martial in which there was an acquittal on all charges and specifications were made available to the public.

Navy and Marine Corps Response to Question B-5:

The Military Departments are constrained by the D.C. Circuit's opinion in *ACLU v. U.S. Department of Justice*, 750 F.3d 927 (D.C. Cir. 2014), which imposes limitations on information that Executive Branch entities may release in cases where a criminal defendant has been found not guilty. Additionally, the Privacy Act requirements apply to these service members. Under JAGINST 5813.2A there is a process for the public to request documents not released under Article 140a. The Navy will review such requests on a case-by-case basis.

Air Force Response to Question B-5:

Court records and filings in cases disposed of by full acquittal or action other than court-martial are generally not made publicly accessible and might not be releasable under the FOIA pursuant to a written FOIA request. Separate, additional public releases of courts-martial records after a full acquittal are determined on a case-by-case basis and comply with the FOIA and Privacy Act with respect to public release of federal agency records. When charges against an accused are disposed of by an action other than court-martial, or when a court-martial results in a full acquittal, due consideration must be given to the likelihood that the accused may have increased privacy interests in

the protection of information contained in military justice documents or records. See *ACLU v. Dept. of Justice*, 750 F.3d 927, 933 (D.C. Cir. 2014).

While such cases are generally not made publicly accessible, disclosure of such cases can depend on the notoriety of the case and/or notoriety of the accused. Some cases may require a balancing test to determine whether public accessibility would constitute an unwarranted invasion of personal privacy. An unwarranted invasion of personal privacy exists when an individual's privacy interests outweigh the public's interest in disclosure of the information. See *Chang v. Dep't of the Navy*, 314 F. Supp. 2d 35 (D.D.C. 2004); *Schmidt v. Dep't of the Air Force*, 2007 U.S. Dist. LEXIS 69584 (C.D. Ill. 2007). The public's interest is defined by the degree to which disclosure sheds light on the performance of an agency's statutory function. *Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989). This can include information about how the government holds its employees accountable. See *Schmidt* at *32.

The DAF limitations on the release of documents from acquittals are also promulgated in both the *Article 140a Redaction Guide* and DAFI 51-201, Chapter 34.

There were no cases during FY21–23 that resulted in a full acquittal and for which the DAF made records available to the public under Article 140a.

APPENDIX G. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON ARTICLE 16(c)(2)(A), UCMJ, JUDGE-ALONE SPECIAL COURTS-MARTIAL

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Information on Article 16(c)(2)(A)
Judge-Alone Special Courts-Martial
30 October 2023

I. Purpose: The Military Justice Review Panel (MJRP) requests the information below to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess changes to the structure, pretrial and trial procedures, punitive articles, and post-trial and sentencing procedures of the military justice system since the passage of the Military Justice Act of 2016.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Ms. Kate Tagert, available at 703-693-3952 or kate.tagert.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Dec 2023	All questions	Military Justice/Criminal Law Divisions

V. Information Requested

1. The MJRP respectfully requests the below data for all Article 16(c)(2)(A) judge-alone special courts-martial completed in Fiscal Years 2021, 2022, and 2023. For any data not provided, please provide a brief reason.

		FY21	FY22	FY23
1a.	Total number of Article 16(c)(2)(A) special courts-martial completed			
1b.	Mean number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)			
1c.	Median number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)			

2. The MJRP respectfully requests the below data for each Article 16(c)(2)(A) judge-alone special court-martial completed in Fiscal Years 2021, 2022, and 2023 in a separate worksheet.
    a. Name of accused
    b. All charges and specifications that were referred to an Article 16(c)(2)(A) SPCM
    c. Finding as to each specification (e.g. guilty, not guilty, dismissed)
    d. Sentence adjudged (please indicate sentence for each specification in which there was a finding of guilty and whether the confinement term was consecutive or concurrent)
3. Does your Service use military magistrates to preside over Article 16(c)(2)(A) special courts-martial?
4. What are the benefits to commanders of referring a case to an Article 16(c)(2)(A) special court-martial?

MILITARY SERVICE RESPONSES – INFORMATION ON ARTICLE 16(c)(2)(A) JUDGE-ALONE SPECIAL COURTS-MARTIAL

The following information reflects each of the Military Services' responses to questions 1–4.

V. Information Requested

1.The MJRP respectfully requests the below data for all Article 16(c)(2)(A) judge-alone special courts-martial completed in Fiscal Years 2021, 2022, and 2023. For any data not provided, please provide a brief reason.

		FY21	FY22	FY23
1a.	Total number of Article 16(c)(2)(A) special courts-martial completed			
1b.	Mean number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)			
1c.	Median number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)			

Army Response to Question 1:

		FY21	FY22	FY23
1a.	Total number of Article 16(c)(2)(A) special courts-martial completed	38	32	22
1b.	Mean number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)	97	144	150
1c.	Median number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)	84	112	122

Navy Response to Question 1:

		FY21	FY22	FY23
1a.	Total number of Article 16(c)(2)(A) special courts-martial completed	9	5[1]	4
1b.	Mean number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)	149.8	115	136.8
1c.	Median number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)	143	119	125

1 Off. of Judge Advoc. Gen., U.S. Navy, U.S. Navy Report on Military Justice for Fiscal Year 2022 (2022) 16, reported six Article 16(c)(2)(A) military judge-alone special courts-martial. Since the date of that report, quality control measures revealed a clerical error that resulted in one case being entered into the case management system twice. That error has been remedied, and the correct number of cases (5) is reported in this response.

Marine Corps Response to Question 1:

		FY21	FY22	FY23
1a.	Completed Cases	15	22	15
1b.	Mean Days	153.02703	117.94444	91.525
1c.	Median Days	138	81	82

Air Force Response to Question 1:

		FY21	FY22	FY23
1a.	Total number of Article 16(c)(2)(A) special courts-martial completed	7	15	13
1b.	Mean number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)	98	94	93
1c.	Median number of days between date of preferral and date sentence adjudged (calculated to include date of preferral and date of adjudication)	73	67	64

Coast Guard Response to Question 1:

		FY21	FY22	FY23
1a.	Total number of Article 16(c)(2)(A) SPCM completed	0	5	3
1b.	Mean number of days between preferral and date sentence adjudged	0	154	167
1c.	Median number of days of same	0	111	177

Question 2. The MJRP respectfully requests the below data for each Article 16(c)(2)(A) judge-alone special court-martial completed in Fiscal Years 2021, 2022, and 2023 in a separate worksheet.

a. Name of accused

b. All charges and specifications that were referred to an Article 16(c)(2)(A) SPCM

c. Finding as to each specification (e.g. guilty, not guilty, dismissed)

d. Sentence adjudged (please indicate sentence for each specification in which there was a finding of guilty and whether the confinement term was consecutive or concurrent)

Note: The Military Services' responses to question 2 are not reproduced in this appendix because the MJRP did not rely on the information provided, given the significant data deficiencies. Information received is referenced within the report to the extent necessary to fully explain the issues discussed.

Question 3. Does your Service use military magistrates to preside over Article 16(c)(2)(A) special courts-martial?

Army Response to Question 3:

No. The Army uses certified trial judges to preside over Article 16(c)(2)(A) special courts-martial.

Navy Response to Question 3:

No. There are two designated billets for Navy Special Court-Martial Judges with one on the East Coast and one on the West Coast. While the Navy does not officially designate these two military judges as magistrates, their duties include presiding over Article 16(c)(2)(A) special courts-martial that arise within their circuits. Article 16(c)(2)(A) special courts-martial may also be presided over by other judges assigned to the circuit in which the case arises.

Marine Corps Response to Question 3:

No.

Air Force Response to Question 3:

No. The Department of the Air Force (DAF) does not use military magistrates to preside over Article 16(c)(2)(A) special courts-martial. Military Judges preside over Article16(c)(2)(A) special courts-martial.

Coast Guard Response to Question 3:

The Coast Guard does not designate military magistrates. It instead uses collateral duty military judges to undertake duties commonly associated with magistrates. These duties would include search authorizations and presiding over Article 16(c)(2)(A) special courts-martial. For more information on collateral duty military judges, please see Chapter 26 of the Coast Guard Military Justice Manual, COMDINST M5810.1H (2021), https://media.defense.gov/2021/Jul/14/2002762684/-1/-1/0/CIM_5810_1H.PDF.

Question 4. What are the benefits to commanders of referring a case to an Article 16(c)(2)(A) special court-martial?

Army Response to Question 4:

Article 16(c)(2)(A) special courts-martial allow for more expeditious processing of cases without the requirement to seat a panel and are intended to address misconduct or indiscipline that cannot be adequately addressed by non-judicial punishment or administrative actions but does not merit another form of court-martial.

Navy Response to Question 4:

Article 16(c)(2)(A) courts-martial provide commanders with an additional tool to achieve specific and general deterrence, and to respond to situations in which an accused refuses nonjudicial punishment or in which the misconduct may warrant limited confinement—or other punishment—but is not so serious as to warrant the possibility of a punitive discharge. Additionally, proceeding to a trial in which the accused cannot elect members may provide commanders with fewer administrative burdens.

Marine Corps Response to Question 4

The most obvious benefit pertains to manpower. In such cases, the commander need not provide significant numbers of personnel from other functional areas, ensuring that mission accomplishment can continue apace. Relatedly, it frees the command from the burden of a short turn-around time between forum election and needing to provide a members panel (along with their members' questionnaires).

In addition to freeing up personnel-hours, a special court-martial consisting of a military judge alone (SPCMMJA) speeds up trial litigation. Voir dire of a single military judge often takes significantly less time than voir dire of a members panel, and the military judge need not receive members' instructions. As a result, the personnel the command must still provide (e.g., the accused, witnesses, brig escorts, etc.) are taken away from their duties for less time.

There are some minor additional benefits. Because a SPCMMJA is not authorized to award a punitive discharge, it does not result in limitations on administrative separation actions under DoD Instruction 1332.14, Encl (4), para. 3.b.(3)(d). Because there is no member selection process, an entire class of reversible errors under Articles 25 and 37, UCMJ, is precluded. Lastly, a SPCMMJA avoids the possibility of lengthy deliberations caused by divided opinions among the finder of fact.

Air Force Response to Question 4:

Referring a case to an Article 16(c)(2)(A) special court-martial may allow for a more expeditious handling of minor offenses, ensuring swift justice and maintaining good order and discipline within the unit by serving as a deterrent. Because the potential maximum punishment at an Article 16(c)(2)(A) special court-martial is less severe than at special court-martial, it may be an appropriate forum for minor offenses whose seriousness straddles the line between a summary court-martial and a special court-martial. Opting for a judge-alone court-martial may be desirable because of the reduced costs in terms of personnel and time, compared to a court-martial involving panel members.

Coast Guard Response to Question 4:

One advantage is that these proceedings enable a commander to expeditiously complete a court-martial without the necessity of convening a panel. The proceedings encourage pretrial agreements in situations where the interests of justice and good order and discipline necessitate a formal conviction but do not warrant significant confinement or a punitive discharge. Instead, an administrative separation is an option at the disposal of the Coast Guard and may be preferred in lieu of a contested court-martial proceeding.

These proceedings may also be useful in instances where a member refuses non-judicial punishment (NJP). However, in the Coast Guard's experience, the proceedings have limitations if the matter is contested. The processing time and the stigma of a court-martial conviction typically render convicted Coast Guard members unsuitable for future service. Also, the nature and circumstances of such cases do not typically justify significant confinement or other serious consequences, and punishments are akin to those imposed through NJP. A conviction would typically result in subsequent administrative separation proceedings, including a board for entitled members.

APPENDIX H. MJRP ASSESSMENT OF THE SERVICES' PRODUCTION OF RECORDS OF TRIAL

Articles 140a(a)(2) and (3) require that DoD standardize its case processing and management and distribute records of trial in a timely, efficient, and accurate manner. To assess DoD's implementation of these statutory requirements, the MJRP requested that each Service provide three years of data with the number of days it takes to certify the record of trial and publish court-martial records for the public.[1]

Although the RFI responses from the Services were incomplete and contained acknowledged errors, the limited data received revealed significant disparities in the Services' case management systems and timelines to certify records of trial. Timelines to certify records of trial are much slower in the Army than in the other Services, with the RFI response showing that the Army is in violation of the Article 140a requirement for timely public access within 45 days.

Request for Information (RFI): Service Timelines for Production of Records of Trial

The RFI asked for the following data:

> **A4. Please provide data for all courts-martial completed in fiscal years 2021, 2022, and 2023, with separate tabs for each fiscal year:**
>
> **a. The median and the mean number of calendar days from entry of judgment (EOJ) until certification of the record of trial (ROT) counting both the day of entry of judgment and the day of certification of the record of trial.**
>
> **b. The median and the mean number of calendar days from entry of judgment until publication of the court-martial information on the docket or other public-facing system, counting both the day of entry of judgment and the date of publication on the docket.**

The purpose of these questions was to assess timelines for ROTs and whether trial records were publicly available 45 days after certification of the ROT, as required by DoD policy.

1 *See* Services' responses to MJRP Request for Information on Article 140a, UCMJ (Oct. 30, 2023), *available at* Appendix F.

RFI Responses

TABLE H-1. MEDIAN NUMBER OF CALENDAR DAYS FROM EOJ TO CERTIFICATION OF THE ROT

Service	FY21	FY22	FY23
Army	67	86	109
Navy/MC	4	3.5	2
Air Force	19	7	8
Coast Guard	32	48	61

The Navy and Marine Corps counted cases as if they were one Service and responded with a single result. The Air Force excluded several cases from the calculations because of data anomalies. For example, in 14 of the Air Force cases, the certification of the ROT was reported as taking place on a date *before* the entry of judgment. This is an obvious data entry error, since the ROT must include the entry of judgment and therefore cannot be certified before entry of judgment has occurred. For the Army, the data also excluded special court-martial acquittals and cases withdrawn or dismissed prior to findings.[2]

TABLE H-2. MEDIAN NUMBER OF CALENDAR DAYS FROM CERTIFICATION OF THE ROT TO PUBLICATION

Service	FY21	FY22	FY23
Army	N/A	N/A	N/A
Navy/MC	26	14	15
Air Force	N/A	N/A	N/A
Coast Guard [3]	59	456	211

The Navy and Marine Corps reported the answer differently than requested in the RFI. Instead of reporting the number of calendar days from EOJ to publication, the Navy/Marine Corps reported the number of days from certification of the ROT to publication. Because the Army and Air Force did not respond, this chart reflects the answer as reported by the Navy and Marine Corps. If the data are accurate, the Navy/Marine Corps response indicates compliance with the 45-day publication policy.

2 Given the Army's significantly slower timelines, it may want to evaluate its processes and consider its adherence to R.C.M. 1114, *Transcription of proceedings*, which provides that a verbatim transcript need not be prepared in every case.

3 The Coast Guard reported the data as requested in the RFI, so the dates have been adjusted to subtract the length of time from EOJ to certification of the ROT. *See* Coast Guard Response to RFI Question 4(b), MJRP RFI on Article 140a, UCMJ (Oct. 30, 2023), *available* at Appendix F.

The Army did not provide data for this question, because its information exists in two separate databases. While the entry of judgment date is recorded in the Army Court-Martial Information System (ACMIS) database, the date on which court-martial information is made available to the public is in the Army Court-Martial Public Record System (ACMPRS). Because ACMIS and ACMPRS are independent of each other and do not communicate, answering the question would have required a time-consuming case-by-case analysis of more than 1,500 individual cases across three fiscal years. Likewise, the Air Force did not respond to this question. The reported answers from the Navy and Marine Corps indicate compliance with DoD's 45-day publication policy, but the Coast Guard response indicates noncompliance.

APPENDIX I. DoD'S INADEQUATE PUBLIC ACCESS TO COURT-MARTIAL RECORDS

The Military Justice Review Panel (MJRP) heard from multiple stakeholders who described the problems caused by the Department of Defense's policy of allowing the Services to wait until after a trial before providing public access to trial records, and of refusing to release any documents in cases in which the accused is acquitted.

The MJRP met with uniformed and civilian victims' counsel, academics, and members of the media. These individuals expressed frustration at the apparent secrecy surrounding courts-martial and the inability of counsel—both military and civilian—to access motions and filings in a case. Attorneys for victims explained that trial counsel often fail to inform them of hearings and motions that directly affect their representation of clients. Victims' counsel pointed out that if DoD adopted an electronic filing and integrated docket system like that of the federal courts, they would not have to rely on prosecutors for this information. Defense counsel also highlighted the importance of access to information in other cases, explaining how their representation would improve with access to motions and filings at both the trial and appellate levels, thereby benefiting Service members who face criminal charges.

DoD's failure to make trial records publicly available also has obstructed the MJRP's ability to assess the military justice system. For example, the Panel is assessing the independence of the Offices of Special Trial Counsel and requested court-martial documents including motions, responses, and rulings. Not only were these documents not publicly accessible, but one of the Services turned over only a select number of documents and refused to provide others, thereby leaving the Panel with incomplete information upon which to base its assessment.

Notably, DoD takes a very different approach for trial records with the military commissions. In cases involving detainees at Guantanamo Bay, Cuba, DoD publishes filings, records, and transcripts—typically within one business day of filing—on the Office of Military Commissions' website under the banner "Fairness*Transparency*Justice."[1] For 13 years, DoD has made available to the public pretrial filings and daily transcripts of all hearings.[2] Military commission filings involve millions of pages that are first reviewed and redacted using technology to ensure that classified information is not released. The website is managed by two civilian employees who use technology to redact documents before posting, typically within one business day of filing. Military commissions involving individuals accused of terrorism should not provide a higher level of public access and justice than courts-martial of Service members facing criminal charges. Both dockets are under the supervision of DoD and both should provide transparency.

1 Dep't of Def., Office of Military Commissions Website, https://www.mc.mil/.

2 The Secretary of Defense published *Regulation for Trial by Military Commission* in 2011, directing procedures for operating military commissions (*available at* https://www.mc.mil/Portals/0/2011%20Regulation.pdf). Chapter 19-4 requires public release of transcripts, filings, rulings, and orders.

APPENDIX J. DATA ON ARTICLE 16(c)(2)(A), UCMJ, JUDGE-ALONE SPECIAL COURTS-MARTIAL

TABLE J-1. NUMBER OF ARTICLE 16(c)(2)(A) SPCMs COMPLETED

Service	FY21	FY22	FY23	Total by Service
Army	38	32	22	92
Navy	9	5	4	18
Marine Corps	15	22	15	52
Air Force	7	15	13	35
Coast Guard	0	5	3	8
Total	69	79	57	205

SOURCE: Services' responses to MJRP RFI on Article 16(c)(2)(A) SPCMs (Oct. 30, 2023), *available at* Appendix G.

TABLE J-2. PROPORTION OF ALL COURTS-MARTIAL (INCLUDING SUMMARY COURTS-MARTIAL) THAT WERE ARTICLE 16(c)(2)(A) SPCMs

Service	FY21	FY22	FY23
Army	5.9%	5.1%	4.1%
Navy	4.1%	2.6%	2.0%
Marine Corps	5.9%	7.5%	5.7%
Air Force	1.7%	3.7%	2.9%

SOURCE: The Services' Article 146a Reports. The information was not available in the Coast Guard's Article 146a Report. The Navy FY22 data were adjusted after an error in its Article 146a Report was identified. In places, the information from the Article 146a Reports was inconsistent with the Services' responses to the MJRP's RFI on Article 16(c)(2)(A) SPCMs.

TABLE J-3. PROPORTION OF ALL SPECIAL COURTS-MARTIAL THAT WERE ARTICLE 16(c)(2)(A) SPCMs

Service	FY21	FY22	FY23
Army	23.6%	19.3%	15.9%
Navy	10.7%	5.1%	5.0%
Marine Corps	15.5%	21.2%	14.1%
Air Force	4.9%	9.8%	10.4%

SOURCE: The Services' Article 146a Reports. The information was not available in the Coast Guard's Article 146a Report. The Navy FY22 data were adjusted after an error in its Article 146a Report was identified. In places, the information from the Article 146a Reports was inconsistent with the Services' responses to the MJRP's RFI on Article 16(c)(2)(A) SPCMs.

TABLE J-4. MEDIAN NUMBER OF DAYS BETWEEN DATE OF PREFERRAL AND DATE SENTENCE ADJUDGED FOR ARTICLE 16(c)(2)(A) SPCMs

Service	FY21	FY22	FY23
Army	84	112	122
Navy	143	119	125
Marine Corps	138	81	82
Air Force	73	67	64
Coast Guard	N/A	111	177

SOURCE: The Services' responses to the MJRP RFI on Article 16(c)(2)(A) SPCMs.

TABLE J-5. TOP OFFENSES REFERRED TO ARTICLE 16(c)(2)(A) SPCMs

Service	Article 92	Article 112a	Article 128	Total by Service
Army	58	31	35	124
Navy	6	10	10	26
Marine Corps	47	23	25	95
Air Force	3	19	4	26
Coast Guard	11	0	6	17
Total	125	83	80	288

SOURCE: Service responses to MJRP RFI on Article 16(c)(2)(A) SPCMs (Oct. 30, 2023), *available at* Appendix F.

APPENDIX K. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON PLEA AGREEMENTS

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Data on Plea Agreements
30 October 2023

I. Purpose: The Military Justice Review Panel (MJRP) respectfully requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess changes to the structure, pretrial and trial procedures, punitive articles, and post-trial and sentencing procedures of the military justice system since the passage of the Military Justice Act of 2016.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Ms. Terri Saunders, available at 703-507-6232 or terri.a.saunders.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Dec 2023	All questions	Military Justice/Criminal Law Divisions

V. Information Requested

The MJRP respectfully requests the following information on plea agreements, as defined in Article 53a, UCMJ, and R.C.M. 705 in general, special, and summary courts-martial for Fiscal Years 2021, 2022, and 2023.

		FY21	FY22	FY23
1.	Total number of plea agreements			
2a.	Total number of GCMs			
2b.	Total number of GCMs in which there was a plea agreement			
3a.	Total number of SPCMs (not including Art 16(c)(2)(A) SPCMs)			
3b.	Total number of SPCMs (not including Art 16(c)(2)(A) SPCMs) in which there was a plea agreement			
4a.	Total number of Art 16(c)(2)(A) SPCMs			
4b.	Total number of Art 16(c)(2)(A) SPCMs in which there was a plea agreement			
5a.	Total number of summary courts-martial			
5b.	Total number of summary courts-martial in which there was a plea agreement			

6. For fiscal years 2021, 2022, or 2023, are you aware of any cases in which the military judge rejected a plea agreement? If so, please provide the case name, if known.

7. Is it standard practice for the government to obtain the victim's views on a plea agreement prior to entering into the agreement? If so, how frequently is it the case that the government proceeds with the plea agreement against the victim's wishes?

MILITARY SERVICE RESPONSES – DATA ON PLEA AGREEMENTS

The following information reflects each of the Military Services' responses to questions 1–7.

V. Information Requested:

The MJRP respectfully requests the following information on plea agreements, as defined in Article 53a, UCMJ, and R.C.M. 705 in general, special, and summary courts-martial for Fiscal Years 2021, 2022, and 2023.

		FY21	FY22	FY23
1.	Total number of plea agreements			
2a.	Total number of GCMs			
2b.	Total number of GCMs in which there was a plea agreement			
3a.	Total number of SPCMs (not including Art 16(c)(2)(A) SPCMs)			
3b.	Total number of SPCMs (not including Art 16(c)(2)(A) SPCMs) in which there was a plea agreement			
4a.	Total number of Art 16(c)(2)(A) SPCMs			
4b.	Total number of Art 16(c)(2)(A) SPCMs in which there was a plea agreement			
5a.	Total number of summary courts-martial			
5b.	Total number of summary courts-martial in which there was a plea agreement			

Military Service Responses to Questions 1–5:

I. Courts-Martial and Plea Agreement Data for Fiscal Years 2021–2023:

FY21:

	Army	Navy	Marine Corps	Air Force	Coast Guard
no. GCMs	394	110	119	175	11
no. GCMs w/PAs	190 (48%)	58 (53%)	52 (44%)	52 (30%)	0 (0%)
no. SPCMs	127	75	110	119	N/A
no. SPCMs w/PAs	71 (56%)	64 (85%)	53 (48%)	79 (66%)	N/A
no. SPCM "short-martials"	38	9	15	7	14
no. SPCM "short-martials" w/PAs	35 (92%)	2 (22%)	4 (27%)	5 (71%)	14 (100%)
no. SCMs	105	26	101	92	8
no. SCMs w/PAs	35 (33%)	N/A	N/A	47 (51%)	8 (100%)

FY22:

	Army	Navy	Marine Corps	Air Force	Coast Guard
no. GCMs	335	81	94	141	7
no. GCMs w/PAs	155 (46%)	51 (63%)	50 (53%)	52 (37%)	1 (14%)
no. SPCMs	111	94	90	118	N/A
no. SPCMs w/PAs	72 (65%)	80 (85%)	47 (52%)	74 (63%)	N/A
no. SPCM "short-martials"	32	5	23	15	4
no. SPCM "short-martials" w/PAs	12 (38%)	3 (60%)	7 (30%)	14 (93%)	4 (100%)
no. SCMs	47	9	106	109	4
no. SCMs w/PAs	37 (79%)	N/A	N/A	61 (56%)	4 (100%)

FY23:

	Army	Navy	Marine Corps	Air Force	Coast Guard
no. GCMs	356	85	83	146	14
no. GCMs w/PAs	154 (43%)	61 (72%)	55 (66%)	49 (34%)	0 (0%)
no. SPCMs	119	76	86	84	N/A
no. SPCMs w/PAs	55 (46%)	69 (91%)	63 (73%)	51 (61%)	N/A
no. SPCM "short-martials"	22	4	15	13	7
no. SPCM "short-martials" w/PAs	10 (45%)	0 (0%)	4 (27%)	9 (69%)	7 (100%)
no. SCMs	34	34	56	131	2
no. SCMs w/PAs	31 (91%)	N/A	N/A	77 (59%)	2 (100%)

Military Service Responses to Questions 6–7:

II. Narrative Responses:

Question 6. For fiscal years 2021, 2022, or 2023, are you aware of any cases in which the military judge rejected a plea agreement? If so, please provide the case name, if known.

Army: OTJAG, Trial Counsel Assistance Program, Defense Counsel Assistance Program, and Chief, Trial Judiciary are not aware of any case in FY21–23 in which the military judge rejected a plea agreement.

Navy: While this information is not specifically tracked in the Navy's military justice database, we are not aware of any instances in which the military judge rejected a plea agreement in Fiscal Year 2021, 2022, or 2023.

Marine Corps: No. However, in United States v. Raines, the military judge struck a single term in a plea agreement. On a petition for extraordinary relief, the NMCCA determined that the military judge did not have this ability, and vacated the military judge's ruling, remanding the case to the convening authority.

Air Force: Our case tracking system, AMJAMS, does not collect data if a military judge rejects a plea agreement. We will send a data call out to all bases for this information, if desired.

Coast Guard: We are not aware of any such case.

Question 7. Is it standard practice for the government to obtain the victim's views on a plea agreement prior to entering into the agreement? If so, how frequently is it the case that the government proceeds with the plea agreement against the victim's wishes?

Army: In addition to the requirement in RCM 705(e)(3)(B) to allow victims to submit views concerning a plea agreement, Army Regulation 27-10, para 17-15a(4) requires the trial counsel to consult with victims on "negotiations of plea agreements and their potential terms." The Army does not track whether the government proceeds with the plea agreement against a victim's wishes. Anecdotally, the Trial Counsel Assistance Program reports that it is "rare" to proceed with a plea agreement against a victim's wishes.

Navy: In accordance R.C.M. 705 (e)(3)(B), JAGMAN 5800.7G, and JAG/CNLSCINST 5800.4A, it is standard practice for the government to request a victim's views on a plea agreement prior to accepting a plea agreement. The Navy does not collect data on when a convening authority enters into a plea agreement against the victim's wishes.

Marine Corps: Yes. Victim input is routinely obtained. We do not systematically track the substance of the victim input, however.

Air Force: It is standard practice to obtain the victim's views on whether or not a plea agreement should exist/be accepted, but that conversation might not include the victim's views on each specific clause of the plea agreement. Our case tracking system, AMJAMS, does not collect data on if a victim supports a plea agreement or not, but regulation does note that victim's preferences are not binding for plea agreements. We will send a data call out to all bases for this information, if desired.

Coast Guard: Yes, it is standard practice. It is not frequent for the government to proceed with a plea agreement against the victim's wishes. We can think of no such case in recent memory.

APPENDIX L. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON PRE-REFERRAL JUDICIAL PROCEEDINGS

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Data on Pre-Referral Judicial Proceedings
30 October 2023

Purpose: The Military Justice Review Panel (MJRP) respectfully requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess changes to the structure, pretrial and trial procedures, punitive articles, and post-trial and sentencing procedures of the military justice system since the passage of the Military Justice Act of 2016.

Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

Point of Contact: The POC for this RFI is Ms. Meghan Peters, available at 202-510-0148 and meghan.peters.civ@mail.mil.

Suspense:

Suspense	RFI	Proponent – Military Services
1 Dec 2023	All questions	Military Justice/Criminal Law Divisions

Information Requested

The MJRP respectfully requests the below data on pre-referral judicial proceedings from Fiscal Years 2021, 2022, and 2023.

		FY21	FY22	FY23
Pre-referral requests for an investigative subpoena				
1.	Total number of cases in which an investigative subpoena was requested in a pre-referral judicial proceeding.			
1a.	If requested, was the request granted? (# Yes; # No)			
1b.	Action by individual subject to subpoena: (# Comply; # Seek relief)			
1c.	Judge's action on a request for relief: (# Ordered to comply; # modified; # quashed)			
1d.	Referral decision in cases in which a request was granted (see 1a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).			

Pre-referral requests for a warrant or order for electronic communications				
2.	Total number of cases in which a pre-referral warrant or order for electronic communications was requested in a pre- referral judicial proceeding.			
2a.	Was the request granted? (# yes; # no)			
2b.	Action by individual/service provider subject to warrant/order (# comply; # seek relief)			
2c.	Judge's action on a request for relief (# ordered to comply; # modified; # quashed)			
2d.	Referral decision in cases in which a request was granted (see 2a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).			
Other matters reviewed in pre-referral judicial proceedings				
3.	Total number of cases in which a military judge reviewed pre-referral matters under subsection (c) or (e) of section 806b of this title (article 6b)			
4.	Total number of cases in which a military judge reviewed pre-referral matters referred by an appellate court			

MILITARY SERVICE RESPONSES – DATA ON PRE-REFERRAL JUDICIAL PROCEEDINGS

The following information reflects each of the Military Services' responses to questions 1–4. The Military Justice Review Panel notes some of the Services explained that data on Article 30a, UCMJ, proceedings are not centrally managed and therefore these data do not reflect the actual total number of proceedings for each Fiscal Year. The Trial Judiciary collects different data on Article 30a.

V. Information Requested

The MJRP respectfully requests the below data on pre-referral judicial proceedings from Fiscal Years 2021, 2022, and 2023.

Army Response to Questions 1–4:

		FY21	FY22	FY23
Pre-referral requests for an investigative subpoena				
1.	Total number of cases in which an investigative subpoena was requested in a pre-referral judicial proceeding.	6	11	6
1a.	If requested, was the request granted? (# Yes; # No)			
1b.	Action by individual subject to subpoena: (# Comply; # Seek relief)			
1c.	Judge's action on a request for relief: (# Ordered to comply; # modified; # quashed)			
1d.	Referral decision in cases in which a request was granted (see 1a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).			
Pre-referral requests for a warrant or order for electronic communications				
2.	Total number of cases in which a pre-referral warrant or order for electronic communications was requested in a pre- referral judicial proceeding.	208	222	277
2a.	Was the request granted? (# yes; # no)			
2b.	Action by individual/service provider subject to warrant/order (# comply; # seek relief)			
2c.	Judge's action on a request for relief (# ordered to comply; # modified; # quashed)			
2d.	Referral decision in cases in which a request was granted (see 2a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).			

Other matters reviewed in pre-referral judicial proceedings				
3.	Total number of cases in which a military judge reviewed pre-referral matters under subsection (c) or (e) of section 806b of this title (article 6b)			
4.	Total number of cases in which a military judge reviewed pre-referral matters referred by an appellate court			

Navy Response to Questions 1–4:

		FY21	FY22	FY23
Pre-referral requests for an investigative subpoena				
1.	Total number of cases in which an investigative subpoena was requested in a pre-referral judicial proceeding.	367	405	593
1a.	If requested, was the request granted? (# Yes; # No)	Granted – 362 Denied – 5	Granted – 387 Denied – 18	Granted – 554 Denied – 39
1b.	Action by individual subject to subpoena: (# Comply; # Seek relief)	Data not available	Data not available	Data not available
1c.	Judge's action on a request for relief: (# Ordered to comply; # modified; # quashed)	Data not available	Data not available	Data not available
1d.	Referral decision in cases in which a request was granted (see 1a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).	Data not available	Data not available	Data not available
Pre-referral requests for a warrant or order for electronic communications				
2.	Total number of cases in which a pre-referral warrant or order for electronic communications was requested in a pre- referral judicial proceeding.	227	267	369
2a.	Was the request granted? (# yes; # no)	Granted – 201 Denied – 26	Granted – 235 Denied – 32	Granted – 297 Denied – 72
2b.	Action by individual/service provider subject to warrant/order (# comply; # seek relief)	Data not available	Data not available	Data not available
2c.	Judge's action on a request for relief (# ordered to comply; # modified; # quashed)	Data not available	Data not available	Data not available
2d.	Referral decision in cases in which a request was granted (see 2a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).	Data not available	Data not available	Data not available
Other matters reviewed in pre-referral judicial proceedings				
3.	Total number of cases in which a military judge reviewed pre-referral matters under subsection (c) or (e) of section 806b of this title (article 6b)	Data not available	Data not available	Data not available
4.	Total number of cases in which a military judge reviewed pre-referral matters referred by an appellate court	0	0	0

Marine Corps Response to Questions 1–4:

Pre-referral Requests for an investigative subpoena	**FY21**	**FY22**	**FY23**
1. Total number of cases in which an investigative subpoena was requested in a pre-referral judicial proceeding.	0	3	3
1a. If requested, was the request granted?			
Yes	0	3	2
No	0	0	0
1b. Action by individual subject to subpoena			
Comply	0	0	2
Seek Relief	0	0	1
1c. Judge's action on a request for relief			
Ordered to comply			1
Modified			
Quashed			1
1d. Referral decision in cases in which a request was granted			
Not referred	0	1	0
SPCM-BCD	0	0	2
GCM	0	2	0
Pre-referral requests for a warrant or order for electronic communications			
2. Total number of cases in which a pre-referral warrant or order for electronic communications was requested in a pre-referral judicial proceeding.	0	7	1
2a. Was the request granted?			
Yes	0	6	1
No	0	0	0
2b. Action by individual/service provider subject to warrant/order			
Comply	0	6	1
Seek relief	0	0	0
2c. Judge's action on a request for relief			
Ordered to comply	0	5	1
modified	0	0	0
quashed	0	0	0
2d. Referral decision in cases in which a request was granted			
Not referred	0	0	0
SPCM-BCD	0	1	0
GCM	0	5	1

Other matters reviewd in pre-referral judicial proceedings			
3. Total number of cases in which a military judge reviewed pre-referral matters under subsection (c) or (e) of section 806b of this title (Article 6b)	0	0	0
4. Total number of cases in which a military judge reviewed pre-referral matters referred by an appellate court	0	0	0
EXTRA: Total number of cases in which a military judge reviewed pre-referral matters related to pretrial confinement under Article 30a(a)(1)(E)(i).	0	1	0

Air Force Response to Questions 1–4:

		FY21	**FY22**	**FY23**
Pre-referral requests for an investigative subpoena				
1.	Total number of cases in which an investigative subpoena was requested in a pre-referral judicial proceeding.	2	2	2
1a.	If requested, was the request granted? (# Yes; # No)	7 – Y	8 – Y; 7 – N	17 – Y; 2 – N
1b.	Action by individual subject to subpoena: (# Comply; # Seek relief)	7 – C	8 – C	17 – C
1c.	Judge's action on a request for relief: (# Ordered to comply; # modified; # quashed)	N/A	N/A	N/A
1d.	Referral decision in cases in which a request was granted (see 1a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).	2 – GCM	2 – GCM	1 – GCM; 1 – SCM
Pre-referral requests for a warrant or order for electronic communications				
2.	Total number of cases in which a pre-referral warrant or order for electronic communications was requested in a pre- referral judicial proceeding.	3	3	1
2a.	Was the request granted? (# yes; # no)	22 – Y	18 – Y	24 – Y
2b.	Action by individual/service provider subject to warrant/order (# comply; # seek relief)	19 – C	18 – C	24 – C
2c.	Judge's action on a request for relief (# ordered to comply; # modified; # quashed)	N/A	N/A	N/A
2d.	Referral decision in cases in which a request was granted (see 2a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).	3 – GCM	3 – GCM	1 – GCM
Other matters reviewed in pre-referral judicial proceedings				
3.	Total number of cases in which a military judge reviewed pre-referral matters under subsection (c) or (e) of section 806b of this title (article 6b)	0	0	0
4.	Total number of cases in which a military judge reviewed pre-referral matters referred by an appellate court	0	0	0

Coast Guard Response to Questions 1–4:

		FY21	FY22	FY23
Pre-referral requests for an investigative subpoena				
1.	Total number of cases in which an investigative subpoena was requested in a pre-referral judicial proceeding.	4	13	29
1a.	If requested, was the request granted? (# Yes; # No)	4 Yes	13 Yes	29
1b.	Action by individual subject to subpoena: (# Comply; # Seek relief)	No Data	No Data	No Data
1c.	Judge's action on a request for relief: (# Ordered to comply; # modified; # quashed)	No Data	No Data	No Data
1d.	Referral decision in cases in which a request was granted (see 1a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).	1 GCM, 2 NP	5 GCM, 1 SPCM, 7 NP	4 GCM, 12 NP
Pre-referral requests for a warrant or order for electronic communications				
2.	Total number of cases in which a pre-referral warrant or order for electronic communications was requested in a pre- referral judicial proceeding.	7	21	29
2a.	Was the request granted? (# yes; # no)	6 Yes	20 Yes, 1 No	21 Yes, 2 No
2b.	Action by individual/service provider subject to warrant/order (# comply; # seek relief)	No Data	No Data	No Data
2c.	Judge's action on a request for relief (# ordered to comply; # modified; # quashed)	No Data	No Data	No Data
2d.	Referral decision in cases in which a request was granted (see 2a) (# referred SPCM-BCD or GCM; # not referred to either forum, including cases not preferred).	1 GCM, 2 NP	5 GCM, 1 SPCM, 7 NP	4 GCM, 12 NP
Other matters reviewed in pre-referral judicial proceedings				
3.	Total number of cases in which a military judge reviewed pre-referral matters under subsection (c) or (e) of section 806b of this title (article 6b)			
4.	Total number of cases in which a military judge reviewed pre-referral matters referred by an appellate court			

Note: Questions 3 and 4

Will endeavor to produce within 3 months. Some level of hand review OR coordination with offices outside OJAG required OR confidence in data produced is low.

APPENDIX M. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON PUNITIVE ARTICLES (MILITARY JUSTICE)

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Information on Punitive Articles 30 October 2023

I. Purpose: The Military Justice Review Panel (MJRP) requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess the effect of changes to the punitive articles since the passage of the Military Justice Act of 2016 and subsequent legislation.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Ms. Theresa Gallagher, available at 703-501-4715 or theresa.a.gallagher2.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Dec 2023	Spreadsheet Data	Excel worksheets containing the requested data (Section VI) from FY21, FY22, and FY23 for the punitive articles identified in Section V of this RFI
1 Dec 2023	Narrative Responses and Documents	Narrative responses from the appropriate Service entities to Section VII questions and requested documents

V. Information Requested: Military Services Military Justice provide data for fiscal years 2021–2023 for the following punitive articles:

1. Article 82 (a): Soliciting commission of offenses generally
2. Article 84: Breach of medical quarantine
3. Article 87b: Offenses against correctional custody and restriction (provide counts separately for each listed sub-section: Article 87b (a) escape from correctional custody, Article 87b (b) breach of correctional custody, and Article 87b (c) breach of restriction)
4. Article 93a: Prohibited Activities with Military Recruit or Trainee by a Person in a Position of Special Trust (provide counts separately for each sub-section: Article 93a (a) abuse of training leadership position and Article 93a (b) abuse of position as military recruiter)
5. Article 95 (b): Loitering or wrongfully sitting on post
6. Article 95a: Disrespect to a sentinel or lookout
7. Article 96 (b): Drinking with prisoner
8. Article 104: Public records offenses
9. Article 105a: False or unauthorized pass offenses

10. Article 106: Impersonation of officer, noncommissioned or petty officer, or agent or official
11. Article 106a: Wearing unauthorized insignia, decoration, badge, device, or lapel button
12. Article 107 (b): False swearing
13. Article 107a: Parole violation
14. Article 109a: Mail matter: wrongful taking, opening, etc.
15. Article 111: Leaving scene of vehicle accident
16. Article 112: provide counts separately for each listed sub-section: Article 112 (b) incapacitation for duty from drunkenness or drug use, and Article 112 (c) drunk prisoner
17. Article 114: provide counts separately for each listed sub-section: Article 114 (a) reckless endangerment; Article 114 (c) firearm discharge, endangering human life; and Article 114 (d) carrying concealed weapon
18. Article 115: provide counts separately for each listed sub-section: Article 115 (a) communicating threats generally; Article 115 (b) communicating threat to use explosive, etc.; and Article 115 (c) communicating false threat concerning use of explosive, etc.
19. Article 117a: Wrongful broadcast or distribution of intimate visual images
20. Article 119b: Child endangerment
21. Article 120a: Mails: deposit of obscene matter
22. Article 121a: Fraudulent use of credit and debit cards
23. Article 121b: False pretenses to obtain services
24. Article 122a: Receiving stolen property
25. Article 123: Offenses concerning Government computers
26. Article 124: Frauds against the United States
27. Article 124a: Bribery
28. Article 124b: Graft
29. Article 125: Kidnapping
30. Article 126 (c): Burning property with intent to defraud
31. Article 128 (c): Assault with intent to commit specified offenses
32. Article 128b: Domestic violence
33. Article 129 (b): Unlawful entry
34. Article 130: Stalking
35. Article 131a: Subornation of perjury
36. Article 131b: Obstructing justice
37. Article 131c: Misprision of serious offense
38. Article 131d: Wrongful refusal to testify
39. Article 131e: Prevention of authorized seizure of property
40. Article 131g: Wrongful interference with adverse administrative proceeding
41. Article 132: Retaliation
42. Article 134: Sexual Harassment

VI. Information to be provided for each of the punitive articles identified in Section V of this Request:

Please provide a spreadsheet containing the following aggregated data for each specified offense and an explanation of the methodology used to collect the provided data. Aggregated data should be provided for all alleged violations of the specified punitive articles reported to a person in a position of authority that reached final adjudication in the applicable fiscal year (hereinafter cases). The data should be specific to the identified offense. If data is unavailable, include a brief explanation as to why.

Aggregated Data Points		
1	Number of reported violations of each offense with a Service member accused/subject	
2	Number of reports to each agency/organization receiving the report	–Chain of Command –MCIO –Military Police –DoD or Service IG –Other
3	Number of investigations commenced	
4	Number of investigations by each investigative entity	–Chain of command –MCIO –Military police –DoD or Service IG –Other
5	Number of each type of command disposition	–No action –Administrative Separation –Other Administrative Action –NJP –Summary Court-Martial –Article 16(c)(2)(A) SPCM –Special Court-Martial –General Court-Martial
6	Number of cases in which pretrial restraint/confinement was imposed	
7	Number of each type of pretrial restraint/confinement	–Conditions on liberty –Restriction in lieu of arrest –Arrest –Confinement
8	Number of cases in which a charge of violating the specified punitive article was preferred	
9	Number of cases in which an Article 32 preliminary hearing was held	
10	Number of cases in which an Article 32 preliminary hearing was waived	

11	Disposition of the charge and specification (R.C.M. 407) by the GCMCA, aggregated by type of disposition	–Dismissed –Dismissed and forwarded to subordinate commander for disposition –Forwarded to subordinate commander for disposition –Forwarded to superior commander for disposition –Referred to court-martial – Imposition of nonjudicial punishment
12	Number of cases that were referred to a GCM	
13	Number of cases that were referred to a SPCM	
14	Number of cases that were referred to an Article 16(c)(2)(A) SPCM	
15	Number of preferred cases that were dismissed without referral	
16	Number of cases in which a resignation in lieu of court- martial was approved	
17	Number of cases in which an administrative discharge in lieu of court-martial was approved	
18	Number of referred cases that resulted in a plea of guilty to the specified punitive offense	
19	Number of referred cases that were tried by military judge	
20	Number of referred cases that were tried by members	
21	Number of cases in which a remedy was granted by the Judge Advocate General pursuant to R.C.M. 1201 and Article 69, UCMJ	
22	Number of cases in which the Court of Criminal Appeals took action on the findings of guilt	
23	Pay grade of the Subject/Accused aggregated by grade	–E-1 through E-4 –E-5 through E-6 –E-7 through E-9 –W-1 through W-5 –O-1 through O-3 –O-4 through O-7+ –Cadet or Midshipman
24	Sex of the Subject/Accused	–M –F
25	Ethnicity of the Subject/Accused	–Hispanic or Latino –Not Hispanic or Latino

26	Race of the Subject/Accused	–American Indian/Alaska Native –Asian –Black or African American –Native Hawaiian or Other Pacific Islander –White –Other
27	Sex of the Victim	–M –F
28	Number of cases in which a victim declined to participate in the investigation, prosecution, or other disposition of the offense	
29	Number of cases in which victim was represented by victims' counsel	
30	Number of cases in which the victim is a victim of domestic violence, as defined by DoDI 6400.06	

VII. Information Requested: Military Services provide narrative responses from the appropriate TJAG and OSTC entities for the following questions:

1. For each offense identified in Section V, what offenses are transferred immediately to an MCIO for investigation? What offenses are transferred immediately to the applicable Service law enforcement entity? What offenses are transferred immediately to the command? Please explain the process used to evaluate and transfer a reported offense to a higher- or lower-level investigative entity. Are there any impending changes to the exercise of investigative jurisdiction? If so, please describe.
2. OSTCs – Please describe the changes that have been made, or will be implemented, to the processing of reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), Article 134 (sexual harassment), in light of the transfer of authority to the OSTCs. Are these changes expected to have an impact on processing time and the ability to capture a more accurate number of reported violations? Are trained criminal lawyers routinely involved in reviewing and assessing these offenses at the time of reporting for the first time? Will OSTCs have the ability to determine who will investigate these offenses on a case-by-case basis?
3. Explain the processes used for reporting, investigating, and disposing of Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).
4. Identify all offenses listed in Sections V and VI for which victims are authorized victim counsel services and attach copies of all policy guidance pertaining to such consultation and/or representation.
5. Identify all Service current (FY 22–24) and planned studies, reports, or other efforts examining the processing of reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), Article 134 (sexual harassment), and provide copies of completed studies, reports, or policy guidance stemming from such efforts. Provide contact information for the appropriate POC to provide briefings on such efforts.
6. For FY 22 and FY 23, describe the three issues most frequently raised on appeal to the Courts of Criminal Appeals for each of the following offenses: Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual

images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).

7. For FY 22 and FY 23, describe the three issues most frequently resulting in action by the Courts of Criminal Appeals for each of the following offenses: Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).
8. For FY 22 and FY 23, describe the three issues most frequently resulting in action by the Court of Appeals for the Armed Forces for each of the following offenses: Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).

MILITARY SERVICE RESPONSES – TJAG AND OSTC INFORMATION ON UCMJ: PUNITIVE ARTICLE DATA

Note: The Military Services' responses to Section V, list of 42 punitive articles, and Section VI, Questions 1–30, are not reproduced in this appendix, given their voluminous nature and varied formatting. Data obtained from these responses have been referenced within the report to the extent necessary to fully explain the issues discussed.

The following information reflects each of the Military Services' responses to Section VII, Questions 1–8.

The Coast Guard restricted disclosure of its RFI response, and thus it is not included within this appendix.

VII. Information Requested: Military Services provide narrative responses from the appropriate TJAG and OSTC entities for the following questions:

Question 1. For each offense identified in Section V, what offenses are transferred immediately to an MCIO for investigation? What offenses are transferred immediately to the applicable Service law enforcement entity? What offenses are transferred immediately to the command? Please explain the process used to evaluate and transfer a reported offense to a higher- or lower-level investigative entity. Are there any impending changes to the exercise of investigative jurisdiction? If so, please describe.

Army Response to Question 1:

AR 195-2, Appendix B-1 sets forth investigative jurisdiction. CID also has the authority to assume jurisdiction over reports of offenses that are assigned to installation law enforcement or command.

Navy Response to Question 1:

Per SECNAVINST 5430.107A (Mission and Functions of the Naval Criminal Investigative Service, 19Jun19), NCIS has primary responsibility for investigating actual, suspected, and alleged serious criminal offenses within the Department of the Navy (DON). A serious criminal offense (sometimes referred to as a major criminal offense or felony) is any criminal offense punishable, under the Uniform Code of Military Justice (UCMJ), or similarly framed Federal, state, local, or foreign statute, by confinement for a term of more than one year.

NCIS has primary responsibility for investigating the following offenses: fraud within the DON; non-combat deaths; fires or explosions of unknown origin; loss or theft of weapons, ordnance, narcotics, dangerous drugs, controlled substances, or high-value property; missing command members when foul play cannot be ruled out; and acts of espionage, terrorism, sabotage, assassination, and defection by DON personnel. Further, pursuant to DODI 5505.18 (Investigation of Sexual Assault in the Department of Defense) and 5505.19 (Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)), NCIS has sole jurisdiction to investigate reports of adult sexual assault, domestic violence involving aggravated assault with grievous bodily harm, child sexual assault, and child abuse involving aggravated assault with grievous bodily harm.

DON commands, activities, and personnel shall refer to NCIS any incidents of actual, suspected, or alleged major criminal offenses regardless of whether they occur on or off an installation or ship or are being investigated by other authorities. NCIS may, at its discretion, decline to undertake an investigation. In such event, NCIS will expeditiously inform the affected command or activity. The NCIS field office will weigh multiple factors when deciding to initiate a criminal investigation. Those factors may include the severity of the offense (degree of bodily injury and/or monetary loss); whether an extensive investigation is necessary to address the allegation; resource allocation of the NCIS field office; and whether another law enforcement agency has initiated or declined to investigate the allegation. Additionally, NCIS field elements typically decline to investigate purely military offenses that are not otherwise punishable under Federal or state law.

In addition to those offenses described in paragraph 2 above, the following listed offenses warrant NCIS notification and, depending on the facts and circumstances of the allegation, may result in the initiation of an NCIS investigation:

1. Article 82 (a): Soliciting commission of offenses generally.

4. Article 93a: Prohibited activities with military recruit or trainee by a person in a position of special trust.

8. Article 104: Public records offenses.

9. Article 105a: False or unauthorized pass offenses (possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling).

10. Article 106: Impersonation of officer, noncommissioned or petty officer, or agent or official (with intent to defraud).

12. Article 107 (b): False swearing.

14. Article 109a: Mail matter: wrongful taking, opening, etc.

18. Article 115: Communicating threats.
19. Article 117a: Wrongful broadcast or distribution of intimate visual images.
20. Article 119b: Child endangerment.
21. Article 120a: Mails: deposit of obscene matter
22. Article 121a: Fraudulent use of credit and debit cards.
23. Article 121b: False pretenses to obtain services.
24. Article 122a: Receiving stolen property.
25. Article 123: Offenses concerning Government computers.
26. Article 124: Frauds against the United States.
27. Article 124a: Bribery.
28. Article 124b: Graft.
29. Article 125: Kidnapping.
30. Article 126 (c): Burning property with intent to defraud.
31. Article 128 (c): Assault with intent to commit specified offenses.
32. Article 128b: Domestic violence.
34. Article 130: Stalking.
35. Article 131a: Subornation of perjury.
36. Article 131b: Obstructing justice.
37. Article 131c: Misprision of serious offense.
39. Article 131e: Prevention of authorized seizure of property.

Finally, NCIS is prepared to assume responsibility for the investigation of UCMJ Article 134 (sexual harassment) in January 2025.

Marine Corps Response to Question 1:

By default, the MCIO retains investigative jurisdiction over national security cases and offenses punishable by one year or more of confinement. See SECNAVINST 5430.107A, Encl (4), para 2.

Marine Corps CID retains primary investigative jurisdiction for offenses punishable by less than one year of confinement. SECNAVINST 5430.107A, Encl (4), para 2; MCO 5580.7, Encl (2), para. 3.a.(1). However, purely military offenses, such as those involving adult private consensual sexual conduct, unauthorized absence, and other good order and discipline offenses, are excluded from Marine Corps CID investigative jurisdiction and may be addressed via command investigations. MCO 5580.7, Encl (2), para. 3.a.(1)(a).

Air Force Response to Question 1:

Generally, reports of crimes are investigated by Air Force Security Forces (SF) or the Air Force Office of Special Investigations (OSI) according to the Investigative Matrix in DAFI 71-101, Volume 1, *Criminal Investigations Program*, Attachment 2. The Investigative Matrix is not binding; investigative resource considerations at the installation level may be considered in determining whether SF or OSI may investigate a case where law or higher-level policy does not specify a particular agency.

Offenses under Office of Special Trial Counsel (OSTC) authority (hereafter "covered offenses") are those, as defined by Article 1(17), UCMJ. If an STC determines that a reported offense is a covered offense, the STC exercises authority over the offense and provides investigative support through the Investigation and Prosecution Support Team (IPST) function at each MAJCOM/FLDCOM-aligned District. The IPST is assigned to the investigation of offenses under OSTC authority, including covered, known, and related offenses as defined in service regulations. The implementation of IPST for offenses under OSTC authority ensures compliance with Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs). IPST ensures compliance with the requirements outlined in DoDI 5505.19, *Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)*. This includes activation of IPST for certain offenses including (1) all unrestricted reports of adult sexual assault (including penetrative and contact offenses); (2) unrestricted reports of domestic violence involving (a) strangulation or suffocation, (b) a dangerous weapon, or (c) resulting in substantial or grievous bodily harm; and (3) child abuse involving sexual assault and/or aggravated assault with grievous bodily harm.

Reports of criminal offenses to military law enforcement that prompt investigation into the alleged offense require coordination through the Criminal Investigation and Prosecution (CIP) capability. Whether military law enforcement initiates an investigation or refers the report to command is determined by military law enforcement agency regulation, but factors may include whether there is an identifiable accused, whether the accused is subject to UCMJ jurisdiction, whether a report is received by a victim or third party, victim preferences, and the nature or seriousness of the reported offense.

Under DoD policy, commanders, chain of command, instructors, and law enforcement personnel are mandatory reporters for sexual assault, with some exceptions as outlined in DoDI 6495.02, Volume 2, *Sexual Assault Prevention and Response: Education and Training*.

Generally, minor isolated offenses (e.g., Article 86, failure to go to an appointed place of duty; Article 92, dereliction of duty) are not covered by other mandatory reporting requirements. Although these offenses could technically constitute criminal violations under the UCMJ, they are often handled at the lowest levels of the command/supervisory chain without law enforcement investigation. There are cases where such minor offenses are reported to military law enforcement but may be referred to the subject's command for disposition without

criminal investigation. Such cases do not preclude command from conducting its own informal or administrative investigation before taking appropriate action.

Question 2. OSTCs – Please describe the changes that have been made, or will be implemented, to the processing of reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), Article 134 (sexual harassment), in light of the transfer of authority to the OSTCs. Are these changes expected to have an impact on processing time and the ability to capture a more accurate number of reported violations? Are trained criminal lawyers routinely involved in reviewing and assessing these offenses at the time of reporting for the first time? Will OSTCs have the ability to determine who will investigate these offenses on a case-by-case basis?

Army Response to Question 2:

As with all covered offenses, the Special Trial Counsel (STC) will be notified as early as possible of any alleged violation of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and formal, substantiated investigations of sexual harassment that violate Article 134. For allegations of Articles 117a, 128b, 130, and 132, STC will be notified of the allegation at the time it is received by law enforcement and will work closely with criminal investigators to ensure a thorough investigation. For allegations of sexual harassment, per congressional mandate the Army is developing a plan to use independent investigators who will be responsible for investigating allegations of sexual harassment. Beginning on January 1, 2025, those investigations that are substantiated and allege sexual harassment that violates Article 134 will be forwarded to STC at the conclusion of the investigation. Each sexual harassment investigation will have a non-STC legal advisor who provides guidance and assistance from the time of the initial report. For all covered offenses, once the investigation is complete STC will make the prosecutorial decisions of preferral and referral to a court-martial or deferral the to the command. Although every case is unique, STC expect that streamlining the notification process to the STC will cut down on processing times. Additionally, involving the STC early in the process will improve the Army's ability to track reported violations, as each case will be input into a military justice database upon receipt of the allegation. It is not within the OSTC's authority to direct which agency investigates offenses, however, the STC will work with all law enforcement agencies and investigators to ensure thorough investigation of all covered offenses.

Navy Response to Question 2:

Per RCM 303, commanders are now required to report all covered offenses to the Office of Special Trial Counsel (OSTC). Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation) will have to be reported as soon as practicable. Article 134 (sexual harassment) must be reported only after a formalized complaint is independently investigated and then substantiated. All cases reported to the OSTC will be recorded in our case management system, NCORS, and screened for prosecutorial merit.

Processing times are impacted by manning and case volume. As discussed above, it is anticipated that reviews of certain types of offense will increase. OSTC must continually assess to determine whether manning levels are appropriate to achieve reduced case-processing timelines.

The NCIS investigative process has not changed as a result of the establishment of the OSTC, and NCIS's threshold for investigating offenses remains unchanged. Sexual harassment offenses will be investigated by specially-hired NCIS investigators as of 1 January 2025.

Marine Corps Response to Question 2:

As of 28 Dec 23, violations of Arts 117a, 128b, 130, and 132 are covered offenses over which the OSTC must exercise authority if the alleged offense was committed on or after 28 Dec 23. If committed prior to 28 Dec 23, the OSTC may exercise its discretional authority over the offense. The OSTC does not have the ability to determine who will investigate these offenses on a case-by-case basis. Investigative policy is set primarily at the Departmental level; the investigative threshold for NCIS is set by SECNAV policy. Currently, most, but not all, allegations of these offenses are investigated by NCIS in accordance with SECNAV policy. For example, currently policy only requires that NCIS investigate 128b violations where there is some aggravating circumstance involved including, but not limited to, strangulation, brandishing a firearm, or results in severe physical harm.

Art 134 sexual harassment will become a covered offense 1 Jan 25. To qualify as a covered offense, the sexual harassment complaint must be a formal complaint and be substantiated by someone outside of the OSTC. In the DON, SECNAV has designated NCIS as the investigative entity that will investigate formal complaints of sexual harassment beginning 1 Jan 25. However, the necessary Secretarial regulations establishing what qualifies as a formal complaint and who will be the substantiating authority have not yet been implemented.

In accordance with the Rules for Courts-Martial, the OSTC must be notified of covered offense allegations as soon as practicable. The Rules for Courts-Martial require commanders to report covered offenses to the OSTC, however, these notifications also come from the law enforcement entity receiving the report. Once the OSTC is made aware of an allegation of a covered offense, OSTC internal business rules require a Special Trial Counsel to be detailed within 48 hours and the detailed Special Trial Counsel partners with the law enforcement entity or command investigator investigating the allegation. By partnering early in the investigative phase for all covered offenses (except Art 134 Sexual Harassment), the Special Trial Counsel is able to continuously review and assess the facts of the case beginning shortly after initial reporting. This assessment includes determining whether the allegation is, in fact, a covered offense and, if it is a covered offense, making a fully informed initial disposition decision regarding the prosecutorial merit of the allegation.

The OSTC's internal business rules for detailing Special Trial Counsel, documenting, processing, and tracking covered offense allegations reported to the OSTC are designed to ensure an accurate accounting of those reports received by the OSTC. However, other than encouraging those with the legal responsibility to report covered offenses to the OSTC to do so, the OSTC has no authority to require them to do so.

As the OSTC is now involved in the process at a much earlier point in the lifecycle of an allegation and is the decision maker in whether an allegation will be addressed via a criminal forum, processing timelines, at least to the point of initial disposition processing timelines, should be substantially reduced.

Air Force Response to Question 2:

Wrongful broadcast or distribution of intimate visual images (Article 117a); Domestic Violence (Article 128b); Stalking (Article 130); and Retaliation (Article 132) became covered offenses under OSTC authority (to include known/related offenses arising out of the same offenses) on 28 December 2023. After 1 January 2025, formal and substantiated claims of sexual harassment (Article 134) will become a covered offense. Since the OSTC program is only a few weeks into its full stand up, it is too early to project impacts on processing times or the ability to capture a more accurate number of reported violations. OSTC must be notified of any covered offenses within 24 hours upon discovery; an STC must then review and asses the offense. The notification triggers the IPST function. Each OSTC District Office provides an IPST STC who is available 24 hours per day and 7 days a week. OSTC and MCIOs will collaborate to determine the scope and methods of investigation for covered offenses.

Question 3. Explain the processes used for reporting, investigating, and disposing of Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).

Army Response to Question 3:

Reports of violations of any offense under the UCMJ can be reported to law enforcement, through command channels, or through relevant Army intervention programs such as Family Advocacy or Sexual Harassment and Response Program personnel. Investigative jurisdiction is governed by the attached Army regulation 195-2, Appendix B-1 [no attachments are included in this appendix]. Investigative jurisdiction for all allegations of retaliation is further governed by DoDI 6495.03. Reports of allegations of sexual harassment are currently governed by attached AD 2022-13 but are expected to be addressed in pending DoDI. Commanders currently have jurisdiction over disposition of all offenses until DEC 2023.

Navy Response to Question 3:

The process for these offenses is the same as for any other offense and is detailed above in response to questions 1 and 2.

Marine Corps Response to Question 3:

Reporting allegations and the investigation of those reports depends on the gravamen of the allegation; for most serious crimes, the report is made to NCIS. Reporting and investigation of Article 134 (sexual harassment) is governed by the Marine Corps Prohibited Activities and Conduct order, MCO 5354.1F, and ALNAV 024/22, which requires independent trained investigators for sexual harassment investigations.

Air Force Response to Question 3:

Reports of prohibited activities with a military recruit or trainee by a person in a position of special trust (Article 93a), although not covered offenses for OSTC purposes, require Special Interest Reporting (SIR). These cases require reports to be forwarded to the Military Justice and Discipline Directorate (JAJM) within one duty day of learning of the incident by the base legal office responsible for the case or supporting the subject's unit of assignment. These reporting requirements are in addition to commanders' separate reporting requirements.[1]

Wrongful broadcast or distribution of intimate images (Article 117a); domestic violence (Article 128b); stalking (Article 130); retaliation (Article 132); and, as of 1 January 2025, formalized and substantiated complaints of sexual harassment (Article 134) are covered offenses and will be reported, investigated, and disposed in accordance with the regulations and procedures governing covered offenses under OSTC authority.

1 See, for instance, AFI 36-2909, *Air Force Professional Relationships and Conduct*, 14 November 2019, Air Education and Training Command Supplement, 27 October 2020, paragraph 1.2.7.

Question 4. Identify all offenses listed in Sections IV and V for which victims are authorized victim counsel services and attach copies of all policy guidance pertaining to such consultation and/or representation.

Army Response to Question 4:

Victims who report offenses under Art. 120, 120a, 120b, 120c, 128b(1) and (5) , or Art. 80 of any of these offenses are eligible for SVC services. See attached policy [no attachments are included in this appendix].

Navy Response to Question 4:

From the list of offenses provided, victims of the following offenses are authorized VLC services as a matter of right:

Article 117a – Wrongful broadcast or distribution of intimate visual images
Article 119b – Child endangerment. Eligible if a crime of domestic violence.
Article 120a – Mails, deposit of obscene matter. Eligible if child pornography.
Article 123 – Offenses concerning Government computers. Eligible if child pornography.
Article 128b – Domestic violence.
Article 132 – Retaliation. Eligible where victim of sexual assault/domestic violence is subject to retaliation. VLC required by statute to assist with retaliation cases.

It should be noted that the Navy's Chief of the Victims' Legal Counsel Program has authority to waive eligibility requirements on a case-by-case basis to allow VLC services to be provided for an offense which does not automatically trigger eligibility for VLC services. Additionally, should an ineligible offense be charged alongside an eligible offense, the VLC will provide services related to all offenses. Policy guidance, consisting of VLC Program Manual and VLC DV Policy Manual, is attached.

Marine Corps Response to Question 4:

Provision of victim counsel is governed primarily by 10 U.S.C. 1044e, which authorizes services for *any* military victim, and for civilian victims of sex-related offenses (including Article 130). Pursuant to MCO 5800.16, Vol. 4 (attached), para. 0104, assignment of victim counsel is determined under policy and procedures published by the Chief VLC of the Marine Corps.

Air Force Response to Question 4:

In accordance with DAFI 51-207, *Victim and Witness Rights and Procedures*, 10 October 2023, Victims' Counsel (VCs) are authorized to provide services to victims of qualifying sex-related offenses, domestic violence offenses, and other offenses that contain elements of interpersonal violence, including but not limited to, workplace violence, under the UCMJ. Qualifying sex-related offenses include violations of the following offenses:

Article 120 and attempts thereof;
Article 120b and attempts thereof;
Article 120c and attempts thereof;
Article 130 and attempts thereof;
Article 117a, subject to eligibility criteria in DAFI 51-207, *Victim and Witness Rights and Procedures,* paragraph 3.2.2.1.6.

Qualifying crimes of domestic violence include violations of the following offenses, provided the victim of the offense is a spouse, intimate partner, or immediate family member:

Article 117a and attempts thereof;
Article 118 (attempts);
Article 119 (attempts);
Article 128(b) and attempts thereof;
Article 128a and attempts thereof;
Article 128b and attempts thereof, but only offenses that constitute violations of Article 128b(1); 128(b)(4); or 128(b)(5); Article 130.

Offenses that constitute violations of Articles 119a, 122, and 126, along with any other offense that has as an element that includes the use, attempted use, or threatened use of physical force against the person or property of a spouse, intimate partner or immediate family member, to include animals, will be considered on a case-by-case basis. A violation of any other provision of the UCMJ when committed against a spouse, intimate partner, or immediate family member may be considered on a case-by-case basis as an Extraordinary Circumstances Request (ECR).

The ECR process authorizes exceptions to eligibility requirements when: (1) the alleged perpetrator was subject to the UCMJ at the time of the offense; and (2) the alleged perpetrator was subject to the UCMJ at the time of the ECR; and (3) the ECR is warranted for good cause and furtherance of the DAF mission. This authority includes, but is not limited to, detailing VCs, on a case-by-case basis, to represent victims of sex-related crimes, domestic violence crimes, or crimes involving interpersonal violence, regardless of eligibility for legal assistance services under 10 U.S.C. § 1044; and victims of other violent crimes under the UCMJ, regardless of eligibility for legal assistance services under 10 U.S.C. § 1044.

Question 5. Identify all Service current (FY 22–24) and planned studies, reports, or other efforts examining the processing of reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), Article 134 (sexual harassment), and provide copies of completed studies, reports, or policy guidance stemming from such efforts. Provide contact information for the appropriate POC to provide briefings on such efforts.

Army Response to Question 5:

OTJAG is not aware of any Army specific studies related to the processing of reported violations of Articles 117a, 128b, 130, 132, or 134.

Navy Response to Question 5:

The Navy is unaware of any such proposed studies.

Marine Corps Response to Question 5:

There is an ongoing effort to examine the processing of reported violations of Article 134 (sexual harassment) and other offenses covered by MCO 5354.1F; however, these efforts are not anticipated to result in studies or reports, and the efforts are currently pre-decisional.

Air Force Response to Question 5:

During FY 22–24, DAF has not undertaken studies, reports, nor efforts to specifically examine the processing of reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), nor Article 134 (sexual harassment).

Question 6. For FY 22 and FY 23, describe the three issues most frequently raised on appeal to the Courts of Criminal Appeals for each of the following offenses: Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).

Army Response to Question 6:

Army Government Appellate Division, Defense Appellate Division and the Army Court of Criminal Appeals do not track assignments of error by enumerated article. Anecdotally, the following issues have been identified with regard to the newer enumerated offenses: Art. 128b has different elements and definitions than 18 USC 922g's definition of misdemeanor crime of domestic violence; whether Art. 134 sexual harassment preempts Art. 93 maltreatment or regulatory violations of AR 600-20 charged under Art. 92; and the application of Art. 43's default 5-year statute of limitations to violations of Arts. 117a, 130, and 128b with a child victim.

Navy Response to Question 6:

The Navy and Marine Corps Court of Criminal Appeals does not track this data in an organized, systemic way. Approximately 50% of all submissions to the Court are submitted "on the merits" with no attempt by counsel to call out or highlight any specific issue. The vast majority of these cases result in a summary disposition. With respect to the remaining cases submitted to the Court, issues raised on appeal are not identified, or cross-referenced, by UCMJ article.

Marine Corps Response to Question 6:

The Court of Criminal Appeals is a Departmental function and these questions are directed primarily to TJAGs. Defer to OJAG.

Air Force Response to Question 6:

N/A

Question 7. For FY 22 and FY 23, describe the three issues most frequently resulting in action by the Courts of Criminal Appeals for each of the following offenses: Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).

Army Response to Question 7:

Army Government Appellate Division, Defense Appellate Division and the Army Court of Criminal Appeals do not track issues resulting in action by the Army Court of Criminal Appeals by enumerated article.

Navy Response to Question 7:

The Navy and Marine Corps Court of Criminal Appeals does not track this data in an organized, systemic way. Approximately 50% of all submissions to the Court are submitted "on the merits" with no attempt by counsel to call out or highlight any specific issue. The vast majority of these cases result in a summary disposition. With respect to the remaining cases submitted to the Court, issues raised on appeal are not identified, or cross-referenced, by UCMJ article.

Marine Corps Response to Question 7:

The Court of Criminal Appeals is a Departmental function and these questions are directed primarily to TJAGs. Defer to OJAG.

Air Force Response to Question 7:

See Air Force Court of Criminal Appeals (AFCCA) Response to MJRP (January 2024) spreadsheet.

Question 8. For FY 22 and FY 23, describe the three issues most frequently resulting in action by the Court of Appeals for the Armed Forces for each of the following offenses: Article 93a (prohibited activities with military recruit or trainee by a person in a position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment).

Army Response to Question 8:

Army Government Appellate Division, Defense Appellate Division and the Army Court of Criminal Appeals do not track issues resulting in action by Court of Appeals for the Armed Forces by enumerated article.

Navy Response to Question 8:

The Navy does not track data relating to action taken by the Court of Appeals for the Armed Forces.

Marine Corps Response to Question 8:

The Court of Criminal Appeals is a Departmental function and these questions are directed primarily to TJAGs. Defer to OJAG.

Air Force Response to Question 8:

In FY22–23, the Court of Appeals for the Armed Forces (CAAF) did not issue any opinions for DAF cases involving Articles 93a, 117a, 128b, 130, 132, nor sexual harassment under Article 134. However, it did consider the statutory elements of Article 117a in one Army case in FY22. See *U.S. v. Hiser*, 82 M.J. 60.

APPENDIX N. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON PUNITIVE ARTICLES (MILITARY LAW ENFORCEMENT)

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
2 November 2023
Law Enforcement

UCMJ: Punitive Article Data

I. Purpose: The Military Justice Review Panel (MJRP) requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess the effect of changes to the punitive articles since the passage of the Military Justice Act of 2016 and subsequent legislation.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Ms. Theresa Gallagher, available at 703-501-4715 or theresa.a.gallagher2.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
8 Dec 2023	Spreadsheet Data	Excel worksheets containing the requested data (Sections VI) from FY21, FY22, and FY23 for the punitive articles identified in Section V of this RFI
8 Dec 2023	Narrative Responses and Documents	Narrative responses from the appropriate Service law enforcement entities to Section VII questions.

V. Information Requested: Military Services law enforcement provide data for fiscal years 2021–2023 for the following punitive articles:

1. Article 82 (a): Soliciting commission of offenses generally
2. Article 84: Breach of medical quarantine
3. Article 87b: Offenses against correctional custody and restriction (provide counts separately for each listed sub-section: Article 87b (a) escape from correctional custody, Article 87b (b) breach of correctional custody, and Article 87b (c) breach of restriction)
4. Article 93a: Prohibited Activities with Military Recruit or Trainee by a Person in a Position of Special Trust (provide counts separately for each sub-section: Article 93a (a) abuse of training leadership position and Article 93a (b) abuse of position as military recruiter)

5. Article 95 (b): Loitering or wrongfully sitting on post
6. Article 95a: Disrespect to a sentinel or lookout
7. Article 96 (b): Drinking with prisoner
8. Article 104: Public records offenses
9. Article 105a: False or unauthorized pass offenses
10. Article 106: Impersonation of officer, noncommissioned or petty officer, or agent or official
11. Article 106a: Wearing unauthorized insignia, decoration, badge, device, or lapel button
12. Article 107 (b): False swearing
13. Article 107a: Parole violation
14. Article 109a: Mail matter: wrongful taking, opening, etc.
15. Article 111: Leaving scene of vehicle accident
16. Article 112: provide counts separately for each listed sub-section: Article 112 (b) incapacitation for duty from drunkenness or drug use, and Article 112 (c) drunk prisoner
17. Article 114: provide counts separately for each listed sub-section: Article 114 (a) reckless endangerment; Article 114 (c) firearm discharge, endangering human life; and Article 114 (d) carrying concealed weapon
18. Article 115: provide counts separately for each listed sub-section: Article 115 (a) communicating threats generally; Article 115 (b) communicating threat to use explosive, etc.; and Article 115 (c) communicating false threat concerning use of explosive, etc.
19. Article 117a: Wrongful broadcast or distribution of intimate visual images
20. Article 119b: Child endangerment
21. Article 120a: Mails: deposit of obscene matter
22. Article 121a: Fraudulent use of credit and debit cards
23. Article 121b: False pretenses to obtain services
24. Article 122a: Receiving stolen property
25. Article 123: Offenses concerning Government computers
26. Article 124: Frauds against the United States
27. Article 124a: Bribery
28. Article 124b: Graft
29. Article 125: Kidnapping
30. Article 126 (c): Burning property with intent to defraud
31. Article 128 (c): Assault with intent to commit specified offenses
32. Article 128b: Domestic violence
33. Article 129 (b): Unlawful entry
34. Article 130: Stalking
35. Article 131a: Subornation of perjury
36. Article 131b: Obstructing justice
37. Article 131c: Misprision of serious offense
38. Article 131d: Wrongful refusal to testify
39. Article 131e: Prevention of authorized seizure of property
40. Article 131g: Wrongful interference with adverse administrative proceeding
41. Article 132: Retaliation
42. Article 134: Sexual Harassment

VI. Information to be provided for each of the punitive articles identified in Section V of this Request:

Please provide a spreadsheet containing the following aggregated data for each specified offense and an explanation of the methodology used to collect the provided data. Aggregated data should be provided for all alleged violations of the specified punitive articles reported to a person in a position of authority that reached final adjudication in the applicable fiscal year (hereinafter cases). The data should be specific to the identified offense. If data is unavailable, include a brief explanation as to why.

Aggregated Data Points		
1	Number of reported violations of each offense with a Service member accused/subject	
2	Number of reports to each agency/organization receiving the report	–Chain of Command –MCIO –Military Police –DoD or Service IG –Other
3	Number of investigations commenced	
4	Number of investigations by each investigative entity	–Chain of command –MCIO –Military police –DoD or Service IG –Other
5	Number of each type of command disposition	–No action –Administrative Separation –Other Administrative Action –NJP –Summary Court-Martial –Article 16(c)(2)(A) SPCM –Special Court-Martial –General Court-Martial
6	Pay grade of the Subject/Accused aggregated by grade	–E-1 through E-4 –E-5 through E-6 –E-7 through E-9 –W-1 through W-5 –O-1 through O-3 –O-4 through O-7+ –Cadet or Midshipman
7	Number of cases in which a victim declined to participate in the investigation, prosecution, or other disposition of the offense	
8	Number of cases in which the victim is a victim of domestic violence, as defined by DoDI 6400.06	
9	Number of cases in which law enforcement submitted fingerprints and reported disposition data to the Criminal Justice Information Services of the FBI criminal history database.	

VII. Information Requested: Military Services MCIOs and Service law enforcement provide narrative responses for the following questions:

1. For each offense identified in Section V, what offenses are transferred immediately to an MCIO for investigation? What offenses are transferred immediately to the applicable Service law enforcement entity? What offenses are transferred immediately to the command? Please explain the process used to evaluate and transfer a reported offense to a higher- or lower-level investigative entity. Are there any impending changes to the exercise of investigative jurisdiction? If so, please describe.
2. Has the investigative process changed as a result of the OSTCs having jurisdiction over reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment)? Please describe those changes.
3. For each offense identified in Section V, what offenses require submission of fingerprints and reporting of disposition to the Criminal Justice Information Services of the FBI criminal history database?

MILITARY SERVICE RESPONSES – LAW ENFORCEMENT INFORMATION ON UCMJ: PUNITIVE ARTICLE DATA

Note: The Military Services' responses to Section V, list of 42 punitive articles, and Section VI, Questions 1–9, are not reproduced in this appendix, given their voluminous nature and varied formatting. Data obtained from these responses have been referenced within the report to the extent necessary to fully explain the issues discussed.

The following information reflects each of the Military Services responses to Section VII, Questions 1–3.

VII. Information Requested: Military Services MCIOs and Service law enforcement provide narrative responses for the following questions:

Question 1. For each offense identified in Section V, what offenses are transferred immediately to an MCIO for investigation? What offenses are transferred immediately to the applicable Service law enforcement entity? What offenses are transferred immediately to the command? Please explain the process used to evaluate and transfer a reported offense to a higher- or lower-level investigative entity. Are there any impending changes to the exercise of investigative jurisdiction? If so, please describe.

Army (CID and MP) Response to Question 1:

The offenses which correlate to the listed punitive articles [that] are transferred immediately to an MCIO (CID) for investigation are: 82 (a), 87b (a), 87b (b), 95 (b), 105a, 106, 106a, 115 (b), 121a, 123, 124, 124a, 124b, 125, 126 (c), 128 (c), 130, 131b, 131c, and 131g. The offenses which correlate to the listed punitive articles [that] are transferred immediately to an applicable Service law enforcement entity (MP) for investigation are: 84, 96 (b), 105a, 107a, 111, 112 (b), 112 (c), 114 (c), 114 (d), 115 (a), 117a, 119b, 121b, 126 (c), and 129 (b). The offenses which correlate to the listed punitive articles [that] are transferred immediately to an MCIO (CID) and an applicable Service law enforcement entity (MP) for investigation are (both entities have purview): 82 (a), 93a, 104, 107 (b), 121a, 122a, 124, 128 (c), 128b, 131a, 131b, 131c, 131d, 132, and 134. There are no specific offenses [that] CID immediately transfers to the command. CID is concerned with what is in our purview. In accordance with the IIOD, para 2.2, Special agents are authorized to investigate and/or report any alleged criminal conduct in which there is an Army interest unless prohibited by law. DACID investigates all allegations of crimes within our investigative purview as detailed in AR 195-2 (Criminal Investigation Activities), App B. Offenses not within DACID's purview are pursued by the most relevant party—MPs, commanders, IGs. In accordance with the IIOD, para 2.2, Special agents are authorized to investigate and/or report any alleged criminal conduct in which there is an Army interest unless prohibited by law. If a DACID investigation determines an offense in our purview (e.g. Sexual Assault) is founded (we substantiate the subject has committed all elements of the offense), then we provide that information in a written report to the commander and prosecutor for action they deem appropriate.

Navy and Marine Corps (NCIS) Response to Question 1:

Per SECNAVINST 5430.107A (Mission and Functions of the Naval Criminal Investigative Service, 19Jun19), NCIS has primary responsibility for investigating actual, suspected, and alleged serious criminal offenses within the Department of the Navy (DON). A serious criminal offense (sometimes referred to as a major criminal offense or felony) is any criminal offense punishable under the Uniform Code of Military Justice (UCMJ), or similarly framed Federal, state, local, or foreign statute, by confinement for a term of more than one year.

NCIS has primary responsibility for investigating the following offenses: fraud within the DON; non-combat deaths; fires or explosions of unknown origin; loss or theft of weapons, ordnance, narcotics, dangerous drugs, controlled substances, or high-value property; missing command members when foul play cannot be ruled out; and acts of espionage, terrorism, sabotage, assassination, and defection by DON personnel. Further, pursuant to DODI 5505.18 (Investigation of Sexual Assault in the Department of Defense) and 5505.19 (Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)), within the DON NCIS has sole jurisdiction to investigate reports of adult sexual assault, domestic violence involving aggravated assault with grievous bodily harm, child sexual assault, and child abuse involving aggravated assault with grievous bodily harm.

DON commands, activities, and personnel shall refer to NCIS any incidents of actual, suspected, or alleged major criminal offenses regardless of whether they occur on or off an installation or ship or are being investigated by other authorities. NCIS may, at its discretion, decline to undertake an investigation. In such event, NCIS will expeditiously inform the affected command or activity. The NCIS field office will weigh multiple factors when deciding to initiate a criminal investigation. Those factors may include the severity of the offense (degree of bodily injury and/or monetary loss); whether an extensive investigation is necessary to address the allegation; resource allocation of the NCIS field office; and whether another law enforcement agency has initiated or declined to investigate the allegation. Additionally, NCIS field elements typically decline to investigate purely military offenses that are not otherwise punishable under Federal or state law.

The following listed offenses warrant NCIS notification and, depending on the facts and circumstances of the allegation, may result in the initiation of an NCIS investigation:

1. Article 82 (a): Soliciting commission of offenses generally.
4. Article 93a: Prohibited activities with military recruit or trainee by a person in a position of special trust.
8. Article 104: Public records offenses.
9. Article 105a: False or unauthorized pass offenses (possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling).
10. Article 106: Impersonation of officer, noncommissioned or petty officer, or agent or official (with intent to defraud).
12. Article 107 (b): False swearing.
14. Article 109a: Mail matter: wrongful taking, opening, etc.
18. Article 115: Communicating threats.
19. Article 117a: Wrongful broadcast or distribution of intimate visual images.
20. Article 119b: Child endangerment.
21. Article 120a: Mails: deposit of obscene matter
22. Article 121a: Fraudulent use of credit and debit cards.
23. Article 121b: False pretenses to obtain services.
24. Article 122a: Receiving stolen property.
25. Article 123: Offenses concerning Government computers.
26. Article 124: Frauds against the United States.
27. Article 124a: Bribery.
28. Article 124b: Graft.
29. Article 125: Kidnapping.
30. Article 126 (c): Burning property with intent to defraud.
31. Article 128 (c): Assault with intent to commit specified offenses.
32. Article 128b: Domestic violence.
34. Article 130: Stalking.
35. Article 131a: Subornation of perjury.
36. Article 131b: Obstructing justice.
37. Article 131c: Misprision of serious offense.
39. Article 131e: Prevention of authorized seizure of property.

Regarding any impending changes to the exercise of investigative jurisdiction, NCIS is prepared to assume responsibility for the investigation of UCMJ Article 134 (sexual harassment) in January 2025.

Air Force (AFOSI and SFS) Response to Question 1:

Air Force Instruction 71-101V1, *Special Investigations*, Attachment 2, delineates investigative responsibilities between AFOSI and Security Forces (SFS). Below is a list of the 42 UCMJ articles identified in section V of your letter.

UCMJ Article Violation	AFOSI	SFS	Command
Article 82 (a): Soliciting commission of offenses generally	None, unless solicitation of a crime during the commission of another crime investigated by AFOSI.	None, unless solicitation of a crime during the commission of another crime investigated by SFS.	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS.

Article 84: Breach of Medical Quarantine	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS.
Article 87b: Offenses against correctional custody and restriction	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 87b (a) escape from correctional custody	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 87b (b) breach of correctional custody	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 87b (c) breach of restriction	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 93a: Prohibited Activities with Military Recruit or Trainee by a Person in a Position of Special Trust	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS.
Article 93a (a) abuse of training leadership position	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS.
Article 93a (b) abuse of position as military recruiter	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS.
Article 95 (b): Loitering or wrongfully sitting on post	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 95a: Disrespect to a sentinel or lookout	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 96 (b): Drinking with prisoner	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 104: Public records offenses	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 105a: False or unauthorized pass offenses	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 106: Impersonation of officer, noncommissioned or petty officer, or agent or official	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 106a: Wearing unauthorized insignia, decoration, badge, device, or lapel button	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 107 (b): False swearing	None, unless committed during the commission of another crime investigated by AFOSI	All	None

Article 107a: Parole violation	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 109a: Mail matter: wrongful taking, opening, etc.	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 111: Leaving scene of vehicle accident	None, unless committed during the commission of another crime investigated by AFOSI	All, unless committed during the commission of another crime investigated by AFOSI	None
Article 112 (b) incapacitation for duty from drunkenness or drug use	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All
Article 112 (c) drunk prisoner	None, unless committed during the commission of another rime investigated by AFOSI	All	None
Article 114 (a) reckless endangerment	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 114 (c) firearm discharge, endangering human life	None, unless the discharge causes grievous bodily harm or death, or occurs during the commission of a crime investigated by AFOSI.	All	None
Article 114 (d) carrying concealed weapon	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 115 (a) communicating threats generally	Threats of extortion, kidnapping and incidents involving grievous bodily harm or committed during the commission of another crime investigated by AFOSI	All	None
Article 115 (b) communicating threat to use explosive, etc.	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 115 (c) communicating false threat concerning use of explosive, etc.	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 117a: Wrongful broadcast or distribution of intimate visual images	All unless deferred to SFS	Minor indecent viewing where no distribution occurred	None
Article 119b: Child endangerment	Physical, sexual, or psychological maltreatment or neglect that places a child in imminent danger of death, grievous bodily injury, or significant mental harm	Unreasonable corporal punishment not resulting in grievous bodily injury and all cases deferred by AFOSI	None
Article 120a Mails: deposit of obscene matter	None, unless committed during the commission of another crime investigated by AFOSI	All	None

Article 121a: Fraudulent use of credit and debit cards	None, unless committed during the commission of another crime investigated by AFOSI	All	None
Article 121b: False pretenses to obtain services	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All
Article 122a: Receiving stolen property	Controlled pharmaceuticals; Arms, ammunitions, or explosives addressed in DoDM 5100.76, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives (AA&E); Losses having a direct impact to critical USAF weapons systems; Classified materials; Significant losses; determined on a case- by-case basis at the installation level.	Cases deferred by AFOSI	None
Article 123: Offenses concerning Government computers	Downloading and/or distribution of child pornography; unauthorized root/user level intrusions to DoD systems; Illegal interception of computer communications; Virus/Trojan/ denial of service attacks causing significant damage to AF information systems or have major impact on the AF mission; Alteration of web pages that cause significant damage or disruption to DoD activities; Computer crimes involving classified information, espionage, or terrorism	Minor incidents; cases involving downloading and/or distribution of adult pornography; unauthorized personal use of government computers; general violations of AFI 33-200, Air Force Cybersecurity Program Management.	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 124: Frauds against the United States	Major cases involving the US Treasury or other federal agencies, false documents or credentials manufactured to commit significant fraud/theft or misrepresentation to DoD (e.g., fake education/medical certificates to gain USAF employment as a physician, fraudulent performance reports, fraudulent identification use to access sensitive/classified areas, etc.)	Insufficient funds checks; minor counterfeiting cases (e.g., fraudulent identification cards used to misrepresent age), and other instances not resulting in significant harm to the DoD. Pay and allowance matters unless assumed by AFOSI	None
Article 124a: Bribery	All	None	None
Article 124b: Graft	All	None	None
Article 125: Kidnapping	All	None	None

Article 126 (c): Burning property with intent to defraud	All	Cases deferred from AFOSI	None
Article 128 (c): Assault with intent to commit specified offenses	Aggravated assault resulting in grievous bodily harm; any assault involving strangulation or suffocation; Any assault committed during the commission of another crime investigated by AFOSI	All other	None
Article 128b: Domestic violence	Aggravated assault resulting in grievous bodily harm; any assault involving strangulation or suffocation; Any assault committed during the commission of another crime investigated by AFOSI	All other	None
Article 129 (b): Unlawful entry	Entry into a SCIF or other controlled/sensitive area; Involve the commission of another crime investigated by AFOSI; Cases involving significant losses, determined on a case-by-case basis at the installation level; Losses exceeding $10,000 (or approximate value as determined by AFOSI).	Local incidents involving base dormitories and housing. Cases deferred by AFOSI	None
Article 130: Stalking	All when associated with physical violence	All others	
Article 131a: Subornation of perjury	All, unless deferred to SFS	Cases deferred by AFOSI	None
Article 131b: Obstructing justice	None, unless committed during the commission of another crime investigated by AFOSI	All, unless assumed by AFOSI	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 131c: Misprision of serious offense	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 131d: Wrongful refusal to testify	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 131e: Prevention of authorized seizure of property	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 131g: Wrongful interference with adverse administrative proceeding	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 132: Retaliation	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS
Article 134: Sexual Harassment	None, unless committed during the commission of another crime investigated by AFOSI	None, unless committed during the commission of another crime investigated by SFS	All, unless violation occurs in commission of a crime investigated by AFOSI or SFS

However, AFOSI often investigates UCMJ violations that fall within the SFS's purview. This occurs when AFOSI investigates serious UCMJ violations within their investigative purview and subsequently identifies other UCMJ violations SFS would normally investigate. An example is when AFOSI investigates a sexual assault allegation in an on-base dormitory where the subject allegedly broke into the residence to commit the crime. The sexual assault violation falls within AFOSI's investigative purview. However, the housebreaking violation falls within SFS's investigative purview. Under circumstances that involve multiple felony level UCMJ violations crossing different investigative jurisdictions, AFOSI would retain the lead for the UCMJ violation investigations in one case. Also, UCMJ violations that do not have a felony level equivalent, and do not require specialized investigative techniques or services, are generally referred to command immediately for action. An example of a UCMJ violation that can be referred to command immediately would be a violation of Article 131d, Wrongful Refusal to Testify. An active-duty member who wrongfully refused to testify can be referred to command for their immediate action without the services of SFS or AFOSI. In short, the process used to evaluate and transfer UCMJ violations to the appropriate investigative agency is rooted in 71-101V1, *Special Investigations*, Attachment 2.

Coast Guard (CGIS) Response to Question 1:

All offenses in Sections V are transferred immediately to CGIS for investigation. There is only one law enforcement entity in the Coast Guard and that is the Coast Guard Investigative Service.

Question 2. Has the investigative process changed as a result of the OSTCs having jurisdiction over reported violations of Article 117a (wrongful broadcast or distribution of intimate visual images), 128b (domestic violence), Article 130 (stalking), Article 132 (retaliation), and Article 134 (sexual harassment)? Please describe those changes.

Army (CID and MP) Response to Question 2:

There have been no significant changes in the manner or processes in which DACID conducts felony level investigations. In some areas, our coordination/case approach may differ, but not the actual investigative steps. Coordination with the OSTC begins at the onset of an investigation into a covered offense and will continue through final disposition. Special agents keep OSTC informed about the seizure of evidence, significant investigative leads, magistrate authorizations, pre-referral subpoenas, and warrant and collaborate with OSTC during the lifecycle of the investigation. DACID is anticipating adding the new Sexual Harassment offense under Art 134, UCMJ, to our investigative purview at a future date.

Navy and Marine Corps (NCIS) Response to Question 2:

No, the NCIS investigative process has not changed as a result of the establishment of the OSTCs.

Air Force (AFOSI and SFS) Response to Question 2:

Later this month, the Air Force Office of Special Trial Counsel (OSTC) will be activated and there are no impending changes for investigative jurisdiction on the horizon for covered offenses.

Coast Guard (CGIS) Response to Question 2:

The investigative process has not changed as a result of the OSTCs having jurisdiction over the reported offenses as described above.

Question 3. For each offense identified in Sections V, what offenses require submission of fingerprints and reporting of disposition to the Criminal Justice Information Services of the FBI criminal history database?

Army (CID and MP) Response to Question 3:

The offenses which correlate to the listed punitive articles require submission of fingerprints and reporting disposition [to the] Criminal Justice Information Services of the FBI criminal history database: 82 (a), 87b (a), 87b (b), 104, 105a, 106, 107 (b), 111, 114 (c), 114 (d), 115 (a), 115 (b), 117a, 119b, 121a, 121b, 123, 124, 124a, 124b, 125, 126 (c), 128 (c), 128b, 129 (b), 130, 131a, 131b, 131c, 131d, 131g, and 134.

Navy and Marine Corps (NCIS) Response to Question 3:

Per DoDI 5505.11, Fingerprint Reporting Requirements, 31Oct19, defense criminal investigative organizations (DCIOs) and other DoD law enforcement activities (LEAs) will collect fingerprints and criminal history record information (CHRI) upon determination of probable cause and will electronically submit to the CJIS Division of the FBI for all Service members who are investigated for all offenses punishable by imprisonment listed in the punitive articles of Chapter 47 of Title 10, U.S.C. or elsewhere in the U.S.C. DCIOs and other DoD LEAs will comply with Part 20.32(b) of Title 28, Code of Federal Regulations concerning offenses excluded from fingerprint collection. These exclusions include non-serious offenses such as drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, and traffic violations (except data will be included on arrests for vehicular manslaughter, driving under the influence of drugs or liquor, and hit and run).

Air Force (AFOSI and SFS) Response to Question 3:

Air Force Manual 71-102, *Special Investigations, Air Force Criminal Indexing*, identifies the UCMJ articles that are excluded from submitting fingerprints and reporting disposition to the Criminal Justice Information Services of the FBI criminal history database. All UCMJ articles listed in section V meet the criminal indexing requirement except those listed below:

Article 84: Breach of Medical Quarantine
Article 87b: Breach of Restriction
Article 95a: Disrespect Toward Sentinel or Lookout
Article 105a: False or Unauthorized Pass Offenses
Article 106a: Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button
Article 112: Drunk Prisoner

Coast Guard (CGIS) Response to Question 3:

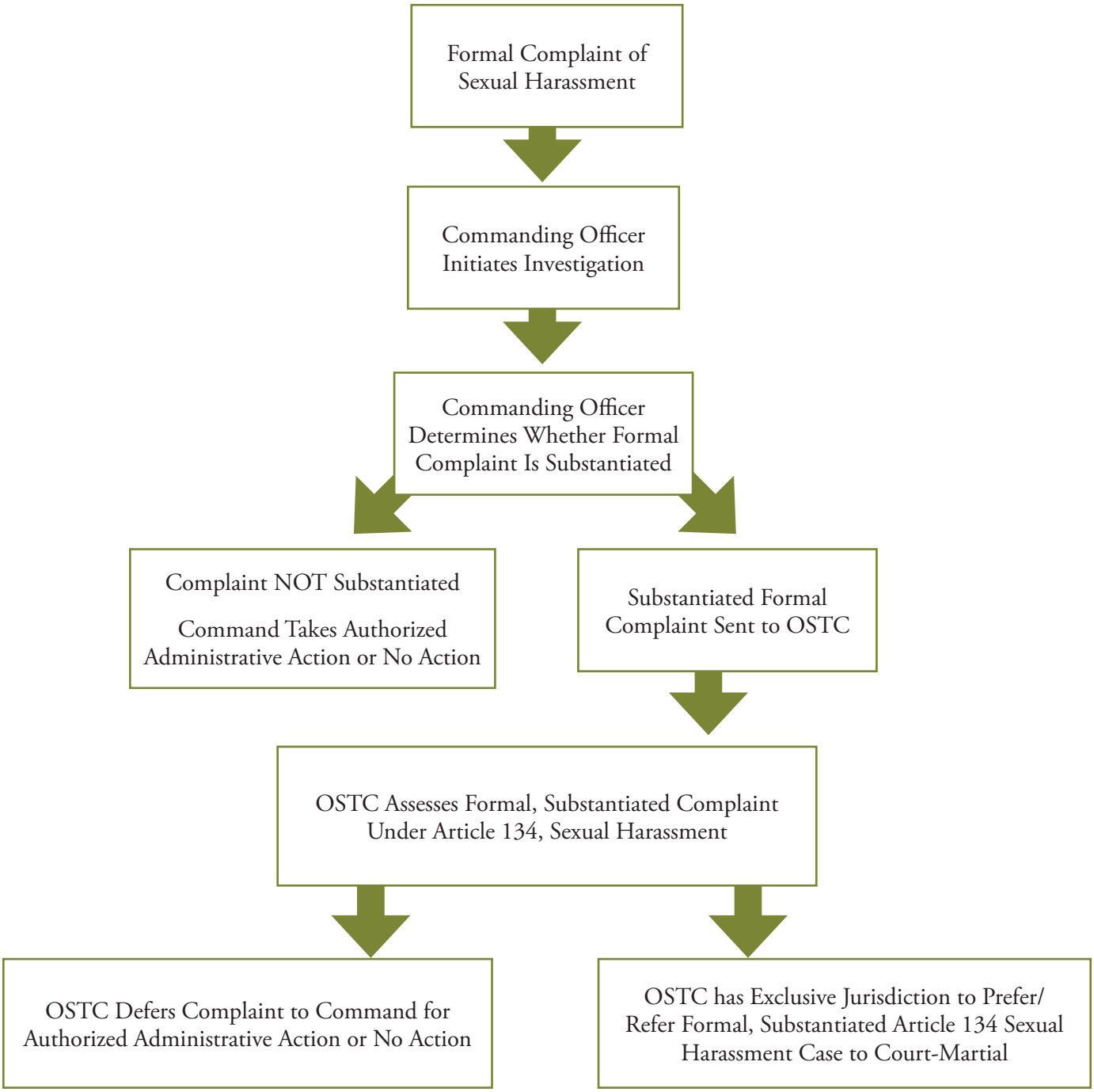
For each offense identified in Section V, the offenses required for submission of fingerprints and reporting of disposition to the CJIS of the FBI criminal history database are all offenses punishable by imprisonment listed in the punitive articles of Chapter 47 of Title 10, U.S.C.

APPENDIX O. COMPARISON OF 10 U.S.C. § 1034 AND ARTICLE 132, UCMJ

10 U.S.C. § 1034: Protected communications; prohibition of retaliatory personnel actions	Article 132, UCMJ – Retaliation
(b) Prohibition of Retaliatory Personnel Actions.— (1) No person may **take (or threaten to take) an unfavorable personnel action or, withhold (or threaten to withhold) a favorable personnel action**, as a **reprisal** against a member of the armed forces **for making or preparing or being perceived as making or preparing–a protected communication** *(see definition below)*.	b. *Elements*. (1)(a) That the accused wrongfully (i) **took or threatened to take an adverse personnel action** against any person, or (ii) **withheld or threatened to withhold a favorable personnel action** with respect to any person; and (b) That, at the time of the action, the accused intended to retaliate against any person **for reporting or planning to report a criminal offense, or for making or planning to make a protected communication** (see definition below). *Wrongful—when used for the purpose of **reprisal**, rather than for purposes of lawful personnel administration.*
(a) Restricting Communications With Members of Congress and Inspector General Prohibited.— (1) No person may **restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.** (2) Paragraph (1) does not apply to a communication that is unlawful.	(2) Discouraging a report of criminal offense or protected communication. (a) That the accused wrongfully (i) took or threatened to take an adverse personnel action against any person, or (ii) withheld or threatened to withhold a favorable personnel action with respect to any person; and (b) That, at the time of the action, the accused intended to discourage any person from **reporting a criminal offense or making a protected communication**.
Defined: Covered Individual or Organization (b)(1)(B)(i) a Member of Congress; (ii) an Inspector General (as defined in subsection (j)) or any other Inspector General appointed under chapter 4 of title 5; (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; (iv) any person or organization in the chain of command; (v) a court-martial proceeding; or (vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.	**Defined:** Covered Individual or Organization a.(b)(3) The term "covered individual or organization" means any recipient of a communication specified in clauses (i) through (v) of 10 U.S.C. § 1034(b)(1)(B).

Defined: Protected Communication (b)(1)(A) a communication to a **Member of Congress or an Inspector General;** (b)(1)(C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section. (c)(2) a communication in which a member of the armed forces **complains of, or discloses information** that the member reasonably believes constitutes evidence of, any of the following: (A) **A violation of law or regulation**, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920, 920b, 920c, or 930 of this title (article 120, 120b, 120c, or 130 of the UCMJ), sexual harassment, or unlawful discrimination. (B) **Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety** (C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to a member of the armed forces or civilians or damage to military, Federal, or civilian property.	**Defined:** Protected Communication a.(b)(1)(A) A lawful communication to a **Member of Congress or an Inspector General.** (B) A communication to a covered individual or organization in which a member of the armed forces **complains of, or discloses information** that the member reasonably believes constitutes evidence of, any of the following: (i) **A violation of law or regulation**, including a law or regulation prohibiting sexual harassment or unlawful discrimination. (ii) **Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety**.
Defined: Inspector General (j)(2)(A) The Inspector General of the Department of Defense. (B) The Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy (C) Any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.	**Defined:** Inspector General a.(b)(2) The term "Inspector General" has the meaning given that term in 10 U.S.C. § 1034(j).
Defined: Prohibited Personnel Action (2)(A) Any action prohibited by paragraph (1), including any of the following: (i) The threat to take any unfavorable action. (ii) The withholding, or threat to withhold, any favorable action. (iii) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade. (iv) The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member. (v) The conducting of a retaliatory investigation of a member.	**Defined:** Prohibited Personnel Action (a) Any action taken on a Servicemember that affects, or has the potential to affect, that Servicemember's current position or career, including promotion; disciplinary or other corrective action; transfer or reassignment; performance evaluations; decisions concerning pay, benefits, awards, or training; relief and removal; separation; discharge; referral for mental health evaluations; and any other personnel actions as defined by law or regulation, such as 5 U.S.C. § 2302 and DoD Directive 7050.06 (17 April 2015); or, (b) any action taken on a civilian employee that affects, or has the potential to affect, that person's current position or career, including promotion; disciplinary or other corrective action; transfer or reassignment; performance evaluations; decisions concerning pay benefits, awards, or training; relief and removal; discharge; and any other personnel actions as defined by law or regulation such as 5 U.S.C. § 2302.

APPENDIX P. SEXUAL HARASSMENT COMPLAINT PROCESS UNDER ARTICLE 134, UCMJ



APPENDIX Q. COMPARISON OF 10 U.S.C. § 1561 AND ARTICLE 134, UCMJ

10 U.S.C. § 1561 (pre-December 27, 2023)	Article 134, UCMJ – Sexual Harassment
(e) **Sexual Harassment Defined**.—In this section, the term "sexual harassment" means any of the following: (1) Conduct that— (A) involves **unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual natur**e when (i) **submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career**; (ii) **submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person**; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates **an intimidating, hostile, or offensive working environment**; and (B) is so **severe or pervasive** that a reasonable person would perceive, and the victim does perceive, **the work environment as hostile or offensive**.	b. *Elements*. (1) That the accused knowingly made **sexual advances, demands or requests for sexual favors**, or knowingly engaged in **other conduct of a sexual nature**; (2) That such conduct was **unwelcome**; (3) That, under the circumstances, such conduct: (a) Would cause a reasonable person to believe, and a certain person did believe, that **submission to such conduct would be made, either explicitly or implicitly, a term or condition of a person's job, pay, career**, benefits, or entitlements; (b) Would cause a reasonable person to believe, and a certain person did believe, that **submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person's job, pay, career**, benefits, or entitlements; or (c) Was so **severe, repetitive, or pervasive** that a reasonable person would perceive**,** and a certain person did perceive, **an intimidating, hostile, or offensive working environment**; and
(2) Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.	
(3) Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.	
	(4) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

APPENDIX R. REQUEST FOR INFORMATION AND MILITARY SERVICE RESPONSES ON MILITARY JUSTICE SENTENCING (JUDGE ADVOCATE HEADQUARTERS)

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Information on Military Justice Sentencing
29 February 2024

I. Purpose: The Military Justice Review Panel (MJRP) requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess changes to the structure, pretrial and trial procedures, punitive articles, and post-trial and sentencing procedures of the military justice system since the passage of the Military Justice Act of 2016.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Mr. Michael Libretto, available at michael.d.libretto.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 April 2024	Narrative Responses	Please provide narrative responses to each of the questions in Sections V and VI below.

V. The MJRP respectfully requests narrative responses to the below questions from a knowledgeable representative of each of the Services' Judge Advocate Headquarters.

Q1: Under the current pre-sentencing procedures, government and defense counsel may present matters to aid the military judge in determining an appropriate sentence, then argue for what they believe is an appropriate sentence. This process differs from state and federal criminal courts that rely primarily on independently produced pre-sentencing reports. Is adopting a process similar to state and federal courts advisable and feasible? Would a bifurcated sentencing hearing that is distinct from, but held close in time to (e.g., within two weeks or 30 days) the verdict, be advisable and feasible? Please explain.

VI. The MJRP respectfully requests narrative responses to the below questions from a knowledgeable representative of each of the following organizations within each Service: (1) Office of the Special Trial Counsel, (2) Trial Services Organization, (3) Defense Services Organization, (4) Victim Legal Services Organization. To the extent that a representative from these organizations has provided input on these questions during a public meeting, the organizations may supplement those responses through this RFI.

Q1: Under the current pre-sentencing procedures, unlike in state and federal criminal courts that rely primarily on independently produced pre-sentencing reports, government and defense counsel may present matters to aid the military judge in determining an appropriate sentence, then argue for what they believe is an appropriate sentence. What challenges do counsel face with doing so effectively? In your view, are there any changes to the rules or procedures that would make the sentencing process more effective and efficient? Is a process similar to state and federal courts advisable and feasible? Would a bifurcated sentencing hearing that is distinct from, but held close in time to (e.g., within two weeks or 30 days) the verdict, be advisable and feasible? Please explain.

Q2: Based on your experience, are military judges sentencing similarly situated servicemembers consistently for the same or similar offenses? If not, in your opinion, is that attributable to different military judges, the facts and circumstances of the individual case, differing quantities and quality of information presented for the military judge's consideration, or other?

Q3: Please comment on the advisability and feasibility of providing the following additional sentencing authorities to a military judge:

1. The ability to suspend all or part of a sentence
2. The ability to defer all or part of a sentence
3. The ability to reduce an Officer member in pay-grade and/or lineal number
4. The ability to sentence a convicted servicemember to a rehabilitative program(s) (e.g., substance or alcohol abuse treatment) in lieu of or in addition to other punishments
5. The ability to vacate a finding of guilty based upon successful completion of specified conditions (e.g., successful completion of rehabilitative program, no additional misconduct, favorable performance)

Q4: Are there any other changes to sentencing processes, procedures, or rules that would be beneficial to ensuring informed, fair, and consistent sentences are adjudged across the services? Please explain.

MILITARY SERVICE RESPONSES – INFORMATION ON MILITARY JUSTICE SENTENCING

The following information reflects each of the Military Services' responses to Section V, Question 1, and Section VI, Questions 1–4.

V. The MJRP respectfully requests narrative responses to the below questions from a knowledgeable representative of each of the Services' Judge Advocate Headquarters.

Q1: Under the current pre-sentencing procedures, government and defense counsel may present matters to aid the military judge in determining an appropriate sentence, then argue for what they believe is an appropriate sentence. This process differs from state and federal criminal courts that rely primarily on independently produced pre-sentencing reports. Is adopting a process similar to state and federal courts advisable and feasible? Would a bifurcated sentencing hearing that is distinct from, but held close in time to (e.g., within two weeks or 30 days) the verdict, be advisable and feasible? Please explain.

Army Judge Advocate Headquarters Response to Q1:

Adopting a process similar to state and federal courts is not advisable. Federal district courts use the Presentencing Report (PSR) to inform their sentences. The PSR identifies pertinent data about the accused to include prior criminal history, financial conditions, and other circumstances that may affect behavior. Further the PSR describes information about any victim such as financial, social, psychological, and medical harm. Accordingly, the report captures information in aggravation and information in mitigation and extenuation.

The military justice system's presentencing process similarly ensures a sentencing authority is informed of evidence in aggravation, extenuation, and mitigation. The military's presentencing procedures allow parties to admit relevant evidence such as sworn or unsworn statements from crime victims and Soldiers convicted of an offense. The military judge may also relax the rules of evidence to allow a convicted Soldier to submit evidence such as affidavits, letters of support, military awards, or certificates of military achievement. Consequently, the purpose behind the PSR is met in a court-martial.

An individual's criminal history is an important component of the PSR. This data point is less important within the military justice system. Criminal background checks are a requirement for entry into the military. Although having a criminal record does not automatically disqualify an individual from entering the military, a record of serious crimes would likely preclude entry into the service. Servicemembers should not have an extensive criminal history as a result. Furthermore, a servicemember likely will either be administratively separated or face trial by court-martial if they commit a serious crime while in service.

The state and federal criminal courts are systems which contemplate probation. The PSR is an important instrument for determining whether a case warrants probation; and probation officers are charged with preparing the PSR. Probation is not a sentencing option within the military justice system. There are no probation officers or similar occupational specialties within the military. Development and resourcing such a program is also not advisable and the delay in executing punishments may detract from good order and discipline

Finally, presentencing reports would require additional infrastructure and growth at a time when the military justice system has recently expanded to add victim counsel, the Office of Special Trial Counsel and complementary defense assets, and defense investigators. In the federal system, presentencing reports are prepared by independent officers in

federal district probation offices. As there is no such organization in the military that provides the independence and expertise needed, additional resourcing and infrastructure would be needed.

Bifurcating the presentencing hearing is feasible. Indeed courts-martial are bifurcated proceedings. Upon a finding of guilt on any specification, the court-martial then proceeds into presentencing. During presentencing, the government is afforded an opportunity to present evidence in aggravation. Counsel for the accused is permitted to present evidence in extenuation and mitigation. The accused's counsel has wide latitude to present such material. The accused is afforded an opportunity to present a sworn or unsworn statement. Any victim of a crime is permitted to present a statement to the court-martial to consider in reaching an appropriate sentence. Although the military judge has discretion to schedule the presentencing phase days or weeks after a finding of guilt, generally presentencing proceedings begin immediately after findings.

Delaying presentencing proceedings for 14–30 days following a finding of guilt by a court-martial is inadvisable. A delayed presentencing proceeding would have second and third order effects on the convicted Soldier's unit. A convicted Soldier would continue to occupy a billet while awaiting a sentence which would prevent the command from filling the billet with another Soldier. Therefore, the unit's combat effectiveness would be diminished.

Additionally, a delayed presentencing proceeding would strain unit resources. Flight risk or potential self-harm or harm to others may be a compelling reason for placing the convicted Soldier into confinement while awaiting the presentencing proceeding. However, most Army installations lack military confinement facilities and confinement for multiple days or weeks would be challenging, requiring either contracts with local civilian confinement facilities or imposing travel and transportation requirements between the installation and the nearest military confinement facility. At a minimum the command would likely impose restrictions on the Soldier's liberty. Due to required monitoring of the convicted Soldier, restrictions tend to stress unit assets.

Beyond deleterious effects on the military command, delayed presentencing proceedings would not support the purposes of the military justice system. Delayed presentencing proceedings would burden the command, undermine readiness, and hinder good order and discipline. Courts-martial are an essential tool in maintaining discipline in the armed forces. An important aspect of the system is expediency and effectiveness. The current process balances those requirements, providing a method that is expedient while still receiving evidence in aggravation, extenuation, and mitigation. The court-martial moves directly into presentencing and all parties are afforded an opportunity to present appropriate information to inform a sentencing decision. Delay in this process would be imprudent and unnecessary.

Air Force Judge Advocate Headquarters Response to Q1:

Adopting a process that is similar to state and federal courts related to pre-sentencing reports is not advisable or feasible. A bifurcated sentencing hearing as a policy for all cases is not advisable or feasible. However, bifurcated sentencing proceedings in certain complex cases may be both advisable and feasible. This should be left to the discretion of the military trial judge hearing that particular case.

Regarding pre-sentencing reports, sentencing in the military justice system has both similarities and differences from federal and state systems. Pre-sentencing reports provide valuable helpful information in the federal and state sentencing context. Most courts-martial would not benefit from such a report. While the pre-sentencing report mainly helps the court determine an appropriate sentence, it also aids probation officers later supervising defendants on probation or parole. For those in the Air Force Corrections system, parole is not available.

Even if pre-sentencing reports excluded parole considerations, they would still be of limited utility given the general nature of most military members facing sentencing at a court-martial. For the most part, military members do not

have a prior criminal history or prior drug addictions. Additionally, their employment history is captured in their military records. To the extent background information on an accused's life is relevant, the current sentencing rules allow the defense wide latitude in presenting information to the sentencing authority.

Pre-sentencing reports would not be feasible based on the significant resourcing considerations required to implement such a program in the military justice system for a relatively small population. If aligning similar to the federal system, to facilitate such a program, the Department of Defense would need to resource an entirely new division within DoD and the Services, as the personnel would need to be independent of both the prosecution and the defense.

Regarding bifurcating sentencing proceedings in all cases, The JAG Headquarters does not believe this is advisable or feasible. However, in complex cases, bifurcating the sentencing hearing could assist government trial and defense counsel who are preparing for a lengthy findings case while simultaneously preparing for a variety of sentencing cases depending on the outcome of the court-martial.

However, a policy for bifurcated sentencing proceedings in all cases, 14–30 days after findings, would add significant burden to the accused's unit during the delay, negatively impact victims desiring a timely conclusion to the case, and drive a need for more resourcing and personnel. This is particularly acute for the DAF as all the parties are not typically stationed at the location of the court-martial. There would also be availability issues for parties, experts, and trial judges who are available for both the findings and sentencing case when scheduled together.

Finally, recent reforms under Section 539E of the Fiscal Year 2022 National Defense Authorization Act introduced considerable changes to the court-martial sentencing procedures, mandating military judges sentence convicted members based on specific criteria for each offense. These changes, applicable to offenses committed after 27 December 2023, signified a substantial shift towards more structured sentencing within the military justice system. These reforms may alleviate concerns in military justice sentencing and thus, AF/JA recommends evaluating the effect of these changes prior to any additional amendments.

Coast Guard Judge Advocate Headquarters Response to Q1:

For both questions, it is important to note that since 1949, as recognized by Article 36(a) of the UCMJ, a core principle of the military justice system is to apply the legal principles in federal district courts to the extent "practicable" so long they do not conflict with the UCMJ. This allows the military to select and devise procedures that are "capable of being put into practice, done, or accomplished" considering its needs for justice and practical concerns. Thus, what might be appropriate for the federal criminal justice system might not suit the military justice system and vice versa.

Adopting a pre-sentencing report would not only duplicate existing practices within the military justice system but would also be impracticable, thereby advising against the adoption of the idea. Per Federal Rule of Criminal Procedure 32, much of the pre-sentencing report pertains to the defendant's background, history, and circumstances reflecting that broad spectrum of defendants encountered by federal law enforcement. Such persons include indigent defendants with minimal public records as well as foreign nationals and multinational corporations with little ties to the United States besides the crimes committed within its jurisdiction.

In contrast, by virtue of pay and personnel records, sentencing authorities and counsel in the military already possess a considerable amount of information pertaining to the accused. Furthermore, intangible information regarding the accused's personal character or rehabilitative potential can be readily accessible through individuals the member has served with, including colleagues and command officials. Military procedure already has a robust and time-tested

method for accessing and making such relevant information admissible under R.C.M. 1001 and other associated rules.

The components of the pre-sentencing report in the federal system pertaining to victim impact likewise do not require specialized analysis within the military justice framework. The military has robust procedures for determining victim impact who are often military members themselves for which extensive data is already available. This eliminates the need for a separate entity to find the victims and gather their information. The federal pre-sentencing report also accounts for a much broader set of victim impacts, including business organizations and abstract harms such as those posed to commerce or the environment, which is infrequently encountered in the military justice system. Additionally, the benefits of other pre-sentencing report aspects, such as determining restitution and criminal forfeiture, would be unclear given their infrequent occurrence.

Implementing a pre-sentencing report scheme in the military justice system would not only introduce unneeded bureaucracy and delay but would potentially undermine just sentencing. Preparing such reports would require an adequate understanding of military life and impacts to servicemembers, which can significantly vary across different services and occupational specialties. It would be difficult if not impossible to find persons ready and able to produce said reports in a timely and effective manner. In turn, the influence of these reports could have an oversized impact on sentencing authorities, overshadowing insights of servicemembers who have meaningful observations of the accused and aggravating and mitigating circumstances. Consequently, a pre-sentencing procedure in the military system might render the sentencing process needlessly impersonal, detracting from its effectiveness and fairness.

The system should continue to empower military judges with the discretion to manage the efficiency of the proceeding, including sentencing. The circumstances of the case should warrant an appropriate recess before commencing sentencing proceedings, a step that could be pertinent following a contested court-martial. The recess could be a period of hours or days. Should there be concerns about judges not exercising this discretion appropriately, it would be more productive for the Office of the General Counsel of the Department of Defense to address it through a Discussion in the Manual for Courts-Martial as opposed to a formal rule change. This would, in turn, inform the discretion, training, and supervision of military judges.

In contrast, the proposed procedure would introduce inefficiencies and is not well-adapted to the practical and logistics constraints of the military. The military justice system needs to function in all places where the military operates, including remote and deployed locations, small units, and even in combat situations. As such, military judges are required to be deployable and capable of traveling to various courts-martial sites and often do.

The natural and probable consequence of the procedure would often require the military judge or accused to travel somewhere else after determination of guilt and return later for sentencing proceedings. In the interim, the military would bear the burden of supervising an individual who has dubious ability to contribute to the mission and might pose a flight or safety risk pending sentencing. Furthermore, this procedure may make little sense when the accused is pleading guilty or is found guilty of a relatively minor offense and may simply serve no other purpose but to delay resolution of their case. In contrast, the federal system does not have comparable goals of efficiency and exportability and therefore has U.S. Probation Officers and other mechanisms to address these concerns. As such, a bifurcated system would contradict both the purpose and practical needs of military justice.

Navy Judge Advocate Headquarters Response to Q1:

Changes as described within the question above are neither advisable nor feasible at this time. Given the recent implementation of significant changes to military justice sentencing—including new sentence parameters and criteria—it is imperative that the Services have the opportunity to assess the impacts of these changes before altering the system further.

Preparation of a pre-sentencing report in the military justice system is unnecessary provided existing procedures to ensure such information is available to the sentencing authority. Sentencing in the military largely involves efforts by the parties to identify the "whole person" who will be sentenced for the offense(s) committed. Both trial and defense counsel have full and complete access to the accused's military record prior to trial. The accused's nature and character of service, important factors in developing the concept of the "whole person," are also readily available to both parties. An independent investigation into the accused's background and character would be unlikely to produce information that is not already within the hands of the parties, or available to them through use of their investigative assets (e.g. military criminal investigative organizations and/or defense investigators).

In addition, there is not a significant benefit to a victim in delaying sentencing to prepare such a pre-sentencing report. Victims are already able to present relevant information to the sentencing authority under current authorities. Victims would be required to wait an additional two to four weeks for closure associated with what is sometimes a lengthy engagement with the military justice system. Such an additional burden in the face of limited benefit is not recommended.

While a bifurcated sentencing hearing is perhaps more feasible now that a military judge is the sentencing authority in all but capital cases, it remains inadvisable. There is a significant risk in the management of those Sailors convicted of crime(s) and awaiting sentencing. The likely outcome—release back to their unit for up to 30 days—would create unique challenges to good order and discipline. It is unlikely that they would return to their duties given their status and the associated constellation of risks in doing so, especially for those members assigned to operational units. Bifurcation would impose additional burdens of supervision on the unit, again without apparent benefit.

Finally, victims and other witnesses may find themselves asked to travel to the courtroom on more than one occasion, at increased government expense, to provide a victim impact statement or other testimony in sentencing. Moreover, defense counsel are already generally concerned about the risk of self-harm to the accused, but especially in the time window between verdict and sentence. Expanding that window where the stress on the accused is potentially at its highest point is not recommended.

There appears to be no persuasive justification for implementing these proposals and the second order impacts of such changes would operate to the detriment of the accused, the victim, witnesses, and the member's own unit.

Marine Corps Judge Advocate Headquarters Response to Q1:

Adopting changes to the court-martial process by inserting delay between findings and sentencing, during which time a pre-sentencing report is produced, is neither advisable nor feasible.

Any benefit derived from this change would not outweigh the degradation to the military justice system's intended efficiency, highlighted at the outset in the Manual for Courts-Martial in the Preamble: "The purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." From there, the Manual is replete with

requirements of immediate, prompt, and expeditious action throughout the court-martial process, all with the aim of contributing to a fair and efficient process that protects the accused's right to a speedy trial and the victim's "right to proceedings free from unreasonable delay."[1] In fact, if disposition would be swifter in another jurisdiction, that may be grounds for military authorities to defer prosecution.[2] Additionally, Congress is so keen in the expeditious disposition of cases under the UCMJ that causing unnecessary delay is a criminal offense under Article 131f. Finally, the Independent Review Commission on Sexual Assault in the Military recently assessed that the military justice process is already too slow. Deliberately inserting delay runs directly counter to implementing the IRC's recommendation: "Driving down the military justice timeline could be instrumental in increasing the reporting of sexual assault cases and increasing the number of cases that are tried by court-martial."

A more specific issue is what to do with convicted servicemembers during a lengthy delay before sentencing. Are they to be deprived of liberty without receiving such a sentence, and by whom? Is that deprivation of liberty justified by the time to collect information that is already at the parties' disposal? Are military judges to hold a hearing concerning the propriety of restraint during which time the actual sentencing proceeding could occur further delaying the conclusion of the case? Must commanders be standing by to make pretrial restraint determinations pursuant to Rules for Courts-Martial 304 and 305, issue protective orders, or direct hospitalization, all in response to the now-more-pressing concerns of mental health, physical safety, and good order and discipline, thus prominently elevating the role of commanders after being reduced by Congress in many cases? Serious consideration of changes as posed in the question demands answers to these other questions.

There are other practical considerations. Military witnesses must twice be removed from their assigned duties to participate in separate findings and sentencing proceedings. This is the antithesis of "promot[ing] efficiency and effectiveness in the military establishment," and "strengthen[ing] the national security of the United States." And civilian witnesses must twice travel to the court-martial sites at increased government expense and disruption to their employment and personal lives.

To counterbalance these issues, there are no identifiable benefits to delaying the sentencing proceeding to produce a presentencing report. The Rules for Courts-Martial contain broad rules for discovery and disclosure, and during presentencing, the presentation of evidence in aggravation, victim impact, extenuation, and mitigation. With the support of investigative assets as necessary, the parties are able to gather and present evidence to equip military judges to "impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the United States Armed Forces, taking into consideration" several important factors, including, "the nature and circumstances of the offense and the history of the accused," and "the impact of the offense on . . . the financial, social, psychological, or medical well-being of any victim of the offense."

As a final note, significant sentencing reform from the FY22 NDAA recently went into effect, requiring military judges to impose a sentence in all cases, except capital ones, and do so pursuant to newly established sentencing parameters and criteria. Time should be allowed to assess the impact of these changes before taking steps to impose even more significant changes to the sentencing process.

1 Article 6b(a)(7), UCMJ.

2 *See* Manual for Courts-Martial, United States (2024 ed.), Appendix 2.1, Paragraph 3.1. ("When the accused is subject to effective prosecution in another jurisdiction, . . . a referral authority should consider the following additional factors when determining disposition: . . . f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.").

VI. The MJRP respectfully requests narrative responses to the below questions from a knowledgeable representative of each of the following organizations within each service: (1) Office of the Special Trial Counsel, (2) Trial Services Organization, (3) Defense Services Organization, (4) Victim Legal Services Organization. To the extent that a representative from these organizations has provided input on these questions during a public meeting, the organizations may supplement those responses through this RFI.

Q1: Under the current pre-sentencing procedures, unlike in state and federal criminal courts that rely primarily on independently produced pre-sentencing reports, government and defense counsel may present matters to aid the military judge in determining an appropriate sentence, then argue for what they believe is an appropriate sentence. What challenges do counsel face with doing so effectively? In your view, are there any changes to the rules or procedures that would make the sentencing process more effective and efficient? Is a process similar to state and federal courts advisable and feasible? Would a bifurcated sentencing hearing that is distinct from, but held close in time to (e.g., within two weeks or 30 days) the verdict, be advisable and feasible? Please explain.

Army OSTC Response to Q1:

None.

Unlike civilian sentencing proceedings which rely primarily on a pre-sentence report typically provided by the probation department (a court system asset), trial and defense counsel are easily able to obtain and present evidence from the accused's personnel record which includes the service record of the accused and any prior convictions or disciplinary actions along with other matters of relevance such as the circumstances of the crime, victim and soldier impact, and matters in aggravation and mitigation. Military members undergo background checks prior to entry and a civilian criminal record, while rare, would also be readily available to counsel for pre-sentencing preparation.

No.

A bifurcated sentencing hearing process would not be advisable and not easily feasible in the military. In courts-martial, sentencing proceedings usually begin immediately after the announcement of a guilty verdict, whether in a guilty plea or contested trial. The essential parties to proceed with sentencing are at hand and the necessary information about the Servicemember is readily available in the form of a soldier's talent profile (which contains the soldier's background, awards, certificates, etc.). This promptness allows the military to deliver swift punishment, quickly remove an offender from the unit, and return court-martial panel members to operational or training duties. Unlike sentencing proceedings in civilian courts where the key participants necessary for sentencing are typically local to the geographical jurisdiction of the court, in the military key sentencing personnel (e.g., judge, prosecutor, defense counsel, offender, victim, court reporter, court staff) are not and would have to be "reassembled" for purposes of a bifurcated sentencing hearing. Additionally, panel members would be required for sentencing an offender who was found guilty of any offense committed before 28 Dec 2023 where an accused elected trial before members. Re-constituting the court-martial for sentencing weeks or months after a trial would be onerous and put additional and unnecessary strain on military mission and operational needs.

Army DSO Response to Q1:

Relying on an independently produced pre-sentencing report is neither advisable nor feasible. Independently produced pre-sentencing reports, assembled by personnel with knowledge of the military justice system, would

require creation and resourcing of a separate entity. Such an entity would either detract from extant capability or require growth that is not currently available, except at expense of current resourcing. Further, such an entity is not necessary given the way trial teams currently develop and present individualized presentencing cases in an adversarial forum that already provides the sentencing authority the best possible pre-sentencing information available, to include extenuation and mitigation matters presented as a matter of advocacy under Rules for Courts-Martial (RCM) 1001(d). The military justice system is very distinct from state and civilian federal courts, balancing both criminal justice and good order and discipline needs for both commands and individual service members. A standardized pre-sentencing report can never be as effective or valuable to a sentencing authority as the individualized adversarial advocacy that characterizes the current system.

Additionally, removing sentencing matters from a defense team in favor of an independent entity will reduce the due process currently provided to service members by eliminating what is often the most consequential advocacy opportunity available for the defense bar. That stated, the sentencing portion of the military justice system could still benefit from improvements like a waivable right to a bifurcated sentencing hearing that is separated from the findings portion by a period of time, up to 30 days. The findings and sentencing phases of a court-martial are both adversarial and defense counsel must prepare a pre-sentencing case while also contesting the charges on the merits. The government is currently responsible for providing sentencing witnesses, who may or may not be necessary depending upon the outcome of the findings phase. Providing the accused the right to elect a bifurcated sentencing hearing could avoid the waste of producing sentencing witnesses when the trial on the merits concludes with an acquittal. Also, when there are multiple charges or specifications, the uncertainty about which charges or specifications will be the subject of a pre-sentencing hearing prevents preparation tailored to the actual convictions, creating inefficiency for both government and defense litigating issues that may be unnecessary.

A bifurcated hearing would minimize those inefficiencies, allowing each party to focus their preparation and presentation on the appropriate sentence for the offenses of which the accused has been found guilty. This would ultimately save taxpayer money without increasing the organizational staffing and training requirements that would be expected with an independent entity producing a pre-sentence report. Determining an appropriate sentence on an individualized basis through the adversarial process is an integral part of the American military due process, and it should not be discarded in an attempt merely to achieve similarity with state and federal criminal courts.

Army VLC Response to Q1:

The SVCP adopts the position of the Army CLD for this response.

Air Force OSTC Response to Q1:

The Department of the Air Force (DAF) Office of Special Trial Counsel (OSTC) is unaware of any current challenges that would be assisted by pre-sentencing reports or bifurcated sentencing proceedings. Our current rules allow for the timely introduction of relevant sentencing information, including the full and robust presentation of evidence in aggravation, extenuation, and mitigation.

Section 539E of the National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA) directed expansive reform to court-martial sentencing procedures. Pursuant to these amendments and except in capital cases, convicted military members will now be sentenced by a military judge and subject to offense-specific sentencing parameters and criteria. Under Rule for Courts-Martial (RCM) 925, the new sentencing procedures apply to those accused convicted exclusively for offenses committed after 27 December 2023.

These reforms mark a significant departure from traditional sentencing procedures, and additional time is needed to fully understand their impact. It is inadvisable to continue to alter sentencing procedures without first

understanding the strengths and weaknesses of the system in place. Although there are no current challenges to counsel's ability to present sentencing cases, continuous change, without time for implementation and analysis, does present a challenge. It risks harm to the system by reducing predictability, limiting the development of subject matter expertise, and hindering consistent application of the law.

Air Force DSO Response to Q1:

With few exceptions, litigated sentencing proceedings in military courts-martial follow immediately after findings. In complex, litigated cases with multiple charges, this often requires defense counsel to prepare several different sentencing cases contingent upon possible outcomes. Character witnesses may be willing to submit a letter or testify on behalf of an accused who is convicted of one charged offense but not if he or she is convicted of another. Additionally, calling upon a client to finalize important decisions in the sentencing case and to deliver a sworn or unsworn statement to the court is extremely difficult when that client is still in the beginning stages of processing a finding of guilt.

A system that allows for or encourages bifurcation would alleviate many of these difficulties and would have the secondary benefit of allowing defense counsel to focus solely on the litigated portion of the court-martial prior to turning attention to sentencing proceedings with a clear understanding of what offenses their clients are to be sentenced for. If this change was adopted, military judges should be given the authority, with input from trial and defense counsel, to remand a convicted military member into confinement or some other type of custody pending sentencing under certain limited circumstances such as when the client might be considered a flight risk or a threat to commit additional misconduct.

Pre-sentencing reports would likely not be meaningful in a court-martial context, given the absence of recidivists due to the extremely high likelihood that anyone convicted of a serious offense will be discharged from the Service. Military records, which are typically introduced during pre-sentencing proceedings, are generally an effective method of capturing the character of a convicted member's service, which can be argued by counsel as a factor in mitigation or as an indication of potential to be rehabilitated. JAJD [the Air Force's Trial Defense Division] would recommend against attempting to graft the criminal sentencing processes utilized in federal, Article III practice wholesale to courts-martial.

Air Force VLC Response to Q1:

JAJS [the Air Force's Victim's Counsel Division] does not believe current limitations on victims' and their impact statements under RCM 1001(c) are necessary with the implementation of judge alone sentencing. Given the recent changes to RCM 1001, many based on the DAC-IPAD recommendations related to victim impact statements, and the move to judge alone sentencing, JAJS is hopeful that perceived prior inequities will be rectified.

In sentencing, JAJS believes the unfettered statements by the convict should be balanced by a similar unfettered ability by a victim in their impact statement. JAJS would suggest the CVRA be the model meaning victims "have an indefeasible right to speak, similar to that of the defendant," during sentencing. *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006); see also *United States v. Vampire Nation*, 451 F.3d 189, 197, n.4 (3d Cir. 2006) (describing it as "an independent right of allocution at sentencing."). Because parties may present rebuttal evidence to a victims' impact statement, there is a natural self-regulation of victim impact content. This is even more appropriate in the era of judge alone sentencing in courts-martial. As such, there is no need to add additional restrictions, nor does it seem to be consistent with the statutory meaning of Article 6b(4)(2), UCMJ (the "right to be reasonably heard" at sentencing).

As for changing the rules of procedure, the military should follow civilian practice with respect to the rules of evidence, i.e. the Federal Rules of Evidence do not apply in a sentencing hearing, and JAJS suggests that the Military Rules of Evidence should not apply in the military sentencing procedure. *See* Fed. R. Evid. 101(a) (*Scope. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101*); Fed R. Evid. 1101(d)(3) (*Exceptions. These rules—except for those on privilege—do not apply to the following: . . . (3) miscellaneous proceedings such as: . . .* ***sentencing***). Currently, the UCMJ requires the government to adhere to the rules of evidence but allows for the defense to request to relax those rules; these requests are summarily granted by military judges.

Air Force TSO Response to Q1:

The Government faces the challenge that the sentencing rules are construed narrowly for the prosecution while the defense are allowed to present a largely unfettered sentencing case. The relevant Rule for Courts-Martial, RCM 1001, as drafted and as interpreted by case law restricts the government from offering relevant evidence that JAJG [the Air Force's Government Trial and Appellate Operations] believes would assist the sentencing authority.

In JAJG's opinion, this results in what often appears to be a sentencing hearing that does not allow the government to present its full case. For example, the Government may admit evidence from the accused's service record, but the government cannot call witnesses to explain that service record. While the government could offer an accused's earlier Article 15, the Government could not call any witnesses to explain the circumstances or place it in context. Similarly, the Government can offer the accused's performance reports, but the government cannot call any witnesses to explain them. The Government can offer opinion evidence as to the accused's rehabilitative potential but cannot have the witness explain the basis of the opinion unless the opinion is challenged on cross-examination. Evidence of uncharged misconduct is, generally, inadmissible unless the uncharged misconduct is part of a continuing course of conduct. Finally, the Government is not allowed to rebut, counteract, or place in context any of the Accused's opinions in his unsworn statement—such as "I am one of the best maintainers in my squadron; I am proud of the reputation for excellence I have earned."

Relatedly, neither the Government nor the Defense is permitted, absent narrow exceptions, to discuss, argue, or offer evidence regarding the collateral consequences of the Accused's conviction, confinement, etc. Frequently, the accused discusses them in the unsworn statement, which is by case law largely unfettered, but the Government is generally powerless to counteract or place that information in context. JAJG is hoping that some of these restrictions and limitations will adjust as judge alone sentencing becomes the norm.

JAJG believes much of the perceived restriction on the Government's sentencing case are no longer appropriate or necessary. JAJG would recommend the Government's sentencing rules be similar to federal practice. See Fed. R. Evid. 1101(d)(3).

Regarding pre-sentencing reports, JAJG does not believe they are advisable or feasible. The value of these reports would be minimal (at most) for the vast majority of cases. Most members convicted at a court-martial have no criminal record, do not have lengthy mental health history, do not have lengthy drug addiction, and have relatively stable employment history. Additionally, most members convicted will be facing relatively short confinement terms under the new sentencing parameters.

Bifurcated sentencing hearings are not advisable, absent some complex cases. For example, perhaps there could be an option for cases that are in sentencing parameter 4 or 5. A civilian convict, either federal or state court convicted, may await sentencing in jail or on bond. In the military, the convict has likely continued to work in his or her unit for a year past the time the crime was committed—being paid, doing tasks, without a clearance, without a line

badge, etc. There is a real burden on the military for all extensions of the time it takes to do complete the court-martial process. In JAJGs estimation, this burden directly translates to reluctance to prefer charges to a court-martial, especially for offenses like drugs, DUIs, financial crimes cases, and other non-victim centric cases.

Coast Guard OSTC Response to Q1:

Military justice practitioners face the potential of lesser time to prepare for sentencing under the current system, especially where members or a military judge serving as fact-finder may return a partial verdict of guilty. In those instances, counsel must potentially, and quickly, change their intended witness lists and other evidentiary submissions to ensure evidence is admitted in accordance with Rule for Courts-Martial 1001 and applicable caselaw. Additionally, unlike civilian proceedings, courts-martial are often convened for longer hours and continue into weekends, so fatigue can lead to a less-than-optimal sentencing hearing in terms of preparation and execution for all parties (i.e., military judge, trial counsel, defense counsel, and where applicable, special victims counsel).

A bifurcated sentencing hearing is feasible from a purely mechanical standpoint under current law and regulations. However, the OCP [Office of the Chief Prosecutor] does not advise this pursuit at this time. The military justice system is already undergoing significant changes to sentencing per Section 539A of the FY22 NDAA. Practitioners need time to assess the impacts of those changes before further legislative changes are considered.

In addition, the military justice system lacks the infrastructure to model its system to federal and many state systems, where bifurcated systems employ probation officers to prepare independent reports that inform the parties' respective positions at sentencing hearings.

Finally, if part of the intent of this request for information is to improve sentencing by including rehabilitation programs for a Court's consideration prior to sentence, the Service lacks dedicated programs for convicted members, and military judges lack the training and ability to properly assess a convicted member's suitability or progress for such programs.

Coast Guard DSO Response to Q1:

Independently produced pre-sentencing reports are likely not feasible. First, a new entity would probably need to be created to generate these reports. If the Coast Guard was responsible for this new body, it could end up being a part-time/collateral position based on the Coast Guard's small docket and force structure. Obviously, this would be less than ideal. Secondly, it is unclear how this new process would impact defense counsel's ability to perform their duties. Finally, to the extent that defense counsel should be familiar with favorable extenuation and mitigation matters, does this additional process end up just being an additional opportunity for the government to uncover unfavorable matters?

The decision to delay sentencing and permit bifurcation should be in the hands of Defense and not an automatic process. Because Defense is typically preparing for the possibility of presenting a sentencing case, bifurcation would generally not be needed. But there may be instances, particularly in a multi-week complex trial, where a delay would be appropriate to allow a tired Defense team to better prepare and present a sentencing case. Another possible result of bifurcating these proceedings is that it could lead to negotiations regarding a sentence—essentially a post-conviction sentencing agreement.

Coast Guard VLC Response to Q1:

The U.S. Coast Guard Special Victims' Counsel program does not recommend modeling the sentencing process within the military after state or federal sentencing procedures for several reasons. The military operates as a unique

society where the purpose of the military justice system is to promote good order and discipline in situations where service members must live and work effectively within the same community. In the military community, a bifurcated sentencing hearing is not practical and would negatively impact operational readiness. Waiting to sentence a convicted service member would result in the convicted member being sent back to a unit for operational military leaders to supervise pending sentencing. This poses several supervisory challenges which would undermine good order and discipline, including how to segregate the member from victims and witnesses while maintaining operational readiness. Additionally, adding additional time to an already lengthy process will continue to diminish the impact the conviction has on good order and discipline. The number one complaint from Commanders about the military justice process is the amount of time it takes to court-martial a member and the detrimental impact this delay has on readiness. The convicted member is not working, can't deploy, and is preventing a new member from joining the command. This has particular disparate impact on a small service, like the Coast Guard, where every person performs multiple duties.

Victims of crime deserve an immediate decision on the fate of their assailants. Bifurcated hearings would impede victim participation in the court-martial process by adding yet another hearing, rather than offering closure at one combined trial and sentencing. In the USCG, a bifurcated hearing would place a significant logistical burden on court personnel, victims, and witnesses since hearings take place at either the Alameda CA or Norfolk VA courtroom and almost all personnel travel to participate. This can result in significant financial and emotional burden on victims who may have to arrange childcare and be absent from work to travel for the case yet again. Witnesses may be required to travel great distances and from remote areas, such as Alaska, where flights are often difficult to arrange in winter months.

The military justice system does not share the same volume of cases or significant sentences as compared to the federal system. In a military, waiting a few weeks to months for sentencing to occur would be relatively significant considering the much smaller typical sentences adjudicated.

Navy OSTC Response to Q1:

Additional changes to the sentencing process are neither advisable nor feasible at this time. In response to the FY22 NDAA, the military just recently implemented significant changes to its sentencing system in an effort to improve consistency, transparency, and fairness. Military judges are now responsible for sentencing with the aid of newly developed sentencing parameters and criteria. We need time to assess the impact of these changes before making additional changes.

The sentencing parameters are substantially less complicated than the federal sentencing guidelines because the military has very few repeat offenders. State and federal probation and parole personnel have extensive staffs used to interview the convict, the convict's family and associates, and those personnel often have training in social work or counseling. There is no analogue in the military justice system capable of preparing these reports.

Navy DSO Response to Q1:

The Defense Service Office argues that independently produced pre-sentencing reports are not advisable or feasible.

a. The military justice process is unique. Pre-sentencing reports would not meaningfully contribute to the quality of the pre-sentencing information available to the sentencing authority. The United States government trains and employs servicemembers throughout the time it also subjects them to criminal prosecution. Courts use independently produced pre-sentencing reports to investigate a client's criminal history, immigration status, medical condition, and other personal background information. These reports are helpful as the Bureau of Prisons and the Department of Probation determine incarceration status and as the criminal justice system processes this person

into a system. Servicemembers on the other hand rarely have any prior convictions or a criminal history. If they do that information is contained in their background investigations and enlistment documents which are already in the possession of the military, and therefore available to the trial counsel and defense counsel. Further, servicemembers serve the United States government in the military at the time of sentencing, which means they have detailed service records with performance evaluations, training histories, and educational information. Similarly, their medical information is available and they generally present less medical concerns for confinement than defendants do in the civilian system. Ultimately, independently produced pre-sentencing reports will not reduce the burden on counsel to represent their clients or provide greater insights to the sentencing authority on an appropriate sentence.

b. An adversarial pre-sentencing hearing is the best way to ensure the sentencing authority has the information necessary to construct a sentence that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces. An independently produced pre-sentencing report would only add to the items that a defense counsel would have to contend with in presenting information to the sentencing authority. If there is information that is inaccurate or disputed then defense counsel would be forced to litigate those issues rather than focusing on presenting information in extenuation and mitigation under R.C.M. 1001(d). A zealous defense requires investigation and advocacy by defense counsel in the presentencing stage. These independently produced pre-sentencing reports would not assist counsel in carrying out this ethical obligation.

c. These reports are also infeasible. Servicemembers share many qualities and experiences with those participating in the military justice process, including the counsel and military judge who are uniformed servicemembers. These reports would require the creation of an entity with sufficient understanding of the military, military justice, and sentencing principles to create these reports. Establishing an entity and maintaining a structure to produce these reports in a principled manner is a lengthy process with numerous hurdles in staffing and training. Even if an entity was created it would still only serve to provide some information to the sentencing authority that the parties can currently present through the adversarial process.

Navy VLC Response to Q1:

Navy VLC and victims face the challenge of accurately assessing and understanding the strength and weakness of a case because they do not have access to the full Report of Investigation and other case information. From the start of the investigation all the way through sentencing, victims need to have access to information to make informed decisions to exercise their rights in a meaningful way. The victim, as the person who suffered actual harm perpetrated on them by the accused, needs to have the full picture of the case to provide meaningful and full input regarding an appropriate sentence, aggravation, etc.

Changes to the rule to assist trial and defense counsel to spend more time in preparing for sentencing should include accommodations that do not further burden the professional and personal lives of the victim, while allowing victims to have a meaningful opportunity to be heard. Sentencing within the military justice system is done rather quickly, but this is mostly to the benefit of the accused. Defense counsel generally has a better sentencing argument and preparation than the government counsel, who may spend most of their time preparing for case on the merits. Victims do not typically have a robust conversation with trial counsel on the effectiveness of the victim's sworn testimony vice an unsworn statement in support of the government's sentencing argument.

Navy TSO Response to Q1:

The timing of the sentencing hearing presents a challenge to counsel. Counsel are typically primarily focused on the case on the merits. For the trial counsel, obtaining a conviction is usually the top priority. For defense counsel, an acquittal is generally the goal. This focus on the merits portion of the case, combined with the possibility that

sentencing won't even occur if the case results in a full acquittal, leads to counsel putting less effort into preparing a sentencing case than they would if it were the singular focus. Bifurcating the process would help alleviate this issue. However, from a good order and discipline perspective, holding the sentencing hearing immediately following the trial on the merits is still preferable. Bifurcating the process only further delays the finality of the process and leaves a command managing a non-productive Sailor (generally). Although no entity currently exists that is well situated to produce a pre-sentencing report, such a report would be valuable for trial counsel, and would allow trial counsel to focus on the merits portion of the trial. Lastly, it is beneficial to the process to allow both the government and defense to advocate for a sentence. This could still be accomplished through a different entity, but the ability to allow the parties to advocate should not be removed.

Marine Corps OSTC Response to Q1:

The U.S. Marine Corps Office of Special Trial Counsel (OSTC) is unaware of any current challenges counsel face in presenting an effective sentencing case. Section 539E of the National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA) directed expansive reform to court-martial sentencing procedures. Pursuant to these amendments, convicted military members, except when convicted of a capital offense, will now be sentenced by a military judge and subject to offense-specific sentencing parameters and criteria. Under Rule for Courts-Martial (RCM) 925, the new sentencing procedures apply to those accused convicted exclusively for offenses committed after 27 December 2023.

These reforms mark a significant departure from historic military justice sentencing procedures. How these reforms impact military justice case sentencing requires data and study. Until the impacts of the most recent reforms are understood, it is inadvisable to further alter sentencing procedures.

Although there are no current challenges to counsel's ability to present sentencing cases, continuous change, without time for implementation and analysis, does present a challenge. It risks harm to the system by reducing predictability, limiting the development of subject matter expertise, and hindering consistent application of the law.

Marine Corps DSO Response to Q1:

Yes, this would be advisable, but the feasibility would have to be worked out and we would potentially need a Rule change. I have been advocating for this for some time.

I have encouraged Defense Counsel to submit a Trial Management Order that requests a 39(a) for sentencing, if necessary, to be a week after the anticipated completion of the trial for findings. We have always proceeded directly into sentencing because of member sentencing and the necessity to return them to duty as quickly as possible. This justification no longer exists. I would advise sentencing to occur on the following Thursday after the standard Monday through Friday contested case. This would give the parties time to prepare sentencing arguments and additional evidence.

One problem would be with sentencing witnesses. A victim would likely wish to be physically present, and this could incur additional costs and difficulty depending on the circumstances. However, at sentencing VTC is allowable. The same challenge exists for Defense witnesses. I don't believe live witnesses for sentencing is as important, at least for the Government, as it is for the Defense, given that the military judge is exclusively doing the sentencing. A challenge of this is for convictions that are going to result in confinement where the Accused was not previously in pretrial confinement. I believe some rules would have to be worked out for that and for all circumstances concerning pretrial and post-trial confinement. The real question is, is whether the military judges will allow this. Many are irrevocably wedded to their dockets and will not consider any sort of "outside the box" thinking. We would probably need an explicit R.C.M. change that directs this absent good cause.

Marine Corps VLC Response to Q1:

Most Marine VLC have observed that the current process relies heavily on the experience and preparation of the Trial and Defense Counsel litigating these matters. That can be beneficial or detrimental for our clients depending on the preparation and sentencing presentation of the side with whom our client's interests best align. As articulated in the prior answer, Marine Corps VLCO views uniform presentencing reports as a favorable advancement in eliminating unnecessary variables during sentencing. However, these reports should not displace an opportunity for victims meaningfully to participate in, and be heard at, sentencing proceedings. Our clients generally view sentencing proceedings as empowering and providing some semblance of closure at the end of an exceedingly lengthy and often traumatic trial process.

If adopted, a practice of using uniform presentencing reports should be established in a manner that enables the collection and preparation of those reports in advance of a sentencing hearing (as is already the case), and in no case should preparation of presentencing reports delay the sentencing process.

Marine Corps TSO Response to Q1:

The U.S. Marine Corps Trial Services Organization (TSO) is unaware of any current challenges counsel face in presenting an effective sentencing case.

Section 539E of the National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA) directed expansive reform to court-martial sentencing procedures. Pursuant to these amendments, convicted military members, except when convicted of a capital offense, will now be sentenced by a military judge and subject to offense-specific sentencing parameters and criteria. Under Rule for Courts-Martial (R.C.M.) 925, the new sentencing procedures apply to those accused convicted exclusively for offenses committed after 27 December 2023.

These reforms mark a significant departure from historic military justice sentencing procedures. How these reforms impact military justice case sentencing requires data and study. Until the impacts of the most recent reforms are understood, it is inadvisable to further alter sentencing procedures.

Although there are no current challenges to counsel's ability to present sentencing cases, continuous change, without time for implementation and analysis, does present a challenge. It risks harm to the system by reducing predictability, limiting the development of subject matter expertise, and hindering consistent application of the law.

Q2: Based on your experience, are military judges sentencing similarly situated servicemembers consistently for the same or similar offenses? If not, in your opinion, is that attributable to different military judges, the facts and circumstances of the individual case, differing quantities and quality of information presented for the military judge's consideration, or other?

Army OSTC Response to Q2:

Given the sentencing reform in the National Defense Authorization Act (NDAA) for fiscal year (FY) 2022 which amended Article 53, UCMJ, (10 U.S.C. § 853) to require military judge alone sentencing in all but capital cases and Article 56, UCMJ, (10 U.S.C. § 856) to require military judges to impose sentences within sentencing parameters for offenses committed after December 27, 2023, the Army OSTC submits it has insufficient data to answer this question.

Army DSO Response to Q2:

There is insufficient data available to fully assess this question in light of the lack of any comprehensive study of sentences adjudged by military judges.

Army VLC Response to Q2:

Generally speaking, yes, military judges sentence similarly situated servicemembers consistently. However, no two cases and no two Soldiers are identical. There are so many factors that go into the discussion—and certainly differences between military judges and counsel would be two of those factors.

The facts and circumstances of each case generally account for those differences. Even when two cases may seem to be similar, there may be a range of different issues impacting the decision-making process.

Judges take many factors into consideration in making sentencing decisions.

The SVCP does not track the sentencing of servicemembers. The SVCP is further unaware of any assessment conducted that would help to further demonstrate prevalence of any trends.

Air Force OSTC Response to Q2:

The congressionally directed sentencing criteria and parameters will ensure greater uniformity in sentencing across the DAF. Under RCM 1002, "If the military judge imposes a sentence outside a sentencing parameter, the military judge shall include in the record a written statement of the factual basis for the sentence." Thus, the current system is built to both encourage consistent sentencing and require written findings for factual deviations. These reforms mark a significant departure from traditional sentencing procedures, and sufficient time is necessary to fully understand their impact.

Air Force DSO Response to Q2:

Prior to recent changes to the law mandating judge alone sentencing guided by sentencing criteria and parameters, military judges pronouncing sentences in a court-martial not involving plea agreements were bound only by forum and statutory minimums and maximums as absolute limits on their discretion in sentencing. An internal Trial Defense Division survey of courts-martial where an accused was sentenced by a military judge sitting alone found that military judges under this system were relatively consistent when sentencing for the same or similar offenses. Variations existed between individual judges, but those variations were not extreme and were likely attributable in some degree to each of the factors identified in the question.

Under the legacy system, Airmen and Guardians facing sentencing had the option of requesting to be sentenced by panel members instead of the military judge. While sentencing by a panel of members will soon not be an option, the requirement that military judges work within required parameters and guidelines will help to protect convicted servicemembers against the appearance that significantly different sentences could be based on the military judge who happens to be detailed to a given case.

Air Force VLC Response to Q2:

There may be some difference in the way that military judges are sentencing similarly situated people. However, it's also fair to suggest that no two accused, no two victims, and no two cases are truly "similarly situated." Every case is different, and every accused should be sentenced consistent with the facts of his or her case and the guidelines in the UCMJ. Additionally, all victims are not the same; their wants and views of justice will be different, and we have no way to tell whether those interests affected adjudged sentences. If there are disparities, the sentencing parameters and criteria should take care of this.

Air Force TSO Response to Q2:

Generally, military judges sentencing similarly situated servicemembers are consistent across the same or similar offenses. Significant departures are primarily related to the facts and circumstances of the individual case.

Coast Guard OSTC Response to Q2:

Where courts-martial for similarly situated servicemembers render inconsistent sentences, OCP finds the facts and circumstances—which include a convicted member's service record—the principal bases for those inconsistencies. (As a general premise, military judges in the Coast Guard see lesser volume than their sister-service, federal, and state counterparts, thus there is less anecdotal data to support inconsistencies for any other reason.)

While OCP does not support changes to the evolving sentencing structure to the UCMJ at this time—especially since part of those changes already include the introduction of sentencing ranges to offer more consistency in sentences—a holistic review of Rule for Courts-Martial 1001 and transition toward the sentencing criteria set forth and used in Title 18, U.S. Code, Section 3553 could mitigate the differing quantities and quantity of information presented during such hearings. That criteria allows for liberal introduction of sentencing evidence, and the presiding judge is given latitude and deference to weigh such evidence accordingly.

Coast Guard DSO Response to Q2:

There is insufficient data available to fully assess this question since many contested cases result in a panel sentencing decision and most plea agreement cases result in the military judge being constrained by the agreement's punishment provisions. While some defense counsels have remarked that military judges award fairly similar punishments across the board, some also believe that the severity of punishments awarded across the different services varies for similar offenses.

Coast Guard VLC Response to Q2:

The USCG SVC Program recommends that RCM 1001(c) be expanded to allow a crime victim to be fully heard at the sentencing hearing. Currently, the rule only permits victims to discuss "direct physical, emotional, or pecuniary harm" suffered as a result of a crime for which the accused was found guilty. Courts have traditionally interpreted this language very narrowly and do not allow victims to testify to impacts on other people. Victims often desire to publicly voice their feelings and emotions, but court rules do not allow them to do so, even where the judge can appropriately discern permissible sentencing factors.

The U.S. Coast Guard trial judiciary (and docket) is small enough that the judges and counsel usually have mutual frame of reference for sentencing. Historically, there has been a rational connection between disparate sentences that is understandable once facts of the cases are known.

Navy OSTC Response to Q2:

Barring review of a study of sentences imposed for specific offenses over a sufficient period of observation, we cannot accurately answer this question. We do not assess that *individual* military judges arbitrarily sentence similarly situated convicts in vastly different ways that are not justified by the unique aspects of the individual case.

As noted above, military judge sentencing informed by the new sentencing parameters and guidelines will reduce sentence variability, while new sentencing rules will promote transparency. RCM 1002(a)(2)(B) now mandates, "If the military judge imposes a sentence outside a sentencing parameter, the military judge shall include in the record a written statement of the factual basis for the sentence."

Navy DSO Response to Q2:

The Defense Service Office submits that a bifurcated sentencing hearing would serve justice without imposing undue costs on good order and discipline. This would ensure a full, robust pre-sentencing hearing takes place with all parties sufficiently prepared to present evidence relevant to the findings.

a. The biggest challenge counsel face in ensuring the service member's right to a full and fair sentencing hearing is the lack of time between findings and the pre-sentencing case. Currently, defense counsel must prepare a pre-sentencing case while still contesting the charges on the merits. This unnecessarily divides their attention. It is also a waste of time and resources as many cases result in findings of not guilty. In those cases, the government has funded witnesses and experts for the purposes of sentencing despite the fact they were never needed. The nature of a contested trial also creates uncertainty on what charges or specifications will be the subject of the pre-sentencing hearing. This often means the evidence sought, collected, and prepared fits the case theory prepared in the event of a conviction to all charges and specifications, but currently a defense counsel has no time to adjust to the actual findings. Instead, defense counsel, likely mentally and emotionally exhausted from the merits portion of trial, try to present their client's case as best they can even as the client attempts to process the findings. Even with additional independent funding being available, defense counsel are faced with the decision of allocating valuable time and resources to both defending the case on the merits and preparing for pre-sentencing in every contested case. This inevitably leads to the focus being on the merits first and foremost. It also means counsel have less time to prepare sentencing witnesses, including experts, as their testimony may be impacted by the findings. Similarly, the system currently forces counsel to obtain written statements from additional witnesses without the clarity of what charges and specifications will be the subject of sentencing procedures. This often leads to less impactful statements in support and lower quality assessments of the client's rehabilitative potential. Assuming the goal to be ensuring the sentencing authority receives high quality information from the victim, the government, and the defense, then a bifurcated hearing would contribute to that goal

b. A waivable right to a bifurcated hearing in contested cases would empower the accused and his counsel to evaluate the costs and benefits of delaying the pre-sentencing hearing. This time permits counsel to finalize witness testimony and other evidence, including preparing expert witness testimony and affidavits in support of the client. The implementation of independent defense funding means defense counsel would have the option to obtain expert testimony from a mitigation specialist during this period in lieu of implementing an independent office to create a pre-sentencing report. It would also be an opportunity to turn the focus of the hearing from confronting evidence in front of a trier of fact, likely members, to presenting evidence in mitigation and extenuation to a military judge.

c. Without members' sentencing, there is no longer a rational reason to force an accused into a rushed sentencing proceeding. I recognize the cost to good order and discipline when members are away from their duties to serve as part of a court-martial. However, the system does not need to rush the pre-sentencing hearing in the new era of military judge alone sentencing. A pre-sentencing hearing is an important due process right of the servicemember and counsel must have time to prepare. In fact, counsel have an ethical duty to investigate and present a robust sentencing case to meet their ethical duties as defense counsel. If the accused has a waivable right to bifurcate the hearing then military judges can ensure the orderly and professional conduct of a court-martial rather than rushing to complete the trial under arbitrary time constraints.

Navy VLC Response to Q2:

Without full access to case information, Navy VLC cannot effectively equate one case to another and reasonably assess if servicemembers are similarly situated. Navy VLC must regularly advise on limited information, which in turn impacts the victim's opportunity to fully participate in the military justice process. Military Judges (MJ) use their own experience, which can be limited as compared to state and federal judges, to make decisions/judgments on what is appropriate. This experience is anecdotal and based on VLC's experiences with their cases and not an overall view of the MJ. Further, most VLC have experience in the court-martial system with sentencing as part of a plea agreement, where the MJ is limited in how they can sentence the accused. With those caveats, MJ appear to be consistent with their own sentencing, but they are not consistent within the military justice system, i.e. a person on the west coast may have a MJ who is a lighter sentencer than someone on the east coast. Our judges come with different experiences, which appear to guide them in their sentencing philosophy. Consistently, many MJs lean towards lighter sentences for military defendants.

Navy TSO Response to Q2:

There is a wide range of sentences for "similarly situated servicemembers" due to multiple factors. First, it is very difficult to define "similarly situated." The military sentencing process looks not only at the offense, but also at the characteristics of the individual offender. Therefore, no two offenders are the same, and it is very difficult to determine whether they are "similarly situated." In addition, different military judges have very different views on what punishment specific offenses deserve. An offense that may guarantee a punitive discharge from one judge may merit minimal punishment from another.

Marine Corps OSTC Response to Q2:

The congressionally directed sentencing criteria and parameters will ensure greater uniformity in sentencing. Under RCM 1002, "If the military judge imposes a sentence outside a sentencing parameter, the military judge shall include in the record a written statement of the factual basis for the sentence." Thus, the current system is built to both encourage consistent sentencing and require written findings for factual deviations. These reforms mark a significant departure from historical military justice sentencing procedures, and sufficient time is necessary to fully understand their impact.

Marine Corps DSO Response to Q2:

In my experience, military judges within a Service are fairly consistent across the board. But there is one caveat to this. As a former appellate and trial judge, I saw differences between the Navy and Marine Corps, at least anecdotally. I particularly saw this from the trial bench where I presided over both Navy and Marine Corps courts-martial and "culturally" there appeared to me based on the Plea-Agreements alone differences between the Services concerning what level of punishment was appropriate. I do believe that with the Sentencing Parameters, it is more important than ever to be able to provide better evidence to military judges to argue for lower sentences.

Marine Corps VLC Response to Q2:

Marine Corps VLCO does not have access to sufficient data and analytical resources to conduct a detailed analysis on this issue. Anecdotally, Victims' Legal Counsel do observe an inexplicably broad range of sentences for the same or similar offenses, both internal to particular regions and across regions. It is unclear what causes these seemingly disparate sentences. While the cause of that disparity is unclear, the establishment of sentencing parameters and criteria, plea agreement rules binding judges to sentence within certain limits, and other recent developments should go far in standardizing sentences. The Manual for Courts-Martial should augment that progress with additional standardizing features such as uniform presentencing reports.

Marine Corps DSO Response to Q2:

The congressionally directed sentencing criteria and parameters will ensure greater uniformity in sentencing. Under R.C.M. 1002, "If the military judge imposes a sentence outside a sentencing parameter, the military judge shall include in the record a written statement of the factual basis for the sentence." Thus, the current system is built to both encourage consistent sentencing and require written findings for factual deviations. These reforms mark a significant departure from historical military justice sentencing procedures, and sufficient time is necessary to fully understand their impact.

Q3: Please comment on the advisability and feasibility of providing the following additional sentencing authorities to a military judge:

1. The ability to suspend all or part of a sentence.
2. The ability to defer all or part of a sentence.
3. The ability to reduce an Officer member in pay-grade and/or lineal number
4. The ability to sentence a convicted servicemember to a rehabilitative program(s) (e.g., substance or alcohol abuse treatment) in lieu of or in addition to other punishments.
5. The ability to vacate a finding of guilty based upon successful completion of specified conditions (e.g., successful completion of rehabilitative program, no additional misconduct, favorable performance)

Army OSTC Response to Q3:

1. Someone who receives a suspended, deferred, or conditional sentence and remains in the military will eventually undergo a permanent change of station (PCS) to another command or separate from the military. As a result of the unique and transient nature of military service, options 1, 2, and 5 are neither advisable nor feasible.

2. The logistics of "returning" the individual from the new command for re-hearing, replacing the individual for operational and mission purposes, and associated risks (flight, potential self-harm, or harm to others) would be significant and impact combat effectiveness. As a result of the unique and transient nature of military service, options 1, 2, and 5 are neither advisable nor feasible.

3. This option is advisable; however, without significant statutory and Service-regulation revisions to account for career management of officers who have been reduced but not discharged from service, it is highly unfeasible.

4. This option does not appear to be a meaningful sentencing alternative in drug or alcohol related cases, as the offender should have already been enrolled by policy in an Army substance abuse program prior to a court-martial

for a drug or alcohol related offense. Additionally, because alcohol impaired driving offenses are typically handled in federal magistrate court, as opposed to court-martial, there is reduced applicability to this option as an alternative disposition.

5. In cases of separation, the military would lose jurisdiction over the individual. As a result of the unique and transient nature of military service, options 1, 2, and 5 are neither advisable nor feasible.

Army DSO Response to Q3:

1. This is both feasible and highly advisable. If military judges are entrusted with the responsibility of adjudging an appropriate sentence, they should be given the power to craft a sentence they determine is just under the circumstances. Because the military justice system encounters fewer career criminals than the civilian criminal courts do, the military judge may have to adjudge a sentence for a service member who appears to have acted out of character, already learned a lesson, and does not pose any danger to society. A lengthy term of confinement or a punitive discharge that will cripple chances to be a productive citizen may be unnecessary and a drain on the resources of society. However, it may be helpful for the military judge to [have] an option to motivate such a rehabilitating service member with a suspended sentence hanging over the service member's head, in case reality was not as it appeared to the military judge. A military judge may currently recommend that a convening authority suspend a sentence, and the convening authority has the authority to follow that recommendation, but military judges follow the same guidance they give to court members. They adjudge a sentence that is appropriate without reliance on the discretionary act of someone else.

2. The ability to defer all or part of a sentence, upon the request of the accused, is also advisable and feasible. The convening authority currently has the authority, under RCM 1103, to defer confinement, forfeitures, or reduction in grade. With some exceptions, that is only upon application by the accused. Providing the authority to defer these same punishments to the military judge will be consistent with the move to remove control of military justice from the command in cases in which a special trial counsel has exercised authority. The ability to defer all or part of a sentence further enables a military judge, who is charged to adjudge a just sentence, to tailor the sentence to best fit all the circumstances of a particular case.

3. This would be advisable, because it would increase the flexibility to craft the most appropriate sentence. However, it would require Congress to make numerous statutory amendments to the military justice system and to the procedures for how commissions are granted and administered, presenting serious feasibility challenges.

4. Providing this sentencing authority to the military judge is both feasible and advisable. This additional option for military judges would further enhance the ability to tailor a sentence that is in the best interests of all parties. It may be particularly effective when used with a suspended punishment, as mentioned above.

5. Providing this additional sentencing authority to the military judge, creating something akin to deferred prosecution or probation, is both feasible and advisable. It would not require a large new infrastructure, and it would achieve the same objectives mentioned in the discussion of suspended sentences above.

Army VLC Response to Q3:

From the SVC program perspective, any additional sentencing authority should consider the needs of the victim and ensure the victim has an opportunity to participate in a meaningful way. As each victim is unique and their desired outcomes from the military justice system differ accordingly. As such, the program does not want to comment on the advisability and/or feasibility of any one measure.

Air Force OSTC Response to Q3:

The FY22 NDAA reforms mark a significant departure from traditional sentencing procedures, and additional time is needed to fully understand their impact. It is inadvisable to continue to alter sentencing procedures without first understanding the strengths and weaknesses of the system in place. Although there are no current challenges to counsel's ability to present sentencing cases, continuous change, without time for implementation and analysis, does present a challenge. It risks harm to the system by reducing predictability, limiting the development of subject matter expertise, and hindering consistent application of the law.

Air Force DSO Response to Q3:

1. Under Article 60a, Uniform Code of Military Justice (UCMJ), in cases involving serious offenses, military judges may recommend suspension of sentences to be ultimately approved or disapproved by the court-martial convening authority. Per current practitioners within AF/JAJD, this process is inefficient and rarely utilized by military judges or convening authorities.

2. As judges are empowered to act on sentencing matters more in line with their Article III counterparts, it would be advisable to explore providing them with authority to tailor a sentence by suspending or deferring adjudged punishment in whole or in part.

3. To be feasible, this would require significant amendment to existing statutory law and implementing regulation. Additionally, while law and regulatory guidance currently provides some guidance for circumstances under which a suspension might be vacated, a more robust process would need to be created to provide a procedure for how that might be work given changes in the status of the convicted Airman or Guardian.

4. From a trial defense perspective, as the military justice system moves closer to the civilian criminal justice system, it is advisable to adopt options like these tailored to the military environment in a way that would allow military members with significant rehabilitative potential to avoid more punitive actions in favor of rehabilitation and a possible return to service. However, offenses that typically lead to court-martial also result in administrative discharge of the offender if a punitive discharge (i.e. a Bad Conduct Discharge, a Dishonorable Discharge, or a Dismissal of officers) is not adjudged by the court-martial.

5. In terms of feasibility, this authority would require buy in from civilian policymakers and military leaders that retention and rehabilitation of certain categories of offenders is in the best interest of the Armed Forces as opposed to discharge.

Air Force VLC Response to Q3:

1. We do not recommend this.

2. We do not recommend this.

3. This option may be beneficial to some victims.

4. This may be beneficial to some victims. As such, victim input and concurrence should be required before a military judge could direct completion of a rehabilitation program in lieu of any other sentence. Presently there is no "re-hearing" mechanism available to resentence an accused if they fail the rehabilitation program. However, if one were to be created, this would further enhance the healing process for the victims should they choose to participate in the second sentencing.

5. Only for "victimless" crimes, like drug use. This should not be allowed for convictions that derive from an abused person. For many victims the finding of guilt is one of the most important/desired outcomes, sometimes more than the sentence. Allowing a military judge to eliminate the verdict is tantamount to saying, "you are not really a victim," even after that fact has been proven beyond a reasonable doubt by competent evidence. Rehabilitation must remain the purview of sentencing, not findings.

Air Force TSO Response to Q3:

1. JAJG does not believe these two options would be useful or desirable in the context of military justice. Typically, convening authorities are best situated to suspend or defer sentences at a court-martial. They are responsible for the unit effectiveness and must balance the needs of the unit with the needs of the accused in these cases. In JAJG's experience, post-conviction, removal of the member from the service is a top priority. A military judge imposed suspended or deferred sentence seems to contemplate the convicted member returning to his or her unit. It would be the rare case where someone could be returned to perform duties, such as a maintainer, security forces member, medical professional, or an intelligence officer, etc., within the military context.

2. Suspension and deferral are useful tools for Article 15s—a forum that does contemplate the member's continuing service. Suspension and deferral in state and federal court are likely effective as the convict will typically be returning to society. There is value to having a suspended or deferred sentence to encourage good citizenship. However, rarely will the DAF wish to retain convicts in the service given the nature of the military and military service.

3. If the reduction were implemented such that it would also permanently reduce the officer's retirement pay, JAJG would support such a change. Currently, for officers, forfeitures, fines, confinement, and dismissal are the only options and, on some occasions, a permanent reduction in military status and benefits seems appropriate even if dismissal is not appropriate based on the facts of the case. While again a convicted officer would likely not continue to serve, a reduction in grade or lineal number during any remaining service time is suggestion supported by JAJG.

4. Some of these programs exist in the Air Force Confinement Program; specifically, treatment, rehabilitation, and counseling. JAJG is unsure of the utility of these types of options for military trial judges.

5. Again, commanders remain a critical aspect to good order and discipline within their unit of command. Additionally, given all the recent changes to sentencing in the military justice system, JAJG would counsel against additional changes until the current changes are assessed regarding their effectiveness.

Coast Guard OSTC Response to Q3:

1. With a legislative change, this ability is feasible. However, for the same reasons provided in the response to Question 1, it is not advisable at this time.

2. With a legislative change, this ability is feasible. However, for the same reasons provided in the response to Question 1, it is not advisable at this time.

3. With a legislative change, this ability is feasible. However, the practical effect of such an authority could lead to a scenario where an officer remains in service after a demotion post-court martial. This scenario is repugnant to a rank structure that inherently relies on adherence to lawful orders given by officers to subordinate personnel. Inevitably, such a scenario would leave to toxic climates at units and open disrespect toward that officer.

4. With a legislative change, this ability is feasible. However, for the same reasons provided in the response to Question 1, it is not advisable at this time.

5. With a legislative change, this ability is feasible. However, for the same reasons provided in the response to Question 1, it is not advisable at this time.

Coast Guard DSO Response to Q3:

1. This would be feasible and advisable. Because military judges are being entrusted with the responsibility of adjudging an appropriate sentence, they should be given the power to craft a sentence they believe is just. If, after receiving evidence in presentencing, they feel they are being compelled to award an unjust punishment by the rules, sentencing parameters, or a plea agreement, then they should be empowered to suspend all or part of a sentence.

2. This would be feasible and advisable.

3. This is not feasible or advisable short of change in the law.

4. This would be feasible and advisable and help ensure that members are getting the help they need whether they return to the service or society.

5. This would be feasible and advisable by creating something akin to deferred prosecution or probation without requiring a large infrastructure.

Coast Guard VLC Response to Q3:

1. Judges should have this discretion; however, they should be required to make specific findings of fact on the record if they exercise this discretion.

2. Judges should have this discretion; however, they should be required to make specific findings of fact on the record if they exercise this discretion.

3. Absolutely. The inability to reduce officers in rank is probably the single biggest driver of the widespread perception that there is a two-tiered justice system in the military. Enlisted members, particularly those that are junior in rank, are routinely reduced in rank, either at court-martial or via non-judicial punishment (Captain's Mast, Article 15, etc.) Officers are not because the law prohibits it. This greatly reduces its impact on good order and discipline and on the victim's perception of fairness and justice.

4. Additional rehabilitative programs are not needed. The military already has a substantial alcohol and drug treatment program where members may be treated inhouse at civilian facilities. If a member has a drug program and is looking for assistance, the command has the authority to send the member to drug rehab and typically uses it; particularly when members are suffering from mental health issues.

In contrast, there are significant practical/logistical challenges for a court to order such a program. First, compelling treatment is a tool at the disposal of a command prior to preferring charges or adjudicating a case. If the command is at the point where they believe a member should face courts-martial for drug or alcohol use, they have typically exhausted the treatment option or treatment is otherwise not feasible. Unlike states or localities, the military must continue to employ the member and potentially house the member's family during the treatment process. Since commanders are responsible for the care of their members, then commands make the decisions about sending members to drug treatment. The military is unlike the civilian courts that do not have visibility or jurisdiction over drug problems before they get to court. Decisions about drug treatment should not happen after the command has decided that this level of justice is necessary and appropriate.

5. When commands make the decision about what level of action to take against a member, they consider options that would allow suspended sentences. This is typically where minor, non-violent, and non-covered offenses are handled. These options are typically an effective tool to encourage rehabilitation, self-improvement, and positive change. However, courts-martial are punitive and are used for more serious offenses. The ability to vacate a lawfully adjudicated criminal conviction is not appropriate or necessary.

Additionally, adding a supervisory period post-conviction would place an undue burden on military commanders. Since the services do not have probation offices, the commanders would have to serve in this role, which is simply not appropriate for our military leaders.

Navy OSTC Response to Q3:

1. The ability to suspend all or part of a sentence.

2. The ability to defer all or part of a sentence.

3. The ability to reduce an Officer member in pay-grade and/or lineal number.

4. The ability to sentence a convicted servicemember to a rehabilitative program(s) (e.g., substance or alcohol abuse treatment) in lieu of or in addition to other punishments.

5. The ability to vacate a finding of guilty based upon successful completion of specified conditions (e.g., successful completion of rehabilitative program, no additional misconduct, favorable performance). There is no need to add these authorities before we have had an opportunity to assess the recently implemented changes.

Navy DSO Response to Q3:

To support meaningful pre-sentencing hearings, military judges should have greater discretion to suspend, defer, and adjudge sentences they believe are just. Unlike the civilian sector, where sentencing guidelines can be tempered using alternatives to incarceration programs, probation, parole, "good time" and "substantial assistance or safety valve" calculations, our system has no such opportunity for leniency from the guidelines. As such, offering judges the power to suspend all or part of a sentence, split a sentence between incarceration and an alternative to incarceration program, or otherwise use alternative sentencing considerations would permit our system to show flexibility, and offer individualized opportunity to earn opportunities to reduce a sentence.

a. Because servicemembers convicted of offenses occurring before 1 January 2024 can elect sentencing by members there is insufficient data available to answer whether the new rules implementing judge alone sentencing have led to similar sentences for similarly situated offenders. Sailors still choose to be sentenced by the members panel far more often than by military judges after being convicted contrary to their plea of not guilty because most cases fall under the rules that [sic]. The data we have for military judge sentencing is almost entirely tied to plea agreements. The negotiated agreement severely limits the military judges' discretion, sometimes to the point that the military judge must award a specific sentence. Since these agreements limit the discretion of the military judge and substitute a negotiated sentence for one crafted by the military judge, it is difficult to evaluate military judges. However, generally speaking, judge advocates serving at the trial level are all members of the military justice litigation qualification career track. They have also served as trial and defense counsel before assuming the bench. The consensus was military judges, when given the opportunity to sentence at their own discretion, tend to be consistent across the judiciary. The quality of information presented for their consideration would affect their sentence and any recommendation to suspend a portion of the sentence, but they still tend to be inside a consistent range based on the offenses.

1. This would be feasible and highly advisable. If the military justice system entrusts experienced military judges with the grave responsibility of adjudging an appropriate sentence, then the system should give them the power to truly craft a sentence they believe is just. If, after receiving evidence in presentencing, they feel they are being compelled to award an unjust punishment by the rules, sentencing parameters, or plea or a plea agreement then they should be empowered to suspend all or part of a sentence

2. This would be feasible and highly advisable. The power to make these recommendations would incentivize a robust pre-sentencing hearing and actions intended to take accountability or rehabilitate Sailors.

3. This would reduce the appearance that officers are treated preferentially based solely on their rank and position. However, it seems logistically more difficult as it may require Congress change how the President grants and delivers commissions and how officers accept them.

4. If the goal of sentencing is to return Sailors to being productive members of society, and possibly productive members of the armed forces, then this is an ideal tool to incentivize good behavior. By promoting treatment, this power would also create a strong motivation to accept responsibility and give Sailors a path to return to duty. It is also in line with limiting mass incarceration for offenses related to drug addiction, etc.

5. This would be feasible and advisable by creating something akin to deferred prosecution or probation without requiring a large infrastructure. This tool would be particularly valuable if a Sailor pleaded guilty and a military judge decided the Sailor could recover and still contribute to the Navy, either based on the plea agreement or pre-sentencing information. Since the Sailor would already be found guilty or have entered a plea of guilty, it would empower the chain of command to evaluate the changes in the Sailor.

Navy VLC Response to Q3:

Navy VLCP generally supports more options for victims to provide input on and subsequently for the victim input to be considered when the decision is made. Each victim is unique and as such, victims have a range of desired outcomes in the military justice process. If there is no victim input or when there is victim input, but it is not considered, then we see victim dissatisfaction with the military justice process.

1. This should not be within the authority of the MJ. This puts the burden back on the command/Navy, and further, creates an administrative issue with jurisdiction, as the Navy would likely want to administratively separate the accused resulting in no actual punishment to a suspension. This would hold only for confinement, as the administrative punishments like Fines/RIR/Forfeitures may be suitable for suspension.

2. See answer above, except for fines/RIR/FF potentially.

3. Without knowing if this is possible to do via Navy Personnel Command, a MJ should be able to offer an opinion for the CA or separation authority to agree to.

4. Yes, not in lieu vice confinement without expert testimony from those who run rehabilitation programs. Many victims, especially domestic violence victims, may want to have their perpetrators receive help. Miramar and other brigs have robust programs for rehabilitation; however, it is the length of the sentence that seems to effect whether or not they can attend these programs. Without programs in existence for perpetrators to attend, however, this would practically be a meaningless sentence.

5. No. For victims of sexual assault and DV, perpetrators should not have their guilty finding vacated. Many sexual and violent perpetrators have a history of these types of offenses, and to have it vacated would allow them to be

under the radar and potentially offend again without the protections afforded society like Lautenberg and sexual offender registration.

Navy TSO Response to Q3:

From a Navy trial counsel perspective, military judges are generally too lenient with their sentences. This has consistently been an issue with much of the trial judiciary for a number of years. Providing these additional sentencing authorities to military judges would likely result in even fewer punitive discharges and sentences to confinement, which would adversely impact good order and discipline.

Marine Corps OSTC Response to Q3:

The FY22 NDAA reforms mark a significant departure from historical military justice sentencing procedures, and additional time is needed to fully understand their impact. It is inadvisable to continue to alter sentencing procedures without first understanding the strengths and weaknesses of the system in place.

Marine Corps DSO Response to Q3:

I believe it is both advisable and feasible to allow military judges to suspend or defer all of part of a sentence, sentence a convicted servicemember to rehabilitative program in lieu of other punishments, or to vacate a finding of guilt based on successful completion of specified conditions. These are all forms of clemency, which was effectively stripped from the convening authorities. However, a military judge often knows less about an accused than a commander would. More robust pre-sentencing hearing would be needed so the military judge received a complete picture of an accused. The Entry of Judgment can be delayed to allow for completion of any rehabilitative programs. The difficulty would be that a command would likely administratively separate a convicted servicemember rather than allow such post-trial measures to take place if the command disagreed with the military judge's decision.

Marine Corps VLC Response to Q3:

Affording Military Judges a broader range of sentencing authorities may be advisable in some respects but seems contrary to the balance of legislative and policy changes in recent years. Those changes generally favor less discretion and more structure, both with respect to disposition authority and in awarding an appropriate sentence. In addition, because a military judge is not the "consumer" of good order and discipline within a unit, that judge is not well-positioned to assess whether suspension, deferral, or similar measures would be effective. As with vacation of findings based on subsequent rehabilitative measures or good conduct, those methods generally impose additional requirements on convening authorities and supported commanders. Accordingly, such measures should be limited to non-binding recommendations from the military judge, which a commander may or may not adopt based on the mission requirements of individual commands.

If military judges are afforded any of these authorities, victims must have an opportunity to attend and be heard through counsel at any proceeding in which these matters are addressed, particularly prior to the vacation of a previously-imposed sentence.

Marine Corps DSO Response to Q3:

The FY22 NDAA reforms mark a significant departure from historical military justice sentencing procedures, and additional time is needed to fully understand their impact. It is inadvisable to continue to alter sentencing procedures without first understanding the strengths and weaknesses of the system in place.

Q4: Are there any other changes to sentencing processes, procedures, or rules that would be beneficial to ensuring informed, fair, and consistent sentences are adjudged across the services? Please explain.

Army OSTC Response to Q4:

No.

Army DSO Response to Q4:

Pre-sentencing should remain an adversarial hearing, benefitting both the sentencing authority, by providing the best pre-sentencing information possible, and individual service members, who continue to have an advocacy opportunity as part of the due process currently afforded within the military justice system. Military judges entrusted with this key function in the system should be given more discretion to suspend or defer punishments and vacate findings, upon specified conditions, to best achieve the goals of sentencing and serve the interests of all parties. Also, because pre-sentencing is a critical step in the military justice process, it should not be rushed at the end of a contested trial on the merits. Service members being tried by court-martial should not have to accept a rushed pre-sentencing hearing for the convenience of the government. Bifurcating the hearing will ensure military judges preside over a robust and zealous pre-sentencing case with the government, victim, and accused represented by prepared advocates. Rule for Courts-Martial 1001(d)(1)(B) should be amended so the definition of mitigation evidence explicitly includes collateral consequences of the findings and sentence. This could be accomplished by adding the words "collateral consequences of the findings and sentence," after the word "includes" in the second sentence of the rule. Current practice regarding collateral consequences is inconsistent. For example, court members are instructed on many collateral consequences, like automatic reductions, automatic forfeitures, and loss of retirement benefits. Nonetheless, some practitioners believe that courts-martial cannot consider collateral consequences. This has led to uneven treatment of matters like sex offender registration, recoupment of money, and retention control points. Current practice is to allow the accused to discuss such things in his or her unsworn statement, but the judge can give an instruction that basically tells the members not to consider collateral consequences. Our practice would benefit from a common-sense rule that allows the defense to offer collateral consequences as mitigation evidence, subject to Military Rule of Evidence 403. The sentencing authority can then decide how important the evidence is.

Army VLC Response to Q4:

In light of the extensive changes to military justice in recent years, it is not advisable to make additional changes until an assessment can be made on the current changes. However, it is essential that victims retain the right to be heard throughout sentencing procedures.

Air Force OSTC Response to Q4:

The FY22 NDAA reforms mark a significant departure from traditional sentencing procedures, and additional time is needed to fully understand their impact. It is inadvisable to continue to alter sentencing procedures without first understanding the strengths and weaknesses of the system in place. Continuous change, without time for implementation and analysis, does present a challenge. It risks harm to the system by reducing predictability, limiting the development of subject matter expertise, and hindering consistent application of the law.

Air Force DSO Response to Q4:

JAJD's position is that time should be taken to evaluate the effect of recent changes mandating military judge alone sentencing under appropriate criteria and parameters before considering additional changes. These changes,

combined with regulatory changes clarifying that an exact sentence may be negotiated as part of a plea agreement, will disincentivize the fully adversarial litigated process that historically was a process relatively unique to courts-martial in terms of sentencing for non-capital cases. While this will result in more predictability in court-martial sentencing, time should be taken to gather data so that a fully informed study can be undertaken of the benefits and drawbacks brought about by these changes.

Air Force VLC Response to Q4:

No additional responsive information other than what was already discussed.

Air Force TSO Response to Q4:

The limitations placed on the victim's unsworn statement should be removed. In a military courtroom a victim of a sexual assault has his or her ability to make a statement restricted in ways that federal and state victims are not. The limits placed on the victim's rights to make an unsworn or to testify are often litigated as well. The rules do not appear necessary and they are confusing to counsel, trial judges, and, arguably, even the appellate judges. *United States v. Harrington*, 83 M.J. 408 (CAAF 2022); *United States v. Tyler*, 81 M.J. 108 (CAAF 2020); *United States v. Barker*, 77 M.J. 377 (CAAF 2017).

Coast Guard OSTC Response to Q4:

For the same reasons provided in the response to Question 1, the OCP does not recommend any other changes to sentencing processes, procedures, and rules at this time.

As the military justice system continues to evolve, however, future changes to sentencing guidelines akin to how the federal system employs the same could lead to more informed, fair, and consistent sentences as well as set more defined parameters for plea negotiations. If and when those changes are pursued and attained, ensuring military judge are aware and appropriately trained will be critical.

Coast Guard DSO Response to Q4:

It is important to note that while we may want to find uniformity amongst stats and figures, no two cases, two convicted members, two judges, or two panels are alike. Uniform sentences do not necessarily mean fair or just sentences.

Coast Guard VLC Response to Q4:

Recommend that the panel continue to explore ways for an offender to pay financial compensation to a victim of sexual assault victim or domestic violence.

Navy OSTC Response to Q4:

Additional changes to the sentencing process are neither advisable nor feasible at this time. In response to the FY22 NDAA, the military just recently implemented significant changes to its sentencing system in an effort to improve consistency, transparency, and fairness. Military judges are now responsible for sentencing with the aid of newly developed sentencing parameters and criteria. We need time to assess the impact of these changes before making additional changes.

Navy DSO Response to Q4:

Pre-sentencing should remain a fully adversarial hearing. However, military judges should be given more discretion to suspend, defer, or deviate from sentencing parameters or plea agreement in order for it to remain meaningful. Similarly, if pre-sentencing is a critical step in the military justice process then the process should not be rushed at the end of a contested trial. The system should not force service members tried by court-martial to accept a rushed pre-sentencing hearing just for the convenience of the government. Bifurcating the hearing will ensure military judges preside over a robust and zealous pre-sentencing case with the government, victim, and accused represented by prepared advocates.

Navy VLC Response to Q4:

As discussed above, victims should have access to case information so they may provide meaningful input on sentencing. Hearing a victim's fully informed voice, as the one who was harmed, is imperative during sentencing.

Navy TSO Response to Q4:

The recent changes enacted in the sentencing procedures (judge alone sentencing and sentencing guidelines) were positive. I cannot think of any additional changes to ensure that informed, fair, and consistent sentences are adjudged across the services.

Marine Corps OSTC Response to Q4:

Until the current reforms have been exercised and their impacts studied and understood, any suggested or recommended further changes to our sentencing processes, procedures, or rules would be ill-informed and inadvisable. Time and data are needed to fully understand the impact of these reforms before deciding whether to pursue more changes.

Marine Corps DSO Response to Q4:

The Sentencing Parameters are an important step, but the trial judiciary needs training that allows them to be comfortable and knowing when they can elect to make a downward departure. It is also important that Congress allow various changes in the laws and procedure to take effect and study them before considering new changes. The number of constant, significant changes in military justice is a large-scale problem for practitioners—particularly senior-level practitioners and military judges.

Marine Corps VLC Response to Q4:

Victim allocution is a critical component of victim voice and plays an important role in victims' long recovery from the harm caused by offenders. Because all non-capital sentencing will be conducted by military judges, victims should have clear, specifically-enumerated rights to fully address the nature of their experience as victims, to describe the impact of the misconduct against them, and to recommend an appropriate punishment for the accused in sentencing proceedings. Military judges are capable of reliably assessing weight and admissibility of various statements, so our clients should not be as constrained in expressing their views and opinions.

To that end, the MJRP should closely study methods employed in both federal civilian and state court proceedings, which generally afford victims far broader latitude in how victims' voices are heard during sentencing. In particular, the MJRP should consider the important differences between victim impact evidence offered by a party, either in aggravation or mitigation; the victim impact statements currently used to convey victims' viewpoints on the case, and the practice in some state courts of affording victims an opportunity to make statements in

allocution—addressed both to the court and to the accused—*after* a sentence has been imposed. Adopting this practice in courts-martial would enable victims to comment more broadly on their experience, without concerns about whether the victim's comments inappropriately influenced the sentence in a given case. Doing so would provide powerful voice and closure to victims who are otherwise largely spectators in the military justice process.

Marine Corps DSO Response to Q4:

Until the current reforms have been exercised and their impacts studied and understood, any suggested or recommended further changes to our sentencing processes, procedures, or rules would be inadvisable. Time and data are needed to fully understand the impact of these reforms before deciding whether to pursue more changes.

APPENDIX S. REQUEST FOR INFORMATION ON MILITARY JUSTICE SENTENCING (DATA)

The Military Justice Review Panel
Article 146, Uniform Code of Military Justice

Request for Information
Information on Military Justice Sentencing
30 October 2023

I. Purpose: The Military Justice Review Panel (MJRP) requests the below information to facilitate its statutory requirement to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice. As part of this requirement, the MJRP will review and assess changes to the structure, pretrial and trial procedures, punitive articles, and post-trial and sentencing procedures of the military justice system since the passage of the Military Justice Act of 2016.

II. Statutory Authority: The MJRP (Article 146, UCMJ) was established pursuant to § 5521 of the NDAA Fiscal Year 2017, as amended. This request is made pursuant to Article 146(h).

III. Point of Contact: The POC for this RFI is Mr. Michael Libretto, available at 910-378-5935 or michael.d.libretto.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Dec 2023	Spreadsheet Data	Military Justice/Criminal Law Divisions: Please provide the list of cases and associated data meeting the RFI criteria outlined in Section V below using the format in Attachment 1. For any data not provided, please provide a brief reason.

V. Information Requested

The MJRP respectfully requests the below data for each case completed in Fiscal Years 2021, 2022, and 2023 in which there was a finding of guilty and the judge imposed segmented sentencing. Responsive data will include only and all cases involving sentencing by military judge alone for which a segmented sentence was imposed. Please provide each FY in a separate worksheet using Attachment 1.

a. Name of accused
b. Date of birth of the accused
c. Sex of the accused
d. Race of the accused
e. Ethnicity of accused
f. Rank of the accused

g. All charges and specifications for which there was a finding of guilty (accounting for all offenses, including with aggravating circumstances listed in Appendix 12C, 2023 Manual for Courts-Martial)[1]

h. The pleas of the accused to the charges and specifications for which there was a guilty finding

i. Confinement term adjudged for each specification for which there was a guilty finding

j. If there were multiple findings of guilty, please indicate for each guilty finding whether the confinement term was consecutive or concurrent with all other offenses for which there was a guilty finding and whether the decision to run consecutively or concurrently resulted from a term of a plea agreement

k. Whether a reduction in rank was adjudged and if so, to what rank

l. Whether any financial penalties were adjudged and if so, the type and amount

m. Whether a punitive discharge was adjudged and if so, the type of discharge

n. Whether the decision to adjudge a discharge resulted from a term of a plea agreement

o. Whether any other punishments were adjudged and if so, the nature of the punishment

Note: The Military Services' responses to this RFI are not reproduced in this appendix, because the MJRP did not rely on the information provided, given the significant data deficiencies.

1 Some punitive articles consist of a single offense with one set of elements and one permissible maximum punishment, while other punitive articles have multiple related offenses with different sets of statutory elements or aggravating factors and thus different permissible maximum punishments. As reflected in Attachment 1 [not reproduced here], the data responsive to this request will distinguish between all offenses under each punitive article.

APPENDIX T. ACRONYMS AND ABBREVIATIONS

AFCCA	Air Force Court of Criminal Appeals
AFOSI	Air Force Office of Special Investigations
AR	Army Regulation
CAAF	Court of Appeals for the Armed Forces
CGIS	Coast Guard Investigative Service
CID	[Army] Criminal Investigation Division
CM/ECF	Case Management/Electronic Case Files
CMC	Commandant of the Marine Corps
CMG	Case Management Group
COMDTINST	Commandant Instruction
CVRA	Crime Victims' Rights Act
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DLSA	Defense Legal Services Agency
DoD	Department of Defense
DoD GC	General Counsel of the Department of Defense
DoD IG	Inspector General of the Department of Defense
DoDD	Department of Defense Directive
DoDI	Department of Defense Instruction
DSAID	Defense Sexual Assault Incident Database
DSO	defense service organization
EOA	equal opportunity advisor
FY	fiscal year
GAO	Government Accountability Office
GCM	general court-martial
HQ	Headquarters
IG	inspector general
IRC	Independent Review Commission on Sexual Assault in the Military
JPP	Judicial Proceedings Panel
JSC	Joint Service Committee on Military Justice

MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
MEO	Military Equal Opportunity
MJA16	Military Justice Act of 2016
MJRG	Military Justice Review Group
MJRP	Military Justice Review Panel
MPs	military police
M.R.E.	Military Rule of Evidence
MWPA	Military Whistleblower Protection Act
NCIS	Naval Criminal Investigative Service
NDAA	National Defense Authorization Act
NJP	nonjudicial punishment
NMCCA	Navy-Marine Corps Court of Criminal Appeals
OCR	optical character recognition
OSTC	Office of Special Trial Counsel
PACER	Public Access to Court Electronic Records
PII	personally identifiable information
PRIVATE	Protecting the Rights of Individuals Against Technological Exploitation
R.C.M.	Rule or Rules for Courts-Martial
RFI	request for information
SAPR	Sexual Assault Prevention and Response
SAPRO	Sexual Assault Prevention and Response Office
SARC	sexual assault response coordinator
SCA	Stored Communications Act
SCM	summary court-martial
SecDef	Secretary of Defense
SHARP	Sexual Harassment/Assault Response and Prevention
SJA	staff judge advocate
SOR	statement of reasons
SPCB	Sentencing Parameters and Criteria Board
SPCM	special court-martial

STC	special trial counsel
SVC	special victims' counsel
TJAG	the Judge Advocate General
TSO	Trial Service Organization
UCMJ	Uniform Code of Military Justice
VA	victim advocate
VIS	victim impact statement
VLC	victims' legal counsel

APPENDIX U. SOURCES CONSULTED

1. Legislative Sources

a. Enacted Statutes

5 U.S.C. §§ 401–424 (Inspectors General)

5 U.S.C. § 552 (Public information)

10 U.S.C. §§ 800–946 (Uniform Code of Military Justice)

10 U.S.C. § 1034 (Protected communications)

10 U.S.C. § 1561 (Complaints of sexual harassment)

18 U.S.C. §§ 2701–2712 (Crimes)

18 U.S.C. § 3553 (Imposition of a sentence)

18 U.S.C. § 3771 (Crime victims' rights)

Military Justice Act of 1968, Pub. L. No. 90-632, Stat. 1335 (1968)

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

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017)

The John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018)

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)

The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022)

National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 136 (2024)

b. Other Congressional Material

H.R. Res. 2052, PRIVATE Act, 115th Cong. (2017)

H.R. Rep. No. 114-840 (Conference Report to Accompany HRPT-S. 2943) (Nov. 30, 2016)

H.R. Rep. No. 114-537 (Report of the House of Representatives Committee on Armed Services on H.R. 4909) (May 4, 2016)

2. Judicial Decisions

a. U.S. Supreme Court

Boykin v. Alabama, 395 U.S. 238 (1969)

Gall v. United States, 552 U.S. 38 (2007)

Rita v. United States, 551 U.S. 338 (2007)

United States v. Booker, 543 U.S. 220 (2005)

b. Federal Circuit Courts

Kenna v. U.S. Dist. Ct., 435 F.3d 1011, 1016 (9th Cir. 2006)

Pro Publica, Inc. v. Butler, 2024 U.S. Dist. LEXIS 38500, 2024 WL 947466 (S.D. Cal. Mar. 4, 2024)

United States v. Colon-Cordero, 91 F.4th 41 (1st Cir. 2024)

United States v. Harrell, 2023 U.S. App. LEXIS 10810, 2023 WL 3220910 (9th Cir. May 3, 2023)

United States v. Warshak, 631 F.3d 266 (6th Cir. 2010)

c. U.S. Court of Appeals for the Armed Forces and Predecessor Court

United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957)

United States v. Anderson, 68 M.J. 378 (C.A.A.F. 2009)

United States v. Cunningham, 83 M.J. 367 (C.A.A.F. 2023)

United States v. Green, 64 M.J. 289 (C.A.A.F. 2007)

United States v. Grijalva, 84 M.J. 433 (C.A.A.F. 2024)

United States v. Hall, 26 M.J. 739 (C.M.A. 1988)

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