



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

MINUTES OF AUGUST 21, 2020, PUBLIC MEETING

AUTHORIZATION

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

EVENT

The Committee held its eighteenth public meeting on August 21, 2020, from 11:00 a.m. to 3:00 p.m. At this meeting the Committee conducted final deliberations on the DAC-IPAD *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*. The Committee received updates regarding the status of the review and assessment of racial and ethnic disparities in the investigation, prosecution, and conviction of Service members for sexual offenses involving adult victims within the military justice system as required by section 540I of the National Defense Authorization Act for Fiscal year 2020. Finally, the Committee received an update from the DAC-IPAD Policy Subcommittee.

LOCATION

The meeting was held via teleconference with dial-in access information provided to the public in the Federal Register and on the DAC-IPAD’s website.

MATERIALS

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

PARTICIPANTS

Participating Committee Members

Ms. Martha S. Bashford, Chair
Ms. Kathleen B. Cannon
Ms. Margaret A. Garvin
The Honorable Paul W. Grimm
Mr. A. J. Kramer
Ms. Jennifer G. Long
Mr. James P. Markey
Dr. Jenifer Markowitz

Chief Master Sergeant of the Air Force
Rodney J. McKinley, U.S. Air Force,
Retired
Brigadier General James R. Schwenk, U.S.
Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash
The Honorable Reggie B. Walton

Committee Staff

Colonel Steven Weir, U.S. Army, Staff
Director
Colonel Laura Calese, U.S. Army, Incoming
Staff Director
Ms. Julie Carson, Deputy Staff Director
Dr. Alice Falk, Technical Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Patricia Ham, Attorney-Advisor

Mr. Glen Hines, Attorney-Advisor
Mr. Chuck Mason, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Mr. Dale Trexler, Chief of Staff
Ms. Eleanor Vuono, Attorney-Advisor

Service Representatives

Major Ryan C. Lipton, U.S. Marine Corps, Military Justice Policy and Legislation Officer, Judge
Advocate Division
Ms. Janet K. Mansfield, Chief, Programs Branch, Army Criminal Law Division
Mr. James S. Martinson, HQE, Navy Criminal Law Division
Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice
Ms. Asha Vaghela, Senior Civilian Military Justice Attorney, Air Force Legal Operations
Agency
Major Marquita Ricks, U.S. Air Force, Chief, Victim and Witness Policy

Other Participant

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

MEETING MINUTES

Mr. Dwight Sullivan, Designated Federal Officer, opened the public meeting at 11:00 a.m. Ms. Martha Bashford, Chair of the DAC-IPAD, provided opening remarks welcoming those in attendance, explaining the purpose of the meeting and outlining the agenda. By voice roll call, she established quorum and introduced the Case Review Subcommittee staff to lead the Committee's deliberations on the draft *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*.

DAC-IPAD Staff Presentation to Committee, Committee Deliberations, and Committee Vote on the Draft Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017

Colonel Steven Weir introduced the report deliberations by providing an overview of the three-year case review project. He explained that the CRSC developed a strategy for reviewing 1,904 cases based on investigations conducted by the Military Services' criminal investigative organizations (MCIOs) and closed between October 1, 2016 and September 30, 2017, that involved an allegation that a Service member on active duty committed a penetrative sexual offense against an adult victim.

Ms. Teresa Gallagher, DAC-IPAD Attorney-Advisor, explained that the Committee reviewed the report at an administrative session the previous day in order to make technical edits and identify substantive questions for deliberation at the public meeting. She stated that the report includes 47 findings and 10 recommendations, but that the Committee would be focusing on the specific findings and directives highlighted by the members at the administrative session for deliberation at the public meeting. She presented the findings, recommendation, and directives to the Committee for deliberation.

Proposed Finding 24 *–(page 65 of the report reviewed by members)*

There (may be) (is) a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense.

The Committee discussed Proposed Finding 24 and addressed the member-proposed amendment to change the language from “may be” to “is.” CRSC Chair Jim Schwenk explained that the reasoning for the proposed change was based on the data which indicates there is a systemic problem with the referral of penetrative sexual offense charges (Finding 15).

The motion passed with a majority of Committee members in favor of the amendment to use the word “is” rather than “may be” for Finding 24. There were two votes in opposition to the amendment.

Proposed Finding 13 *(page 58 of the report):*

While all Services consider whether there is sufficient admissible evidence to obtain and sustain a conviction on the charged penetrative sexual offense, in military prosecutions, unlike in federal civilian prosecutions, there is no policy requirement to do so before either preferral or referral of those charges to trial by general court-martial.

General Schwenk reviewed Proposed Finding 13 stating that the recommendation is to eliminate the language “of those charges to trial by general court-martial,” as unnecessary. There was no opposition to the proposed editorial change.

Proposed Finding 15 *(at page 58 of the report):*

The data clearly indicate that no penetrative sexual offense charge should be referred to trial by general court-martial without sufficient admissible evidence to obtain and sustain a conviction on the charged offense, and Article 34, UCMJ, should incorporate this requirement.

Proposed Directive 6 to Policy Subcommittee (page 66 of the report):

The Policy Subcommittee develop proposals, as part of their findings and recommendations regarding Articles 30, 32, 33, and 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.

Based on the amendment to Proposed Finding 24, Ms. Gallagher asked if there were any proposed amendments to Proposed Directive 6. The Committee deliberated on Proposed Directive 6 and agreed unanimously that a recommendation be added to the report that Congress amend Article 34 to require the staff judge advocate to advise the convening authority about the sufficiency of the evidence. Additionally, the Committee agreed that this recommendation eliminates Proposed Directive 6.

Ms. Gallagher explained that the proposed recommendation language would be taken from Proposed Directive 6, and that the draft amendment to Article 34 would be made an appendix to the report and the proposed amendment to the corresponding Rules for Court-Martial.

Proposed Directive 4 to Case Review Subcommittee (page 60 of the report):

In light of the data demonstrating that in 50.7% of cases resulting in acquittal of a penetrative sexual offense charge, the materials reviewed contained sufficient admissible evidence to obtain a conviction on the charged offense and in 49.3% of cases such evidence is not present, the CRSC consider whether controllable factors are contributing to acquittals in these cases or if there are common characteristics in the cases that might help explain the conviction and acquittal rates for these offenses.

Alternative Proposed Directive 4 to Case Review Subcommittee (proposed by Ms. Bashford):

The Committee recognizes that not all cases with sufficient admissible evidence to obtain a conviction will, in fact, result in a verdict of guilty. Moreover, this assessment was made in the absence of any evidence presented by the defense at trial. However, in light of the data demonstrating that in just over half (50.7%) of cases resulting in acquittal of a penetrative sexual offense charge, the materials reviewed contained sufficient admissible evidence to obtain a conviction on the charged offense and in 49.3% of cases such evidence was not present, the CRSC should consider if there are common characteristics in the cases that might help explain the conviction and acquittal rates for these offenses. Part of the CRSC's assessment and consideration of these matters should involve observation of courts-martial.

These data raise the issues of why cases lacking sufficient admissible evidence to obtain and sustain a conviction are being referred and why cases with sufficient admissible evidence to obtain and sustain a conviction are resulting in acquittals.

Ms. Gallagher advised that in order to alleviate some concerns about possible misinterpretation of Proposed Directive 4, Chair Bashford proposed an alternative directive. Chair Bashford explained that the original language left the impression that the assessment was that every case that had sufficient admissible evidence would bring a verdict of guilty.

The Committee agreed unanimously to adopt the Alternative Proposed Directive 4.

Proposed Directive 3 to Case Review Subcommittee (page 51 of the report):

The CRSC continue to review and assess victim statements to law enforcement regarding allegations of penetrative sexual offenses, both to determine what factors contribute to these statements not providing a factual basis to establish that the subject committed the alleged penetrative sexual offense and to determine how to improve the efficacy of such statements.

Alternative Proposed Directive 3 to Case Review Subcommittee

(flagged for discussion by a Committee Member):

In light of the Committee's determination that 41.3% of victim statements to law enforcement do not establish probable cause that the subject committed the alleged penetrative sexual offense, the CRSC continue to review and assess such statements in order to examine the factors that may contribute to this result, and make appropriate findings and recommendations.

Ms. Gallagher presented an alternative directive 3 for the Committee's consideration. The Committee briefly discussed the options provided and unanimously agreed to adopt "Alternative Proposed Directive 3 to Case Review Subcommittee".

Proposed Directive 2 to Case Review Subcommittee (page 51 of the report):

The CRSC conduct a review of a random sample of MCIO investigations of penetrative sexual offenses within 5 years, to further assess the quality of investigations and the progress made in light of statutory and regulatory modifications as well as implementation of previous DAC-IPAD recommendations.

Ms. Gallagher directed the Committee to consider Proposed Directive 2 and discuss the amended language. The Committee was in agreement with the proposed amendment. Ms. Gallagher reviewed the Executive Summary and highlighted the proposed edits and amendments. All were unanimously accepted.

Ms. Kate Tagert, DAC-IPAD Attorney-Advisor, and Dr. William Wells, Criminologist, provided the Committee with a briefing of the data portion of the report. They described the methodology for developing the data analysis through univariate, bivariate and multivariate models and explained the relationships and the associated outcomes.

Directive 7 to Case Review Subcommittee:

The CRSC examine the law, policy, and practices concerning DNA collection and testing and sexual assault forensic examinations in penetrative sexual offense cases and make appropriate findings and recommendations.

Directive 8 to Case Review Subcommittee:

The CRSC examine penetrative sexual offense cases in which the victim reported being impaired in order to assess MCIO interview and investigative techniques utilized in such cases and make appropriate findings and recommendations.

Directive 9 to Case Review Subcommittee:

The CRSC examine penetrative sexual offense investigative files in which the victim reports both no impairment and no use of physical force or the threat of force in order to further assess how the facts in these cases influence the initial disposition decision to prefer a penetrative sexual offense charge or take no action on that offense, and, in cases resulting in a preferred penetrative sexual offense charge, the post-preferred outcomes for those offenses.

Proposed Directive 10 to Case Review Subcommittee:

The CRSC examine factors that may contribute to the relationship between conviction and acquittal rates and the victim's representation by counsel.

Ms. Tagert presented the Committee with the four data-related directives that were developed for the members to consider directing to the CRSC for additional research and investigation. The Committee unanimously agreed that the CRSC should conduct additional research and investigation of each of the proposed directives as stated.

Chair Bashford summarized the report deliberations and made the motion that the report be approved as amended. The motion passed by unanimous vote.

Status of the Committee's Review and Assessment of Racial and Ethnic Disparities in the Investigation, Prosecution, and Conviction of Service Members for Sexual Offenses Involving Adult Victims within the Military Justice System as Required by Section 540I of the National Defense Authorization Act for Fiscal Year 2020

Ms. Eleanor Vuono, DAC-IPAD Attorney-Advisor, provided the Committee with a briefing of the congressionally mandated report to conduct a review and assessment of the race and ethnicity of Service members accused of a penetrative or contact sexual offense; the race and ethnicity of each service member against whom a penetrative or contact sexual offense were preferred; and the race and ethnicity of each service member convicted of one of those offenses. She explained the organization and timeline of the project, and stated that the report is due to Congress December 19, 2020. She advised that a draft report would be provided to the Committee for deliberation at the November public meeting.

Policy Subcommittee Update

Ms. Meghan Peters, DAC-IPAD Attorney-Advisor, provided the Committee with an update of the Policy Subcommittee's (PSC) continuing review of Articles 32, 33 and 34. She stated that in order to compare military and civilian preliminary hearings and pretrial procedures, the PSC has been conducting interviews with prosecutors from various state and federal jurisdictions. She stated the goal is to provide background that will inform the subcommittee and the Committee's future analysis and future report development. Ms. Peters added that in the coming months the

Subcommittee will pivot to interviewing defense counsel, victims' counsel and magistrates. She stated that PSC would also take up the directive received from the CRSC. She concluded her briefing stating that the PSC will assess all aspects of the pretrial phase of the military justice process before advancing the subcommittee's final findings and recommendations

Meeting Wrap-Up and Public Comment

Colonel Weir provided closing remarks and thanked the members and staff for their commitment to the work of the DAC-IPAD. He reported that the next scheduled public meeting for the DAC-IPAD is November 6, 2020.

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

The DFO closed the public meeting at 3:07 p.m.

CERTIFICATION

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



Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of August 21, 2020, Committee Public Meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

1. PowerPoint Slide Presentation Prepared by DAC-IPAD Staff Providing an Overview of DAC-IPAD *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal year 2017*
2. Draft Potential *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal year 2017* Findings and Directives for DAC-IPAD Committee Deliberations
3. Draft *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal year 2017* Executive Summary
4. Draft *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal year 2017*

5. Index of Tables for *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal year 2017*
6. FY20 NDAA Provision Sec. 540I. Assessment of Racial, Ethnic, and Gender Disparities in the Military Justice System
7. DAC-IPAD August 7, 2020, Request for Information 18A, Assessment of Racial, Ethnic, and Gender Disparities in the Military Justice System