



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

MINUTES OF JUNE 21-22, 2022, 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 twenty-third public meeting on June 21-22, 2022.

LOCATION

The meeting was held at the Ritz-Carlton, Pentagon City, located at 1250 South Hayes Street, Arlington, Virginia. Location details were 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

The Honorable Karla N. Smith, Chair
Major General Marcia Anderson,
U.S. Army, Retired
Ms. Martha S. Bashford
Mr. William E. Cassara
Ms. Margaret A. Garvin
The Honorable Suzanne Goldberg
The Honorable Paul W. Grimm
Mr. A. J. Kramer

Ms. Jennifer Gentile Long
Mr. James P. Markey
Dr. Jenifer Markowitz
The Honorable Jennifer M. O'Connor
Brigadier General James R. Schwenk,
U.S. Marine Corps, Retired
Ms. Meghan A. Tokash
The Honorable Reggie B. Walton

Absent Committee Member

Dr. Cassia C. Spohn

Committee Staff

Colonel Jeff A. Bovarnick, U.S. Army,
Executive Director
Ms. Julie Carson, Deputy Director
Mr. Dale Trexler, Chief of Staff

Ms. Audrey Critchley, Attorney-Advisor
Dr. Alice Falk, Technical Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Mr. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst
Ms. Laurel Prucha Moran, Graphic Designer
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
Ms. Eleanor Magers Vuono, Attorney-Advisor
Dr. William Wells, Criminologist
Mr. Pete Yob, Attorney-Advisor

Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

MEETING MINUTES

Day One - June 21, 2022

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 9:25 a.m. Mr. Sullivan introduced the Honorable Karla N. Smith, DAC-IPAD Chair, who provided opening remarks welcoming those in attendance; explained the purpose of the meeting; outlined the agenda; and introduced Colonel Jeff Bovarnick, DAC-IPAD Executive Director, who provided a brief overview of the meeting and introduced the first session.

Terms of Reference (ToR), Subcommittees, and Committee Task Review and Update

In this session, COL Bovarnick provided a review of the ToR, approved by the DoD General Counsel on May 23, and reviewed the Committee’s current tasks/reports/studies, including the various ways those tasks are assigned to the Committee:

1. By statute: Annual Report (due March 30, 2023)
2. By statute: Biennial Collateral Misconduct Report (next – September 30, 2023)
3. From JES – Assessment of Alternative Justice Programs (initial brief later that morning)
4. From JES – Victim Impact Statements (initial brief later that morning)
5. From DoD GC – Appellate Case Review (initial brief later that morning)
6. From DoD GC – SVC/VLC Report (review and deliberations that afternoon)
7. From DoD GC in response to Request – OSTC (focus of the 2-day meeting)

Finally, this session covered a proposal and vote for subcommittees; nominations for subcommittee membership and subcommittee chairs that the Chair will submit to the DoD GC for approval (note: it was later confirmed that the DoD GC establishes the subcommittees and the Secretary of Defense approves the subcommittee membership); and assignment of tasks to subcommittees (covered in the Strategic Planning Session on Day 2, but included in the chart that follows).

By unanimous vote:

Special Projects Subcommittee	Case Review Subcommittee	Policy Subcommittee
Chair: Ms. Meghan Tokash	Chair: Ms. Martha Bashford	Chair: BGen(R) James Schwenk
Judge Paul Grimm	Ms. Meg Garvin	MG(R) Marcia Anderson
Mr. A.J. Kramer	Ms. Jennifer Long	Ms. Suzanne Goldberg
Dr. Jenifer Markowitz	Mr. James Markey	Ms. Jennifer O’Connor
Dr. Cassia Spohn	BGen(R) James Schwenk	Judge Karla Smith (Chair)
Judge Reggie Walton		
Projects	Projects	Projects
Office of Special Trial Counsel (Requested / GC assigned)	Appellate Case Review (in ToR)	Victim Impact (from JES / in ToR)
Standing Military Magistrates* (DAC-IPAD proposal)	Acquittal Rates in C-M* (DAC-IPAD proposal)	Alternative Justice (from JES / in ToR)

*the scope of these two proposals will be developed by the Subcommittees

The next session included three briefings from the professional staff, including a data update and initial briefings on three tasks assigned to the Committee.

Appellate Decisions in Military Sexual Assault Cases

Ms. Audrey Critchley and Ms. Kate Tagert briefed the Committee on the Appellate Case Review Task as contained in the ToR. After full deliberations following the briefing, in the Strategic Planning Session on Day 2, the committee voted on and unanimously approved the following three actions: (1) include child sexual offenses; (2) adopt the staff proposed “definition” of sexual offenses (listing the offenses to be covered in the study); and (3) issue the report in phases, starting with an update in the March 2023 Annual Report, as multiple years of data will need to be analyzed to provide a meaningful study of the issues. This task will be assigned to the Case Review Subcommittee (once it is established by the DoD GC and its membership approved by the Secretary of Defense) and include additional appellate issues. Finally, at the September meeting, the full committee wants to hear from a diverse group of appellate practitioners.

Data Update

Mr. Chuck Mason provided a 30-minute brief on how the staff’s Data Team will support the DAC-IPAD. This was requested by the Committee at its initial meeting. Prior to the Zero-Based Review, the DAC-IPAD had a Data Subcommittee, and at the Initial Meeting in April, the Committee recommended a Data Subcommittee, as its fourth subcommittee. After further consideration by the members, only the first three subcommittees noted above were proposed and approved for establishment. The Data briefing described how the Data Team will fully support the DAC-IPAD and its subcommittees [in addition to the newly formed Military Justice Review Panel and the (FY22 NDAA) Section 547 Project (that is assigned to the professional staff in their capacity as Defense Legal Services Agency attorneys)].

FY20 National Defense Authorization Act Joint Explanatory Statement (JES) Update

Ms. Terri Saunders and Ms. Meghan Peters split this last briefing and introduced the two tasks requested from the JES and contained in the ToR. As noted above, these two tasks will be assigned to the Policy Subcommittee.

Offices of Special Trial Counsel Overview

To set the scene for upcoming sessions, COL Bovarnick provided a quick overview of the Offices of Special Trial Counsel.

Civilian Prosecutors Panel: Best Practices for Establishing an Independent Prosecutorial Office

This panel included the following presenters (4 in-person, 1 virtual):

Ms. Sherry Boston, District Attorney, Office of the DeKalb County District Attorney, Decatur, GA
Ms. Parisa Dehghani-Tafti, Commonwealth’s Attorney for Arlington County & City of Falls Church, VA
Ms. Fara Gold, Senior Counsel on Sexual Misconduct to the Assist. Atty General, Civil Rts Div, U.S. DoJ
Ms. Sharon Marcus-Kurn, Chief, Sex Offense & Domestic Violence Sect, U.S. Atty’s Off for DC
Mr. Eric Rosenbaum, Chief, Special Victims Bureau, Major Crimes Div, Queens Cty DA’s Off, NY (virtual)

After providing brief individual introductions, the panel of experts provided an in-depth dialogue (through a question and answer format) with Committee members covering such topics as:

1. Career Prosecutors. Important to practice in this area as a career or substantial period of time. Experience is a critical element to successfully prosecuting sexual assault cases. It is vital to have a robust victim advocate program that includes training, experience and certification.
2. Minimum trial experience. Ideally, a minimum standard of experience would be helpful (recognized that since COVID this was not necessarily possible). One presenter added that it is critical for the individual to be able to work in a victim-centered prosecution office which is evidence-based.
3. Does the status of the accused or accuser play a factor in assessing whether someone should be charged? DoJ relies heavily on their Justice Manual. Another presenter added that their office has a three-part process that includes the senior prosecutor reviewing the pre-trial process (warrants, grand jury originals), writing and collaborating on the charging decisions, and maintaining charts that show areas that are more susceptible to bias or political influence. The group agreed that it was critical to have an internal system of checks and balances.
4. Is it important to have investigators assigned directly to the prosecutor's office? The panel agreed that it was invaluable, and equally important to have those assigned players independent from their investigation affiliation (ex. sheriff's office, police department). One presenter noted that the five largest district attorney's offices in the U.S. all have independent investigators.
5. What impact does having other prosecutorial teammates (ex. investigators, victim advocates, SVC/VLCs) moving in and out of the jurisdiction have on the cases? The presenters acknowledged military transitions; however, their offices have these challenges as well, including working with FBI agents who move from assignment to assignment. One emphasized the importance of the victim advocate and using them as key personnel during a hand-off of key personnel. It is the prosecutor's responsibility to ensure the victim is kept well-informed, particularly if a key person will transition before conclusion of the case. Arlington County practices vertical prosecution with prosecutors assigned to a case until conclusion for continuity.
6. Advice for Military Department Secretaries in standing up the OSTC. Trust your experts and rely on them; do not micromanage; let the senior prosecutors make the charging decisions; decisions to dismiss should be treated more seriously than other decisions in the office. Both external and internal practices should have written policies and guidelines so the standard for operating inside and outside the agency is uniform and consistent, without hand-cuffing.
7. Do the presenters' respective agencies prosecute sexual contact cases? Each asserted their jurisdiction had statutory provisions to prosecute sexual contact cases; however, many categories under their statutes classify contact cases as misdemeanors as opposed to felonious sexual penetration offenses.

Committee Members – Best Practices for Establishing an Independent Prosecutorial Office

This panel included the following Committee Members:

Ms. Martha Bashford

Mr. A.J. Kramer

Ms. Jennifer Long

Ms. Meghan Tokash

Ms. Bashford: it is critical for this new office to be facing-forward, transparent, and maintain confidentiality. Service members, the public, and Congress need to trust the MJ system.

Mr. Kramer: there is fine balance between the need for specialization and a general loss of lawyers in other areas. There is a concern that an office that specializes has to continue to justify its existence. For example, investigators who specialize in this area could lose their objectivity – they must balance empathy and objectivity. The two major decisions for specialized prosecutors: to file charges or seek filing charges or, if charges are pending, to dismiss the charges. He was troubled to hear, from one panelist, that decisions to dismiss must go all the way to the senior prosecutor - Mr. Kramer stated that if you have a prosecutor you trust to file charges, why not trust them to dismiss.

Ms. Long: concurred that specialization was a critical element, and recommended that the *Model Response to Sexual Violence for Prosecutors* be used. She highlighted the importance of experience; you need the right people who understand the research, have length of experience, and have demonstrated an understanding of these cases.

Ms. Tokash: provided a slide presentation highlighting her recommendation to establish a strategic policy at the Department of Defense and Military Department levels. In summation she provided three takeaways: Establishing types of standards, specialization, and stabilization.

Judge Walton recognized the friction between the need for experience and specialization, and the ability to gain those necessities when the JAG officers have a limited tenure in each position. He also stated that there would be an imbalance if you don't establish similar defense offices in resources, skill sets, and ability to assess and try cases.

Ms. Goldberg suggested establishing incentives and recognition opportunities to encourage those specialized prosecutors to stay in their positions, and to evaluate lessons learned from civilian counterparts.

SVC/VLC Report Overview and Discussion

This session was led by Mr. Pete Yob and Ms. Audrey Critchley. They provided the Committee an overview of the SVC/VLC Report and its recommendations. Ms. Julie Carson facilitated a Committee discussion on the 2 primary recommendations regarding tour length and the Army Rating Chain structure. The final deliberations and vote were completed during the Day 2 Strategic Planning Session (covered below).

With no further comments, the DFO closed day one of the public meeting at 4:43 p.m.

Day Two - June 22, 2022

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 9:25 a.m. The Honorable Karla N. Smith, DAC-IPAD Chair, provided opening remarks.

R.C.M. Amendment Process to Implement FY22 NDAA Military Justice Reforms

For this session, Col Elizabeth Hernandez, U.S. Air Force, Chair, Joint Service Committee (JSC), provided a briefing on the JSC, its composition, duties, processes, and current activities.

Of note, the Committee requested to be notified when the JSC announcement for public comment on its proposed amendments to the Manual for Courts-Martial implementing the military justice reforms enacted by the National Defense Authorization Act for Fiscal Year 2022 are published in the Federal Register.

Offices of Special Trial Counsel Panel

This panel included the following presenters (6 in-person, 2 virtual):

Honorable John P. Coffey, General Counsel, Department of the Navy
Vice Admiral Darse E. Crandall, Jr., Judge Advocate General, U.S. Navy
Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps
Honorable Peter J. Beshar, General Counsel, Department of the Air Force
Lieutenant General Charles L. Plummer, Judge Advocate General, U.S. Air Force
Major General Rebecca Vernon, Deputy Judge Advocate General, U.S. Air Force
Honorable Carrie F. Ricci, General Counsel, Department of the Army (virtual)
Lieutenant General Stuart W. Risch, Judge Advocate General, U.S. Army (virtual)

Remarks by the General Counsel of the Navy:

The Secretary of the Navy has formed an Implementation Advisory Panel (IAP) to advise the Secretary on how to implement IRC recommendations and NDAA provisions, including those concerning the OSTC. The advisory panel includes the Navy TJAG, the Legal Advisor to the Commandant of the Marine Corps, Navy SAPR, and NCIS officials, among others. The Secretary issued written guidance to the IAP on Feb. 7, 2022.

Remarks by the Judge Advocate General of the Navy:

The Navy is implementing the OSTC under a four-phase approach, that includes:

1. Planning Phase (September 2021 – March 2022);
2. Building Phase (March 2022 – September 2023);
3. Execution Phase (in advance of December 2023), composed of field testing; and,
4. Assessment Phase (following December 2023).

This process will ensure the OSTC has independence and specialization. The Navy OSTC will require an additional 40 personnel who must be litigation experts; will have a “lean” headquarters in Washington DC, with an O-7 level lead; and, two regional OSTC Offices.

Remarks by the Staff Judge Advocate to the Commandant of the Marine Corps:

The Marine Corps is focused on developing a “constitutionally sound” OSTC program. It will employ a regional model, with a “lean” headquarters, and four regional offices in Camp Pendleton, Okinawa, MCB Quantico, and Camp Lejeune.

Remarks by the General Counsel of the Air Force:

The Air Force will pursue a “civilian led and military executed” OSTC, with 3 critical objectives:

1. Protecting the independence of prosecutors;
2. Developing highly skilled prosecutors and litigation support teams; and,
3. Engendering greater trust in the military justice system.

Additionally, concerns include implementing effective timelines for investigations and case disposition decisions, and ensuring due process for all involved in sexual offense cases

Remarks by the Judge Advocate General and Deputy Judge Advocate General of the Air Force:
(The Air Force DJAG is the architect of the Air Force’s OSTC program):

The implementation of the OSTC will occur in phases:

Phase I: Testing models and procedures, to include eight table-top exercises for the “Independent Case Disposition Model”; Developing a training and communication plan; and, Planning for an O-7 level OSTC office and 6 field offices that will run similar to District Attorney offices, comprised of OSTC attorneys, paralegals, and other support personnel.

Phase II: Education and training for STCs. Professional development courses for STCs are underway.

Remarks by the General Counsel of the Army:

The Army GC was a member of the Fort Hood Independent Review Committee. The Army has a focus on hiring a prevention workforce.

Remarks by The Judge Advocate General of the Army:

The Army will establish an OSTC by July 15, 2022. The OSTC will be led by an O-6 until an O-7 is selected through a scheduled promotion/selection board. The operational planning team consists of 30 judge advocates. The OSTC will require funding from TJAG. Civilian experts will come on board at the OSTC headquarters.

Panelists’ Responses to Committee Members’ Questions:

1. Prosecution rates: The high rate of dismissals could be the result of over-charging due to external pressure on commanders to prosecute sexual offense cases. With the establishment of OSTCs, fewer sexual offense cases will be charged and tried. Service-specific statistics may vary from the overarching figures. Conviction rates alone should not be used as a metric to evaluate the success of the OSTCs.

2. Dedicated OSTC investigators: No determination/decision has been made on whether to have dedicated/assigned investigators within the OSTCs. The baseline approach will be to have Service MCIOs work with regional/local STCs.

The Army is working to enhance collaboration between prosecutors and investigators. Additionally, SVPs must be notified immediately of a reported sexual offense and begin working on a case at its inception.

3. Specialized litigation experience, as opposed to general legal experience, will be required for STC positions: The Navy stated that regional OSTC leaders will have at least 12 years' litigation experience, including as a judge. The Services will provide the Committee with specific information following the meeting, but in most instances the regional OSTCs will be led by an O-6.
4. Quality and uniformity of judging across jurisdictions: The Services use a rigorous process for selecting military judges. Training for military judges is hosted by the Army. Judge Walton has participated in this 3-week course and it is excellent.
5. Diversity, in terms of race and gender, among Service JAG Corps personnel: Each Service is working to increase gender and racial/ethnic diversity. The Navy reported that 40% of Navy JA's are female; however, among senior field grade ranks there is little diversity.
6. Civilian oversight by Service Secretaries of the OSTCs: The Secretary of the Navy is very involved in the OSTC as evidenced by the establishment of an advisory panel that includes the Navy GC. The Under Secretary of the Army has the lead on standing up the Army's OSTC.
7. Promotion potential for the STCs: The Navy panelists recognized that promotion boards need to be advised of the importance of the STC assignments, and the other Services concurred.

Strategic Planning Discussion

1. Committee discussion on briefings and testimony.

LTG Risch, Army TJAG: Invitation for the Committee to visit the Army Advocacy Center.

COL Hernandez: Committee requested to be notified when the JSC announcement for public comment on its proposed Manual for Courts-Martial amendments to implement the military justice reforms enacted by the National Defense Authorization Act for Fiscal Year 2022 are published in the Federal Register.

2. Final deliberations and voting on SVC/VLC Report.

Following a full discussion and deliberations, the Committee voted unanimously to adopt the DLSA SVC/VLC Report with the following modified recommendations:

Recommendation #1: First-tour judge advocates serve for a minimum of 18 months and second- and subsequent-tour judge advocates serve for a minimum of 24 months, both with exceptions for operational necessity or compelling personal reasons.

Recommendation #2: Adopt the report's recommendation that the Army rating chain structure for SVC's should match the other Services with an independent rating chain outside of the local SJA office.

Additional Recommendations #3 - #10. Remove these from the report and hold for further study in a separate report to be assigned to a subcommittee, with a view toward redefining as "best practices".

3. Voting on the scope of Appellate Case Review Project.

The committee unanimously approved the following three items discussed during the earlier Appellate Case Review project briefing: (1) the project will include child sexual offenses; (2) the Committee will utilize the staff proposed “definition” of sexual offenses, which listed the specific offenses to be covered in the study; and (3) the Committee will issue the report in phases, starting with an update in the March 2023 Annual Report, since multiple years of data are required to provide a meaningful study of the issues.

4. Subcommittees; projects assigned to subcommittees; and proposed projects.

Subcommittee member assignments, project assignments, and proposed projects were discussed and unanimously agreed to by the members during Session 1 of the meeting on this topic.

5. Scope of projects.

The Committee unanimously agreed to expand the scope of what the prior Committee covered, to include: child offenses, contact sex offenses, and sexual harassment on a project-by project basis.

6. Composition of March 2023 Annual Report.

The Committee unanimously agreed to include the reconstitution of the committee; formation of subcommittees; a summary of the SVC/VLC report; an update on the appellate review project; an update on the review of victim impact statements and alternative justice models; summaries of the public meetings; and an update on any other ongoing studies or plans for future study.

7. Presenters/Focus of next meeting; and December Meeting.

- September 12, 2022: Admin Session: (1-hour; virtual)
- September 13, 2022: 24th DAC-IPAD Public Meeting
- 1-day in-person (with virtual option); likely location: Ritz-Carlton, Pentagon City
- Focus: Appellate practitioners
- December 13-14, 2022: 25th DAC-IPAD Public Meeting
- Focus: MCIOs; request update from OTSC Panel

8. Court-martial observations.

Ms. Terry Gallagher provided a short explanation of this project.

It was noted that Ms. Bashford will observe a court-martial at Naval Base Kitsap-Bremerton, WA, from June 27 – July 1, with Ms. Terri Saunders as her staff escort.

Public Comment, Recap, and Preview of Next Meeting

The Committee received one public comment via email prior to the meeting. The email, sent by Navy Lieutenant Commander Manuel Dominguez who appeared at the last meeting on April 21, 2022, was received by the staff on Monday, June 6 and sent to all committee members on Tuesday, June 7, 2022. The Committee did not receive any additional public comments via email or requests from the public during this meeting.

Meeting Wrap-Up

Ms. Terri Saunders provided a list of due-outs to the Committee, and Colonel Bovarnick provided closing remarks. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD and reported that the next scheduled public meeting for the DAC-IPAD is September 13-14, 2022 (note: later changed to September 21). With no further comments or issues to address, the meeting concluded.

The DFO closed day two of the public meeting at 2:06 p.m.

CERTIFICATION

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



Honorable Karla N. Smith, Chair

MATERIALS

Materials Provided Prior to and at the Public Meeting

1. Agenda for June 21, 22, 2022 Meetings
2. Presenter Biographies
3. Terms of Reference (approved May 23, 2022)
4. Military Justice Acronyms, Abbreviations, and Overview
5. DoD General Counsel (GC) Tasking Memos and Chair, DAC-IPAD Letters
 - GC Task to Advise on the Offices of Special Trial Counsel Program, May 10, 2022
 - GC Request to Secretaries to of the Military Departments to designate representatives to appear before the DAC-IPAD, May 10, 2022
 - Chair Request to Invite Secretaries of the Military Departments to appear before the DAC-IPAD, Apr 27, 2022
 - GC Task to Review Report on Tour Lengths and Rating Chain Structure for SVC/VLC Programs, Apr 21, 2022
 - GC Task to Study Appellate Decisions in Military Sexual Assault Cases, Jan 28, 2022
6. Summary of SVC/VLC Recommendation List and Report on Tour Lengths and Rating Chain Structure for Services' SVC/VLC Programs
7. FY 2022 NDAA § 531-539C
8. Summary of Federal & State Prosecutors Interviews (DAC-IPAD Policy Subcommittee - July 2020)
9. Example Questions for the Office of Special Trial Counsel
10. Public Comment: Lieutenant Commander Manuel Dominguez
11. Minutes from April 21, 2022 DAC-IPAD Meeting