



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

MINUTES OF DECEMBER 6-7, 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-fifth public meeting on December 6-7, 2022.

LOCATION

The meeting was held at the Ritz-Carlton Hotel, 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
Ms. Suzanne Goldberg
The Honorable Paul W. Grimm*
Mr. A. J. Kramer

Ms. Jennifer Gentile Long
Dr. Jenifer Markowitz*
The Honorable Jennifer M. O'Connor*
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 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. Meghan Peters, Attorney-Advisor
Ms. Stacy Boggess, 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*

Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

*Via video-teleconference

MEETING MINUTES

Day One – December 6, 2022

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 9:00 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.

Uniform Code of Military Justice Panel Selection Panel

This panel included the following presenters:

Colonel Shannon Sherwin, Staff Judge Advocate (SJA), Air Education & Training Command, U.S. Air Force*

Captain Andrew House, SJA, U.S. Naval Academy, U.S. Navy

Colonel Christopher G. Tolar, Deputy SJA to the Commandant of the Marine Corps, U.S. Marine Corps

Commander Kismet Wunder, Legal Services Command, U.S. Coast Guard

Christopher Kennebeck, Chief, Criminal Law, OTJAG, U.S. Army

After providing an overview of their Service panel selection process and training, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members covering such topics as:

1. Is a convening authority excluded from selecting members they are familiar with?

No.

2. Is voir dire used to exclude individuals familiar with the case from hearing the case?

Yes; voir dire is used in the member selection process. The Navy, Army, and Air Force panelists cited Article 25 as the process to exclude any member who is the accuser or whose familiarity with the case threatens their objectivity or perceptions of their objectivity from the panel.

The Marine and Coast Guard panelists added that commands nominate a select number or pool of individuals from each command and those who are best qualified, in accordance to Article 25 criteria, are selected. Sometimes a Commander may select a member not within the pool based on his or her familiarity with that individual as being the best qualified under Article 25.

3. What are the obstacles to having diverse panels?

Convening authorities may go outside the specific installation where a court-martial is held to select other individuals who may be more qualified under Article 25.

4. Can reservists sit as panel members?

An Air Force Instruction specifically addresses detailing reservists as panel members.

The Coast Guard routinely selects some active duty members for reservist accused and reservist panel members for active duty accused.

5. Mr. Cassara noted that based on personal experience, an African American defendant is more likely than not to have an all-White panel of members. Dr. Markowitz agreed with his assessment. Chair Smith requested the Services provide the Committee with statistics of the racial make-up of courts-martial panel members.

6. In response to a question about sentencing parameters, Colonel Kennebeck and Mr. Sullivan noted that for cases in which all findings of guilty are for offenses committed after December 27, 2023, based on the FY 22 NDAA (enacted December 27, 2021) there will be new parameters and criteria for sentencing by judge alone. DoD established the Military Sentencing Parameters and Criteria Board to propose sentencing guidelines. (Note: the Committee requested and will hear from an MSPCB representative of at its next public meeting).

7. Ms. Tokash inquired about uniform questionnaires across the Services.

The Army panelist stated that although the Services routinely share best practices, no purposeful steps are being taken to make panel member questionnaires uniform across the Services.

8. Ms. Goldberg inquired about gender diversity and exclusion of females from panels.

The Coast Guard panelist responded that although officer and enlisted panels may not be as racial or ethnically diverse, they are gender diverse. The Army panelist added that in some cases female panel members are more likely to be taken off the panel due to their past experience with sexual assault or feeling about the particular alleged crime.

Survivors United Panel

This panel included the following presenters:

Mr. Ryan Guilds, Special Victims' Counsel, Arnold & Porter LLP

Ms. Adrian Perry, Victim Advocate, Survivors United

Dr. Breck Perry, Victim Advocate, Survivors United

Dr. Breck Perry and Ms. Adrian Perry—founding members of Survivors United—and Mr. Ryan Guilds, an attorney who has represented victims in military and civilian trials, provided information to the Committee regarding victim impact statements (VIS).

The Perrys relayed that during the trial of the officer accused of sexually abusing their young daughters, the military judge caused them great pain by placing limitations on their delivery of their victim impact statements, including allowing only one parent to provide a VIS.

Dr. Perry, who ultimately provided the VIS, stated that the military judge stopped him on several occasions while he was delivering the VIS to tell him he had to remove several parts and he could not face the accused while delivering his statement, but instead had to face the jury.

Ms. Perry stated it is insulting for a victim to have that moment tarnished after everything they endured and the silence they faced for so long during the entire criminal justice process.

Mr. Guilds gave his opinion that the appellate courts have provided a broader interpretation of who may be considered a victim and that parents or others in the Perrys' position would now be allowed to provide VIS. In his representation of victims, he has observed victims limited in their ability to speak directly to the accused during their VIS, not being able to speak to an appropriate sentence, not being permitted to express too much emotion, and not being permitted to describe the impact on them in detail. He noted these limitations are often self-imposed by well-meaning victims' counsel or prosecutors to prevent the victim being interrupted by defense objection.

Mr. Guilds also expressed concern about the practice of military judges "whittling down" victim impact statements in court. He gave an example of an accused pleading guilty to a physical assault rather than a sexual assault as part of a plea agreement, yet the victim cannot discuss the impact of a sexual assault, but only the physical assault, thus undermining "the value and power of the victim impact statement" and reinforcing the survivor's "sense of powerlessness" in a manner not necessary to protect the accused rights.

Finally, Mr. Guilds commented that victims should be allowed to describe the impact of the investigation and pretrial and trial processes in their impact statements, topics that are currently not within the scope of victim impact under R.C.M. 1001(c). He recommended to the Committee that there should be a presumption that unless there is a Constitutional right at stake, a victim should be allowed to say what they want in their VIS.

Special Victims' Counsel (SVC)/Victims' Legal Counsel (VLC)/Victims' Counsel (VC) Panel

This panel included the following presenters

Colonel Carol A. Brewer, Chief, SVC Program, U.S. Army
Captain Daniel Cimmino, Chief, VLC Program, U.S. Navy
Lieutenant Colonel Iain D. Pedden, Chief, VLC Program, U.S. Marine Corps
Colonel Tracy Park, Chief, VC Program, U.S. Air Force
Ms. Elizabeth Marotta, Chief, Office of Member Advocacy, U.S. Coast Guard

After providing brief introductions, the panel of SVC/VLC/VC engaged in an in-depth dialogue (through a Q&A format) with Committee members covering such topics as:

1. Services' SVC/VLC/VC representation of non-military victims.

All Services have similar policies that grant authorization to provide counsel to non-military victims when it is in the best interest of the government or the victims.

2. Training requirements and enforcement mechanisms for enforcing the Crime Victims' Rights Act.

All Services have similar training requirements in their certification courses that teach judge advocates about victims' rights and how to report violations and remedies available to victims.

3. The number of appeals filed for actual or perceived violations of 18 U.S.C. 3771.

The Army has not had a writ filed in some time. The Marine Corps currently has one docketed at the Court of Appeals for the Armed Forces (CAAF). The Air Force currently has five petitions for extraordinary relief before the Air Force Court of Criminal Appeals. The Coast Guard recently had a writ granted for review.

4. Joint Service Committee on Military Justice (JSC) proposals to broaden the scope of R.C.M. 1001(c) to allow victims to speak more fully about the impact of the crime and to recommend specific sentences.

All Services agreed with the JSC's proposal to allow SVCs to be heard on the objections regarding VIS and other changes to allow a broader definition of victim impact and for the victim to be able to propose an appropriate sentence.

5. SVC/VLC/VC 2-year tour lengths.

All Services responded that 2- or 3-year assignments as a Senior SVC/VLC/VC are appropriate and consistent with other judge advocate positions.

Office of the Special Trial Counsel Panel (OSTC)

This panel included the following presenters:

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

After providing opening remarks, the panelists engaged in an in-depth dialogue (through a Q&A format) with Committee members covering such topics as:

1. Unlawful Command Influence.

Mr. Coffey, VADM Crandall, LTG Risch and Maj Gen Vernon all replied that the Military Departments' Secretaries have made it clear through their instructions that convening authorities and SJAs are forbidden from exercising unlawful influence on STCs.

2. Case Disposition.

LTG Risch stated that the Army's OSTC policy outlines the standards and process by which cases are disposed and at what level those decision will be made. VADM Crandall echoed LTG Risch's response and said the Navy has a similar procedure for disposition of cases.

3. Race and gender diversity.

The Army has a program that targets Historically Black Colleges and Universities to help the OSTC obtain a balanced and diverse population. Diversity is a huge priority for the Air Force, starting with recruitment and continuing with professional development throughout an individual's career. All four Services' OSTC continue to work together to exchange ideas and challenges on this extremely important issue.

4. Equity between trial defense counsel and special trial counsel.

LTG Risch expressed concern about perceived imbalance, so he specifically requested the Secretary and Chief increase growth of the (Army) Trial Defense Service (TDS) personnel and experience, including the potential for TDS to manage its own budget and a manpower analysis for additional needs. Ms. Ricci added that the appropriate administrative support was added to the TDS. MajGen Bligh, VADM Crandall, and Maj Gen Vernon responded similarly that their respective Services continually strive to create a balanced military justice system that is fair and provides due process.

5. Evaluation of the impacts of legislative changes on OTSC/LSTC or individual STCs.

All Services are looking at the measures of effectiveness. Many (service members, family, and public) have lost faith in the military system and leaders and much needs to be done to restore trust. All Services are identifying ways to take self-assessments and make changes and adjustments where required.

6. How are OSTCs measuring whether trust is restored in the military justice system?

All Service OSTCs routinely work with SVC Program Chiefs on ways to improve victims' responses to surveys about their experience and ways to improve barriers to trust.

7. What can the DAC-IPAD do regarding the addition of sexual harassment as a covered offense?

Mr. Coffey did not have a specific recommendation, but urged all concerned to consider any demands for additional resources to investigate and potentially prosecute sexual harassment offenses.

DAC-IPAD and U.S. Government Accountability Office (GAO) Racial Disparity Reports Brief

Mr. Chuck Mason addressed the Committee Members on the topic of racial and ethnic disparities in the Services and military justice, including findings and recommendations of two reports published by the GAO (GAO-19-344 in May 2019 and GAO-21-105000 in August 2021), and one DAC-IPAD report on Racial and Ethnic Disparities published in December 2020. The discussion focused on the Services' progress to improve accounting and reporting of demographic data. After identifying differences in reporting, the Committee requested that the June 2022 Request for Information be reissued requesting the Services provide the data according to standardized racial and ethnicity categories.

Public Comment

Mr. Christopher Hines gave public comment virtually.

Mr. Antiwan Henning gave public comment.

Ms. Nicole Pulver gave public comment.

Meeting Wrap-Up; Subcommittee Update; Preview Next Meeting

Colonel Bovarnick discussed the December 7, 2022 meeting agenda. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD.

The DFO closed the public meeting at 4:47 p.m.

Day Two – December 7, 2022

Case Review Subcommittee Update Panel

This panel included the following presenters:

Ms. Kate Tagert, DAC-IPAD Staff Attorney
Ms. Audrey Critchley, DAC-IPAD Staff Attorney

Ms. Tagert and Ms. Critchley provided an update on the Case Review Subcommittee (CRSC), covering the subcommittee's review of cases and updates on certain appellate decisions.

The Court of Appeals for the Armed Forces (CAAF) case, *United States v. Jeter*, which will be decided in 2023, will cover issues involving a military member's right to a fair and impartial panel and the UCMJ, article 25 criteria used by the convening authority when selecting panel members that does not include race as a factor.

The FY22 NDAA contains a provision for a randomization process when selecting panel members.

Ms. Bashford asked why a convening authority would have to depart from the Article 25 criteria to select a diverse panel.

Ms. Spohn referenced the U.S. Supreme Court case, *Castaneda v. Partida*, 430 U.S. 482 (1977) which held that the Texas "key man" system for jury selection in which a person from the community would select the venire for jury selection based on subjective standards demonstrated intentional discrimination.

Ms. Tokash asked what the DAC-IPAD could do to have an immediate impact on the Article 25 criteria in either this or next year's legislation.

Several DAC-IPAD members suggested a study of the new legislation for randomized panel selection. Chair Smith expressed concern about the lack of diversity on panels and would like to review data on panel selection. Ms. Goldberg stated she would like to look at the data where discretionary decisions occur, especially at the points where the pools are narrowed down. Judge Walton said the data was important; however, there is much research showing the benefits of having diverse panels in the civilian sector, and that change is needed now for panels to appropriately reflect racial diversity. Ms. Tokash agreed that change was needed now as opposed to waiting for the data to be analyzed.

Special Projects Subcommittee Update Panel

Ms. Meghan Peters, DAC-IPAD Staff Attorney, opened this Panel by introducing the Special Projects Subcommittee (SPSC) members: Ms. Meghan Tokash, Chair; Judge Grimm; Mr. Kramer; Dr. Markowitz; Dr. Spohn and Judge Walton, and the staff: Ms. Peters, Ms. Eleanor Magers Vuono and Ms. Stayce Rozell.

The SPSC will study and evaluate the OSTC, with a focus on policy development, workforce structure, and implementation of best practices.

The SPSC will review proposed changes to the Rules for Courts-Martial published for comment in October 2022. Ms. Tokash, Ms. Goldberg and Dr. Markowitz attended the JCS's public meeting, which was brief and no one provided comment. The deadline to make public comment to the JCS is December 19, 2022.

The SPSC will meet after the DAC-IPAD public meeting closes. The SPSC will hear from members of the Inter-Service Working Group on the Special Trial Counsel on the business rules and standards for referral of cases and deferral of cases back to the command for action. A second panel of judge advocate personnel managers will discuss recruiting for STC, attrition, and military justice expertise within the Services.

The SPSC is considering introducing a draft assessment of pretrial procedures in articles 32 and 34 and how they apply in cases prosecuted by the STC.

The SPSC will also discuss its contribution to the Annual Report, including topics such as OSTC development and recommendations; proposed RCM changes; and an SPSC assessment of articles 32 and 34 in cases over which STC exercise authority. The SPSC will consider whether a preliminary hearing officer should be elevated to the stature of a magistrate or a judge compared to the current legal officer who offers an advisory opinion as to probable cause. Article 34 requires the SJA to advise the convening authority on probable cause and the appropriate disposition of the case. The FY22 NDAA amendment to article 34 provides for an STC to make the probable cause determination. The SPSC is concerned that the probable cause threshold for referral is too low.

Policy Subcommittee Update Panel

Ms. Terri Saunders, DAC-IPAD Staff Attorney
Ms. Terry Gallagher, DAC-IPAD Staff Attorney

Ms. Saunders summarized the victim impact statement (VIS) information for the annual report. The Joint Explanatory Statement to the FY20 NDAA posed two questions: (1) are military judges interpreting RCM 1001(c) too narrowly in limiting victim impact statements; and (2) are judges appropriately permitting others to testify about the impact of the crime on them? A Policy Subcommittee (PSC) study answered these two questions.

A review of 241 cases tried in FY21 resulting in a guilty verdict for:

- Article 120: adult sexual offenses
- Article 120b: child sexual offenses
- Article 120c: indecent viewing, recording, indecent exposure
- Article 93: sexual harassment offenses
- Article 93a: military trainer/recruiter sexual conduct with trainee/recruit
- Article 117a: wrongful broadcast/distribution of intimate images
- Article 128: assault (had Art. 120 or 120b offense referred and accused was acquitted or charge was dismissed pursuant to a pretrial agreement)
- Article 80: attempts to commit one of these offenses

The study found the following result:

	Army	Navy	Marine Corps	Air Force	Coast Guard	
Judge Sentenced	91	14	13	31	2	151
VIS Limited	8 (9%)	1 (7%)	1 (8%)	3 (10%)	0 (0%)	13 (9%)
Members Sentenced	5	4	2	9	2	22
VIS Limited	0 (0%)	4 (100%)	0 (0%)	3 (33%)	0 (0%)	7 (32%)

In most of the cases in which the military judge limited the VIS, the judge found that the statement went beyond the scope of the victim impact or the victim recommended a sentence. In the majority of the cases that were not limited, the judge did not ask for any objections.

In the majority of the 13 cases in which the judge limited some aspect of the VIS, the judge applied the rule appropriately.

The members offered comments in the cases they reviewed:

Ms. Goldberg provided the opinion that in one case, the judge’s ruling was unduly narrow as to what the victim could say.

BGEN (R) Schwenk provided the opinion that in one case, the military judge’s refusal to allow a portion of a victim’s daughter’s statement about how the crime had affected her mother because it was not the effect of the crime on the daughter was unduly narrow.

Ms. Garvin stated that she was shocked about the process of “redlining” the victim’s words and editing the words of the victim.

Judge Walton, Judge Grimm and Chair Smith gave additional comments about their experience with victim impact statements.

Ms. Saunders summarized the JSC’s draft Executive Order on changes to RCM 1001:

- (1) includes a provision for victims to be heard on objections to the unsworn statement.
- (2) will remove the provision prohibiting recommendation for specific sentence;
- (3) allows the victim, victim’s counsel, or both to make an unsworn statement; and
- (4) will remove a portion of the discussion that reads, “Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim’s statement that includes matters outside the scope of R.C.M. 1001(c)(3).”

The Committee voted on the following recommendations for the JSC's draft E.O.:

Recommendation 1

The JSC should draft an amendment to R.C.M. 1001(c)(2)(B) to remove the word "directly" from the definition of victim impact. Alternately, the words "or indirectly" should be added to the definition of victim impact.

There were no objections to the recommendation and the recommendation was adopted as amended.

Recommendation 2

The JSC should draft an amendment to R.C.M. 1001(c)(2)(B) to allow crime victims to discuss the impact on family members relating to or arising from the offenses for which the accused has been found guilty.

Mr. Kramer opposed the recommendation. With no other objections, the recommendation was not adopted.

Recommendation 3

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

There were no objections to the recommendation and the recommendation was adopted.

Recommendation 4

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

There were no objections to the recommendation and the recommendation was adopted.

Recommendation 5

The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(5)(B) to remove the "upon good cause shown" clause in order to be consistent with the Joint Service Committee's proposed change to R.C.M. 1001(c)(5)(A).

There were no objections to the recommendation and the recommendation was adopted.

Recommendation 6

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

Mr. Kramer and Mr. Cassara opposed the recommendation. With no other objections, the recommendation was adopted.

Meeting Wrap-Up

Colonel Bovarnick covered the timeline for the March 2023 5th Annual Report, calendar year 2023 meeting dates; and topics for the February meeting. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD. With no further comments or issues to address, the meeting concluded.

The DFO closed day two of the public meeting at 1:39 p.m.

CERTIFICATION

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



The Honorable Karla N. Smith, Chair

MATERIALS

Materials Provided Prior to and at the Public Meeting

1. Agenda for December 6 – 7 2022 Meetings
2. UCMJ Panel Selections
 - a. Presenter Biographies; b. Panel Questions; c. Article 25, UCMJ;
 - d. UCMJ Panel Selection Materials: Air Force; Navy; Marine Corps; Coast Guard; Army
3. Survivors United
 - a. Presenter Biographies; b. Panel Questions
4. Special Victims' Counsel/Victims' Legal Counsel
 - a. Presenter Biographies; b. Panel Questions
5. Office of Special Trial Counsel
 - a. Presenter Biographies; b. Panel Questions (Committee); c. Panel Questions (SPSC)
6. Race and Ethnicity Disparities Reports: Presentation & Army Article 146a (excerpt)
7. Subcommittee: Case Review Update: Presentation
8. Subcommittee: Special Projects Update: Presentation
9. Subcommittee: Policy Update
 - a. Presentation; b. Draft E.O. Annex R.C.M. 1001; c. Draft Public Comment to the JSC;
 - d. Victim Impact Statement Deliberation Guide
10. Deliberations
 - a. Timeline and CY 2023 Meeting Dates; b. 5th Annual Report Outline; c. Presentation
11. Public Comment
 - a. Mr. Clarence Anderson III
 1. Written Comment (Mr. Anderson) (Redacted)
 2. Petition for a New Trial
 3. Petition for Reconsideration
 - b. LCDR Manuel Dominguez
 1. Written Comment (LCDR Dominguez)
 2. Written Comment (Ms. Tami Mitchell-Attorney)
 3. Written Comment (Ms. Sarah Gonzales)