

**Defense Advisory Committee on Investigation, Prosecution, and
Defense of Sexual Assault in the Armed Forces (DAC-IPAD)**

Request for Information and Request for Presenters

RFI Set 11, Narrative Questions

Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates

Date of Request: May 15, 2019

I. Purpose

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is 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.
- C. The DAC-IPAD requests the below information to facilitate its required review of cases involving allegations of sexual misconduct on an ongoing basis for purposes of providing advice to the Secretary of Defense.

II. Summary of Requested Response Dates

| Suspense | Question(s) | Proponent |
|------------------|--------------------------------------|--|
| 21 Jun 19 | Speakers Section III | Services provide names and contact information for nominated speakers for each panel. |
| 21 Jun 19 | Narrative Questions Section IV | Services – The identified group provide narrative responses to the identified questions in Section IV of this RFI. |

III. Request for Speakers at the August 23, 2019 DAC-IPAD Public Meeting

The DAC-IPAD requests each of the Military Services make available the following speakers within their respective organizations to answer questions from Committee members at the DAC-IPAD public meeting scheduled for August 23, 2019 in Arlington, Virginia, regarding the topics addressed in Section IV of this RFI:

Panel 1: Chief, Criminal Law/Military Justice Division

Panel 2: Program Manager, Special Victims' Counsel and Victims' Legal Counsel Program

Panel 3: Chief, Trial Defense Services Organization

IV. Narrative Questions

Purpose: The Judicial Proceedings Panel (JPP or Panel) recommended the DAC-IPAD explore a number of issues raised throughout the course of the Panel’s military installation site visits in 2016.¹ Further, the DoD General Counsel has requested the DAC-IPAD examine these issues. To this end, the Committee begins its review by requesting written responses from stakeholders involved in the process on these as well as additional issues of interest to the Committee. Please consider each issue separately, and not as it relates to any of the other policy issues.

Responses to the questions in section A are requested from all RFI recipients. Responses to the questions in section B are requested only from the criminal law/military justice organizations. Responses to the section C questions are requested only from the SVC/VLC Program Managers. Responses to the section D questions are requested only from the defense service organizations.

A. Policy Questions for Service Criminal Law/Military Justice Divisions, Special Victims’ Counsel Program Managers, and Trial Defense Service Organizations

Policy Question 1: Article 32 Preliminary Hearing.

JPP recommendation 55² requested the DAC-IPAD continue to review the usefulness of the Article 32 preliminary hearing process including the weight given to preliminary hearing officers’ (PHOs) recommendations. DAC-IPAD members reviewing penetrative sexual assault investigative case files have found instances in which a PHO indicated, typically in a very thorough report, that no probable cause existed for a penetrative sexual assault offense, the staff judge advocate disagreed, the case was referred to court-martial and an acquittal resulted. To begin its evaluation of the Article 32, UCMJ, process, the Committee requests narrative responses to the following questions:

- a. Should the recommendations of PHOs against referral of sexual assault charges to court-martial, based on a lack of probable cause, be binding on convening authorities?

¹ The Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases (Sept. 2017) can be found at: https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf

² JPP recommendation 55: The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

- What are the most compelling arguments for and against this proposition from your organization's perspective?
 - Does your organization support or oppose the proposition? Why or why not?
- b. Alternatively, should Article 34, UCMJ, and/or R.C.M. 406 be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause?
- What are the most compelling arguments for and against this proposition from your organization's perspective?
 - Does your organization agree or disagree with instituting such a requirement? Why or why not?
- c. Could there be a benefit in having a preliminary hearing akin to the function of a federal grand jury proceeding PRIOR to the preferral of charges?
- What are the most compelling arguments for and against this proposition from your organization's perspective?
 - Does your organization agree or disagree with this proposition? Why or why not?

Policy Question 2: Non-Disclosure of Article 34 Pretrial Advice.

In JPP Recommendation 58,³ the Panel requested that the DAC-IPAD review whether Article 34 of the UCMJ and R.C.M. 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority be released to the defense upon referral of charges to court-martial. The Panel was concerned that this requirement inhibited the convening authority's legal staff from providing a fully developed, candid analysis of the evidence in the case. To begin its evaluation of Article 34, UCMJ, the Committee requests narrative responses to the following questions:

Should the UCMJ and/or Manual for Courts-Martial be amended to protect a staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel

³ JPP recommendation 58: The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

(sometimes referred to as a “prosecution merits memorandum”), from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges?

- a. What are the most compelling arguments for and against this proposition from your organization’s perspective?
- b. Does your organization support or oppose the proposition? Why or why not?

B. Operational Questions for Service Criminal Law/Military Justice Divisions

Question 1: Prosecution Initiation/Declination.

- a. Is the ability to obtain and sustain a conviction being considered in decisions to prefer charges in sexual assault cases? If so, what weight is it given? What weight is given to the victim's preferences at this stage?
- b. Do your prosecutors recommend that certain sexual assault prosecutions should be declined because the accused is subject to effective prosecution in another jurisdiction? If so, what factors do they consider?
- c. How do you ensure there is appropriate consistency across jurisdictions (GCMCAs) within your Service with regard to the decision whether to prefer charges or decline prosecution, in order to prevent unwarranted disparity in prosecution initiation or declination decisions?

Question 2: Article 32 Preliminary Hearing Practice.

- a. Do the judge advocates available to serve as PHOs in sexual assault cases possess sufficient training and experience?
- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the prosecution realize a benefit from the hearing? Does the defense realize a benefit?
- c. Have the Military Justice Act of 2016 requirements for a more detailed analysis of the evidence by the PHO, and the post-hearing submission of supplementary information relevant to disposition pursuant to R.C.M. 405(k) assisted SJAs and convening authorities in making a referral decision?

Question 3: Effect of the New Article 33 Disposition Guidance.

JPP Recommendation 57⁴ requests that the DAC-IPAD determine what effect, if any, the Article 33 disposition guidance has on the number of sexual assault cases being referred to courts-martial.

In practice, since the non-binding disposition guidance codified in Article 33 and Appendix 2.1 of the Manual for Courts-Martial went into effect on January 1, 2019, what effect, if any, has this guidance had on the number of sexual assault cases referred to courts-martial?

⁴ JPP Recommendation 57: After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Question 4: Article 33 Disposition Guidance, in Practice.

- a. How important is the ability to obtain and sustain a conviction to the decision to refer a sexual assault charge to trial?
- b. What considerations are SJAs incorporating into their recommendation as to disposition of the charges and specifications “in the interest of justice and discipline?” How are these considerations used in cases in which the SJA recommends referral contrary to the recommendation of the Article 32 PHO? Are these other considerations discussed in writing in the Article 34 advice or being briefed orally (and by whom), or both?⁵
- c. In a sexual assault case pending referral, if the SJA determines there is probable cause to believe that the accused committed a sexual assault offense, but conviction is not likely, under what circumstances should the SJA advise the convening authority to refer the case to court-martial?
- d. In such cases, do acquittals help or hinder the maintenance of good order and discipline, and why?

Question 5: Conviction and Acquittal Rates for Sexual Assault Offenses

The DAC-IPAD’s Third Annual Report (March 2019),⁶ contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in the questions that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
- 35% of contested cases result in a full acquittal

⁵ Rule for Court-Martial (R.C.M.) 601 provides, “If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it.”

Article 34, UCMJ, and R.C.M. 406 prohibit the convening authority from referring a case to court-martial unless the staff judge advocate advises that there is probable cause to believe the accused committed the offense charged; in addition, Article 34, UCMJ, and R.C.M. 406 require the staff judge advocate to provide a recommendation as to the disposition that should be made of the charges in the interest of justice and discipline.

Appendix 2.1, which implements Article 33, UCMJ, provides additional guidance regarding factors the convening authorities and staff judge advocates should consider when exercising their duties with respect to the disposition of charges, including “[w]hether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial . . .”

⁶ See DAC-IPAD Report Appx. I, p.8, 12-13 (Table 1C, *Case Characteristics (FY2017)*; Table 2C, *Case Dispositions and Case Outcomes (FY 2017)*). available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To begin its evaluation, the Committee requests narrative responses to the following questions:

- a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?
- b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within each Military Service? Please describe.
- c. In your Service, are the conviction and acquittal rates for other offenses similar to those for sexual assault? Is this information routinely tracked by your Service?

Question 6: Prosecutor and Defense Counsel Training.

Do military prosecutors and defense counsel in your Service have sufficient training to ensure just convictions and acquittals in sexual assault cases?

Question 7: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.

The DAC-IPAD's Third Annual Report (March 2019), indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases contained a record of the victim declining to participate at some stage in the process.

- a. Does your organization collect or track any information regarding victim participation/declination in sexual assault cases? If so, please explain.
- b. What, either anecdotally or based on your organization's analysis, are the most frequent reasons victims give for declining to participate? Do these reasons differ when comparing civilian and military victims?

C. Operational Questions for Program Managers for the Special Victims' Counsel and Victims' Legal Counsel Programs

Question 1: Managing Victim Expectations.

- a. Do you and your SVCs/VLCs manage expectations with victims regarding court-martial results or does the trial counsel do this? Please explain.
- b. What effect does a full acquittal in a sexual assault case have on victims' perceptions of the military justice process?

Question 2: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.

The DAC-IPAD's Third Annual Report (March 2019), indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases had a record of the victim declining to participate or to participate further at some stage in the military justice process, meaning the victims declined to be interviewed by investigators or trial counsel or declined to testify at an Article 32 hearing or at trial.

- a. From a program management perspective, do you think it's helpful to identify and understand the reasons why victims are not willing to participate in the military justice process?
- b. At what stage of the military justice process—investigation, preferral of charges, Article 32 hearing, or up until trial—are victims most likely to decline to participate in the process? Why do you believe this is so?
- c. What are the most common reasons why victims decline to participate in the investigative or court-martial process? Do these reasons differ when comparing civilian and military victims?
- d. In reviewing investigative and court-martial case files, the DAC-IPAD has found that many cases take more than a year from the offense being reported until the court-martial takes place. Does the length of time it takes for a case to proceed to court-martial have an effect on victim participation in the military justice process?
- e. Has the SVC/VLC program had an effect on victim declinations to participate in the investigative and court-martial process?

D. Operational Questions for Trial Defense Services Organizations

Question 1: Article 32 Preliminary Hearings.

- a. Have the changes to Article 32, UCMJ, and R.C.M. 405—in particular the addition of the post-hearing submission of information relevant to the disposition of the charges—made Article 32 preliminary hearings more beneficial to the defense? Why or why not?
- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the defense realize a benefit from the hearing?
- c. Do the judge advocates serving as PHOs in sexual assault cases possess sufficient training and experience?
- d. Prosecutorial discretion exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility under the U.S. Constitution to ensure that the laws of the United States be "faithfully executed." Have you filed any motions to dismiss arguing the government has breached this principle (U.S. Constitution Article 2, Section 3) when charges are referred contrary to the advice of a PHO? If so, what was the outcome?

Question 2: Conviction and Acquittal Rates.

The DAC-IPAD's Third Annual Report (March 2019),⁷ contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in Questions a through d that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
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The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To this end, the Committee requests written responses to the following questions.

- a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?
- b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within your Service? Please describe.

⁷ See DAC-IPAD Report Appx. I, p.8, 12-13 (Table 1C, *Case Characteristics (FY2017)*; Table 2C, *Case Dispositions and Case Outcomes (FY 2017)*). available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

- c. Are the conviction and acquittal rates for other offenses similar to those for sexual assault?
- d. Do military prosecutors and defense counsel possess sufficient training and experience to ensure just convictions and acquittals in sexual assault case?