



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

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JUN 7 2018

GENERAL COUNSEL

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

SUBJECT: Assessment of Judicial Proceedings Since Fiscal Year 2012 Amendments Panel
Recommendations 54, 55, 57, 58 and 60

The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), a congressionally mandated federal advisory committee, concluded its work on October 9, 2017 with the issuance of its final report. Having reviewed the recommendations, I have determined that the Defense Advisory Committee on Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)'s analysis of recommendations 54, 55, 57, 58 and 60 would be helpful, and respectfully request that the DAC-IPAD examine these recommendations.

I respectfully request that the DAC-IPAD include its analysis and findings, if any, of the aforementioned recommendations in its next annual report.

A handwritten signature in black ink, appearing to read "William S. Castle".

William S. Castle
Acting

Recommendations of the Judicial Proceedings Panel Assigned to The DAC-IPAD by DoD on June 7, 2018

A. Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 (September 2017)

Recommendation 54: The successor federal advisory committee to the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, should consider continuing to analyze adult-victim sexual assault court-martial data on an annual basis as the JPP has done, and should consider analyzing the following patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data:

- a. Cases involving military victims tend to have less punitive outcomes than cases involving civilian victims; and
- b. The conviction and acquittal rates for sexual assault offenses vary significantly among the military Services.
- c. If a Service member is charged with a sexual assault offense, and pleads not guilty, the probability that he or she will be convicted of a sexual assault offense is 36%, and the probability that he or she will be convicted of any offense (i.e., either a sex or a non-sex offense) is 59%.

B. Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice (September 2017)

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.

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.

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

Recommendation 60: The Secretary of Defense and the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.