

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



FIFTH ANNUAL REPORT
March 2023

Defense Advisory Committee

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Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces



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March 2023



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

March 30, 2023

The Honorable Jack Reed
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mike Rogers
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with the *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces [DAC-IPAD] March 2023 Fifth Annual Report* in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended, describing the Committee's activities over the previous 12 months.

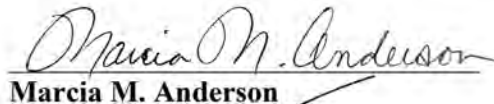
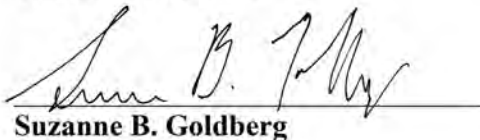


The report first sets forth the Committee's two responses to the questions posed in the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 and five recommendations to the Joint Service Committee on Military Justice (JSC) to amend Rule for Courts-Martial 1001(c). The Committee's responses and recommendations are related to victim impact statements made during the pre-sentencing phase of a court-martial. The Committee also provided public comments to the JSC draft Executive Order revising the Rules for Courts-Martial for the new Office of the Special Trial Counsel. Most significantly the DAC-IPAD made two recommendations related to the Article 32 preliminary hearing, including that a finding of no probable cause is an absolute bar to prosecution and a process for reconsideration. These reforms align with federal district courts practice and contribute to the overall health of the military justice system. As the Committee continues its study of reforms to pre-trial processes and uniform prosecution standards, a future report will include the supporting documentation for the Article 32 recommendations and detail the Committee's engagement with the Military Justice Review Panel in this process.

The report also provides an update on the reconstitution of the Committee, the establishment and work of the three subcommittees, and a summary of the Committee's work from April 2020 through January 2021.

Further, the report includes a summary of the Committee's two recommendations related to the DAC-IPAD's *Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel / Victims' Legal Counsel (SVC/VLC) Programs*, submitted to the Department of Defense General Counsel in August 2022 and is available at the DAC-IPAD website at https://dacipad.whs.mil/images/Public/08-Reports/10-DAC-IPAD_SVC-VLC_Report_20220815_Final_Complete.pdf.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

Respectfully submitted,


Karla N. Smith, Chair
Marcia M. Anderson
William S. Cassara
Suzanne B. Goldberg
A. J. Kramer
Jenifer Markowitz
James R. Schwenk
Meghan A. Tokash
Martha S. Bashford
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EXECUTIVE SUMMARY

In section 546 of the National Defense Authorization Act for Fiscal Year 2015, enacted on December 23, 2014, Congress directed the Secretary of Defense to establish the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee). Its authorizing legislation, as amended in 2019, charges the Committee to execute three tasks over a 10-year term:

1. 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;
2. To review, on an ongoing basis, cases involving allegations of sexual misconduct for purposes of providing advice to the Secretary of Defense; and
3. To submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives describing the results of its activities during the preceding year no later than March 30 of each year.

This is the fifth annual report of the DAC-IPAD. It describes the Committee's activities since January 30, 2022, when the Committee was reconstituted following a zero-based review of all Department of Defense advisory committees. Between April 2022 and March 2023, the Committee held six public meetings and numerous preparatory meetings, during which it received presentations from dozens of stakeholders, including the General Counsel of the Military Departments, the Judge Advocates General of the Military Departments, civilian prosecutors, and military justice experts and practitioners, including military trial and defense counsel, military appellate counsel, and special victims' counsel and victims' legal counsel (SVCs/VLCs). In addition, Committee members observed courts-martial involving charges of sexual offenses and attended litigation courses held by the Services.

Since its reconstitution in April 2022, the Committee has deliberated and voted on three stand-alone reports. On August 10, 2022, the Committee transmitted to the General Counsel of the Department of Defense its first stand-alone report on tour lengths and rating chain structures for SVC/VLC programs. Two stand-alone reports, one on recurring issues in military appellate litigation and the other on victim impact statements at court-martial presentencing proceedings, will be released concurrently with this fifth annual report.

As the result of a zero-based review directed by the Secretary of Defense, the Committee's operations were suspended in January 2021; the Committee therefore did not publish an annual report in March 2021 describing its activities during the prior year (April 2020–March 2021). To ensure continuity of its recommendations and reports issued to date, in addition to a description of its reports and activities since the Committee's reconstitution in April 2022, this report also includes a summary of its reports and activities from April 2020 until its suspension in January 2021.

SUMMARY OF FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

Responses to the questions posed in the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) and recommendations to the Joint Service Committee on Military Justice (JSC) to amend Rule for Courts-Martial 1001(c):

JES Question 1: Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

DAC-IPAD Response: In the vast majority of cases, military judges do not limit a victim's right to be heard at sentencing. Of the 173 FY21 sexual offense court-martial cases reviewed involving a victim impact statement, the military judge limited a victim's statement in 20 cases (12%). In the 151 cases in which the military judge was the sentencing authority, the judge limited a victim impact statement in 13 cases (9%). In those cases in which the judge took such action, they generally did so in accordance with R.C.M. 1001(c).

The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges. For example, some judges permit victims to address only their experience specific to the crime for which the accused was convicted and other judges allow a victim to address the impact of their interaction with the accused, which includes the crime and the surrounding circumstances.

The Committee has determined that this standard is too narrow and should be clarified. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001(c) should clarify the standard, incorporate aspects of civilian practice, and allow crime victims to more fully inform the courts about how the accused's crimes have impacted them.

JES Question 2: Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

DAC-IPAD response: Military judges generally do permit individuals who have suffered harm as a result of the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

Since Congress posed this question almost three years ago in the FY20 NDAA Joint Explanatory Statement, the Service appellate courts have adopted an expansive view of who may be considered a crime victim. In addition, the Committee's FY21 court-martial case review revealed that military judges generally apply a broad definition of crime victim in determining who may provide a victim impact statement at presentencing proceedings.

RECOMMENDATIONS:

Recommendation 41: An 18-month minimum assignment length for SVCs/VLCs serving in their first tour as a judge advocate, and a 24-month minimum for all other SVCs/VLCs, with appropriate exceptions for personal or operational reasons.

Recommendation 42: The establishment of an independent supervisory rating structure for Army SVCs outside of the OSJA and local command.

Recommendation 43: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words “or indirectly” to the definition of victim impact, amending the section as follows:

“For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly *or indirectly relating* to or arising from the offense of which the accused has been found guilty.”

Recommendation 44: The JSC 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 except in capital cases.

Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to allowing the statement orally, in writing, or both.

Recommendation 46: The JSC 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 JSC’s proposed change to R.C.M. 1001(c)(5)(A).

Recommendation 47: The JSC 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.

Recommendation 48a:* Amend Article 32 to provide that a preliminary hearing officer’s determination of no-probable cause is an absolute bar to referral of the affected specification(s) to court-martial, subject to reconsideration as described in Recommendation 48b.

Recommendation 48b:* Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer’s no-probable cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following:

1. Trial counsel, within 10 days of receiving the preliminary hearing officer’s report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented.
2. The preliminary hearing officer shall reconsider their previous no-probable cause determination one time upon re-opening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer’s determination as to whether probable cause exists is final.

*At the DAC-IPAD’s 27th Public Meeting, held on March 14, 2023, just prior to finalizing this 5th Annual Report, the DAC-IPAD voted to approve Recommendations 48a and 48b. The DAC-IPAD will issue a separate report with the details and supporting documentation for these recommendations. *See also* Section II of Chapter 1 of this report.

INTRODUCTION

I. COMMITTEE ESTABLISHMENT AND MISSION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) was established by the Secretary of Defense in February 2016 pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA), as amended.¹ The statutory mission of the DAC-IPAD 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.² To provide that advice, the Committee is directed to review, on an ongoing basis, cases involving allegations of sexual misconduct.³

The DAC-IPAD is required by its authorizing legislation to submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives, no later than March 30 of each year, describing the results of its activities.⁴ This fifth annual report of the DAC-IPAD summarizes the Committee's activities from April 2020 until their suspension in January 2021 and provides an update on the Committee's current status and activities.

For the original appointments, the statute required the Secretary of Defense to select a maximum of 20 Committee members with experience in investigating, prosecuting, and defending against allegations of sexual offenses.⁵ In January 2017, the Secretary of Defense appointed 16 members to the DAC-IPAD, representing a wide range of perspectives and experience related to sexual offenses both within and outside the military.⁶

In 2017, the DAC-IPAD established three subcommittees to support its mission: the Case Review Subcommittee, the Data Subcommittee, and the Policy Subcommittee. The subcommittees were each composed of three to five members of the Committee.

The terms of all 15 DAC-IPAD members expired on January 18, 2021.

1 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [FY15 NDAA], § 546, 128 Stat. 3292 (2014). Pursuant to the authorizing statute and the Federal Advisory Committee Act of 1972 (FACA), the Department of Defense filed the charter for the DAC-IPAD with the General Services Administration on February 18, 2016. The National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 [FY20 NDAA], § 535, 133 Stat. 1198 (2019), amended FY15 NDAA § 546 to extend the Committee's term from 5 to 10 years.

2 FY15 NDAA, *supra* note 1, at § 546(c)(1).

3 *Id.* at § 546(c)(2).

4 *Id.* at § 546(d).

5 *Id.* at § 546(b).

6 Committee member Dean Keith M. Harrison, Associate Dean and Professor of Law, Savannah Law School, passed away unexpectedly in 2018.

II. ZERO-BASED REVIEW

On January 30, 2021, the Secretary of Defense suspended all Department of Defense (DoD) advisory committee operations, including those of the DAC-IPAD, and directed a comprehensive “zero-based review” of each committee’s purpose, mission, and alignment with the Department’s strategic plan.⁷ During the zero-based review, advisory committees were prohibited from undertaking any committee or subcommittee work until the reappointment of such committees, subcommittees, and members was approved and the members took their oath of office.

The Committee’s suspension prevented its completion of two statutorily required annual reports due by March 30, 2021, and March 30, 2022. To notify Congress of the suspension of Committee activities, on March 26, 2021, the General Counsel of the Department of Defense (DoD GC) submitted interim report letters to the chairs of the Committees on Armed Services of the Senate and the House of Representatives (SASC and HASC),⁸ explaining the suspension of the DAC-IPAD’s continued operations and the need to renew its members.

On July 6, 2021, following the Zero-Based Review Board’s recommendations, the Secretary of Defense authorized the DAC-IPAD to resume operations once its new members were duly appointed, written terms of reference were approved, and the new members were sworn in.⁹

By the annual reporting date of March 30, 2022, the newly reappointed DAC-IPAD had not held its first meeting; therefore, on March 31, 2022, the DoD GC submitted a second interim report to Congress describing the Committee’s activities during the year prior to the zero-based review and providing an update on the status of the reconstituted DAC-IPAD.¹⁰

III. RECONSTITUTION OF THE COMMITTEE AND APPOINTMENT OF MEMBERS

In January 2022, the Secretary of Defense appointed 17 new members to the DAC-IPAD.¹¹ The newly appointed Committee members represent a broad range of perspectives and experience related to sexual assault both within and outside the military.

The Committee members’ areas of expertise include civilian sexual assault forensics, civilian and military prosecution of sexual assault, civilian and military defense of sexual assault, the federal and state court system, military command, criminology, and academic disciplines and legal policy.

7 Memorandum from Secretary of Defense to Senior Pentagon Leadership Regarding Department of Defense Advisory Committees – Zero-Based Review (Jan. 30, 2021). The Secretary directed this review to align DoD advisory committee efforts with the Department’s most pressing strategic priorities.

8 Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 26, 2021) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 26, 2021).

9 Memorandum from Secretary of Defense to General Counsel of the Department of Defense Regarding Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (July 6, 2021).

10 Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 31, 2022) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 31, 2022); U.S. Dept. of Def., Report of the Department of Defense on the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (Mar. 2022).

11 The Committee currently has 15 members. The Secretary of Defense appointed 17 members; however, one member declined the appointment. Sixteen members took the oath of office in April 2022. Due to health concerns, one member resigned in September 2022.

Ten original DAC-IPAD members were reappointed to a second four-year term, and seven distinguished new members were appointed for a first term. The members' depth and breadth of experience will be extremely valuable in developing informed, authoritative assessments of the status of the military's response to sexual offenses within its ranks and providing thoughtful, well-considered recommendations to the Secretary of Defense that consider civilian best practices and the unique nature of the military criminal justice system.

The Secretary of Defense selected Judge Karla Smith to serve as the Chair of the DAC-IPAD. The DAC-IPAD held its first public meeting on April 21, 2022, via videoconference.

IV. ESTABLISHMENT OF SUBCOMMITTEES

On September 22, 2022, the DoD GC established three subcommittees of the DAC-IPAD:

1. The Case Review Subcommittee;
2. The Policy Subcommittee; and
3. The Special Projects Subcommittee.¹²

Each subcommittee comprises members of the full Committee, and each subcommittee has its own terms of reference (ToR) defining its mission, objectives, and scope.¹³

A. Case Review Subcommittee (CRSC)

The mission of the Case Review Subcommittee as defined in its ToR is to assess and provide independent advice to the DAC-IPAD related to the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.

The objectives and scope of the CRSC, as set forth in its ToR, are the following:

1. Assessing the strengths and weaknesses of the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces through the review of military justice cases from investigation through final disposition, including appellate review, if applicable.
2. Assessing the differences among the Military Departments (MILDEPs) in the investigation, prosecution, and defense of allegations of sexual misconduct.
3. Identifying best practices among the MILDEPs in the investigation, prosecution, and defense of allegations of sexual misconduct.
4. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Case Review Subcommittee in writing by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

Ms. Martha Bashford is the CRSC Chair, and the other CRSC members are Ms. Margaret Garvin, Ms. Jennifer Long, Dr. Jenifer Markowitz, and BGen James Schwenk, USMC (Ret.).

¹² Memorandum from DoD General Counsel to the Chair of the DAC-IPAD, DAC-IPAD Subcommittee Establishment, Sept. 24, 2022.

¹³ See Appendix D for the CRSC, PSC, and SPSC Terms of Reference.

In a January 28, 2022, memorandum to the DAC-IPAD Staff Director, the DoD GC requested that the DAC-IPAD study appellate decisions in military sexual assault cases.¹⁴ The DAC-IPAD assigned this task to the CRSC at its September 2022 public meeting.

B. Policy Subcommittee (PSC)

The mission of the Policy Subcommittee is to assess and provide independent advice to the DAC-IPAD related to the investigation, prosecution, and defense of sexual misconduct involving members of the Armed Forces based on its review of DoD policies, MILDEP policies, and the Uniform Code of Military Justice (UCMJ).

The objectives and scope of the PSC, as set forth in its ToR, are the following:

1. Reviewing and assessing policies promulgated by DoD and the MILDEPS, and UCMJ provisions related to the investigation, prosecution, and defense of allegations of sexual misconduct in the Armed Forces.
2. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the PSC in writing by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

Brigadier General James Schwenk, USMC (Ret.), is the PSC Chair, and the other PSC members are Major General Marcia Anderson, U.S. Army (Ret.), Ms. Jennifer O'Connor, Ms. Suzanne Goldberg, and DAC-IPAD Chair Judge Karla Smith.

C. Special Projects Subcommittee (SPSC)

The mission of the Special Projects Subcommittee is to assess and provide independent advice to the DAC-IPAD related to the investigation, prosecution, and defense of sexual misconduct involving members of the Armed Forces based on its review and analysis of existing, developing, and proposed statutory requirements, DoD and MILDEP plans and policies, and the UCMJ and Manual for Courts-Martial (MCM) rules and provisions applicable to such requirements, plans, policies, and provisions.

The objectives and scope of the SPSC, as set forth in its ToR, are the following:

1. Reviewing and assessing existing, developing, and proposed statutory requirements related to the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces and the DoD and MILDEPs' plans and policies related to those statutory requirements, including changes to the MCM.
2. Identifying significant trends and variances among the MILDEPs in the investigation, prosecution, and defense of allegations of sexual misconduct.
3. Identifying best practices and recommending standards and criteria for a uniform system of military justice within DoD.
4. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Special Projects Subcommittee in writing by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

Ms. Meghan Tokash is the SPSC Chair, and the other SPSC members are Judge Paul Grimm, Mr. A.J. Kramer, Dr. Jenifer Markowitz, Dr. Cassia Spohn, and Judge Reggie Walton.

¹⁴ Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study Appellate Decisions in Military Sexual Assault Cases* (Jan. 28, 2022) [Appellate Review Memo].

V. FIFTH ANNUAL REPORT – MARCH 2023

This is the fifth annual report of the DAC-IPAD. It describes the Committee’s activities since January 30, 2022, when the Committee was reconstituted following a zero-based review of all Department of Defense advisory committees. Between April 2022 and March 2023, the Committee held six public meetings and numerous preparatory meetings, during which it received presentations from dozens of stakeholders, including the General Counsel of the Military Departments, the Judge Advocates General of the Military Services, civilian prosecutors, and military justice experts and practitioners, including military trial and defense counsel, military appellate counsel, and special victims’ counsel and victims’ legal counsel (SVCs/VLCs). In addition, Committee members observed courts-martial involving charges of sexual offenses and attended litigation courses held by the Services.

Since its reconstitution in April 2022, the Committee has deliberated and voted on three stand-alone reports. On August 10, 2022, the Committee transmitted to the General Counsel of the Department of Defense its first stand-alone report on tour lengths and rating chain structures for SVC/VLC programs. Two stand-alone reports, one on recurring issues in military appellate litigation and the other on victim impact statements at court-martial presentencing proceedings, will be released concurrently with this fifth annual report.

VI SUMMARY OF THE COMMITTEE’S ACTIVITIES: APRIL 2020 – JANUARY 2021

Although the DoD GC provided Congress an interim report describing the DAC-IPAD’s activities between April 2020 and January 2021,¹⁵ to ensure continuity in its reporting the DAC-IPAD provides the following summaries in this statutorily required annual report.

Between April 2020 and January 2021 (when the Committee’s activities were suspended by the zero-based review), the Committee held five public meetings.¹⁶ It also deliberated on and released three stand-alone reports: one on the advisability of a guardian ad litem appointment process for child victims of an alleged sex-related offense in the military, the second on investigative case file reviews for military adult penetrative sexual offense cases closed in fiscal year 2017, and the third on racial and ethnic data relating to disparities in the investigation, prosecution, and conviction of sexual offenses in the military. These reports are summarized below.

A Guardian ad Litem Report (June 2020)

In June 2020, the DAC-IPAD submitted its *Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military*.¹⁷ This report was published in response to a request from the HASC that the DAC-IPAD evaluate the advisability and feasibility of establishing a process under which a guardian ad litem may be appointed in a court-martial to represent the interests of a child victim of an alleged sex-related offense.¹⁸

¹⁵ Letters from Caroline Krass, DoD General Counsel, to Chairman of Senate and House Armed Services Committees (Mar. 31, 2022).

¹⁶ See Appendix E for a complete listing of DAC-IPAD meetings, preparatory sessions, and presenters since April 2020.

¹⁷ DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON THE ADVISABILITY AND FEASIBILITY OF ESTABLISHING A GUARDIAN AD LITEM APPOINTMENT PROCESS FOR CHILD VICTIMS OF AN ALLEGED SEX-RELATED OFFENSE IN THE MILITARY [DAC-IPAD GAL REPORT] (June 2020), *available* at https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_GAL_Report_20200617_Final_Web.pdf.

¹⁸ H.R. REP. NO. 116-120, at 124–25 (2019). While this provision from the House Report was not part of the final FY20 NDAA, the DAC-IPAD followed the DoD policy of responding to all requests made by Congress for reports.

The Committee conducted comprehensive research on civilian and military court practices and rules regarding the appointment of guardians ad litem for child victims, including extensive interviews of experts in the area of child victims' rights. The report sets forth the Committee's 42 findings and eight recommendations resulting from this research.¹⁹ The Committee concluded that while some gaps exist in services available to child victims of sexual offenses, it is neither advisable nor necessary to implement a designated guardian ad litem program in the military, provided that the Committee's recommendations or similar proposals to rectify these gaps are approved and implemented. The Committee determined that a trained child victim advocate working in collaboration with the SVC/VLC is the best option for ensuring that a child's interests are protected in the courtroom.²⁰

B. Report on Investigative Case File Reviews (October 2020)

In October 2020, the DAC-IPAD submitted its *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*, the culmination of a three-year project that entailed in-depth quantitative and qualitative reviews of 1,904 criminal investigative cases and related court-martial cases involving adult penetrative sexual offenses.²¹

In the comprehensive review, the DAC-IPAD (1) recorded numerous objective data points for each case; (2) subjectively assessed whether the victim's statement(s), if any, contained sufficient evidence to establish probable cause to believe that the subject of the investigation had committed a penetrative sexual offense; (3) subjectively assessed whether the initial disposition authority's decision to prefer a penetrative sexual offense charge or to take no action in the case was reasonable; and (4) for those cases resulting in preferred penetrative sexual offense charges, subjectively assessed the evidence provided for review with a focus both on whether it was sufficient to establish probable cause to believe that the accused had committed a penetrative sexual offense and on whether the materials reviewed contained sufficient admissible evidence to obtain and sustain a conviction.²²

The October 2020 case review report sets out 47 findings, one recommendation, and nine directives for further study, including the following two key findings:

- There is not a systemic problem with an initial disposition authority's decision either to prefer a penetrative sexual offense charge or to take no action. In 94.0% (486 of 517) and 98.5% (1,316 of 1,336) of cases examined, respectively, the reviewers found those decisions to be reasonable.
- There 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. In 31.1% (73 of 235) of cases reviewed that were tried to verdict on a penetrative sexual offense charge, the evidence in the materials reviewed did not meet that threshold.²³

19 DAC-IPAD GAL REPORT, *supra* note 17, at 6–13.

20 *Id.* at 4.

21 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 (Oct. 2020), *available at* https://dacipad.whs.mil/images/Public/08-Reports/08_DACIPAD_CaseReview_Report_20201019_Final_Web.pdf.

22 *Id.* at 26–27.

23 *Id.* at 2–4.

In the Committee's view, the decision to refer charges to trial by general court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process. Accordingly, the Committee recommended that Congress amend Article 34, UCMJ, to require that the staff judge advocate 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.²⁴

C. Report on Racial and Ethnic Data Disparity (December 2020)

In December 2020, as required by section 540I of the National Defense Authorization Act for Fiscal Year 2020, the Committee released its *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military*.²⁵ This important report was undertaken at a time of heightened focus on racial discrimination in the United States, including within the military justice system. Pursuant to the congressional tasking, the Committee requested, and each Military Service reported, the race and ethnicity of (1) Service members accused of a penetrative or contact sexual offense, (2) Service members against whom such charges were preferred, and (3) Service members convicted of a penetrative or contact sexual offense for all cases completed in fiscal year 2019.²⁶

The Committee found that the Military Services' FY19 data responses raised more questions than they answered, owing to persistent inadequacies in race and ethnicity data collection in DoD and the Military Services. The Committee's assessment of the FY19 data for this report was further hampered by inconsistencies across the Military Services in how they reported demographic data for Service members.²⁷ Because the Military Services do not report race and ethnicity in standardized categories, the Committee was limited in its ability to undertake the type of comprehensive assessment that is essential to identifying possible areas of racial and ethnic discrimination in sexual offense cases. In addition, no Military Service consistently recorded the race and ethnicity of victims of a sexual offense. Civilian criminologists consider the victim's demographic information to be a critical component of any assessment of racial disparities in a criminal justice system.²⁸

The report's five findings and eight recommendations for improvement focused on comprehensive data collection, consistent terminology, and holistic assessments of racial disparities.²⁹ The report concluded that implementation of the Committee's recommendations, along with the Article 140a, UCMJ, standards and criteria, will enhance the administration of justice in the military.

24 *Id.* at 16.

25 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY (Dec. 2020), available at https://dacipad.whs.mil/images/Public/08-Reports/09_DACIPAD_RaceEthnicity_Report_20201215_Web_Final.pdf.

26 *Id.* at 18.

27 *Id.* at 1.

28 *Id.* at 8.

29 *Id.* at 5–6.

CHAPTER 1. SPECIAL PROJECTS SUBCOMMITTEE

I. INTRODUCTION

The National Defense Authorization Act for Fiscal Year 2022 brought momentous change to the practice of military justice³⁰ when Congress transferred significant prosecutorial functions in sexual offense cases from military commanders to independent judge advocates,³¹ removing the supervision of these military lawyers from their traditional military chains of command and placing them under the supervision of the civilian Secretaries of the Military Departments.³² These changes create a bifurcated military justice system: If a Service member commits an offense under the jurisdiction of the new “special trial counsel,” the military prosecutor will decide—independent of the accused’s chain of command—whether to send charges to a court-martial. However, if a Service member commits an offense that is not within the special trial counsel’s jurisdiction, then the traditional, command-driven system for charging and referring cases to court-martial will be followed.³³

The DAC-IPAD is studying this historic change to the military’s prosecution of sexual assault offenses. In a May 10, 2022, memorandum, the DoD GC tasked the DAC-IPAD with advising the Secretary of Defense and herself on policy development, workforce structure, and implementation of best practices for the Military Departments’ Offices of Special Trial Counsel (OSTCs).³⁴ The Committee is uniquely positioned to provide this advice regarding the OSTCs, which are intended to function much like independent district attorneys’ offices.³⁵

The Special Projects Subcommittee (SPSC) will lead this effort and provide findings and recommendations for consideration by the full Committee. Initially, the SPSC identified topics foundational to the structure and independence of the OSTC. In November 2022, the SPSC reviewed and provided public comment on proposed Rules for Courts-Martial implementing the authorities of the OSTC. Finally, the SPSC met with members of an inter-Service working group coordinating the organization and business rules for their respective OSTCs. The discussion addressed the law and policies applicable to the special trial counsel’s exclusive authority to dispose of charges involving covered offenses, as well as their ability to maintain independence and objectivity in the exercise of prosecutorial discretion.

30 National Defense Authorization Act for Fiscal Year 2022, S. 1605 [FY22 NDAA], §§ 531–539C, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021).

31 The OSTC will be responsible for the disposition of “covered offenses,” including 10 U.S.C. §§ 917a (article 117a), 918 (article 118), 919 (article 119), 919a (article 119a), 920 (article 120), 920a (article 120a), 920b (article 120b), 920c (article 120c), 925 (article 125), 928b (article 128b), 930 (article 130), 932 (article 132), or the stand-alone offense of child pornography punishable under § 934 (article 134). [add 3 more from FY32 NDAA here]. The OSTC exercises authority in cases in which all covered offenses occurred on or after December 27, 2023.

32 FY22 NDAA, *supra* note 30, §§ 531–32.

33 Military Criminal Justice: Practice and Procedure, § 8–1 (2022).

34 See Memorandum from Ms. Caroline Krass, General Counsel for the Department of Defense, to Judge Karla Smith, DAC-IPAD Chair, *DAC-IPAD Advice on Policy Development, Workforce Structure, and Implementation of Best Practices for the Military Departments’ Offices of Special Trial Counsel* (May 10, 2022).

35 See *Transcript of DAC-IPAD Public Meeting* 84 (April 21, 2022) (comment by Ms. Megan Tokash, Committee member) (all DAC-IPAD public meeting transcripts are available at <https://dacipad.whs.mil/>).

II. SUBCOMMITTEE ACTIVITIES

In furtherance of the SPSC's specific focus on the new OSTC as described above, the full Committee has also received information on the establishment and development of the new offices, including the following:

- A. Testimony from senior officials from the Military Departments on the establishment of their OSTC at the DAC-IPAD's 23rd Public Meeting on June 22, 2022.³⁶
- B. Testimony from senior officials from the Military Departments on the status of their OSTC at the DAC-IPAD's 25th Public Meeting on December 7, 2022.³⁷
- C. The DAC-IPAD requested and received numerous documents from the Military Departments regarding the policies for establishment of the OSTC and the competency and qualification standards for personnel serving in the OSTC

On March 14, 2023, the Special Projects Subcommittee presented to the DAC-IPAD its recommendations for reforms to pretrial procedures and prosecution standards:

Recommendation 1a (DAC-IPAD Recommendation 48a): Amend Article 32 to provide that a preliminary hearing officer's determination of no-probable cause is an absolute bar to referral of the affected specification(s) to court-martial, subject to reconsideration as described in Recommendation 1b.

Recommendation 1b (DAC-IPAD Recommendation 48b): Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer's no-probable cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following:

1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented.
2. The preliminary hearing officer shall reconsider their previous no-probable cause determination one time upon re-opening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final.

Recommendation 2: Revise Appendix 2.1, Manual for Courts-Martial, as follows:

- (1) Remove "Non-Binding" from the title of Appendix 2.1 to align with the title of Article 33, UCMJ, "Disposition Guidance"; and
- (2) Revise the referral guidance in section 2.3 of Appendix 2.1 to provide that special trial counsel should only refer charges to a general court-martial, and judge advocates should only recommend that a convening authority refer charges to a general court-martial, if they believe that the Servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. See proposed revisions to Appendix 2.1, Manual for Courts-Martial, enclosed with this report.
- (3) Update Appendix 2.1 to reflect the new authorities of the special trial counsel.

³⁶ See *Transcript of DAC-IPAD Public Meeting 29-130* (June 22, 2022)

³⁷ See *Transcript of DAC-IPAD Public Meeting 204-297* (December 6, 2022)

Recommendation 3: Require training of all special trial counsel and judge advocates advising convening authorities on the disposition guidance in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is only appropriate if they believe that the servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

After deliberating on the subcommittee's recommendations, the DAC-IPAD approved Recommendations 1a and 1b (now adopted as DAC-IPAD Recommendations 46a and 46b). The DAC-IPAD asked the Special Projects Subcommittee to develop additional guidance for the proposed prosecution standards in Appendix 2.1 contained in Recommendation 2 and deferred deliberations and a vote on Recommendations 2 and 3 until a future meeting. The Special Projects Subcommittee will provide the DAC-IPAD with its proposed prosecution standards for the Committee's future consideration. The DAC-IPAD will publish an independent, stand-alone report supporting its recommendations on pretrial procedures and prosecution standards in 2023.

III. THE WAY AHEAD

In 2023, the SPSC will report on the processes by which special trial counsel prefer and refer charges, with particular focus on cases in which an Article 32 preliminary hearing is held. The SPSC will assess the current disposition guidance and legal standards for referring cases to court-martial and recommend uniform policies for the exercise of prosecutorial discretion. The SPSC will incorporate the previous DAC-IPAD's extensive review of penetrative sexual offense court-martial documents and observations from its investigative case file review.³⁸ The SPSC intends to report its analysis and findings to the Committee in mid-2023.

Future SPSC topics of study include developing metrics for evaluating the success of the special trial counsel program. Civilian criminal justice experts emphasize the importance of a holistic assessment of these new, independent prosecutors. An evaluation of the OSTC must account for a variety of perspectives about the fairness of the process as well as case outcomes; success cannot be gauged solely by the number of convictions obtained. Ultimately, the assessment will determine whether the goals of this historic change—including enhanced confidence in the military's ability to deliver justice and maintain good order and discipline—have been achieved.

Finally, the DAC-IPAD assigned the SPSC the task of developing information in support of the Committee's statutory task to study the sharing of information contained in investigative and prosecution files with victim's counsel. The DAC-IPAD received this task in the National Defense Authorization Act for Fiscal Year 2023, and must provide its findings and recommendations by December 23, 2023.³⁹ The DAC-IPAD will benefit from the SPSC's ability to draw on its current focus on pretrial matters in connection with the special trial counsel to undertake the research and provide the needed context for evaluating potential legislative or administrative action considered by the DAC-IPAD.

38 DAC-IPAD reports can be found at <https://dacipad.whs.mil/reports>.

39 National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, § 549B, 136 Stat. 2395 (2022).

CHAPTER 2. CASE REVIEW SUBCOMMITTEE

I. INTRODUCTION

After the Case Review Subcommittee (CRSC) was formed, the DAC-IPAD assigned the Appellate Review Study to it.⁴⁰ Over the course of several public meetings in 2022, the full Committee developed the parameters for the Appellate Review Study.⁴¹ After reviewing appellate cases, analyzing the court decisions, and hearing public testimony, the CRSC drafted a stand-alone report for the full Committee's consideration and approval to be issued concurrently with this report.⁴²

In December, CRSC Chair Martha Bashford made a motion, approved by the DAC-IPAD, that the CRSC study court-martial panel selection information and collect data on how panels are constituted from the pool of eligible personnel, so that the DAC-IPAD can recommend appropriate changes to the military system.⁴³ To that end, the CRSC developed a strategic plan to analyze the race, ethnicity, and gender of military panel members, victims, the accused, trial and military defense counsel, and judges at courts-martial for sexual assault offenses.

II. SUBCOMMITTEE ACTIVITIES

As the CRSC Appellate Review Study progressed, the full Committee was briefed on court decisions challenging the convening authority's composition of an accused's court-martial panel,⁴⁴ including the pending decision in *United States v. Jeter*.⁴⁵ The DAC-IPAD expressed a strong interest in studying the court-martial member selection process, including how race and gender factor into the selection of panel members.⁴⁶

At its September 2022 public meeting, the DAC-IPAD heard testimony from a subject-matter expert on the military panel selection process, including the statutory authority set forth in Article 25(e)(2), UCMJ, that provides that the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament."⁴⁷ The expert stated that military panel selection criteria do not explicitly take into account race or gender, noting there is a human element in the convening authority's selection of eligible panel members.⁴⁸

⁴⁰ See *supra* note 14.

⁴¹ The DAC-IPAD discussed and deliberated on the Appellate Project in June, September, and December 2022.

⁴² *Appellate Review Study*, available at <https://dacipad.whs.mil/meetings/2-uncategorised/72-dac-ipad-reports>.

⁴³ See *Transcript of DAC-IPAD Public Meeting* 30–31 (Dec. 7, 2022) (comment of Ms. Martha Bashford, Committee member).

⁴⁴ See *Appellate Review Study*, *supra* note 42, for an in-depth review of these decisions.

⁴⁵ *United States v. Jeter*, 82 M.J. 355 (CAAF 2022) (considering whether a convening authority violated the appellant's equal protection rights when, over defense objection, he convened an all-white panel using a racially nonneutral members selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith).

⁴⁶ See generally *Transcript of DAC-IPAD Public Meeting* (Sept. 21, 2022).

⁴⁷ See also R.C.M. 503(a)(1)(A) (providing that the convening authority shall detail qualified persons as members for courts-martial); R.C.M. 502(a)(1) (requiring that the "members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament").

⁴⁸ See *Transcript of DAC-IPAD Public Meeting* 44 (Sept. 21, 2022) (Major Steven Dray, professor of sentencing, post-trial, and appeals at The Judge Advocate Legal Center and School in Charlottesville, VA).

The testimony suggested it would be difficult to show that a convening authority's selection of a panel was improper because of discrimination based on race or gender.⁴⁹

At a later subcommittee meeting, the CRSC heard similar testimony on the human element in panel selection from a civilian defense attorney, who said that the convening authority "selects these individuals based on familiarity and trust rather than a specific reference to judicial temperament, which there is no way that a commanding general could know based on job position."⁵⁰ In addition, during public comment sessions of the DAC-IPAD's September and December 2022 meetings, the Committee heard from Black and Hispanic Service members convicted of sexual misconduct by all-white panels, or who chose trial by military judge alone because they were uncomfortable with the all-white panel detailed to their court-martial.⁵¹

After listening to the September 2022 testimony and testimony from staff judge advocates (SJAs) on the criteria used to select panel members, the Committee members raised questions about military panel demographics.⁵² The full Committee focused on military panel composition,⁵³ and especially on how to change the composition procedurally and factually.⁵⁴ The Committee expressed concern about the public perception that women and minorities are underrepresented on court-martial panels, noting that this perception undermines the credibility of the military justice system.⁵⁵ Committee members also asked whether women are disproportionately excluded from panels because of their experiences as victims of sexual assault or their additional duties as victim advocates.⁵⁶

At a January 2023 CRSC meeting, two civilian defense counsel shared their perspectives on military panel selection practices,⁵⁷ raising concerns about the lack of transparency within the nomination process, although both observed that panel members took their duties seriously.⁵⁸ One of them compared the process to a tip of the iceberg:

49 *Id.* at 69 (In response to an inquiry of how an accused could show that minorities were being purposefully excluded Major Dray stated that "you'd have to be privy to probably some kind of, some of the conversations between the SJA and the command if you could get that, if anybody would admit it or subordinate commanders, very difficult.").

50 *See Transcript of CRSC Meeting* 39 (Jan. 26, 2023) (Margaret Kurz, Owens and Kurz LLC).

51 *Transcript of DAC-IPAD Public Meeting* 346–83 (Sept. 21, 2022). *See also Transcript of the DAC-IPAD Public Meeting* 76–77 (Sept. 12, 2022) (comment of Mr. William E. Cassara, Committee member: "The very first court-martial I ever tried in 1990, it was an African American accused, and there was not a single African American on the panel. The last case I tried in 2018, '16, the first one was an Army case, this last one was an Air Force case. I had an African American accused, and there was not a single African American on the panel. I would venture to say without a scientific analysis or any data, that in my empirical experience the overwhelming majority of my cases fell into that category.").

52 *See Transcript of DAC-IPAD Public Meeting* 27 (Dec. 7, 2022) (comment of the Honorable Reggie Walton, Committee member, on the racial makeup of military panels: "I think the change needs to occur a lot sooner [than gathering data] because I think we're experiencing it now and I think it's detrimental to morale to have people feeling that they're being railroaded through a system that doesn't accurately or appropriately reflect their racial makeup.").

53 *Transcript of the DAC-IPAD Public Meeting* 58 (Sept. 21, 2022) (comment of Ms. Jennifer O'Connor, Committee member: "Could you just talk a little bit more about is there—is everybody, you know, put on a list and it's randomly selected based on who's available? I am curious about how the panels are composed.").

54 *Id.* at 67 (comment of Judge Karla Smith, Committee Chair: "If it's a scenario of an all white jury or panel, can an accused challenge that panel? And when the general is looking at the list, is there any consideration to having women, having minorities, et cetera?").

55 *Transcript of DAC-IPAD Public Meeting* 63–64, 76–78, 94 (Dec. 6, 2022).

56 *Id.* at 94 (comment of Ms. Suzanne Goldberg, Committee member: "And so, to the extent it's a common practice that it is assumed that someone who has been trained as a victims counsel cannot deliberate fairly as a panel member, that sort of amplifies or exacerbates the other issue, which is that more women will be excluded from panels because more women will report having experienced sexual assault.").

57 Brian Pristera, Daniel and Conway Associates, and Margaret Kurz, Owens and Kurz LLC.

58 *See Transcript of CRSC Meeting* 51–53 (Jan. 26, 2023)

“By the time you get to the venire and you are in the courtroom, it is that top part of the iceberg, but there is a whole selection process that occurred . . . invisibly.” He explained that any irregularities in the selection could never be discovered, because the conversations between the convening authority and the SJA regarding the selections are not put in writing.⁵⁹ If counsel were privy to how the venire was selected, he said, they could raise any issues to the military judge before trial and preserve the issue for appeal, increasing overall efficiency.⁶⁰ The counsel noted that there are often delays in receiving questionnaires or even knowing who the panel members are until the day of trial, resulting in delays.⁶¹

III. THE WAY AHEAD

In 2023, the CRSC will study the issues of race, ethnicity, and gender in panel selection. On the basis of testimony already heard, the Committee believes that there is at least a public perception that military panels are not diverse and that a perception of conscious or unconscious bias may be introduced by the convening authority’s ability to handpick the panel. Further, the Committee recognizes that the nomination process is not transparent and that if discrepancies exist in how the Article 25 criteria are applied, such deviations would be nearly impossible to successfully challenge.

Research has shown that diverse juries have broader deliberations.⁶² The CRSC will collect demographic characteristics of panel members in courts-martial as well as the demographics of both the victims and accused. The study will include any case in which a sexual offense under Articles 120, 120b, or 120c, UCMJ, was referred to a general court-martial and a panel was seated in fiscal years 2021 and 2022.⁶³

For this initial study, the CRSC intends to review the race, ethnicity, grade, age, and gender of members selected to serve on courts-martial and those detailed by the convening authority. After compiling and analyzing these data, the Committee will be able to describe panel composition in a number of ways, such as

- The proportion of panels that contain only white Service members;
- The proportion of panels that contain one, and only one, Hispanic Service member; and
- The proportion of panels that contain more than 50% Black Service members.

If feasible, the CRSC intends to collect demographic data on the victims and accused in these courts-martial to determine whether there are correlations between a panel’s composition and the demographic characteristics of the victims and accused. In addition, the study will collect demographic information on judges and on trial and military defense counsel in each court-martial reviewed.

⁵⁹ *Id.* at 40.

⁶⁰ *Id.* at 96 (testimony of Mr. Pristera: “And so, I circle that back around to my discovery ask, which I actually think is the most important change that we could make here. Regardless of what the *Jeter* court says for the decision on venire selection, and even regardless of a randomization, the imposition of a randomizer, this [the nomination process] has to be crystal clear and presented to the defense in a timely manner for the defense to be able to raise any issues it has or waive them before trial, and that would, in my opinion, increase the fairness to the accused and increase the efficiency of the process with panel selection issues[.]”).

⁶¹ *Id.* at 97.

⁶² Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. OF PERS. AND SOC. PSYCH. 597, 606 (2006) (“Racial composition also had clear effects on deliberation content, supporting the prediction that diversity would lead to broader information exchange.”).

⁶³ Depending on the number of cases found for FY21 and FY22, the CRSC may also review cases under Article 120c, UCMJ.

The CRSC is not aware of any other study, government or otherwise, that has compiled data on the race and gender of military panels. Data on jury pools are also scarce for civilian juries.⁶⁴ The initial phase of this study will focus on discovering the demographic makeup of courts-martial. These data will enable the Committee to determine whether perceptions that military panels are homogenous are accurate. The data results will also help inform policy recommendations on the nomination process.

After completing the panel composition study, the CRSC will begin assessing case attrition as well as court-martial outcomes in sexual assault cases. By studying case outcomes, the CRSC will attempt to discover why conviction rates in sexual assault cases are so much lower than those for other offenses.⁶⁵

⁶⁴ Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 379 (2018) (“Remarkably, in the current legal and social science literature, we lack quality answers to even the most basic social science questions about jury pools: How often do disparities exist and how large are they? Are disparities larger for some groups than for others? How often are disparities likely to be deemed ‘not fair and reasonable’ under any one of the available legal tests of underrepresentation?”).

⁶⁵ The DAC-IPAD staff reviewed court-martial documents and found that in fiscal years 2018–2020, not a single Service had more than a 50% conviction rate in adult penetrative sexual assault cases.

CHAPTER 3. POLICY SUBCOMMITTEE

I. INTRODUCTION

In the Joint Explanatory Statement (JES) accompanying section 535 of the FY20 NDAA, Congress requested that the DAC-IPAD study two issues: victim impact statements at presentencing proceedings and alternative justice programs.⁶⁶

The DAC-IPAD received some initial information on these issues in November 2020;⁶⁷ however, as noted earlier in this report, the DAC-IPAD was suspended in January 2021. After its reconstitution, the DAC-IPAD assigned the victim impact statement and alternative justice projects to the Policy Subcommittee (PSC) at its June 2022 public meeting.⁶⁸ The PSC reported its findings and recommendations regarding victim impact statements to the DAC-IPAD at its December 2022 public meeting, and the DAC-IPAD adopted five proposed recommendations.⁶⁹

II. SUBCOMMITTEE ACTIVITIES

The DAC-IPAD began studying the issue of victim impact statements in June 2022 and issued its *Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings* (VIS Report) in March 2023.⁷⁰ The VIS Report responded to the following questions posed by Congress in the FY20 JES:

- Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?
- Are military judges appropriately permitting other witnesses to testify about the impact of the crime?⁷¹

To respond to these questions, the Committee reviewed records of trial from court-martial cases tried in FY21 involving victim impact statements; spoke to Service victims' counsel program managers, Service trial defense organization chiefs, an attorney who represents victims in military and civilian court proceedings, former military judges, and members of Survivors United—a victim advocacy group that initially brought these issues to the attention of Congress; and reviewed federal and state laws and rules regarding victim impact statements.⁷²

The Committee noted that in the three years since Congress requested that the DAC-IPAD review this issue, the procedures for implementing victim impact statements have matured, the appellate courts further defined and clarified the rules governing these statements, and Congress enacted an important change to court-martial sentencing that requires military judges to serve as the sentencing authority in all special and general courts-martial, except in capital cases.⁷³

66 The JES accompanies Sec. 535. Extension of Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces of the FY20 NDAA, *supra* note 1.

67 *Transcript of DAC-IPAD Public Meeting* 163 (Nov. 6, 2020).

68 *Transcript of DAC-IPAD Public Meeting* 157 (June 22, 2022).

69 See *Transcript of DAC-IPAD Public Meeting* (Dec. 7, 2022).

70 The VIS Report can be found at <https://dacipad.whs.mil/reports>.

71 See *supra* note 70.

72 See *Transcript of DAC-IPAD Public Meeting* 8 (Feb. 14, 2020); *Transcript of DAC-IPAD Public Meeting* 94, 126 (Dec. 6, 2022).

73 This provision takes effect for cases in which the charged offenses are committed on or after Dec. 27, 2023. FY22 NDAA, *supra* note 1, § 539E.

At the conclusion of its review, the Committee determined that it is the R.C.M. 1001(c) standards, not the decisions of military judges, that inappropriately limit victim impact statements. The Committee further concluded that military judges generally do permit individuals who have suffered harm resulting from the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

In its report on victim impact statements, the Committee made five recommendations to amend R.C.M. 1001(c) to provide victims wider latitude in their impact statements. In December 2022, the Committee provided these recommendations in a public comment to the Joint Service Committee on Military Justice requesting the JSC seek to amend R.C.M. 1001(c).⁷⁴ The Committee recommended amending the definition of victim impact to provide a broader standard; allowing the victim to make a specific sentence recommendation in noncapital cases; allowing submission of an unsworn victim impact statement by audiotape, videotape, or other electronic means; allowing the victims' counsel to deliver the victim impact statement without having to show good cause; and removing the requirement that the victim provide a proffer of their impact statement prior to delivery.⁷⁵

The Committee concluded that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. The Committee members determined that with military judges soon to be serving as the sentencing authority, there is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions.

III. THE WAY AHEAD

A. Restorative Justice Programs

In the FY20 NDAA JES, Congress requested that the DAC-IPAD review “whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim's case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.”⁷⁶

On February 26, 2021—while the DAC-IPAD was suspended as part of the zero-based review—the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military (IRC) and directed the IRC to conduct a 90-day independent assessment of the military's treatment of sexual assault and sexual harassment.⁷⁷ The IRC made numerous recommendations for improvements to the systems used to treat and respond to reports of sexual assault, among them that the DAC-IPAD “study the methods our Allies have used to make amends to survivors, including restorative engagement to acknowledge harm and potential victim compensation.”⁷⁸

74 See DAC-IPAD public comment to the Joint Service Committee on Military Justice, *available at* <https://dacipad.whs.mil/meetings/materials> (December 6-7, 2022, Meeting).

75 See DAC-IPAD Recommendations 41–45 in the Summary of Findings, Observations, and Recommendations, above.

76 See *supra* note 73.

77 This review began March 24, 2021 and concluded with the release of the IRC's report in July 2021. See INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY STUDY, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (July 2021) [IRC Report], *available at* <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>.

78 IRC Report, *supra* note 77, IRC Recommendation 4.3 e.

In a September 2021 memo, the Secretary of Defense approved a road map for implementing the IRC's recommendations, including IRC Recommendation 4.3 e on restorative engagement programs, with an estimated completion date of fiscal year 2027.⁷⁹ The Secretary amended this recommendation to assign implementation responsibility to DoD, rather than the DAC-IPAD.

The DAC-IPAD intends to study the restorative engagement programs offered by our allies, as noted in the IRC report, and issue a report in the coming year as a means of offering the Committee's guidance to DoD as it develops a restorative engagement program.

B. Article 25, UCMJ, Panel Selection

In 2023, the PSC will conduct a comprehensive study to review and assess the criteria and processes used to nominate and select qualified members for detail to courts-martial, as well as to identify best practices for reforming the member selection system, including random selection.⁸⁰ This study will be coordinated with the related CRSC study on the demographic characteristics of panel members.⁸¹ The results of both of these studies will inform DAC-IPAD recommendations for reforming the system for selecting court-martial members.

The PSC study will include issues identified by the DAC-IPAD concerning both the Article 25(e)(2), UCMJ, court-martial member selection criteria and the processes used by the Services to facilitate that selection.⁸² Those issues include poorly defined selection criteria, subjective criteria, cognitive bias, lack of panel diversity, and the lack of transparency.⁸³

The PSC study will also consider the implications of recent legislation on member selection criteria and processes. Beginning in December 2023, panel member duties in non-capital cases will no longer include determining an appropriate sentence; instead, their duties will be limited to determining findings.⁸⁴ Beginning in December 2024, an amendment to Article 25(e), UCMJ, will require convening authorities to detail members using randomized selection processes prescribed by the President, rather than the current processes by which specific Service members are intentionally selected for duty.⁸⁵

79 U.S. Dep't. of Def., Memorandum from the Secretary of Defense on Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military (Sept. 22, 2021).

80 *Transcript of DAC-IPAD Meeting* 163-164 (February 22, 2023) (the DAC-IPAD assigned the PSC to study court-martial member selection criteria and processes).

81 *See supra* at pp. 19–20 (describing the CRSC study on panel member demographics).

82 *Transcript of DAC-IPAD Meeting* 12–94 (Dec. 21, 2022) (describing the criteria and processes used by the Services to select court-martial members and identifying issues); Article 25(e)(2), UCMJ (the convening authority “shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament.”).

83 *Transcript of DAC-IPAD Meeting* 355–56, 368, 381 (Sept. 21, 2022) (noting the lack of panel diversity); *Transcript of DAC-IPAD Meeting* 12–94 (Dec. 21, 2022) (describing the criteria and processes used by the Services to select court-martial members and identifying issues). *See also supra* at pp. 17–19 (noting panel member selection issues identified by the Committee).

84 FY22 NDAA, *supra* note 30, § 539E.

85 FY23 NDAA, *supra* note 39, § 543 (requiring randomized selection, to the maximum extent practicable, under regulations prescribed by the President); *Transcript of DAC-IPAD Public Meeting* 41–51 (Dec. 21, 2022) (describing the current selection processes as generally intentional rather than random).

CHAPTER 4. REPORT ON TOUR LENGTHS AND RATING CHAIN STRUCTURE FOR SERVICES' SPECIAL VICTIMS' COUNSEL / VICTIMS' LEGAL COUNSEL (SVC/VLC) PROGRAMS

I. INTRODUCTION

In October 2021, the DoD GC requested that the DAC-IPAD study and report on the issue of tour lengths of SVCs/VLCs, assess whether it is practical to adopt a minimum assignment length (with appropriate exceptions for operational concerns), and, if practical to adopt a minimum assignment length, recommend what the minimum should be.⁸⁶

In November 2021, in conjunction with the minimum tour length tasking, the DoD GC asked the DAC-IPAD to study and report on the rating chains of Army SVCs, including

- An assessment of the rating chain for Army SVC officer evaluation reports.
- A comparison of that rating chain with those used in the other Military Services' SVC/VLC programs.
- An evaluation of whether the rating chain for Army SVCs creates an actual or apparent limitation on those SVCs' independence or ability to zealously represent their clients.
- Any recommendations for change based on the study's findings.⁸⁷

In response to the DoD GC's request, during the period the DAC-IPAD was suspended due to the zero-based review the staff completed a draft report. The staff's study and draft report was based on a comprehensive review of detailed information provided by the Military Services in addition to literature, statutes, regulations, agency guidance, and reports relevant to SVC/VLC programs, as well as extensive interviews of SVC/VLC program managers, current and former SVCs/VLCs, victims represented by SVCs/VLCs, and civilian victim advocates who represent military sexual assault victims and work with SVCs/VLCs.

In April 2022, the DoD GC asked the DAC-IPAD to review the staff study and draft report on SVC/VLC tour lengths and Army SVC supervisory rating chains.⁸⁸

86 See Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study the Tour Lengths of Special Victims' Counsel/Victims' Legal Counsel* (Oct. 5, 2021) [Tour Length Memo], available at Appendix A. See *infra* notes 7-10 and accompanying text for status of DAC-IPAD during this time period.

87 See Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study Rating Chain of Army Special Victims' Counsel* (Nov. 2, 2021) [Rating Chain Memo], available at Appendix B.

88 See Memorandum from Caroline Krass, DoD General Counsel, to Chair, DAC-IPAD, *Request to Review Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs* (Apr. 21, 2022) [Request for Review Memo], available at Appendix C.

II. EXECUTIVE SUMMARY

The DAC-IPAD submitted its *Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel / Victims' Legal Counsel (SVC/VLC) Programs* in August 2022.⁸⁹

SVC/VLC programs in the Military Services provide advice, critical protections, and advocacy for victims throughout the military justice process. The programs—and the dedicated judge advocates who implement them—are at the forefront of the Department of Defense's delivery of legal services to victims. Since the formal inception of the programs in 2013, SVCs/VLCs have represented more than 30,000 clients across all of the Military Services.

Over the past decade, the SVC/VLC programs have grown and expanded. While the Services have continually adapted and improved these programs to meet the needs of victims, two aspects of the programs have come under recent scrutiny: (1) the issue of SVC/VLC tour lengths, and whether it is practical to adopt a minimum assignment length, and (2) whether the Army should adopt an independent supervisory rating structure for Army SVCs outside of the Office of the Staff Judge Advocate (OSJA) and local command, thereby aligning Army practice with the SVC/VLC rating structure in the other Military Services.

The SVC/VLC report includes the results of a comprehensive review of the Services' SVC/VLC programs, authorities, agency guidance, and reports relevant to these programs. In addition, the study included 60 interviews with current and former SVCs/VLCs, victims represented by SVCs/VLCs, SVC/VLC program managers, and civilian victim advocates who represent military victims of sexual assault.

III. FINDINGS AND RECOMMENDATIONS

The SVC/VLC report finds that longer tours for SVCs/VLCs better serve victims, minimize delay and inefficiencies in the military justice process, and enable judge advocates to develop the skills and expertise necessary to effectively advocate for their clients. This report also finds that the current Army rating structure adversely affects the independence and zealous advocacy of Army SVCs.

On the basis of those findings and the comprehensive review, the DAC-IPAD recommends:

DAC-IPAD Recommendation 41: An 18-month minimum assignment length for SVCs/VLCs serving in their first tour as a judge advocate, and a 24-month minimum for all other SVCs/VLCs, with appropriate exceptions for personal or operational reasons; and

DAC-IPAD Recommendation 42: The establishment of an independent supervisory rating structure for Army SVCs outside of the OSJA and local command.

89 The full report can be found at <https://dacipad.whs.mil/reports>.

CHAPTER 5. MEMBER OBSERVATIONS OF COURTS-MARTIAL AND ADVANCED LITIGATION TRAINING

I COURT-MARTIAL OBSERVATIONS

At its June 2022 public meeting, the DAC-IPAD approved a program for its members to attend and observe courts-martial involving charges of sexual offenses,⁹⁰ with a threefold purpose of (1) educating members on current courts-martial practice, (2) highlighting practice areas affected by recent or pending changes, and (3) identifying issues that may warrant further review.

Two former DAC-IPAD members and four current DAC-IPAD members attended a total of six courts-martial in their official DAC-IPAD capacity.⁹¹ Members record their observations on topics including motion and objection practice, voir dire, expert and witness testimony, evidence, sentencing proceedings, and the performance of the trial counsel, defense counsel, SVC/VLC, and military judge.⁹² Members share their observations during DAC-IPAD public meetings for discussion by the full Committee.

II ADVANCED LITIGATION COURSES

Following the June 2022 public meeting and testimony on the establishment of the Offices of Special Trial Counsel (OSTCs), the Air Force and the Army invited Committee members to attend advanced litigation training courses.⁹³ DAC-IPAD members attended an Air Force litigation course in August 2022 and an Army litigation course in September 2022.⁹⁴

The Air Force advanced sexual assault litigation course was a joint training event attended by prosecutors, defense counsel, and victims' counsel. This training was developed for experienced litigators, and the trial counsel attending the course had been selected to be part of the OSTC. The training covered voir dire, preparation and presentation of expert and witness testimony, and argument in sexual assault and special victim cases. The instructors consisted of Air Force Judge Advocate General's school staff and experienced counsel from the field.⁹⁵

90 *Transcript of DAC-IPAD Public Meeting 202–4* (June 22, 2022).

91 Former members Ms. Kathleen Cannon attended a Marine Corps court-martial in January 2020, and Mr. James Markey attended a Marine Corps court-martial in November 2019 and an Army court-martial in January 2020. Dr. Cassia Spohn attended a Marine Corps court-martial in November 2019. Ms. Martha Bashford, Mr. A. J. Kramer, and MG (R) Marcia Anderson attended courts-martial from June 2022 through January 2023. In addition, several DAC-IPAD members have significant exposure to recent courts-martial practice in their personal capacity.

92 Members record their observations on a form without attribution to any individual by name.

93 *Transcript of DAC-IPAD Public Meeting 7* (Sept. 21, 2022).

94 *Id.* at 71, 74. The Air Force training was attended by Ms. Bashford, Ms. Suzanne Goldberg, and Dr. Spohn. Ms. Bashford also attended the Army training program.

95 *Id.* at 71–73.

The Army sexual assault trial advocacy course was limited to prosecutors, with approximately half projected to be assigned to the OSTC.⁹⁶ The training consisted of lectures and small group practical exercises covering motion practice, corroborating evidence, voir dire, opening statements, closing and rebuttal arguments, expert testimony, and direct and cross-examinations. The lectures were presented by military and civilian experts, with the civilian forensic psychologist and forensic biologist remaining to participate in the practical exercises and to provide feedback to the students. The practical exercise evaluators consisted of both experienced field-grade litigators and civilian highly qualified sexual assault experts, the latter from the Trial Counsel Assistance Program.⁹⁷

Members who attended the litigation courses reported their observations to the full Committee at the September 2022 public meeting. Their observations covered the quality of the teaching and instructor feedback, the quality of the breakout sessions and group practical exercises, and the efficacy of joint training.

III CONCLUSION

Committee members will continue to attend sexual offense courts-martial across the Military Services and report their observations to the full Committee. Committee members will also continue to monitor training as they review the OSTC implementation plans.

⁹⁶ *Id.* at 74–75. This course is being redesigned into a three-week Special Trial Counsel certification course with the first training scheduled for June 2023.

⁹⁷ *Id.* at 75–76.

APPENDIXES

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APPENDIX A AUTHORIZING STATUTE AND AMENDMENTS

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SECTION 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES. (PUBLIC LAW 113–291; 128 STAT. 3374; 10 U.S.C. 1561 NOTE)

(a) ESTABLISHMENT REQUIRED.—

- (1) IN GENERAL.—The Secretary of Defense shall establish and maintain within the Department of Defense an advisory committee to be known as the “Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces” (in this section referred to as the “Advisory Committee”).
- (2) DEADLINE FOR ESTABLISHMENT.—The Secretary shall establish the Advisory Committee not later than 30 days before the termination date of the independent panel established by the Secretary under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1758), known as the “judicial proceedings panel”.

(b) MEMBERSHIP.—The Advisory Committee shall consist of not more than 20 members, to be appointed by the Secretary of Defense, who have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Advisory Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as a member of the Advisory Committee.

(c) DUTIES.—

- (1) IN GENERAL.—The Advisory Committee shall 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.
- (2) BASIS FOR PROVISION OF ADVICE.—For purposes of providing advice to the Secretary pursuant to this subsection, the Advisory Committee shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in paragraph (1).

(d) ANNUAL REPORTS.—Not later than March 30 each year, the Advisory Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives a report describing the results of the activities of the Advisory Committee pursuant to this section during the preceding year.

(e) TERMINATION.—

- (1) IN GENERAL.— Except as provided in paragraph (2), the Advisory Committee shall terminate on the date that is five years after the date of the establishment of the Advisory Committee pursuant to subsection (a).

(2) CONTINUATION.—The Secretary of Defense may continue the Advisory Committee after the termination date applicable under paragraph (1) if the Secretary determines that continuation of the Advisory Committee after that date is advisable and appropriate. If the Secretary determines to continue the Advisory Committee after that date, the Secretary shall submit to the President and the congressional committees specified in subsection (d) a report describing the reasons for that determination and specifying the new termination date for the Advisory Committee.

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL.—Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually thereafter” after “reports”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

SECTION 537. MODIFICATION OF DEADLINE FOR ESTABLISHMENT OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

Section 546(a)(2) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291; 128 Stat. 3374; 10 U.S.C. 1561 note) is amended by striking “not later than” and all that follows and inserting “not later than 90 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016.”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019

SEC. 533. AUTHORITIES OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended—

(1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

“(d) AUTHORITIES.—

“(1) HEARINGS.—The Advisory Committee may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the committee considers appropriate to carry out its duties under this section.

“(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of the Advisory Committee, a department or agency of the Federal Government shall provide information that the Advisory Committee considers necessary to carry out its duties under this section. In carrying out this paragraph, the department or agency shall take steps to prevent the unauthorized disclosure of personally identifiable information.”.

SEC. 547. REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS.

- (a) **REPORT.**—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
 - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
 - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).
- (b) **COVERED INDIVIDUAL DEFINED.**—In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

SEC. 535. EXTENSION OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

Section 546(f)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended by striking “five” and inserting “ten”.

Joint Explanatory Statement:

The conferees request the DAC-IPAD review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim’s case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.

Further, the conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.

SEC. 540I. ASSESSMENT OF RACIAL, ETHNIC, AND GENDER DISPARITIES IN THE MILITARY JUSTICE SYSTEM.

- (a) IN GENERAL.—The Secretary of Defense shall provide for the carrying out of the activities described in subsections (b) and (c) in order to improve the ability of the Department of Defense to detect and address racial, ethnic, and gender disparities in the military justice system.
- (b) SECRETARY OF DEFENSE AND RELATED ACTIVITIES.—The activities described in this subsection are the following, to be commenced or carried out (as applicable) by not later than 180 days after the date of the enactment of this Act:
 - (1) For each court-martial carried out by an Armed Force after the date of the enactment of this Act, the Secretary of Defense shall require the head of the Armed Force concerned—
 - (A) to record the race, ethnicity, and gender of the victim and the accused, and such other demographic information about the victim and the accused as the Secretary considers appropriate;
 - (B) to include data based on the information described in subparagraph (A) in the annual military justice reports of the Armed Force.
 - (2) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall issue guidance that—
 - (A) establishes criteria to determine when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed; and
 - (B) describes how such a review should be conducted.
 - (3) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall—
 - (A) conduct an evaluation to identify the causes of any racial, ethnic, or gender disparities in the military justice system;
 - (B) take steps to address the causes of such disparities, as appropriate.
- (c) DAC-IPAD ACTIVITIES.—
 - (1) IN GENERAL.—The activities described in this subsection are the following, to be conducted by the independent committee DAC-IPAD:
 - (A) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year addressed.
 - (B) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

- (C) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

(2) INFORMATION FROM FEDERAL AGENCIES.—

- (A) IN GENERAL.—Upon request by the chair of the committee, a department or agency of the Federal Government shall provide information that the committee considers necessary to conduct reviews and assessments required by paragraph (1), including military criminal investigative files, charge sheets, records of trial, and personnel records.

- (B) HANDLING, STORAGE, AND RETURN.—The committee shall handle and store all records received and reviewed under this subsection in accordance with applicable privacy laws and Department of Defense policy, and shall return all records so received in a timely manner.

- (3) REPORT.—Not later than one year after the date of the enactment of this Act, the committee shall submit to the Secretary of Defense, and to the Committees on Armed Services of the Senate and the House of representatives, a report setting forth the results of the reviews and assessments required by paragraph (1). The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

(4) DEFINITIONS.—In this subsection:

- (A) The term “independent committee DAC-IPAD” means the independent committee established by the Secretary of Defense under section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374), commonly known as the “DAC-IPAD”.
- (B) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.
- (C) The term “completed”, with respect to a case, means that the case was tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.
- (D) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.
- (E) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

H. Rept. 116-120 on H.R. 2500

Title V—Military Personnel Policy Items of Special Interest

Appointment of Guardian ad Litem for Minor Victims

The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

APPENDIX B COMMITTEE CHARTER AND TERMS OF REFERENCE

Charter

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

1. Committee's Official Designation: The committee shall be known as the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).
2. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("the FY 2015 NDAA") (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., App) and 41 C.F.R. § 102-3.50(a), established this non-discretionary Federal advisory committee.
3. Objectives and Scope of Activities: Pursuant to section 546(c)(1) of the FY 2015 NDAA, the DAC-IPAD shall provide independent advice and recommendations 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 ongoing review of cases.
4. Description of Duties: Pursuant to sections 546(c)(2) and (d) of the FY 2015 NDAA, the DAC-IPAD, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel of the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and the House of Representatives, a report describing the results of the activities of the DAC-IPAD pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The purpose of providing advice to the Secretary of Defense pursuant to this section, the DAC-IPAD shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in section 546(c)(1) of the FY 2015 NDAA. The DAC-IPAD will also focus on matters of special interest to the DoD, as determined by the Secretary of Defense, the Deputy Secretary of Defense, or the GC DoD, as the DAC-IPAD's sponsor.

Pursuant to section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283), not later than September 30, 2019 and once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual offenses that involved suspicion of or adverse action against a covered individual as described in paragraphs (1) and (2).

The term "covered individual" means an individual who is identified in the case files of a military criminal investigative organization as a victim of a sexual offense that occurred while that individual was serving on active duty as a member of the Armed Forces. The term 'suspected of,' when used with respect to a covered individual suspected of collateral misconduct or crimes as described in subsection (a), means that

an investigation by a military criminal investigative organization reveals facts and circumstances that would lead a reasonable person to believe that the individual committed an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

Pursuant to the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92) Joint Explanatory Statement, the conferees request the DAC-IPAD:

- (1) Review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases when the evidence in the victim’s case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.
- (2) On a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under Rule for Courts-Martial (RCM) 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.

The Joint Explanatory Statement summarized the conferees’ concern as follows: [T]he conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted RCM 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

5. Agency or Official to Whom the Committee Reports: The DAC-IPAD reports to the Secretary of Defense and the Deputy Secretary of Defense, through the GC DoD, who may act upon the DAC-IPAD’s advice and recommendations in accordance with DoD policy and procedures.
6. Support: The DoD, through the Office of the GC DoD, provides support for the Committee’s functions and ensures compliance with the requirements of the FACA, the Government in the Sunshine Act (“the Sunshine Act”) (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.
7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating costs for the DAC-IPAD, to include travel, meetings, and contract support, are approximately \$2,600,000. The estimated annual personnel cost to the DoD is 15.0 full-time equivalents.
8. Designated Federal Officer: The DAC-IPAD’s Designated Federal Officer (DFO) shall be a full-time or permanent part-time DoD civilian officer or employee, or active duty member of the Armed Forces, designated in accordance with established DoD policy and procedures.

The DAC-IPAD’s DFO is required to attend all DAC-IPAD and subcommittee meetings for the entire duration of each meeting. However, in the absence of the DAC-IPAD’s DFO, a properly approved Alternate DFO, duly designated to the DAC-IPAD in accordance with DoD policy and procedures, shall attend the entire duration of all DAC-IPAD and subcommittee meetings.

The DFO, or Alternate DFO, calls all DAC-IPAD and subcommittee meetings; prepares and approves all meeting agendas; and adjourns any meeting when the DFO, or Alternate DFO, determines adjournment to be in the public’s interest or required by governing regulations or DoD policy and procedures.

9. Estimated Number and Frequency of Meetings: The DAC-IPAD shall meet at the call of the DFO, in consultation with the DAC-IPAD's Chair and the GC DoD. The estimated number of meetings is at least one per year.
10. Duration: The need for this advisory committee is on a continuing basis through February 28, 2026; however, the DAC-IPAD is subject to renewal every two years.
11. Termination: In accordance with sections 546(e)(1) and (2) of the FY 2015 NDAA, as modified by section 535 of the FY 2020 NDAA, the DAC-IPAD will terminate on February 28, 2026, ten years after the DAC-IPAD was established, unless the DoD renews the DAC-IPAD in accordance with DoD policy and procedures.
12. Membership and Designation: Pursuant to section 546(b) of the FY 2015 NDAA, the DAC-IPAD will be composed of no more than 20 members who must have extensive experience and subject matter expertise in the investigation, prosecution, or defense of allegations of sexual offenses. DAC-IPAD members may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as DAC-IPAD members.

Authority to invite or appoint individuals to serve on the DAC-IPAD rests solely with the Secretary of Defense or the Deputy Secretary of Defense ("the DoD Appointing Authority") for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authority, may serve more than two consecutive terms of service on the DAC-IPAD, to include its subcommittees, or serve on more than two DoD Federal advisory committees at one time. DAC-IPAD members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. DAC-IPAD members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members. The DoD Appointing Authority shall appoint the DAC-IPAD's leadership from among the membership previously appointed to serve on the DAC-IPAD in accordance with DoD policy and procedures, for a term of service of one-to-two-years, with annual renewal, which shall not exceed the member's approved appointment.

All members of the DAC-IPAD are expected to exercise their best judgment on behalf of the DoD, without representing any particular point of view and to discuss and deliberate in a manner that is free from conflicts of interest. Except for reimbursement of official DAC-IPAD related travel and per diem, DAC-IPAD members serve without compensation.

13. Subcommittees: The DoD, when necessary and consistent with the DAC-IPAD's mission and DoD policy and procedures, may establish subcommittees, task forces, or working groups ("subcommittees") to support the DAC-IPAD. Establishment of subcommittees shall be based upon a written determination, including terms of reference (ToR), by the DoD Appointing Authority or the GC DoD.

All subcommittees operate under the provisions of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures. If a subcommittee's duration exceeds that of the DAC-IPAD, and the DoD does not renew the DAC-IPAD, then the subcommittee terminates when the DAC-IPAD does.

Subcommittees shall not work independently of the DAC-IPAD and shall report all of their recommendations and advice solely to the DAC-IPAD for its thorough deliberation and discussion at a properly noticed and open meeting, subject to the Sunshine Act. Subcommittees have no authority to make decisions and recommendations, orally or in writing, on behalf of the DAC-IPAD. Neither the subcommittee nor any of its members may provide updates or report directly to the DoD or to any Federal officer or employee, whether orally or in writing, on behalf of the DAC-IPAD. If a majority of DAC-IPAD members are appointed to a particular subcommittee, then that subcommittee may be required to operate pursuant to the same FACA notice and openness requirements governing the DAC-IPAD's operations.

Individual appointments to serve on DAC-IPAD subcommittees, which may be no more than 15 members, shall be approved by the DoD Appointing Authority for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member shall serve more than two consecutive terms of service on a subcommittee without prior approval from the DoD Appointing Authority. Subcommittee members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as RGE members. The DoD Appointing Authority shall appoint subcommittee leadership from among the membership previously appointed to serve on a subcommittee in accordance with DoD policy and procedures, for a term of service of one-to-two-years, with annual renewal, not to exceed the member's approved appointment.

All members of a subcommittee are appointed to exercise their own best judgment on behalf of the DoD, without representing any particular point of view, and to discuss and deliberate in a manner free from conflicts of interest. Except for reimbursement for official travel and per diem related to the DAC-IPAD or its subcommittees, subcommittee members shall serve without compensation.

14. Recordkeeping: The records of the DAC-IPAD and its subcommittees shall be managed in accordance with General Records Schedule 6.2, Federal Advisory Committee Records, or other approved agency records disposition schedule, and the appropriate DoD policy and procedures. These records will be available for public inspection and copying, subject to the Freedom of Information Act (5 U.S.C. § 552).
15. Filing Date: February 16, 2022

TERMS OF REFERENCE

These terms of reference establish the objectives for the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

I. Objectives and Scope:

Pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA) (Pub. L. No. 113-291), as amended by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. No. 114-92), the DAC-IPAD shall provide independent advice and recommendations 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 ongoing review of cases.

II. Methodology:

A. Regulatory Compliance.

All DAC-IPAD assessments will be conducted in compliance with the Federal Advisory Committee Act (FACA) (5 U.S.C., App) and the General Services Administration, Federal Advisory Committee Management Final Rule (41 C.F.R. Part 102-3).

B. Tasking Authority.

All work performed by the DAC-IPAD, as designated by the Secretary of Defense and defined in statute, is based upon these Terms of Reference or written tasks assigned to the DAC-IPAD by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD General Counsel (DoD GC) unless otherwise provided for by statute or Presidential directive. These Terms of Reference and all written tasks must be provided to the DoD Advisory Committee Management Officer and are subject to public review.

C. Access to Records.

The DAC-IPAD is authorized to access and review, consistent with law, documents and records from the Department of Defense and Military Departments and any other Federal department or agency which the Committee deems necessary. The DAC-IPAD is authorized to meet with and interview DoD and other personnel the Committee determines necessary to complete its tasks. Committee members may be required to execute a non-disclosure agreement, consistent with FACA.

D. Collection of Information through Meetings, Visits, and Observations.

The Committee may hold meetings and gather information through interviews, presentations, oral or written testimony, roundtable/panel discussions, document reviews, military installation or other site visits, court-martial observations, or other means, as necessary.

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E. *Input from Government Agencies, Experts, and Other Entities.*

As appropriate, the Committee may seek input from other Federal agencies, non-Federal entities, and other sources with pertinent knowledge or experience.

F. *Input from Members the Public.*

The Committee will consider all submissions by organizations or members of the public that are relevant to its mission and received either in writing or orally during public meetings in compliance with FACA.

III. Statutory Deliverables:

A. *Annual Report.*

Pursuant to section 546(d) of the FY15 NDAA, the DAC-IPAD, not later than March 30 of each year, will submit to the Secretary of Defense through the DoD GC, and to the Committees on Armed Services of the Senate and the House of Representatives, a report describing the results of the activities of the DAC-IPAD during the preceding year.

B. *Biennial Collateral Misconduct Report.*

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. No. 115-232), as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY 21 NDAA) (Pub. L. No. 116-283), not later than September 30, 2019, and once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was suspected of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual offenses that involved suspicion of or adverse action against a covered individual as described in paragraphs (1) and (2).

The term “covered individual” means an individual who is identified in the case files of a military criminal investigative organization as a victim of a sexual offense that occurred while that individual was serving on active duty as a member of the Armed Forces. The term “suspected of,” when used with respect to a covered individual suspected of collateral misconduct or crimes as described in subsection (a), means that an investigation by a military criminal investigative organization reveals

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facts and circumstances that would lead a reasonable person to believe that the individual committed an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

C. DAC-IPAD Studies.

Pursuant to section 546(c)(2) of the FY15 NDAA, the DAC-IPAD shall study issues identified in its ongoing reviews of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

IV. Deliverables Requested by Joint Explanatory Statement:

The Joint Explanatory Statement accompanying the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. No. 116-92) requested two assessments by the DAC-IPAD:

(1) *Assessment of Alternative Justice Programs.*

Review, as appropriate, whether other justice programs (*e.g.*, restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases where the evidence in the victim's case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.

(2) *Victim Impact Statement Assessment.*

On a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under Rule for Courts-Martial (RCM) 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001. The assessment should recognize:

- The importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense.
- That Members of Congress have received complaints that some military judges have interpreted RCM 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

The DAC-IPAD will provide the DoD GC with a recommended date for completion of those two assessments.

V. Deliverable Requested by DoD GC:

Pursuant to the DAC-IPAD Charter filed on February 16, 2022, the DAC-IPAD will address matters of special interest to DoD, as directed by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC, as the DAC-IPAD's sponsor, including:

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Appellate Case Review.

In a January 28, 2022, memorandum to the DAC-IPAD Staff Director, the DoD GC requested that the DAC-IPAD conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study. The DAC-IPAD's report should include an analysis of the most commonly recurring issues and any recommendations for reforms and should:

- Consider the efficacy of the military appellate system's handling of those cases.
- Identify any recommended training and education improvements for military justice practitioners suggested by the study.

The DAC-IPAD should determine the optimal study design to analyze the issues set out above. In developing a study design, the DAC-IPAD should note two recent changes to the law that affect the Courts of Criminal Appeals' reviews of findings and sentences:

- Section 542(b) of the FY 21 NDAA modified the factual sufficiency standard of review that the Courts of Criminal Appeals apply when reviewing findings of guilty entered on or after January 1, 2021.
- In conjunction with the enactment of sentencing reform to move largely to parameter-based sentencing in special and non-capital general court-martial cases, section 539E of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. No. 117-81) modified the Courts of Criminal Appeals' sentence appropriateness review standard to be applied in cases where all offenses resulting in a finding of guilty occur after December 27, 2023.

The DAC-IPAD will provide the DoD GC with a recommended date for completion of that review.

VI. Support:

The DoD, through the Office of the DoD GC, provides support for the Committee's functions and ensures compliance with the requirements of the FACA, the Government in the Sunshine Act (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.



Caroline Krass
General Counsel

Date:

MAY 23 2022

APPENDIX C. COMMITTEE MEMBERS



Marcia Anderson was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin starting in 1998 until her retirement in 2019. In this role she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson recently retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy Commanding General of the Army’s Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of \$8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.



Martha Bashford served in the New York County District Attorney’s Office starting in 1979 until her retirement in 2020. At the time of her retirement, she was the chief of the New York County District Attorney’s Office Sex Crimes Unit, which was the first of its kind in the country. She served in this role starting in 2011. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI’s Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (*summa cum laude*) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.



William E. Cassara is a former Army prosecutor, defense counsel and appellate counsel, with more than 30 years of military law experience. Mr. Cassara holds a law degree from University of Baltimore and an undergraduate degree in business administration from Florida State University. He is a former professor at the University of Baltimore School of Law and the University of South Carolina School of Law. Mr. Cassara has been in private military law practice since 1996 focusing on court-martial appeals, discharge upgrades, security clearance and all other administrative military law matters.



Margaret “Meg” Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar Association’s Criminal Justice Section Victims Committee, as co-chair of the Oregon Attorney General’s Crime Victims’ Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General’s Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.



Suzanne Goldberg has served in the U.S. Department of Education’s Office for Civil Rights since day one of the Biden-Harris administration as Acting Assistant Secretary (January – October 2021) and Deputy Assistant Secretary for Strategic Operations and Outreach. Goldberg brings extensive experience in civil rights leadership, with expertise in gender and sexuality law, and many years as a university administrator and faculty member. Before joining the U.S. Department of Education, Goldberg was the inaugural Executive Vice President for University Life at Columbia University and on the faculty of Columbia Law School, where she is on a public service leave from her role as the Herbert and Doris Wechsler Clinical Professor of Law at Columbia Law School. She founded the Law School’s Sexuality and Gender Law Clinic, the first of its kind in the nation, and was co-founder and co-director of the Law School’s Center for Gender and Sexuality Law. Goldberg earlier served as a senior staff attorney with Lambda Legal, a national legal organization committed to the full recognition of the civil rights of LGBT people and people living with HIV. Goldberg holds a law degree with honors from Harvard University and a bachelor’s degree with honors from Brown University and was a Fulbright Fellow at the National University of Singapore.



Judge Paul W. Grimm is a Professor of the Practice and Director of the Bolch Judicial Institute at Duke Law School. Prior to joining Duke Law School, Judge Grimm served as a federal judge for 25 years. In 2012 he was appointed as a District Judge for the United States District Court for the District of Maryland. Previously, he was appointed to the Court as a Magistrate Judge in February 1997 and served as Chief Magistrate Judge from 2006 through 2012. In September, 2009 he was appointed by the Chief Justice of the United States to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure. Additionally, Judge Grimm is an adjunct professor of law at the University of Maryland School of Law, where he teaches evidence, and also has taught trial evidence, pretrial civil procedure, and scientific evidence. He also has been an adjunct professor of law at the University of Baltimore School of Law, where he taught a course regarding the discovery of and pretrial practices associated with electronically stored evidence.

Before joining the Court, Judge Grimm was in private practice in Baltimore for thirteen years, during which time he handled commercial litigation. He also served as an Assistant Attorney General for the State of Maryland, an Assistant State’s Attorney for Baltimore County, Maryland, and a Captain in the United States Army Judge

Advocate General's Corps. While on active duty in the Army, Judge Grimm served as a defense attorney and prosecutor while assigned to the JAG Office at Aberdeen Proving Ground, Maryland, and thereafter as an action officer in the Office of the Judge Advocate General of the Army (Administrative Law Division), The Pentagon. In 2001, Judge Grimm retired as a Lieutenant Colonel from the United States Army Reserve.

Judge Grimm received his undergraduate degree from the University of California Davis (summa cum laude), his J.D. from the University of New Mexico School of Law (magna cum laude, Order of the Coif) and his LLM from Duke Law School.



A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr. Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers. He is a member of the Judicial Conference of the United States' Advisory Committee on Evidence Rules and the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.



Jennifer Gentile Long (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.



Jenifer Markowitz is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a

national protocol and training standards for sexual assault medical- forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.



Jennifer O'Connor is Vice President and General Counsel of Northrop Grumman Corporation. Prior to joining Northrop Grumman, Ms. O'Connor served as the General Counsel for the Department of Defense. In that role, she was the chief legal officer of the Department and the principal legal advisor to the Secretary of Defense. Earlier in her career, she served in numerous positions and agencies throughout the federal government. Her past positions include service in the Obama administration as Deputy Assistant to the President and Deputy White House Counsel responsible for the litigation, oversight and investigations portfolios; Senior Counsel at the Department of Health and Human Services; and as Counselor to the Commissioner of the Internal Revenue Service. Ms. O'Connor also worked in the Clinton Administration as Deputy Assistant Secretary for Policy at the Department of Labor, Special Assistant to the President in the Office of the White House Deputy Chief of Staff; Special Assistant to the President in the Office of Cabinet Affairs; and as Deputy Director of the White House Office of Management and Administration. Ms. O'Connor received a Bachelor of Arts degree from Harvard University, a Masters in Public Administration from Columbia University's School of International Public Affairs, and a Juris Doctor degree from Georgetown University.



BGen James (Jim) Schwenk was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of "don't ask, don't tell," for the provision of benefits to same-sex spouses of military personnel, in the review of the murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.



Judge Karla N. Smith was appointed to the Circuit Court for Montgomery County, Maryland in December 2014 by Governor Martin O'Malley. Judge Smith served on the District Court of Maryland from August 2012 until her appointment to the Circuit Court. In addition, Judge Smith serves as the Judiciary's representative on the State Council on Child Abuse and Neglect; the Operations Subcommittee of the Judiciary Committee on Equal Justice; and she represents the Circuit Court on the Montgomery County Domestic Violence Coordinating Council (DVCC).

Prior to her appointment, Judge Smith worked as a prosecutor for over 15 years. For five years, Judge Smith served as the Chief of the Family Violence Division of the Montgomery County State's Attorney's Office. Additionally, she sat on the Montgomery County Child Fatality Review Team; the Multidisciplinary Case Review Team for Child Abuse and Neglect; the Elder and Vulnerable Adult Abuse Task Force, which she chaired; the Interagency Sex Offender Management Team; Domestic Violence Case Review Team; and the Montgomery County Teen Dating Taskforce. It was during this time that Judge Smith was integral to the development of the Montgomery County Family Justice Center and the drafting and passage of a criminal child neglect statute that was signed into law in 2011.

Judge Smith received her Bachelor of Arts degree from the University of Maryland and her Juris Doctor from the University of Virginia. A life-long resident of Montgomery County and a product of Montgomery County Public Schools, Judge Smith currently lives in Bethesda with her husband and three sons.



Cassia Spohn is a Regents Professor in the School of Criminology and Criminal Justice at Arizona State University and an Affiliate Professor of Law at ASU's Sandra Day O'Connor College of Law. She is a Fellow of the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Western Society of Criminology. She is the recipient of numerous academic awards, including the University of Nebraska Outstanding Research and Creative Activity Award, the W.E.B. DuBois Award for Contributions to Research on Crime and Race/Ethnicity, the Lifetime Achievement Award from the American Society of Criminology's

Division on Corrections and Sentencing, and Arizona State University's Faculty Achievement Award for Defining-Edge Research in the Social Sciences. Dr. Spohn's research interests include the correlates of federal and state sentencing outcomes, prosecutorial decision making, the intersections of race, ethnicity, gender, crime and justice, and sexual assault case processing decisions. She is the author of eight books, including *How Do Judges Decide: The Search for Fairness and Justice in Punishment* and *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System*. She is the author of more than 140 peer-reviewed publications. She currently is working on a National Science Foundation-funded project evaluating the impact of Arizona's recent ban on peremptory challenges and a series of papers on the imposition of life sentences in the U.S. District Courts.



Meghan Tokash is a trial attorney with the Human Trafficking Prosecution Unit, Criminal Section, Civil Rights Division at Department of Justice. Prior to her current position, she served as an Assistant United States Attorney at the Department of Justice. Previously, she served as a special victim prosecutor in the U.S. Army Judge Advocate General's Corps for eight years, litigating cases related to homicide, rape, sexual assault, domestic violence and child abuse. She worked in the Army's first Special Victim Unit at the Fort Hood Criminal Investigation Division Office. She deployed to Iraq as the senior trial counsel for U.S. Forces Iraq, and prosecuted special victim cases across U.S. Army Europe and U.S. Army Central Command. Ms. Tokash was an attorney advisor for the Judicial Proceedings Panel prior to her 2017 appointment by Secretary of Defense Ash Carter to serve on the Defense Advisory Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces. In 2021, Ms. Tokash served on the 90-day Independent Review Commission on Sexual Assault in the Military that was established by Secretary of Defense Lloyd Austin at the direction of President Biden.



Judge Walton was born in Donora, Pennsylvania. In 1971, he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission's recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary's Criminal Law Committee, on which he served until 2011. In 2007, Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

APPENDIX D. SUBCOMMITTEE TERMS OF REFERENCE

TERMS OF REFERENCE

These terms of reference (ToR) establish the mission and objectives of the Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

I. Mission Statement: The mission of the Case Review Subcommittee is to assess and provide independent advice to the DAC-IPAD in order for it to make recommendations to the Secretary of Defense and Deputy Secretary of Defense (“the DoD Appointing Authority”) through the Department of Defense General Counsel (DoD GC), related to 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 cases involving such allegations.

II. Issue Statement: Section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, as amended by section 537 of the NDAA for FY 2016, provides that the DAC-IPAD will provide the Secretary of Defense independent advice and recommendations on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, and that, as a basis for such advice, the DAC-IPAD will review cases involving allegations of sexual misconduct on an ongoing basis.

III. Objectives and Scope: The Case Review Subcommittee will address the following specific objectives:

1. Assessing the strengths and weaknesses of the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces through the review of military justice cases from investigation through final disposition, including appellate review, if applicable.
2. Assessing differences among the Military Departments (MILDEP) in the investigation, prosecution, and defense of allegations of sexual misconduct.
3. Identifying best practices among the MILDEPs in the investigation, prosecution, and defense of allegations of sexual misconduct.
4. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Case Review Subcommittee in writing by the DoD Appointing Authority or the DoD GC.

The Case Review Subcommittee will develop conclusions and recommendations on the matters above for consideration and use by the DAC-IPAD as it deems appropriate.

TERMS OF REFERENCE

IV. Methodology: The Case Review Subcommittee must comply with the DAC-IPAD Charter and the DAC-IPAD ToR (May 23, 2022) in the undertaking and execution of all projects, tasks, studies, and reports. Additionally, in support of the Case Review Subcommittee's ToR and the work conducted in response to it:

1. The Case Review Subcommittee is authorized to access all non-sealed, non-privileged, unclassified case documents (including records of trial, investigation case files, prosecutorial case files, and staff judge advocate advice), records, and personnel from the DoD and MILDEPs it deems necessary to complete its task. Case Review Subcommittee participants may be required to execute non-disclosure agreements where required by law. All requests will be consistent with applicable laws; applicable security classifications; DoDI 5105.04, "Department of Defense Federal Advisory Committee Management Program"; and the Case Review Subcommittee's ToR. As special government employee members of a DoD Federal advisory committee, the Case Review Subcommittee members will not be given any access to DoD networks, to include DoD email systems.

Once material is provided to the Case Review Subcommittee, it becomes a permanent part of the DAC-IPAD's records. All data/information provided to the Subcommittee is subject to public inspection unless the originating Component or MILDEP office properly marks the data/information with the appropriate classification and Freedom of Information Act exemption categories before the data/information is released to the Case Review Subcommittee.

2. The Case Review Subcommittee may conduct interviews and site visits, as appropriate, and in accordance with the DAC-IPAD Charter.
3. The Case Review Subcommittee may seek input from other sources with pertinent knowledge or experience, as appropriate.

V. Deliverables: The Case Review Subcommittee will complete all tasks, projects, studies, and reports as assigned to it in writing by the DoD Appointing Authority or the DoD GC.

1. As a subcommittee of the DAC-IPAD, the Case Review Subcommittee will not work independently of the DAC-IPAD's charter and will report its recommendations, including providing interim updates, to the full DAC-IPAD in a properly noticed and open public meeting for full deliberation and discussion and committee approval, subject to the Government in the Sunshine Act (5 U.S.C. § 552b) (Sunshine Act) exemptions, as appropriate. The Case Review Subcommittee and the DAC-IPAD will operate in conformity with, and pursuant to, the DAC-IPAD's charter, the Federal Advisory Committee Act (FACA), the Sunshine Act, other applicable Federal statutes and regulations, and DoD policies and procedures. The Case Review Subcommittee does not have the authority to make decisions on behalf of the DAC-IPAD nor can it report directly to any Federal representative. The members of the Case Review Subcommittee and the DAC-IPAD are subject to certain Federal ethics laws, including Title 18, United States Code, § 208, governing conflicts of interest, and the Standards of Ethical Conduct regulations in 5 C.F.R, Part 2635.

TERMS OF REFERENCE

2. The Case Review Subcommittee is tasked to complete the study requested in the DoD GC's January 28, 2022 memorandum, subject: Request to Study Appellate Decisions in Military Sexual Assault Cases (attached). After an initial assessment, the Case Review Subcommittee will provide the DAC-IPAD an appropriate timeframe in which it can complete this study.

VI. Support: The DoD, through the Office of the DoD GC, provides support for the Case Review Subcommittee's functions and ensures compliance with the requirements of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures.

Under the authority of the DoD GC, the DAC-IPAD Executive Director will support and coordinate all Case Review Subcommittee activities.

Attachment:
As stated

TERMS OF REFERENCE

These terms of reference (ToR) establish the mission and objectives of the Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

I. Mission Statement: The mission of the Policy Subcommittee is to assess and provide independent advice to the DAC-IPAD in order for it to make recommendations to the Secretary of Defense and Deputy Secretary of Defense (“the DoD Appointing Authority”), through the Department of Defense General Counsel (DoD GC), related to 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 DoD policies, Military Department (MILDEP) policies, and Uniform Code of Military Justice (UCMJ) provisions applicable to such allegations.

II. Issue Statement: Section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, as amended by section 537 of the NDAA for FY 2016, provides that the DAC-IPAD will provide the Secretary of Defense independent advice and recommendations on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, and that, as a basis for such advice, the DAC-IPAD will review cases involving allegations of sexual misconduct on an ongoing basis.

III. Objectives and Scope: The Policy Subcommittee will address the following specific objectives:

1. Reviewing and assessing policies promulgated by the DoD and the MILDEPs, and UCMJ provisions related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
2. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Policy Subcommittee in writing by the DoD Appointing Authority or the DoD GC.

The Policy Subcommittee will develop conclusions and recommendations on the matters above for consideration and use by the DAC-IPAD as it deems appropriate.

IV. Methodology: The Policy Subcommittee must comply with the DAC-IPAD Charter and the DAC-IPAD ToR (May 23, 2022) in the undertaking and execution of all projects, tasks, studies, and reports. Additionally, in support of the Policy Subcommittee’s ToR and the work conducted in response to them:

1. The Policy Subcommittee is authorized to access all non-sealed, non-privileged, unclassified case documents (including records of trial, investigation case files, prosecutorial case files, and staff judge advocate advice), records, and personnel from the DoD and MILDEPs it deems necessary to complete its task. Policy Subcommittee participants may be required to execute non-disclosure agreements where required by law.

TERMS OF REFERENCE

All requests will be consistent with applicable laws; applicable security classifications; DoDI 5105.04, “Department of Defense Federal Advisory Committee Management Program”; and the Policy Subcommittee’s ToR. As special government employee members of a DoD Federal advisory committee, the Policy Subcommittee members will not be given any access to DoD networks, to include DoD email systems.

Once material is provided to the Policy Subcommittee, it becomes a permanent part of the DAC-IPAD’s records. All data/information provided to the Subcommittee is subject to public inspection unless the originating Component or MILDEP office properly marks the data/information with the appropriate classification and Freedom of Information Act exemption categories before the data/information is released to the Case Review Subcommittee.

2. The Policy Subcommittee may conduct interviews and site visits, as appropriate, and in accordance with the DAC-IPAD Charter.
3. The Policy Subcommittee may seek input from other sources with pertinent knowledge or experience, as appropriate.

V. Deliverables: The Policy Subcommittee will complete all tasks, projects, studies, and reports as assigned to it in writing by the DoD Appointing Authority or the DoD GC.

As a subcommittee of the DAC-IPAD, the Policy Subcommittee will not work independently of the DAC-IPAD’s charter and will report its recommendations, including providing interim updates, to the full DAC-IPAD in a properly noticed and open public meeting for full deliberation and discussion and committee approval, subject to the Government in the Sunshine Act (5 U.S.C. § 552b) (Sunshine Act) exemptions, as appropriate. The Policy Subcommittee and the DAC-IPAD will operate in conformity with, and pursuant to, the DAC-IPAD’s charter, the Federal Advisory Committee Act (FACA), the Sunshine Act, other applicable Federal statutes and regulations, and DoD policies and procedures. The Policy Subcommittee does not have the authority to make decisions on behalf of the DAC-IPAD nor can it report directly to any Federal representative. The members of the Policy Subcommittee and the DAC-IPAD are subject to certain Federal ethics laws, including Title 18, United States Code, § 208, governing conflicts of interest, and the Standards of Ethical Conduct regulations in 5 C.F.R, Part 2635.

VI. Support: The DoD, through the Office of the DoD GC, provides support for the Policy Subcommittee’s functions and ensures compliance with the requirements of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures. Under the authority of the DoD GC, the DAC-IPAD Executive Director will support and coordinate all Policy Subcommittee activities.

TERMS OF REFERENCE

These terms of reference (ToR) establish the mission and objectives of the Special Projects Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

I. Mission Statement: The mission of the Special Projects Subcommittee is to assess and provide independent advice to the DAC-IPAD in order for it to make recommendations to the Secretary of Defense and Deputy Secretary of Defense (“the DoD Appointing Authority”), through the Department of Defense General Counsel (DoD GC), related to 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 and analysis of existing, developing, and proposed statutory requirements and the DoD and Military Department (MILDEP) plans and policies, and the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial rules and provisions, applicable to such requirements, plans, policies, and provisions.

II. Issue Statement: Section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, as amended by section 537 of the NDAA for FY 2016, provides that the DAC-IPAD will provide the Secretary of Defense independent advice and recommendations on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, and that, as a basis for such advice, the DAC-IPAD will review cases involving allegations of sexual misconduct on an ongoing basis.

III. Objectives and Scope: The Special Projects Subcommittee will address the following specific objectives:

1. Reviewing and assessing existing, developing, and proposed statutory requirements related to the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces and the DoD and MILDEPs’ plans and policies related to those statutory requirements, including changes to the Manual for Courts-Martial.
2. Identifying significant trends and variances among the MILDEPs in the investigation, prosecution, and defense of allegations of sexual misconduct.
3. Identifying best practices and recommending standards and criteria for a uniform system of military justice within the DoD.
4. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Special Projects Subcommittee in writing by the DoD Appointing Authority or the DoD GC.

The Special Projects Subcommittee will develop conclusions and recommendations on the matters above for consideration and use by the DAC-IPAD as it deems appropriate.

TERMS OF REFERENCE

IV. Methodology: The Special Projects Subcommittee must comply with the DAC-IPAD Charter and the DAC-IPAD ToR (May 23, 2022) in the undertaking and execution of all projects, tasks, studies, and reports. Additionally, in support of the Special Projects Subcommittee's ToR and the work conducted in response to it:

1. The Special Projects Subcommittee is authorized to access all non-sealed, non-privileged, unclassified case documents (including records of trial, investigation case files, prosecutorial case files, and staff judge advocate advice), records, and personnel from the DoD and MILDEPs as it deems necessary to complete its task. Special Projects Subcommittee participants may be required to execute non-disclosure agreements where required by law. All requests shall be consistent with applicable laws; applicable security classifications; DoDI 5105.04, "Department of Defense Federal Advisory Committee Management Program"; and the Special Projects Subcommittee's ToR. As special government employee members of a DoD Federal advisory committee, the Special Projects Subcommittee members will not be given any access to DoD networks, to include DoD email systems.

Once material is provided to the Special Projects Subcommittee, it becomes a permanent part of the DAC-IPAD's records. All data/information provided to the Subcommittee is subject to public inspection unless the originating Component or MILDEP office properly marks the data/information with the appropriate classification and Freedom of Information Act exemption categories before the data/information is released to the Special Projects Subcommittee.

2. The Special Projects Subcommittee may conduct interviews and site visits, as appropriate, and in accordance with the DAC-IPAD Charter.
3. The Special Projects Subcommittee may seek input from other sources with pertinent knowledge or experience, as appropriate.

V. Deliverables: The Special Projects Subcommittee will complete all tasks, projects, studies, and reports as assigned to it in writing by the DoD Appointing Authority or the DoD GC.

1. As a subcommittee of the DAC-IPAD, the Special Projects Subcommittee will not work independently of the DAC-IPAD's charter and will report its recommendations, including providing interim updates, to the full DAC-IPAD in a properly noticed and open public meeting for full deliberation and discussion for committee approval, subject to the Government in the Sunshine Act (5 U.S.C. § 552b) (Sunshine Act) exemptions, as appropriate. The Special Projects Subcommittee and the DAC-IPAD will operate in conformity with, and pursuant to, the DAC-IPAD's charter, the Federal Advisory Committee Act (FACA), the Sunshine Act, other applicable Federal statutes and regulations, and DoD policies and procedures. The Special Projects Subcommittee does not have the authority to make decisions on behalf of the DAC-IPAD nor can it report directly to any Federal representative. The members of the Special Projects Subcommittee and the DAC-IPAD are subject to certain Federal ethics laws, including Title 18, United States Code, § 208, governing conflicts of interest, and the Standards of Ethical Conduct regulations in 5 C.F.R, Part 2635.

TERMS OF REFERENCE

2. The Special Projects Subcommittee is tasked to complete the study requested in the DoD GC's May 10, 2022 memorandum, subject: DAC-IPAD Advice on Policy Development, Workforce Structure, and Implementation of Best Practices for the Military Departments' Offices of Special Trial Counsel (attached).

VI. Support: The DoD, through the Office of the DoD GC, provides support for the Special Projects Subcommittee's functions and ensures compliance with the requirements of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures.

Under the authority of the DoD GC, the DAC-IPAD Executive Director will support and coordinate all Special Projects Subcommittee activities.

Attachment:

As stated

APPENDIX E. COMMITTEE RECOMMENDATIONS TO DATE

DAC-IPAD Recommendation 1 – (March 2018) The Secretary of Defense, the Secretary of Homeland Security, and the Services take action to dispel the misperception of widespread abuse of the expedited transfer policy, including addressing the issue in the training of all military personnel.

DAC-IPAD Recommendation 2 – (March 2018) The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it.

DAC-IPAD Recommendation 3 – (March 2018) The DoD-level and Coast Guard equivalent Family Advocacy Program (FAP) policy include provisions for expedited transfer of active duty Service members who are victims of sexual assault similar to the expedited transfer provisions in the DoD Sexual Assault Prevention and Response (SAPR) policy and consistent with 10 U.S.C. § 673.

DAC-IPAD Recommendation 4 – (March 2018) The DoD-level military personnel assignments policy (DoD Instruction 1315.18) and Coast Guard equivalent include a requirement that assignments personnel or commanders coordinate with and keep SAPR and FAP personnel informed throughout the expedited transfer, safety transfer, and humanitarian/compassionate transfer assignment process when the transfer involves an allegation of sexual assault.

DAC-IPAD Recommendation 5 – (March 2019) In developing a uniform command action form in accordance with section 535 of the FY19 National Defense Authorization Act (NDAA), the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should ensure that the standard set of options for documenting command disposition decisions is based on recognized legal and investigatory terminology and standards that are uniformly defined across the Services and accurately reflect command action source documents.

DAC-IPAD Recommendation 6 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should require that judge advocates or civilian attorneys employed by the Services in a similar capacity provide advice to commanders in completing command disposition/action reports in order to make certain that the documentation of that decision is accurate and complete.

DAC-IPAD Recommendation 7 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should provide uniform guidance to the Services regarding the submission of final disposition information to federal databases for sexual assault cases in which, after fingerprints have been submitted, the command took no action, or took action only for an offense other than sexual assault.

DAC-IPAD Recommendation 8 – (March 2019) The uniform standards and criteria developed to implement Article 140a, Uniform Code of Military Justice (UCMJ), should reflect the following best practices for case data collection:

- a. Collect all case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process, such as the initial report of investigation, the commander's report of disciplinary or administrative action, the charge sheet, the Article 32 report, and the Report of Result of Trial.
- b. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD.
- c. Develop one electronic database for the storage and analysis of standardized source documents, and locate that database in the centralized military justice data office/organization within DoD.
- d. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible.
- e. Have data entered from source documents into the electronic database by one independent team of trained professionals whose full-time occupation is document analysis and data entry. This team should have expertise in the military justice process and in social science research methods, and should ensure that the data are audited at regular intervals.

DAC-IPAD Recommendation 9 – (March 2019) The source documents referenced in DAC-IPAD Recommendation 8 should contain uniformly defined content covering all data elements that DoD decides to collect to meet the requirements of Articles 140a and 146, UCMJ.

DAC-IPAD Recommendation 10 – (March 2019) The data produced pursuant to Article 140a, UCMJ, should serve as the primary source for the Military Justice Review Panel's periodic assessments of the military justice system, which are required by Article 146, UCMJ, and as the sole source of military justice data for all other organizations in DoD and for external entities.

DAC-IPAD Recommendation 11 – (March 2019) Article 140a, UCMJ, should be implemented so as to require collection of the following information with respect to allegations of both adult-victim and child-victim sexual offenses, within the meaning of Articles 120, 120b, and 125, UCMJ (10 U.S.C. §§ 920, 920b, and 925 (2016)):

- a. A summary of the initial complaint giving rise to a criminal investigation by a military criminal investigative organization (MCIO) concerning a military member who is subject to the UCMJ, and how the complaint became known to law enforcement;
- b. Whether an unrestricted report of sexual assault originated as a restricted report;
- c. Demographic data pertaining to each victim and accused, including race and sex;
- d. The nature of any relationship between the accused and the victim(s);
- e. The initial disposition decision under Rule for Court-Martial 306, including the decision to take no action, and the outcome of any administrative action, any disciplinary action, or any case in which one or more charges of sexual assault were preferred, through the completion of court-martial and appellate review;
- f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;
- g. Whether a victim declined to participate at any point in the military justice process;

- h. Whether a defense counsel requested expert assistance on behalf of a military accused, whether those requests were approved by a convening authority or military judge, and whether the government availed itself of expert assistance; and
- i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.

DAC-IPAD Recommendation 12 – (March 2019) The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that:

- a. The Services use the same uniform standards and definitions to refer to common procedures and substantive offenses in the Manual for Courts-Martial, as required by Article 140a; and
- b. The Services develop a plan to transition toward operating one uniform case management system across all of the Services, similar to the federal judiciary's Case Management/ Electronic Court Filing (CM/ECF) system.

DAC-IPAD Recommendation 13 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:

- a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.
- b. The victim's commander and senior enlisted leader, at both the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the subject's identity or other facts of the case—thereby enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
- c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the subject not being held accountable for his or her actions and the absence of evidence should the victim later decide to unrestrict his or her report.

DAC-IPAD Recommendation 14 – (March 2019) The Secretary of Defense (in consultation with the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) establish a working group to review whether victims should have the option to request that further disclosure or investigation of a sexual assault report be restricted in situations in which the member has lost the ability to file a restricted report, whether because a third party has reported the sexual assault or because the member has disclosed the assault to a member of the chain of command or to military law enforcement. The working group's goal should be to find a feasible solution that would, in appropriate circumstances, allow the victim to request that the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes; it should also consider whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This working group should consider developing such a policy with the following requirements:

- a. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
- b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.
- c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request.
- d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.
- e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault.

DAC-IPAD Recommendation 15 – (March 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) revise the DoD expedited transfer policy (and the policy governing the Coast Guard with respect to expedited transfers) to include the following points:

- a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should focus on that goal when they make decisions regarding such requests.
- b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery (e.g., proximity to the subject or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).
- c. The requirement that a commander determine that a report be credible is not aligned with the core purpose of the expedited transfer policy. It should be eliminated, and instead an addition should be made to the criteria that commanders must consider in making a decision on an expedited transfer request: "any evidence that the victim's report is not credible."

DAC-IPAD Recommendation 16 – (March 2019) Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five workdays.

DAC-IPAD Recommendation 17 – (March 2019) The Services track and report the following data in order to best evaluate the expedited transfer program:

- a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final.

- b. Data on the number of accused transferred; the grade and job title of the accused; the sex and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final.
- c. Data on victim participation in investigation/prosecution before and after an expedited transfer.
- d. Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers and accused Service members who are transferred under this program.
- e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.
- f. Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- g. Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- h. Data on victim satisfaction with the expedited transfer program.
- i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.

DAC-IPAD Recommendation 18 – (March 2019) The Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.

DAC-IPAD Recommendation 19 – (March 2020) The Department of Defense should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Military Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 [of the FY19 NDAA] by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles:

a. Definition of “sexual offense”:

- The definition of “sexual offense” for purposes of reporting collateral misconduct should include
 - Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
 - Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
 - Attempts, conspiracies, and solicitations of all of the above.

The definition of sexual offense should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child); Article 120c, UCMJ (Other sexual misconduct); Article 130, UCMJ (Stalking); or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual offense incident.”¹
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should read as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual offense, and directly related to the incident that formed the basis of the sexual offense allegation. The collateral misconduct must have been discovered as a direct result of the report of the sexual offense and/or the ensuing investigation into the sexual offense.”
- Collateral misconduct includes (but is not limited to) the following situations:
 - The victim was in an unprofessional or adulterous relationship with the accused at the time of the assault.²
 - The victim was drinking underage or using illicit substances at the time of the assault.
 - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
- To ensure consistency across the Military Services, collateral misconduct, for purposes of this report, should *not* include the following situations (the list is not exhaustive):
 - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of a sexual offense.
 - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
 - The victim engaged in misconduct after reporting the sexual offense.
 - The victim had previously engaged in an unprofessional or adulterous relationship with the subject, but had terminated the relationship prior to the assault.
 - The victim engaged in misconduct that is not close in time to the sexual offense, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
 - The victim is suspected of making a false allegation of a sexual offense.

1 Dep’t of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Glossary (March 28, 2013, Incorporating Change 3, May 24, 2017), 117.

2 For purposes of this report, an “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.

- The victim engaged in misconduct during the reporting or investigation of the sexual offense (such as making false official statements during the course of the investigation).

c. Methodology for identifying sexual offense cases and victims:

- To identify sexual offense cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the MCIOs.
- A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.³
- Each Military Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Military Service’s MCIO.

d. Time frame for collection of data:

- The Military Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and should include only closed cases as defined above. For example, the Department’s report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.

e. Definition of “covered individual”:

- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual offense in the case files of a military criminal investigative organization.” This definition should be clarified as follows: “an individual identified in the case files of an MCIO as a victim of a sexual offense while in title 10 status.”
- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

f. Replacement of the term “accused”:

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term “suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.⁴
- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:

³ This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group.

⁴ *Cf. United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article 31(b) prior to interrogation “is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense”) (internal citations omitted).

- The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- Another witness in the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- In the course of the sexual offense investigation, an analysis of the victim's phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- This definition of “suspected of” does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions has occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
 - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

g. Definition of “adverse action”:

- The term “adverse action” applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.
- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
 - Letter of reprimand (or Military Service equivalent) or written record of individual counseling in official personnel file;
 - Imposition of nonjudicial punishment;
 - Preferral of charges; or
 - Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Military Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Military Service equivalent), or reclassification.

h. Methodology for counting “number of instances”:

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse action, under the most serious collateral misconduct identified in the adverse action.

·For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

DAC-IPAD Recommendation 20 – (March 2020) Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.

DAC-IPAD Recommendation 21 – (March 2020) For purposes of the third statistical data element required by section 547, the Department of Defense should report not only the percentage of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are suspected of collateral misconduct and then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim's receiving an adverse action for collateral misconduct once they are suspected of such misconduct.

DAC-IPAD Recommendation 22 – (March 2020) The Department of Defense should include in its report data on the number of collateral offenses that victims were suspected of by type of offense (using the methodology specified in section h of Recommendation 19) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.

DAC-IPAD Recommendation 23 – (March 2020) To facilitate production of the future collateral misconduct reports required by section 547, the Military Services should employ standardized internal documentation of sexual offense cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.

DAC-IPAD Recommendation 24 – (June 2020) Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) enhance funding and training for SVCs/VLCs appointed to represent child victims, including authorization to hire civilian highly qualified experts (HQEs) with experience and expertise in representing child victims, including expertise in child development, within the SVC/VLC Programs.

DAC-IPAD Recommendation 25 – (June 2020) In conjunction with Recommendation 24, the Judge Advocates General of the Military Services including the Coast Guard and the Staff Judge Advocate to the Commandant of the Marine Corps develop a cadre of identifiable SVCs/VLCs who have specialized training, experience, and expertise in representing child victims of sex-related offenses by utilizing military personnel mechanisms such as Additional Skill Identifiers.

DAC-IPAD Recommendation 26 – (June 2020) The Department of Defense Office of the Inspector General and the Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) assess whether the MCIOs and FAPs currently are providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported, and if necessary take corrective action.

DAC-IPAD Recommendation 27 – (June 2020) Congress amend 10 U.S.C. § 1044e to expand SVC/VLC eligibility to any child victim of a sex-related offense committed by an individual subject to the UCMJ.

DAC-IPAD Recommendation 28 – (June 2020) Congress amend the UCMJ to authorize the military judge to direct the appointment of an SVC/VLC for a child victim of a sex-related offense and/or of an independent best

interest advocate to advise the military judge when they find that the child's interests are not otherwise adequately protected.

DAC-IPAD Recommendation 29 – (June 2020) The Secretary of Defense and the Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) develop a child victim advocate capability within each of the Services to support certain child victims of sexual offenses. The child victim advocate should reside within the SVC/VLC Programs and work as part of the SVC/VLC team in order to ensure that the child's legal interests are fully represented and protected. The child victim advocate should have expertise in social work, child development, and family dynamics.

DAC-IPAD Recommendation 30 – (June 2020) Congress amend Article 6b, UCMJ, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests; any such representative should be appointed as early as possible in the military justice process.

DAC-IPAD Recommendation 31 – (June 2020) Provided that the Department of Defense adopts and implements DAC-IPAD Recommendations 24–30, it is not advisable or necessary to establish a military guardian ad litem program within the Department of Defense for child victims of alleged sex-related offenses in courts-martial.

DAC-IPAD Recommendation 32 – (October 2020) Congress amend Article 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.

DAC-IPAD Recommendation 33 – (December 2020) The Secretary of Defense designate the military personnel system as the primary data system in the DoD for the collection of demographic information such as race and ethnicity. All other DoD systems that collect demographic data regarding military personnel, such as the military criminal investigative system and the military justice system, should obtain demographic information on military personnel from the military personnel system.

DAC-IPAD Recommendation 34 – (December 2020) The Secretary of Defense direct each Military Department to record race and ethnicity in military criminal investigative organization databases, military justice databases, and military personnel databases using the same racial and ethnic categories. The Secretary of Defense should direct each Military Department to report race using the following six categories: *American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, More Than One Race/Other*, and *White*, and to report ethnicity using the following two categories: *Hispanic or Latino* and *Not Hispanic or Latino*.

DAC-IPAD Recommendation 35 – (December 2020) Congress authorize and appropriate funds for the Secretary of Defense to establish a pilot program operating one uniform, document-based data system for collecting and reporting contact and penetrative sexual offenses across all of the Military Services. The pilot program, which should cover every sexual offense allegation made against a Service member under the military's jurisdiction that is investigated by a military criminal investigative organization (MCIO), will record case data from standardized source documents provided to the pilot program by the Military Services and will include demographic data pertaining to each victim and accused—including race and ethnicity.

DAC-IPAD Recommendation 36 – (December 2020) The Secretary of Defense direct the Military Departments to record and track the race, ethnicity, sex, gender, age, and grade of the victim(s) and the accused for every

investigation initiated by military law enforcement in which a Service member is identified as a subject through the final disposition within the military justice system.

DAC-IPAD Recommendation 37 – (December 2020) The Secretary of Defense direct the Military Departments to record, beginning in fiscal year 2022, the race and ethnicity of military police and criminal investigators, trial counsel, defense counsel, victims’ counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges involved in every case investigated by military law enforcement in which a Service member is the subject of an allegation of a contact or penetrative sexual offense. The source information for these data should be collected from the military personnel databases and maintained for future studies by the DAC-IPAD on racial and ethnic disparities in cases involving contact and penetrative sexual offenses.

DAC-IPAD Recommendation 38 – (December 2020) The Secretary of Defense direct the newly established Military Justice Review Panel to determine whether to review and assess, by functional roles and/or on an individual case basis, the race and ethnicity demographics of the various participants in the military justice process, including military police and criminal investigators, trial counsel, defense counsel, victims’ counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges.

DAC-IPAD Recommendation 39 – (December 2020) Once the Department of Defense has implemented new data collection processes as recommended in this report and as required pursuant to Article 140a, UCMJ, the Secretary of Defense direct the newly established Military Justice Review Panel to determine whether to review and assess racial and ethnic disparities in every aspect of the military justice system as part of its charter for periodic and comprehensive reviews. This review and assessment of racial and ethnic disparities should include, but not be limited to, cases involving sexual offenses.

DAC-IPAD Recommendation 40 – (December 2020) The Secretary of Defense direct the Military Justice Review Panel to assess whether a uniform training system on explicit and implicit bias should be developed for all military personnel who perform duties in the military justice system, including military police and criminal investigators, trial counsel, defense counsel, victims’ counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate judges.

APPENDIX F. COMMITTEE REQUESTS FOR INFORMATION



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

13 June 2022

MEMORANDUM FOR THE JUDGE ADVOCATES GENERAL
THE STAFF JUDGE ADVOCATE TO THE COMMANDANT

SUBJECT: Request for Information for Appellate Decisions in Military Sexual Assault Cases

1. The DoD General Counsel directed the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study. (Encl 1)
2. I respectfully ask your staffs to provide our staff with the responses specified in the Request for Information by the date requested (Encl 2).
3. Thank you for your support of this important project. My POC is Mr. Chuck Mason, Data Lead, at (571) 296-5303 or robert.c.mason2.civ@mail.mil.

A handwritten signature in black ink that reads "Jeff A. Bovarnick".

JEFF A. BOVARNICK
Colonel, U.S. Army
Staff Director

2 Encls
As stated

cc:
Mr. Dwight Sullivan (DoD OGC)
Service Representatives

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

Request for Information from The Army Service Judge Advocate General 13 June 2022

Appellate Decisions in Military Sexual Assault Cases: Documents

I. Purpose

1. In a memorandum dated 28 January 2022 (attached), the Department of Defense (DoD) General Counsel (GC) directed the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study.

II. Authority

1. The DoD GC is the Chief Legal Officer of the DoD (10 U.S.C. § 140); this position is appointed by the President with the advice and consent of the U.S. Senate.
2. 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.
3. 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.
4. The DAC-IPAD requests the assistance of the Military Services to provide the requested information by the suspense date indicated below.

III. Suspense

Suspense	RFI	Proponent – Military Services
13 July 2022	Documents	Service TJAG provide documents, as provided in Section IV below, for all cases identified in Attachment 1.

IV. Information Requested:

Case Documents

Provide electronic copies (PDFs) of the following documents, as applicable. (If your Service does not use the specified DD form, please provide Service-equivalent documents.):

1. DD Form 458, *Charge Sheet*
2. DD Form 2707-1, *Report of Result of Trial*
3. *Statement of Trial Results*
4. *Convening Authority Action*
5. *Entry of Judgment*

DAC-IPAD Request for Information

Appellate Decisions in Military Sexual Assault Cases: DocumentsATTACHMENT 1 – Army cases resulting in appellate decision in FY21

Please provide the requested documents for each of the following cases:

Name:	ACCA Docket # (unless otherwise noted):
United States v. First Lieutenant Samuel B. BADDERS	20200735
United States v. Staff Sergeant Michael J. GUINN	20170500
United States v. Sergeant Frank K. HERTEL	20200348
United States v. Staff Sergeant Jerry D. CLEVELAND	20170496
United States v. Private First Class Isaac MCLEOD	20200330
United States v. Private E2 Jacob G. GRIEGO	20160487
United States v. First Lieutenant Joel R. LESTER	20190593
United States v. Master Sergeant John T. LONG	20150160
United States v. Specialist Robert HUNT	20200158
United States v. Private First Class Kemen CROSS	20200029
United States v. Private First Class Arturo J. RUIZ	20200243
United States v. Specialist Brandon HOELLE	20200519
United States v. Private E2 Tucker A. WRIGHT	20200496
United States v. Staff Sergeant Michael J. HALE	20200468
United States v. Staff Sergeant Zachary CLONCS	20200547
United States v. Private E1 Devon S. ROSS	20200286
United States v. Private First Class Wendell W CARPENTER IV	20200397
United States v. Corporal James K. MORPHEW	20200338
United States v. Private First Class Tyler D. MORGAN	20200247
United States v. Specialist Stephen M. HOLTSCLOW	20200141
United States v. Specialist Jaquez DAVIS	20200463
United States v. Specialist Shane M. KRIETE	20200500
United States v. Specialist Jacob A. STRICKLAND	20200167
United States v. Payton CORK	20200418
United States v. Sergeant David T. BURGIN	20200204
United States v. Kevin K. MCGUIRE	20200349
United States v. Specialist Lewron C. LACEY	20200284
United States v. Staff Sergeant Brian R. MILLISER	20200484
United States v. Staff Sergeant Jason A. LOPEZ	20170386
United States v. Staff Sergeant Aaron G. HEARD (II)	20200021
United States v. Staff Sergeant Joshua MB. TOBIAS	20200169
United States v. Private First Class Nicholas D. HAYES	20190834
United States v. Sergeant Gary A. HEMMINGSEN	20180611
United States v. Sergeant Jesus MENDOZA	20200254
United States v. Staff Sergeant Alejandro M. FIGUEROA	20200143
United States v. Specialist Nihan G. JOHNNIE	20200490

DAC-IPAD Request for Information

Appellate Decisions in Military Sexual Assault Cases: Documents

United States v. Staff Sergeant Christopher D. BROWN	20200488
United States v. Sergeant Andre B. REDDING-WILLIAMS	20200444
United States v. Specialist Marquise J. MILLER	20200268
United States v. Sergeant Albert YEBOAH	20200529
United States v. Private E2 Fred L. BURGESS	20200055
United States v. Sergeant Joshua PRUETT	20180368
United States v. Specialist Jesse E. SPYKER	20200483
United States v. Private E1 Davione GERMANY	20200564
United States v. Captain Luis L. BALLESTEROS	20200319
United States v. Private First Class Lavon C. BLAYLOCK	20200395
United States v. Sergeant First Class Jose RAMOS	20200291
United States v. Private E2 Shaquan DOBSON	20200531
United States v. Specialist Noah J. KREBS	20200511
United States v. Private E1 Zachary TILLMAN	20200305
United States v. Sergeant Nathaniel J. ASHCROFT	20200317
United States v. Sergeant Glenn S. SMITH, JR.	20200229
United States v. Private E2 Maurice D. PIERCE	20200231
United States v. Specialist Kelvin SANTOS	20200223
United States v. Private First Class Noah M. RANES	20200301
United States v. Private E1 Ikeem K. SINGLETON	20200292
United States v. Specialist Deshawn E. STURKEY	20200351
United States v. Specialist Thomas M. WALKER	20200210
United States v. Private E1 Isaiah R. HIGHSMITH	20200527
United States v. Specialist Rasheed A. WALKER	20200212
United States v. Sergeant Eric J. BROOKS	20200258
United States v. Private First Class Isaiah M. HACKWORTH	20200026
United States v. Sergeant James E. BOWMAN	20190396
United States v. Private First Class Rodney GREEN	20200285
United States v. Sergeant Raymundo SOLORZANO	20200089
United States v. Private E1 Gabriel O. INABOYA	20200222
United States v. Specialist Christopher S. CROTTY	20200072
United States v. First Lieutenant Jonathan MELGARROCA	20200022
United States v. Specialist Hubert STEPTOE	20200208
United States v. Sergeant Elijahawon HENDERSON	20190744
United States v. Private First Class Logan P. SMITH	20200253
United States v. Specialist Ryan D. HARVEY	20200192
United States v. Private E2 Kurtis J. GILBERT	20200198
United States v. Sergeant Christopher R. SALCIDO	20200172
United States v. Specialist Jon A. CHILDS	20190845
United States v. Private First Class Andre J. FELTON	20190214
United States v. Staff Sergeant Danny L. MCPHERSON	20180214
United States v. Specialist Jeremy N. NAVARETTE	20160786
United States v. Sergeant Clovis H. CASTRO	20190408

DAC-IPAD Request for Information

Appellate Decisions in Military Sexual Assault Cases: Documents

United States v. Second Lieutenant Kevin M. FURTH	20180191
United States v. Sergeant First Class Dashaun K. HENRY	20190688
United States v. Major Jason A. SCOTT	20170242
United States v. Fernando QUINONES-COLON, JR.	20200092
United State v. Leshan JONES	20190254
United States v. Glenn S. SMITH	20200229
In re Ramon M. MARRERO	20210358, 20200495
United States v. Erik D. JENKINS	20110673
United States v. Carlos MUNIZ, JR.	20200092
United States v. Montana J. MILLER	20190597
United States v. Stephen S. LEE	20180001
United States v. Sergeant Anthony R. HALE	20180407
United States v. Nidal M. HASAN	20130781
United States v. Master Sergeant Theodore NALEZYNSKI	20200038
United States v. Private E1 Cristian FIGUEROA	20200059
United States v. Staff Sergeant Robert C. MCKEE	20190680
United States v. Private First Class Nathaniel A. MEADOWS	20190260
United States v. Staff Sergeant Mark MENESES	20190636
United States v. Private First Class Jerrica DANIELS	20190696
United States v. Specialist Robert BARNETT	20190709
United States v. Sergeant Terry J. SINGLETON	20200279
United States v. Sergeant Vanessa L. LANCASTER	20190852
United States v. Lieutenant Colonel Mark W. CHRISTENSEN	20190197
United States v. Staff Sergeant David C. TATE	20180477
United States v. Chief Warrant Officer Two Abdul M. SHUFORD	20190594
United States v. Private First Class Eddie R. HOLLAND	20200311
United States v. Sergeant Clifford PARKER	20180672
United States v. Specialist Terron CLEMMONS	20180581
United States v. Sergeant Robert B. BERGDAHL	20200588
United States v. Private E2 Brian C. HOTALING	20190360
United States v. Sergeant Jared D. CRAIN	20190265
United States v. Sergeant Matthew D. LEMIRE	20190129
United States v. Private E2 Andre FOWLER, JR.	20190751
United States v. Sergeant First Class Iandraire E. MALLARI	20200508
United States v. Private E2 Romon L. HAMMOND	20200168
United States v. Private E2 Joshua A. FINDLAYTER	20200030
United States v. Private First Class Demetrius J. SLAUGHTER	20200110
United States v. Specialist Matthew LEWANDOWSKI	20190714
United States v. Specialist- Logan T. KYLE	20190372
United States v. Specialist Rashad S. RICKARDS	20190229
United States v. Warrant Officer One Hashim M. MILLER	20200170
United States v. Private First Class Kevin SMITH	20190832
United States v. Private First Class Conner B. HISER	20190325

DAC-IPAD Request for Information

Appellate Decisions in Military Sexual Assault Cases: Documents

United States v. Private First Class Justin C. GAINES	20190153
United States v. Private First Class Julian PAYNE	20200165
United States v. Staff Sergeant Adrian INGRAM	20190610
United States v. Specialist Alan I. CESPEDES-MARINO	20190728
United States v. Private First Class Pablo PADILLA	20200213
United States v. Specialist Matthew K. SNYDER	20200123
United States v. Major Jason M. SARTORI	20190052
United States v. Sergeant Brian M. WINTERS	20200174
United States v. Private E1 Louis F. ESPINOSA III	20190539
United States v. Colonel Robert J. RICE	20160695
United States v. Specialist Ronald C. GIVENS	20190132



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

26 July 2022

MEMORANDUM FOR THE JUDGE ADVOCATES GENERAL
THE STAFF JUDGE ADVOCATE TO THE COMMANDANT

SUBJECT: Requests for Information Regarding Military Justice Issues

1. On June 22, 2022, at the 23rd Public Meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), the Committee received testimony on the status of creation of the Offices of Special Trial Counsel, appointment of Lead Special Trial Counsel, precept language utilized in officer promotions, and diversity within the Judge Advocate Generals' Corps.
2. I respectfully ask your staffs to provide our staff with the responses specified in the Requests for Information by the date requested (Encls 1 and 2).
3. Thank you for your support of this important project. My POC is Mr. Chuck Mason, Data Lead, at (571) 296-5303 or robert.c.mason2.civ@mail.mil.

A handwritten signature in black ink that reads "Jeff A. Bovarnick".

JEFF A. BOVARNICK
Colonel, U.S. Army
Staff Director

2 Encls
As stated

cc:
Mr. Dwight Sullivan (DoD OGC)
Service Representatives

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

Request for Information from Service Judge Advocates General

26 July 2022

Creation of Offices of Special Trial Counsel and Related Issues

I. Purpose

1. In a memorandum dated 11 March 2022 (attached), the Secretary of Defense established policies governing Offices of Special Trial Counsel (OSTC) for the Military Departments and required such policies “be incorporated in issuances promulgated by the Secretary of each Military Department to be issued within 180 days of the date of the memorandum.” Further the memorandum provided that Services identify recommended nominees for Lead Special Trial Counsel (LSTC) no later than September 30, 2022.
2. On June 22, 2022, at the 23rd Public Meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), the Committee received testimony on the status of the creation of the OSTC and appointments of the LSTC.
3. With the understanding that some of the covered offenses subject to disposition by the OSTC include sexual assault crimes, the DAC-IPAD has expressed an interest in further understanding the role of the OSTC and LSTC and potential impacts to investigation, prosecution and defense of these offenses.
4. Additionally, the DAC-IPAD is interested if judge advocates serving in specialized military justice billets, such as special victim prosecutors or Service-specific military justice tracks, have specific or additional precept language for promotion boards that differentiates such billets from operational or administrative law billets during the promotion process.

II. Authority

1. 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.
2. 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.
3. The DAC-IPAD requests the assistance of the Military Departments to provide the requested information by the suspense date indicated below.

DAC-IPAD Request for Information

Creation of Offices of Special Trial Counsel and Related IssuesIII. Suspense

Suspense	RFI	Proponent – Military Services
9 Sep 2022	Documents	Service TJAG provide precept language, as provided in Section IV, Request 1.
9 Sep 2022	Documents	Service TJAG provide materials related to creation of the OSTC, as provided in Section IV, Request 2.
9 Sep 2022	Documents	Service TJAG provide competency/qualification criteria, as provided in Section IV, Request 3.

IV. Information Requested

1. The precept language provided to board members for Fiscal Years 2019, 2020, 2021, and 2022 promotion boards for judge advocates to pay grades, O-4, O-5, and O-6.
2. All issuances and/or guidance by Secretaries of the Military Departments, as required by the Secretary of Defense memorandum (above), establishing and incorporating policies pertaining to the creation of Offices of Special Trial Counsel.
3. The competency and/or qualification standards or policies used in the process of identifying qualified nominees for the Lead Special Trial Counsel position.



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 11 2022

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Policies Governing Offices of Special Trial Counsel

In accordance with title 10, U.S. Code, section 1044f, as enacted by section 532 of the National Defense Authorization Act for Fiscal Year (FY) 2022, effective immediately, I establish the following policies for the Military Departments' Offices of Special Trial Counsel and their personnel. These policies will be incorporated in issuances promulgated by the Secretary of each Military Department to be issued within 180 days of the date of this memorandum.

I. Mission

The mission of the Offices of Special Trial Counsel is to provide expert, specialized, independent, and ethical representation of the United States, under the direct civilian control of the Secretary of the applicable Military Department, in the investigation and trial-level litigation of covered offenses as prescribed by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the offices exercise authority.

II. Offices' Establishment

A. Not later than December 27, 2023, the Secretaries of the Military Departments will ensure that an Office of Special Trial Counsel with respect to each Military Service within their respective Military Department is at full operational capability, recognizing that those offices cannot exercise the authorities newly enacted by the National Defense Authorization Act for FY 2022 with respect to offenses that occur before December 28, 2023. In preparation for full operational capability, the Secretaries of the Military Departments will take the following actions, completion of which will be reported to the General Counsel of the Department of Defense:

1. Not later than July 15, 2022, establish the Offices of Special Trial Counsel. For purposes of initial operational capability, the Department of the Air Force may establish a single Office of Special Trial Counsel for both the Air Force and the Space Force.
2. Not later than September 30, 2022, identify recommended nominees for Lead Special Trial Counsel.
3. Not later than October 15, 2022, identify Special Trial Counsel.
4. Not later than December 31, 2022, develop and issue initial training and education policies for the Offices of Special Trial Counsel.



OSD001504-22/CMD001846-22

5. Not later than January 1, 2023, or such later date on which each Lead Special Trial Counsel is confirmed and appointed as a general or flag officer, assign, and where applicable ensure the permanent change of station of, Lead Special Trial Counsel to that permanent general/flag officer position.
 6. Not later than August 31, 2023, assign or detail, and where applicable ensure the permanent change of station of, judge advocates to fill the Special Trial Counsel positions. Until December 27, 2023, either (a) the Lead Special Trial Counsel, or (b) if the Lead Special Trial Counsel has not yet been appointed, the Secretary of the Military Department concerned may make Special Trial Counsel available to perform duties outside of the Office of Special Trial Counsel, provided that the primary duty of the Special Trial Counsel is within the Office of Special Trial Counsel. This authority of the Lead Special Trial Counsel or the Secretary of the Military Department concerned may not be delegated. Beginning on December 27, 2023, the provisions of para. IV.B.4 will apply.
 7. Not later than July 1, 2023, establish standard operating procedures for the Offices of Special Trial Counsel, including the reciprocal agreements required by para. III.B.2.
- B. Pursuant to section 958(b)(1) of the National Defense Authorization Act for FY 2020, Public Law No. 116-92 (2019), the Secretary of the Air Force may designate a single Space Force judge advocate to be the Lead Special Trial Counsel for both the Air Force and the Space Force.

III. Offices' Functions

- A. All Lead Special Trial Counsel, Special Trial Counsel, and other support personnel deemed appropriate by the Secretary of the Military Department concerned will be assigned to an Office of Special Trial Counsel, which will supervise and oversee the United States' legal representation in the investigation and trial-level litigation of covered offenses as defined by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the office exercises authority.
- B. Independence
1. The Offices of Special Trial Counsel will operate independently of the military chains of command of both the victims of alleged covered offenses and those accused of covered offenses as defined by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and any other offenses over which the offices exercise authority.
 2. The Military Departments will enter into reciprocal agreements to provide for the legal representation of the United States in the investigation and trial-level litigation by another Military Service's Office of Special Trial Counsel of any

offense over which an Office of Special Trial Counsel is precluded from exercising authority because either the alleged offender or victim is a member of the relevant Office of Special Trial Counsel (see para. III.B.1).

3. Special Trial Counsel will conduct their assigned activities free from unlawful or otherwise unauthorized influence or coercion.

IV. Personnel

A. Office Head

1. Each Office of Special Trial Counsel will be headed by a general or flag officer with significant military justice experience with the title, "Lead Special Trial Counsel."
2. To promote both the appearance and the actuality of independence to the maximum extent possible, each Lead Special Trial Counsel will serve for a specified fixed term of not less than three years, with an option for that term to be renewed for a subsequent fixed term or terms of any length. A Lead Special Trial Counsel may be relieved of duty prior to the end of his or her term only for cause, unless he or she leaves active duty or is promoted. The Secretaries of the Military Departments will promulgate issuances governing the grounds and procedures for relieving a Lead Special Trial Counsel for cause. Only the Secretary of the Military Department concerned or the Secretary's superior may relieve a Lead Special Trial Counsel for cause.
3. Each Lead Special Trial Counsel will report directly to the Secretary of the Military Department concerned with no intervening authority.
4. No Lead Special Trial Counsel may be assigned any additional duties with the following exception. If favorably endorsed by a Lead Special Trial Counsel, a request for that Lead Special Trial Counsel to serve on an officer promotion selection board may, at the discretion of the Secretary of the Military Department, be granted.
5. No Lead Special Trial Counsel may be supervised or rated by anyone other than the Secretary of the applicable Military Department.
6. In cases over which an Office of Special Trial Counsel exercises authority, the Lead Special Trial Counsel of the applicable Military Service will have exclusive authority to determine whether to file an appeal under Article 62 of the Uniform Code of Military Justice (10 U.S.C. § 862), in consultation with appellate government counsel in the office of the Judge Advocate General of the applicable Military Department. Appellate government counsel will litigate those appeals on behalf of the United States and are responsible for the substance and content of submissions to the appellate courts.

B. Special Trial Counsel

1. Special Trial Counsel will be assigned to the Office of Special Trial Counsel for a fixed term of not less than three years. Those assignments may, with the permission of the applicable Judge Advocate General or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps, be renewed for subsequent fixed terms of any length. Each Military Department's issuance governing its Office or Offices of Special Trial Counsel will provide that a Special Trial Counsel may be released before the end of the fixed term only if the Special Trial Counsel leaves active duty or at the direction or with the permission of the Lead Special Trial Counsel with notice to the applicable Judge Advocate General or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps.
2. Special Trial Counsel will be highly skilled, experienced, well-trained, and competent in handling the investigation and trial-level litigation of covered offenses.
3. Special Trial Counsel will be supervised and rated only by personnel assigned to the applicable Office of Special Trial Counsel.
4. The Military Services will instruct promotion boards to value litigation experience.
5. A request may be made to a Lead Special Trial Counsel to detail a Special Trial Counsel to a case that does not fall under the authority of an Office of Special Trial Counsel. The Lead Special Trial Counsel will have exclusive and unreviewable authority to grant or deny such a request. If a Special Trial Counsel is detailed to a case that does not fall under the authority of an Office of Special Trial Counsel, no one other than a member of an Office of Special Trial Counsel will prepare a performance evaluation for the Special Trial Counsel for the period during which the Special Trial Counsel performs those duties.

V. Command Input

The commander of any victim of an alleged covered offense and the commander of any accused in a case involving a covered offense will be given a reasonable opportunity to provide input to the Special Trial Counsel regarding case disposition, but that input is not binding on the Special Trial Counsel.

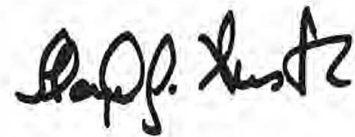
VI. Training

The Lead Special Trial Counsel will establish appropriate training programs for personnel assigned to their respective offices. Joint training among the Military Services' Offices of Special Trial Counsel is encouraged. Lead Special Trial Counsel are encouraged to

have personnel assigned to their respective offices participate in training with judge advocates outside of the Offices of Special Trial Counsel in addition to appropriate specialized training within the Office of Special Trial Counsel concerned. Lead Special Trial Counsel are encouraged to send their respective personnel to training programs outside the Department of Defense, including those offered by the Department of Justice.

VII. Exceptions to Policy

Exceptions to these policies may be granted only by the Secretary of Defense or the Deputy Secretary of Defense. That authority may not be delegated.

A handwritten signature in black ink, appearing to read "Deputy SecDef", is located in the lower right quadrant of the page.

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

Request for Information from Service Judge Advocates General

26 July 2022

Diversity Statistics for Service Judge Advocate General's Corps

I. Purpose

1. In 2020, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) published its Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military.
2. On June 22, 2022, at the 23rd Public Meeting of the DAC-IPAD the Committee received testimony on diversity within the Judge Advocate General's Corps.
3. The DAC-IPAD remains interested in potential diversity disparities in military justice with respect to offenders and victims of sexual offenses, and of the practitioners as well.

II. Authority

1. 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.
2. 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.
3. The DAC-IPAD requests the assistance of the Military Departments to provide the requested information by the suspense date indicated below.

III. Suspense

Suspense	RFI	Proponent – Military Services
22 Aug 2022	Data	Service TJAG provide data, in Excel, as provided in Section IV below.

DAC-IPAD Request for Information

Diversity Statistics for Service Judge Advocate General's Corps

IV. Information Requested

1. Please provide the numbers of the total force for your Service as well as the Judge Advocate General's Corps (JAG) as of the following dates: June 1, 2022; June 1, 2021, and June 1, 2020. Additionally, for the same dates, please break out the following demographic data for Members of the Service and Members of the JAG Corps.

As of June 1, 2022:

- Service – Total number of Members (Enlisted and Officers)
- JAG Corps – Total number of Members (Enlisted and Officers)

Service by Member		JAG Corps by Member	
Sex (by category)	# of each	Sex (by category)	# of each
Race (by category)	# of each	Race (by category)	# of each
Ethnicity (by category)	# of each	Ethnicity (by category)	# of each
Pay Grade (by category)	# of each	Pay Grade (by category)	# of each
Service by Pay Grade		JAG Corps by Pay Grade	
Sex (by category)	# of each	Sex (by category)	# of each
Race (by category)	# of each	Race (by category)	# of each
Ethnicity (by category)	# of each	Ethnicity (by category)	# of each

Repeat above information as of June 1, 2021, and June 1, 2020.



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

26 July 2022

MEMORANDUM FOR THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

SUBJECT: Victim Impact Statements under Rule for Courts-Martial 1001(c)

1. At the June 22, 2022 DAC-IPAD public meeting, the Committee voted to review the topic of whether military judges are giving appropriate deference to crime victims who provide victim impact statements in presentencing proceedings under RCM 1001(c), as requested by Congress in the Joint Explanatory Statement to the FY20 National Defense Authorization Act.
2. I respectfully ask your staff to provide our staff with the responses specified in the Request for Information by the date requested (Encl 1).
3. Thank you for your support of this important project. My POC is Mr. Chuck Mason, Data Lead, at (571) 296-5303 or robert.c.mason2.civ@mail.mil.

JEFF A. BOVARNICK
Colonel, U.S. Army
Staff Director

Encl
As stated

cc:
Mr. Dwight Sullivan (DoD OGC)
Service Representative

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

Request for Information from The Judge Advocate General of the Air Force

26 July 2022

Victim Impact Statements under Rule for Courts-Martial 1001(c)

I. Purpose

1. At the June 22, 2022 DAC-IPAD public meeting, the Committee voted to review the topic of whether military judges are giving appropriate deference to crime victims who provide victim impact statements in presentencing proceedings under RCM 1001(c), as requested by Congress in the Joint Explanatory Statement to the FY20 National Defense Authorization Act.

2. As part of the DAC-IPAD's review of victim impact statements and to support other statutory requirements, the Committee must review FY21 courts-martial documents.

II. Authority

1. 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.

2. 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.

III. Suspense

Suspense	RFI	Proponent – Military Services
12 Aug 2022	Documents	Service TJAG provide documents requested in Section IV for courts-martial listed in attachment.

IV. Documents Requested

The DAC-IPAD requests the electronic record of trial (eROT) for only those 51 FY21 cases listed below which involve a victim impact statement under RCM 1001(c). If the eROT is not available for any of the 51 cases listed below, the DAC-IPAD requests the following documents for only those cases listed below which involve a victim impact statement under RCM 1001(c):

- The transcript of the sentencing portion of the trial;
- The transcript of any portions of the trial in which victim impact statements under RCM 1001(c) are discussed, such as motion hearings;
- Written victim impact statements;
- Motions and responses pertaining to victim impact statements;
- Judicial orders or findings related to victim impact statements;
- Any other materials that would ordinarily be contained within a record of trial pertaining to victim impact statements.

DAC-IPAD Request for Information

Victim Impact Statements under Rule for Courts-Martial 1001(c)

Air Force FY21 Convictions

	Accused's Name	Victim Impact Statement? (Yes/No)		Accused's Name	Victim Impact Statement? (Yes/No)
1	Ashmore, Donovan		27	Massie, Zane	
2	Baker, Dakota		28	McCoy, Ervin	
3	Berry, Nigel		29	McCrary, Julian	
4	Boren, Douglas		30	Payan, Christian	
5	Borneman, David		31	Pearson, Brandon	
6	Brown, Allan		32	Pearson Jr., Roderick	
7	Cabuhut, Domingo		33	Raver, Michael	
8	Cadavona, Ian		34	Renzi, Paul	
9	Cannon, Corey		35	Rivera-Moyet, Jorgediego	
10	Carlile, Joseph		36	Roberts, Deryk	
11	Cochran, Stacy		37	Rodriguez, Christian	
12	Cole, Kristopher		38	Ross, Jaden	
13	Daley, Sean		39	Sayers, Cody	
14	Dixon, Alexander		40	Souders, Garret	
15	Dyer, Brandon		41	Stafford, John	
16	Ermas, Nicholas		42	Stewart, Roderick	
17	Garron, Charles		43	Taylor, Terry	
18	Gonzales, Giovanni		44	Torello, Dante	
19	Guihama, Jonel		45	Valentin-Andino, Michael	
20	Heppermann, Nathaniel		46	Velasquez, Nicholas	
21	Jackson, Nathaniel		47	Vieth, Adamg	
22	Jones, Alexander		48	Wells, Deshaun	
23	Kilcrease, Spencer		49	West, Demorris	
24	Kim, Won-Jun		50	Williamson, Tyler	
25	Knodel, Philip		51	Zapata, John	
26	Lopez, George (2 nd C-M – 12 Jun 21)				

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

Request for Information from Air Force Judge Advocate General

19 October 2022

Special Trial Counsel Qualification Course

I. Purpose

1. On 11 March 2022, the Secretary of Defense established policies for the Military Departments' Offices of Special Trial Counsel (OSTC) and their personnel (Encl 1).
2. On 10 May 2022, the DoD General Counsel tasked the DAC-IPAD with advising on policy development, workforce structure, and implementation of best practices for the Military Department's OSTC (Encl 2).
3. With the understanding that some of the covered offenses, subject to disposition by the OSTC, include sexual assault crimes, the DAC-IPAD has expressed an interest in further understanding the role of the OSTC and the potential impact to the investigation, prosecution and defense of these offenses involving member of the Armed Forces.

II. Authority

1. 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, as amended by section 533 of the National Defense Authorization Act for Fiscal Year 2019. This request for information is pursuant to section 546(d)(2).
2. 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.
3. The DAC-IPAD requests the assistance of the Department of the Air Force to provide the requested information by the suspense date indicated below.

III. Suspense

Suspense	RFI	Proponent – Military Services
14 Nov 2022	Documents	Service TJAG provide documents, as provided in Section IV below.

IV. Information Requested

Any reports and/or after action reports (AARs) from the Department of the Air Force's *Judge Advocate Special Trial Counsel Qualification Course* held May 2-6, 2022 at Joint Base Andrews, MD. Reports and/or AARs include, but are not limited to, summary of critiques from program level down to instructors/students and any revised curricula or POI developed or implemented as a result of reports or evaluations of the May 2022 course.



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 11 2022

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Policies Governing Offices of Special Trial Counsel

In accordance with title 10, U.S. Code, section 1044f, as enacted by section 532 of the National Defense Authorization Act for Fiscal Year (FY) 2022, effective immediately, I establish the following policies for the Military Departments' Offices of Special Trial Counsel and their personnel. These policies will be incorporated in issuances promulgated by the Secretary of each Military Department to be issued within 180 days of the date of this memorandum.

I. Mission

The mission of the Offices of Special Trial Counsel is to provide expert, specialized, independent, and ethical representation of the United States, under the direct civilian control of the Secretary of the applicable Military Department, in the investigation and trial-level litigation of covered offenses as prescribed by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the offices exercise authority.

II. Offices' Establishment

A. Not later than December 27, 2023, the Secretaries of the Military Departments will ensure that an Office of Special Trial Counsel with respect to each Military Service within their respective Military Department is at full operational capability, recognizing that those offices cannot exercise the authorities newly enacted by the National Defense Authorization Act for FY 2022 with respect to offenses that occur before December 28, 2023. In preparation for full operational capability, the Secretaries of the Military Departments will take the following actions, completion of which will be reported to the General Counsel of the Department of Defense:

1. Not later than July 15, 2022, establish the Offices of Special Trial Counsel. For purposes of initial operational capability, the Department of the Air Force may establish a single Office of Special Trial Counsel for both the Air Force and the Space Force.
2. Not later than September 30, 2022, identify recommended nominees for Lead Special Trial Counsel.
3. Not later than October 15, 2022, identify Special Trial Counsel.
4. Not later than December 31, 2022, develop and issue initial training and education policies for the Offices of Special Trial Counsel.



OSD001504-22/CMD001846-22

5. Not later than January 1, 2023, or such later date on which each Lead Special Trial Counsel is confirmed and appointed as a general or flag officer, assign, and where applicable ensure the permanent change of station of, Lead Special Trial Counsel to that permanent general/flag officer position.
 6. Not later than August 31, 2023, assign or detail, and where applicable ensure the permanent change of station of, judge advocates to fill the Special Trial Counsel positions. Until December 27, 2023, either (a) the Lead Special Trial Counsel, or (b) if the Lead Special Trial Counsel has not yet been appointed, the Secretary of the Military Department concerned may make Special Trial Counsel available to perform duties outside of the Office of Special Trial Counsel, provided that the primary duty of the Special Trial Counsel is within the Office of Special Trial Counsel. This authority of the Lead Special Trial Counsel or the Secretary of the Military Department concerned may not be delegated. Beginning on December 27, 2023, the provisions of para. IV.B.4 will apply.
 7. Not later than July 1, 2023, establish standard operating procedures for the Offices of Special Trial Counsel, including the reciprocal agreements required by para. III.B.2.
- B. Pursuant to section 958(b)(1) of the National Defense Authorization Act for FY 2020, Public Law No. 116-92 (2019), the Secretary of the Air Force may designate a single Space Force judge advocate to be the Lead Special Trial Counsel for both the Air Force and the Space Force.

III. Offices' Functions

- A. All Lead Special Trial Counsel, Special Trial Counsel, and other support personnel deemed appropriate by the Secretary of the Military Department concerned will be assigned to an Office of Special Trial Counsel, which will supervise and oversee the United States' legal representation in the investigation and trial-level litigation of covered offenses as defined by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and other offenses over which the office exercises authority.
- B. Independence
1. The Offices of Special Trial Counsel will operate independently of the military chains of command of both the victims of alleged covered offenses and those accused of covered offenses as defined by article 1(17) of the Uniform Code of Military Justice, 10 U.S.C. § 801(17), and any other offenses over which the offices exercise authority.
 2. The Military Departments will enter into reciprocal agreements to provide for the legal representation of the United States in the investigation and trial-level litigation by another Military Service's Office of Special Trial Counsel of any

offense over which an Office of Special Trial Counsel is precluded from exercising authority because either the alleged offender or victim is a member of the relevant Office of Special Trial Counsel (see para. III.B.1).

3. Special Trial Counsel will conduct their assigned activities free from unlawful or otherwise unauthorized influence or coercion.

IV. Personnel

A. Office Head

1. Each Office of Special Trial Counsel will be headed by a general or flag officer with significant military justice experience with the title, "Lead Special Trial Counsel."
2. To promote both the appearance and the actuality of independence to the maximum extent possible, each Lead Special Trial Counsel will serve for a specified fixed term of not less than three years, with an option for that term to be renewed for a subsequent fixed term or terms of any length. A Lead Special Trial Counsel may be relieved of duty prior to the end of his or her term only for cause, unless he or she leaves active duty or is promoted. The Secretaries of the Military Departments will promulgate issuances governing the grounds and procedures for relieving a Lead Special Trial Counsel for cause. Only the Secretary of the Military Department concerned or the Secretary's superior may relieve a Lead Special Trial Counsel for cause.
3. Each Lead Special Trial Counsel will report directly to the Secretary of the Military Department concerned with no intervening authority.
4. No Lead Special Trial Counsel may be assigned any additional duties with the following exception. If favorably endorsed by a Lead Special Trial Counsel, a request for that Lead Special Trial Counsel to serve on an officer promotion selection board may, at the discretion of the Secretary of the Military Department, be granted.
5. No Lead Special Trial Counsel may be supervised or rated by anyone other than the Secretary of the applicable Military Department.
6. In cases over which an Office of Special Trial Counsel exercises authority, the Lead Special Trial Counsel of the applicable Military Service will have exclusive authority to determine whether to file an appeal under Article 62 of the Uniform Code of Military Justice (10 U.S.C. § 862), in consultation with appellate government counsel in the office of the Judge Advocate General of the applicable Military Department. Appellate government counsel will litigate those appeals on behalf of the United States and are responsible for the substance and content of submissions to the appellate courts.

B. Special Trial Counsel

1. Special Trial Counsel will be assigned to the Office of Special Trial Counsel for a fixed term of not less than three years. Those assignments may, with the permission of the applicable Judge Advocate General or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps, be renewed for subsequent fixed terms of any length. Each Military Department's issuance governing its Office or Offices of Special Trial Counsel will provide that a Special Trial Counsel may be released before the end of the fixed term only if the Special Trial Counsel leaves active duty or at the direction or with the permission of the Lead Special Trial Counsel with notice to the applicable Judge Advocate General or, in the case of Marine Corps judge advocates, the Commandant of the Marine Corps.
2. Special Trial Counsel will be highly skilled, experienced, well-trained, and competent in handling the investigation and trial-level litigation of covered offenses.
3. Special Trial Counsel will be supervised and rated only by personnel assigned to the applicable Office of Special Trial Counsel.
4. The Military Services will instruct promotion boards to value litigation experience.
5. A request may be made to a Lead Special Trial Counsel to detail a Special Trial Counsel to a case that does not fall under the authority of an Office of Special Trial Counsel. The Lead Special Trial Counsel will have exclusive and unreviewable authority to grant or deny such a request. If a Special Trial Counsel is detailed to a case that does not fall under the authority of an Office of Special Trial Counsel, no one other than a member of an Office of Special Trial Counsel will prepare a performance evaluation for the Special Trial Counsel for the period during which the Special Trial Counsel performs those duties.

V. Command Input

The commander of any victim of an alleged covered offense and the commander of any accused in a case involving a covered offense will be given a reasonable opportunity to provide input to the Special Trial Counsel regarding case disposition, but that input is not binding on the Special Trial Counsel.

VI. Training

The Lead Special Trial Counsel will establish appropriate training programs for personnel assigned to their respective offices. Joint training among the Military Services' Offices of Special Trial Counsel is encouraged. Lead Special Trial Counsel are encouraged to

have personnel assigned to their respective offices participate in training with judge advocates outside of the Offices of Special Trial Counsel in addition to appropriate specialized training within the Office of Special Trial Counsel concerned. Lead Special Trial Counsel are encouraged to send their respective personnel to training programs outside the Department of Defense, including those offered by the Department of Justice.

VII. Exceptions to Policy

Exceptions to these policies may be granted only by the Secretary of Defense or the Deputy Secretary of Defense. That authority may not be delegated.

A handwritten signature in black ink, appearing to read "R. J. Lutz". The signature is written in a cursive, stylized font.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

MAY 10 2022

GENERAL COUNSEL

MEMORANDUM FOR CHAIR, DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)

SUBJECT: DAC-IPAD Advice on Policy Development, Workforce Structure, and
Implementation of Best Practices for the Military Departments' Offices of Special
Trial Counsel

As requested in your letter of April 27, 2022, I task the DAC-IPAD with advising the Secretary of Defense and me on policy development, workforce structure, and implementation of best practices for the Military Departments' Offices of Special Trial Counsel. The Department of Defense would benefit greatly from the advice of the DAC-IPAD, whose members possess extraordinary expertise regarding the organization and operation of offices devoted to complex prosecutions, concerning the Offices of Special Trial Counsel. Advising the Department regarding the Offices of Special Trial Counsel is a core function of the DAC-IPAD. Please provide such advice on an ongoing basis.

Consistent with your request, I have asked the Secretaries of the Military Departments to provide the appropriate civilian officials, supported by uniformed subject matter experts, to appear at the DAC-IPAD's next public meeting.

I reiterate my thanks to you and to all of the DAC-IPAD's members for assisting the Department of Defense in improving our sexual assault response systems.

A handwritten signature in black ink, appearing to read "Caroline Krass", is located below the text.

Caroline Krass
General Counsel

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

Request for Information from Service Judge Advocates General

12 December 2022

Diversity Statistics for Service Judge Advocate General's Corps

I. Purpose

1. In 2020, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) published its Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military.
2. On June 22, 2022, the DAC-IPAD received testimony on diversity within the Judge Advocate General's (JAG) Corps at its 23rd Public Meeting. The DAC-IPAD remains interested in potential diversity disparities in military justice with respect to offenders and victims of sexual offenses, and of the practitioners as well.
3. Due to variations in responses to a previous RFI requesting JAG Corps diversity statistics, the DAC-IPAD requests the Services provide the information in a standardized format.

II. Authority

1. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the FY 2015 National Defense Authorization Act, as amended.
2. The DAC-IPAD advises 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.
3. The DAC-IPAD requests the assistance of the Military Departments to provide the requested information by the suspense date indicated below.

III. Suspense

Suspense	RFI	Proponent – Military Services
13 Jan 2023	Data & Narrative	Service TJAG provide data, in Excel spreadsheet and narrative, as requested in Section IV below.

IV. Information Requested

1. Using the attached Excel spreadsheet template, please provide you Service and JAG Corps total force numbers as of the following dates: June 1, 2022, June 1, 2021, and June 1, 2020.
2. Please provide a narrative of the process employed to provide the above data, including:
 - a. Names of the databases accessed
 - b. Custodial organization of the databases accessed
 - c. Specific query/steps required to achieve the provided results.
 - d. Statement describing the amount of time/resources (burden) necessary to answer the RFI.

APPENDIX G. COMMITTEE AND SUBCOMMITTEE MEETINGS AND PRESENTERS

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
DAC-IPAD PUBLIC MEETING 22 April 21, 2022 Virtual	<p>Committee briefing of Charter and Bylaws for the reconstituted DAC-IPAD.</p> <p>Professional staff presentation on summary of events since last meeting that occurred while the Committee was suspended, including Fort Hood Report; IRC report and DoD implementation; FY22 NDAA provisions update; and the March 2022 DAC-IPAD report.</p> <p>Committee deliberations to formulate a strategic plan and a timeline for implementation of current statutory tasks, assigned tasks, and additional tasks for consideration.</p>

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
<p>DAC-IPAD PUBLIC MEETING 23</p> <p>June 21-22, 2022</p> <p>Arlington, VA</p>	<p>Committee deliberations for establishing their terms of reference, and subcommittees.</p> <p>Committee review of the current statutory and assigned tasks.</p> <p>Professional staff presentations on Appellate Decisions in Military Sexual Assault Cases; Data Review; FY20 NDAA Joint Explanatory Statement; Office of Special Trial Counsel Update; and SVC/VLC Report Overview.</p> <p>Panel presentation from civilian prosecutors who provided their perspectives on best practices for establishing an independent prosecutorial office. Panel members included:</p> <p><i>Ms. Sherry Boston, District Attorney, Office of the DeKalb County District Attorney, Decatur, Georgia</i></p> <p><i>Ms. Parisa Dehghani-Tafti, Commonwealth's Attorney for Arlington County and the City of Falls Church, Virginia</i></p> <p><i>Ms. Fara Gold, Senior Counsel on Sexual Misconduct to the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice</i></p> <p><i>Ms. Sharon Marcus-Kurn, Chief, Sex Offense and Domestic Violence Section, United States Attorney's Office for the District of Columbia</i></p> <p><i>Mr. Eric Rosenbaum, Chief, Special Victims Bureau, Major Crimes Division, Queens County District Attorney's Office</i></p> <p>Briefing from <i>Colonel Elizabeth Hernandez, U.S. Air Force, Chair, Joint Service Committee</i> on the R.C.M. amendment process to implement FY22 NDAA Military Justice Reforms.</p> <p>Offices of Special Trial Counsel panel presentation from:</p> <p><i>Honorable John P. "Sean" Coffey, General Counsel, Department of the Navy</i></p> <p><i>Vice Admiral Darce E. "Del" Crandall, Jr., Judge Advocate General, U.S. Navy</i></p> <p><i>Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps</i></p> <p><i>Honorable Peter J. Beshar, General Counsel, Department of the Air Force</i></p> <p><i>Lieutenant General Charles L. Plummer, The Judge Advocate General, U.S. Air Force</i></p> <p><i>Major General Rebecca Vernon, The Deputy Judge Advocate General, U.S. Air Force</i></p> <p><i>Honorable Carrie F. Ricci, General Counsel, Department of the Army</i></p> <p><i>Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army</i></p>

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
<p>DAC-IPAD PUBLIC MEETING 24</p> <p>September 21, 2022</p> <p>Pentagon City, VA</p>	<p>Professional staff briefings on recent court-martial observation; professional training course observation; UCMJ appellate process; and FY2021 appellate case data.</p> <p>Panel presentation and discussion on the UCMJ appellate process with panel member <i>Major Steven Dray, Associate Professor, Criminal Law, U.S. Army.</i></p> <p>Panel presentations on the current practice of military appellate process from the Government and Defense Appellate Divisions. Panel members included:</p> <p>Government Appellate Division Panel:</p> <p><i>MAJ Dustin Morgan, (former) Government Appellate Division, U.S. Army</i> <i>Maj Brittany Speirs, Government Appellate Division, U.S. Air Force</i> <i>Mr. Brian Keller, Deputy Director, Appellate Government Division, U.S. Navy</i> <i>CAPT Anita Scott, Chief, Military Justice, U.S. Coast Guard</i></p> <p>Defense Appellate Division Panel:</p> <p><i>MAJ Rachel Gordienko, Branch Chief (II), Defense Appellate Division, U.S. Army</i> <i>Maj Jenna Arroyo, Defense Appellate Division, U.S. Air Force</i> <i>Ms. Rebecca Snyder, Deputy Director, Appellate Defense Division, U.S. Navy</i> <i>Mr. Thomas Cook, Chief, Legal Assistance & Defense Services, U.S. Coast Guard</i></p>

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
<p>DAC-IPAD PUBLIC MEETING 25</p> <p>December 6-7, 2022</p> <p>Pentagon City, VA</p>	<p>Panel presentation and discussion on the UCMJ courts-martial panel selection process. Panel members included:</p> <p><i>Colonel Christopher Kennebeck, Chief, Criminal Law, OTJAG, U.S. Army</i></p> <p><i>Captain Andrew House, SJA, U.S. Naval Academy, U.S. Navy</i></p> <p><i>Colonel Shannon Sherwin, SJA, Air Education & Training Command, U.S. Air Force</i></p> <p><i>Colonel Christopher G. Tolar, Deputy SJA to the Commandant of the Marine Corps, U.S. Marine Corps</i></p> <p><i>Commander Kismet Wunder, Legal Services Command, U.S. Coast Guard</i></p> <p>Panel presentation and discussion on victim's impact statements at sentencing. Panel members included:</p> <p><i>Ms. Adrian Perry, Victim Advocate, Survivors United</i></p> <p><i>Dr. Breck Perry, Victim Advocate, Survivors United</i></p> <p><i>Mr. Ryan Guilds, Special Victims' Counsel, Arnold & Porter LLP</i></p> <p>Panel presentation and discussion on victim impact statements at sentencing with Special Victims' Counsel/Victims' Legal Counsel. Panel members included:</p> <p><i>Colonel Carol A. Brewer, Chief, SVC Program, U.S. Army</i></p> <p><i>Captain Daniel Cimmino, Chief, VLC Program, U.S. Navy</i></p> <p><i>Colonel Tracy Park, Chief, VC Program, U.S. Air Force</i></p> <p><i>Lieutenant Colonel Iain D. Pedden, Chief, VLC Program, U.S. Marine Corps</i></p> <p><i>Ms. Elizabeth Marotta, Chief, Office of Member Advocacy, U.S. Coast Guard</i></p> <p>Panel presentation and discussion on the Offices of Special Trial Counsel update. Panel members included:</p> <p><i>Honorable Carrie F. Ricci, General Counsel, Department of the Army</i></p> <p><i>Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army</i></p> <p><i>Honorable John P. "Sean" Coffey, General Counsel, Department of the Navy</i></p> <p><i>Vice Admiral Darse E. "Del" Crandall, Jr., Judge Advocate General, U.S. Navy</i></p> <p><i>Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps</i></p> <p><i>Honorable Peter J. Beshar, General Counsel, Department of the Air Force</i></p> <p><i>Lieutenant General Charles L. Plummer, The Judge Advocate General, U.S. Air Force</i></p> <p>Professional staff briefings on the DAC-IPAD and GAO Racial Disparity Reports; and Case Review, Special Projects and Policy Subcommittee updates.</p> <p>Committee deliberations on the DAC-IPAD March 2023 annual report.</p>

DAC-IPAD PUBLIC MEETINGS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
<p>DAC-IPAD PUBLIC MEETING 26</p> <p>February 21-22, 2023</p> <p>Arlington, VA</p>	<p>Briefing from <i>Captain Anita Scott, U.S. Coast Guard, Joint Service Committee Member</i>, on the FY23 NDAA Military Justice provisions.</p> <p>Panel presentation on Article 25 criteria and court-martial panel selection process. Panel members from the trial defense organizations included:</p> <p><i>COL Sean McGarry, U.S. Army</i> <i>CAPT Mark Holley, U.S. Navy</i> <i>Col Valerie Danyluk, U.S. Marine Corps</i> <i>Col Brett Landry, U.S. Air Force</i> <i>LCDR Jennifer Saviano, U.S. Coast Guard</i></p> <p>Panel discussion with <i>Colonel Tyesha Lowery Smith, U.S. Army</i> on the current status of military sentencing guidelines development and implementation.</p> <p>Panel presentation and discussion with former military judges on Article 25 and victim impact statements at sentencing. Panel members included:</p> <p><i>LTC(R) Stefan Wolfe, U.S. Army</i> <i>CAPT(R) Marcus Fulton, U.S. Navy</i> <i>CDR(R) Will Weiland, U.S. Navy</i> <i>LtCol(R) Michael Libretto, U.S. Marine Corps</i> <i>COL(R) W. Shane Cohen, U.S. Air Force</i></p> <p>Professional staff briefings on subcommittee updates and the 5th annual report development.</p> <p>Committee deliberations on the 5th annual report.</p>
<p>DAC-IPAD PUBLIC MEETING 27</p> <p>March 14, 2023</p> <p>Virtual</p>	<p>Discussion, Deliberations, and Voting:</p> <p><i>5th Annual Report</i> <i>Report on Victim Impact Statements</i> <i>Study on Appellate Review</i></p> <p>DAC-IPAD Subcommittee: Special Projects Update</p>

CASE REVIEW PREPARATORY SESSIONS	
MEETING DATE AND LOCATION	TOPICS AND PRESENTERS
<p>Case Review Subcommittee Preparatory Session 1</p> <p>December 7, 2022</p> <p>Virtual</p>	<p>Case Review Subcommittee discussion of administrative matters; courts-martial data; post-conviction appellate process; and, testimony and Service policies, along with accurate data that reflects the race, ethnicity, and gender makeup throughout the entire process.</p>
<p>Case Review Preparatory Session 2</p> <p>January 26, 2023</p> <p>Arlington, VA/Virtual</p>	<p>Case Review Subcommittee discussed an overview of the DAC-IPAD Meeting transcript from December, 2022; received presentations from civilian defense counsel, discussed appellate victims' counsel; received a presentation on the study of race and gender in military panel selection; and, discussed conviction data from FY18-20.</p>
<p>Case Review Preparatory Session 3</p> <p>February 21, 2023</p> <p>Arlington, VA</p>	<p>Case Review Subcommittee received an update from the professional staff on the Appellate Review Study and panel demographics.</p>

POLICY WORKING GROUP PREPARATORY SESSIONS	
SESSION DATE AND LOCATION	TOPICS AND PRESENTERS
Policy Subcommittee Preparatory Session 1 November 9, 2022 Virtual	Policy Subcommittee discussion of administrative matters; victim impact statement study; FY20 NDAA Joint Explanatory Statement request to review Alternative Justice; and strategic planning for the PSC.
Policy Subcommittee Preparatory Session 2 December 1, 2022 Virtual	Policy Subcommittee discussion on the topic of victim impact statements at presentencing proceedings.
Policy Subcommittee Preparatory Session 3 December 7, 2022 Pentagon City, VA	Policy Subcommittee discussion on the topic of victim impact statements at presentencing proceedings; FY20 NDAA Joint Explanatory Statement request to review Alternative Justice in the military justice system; uniform policy for providing information to victims' counsel; and additional policy issues for the PSC to consider.
Policy Subcommittee Preparatory Session 4 January 24, 2023 Virtual	Policy Subcommittee discussion on the victim impact statements at presentencing proceedings report; the FY20 NDAA Joint Explanatory Statement request to review Alternative Justice in the military justice system; and Article 25, court-martial panel selection criteria.
Policy Subcommittee Preparatory Session 5 February 1, 2023 Virtual	Policy Subcommittee discussion on the FY20 NDAA Joint Explanatory Statement request to review Alternative Justice in the military justice system.
Policy Subcommittee Preparatory Session 6 February 21, 2023 Arlington, VA	<p>Policy Subcommittee discussion on the Victim Impact Statement report; Alternative Justice; and the proposed Article 25 study.</p> <p>Panel presentation and discussion on Article 25 criteria and randomized panel selection. Panel members included:</p> <p><i>Colonel Brett Landry, U.S. Air Force, Chief, Trial Defense Division</i> <i>Colonel Sean McGarry, U.S. Army, Chief, Trial Defense Service</i> <i>Captain Mark Holley, U.S. Navy, Director, Defense Service Office Operations</i> <i>Colonel Valerie Danyluk, U.S. Marine Corps, Chief Defense Counsel</i> <i>Lieutenant Commander Jennifer Saviano, U.S. Coast Guard, Chief of Defense Services</i></p>

SPECIAL PROJECTS PREPARATORY SESSIONS	
SESSION DATE AND LOCATION	TOPICS AND PRESENTERS
Special Projects Subcommittee Preparatory Session 1 December 7, 2022 Virtual	Special Projects Subcommittee discussion of the Services Office of Special Trial Counsel (OSTC); received a presentation from the Services Acting Lead Special Trial Counsel (LSTC); received a presentation from JAG Corps personnel managers; and, developed the strategic plan of the subcommittee.
Special Projects Preparatory Session 2 December 13, 2022 Virtual	Special Projects Subcommittee discussion of the Article 32/34 Report, OSTC evaluation of draft Rules for Courts-Martial for Executive Order; and, voted on whether to add an additional project on SVC/VLC Evidence and Access Question.
Special Projects Preparatory Session 3 February 21, 2023 Virtual	Special Projects Subcommittee discussed their report on pretrial procedures and prosecution standards.
Special Projects Preparatory Session 4 March 9, 2023 Virtual	Special Projects Subcommittee discussed the completion of their report on Military Pretrial Processes and Prosecution Standards

APPENDIX H. DAC-IPAD PROFESSIONAL STAFF

PROFESSIONAL STAFF

Colonel Jeff A. Bovarnick, USA, JAG Corps, Director

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

Ms. Amanda Hagy, Senior Paralegal

Mr. R. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst

Ms. Meghan Peters, Attorney-Advisor

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COMMITTEE CONSULTANTS

Dr. Alice Falk, Editor

Ms. Laurel Prucha Moran, Graphic Designer

Dr. William “Bill” Wells, Criminologist

APPENDIX I. ACRONYMS AND ABBREVIATIONS

C.A.A.F.	Court of Appeals for the Armed Forces
C.M.R.	Court-Martial Reports
CRSC	Case Review Subcommittee
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DFO	Designated Federal Officer
DoD	Department of Defense
DoDI	Department of Defense Instruction
FACA	Federal Advisory Committee Act
FY	fiscal year
GAL	Guardian ad Litem
GC DoD	General Counsel for the Department of Defense
GCM	general court-martial
GCMCA	general court-martial convening authority
HASC	House Armed Services Committee
HQE	highly qualified expert
IO	investigating officer
IRC	Independent Review Commission
JAG	judge advocate general
JES	Joint Explanatory Statement

JPP	Judicial Proceedings Panel (Judicial Proceedings Since 2012 Amendments Panel)
JSC	Joint Service Committee
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
MILDEPs	Military Departments
MRE	Military Rules of Evidence
MJ	military judge
MJRG	Military Justice Review Group
N/n	number
NDAA	National Defense Authorization Act
NJP	nonjudicial punishment
OJTAG	Office of the Judge Advocate General
OSTC	Office of Special Trial Counsel
PHO	preliminary hearing officer
PSC	Policy Subcommittee
R.C.M.	Rule or Rules for Courts-Martial
RFI	request for information
RGE	regular government employee
ROI	Report of Investigation
RSP	Response Systems Panel (Response Systems to Adult Sexual Assault Crimes Panel)
SA	sexual assault
SAPR	Sexual Assault Prevention and Response

SAPRO	Sexual Assault Prevention and Response Office
SASC	Senate Armed Services Committee
SGE	special government employee
SJA	staff judge advocate
SPCMCA	special court-martial convening authority
SPCM	special court-martial
SPSC	Special Projects Subcommittee
SVC	special victims' counsel
ToR	Terms of Reference
UCMJ	Uniform Code of Military Justice
USA	United States Army
USAF	United States Air Force
U.S.C.	United States Code
USCG	United States Coast Guard
USMC	United States Marine Corps
USN	United States Navy
VIS	victim impact statement
VLC	victims' legal counsel

APPENDIX J. SOURCES CONSULTED

1. Legislative Sources

a. Enacted Statutes

5 U.S.C. App. §§ 1–16 (Federal Advisory Committee Act)

10 U.S.C. § 832 (Uniform Code of Military Justice) (2012)

10 U.S.C. § 832 (Uniform Code of Military Justice) (2014)

10 U.S.C. §§ 830, 832, 834 (Uniform Code of Military Justice) (2016)

10 U.S.C. §§ 823, 830, 832–834 (Uniform Code of Military Justice) (2019)

Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3374 (2014)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017)

John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018)

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, 36 Stat. 2395 (2022).

2. Judicial Decisions

U.S. Court of Appeals for the Armed Forces

United States v. Jeter, 82 M.J. 355 (C.A.A.F. 2022)

3. Rules and Regulations

a. Executive Orders

Manual for Courts-Martial, United States (2012 edition)

Manual for Courts-Martial, United States (2016 edition)

Executive Order 13825, 83 Federal Register 9889 (March 18, 2018)

Manual for Courts-Martial, United States (2019 edition)

b. Department of Defense

Department of Defense Instruction 5105.4, *Federal Advisory Management Program* (Aug. 6, 2007)

4. Meetings and Hearings

a. Public Meetings of the DAC-IPAD

Transcript of DAC-IPAD Public Meeting (February 14, 2020)

Transcript of DAC-IPAD Public Meeting (November 6, 2020)

Transcript of DAC-IPAD Public Meeting (April 21, 2022)

Transcript of DAC-IPAD Public Meeting (June 22, 2022)

Transcript of DAC-IPAD Public Meeting (September 21, 2022)

Transcript of DAC-IPAD Public Meeting (December 6, 2022)

Transcript of DAC-IPAD Public Meeting (December 7, 2022)

Transcript of DAC-IPAD Public Meeting (February 22, 2023)

b. Preparatory Sessions of the DAC-IPAD Subcommittees

DAC-IPAD Case Review Subcommittee Preparatory Session (January 26, 2023)

5. DoD Memoranda and Reports

U.S. Dep't. of Def., Memorandum from the Secretary of Defense on Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military (Sept. 22, 2021).

Independent Review Commission on Sexual Assault in the Military, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (July 2021)

6. DAC-IPAD Reports

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Initial Report* (March 2017)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Annual Report* (March 2018)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Third Annual Report* (March 2019)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Fourth Annual Report* (March 2020)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military* (June 2020)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017* (October 2020)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military* (December 2020)

7. DAC-IPAD Requests for Information and Responses

See Appendix F

8. Articles

Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. OF PERS. AND SOC. PSYCH. 597 (2006)

Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378 (2018)

9. DoD and DAC-IPAD Correspondence

Memorandum from Secretary of Defense to Senior Pentagon Leadership Regarding Department of Defense Advisory Committees – Zero-Based Review (Jan. 30, 2021)

Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 26, 2021) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 26, 2021)

Memorandum from Secretary of Defense to General Counsel of the Department of Defense Regarding Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (July 6, 2021)

Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 31, 2022) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 31, 2022)

Memorandum from DoD General Counsel to the Chair of the DAC-IPAD, DAC-IPAD Subcommittee Establishment, Sept. 24, 2022

Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, Request to Study Appellate Decisions in Military Sexual Assault Cases (Jan. 28, 2022)

Memorandum from Ms. Caroline Krass, General Counsel for the Department of Defense, to Judge Karla Smith, DAC-IPAD Chair, DAC-IPAD Advice on Policy Development, Workforce Structure, and Implementation of Best Practices for the Military Departments' Offices of Special Trial Counsel (May 10, 2022)

