

*Study of the Race, Ethnicity, and Gender of Military Panel Members*

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Introduction

1. Establishment of the DAC-IPAD
  - a. Section 546 of the National Defense Authorization Act for Fiscal Year 2015 [FY 2015 NDAA] (Public Law 113–291; 128 Stat. 3374; 10 U.S.C. 1561 note), as amended, established the DAC-IPAD as a non-discretionary federal advisory committee.
  - b. 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.
  - c. The DAC-IPAD website, <https://dacipad.whs.mil/> provides the following information:
    - i. DAC-IPAD Charter
    - ii. Annual and topic-specific reports and letters published by the Committee
    - iii. Transcripts of public meetings and written public comments provided to the DAC-IPAD
    - iv. Reading Room with information reviewed by the DAC-IPAD
    - v. Date/time/location for upcoming DAC-IPAD public meetings, including instructions for accessing virtual public meetings of the DAC-IPAD

How the DAC-IPAD conducts reviews

1. How the DAC-IPAD identifies issues to review
  - a. Statutory tasks or requests in the Joint Explanatory Statement accompanying the National Defense Authorization Act. Example: Victim impact statement study
  - b. Requests for review from the General Counsel of the Department of Defense. Example: Appellate study on factual and legal sufficiency standards and sentence appropriateness
  - c. Committee members determine topics for study. Example: Panel member selection and demographic study

Key Issues for DAC-IPAD Review

1. DAC-IPAD's work to date reports (13 in total). In addition to the annual report, recent topics include:
  - a. Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017-October 2020
  - b. Victim impact statements at presentencing proceedings under Rule for Courts-Martial 1001(c), Manual for Courts-Martial
  - c. Appellate review of military sexual offense convictions under Articles 66 and 67, Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 866–67)
  - d. Report on reforming pretrial procedures in Article 32, UCMJ, and establishing uniform prosecution standards in Appendix 2.1, Manual for Courts-Martial

- e. Recommendations for a uniform policy for sharing information with victims and their counsel
- f. Randomizing court-martial panel member selection under Article 25, UCMJ, and Rules For Courts-Martial 503(a) and 504(d)(1)(A)(ii)

#### Perception of Fairness in Panel Selection, Article 25 criteria, and Randomization

- 1. Recent Changes Impacting Panel Selection
  - a. In 2021, the Independent Review Commission on Sexual Assault in the military, a 90-day commission directed by the President of the United States, recommended that Article 25, UCMJ, be amended to establish random selection of panel members in order to “enhance the perception and reality of a fair and impartial panel.” 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* 33, Recommendation 1.7d (July 2021).
  - b. Congress amended Article 25 to require by December 2024 the random selection of panel members to the maximum extent possible, under regulations prescribed by the President. National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 [FY23 NDAA], § 543, 136 Stat. 2395 (2022).
  - c. DAC-IPAD issued a Report on Randomizing Court-Martial Panel Selection (Dec. 2023), with 10 recommendations related to the panel selection process. Recommendation 1: Congress should amend Article 25(e) to remove the requirement for the convening authority to detail members who “in his opinion, are bested qualified” based on “age, education, training experience, length of service, and judicial temperament.”

#### Panel Selection Study

- 1. Impetus for the Panel Selection Study
  - a. In late 2022, the DAC-IPAD received public comments from minority Service members, convicted of sexual assault, who raised issues about the diversity of their panels or explained their reluctance to select a member panel because of diversity concerns.
  - b. The DAC-IPAD is aware of research regarding the benefits of diverse juries in civilian judicial systems, including that diverse juries have longer deliberations and make fewer inaccurate statements than homogenous juries, and that diverse juries bolster public perceptions of legitimacy and fairness of the criminal justice system.
    - i. Sonia Chopra, *Preserving Jury Diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/Wheeler Motion at Trial (and Why You Should)*, The Trial Lawyer, Summer 2014
    - ii. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 (3) Chicago-Kent Law Review 1033 (2003)
  - c. The DAC-IPAD was tasked by DoD OGC to study recurring appellate issues. The Appellate Review Study, a published report, identified 14 appellate opinions addressing the selection of court-martial panel members. In three cases, the accused challenged the convening authority’s composition of their court-martial panel, alleging systematic and purposeful exclusion of women, African Americans, and medical personnel. The CCAs did not grant any relief on any of these claims, but the CAAF granted review in *U.S. v Jeter*, 2023 CAAF LEXIS 676 (C.A.A.F. 2023) and later ordered a supplemental briefing on whether *U.S. v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964) should be overturned.

- d. Congress indicated interest in the demographics of panels in Section 549F of the National Defense Authorization Act for Fiscal Year 2022. The DAC-IPAD does not believe this study has been completed.
  - e. In December 2022 the DAC-IPAD approved the Case Review Subcommittee to study the race, ethnicity, and gender of military panel members based on the public testimony and the issues raised in the appellate courts.
2. Importance of the Study
    - a. The DAC-IPAD's study will analyze data about multiple stages of the selection process that lead to impanelment. No other public study exists on the race, gender, and ethnicity of detailed and/or impaneled military members.
      - a. This study encompasses all contested courts-martial with an Article 120, 120b, or 120c offense tried to verdict and adjudicated by an officer or enlisted panel.
      - b. The overall study describes the demographics of detailed panel members, impaneled members, lead trial and defense counsel, as well as military judges.
    - b. The results of this study will establish a baseline for potential further study on the impact of *U.S. v. Jeter* and randomized selection (Dec. 2024).
3. Methodology
    - a. An RFI was issued requesting documents for all cases tried by panels with a sexual assault offense. Staff reviewed source documents/audios: convening orders, transcripts/audios of voir dire, randomization documents, and entry of judgments.
    - b. Staff consulted with Services to understand race and ethnicity data.
    - c. Case data: information collected allowed for an analysis on the outcome of case, forum, and the demographics of the accused.
    - d. Individual data: information collected allowed for analysis of detailed members, impaneled members, as well as reasons for exclusion.
    - e. Table: Total Data Field Contested Courts-Martial.
    - f. Requested demographic information from the Services. The quality of the demographic information was hard to decipher and varied across Services.
1. Analysis Plan
    - a. Part 1: Combines all panel members in all the cases to include those detailed and then impaneled.
    - b. Part 2: Presents details about the characteristics of individuals at the case level.
2. Demographics of courts-martial panel members by military Service of the Accused
    1. **Part 1:** Race and ethnicity of detailed members and Service demographics
    2. Impaneled members by race and ethnicity and Service demographics
    3. Gender of detailed members and Service demographics
    4. Gender of impaneled members and Service demographics
    5. Members not impaneled and reason for excusal (challenge for cause, peremptory challenge, randomization, other)
    6. **Part 2:** Representation of race and ethnicity of service members detailed and impaneled
    7. Graphic: Race/ethnicity composition of detailed members
    8. Graphic: Race/ethnicity composition of panels
    9. Representation of race and ethnicity of service members impaneled by race and ethnicity of the accused.
    10. Representation of gender of service members detailed and impaneled
    11. Graphic: gender of service members detailed
    12. Graphic: gender composition of panels

Army Take-Aways Part I of Analysis:

- a. The percent of detailed members who are white, not Hispanic and who are minority service members is very similar to their representation in Army.
- b. The rate at which white, not Hispanic service members are impaneled is nearly identical to the rate at which racial and/or ethnic Minority service members are impaneled (48.6%).
- c. The rate at which racial and ethnic minority service members are impaneled is slightly higher than their representation on details; the representation of white, not Hispanic service members on panels is slightly lower than their representation on details.
- d. Female service members are detailed at a rate (20.2%) that is greater than their representation in the Army (15.7%).
- e. Females are impaneled at a lower rate than males.
- f. Minority and white detailed members are being excused based on challenges for cause at identical rates; the rates of excusal for peremptory challenges are very similar.
- g. Female and male detailed service members are being excused with for cause challenges, peremptory challenges, and randomization at nearly identical rates.

Army Take-Aways Part II of Analysis:

- a. The typical panel is similar to the typical detail of panel members in terms of race and ethnicity.
- b. On average, panels have a greater representation of minority service members when the accused is a racial and/or ethnic Minority service member than when the accused is a White, not Hispanic service member.
- c. On average, panels have a lower percentage of female service members (16.1%) than the representation of females on the average detail (20.6%); the rate at which female service members are represented on the typical panel (16.1%) is similar to the representation of female service members in the Army (15.7%).