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

MINUTES OF APRIL 28, 2017 PUBLIC MEETING

AUTHORIZATION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("the Committee") is a federal advisory committee established by the Secretary of Defense in February 2016 in accordance with section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 537 of the NDAA for FY 2016. The Committee is tasked to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of such cases on an ongoing basis.

EVENT

The Committee held a public meeting on April 28, 2017 from 10:00 a.m. to 5:17 p.m. The Committee received informational presentations on the mechanics of a sexual assault case, military sexual assault case adjudication data for fiscal year 2015, and an overview of the Department of Defense Sexual Assault Prevention and Response Office and annual reporting data. Following the presentations, the Committee held a planning session.

LOCATION

The meeting was held at One Liberty Center, Suite 1432, 875 North Randolph Street, Arlington, Virginia 22203.

MATERIALS

A verbatim transcript of the meeting, as well as preparatory materials provided to the Committee members prior to and during the meeting, are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Committee are available on the website at: http://dacipad.whs.mil.

PARTICIPANTS

Participating Committee Members
Ms. Martha Bashford, Chair
Major General Marcia Anderson, U.S. Army, Retired
The Honorable Leo Brisbois
Ms. Margaret Garvin
The Honorable Paul Grimm
Dean Keith Harrison
Mr. A.J. Kramer
Mr. James Markey
Chief Master Sergeant of the Air Force Rodney McKinley, U.S. Air Force, Retired
Dr. Cassia Spohn
Brigadier General James Schwenk, U.S. Marine Corps, Retired
Ms. Meghan Tokash

Absent Committee Members
Ms. Kathleen Cannon
Ms. Jennifer Long
Dr. Jenifer Markowitz
The Honorable Reggie Walton

Committee Staff
Captain Tammy Tideswell, JAGC, U.S. Navy, Staff Director
Lieutenant Colonel Patricia Lewis, U.S. Army, Deputy Staff Director
Mr. Dale Trexler, Chief of Staff
Ms. Julie Carson, Attorney-Advisor
Dr. Janice Chayt, Investigator
Dr. Alice Falk, Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Meghan Peters, Attorney-Advisor
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Tiffany Williams, Supervising Paralegal

Other Participants
Mr. Dwight Sullivan, Designated Federal Officer (DFO)

Presenters
Colonel Christopher Kennebeck, U.S. Army, Chair, Criminal Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS)
Ms. Patricia Sudendorf, Professor and Special Victims' Litigation Expert, Criminal Law Department, TJAGLCS
Major Kristen Fricchione, U.S. Army, Associate Professor and Special Victims' Counsel Course Manager, Criminal Law Department, TJAGLCS
Major Iain Pedden, U.S. Marine Corps, Associate Professor, Criminal Law Department, TJAGLCS

Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice
Ms. Meghan Peters, Attorney-Advisor, Judicial Proceedings Panel and DAC-IPAD, U.S. Department of Defense
Dr. Nathan Galbreath, Deputy Director, Sexual Assault Prevention and Response Office (SAPRO), U.S. Department of Defense

MEETING MINUTES

The DFO opened the public meeting at 10:00 a.m. Chair Martha Bashford provided opening remarks and summarized the agenda for the meeting.

Mechanics of a Sexual Assault Case

Colonel Christopher Kennebeck, the chair of the Criminal Law Department at the U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS), accompanied by three criminal law professors from the TJAGLCS, Ms. Patricia Sudendorf, Major Kristen Fricchione, and Major Iain Pedden, provided a presentation to the Committee on the court-martial process for sexual assault allegations. The instruction included a sample sexual assault fact pattern utilized by the school and examples of the forms and documentation involved in a sexual assault case.

Colonel Kennebeck provided an overview of the military justice case disposition process, beginning with the relationship between judge advocates and commanders at the various levels of command. Colonel Kennebeck explained that in the Army, each brigade, which typically comprises 3,000 to 5,000 soldiers, is led by a colonel (O-6). The brigade will have a prosecutor who is a captain (O-3), and possibly a brigade judge advocate, who is a major (O-4), giving legal advice to the commander about how a case should be disposed of–whether it should be administratively handled or go to a court-martial. He also noted that the brigade commander is a special court-martial convening authority (SPCMCA) and is the lowest level commander who can make a disposition decision about a sexual assault case.

The next level of legal authority, Colonel Kennebeck explained, is the staff judge advocate (SJA), usually a colonel (O-6), who gives advice to the general court-martial convening authority (GCMCA). The GCMCA is typically a two-star general (or flag officer) leading a division or equivalent unit. He continued that the SJA runs the installation legal office, which for the Army includes the legal assistance, administrative law, operational law, special victims' counsel (SVC), and criminal law organizations. Committee member Brigadier General James Schwenk, a retired Marine Corps judge advocate, added that defense counsel have their own organizations and chain of command separate from the SJA to protect their independence on behalf of their clients, as do special victims' counsel in all of the Services except the Army.

Major Kristen Fricchione explained the Army's Special Victims' Counsel Program (SVC). She informed the Committee that the Army houses its special victims' counsel organization within the installation legal office due to the size of the Army and the force multiplying effect of having both full and part-time SVCs locally available through legal assistance to handle fluctuating

caseloads. She also noted that the SVC Program itself is authorized within the military legal assistance statute (10 U.S.C. § 1044(e)).

Next, Colonel Kennebeck explained the restricted and unrestricted reporting process, noting that a victim making a restricted report will have access to care and may have evidence collected, however the report will not go to their commander or to law enforcement. He added that it is required in all Services that as soon as someone makes an unrestricted report of a sexual assault, whether penetrative or contact only, the military criminal investigation office (MCIO) must be notified and open an investigation.

While the investigation is ongoing, Colonel Kennebeck explained, trial counsel work with special victim prosecutors (in the Army, there are 22 or 23 of these senior litigators with experience trying sexual assault cases), and SJAs, who then advise the GCMCA as they evaluate the evidence. The next step, he said, is that the lawyers prepare a legal opinion about what the options are for the case that is then shared with the brigade commander to make his or her disposition decision. The brigade commander can then either dispose of the case by sending it to a special court-martial; dispose of it alternatively with nonjudicial punishment, administrative action or no action; send it back down to the company commander for action at a lower level; or forward it to the GCMCA to decide.

Chair Bashford asked about the assignment of defense counsel, and when in the process this takes place. Colonel Kennebeck responded that as soon as the accused has been called in to give a statement, he or she will typically go to trial defense services (TDS), and that sometimes they seek counsel before that.

Committee member and retired Chief Master Sergeant of the Air Force Rodney McKinley asked what administratively happens to an accused once the MCIO opens an investigation, and whether it includes actions such as suspension of any security clearance and becoming ineligible for promotion, change of duty station, or re-enlistment. Colonel Kennebeck confirmed that everything stops for an individual once “flagged,” which is the Army term for the status when an investigation is opened. He added that the individual must be kept in a job commensurate with his or her grade during the course of the investigation.

Dean Harrison asked whether there is an effort to coordinate investigation efforts with civilian prosecutors when an alleged offense takes place in a civilian jurisdiction, and whether civilian prosecutors are notified when a convening authority decides to prosecute a case so they can decide if they wish to prosecute the case. Colonel Kennebeck replied yes to both but noted that the military generally tries to maximize its jurisdiction. He also referenced a new Rule for Courts-Martial (R.C.M.) 306(e) which requires a convening authority to consider a victim’s preference for military or civilian court and to provide certain notifications to civilian authorities.

Dr. Spohn asked whether the process differs when the victim is a civilian making an accusation against a member of the military. Colonel Kennebeck replied that the investigation and prosecution process is no different, though a civilian’s access to counsel may be an issue. He added that if the perpetrator was a soldier, then the case could be tried either by the military or civilian court, however, if the crime happens on a military installation that has exclusive federal

jurisdiction, the state court would not have jurisdiction to prosecute. Colonel Kennebeck also noted that a case can be tried by both the military and state courts if there is concurrent jurisdiction.

In response to a question from Committee member Judge Leo Brisbois, Colonel Kennebeck also added that if the allegation is of a violent offense or if there is a chance an accused might flee, the military has the option to put that person in pre-trial confinement or to otherwise lawfully restrict them–although the military does not have bail and pre-trial confinement starts the speedy trial clock so it is used with discretion by commanders. Chief McKinley also raised the concern of suicide prevention as a justification for pre-trial confinement.

With respect to SVCs, Committee member Meg Garvin asked whether contractors and civilian employees have access to these counsel. Major Fricchione responded that there are different categories of civilians that qualify for different services, noting that DoD civilian employees and military dependents do have access to SVCs, but other civilians do not. Colonel Kennebeck observed that because SVC caseloads are already heavy, adding eligibility to more categories of victims would have a negative impact on other legal services provided. He also indicated that in the Army, SVCs are made available only to sexual assault victims, though some Services make SVCs available for other crimes as well, such as domestic violence.

Disposition Process

Colonel Kennebeck explained that when the prosecutor sits down with the brigade-level O-6 commander to brief the case for disposition, he or she will have the completed investigation file and will have written a prosecution memo to break down all of the evidence required to prove all of the elements of the offenses with an assessment of the strength or weakness of the evidence. He noted that the prosecution memo wouldn't be shared with the commander because it is a work product, but it would be discussed so the commander has an understanding of why a case should or should not be tried. After that, he said, the commander owns the decision.

Command Review of Sexual Assault Cases

Colonel Kennebeck explained to the Committee that the SAIRO report (the Sexual Assault Incident Response Oversight report) is an initial report for commanders with the basic facts of a sexual assault incident—without including personally identifying information (PII)—to let them know quickly about an incident within their command. He stated that it is received by the lowest level commander and routed up to the general officer. The battalion-level commander, typically a lieutenant colonel, is then required to meet with the victim monthly to provide an update on the case.

The next form of command review, explained Colonel Kennebeck, is the monthly sexual assault review board (SARB) where the commanding general and all of the O-6s who work in the installation review the status of each sexual assault case within the command—without divulging PII—to discuss victim care and the status of pending cases. As another level of command accountability, Colonel Kennebeck referenced Army Form 4833, which contains information on what action was taken by the command once the investigation was closed. Chair Bashford asked

whether the 4833 form contains information on why certain action was taken or not by the command. Colonel Kennebeck responded that it could say something like "evidentiary challenges prohibited" prosecution, but it would be very generic and will depend on how carefully the form is filled out. He said they don't usually provide a justification.

Retaliation

Dean Harrison asked whether there are any administrative procedures in place to "flag" a victim to make sure she or he is not penalized for reporting an allegation of sexual assault. Colonel Kennebeck replied that the SVC typically solves that issue because they are the first person to hear about this. Major Fricchione elaborated on the military's recent focus on the area of retaliation. She explained that reprisal is where anyone in a position of authority withdraws a favorable action, or imposes a negative personnel action, as a result of the sexual assault allegation. She added that traditionally reprisal is investigated by the Inspector General. Major Fricchione also referenced an Army Directive (AD 2014-20) that makes retaliation a punitive offense and enables the command to take action if there has been reprisal following a report of any crime, as well as the new Article 132 of the UCMJ enacted in the 2017 NDAA which prohibits reprisal.

Colonel Kennebeck added that the monthly SARB is a venue where any occurrence of retaliation is discussed and resolved by the command. Major Fricchione also referenced an Army Directive that came out in 2015 that talks about the command's responsibilities to prevent retaliation and she indicated that if retaliation is reported by anyone involved in the case from witnesses to the SARC, victim advocate, the victim, or others, it will be reported and tracked through the SARB. She added that the SARB will track any incidents even after a court-martial has ended and that the O-5 battalion-level commander of the individual who is being retaliated against is required to develop a plan to address it. In sum, Major Fricchione stated that retaliation issues are most commonly solved by command action through these processes rather than through formal investigation and prosecution.

Chief McKinley expressed concern about the potential unintended consequence of a victim not being able to study and concentrate for a promotion test such as from staff sergeant to tech sergeant and may, as a result, lose out on the promotion.

Committee member James Markey inquired whether the military collects data on retaliation. Major Fricchione indicated that it is collected through the SARB and from SARCs and victim advocates as well as the SVCs. Colonel Kennebeck added that the Inspector General (IG) manages all formal investigations and will be tracking data on those.

Ms. Asha Vaghela, the Service representative for the Air Force, informed the Committee that DoD has a Retaliation Prevention Response Strategy and that the Services all have a process by which retaliation data is collected quarterly by the Department of Defense Sexual Assault and Prevention Office (SAPRO) through the SARCS and victim advocates for the annual DoD sexual assault report. She also noted that the Air Force collects retaliation data from command-directed investigations and the Air Force Office of Special Investigations (OSI).

Committee member Mr. A.J. Kramer asked about the difference between retaliation and reprisal. Major Fricchione explained that retaliation is the umbrella term that refers to hostile acts made by anyone in response to someone reporting or believed to have reported a crime of any kind. Reprisal, she continued, has to do with a supervisor or commander or anyone with authority over an individual in an organization who takes a negative personnel action on or withholds a favorable personnel action from an individual.

Major Fricchione addressed a question from Brigadier General Schwenk about 10 U.S.C. § 1034, the federal Whistleblower Protection Act, noting that the military has its own statute, the Military Whistleblower Protection Act, and that the same protections are also codified in the new punitive Article 132 of the UCMJ.

Commanders' Disposition Options

Colonel Kennebeck discussed commanders' disposition options. First, he described the array of administrative actions a commander may take, including on-the-spot correction, corrective training, counseling, revoking privileges, or issuing a letter of reprimand, which can be the basis for an administrative separation from the Service. He also explained the types of non-punitive discharges one may receive with an administrative discharge noting that "other than honorable" (OTH) is the most severe administrative discharge and that it is a very damaging punishment. An OTH discharge precludes veterans' (VA) benefits and makes it very difficult to secure future employment. In fact, he said, an individual is better off not admitting having served at all.

Next, Colonel Kennebeck reviewed nonjudicial punishment (NJP), which he said is punitive and meant to be a corrective action for minor offenses. With nonjudicial punishment, he continued, an individual may continue to serve but may be reduced in grade and incur monetary penalties. He noted that in the Army the burden of proof increases from a preponderance of the evidence in administrative actions to beyond a reasonable doubt for NJP. However, Major Pedden reported that in the Marine Corps the burden of proof for NJP is the same as it is for administrative actions–a preponderance of the evidence.

Committee member Ms. Meghan Tokash followed up with a question about the factors a commander must consider in making the disposition decision. She asked whether the R.C.M. 306 discussion section, which deals with this issue, still includes "bias of the reporting victim" and the "character and military service of the accused" as factors for the commander to consider. After reviewing the Manual for Courts-Martial (MCM), Colonel Kennebeck answered that the character of the accused has been removed as a consideration (by the FY 2015 NDAA) though bias of the reporting victim is still included. He noted that these considerations are enumerated as guidance and not authoritative.

Colonel Kennebeck next discussed the third type of disposition—the court-martial. He explained that the summary court-martial is similar to NJP, noting that it isn't considered a real conviction and a Service member can turn it down and demand trial by court-martial. With respect to special courts-martial, he noted that in practice it is the GCMCA who refers both special and general courts-martial cases to trial, noting that penetrative sexual assault cases can only be referred to a GCM.

Another disposition option Colonel Kennebeck explained is what he called a "Chapter 10." This occurs after charges have been preferred and an accused requests an administrative separation with an OTH discharge rather than being tried by court-martial. He indicated that this is not common for sex offenses. Lastly, Colonel Kennebeck explained that punitive discharges–dishonorable, or bad conduct for enlisted members, and dismissal for officers–can only be adjudged at courts-martial.

Committee member Dr. Cassia Spohn inquired about the cases where there is no action taken. She wanted to know about the process and standard followed in the military for unfounding cases, noting that, in the civilian world, law enforcement must determine that a case is false or baseless to consider it unfounded.

Dr. Spohn then asked who makes that decision. Colonel Kennebeck responded "that happens between the lawyers and the investigators before they advise the command." He continued that once the MCIO is close to completing an investigation the investigator will ask the prosecuting attorney for an opinion. Colonel Kennebeck said this will be a conversation between the investigator and the prosecutor about whether or not there is probable cause for the offenses. He explained that the founding decision is not made at this point but, in practice, it is a very similar decision. The MCIO will record the conversation with the prosecutor about the case in the final investigation report.

The Marine Corps representative at the meeting, Major Harlye Carlton, addressed the Committee, pointing out that in the Marine Corps it is the commanding officer who makes the decision about whether a case is founded, unfounded, or whether there is probable cause, based on the advice of the SJA and the input of the investigating officers, the preliminary hearing officer (if there is an Article 32 hearing), and the attorneys who worked on the case along the way. Colonel Kennebeck responded that the difference is non-existent—the same players are having the discussion, but the conversation about whether there is probable cause or not is very legal, so the Army treats it as a legal discussion.

Brigadier General Schwenk asked whether CID (the Army criminal investigative organization) has stopped making founding decisions. Colonel Kennebeck responded yes, they have stopped. Brigadier General Schwenk added that, in the Army, CID used to go beyond merely delivering their report and making themselves available for questions and made conclusions about whether there was probable cause or the case was unfounded. He asked if this is still happening. Colonel Kennebeck indicated that yes, as he understands it, CID is still doing that. He said it is primarily to help the investigators determine whether there is enough evidence to enter the accused into the database because once an accused is "titled" in the database, it stays with the individual for a long time.

Later in the session, Colonel Kennebeck clarified that the titling decision is separate from whether an investigation is complete or not and has a lower standard. Although the MCIOs are no longer founding and unfounding cases, there is still discussion about probable cause, though it is not dispositive. He explained that every investigation, once complete, goes to the command.

Chief McKinley expressed his concern about accused who receive a separation in lieu of court-martial with an OTH discharge who then are able to appeal the discharge for an upgrade to honorable. He asked whether there are any statistics on how many separations in lieu of court-martial are occurring in each Service. He also expressed concern that the military is discharging perpetrators into the civilian community with no follow-on records or sex offender registry. Colonel Kennebeck responded that there are occasions when it is the victim's wishes to have the accused discharged with "bad paper" rather than having to go through the court-martial process, so it is not always a bad thing. He also noted that it is extremely unlikely that an accused who is discharged in lieu of court-martial will be able to upgrade the discharge since an accused seeking a Chapter 10 is required to make the decision with the advice of a lawyer and sign a form that hr or she understands what he or she is agreeing to.

Sexual Assault Prevention and Response

Colonel Kennebeck reviewed the Department of Defense's lines of effort in preventing, educating, and responding to sexual assault. He described the many resources and organizations implemented by the military to support victims including SARCs, victim advocates, special victims' counsel, special victim prosecutors, victim witness liaisons, behavioral health, and the SAFE Helpline.

U.S. v. Abbott - Sample Case

Colonel Kennebeck introduced a fictional case utilized at the Army TJAGLCS called U.S. v. Abbott. Ms. Sudendorf explained that she and Major Pedden developed the case as a teaching tool to encompass as many of the challenging issues that military litigators are encountering in sexual assault prosecutions as possible. The case involves multiple victims of a single perpetrator, including a victim who reported early, initially made a restricted report, and after nearly a year converted it to unrestricted.

Major Pedden described the actions that take place in the first week after a sexual assault report is made. First, he explained, a victim must report the offense to, or be referred to, a SARC to determine whether the victim wants to make a restricted or unrestricted report (by completing DD Form 2910). He noted a problematic issue that sometimes arises is when a victim tells a friend (before making a formal report with a SARC) who then reports the assault to someone in the command, automatically triggering an unrestricted report. However, Major Pedden noted that, in most cases, a victim is able to go to the SARC, make a restricted report, and the command will not know who made the report, only that an incident has been reported.

For unrestricted cases, Major Pedden explained, the victim is offered the services of an SVC, SARC, victim advocate, and medical care, and the victim will be interviewed by the MCIO. He said the victim may also request an expedited transfer, adding that the authority to approve or deny a request for expedited transfer is with the first general officer in the command. Once a victim gets an expedited transfer, he continued, the likelihood of going to come back to participate in the case decreases exponentially, particularly if the case is overseas. He noted that this puts commands in a tough spot because a commander doesn't want to say no to the victim, but also doesn't want to let someone off the hook if it is a strong case. Ms. Sudendorf added that

a victim may also seek a protective order and that the SVC will assist the victim in requesting expedited transfers and protective orders as long as the victim has made an unrestricted report, since both must be approved by the commanding general.

Chair Bashford asked about the finding of a JPP Subcommittee report that indicated substantial delays are occurring before the first MCIO interview with a victim because of the SVCs. Colonel Kennebeck, noting that his experience is anecdotal and somewhat dated, said he thinks there is some truth to that but doesn't see it as a pervasive problem.

Another issue Colonel Kennebeck discussed is collateral misconduct—such as underage drinking—which is fairly common in sexual assault cases. He explained that the disposition decision on collateral misconduct is withheld to the brigade-level commander at the same time the sexual assault disposition decision is forwarded. He noted that this can be a tricky situation for a commander—and a victim, especially if others were engaged in the collateral misconduct, such as underage drinking, and are immediately given NJP. Colonel Kennebeck explained that the policy of DoD is to withhold the disposition of collateral misconduct until the sexual assault is disposed of, however a problem is that this provides great fodder for cross-examination by the defense and may lead to perceptions of favoritism toward the victim by peers, which only increases the pressure on the victim. He noted that this is an area where the SVC has proven very valuable because they can frequently step in and assist with an informal solution that mitigates pressure on the victim and the risk of retaliation from peers.

Next, Colonel Kennebeck discussed prosecution strategy. He explained that throughout the investigation the prosecution is working on the theme and theory of the prosecution of the case and building the prosecution memo, which indicates the strengths, weaknesses and challenges to the evidence. If the trial counsel and special victim prosecutor don't believe they can prove the case beyond a reasonable doubt, he explained, the SJA is usually consulted as well. He noted that the prosecution memo is treated as work product and kept in the file; however, if the case isn't prosecuted, every unit handles this a bit differently. He indicated that there is not a formal policy on how this is managed, but if the decision is made that the case can't be prosecuted, then that is recommended to the brigade commander (O-6), who generally wants to know why. Sometimes the commander will say they want to take it to court-martial anyway, though he said he has not seen a case where a prosecutor believed he or she could not ethically try a case a commander wanted to take forward and that typically the line is fairly clear.

Colonel Kennebeck stated that he doesn't think the nature of the prosecution discussion or decision-making process is much different from that of a civilian prosecutor in a state office—from what can and cannot be proven to what experts are needed. Ms. Sudendorf added that the Army's prosecution memo is similar to the felony review memo used by Cook County when she was a prosecutor in Chicago, Illinois.

With respect to experts needed, Ms. Garvin asked whether there was a budgetary analysis involved with regard to expert testimony. Colonel Kennebeck responded that budget for experts is not a limitation. He added that if the government wants an expert, then the expectation is that the defense is going to need one as well and that is factored in. He said they have plenty of budget money to try the courts-martial they are trying.

Ms. Tokash commented that from her experience as a federal civilian prosecutor, there is a difference between the civilian and military prosecution decisions. She asked what the standard operating procedure is when the SJA's written pre-trial advice to the GCMCA differs from the commander's decision. Colonel Kennebeck explained that Article 34 of the UCMJ defines when a case can be referred to trial—if there is an offense under the UCMJ, probable cause that the accused committed the offense, and court-martial jurisdiction over the accused. Committee member Judge Paul Grimm noted that probable cause is also the standard for a civilian grand jury. If the SJA advises the commanding general (CG) that there is probable cause and the CG agrees, Colonel Kennebeck explained, the commander signs the back of the document and the case has now been referred to a court-martial.

Major Fricchione explained that it was mandated in the 2015 NDAA § 1744 (and Army Directive 2014-19) that when an SJA recommends no charges and the GCMCA agrees, that decision must be reviewed by the next highest commander in the chain of command. She continued that if the SJA recommends going forward with the case and the GCMCA decides not to refer charges, the decision must be reviewed by the secretary of the Service. Dean Harrison asked whether there are any statistics on how often there is disagreement between the SJA advice and commander's disposition decision. Brigadier General Schwenk, who is a member of the JPP Subcommittee, informed the Committee that from the information the JPP received, there have been zero cases reviewed by Service secretaries and 21 or 22 instances where the SJA recommended not going forward and the commander agreed and did not send the case forward. He added that in none of those cases did the next higher authority send it to trial.

Article 32 Preliminary Hearing

Colonel Kennebeck explained the Article 32 preliminary hearing process, noting that the military does not have grand juries like the civilian system. He stated that the Article 32 hearing used to be a more robust discovery took but it is now limited to a review by a preliminary hearing officer (PHO) of statements and other documentary evidence to determine probable cause. He highlighted that the victim can opt not to testify at the hearing. The PHO, he continued, is a judge advocate usually in the rank of a captain (O-3) or major (O-4) in the Army. He explained that the PHO makes a recommendation as to whether there is probable cause to go forward and produces a report that will be found in the record of trial.

Colonel Kennebeck stated that ideally, in practice, if a prosecutor is confident that a case can't be tried, he or she can advise the brigade commander not to send it to an Article 32, and to handle it with an alternative disposition. However, he said, if a brigade commander is at all hesitant, he or she will send it to an Article 32 to see what the PHO recommends, noting that the Article 32 will have happened before the GCMCA and the SJA get together to decide whether the case should be referred to a court-martial.

Brigadier General Schwenk asked whether that might change because previously (before the legislative revision of Article 32 in 2014), the Article 32 investigating officer had access to everything and could call witnesses, but now is limited to a few documents about the case. He noted that the idea that a commander can get an independent outside observer's in-depth review from an Article 32 hearing is no longer the case.

Colonel Kennebeck concurred that the Article 32 has changed in scope, but he believes that for the cases that are on the fence, where the command "just can't viscerally give it up or just thinks that we need to know more before [he or she] can make [a] decision," it is at least another look by another person to opine on whether probable cause exists to send the case to trial. He added that if the PHO doesn't believe there is probable cause, that is a pretty good indication that the case is unlikely to be proven beyond a reasonable doubt. Colonel Kennebeck said that the Article 32 is certainly not what it was, but he feels that there are pros and cons to the changes.

Alternative Dispositions

Next, Colonel Kennebeck discussed alternative dispositions which may occur when the advice from the prosecutor is that there is not enough evidence to go to trial and the commander will ask what the other options are. An example he provided is an instance where the victim is credible but there is not good forensic evidence, and perhaps the victim and accused were friendly beforehand, or if the victim decides not to participate. He stated that these are the cases where an alternative disposition may be very appropriate, and where commanders may pursue a reprimand or administrative separation.

Major Pedden added that, from his experience, commanders are generally not inclined to entertain alternative dispositions unless there is a compelling reason to do so. He said that, ordinarily, the commander's election is to move forward.

Chair Bashford asked whether a victim's decision not to participate is dispositive, and whether it matters at what stage in the process that happens or if the accused is being held in pretrial confinement. According to Colonel Kennebeck, a victim can stop cooperating at any stage in the process, but it is usually less frequent if the case is moving towards a court-martial. He indicated that it is not dispositive, but that it puts the commander in a very difficult position.

Mr. A. J. Kramer asked whether the accused is told of a victim's decision not to testify or cooperate any longer. Major Pedden said he is not aware of a precise rule that requires that, but as a practical matter it comes to the attention of the accused during the process of preferring charges and moving forward with the case in the event the command elects to do so.

Military Rules of Evidence 412 (Prior sexual behavior) and 513 (Psychotherapist-patient privilege)

Major Pedden discussed issues related to M.R.E. 412 and 513, noting that M.R.E. 412 precludes the introduction of evidence at trial of the prior sexual conduct of a victim in a sexual assault case or evidence of the victim's sexual predisposition, unless one of three specific exceptions is met. He added that prior to disclosing that evidence in open court, the military judge has to hold a closed hearing with certain notice requirements. Rule 513 is a privilege rather than a rule of relevance and admissibility, therefore until the court holds a closed hearing, the court does not even have the authority to order production of those materials from their ordinary custodian.

Major Pedden explained that in 2015, the NDAA amended the language of the rule to specify that the victim has a right to be heard, including a right to be heard through counsel, including

special victims' counsel, at this hearing as the judge makes a determination on the admissibility of evidence. He also explained that M.R.E. 513 was modified by the 2015 NDAA making it now exceptionally difficult even to order production of mental health records, or to get an in camera review. He indicated that the changes to M.R.E. 513 are now the subject of extensive litigation.

Judge Grimm asked a question regarding M.R.E. 412, noting that under Rule 412(b)(1) there are three circumstances where the otherwise prohibited evidence under 412(a), can be allowed in: (1) to show the identity of the assailant; (2) to show consent; or (3) if otherwise required by the Constitution. Judge Grimm suggested that a clever defense attorney could certainly argue that a client's Sixth Amendment Confrontation Clause rights trump the protections under 412(a) to obtain the otherwise protected information. He asked whether this happens much in practice in the military, and if so, whether it has been successfully argued as an end run around the rape shield rule.

Major Pedden responded that M.R.E. 412 very closely parallels the Federal Rule of Evidence and that the three exceptions are roughly the same. He believes that generally, counsel are not making an end run around the first two requirements by pleading the third, the constitutionally required section, and emphasized that at its basic level, M.R.E. 412 is a rule of exclusion and the default position is not just that the evidence isn't admissible, but that it isn't relevant. He added that the military has a robust executive and legislative history that shows the development and implementation of the rule, and recommended an article by Colonel Fredric Lederer regarding judicial implementation and interpretation of the M.R.E. Major Pedden highlighted that the Sixth Amendment right of confrontation, or any fundamental constitutional right, will trump a rule of evidence. He emphasized that judicial opinions show careful consideration of this issue by military judges who are well-trained on the matter. He also noted that the constitutionally required exception is the most commonly litigated because the first two are less frequently argued.

Colonel Kennebeck noted that even if the constitutionally required exception is met, the judge still must narrowly tailor what is allowed in, in order to protect the victim. Mr. Kramer asked how often it occurs that after a pre-trial ruling on a 412 matter, the victim testifies on direct and says something to open the door to cross-examination on the issue. Major Pedden responded that, in theory, it shouldn't be an issue because the military judge's pre-trial ruling is binding on everyone who testifies, including the victim, and so to the extent that counsel begin to ask questions that sound like they might encroach on the judge's ruling, the judge is going to stop the questioning. He added that if some other fact became known that required the military judge to revisit whether the answer to a particular question is constitutionally required, the military judge might order another closed session to consider it, but this does not typically happen.

Major Pedden noted that the case law shows that the protection is becoming more robust over time, and that the rule is more strictly construed in favor of victims now than it was in the past.

Judge Grimm asked whether the military version of M.R.E. 412 requires notice by the defendant 15 days before the trial and whether the defense has to identify the specific purpose for which it is offered. Major Pedden replied that it requires advance notice, but not 15 days and that not only

does the defendant have to identify the specific purpose, but the moving party bears the burdens of both persuasion and proof by a preponderance of the evidence. Judge Grimm also asked whether a judge who is required to give notice to the victim will consider the victim's views when making the ruling. Major Pedden said the plain language of the rule expressly requires the judge to at least afford the victim the right to be present and opportunity to be heard through the SVC. Colonel Kennebeck noted that Article 6b gives the SVC the right to file a petition (for a writ of mandamus) if the judge does not grant the rights the victim should be afforded or correctly follow procedures. He added that such writs have been successfully filed and granted by the CCAs.

Major Pedden also noted that the standard for appeal under Article 6b is important because it is entirely subjective. The statute says that if a victim believes that what the trial judge has done violates the victim's rights under certain evidentiary rules, including M.R.E. 412 and 513, then the victim may petition the court of criminal appeals for a writ of mandamus. Major Pedden asserted that this standard makes Article 6b a very powerful statute, because it is based only on what the victim "believes," but he noted that it is being employed rather judiciously. He reported that, in practice, the courts are not receiving many writs, and those filed are well-considered and based on substantial questions where a victim is committed to that privacy right and is willing to litigate.

In response to Judge Grimm's question about how quickly these writs are being turned around, Major Pedden answered that they have priority over other matters at the CCAs and some are as quick as a few days, though others have taken longer because they present more complex issues.

Major Pedden noted that Article 6b rights also apply to the privileges under Military Rule of Evidence 513 and 514, and also Military Rule of Evidence 615, which precludes the military judge from excluding the victim from the proceedings unless the military judge first finds that the testimony of the victim would be altered.

Offer to Plead Guilty

Colonel Kennebeck explained that a guilty plea in the military is not the same as in civilian court. He said in the military a deal is negotiated between the accused and the GCMCA and the accused will sign an agreement that places all communications within that agreement and a separate document which agrees to the limit of confinement or punishment, known as the "quantum." The stipulation of fact is presented during the accused's guilty plea and the military judge will ensure that the accused's pleas are provident.

Colonel Kennebeck continued that after the sentencing, the judge will look at the quantum page of the agreement, which the judge has not previously seen, and the accused will get the lesser of the agreement or the adjudged sentence—known as "beat the deal."

Court-Martial

Colonel Kennebeck explained that the Court-Martial Convening Order is the document that creates the court-martial, and it will identify names of the panel members who are selected by the

GCMCA from that installation or from the units that the GCMCA commands. He noted that panel members are typically more senior folks and tend to be captains, majors, lieutenant colonels, colonels, first sergeants, and master sergeants.

He described the next steps which are that the case will be docketed, motions will be argued, and a trial date will be set. He also noted that under R.C.M. 1001A, which is a new provision, the victim is now able to make an unsworn statement, which is usually in addition to the government's case and presentation of victim impact evidence. He added that, much like that of the accused, the victim's unsworn statement can be rebutted with additional evidence. The unsworn statement is typically in writing and is provided to the defense and judge prior to being presented in court.

Sentencing and Post-Trial

Next Colonel Kennebeck discussed the sentencing and post-trial phases, noting that the sentencing hearing takes place immediately after the conviction, unlike civilian practice. He explained that witnesses—typically the victim—testify on behalf of the government about the impact of the crime, followed by the accused, who will testify or submit an unsworn statement, and any supporting witnesses. After that the panel or the judge will render a sentence.

He then discussed the post-trial phase, which he described as giving a second look at what happened in the court-martial. He explained that a verbatim record of trial is typed up which usually takes a few weeks. It is then reviewed by trial and defense counsel and the military judge for error. Once that is completed, it is served on the accused and the victim who both have a certain window of time to provide input back to the convening authority. He noted that the judge is done with the case at this point.

Colonel Kennebeck then discussed what is contained in the record of trial, noting that it is usually contained in four or five hard-copy volumes. He said that there will be a chronology of when the case started and when it ended, the MCIO investigation, all of the submitted pieces of evidence that were admitted or offered, and other documents related to the case that may or may not have been used. He added that any sealed material will be included, as will the transcript of the Article 32 preliminary hearing.

He continued that after receiving input from the accused and victim, the staff judge advocate makes a recommendation to the convening authority on clemency. He noted that Article 60, which gave the convening authority power to disapprove findings of guilt or reduce sentences, has been severely limited by statute. After reviewing the packet, he explained, the commanding general signs a document called the "action," which is an approval of the sentence and findings and starts the appellate process.

Colonel Kennebeck gave an example of clemency that might be granted—an accused who is married with a child requests a waiver of forfeitures for a period of six months to help the family.

Questions

Brigadier General Schwenk asked the presenters whether they had any suggestions based on what they are hearing from people out in the field about issues of concern that the DAC-IPAD may want to look into over the next couple of years.

Major Fricchione mentioned Article 6b and the enforcement of the rights of victims at trial. She referenced the recent *Martinez* case, where the CAAF determined that it did not have jurisdiction to hear Article 6b appeals from the CCAs. She noted that there is no clear guidance on what is and is not a right and the procedural requirements including the incorporation of SVCs into the process. With no CAAF decisions on these issues, each jurisdiction has to take each case on its own and try and figure out how to apply the rules. Major Fricchione noted that one issue is the lack of guidance on where the SVC sits in the courtroom and how they make objections.

Committee member Major General Marcia Anderson asked about the SVC/VLC assignments and career path. Colonel Kennebeck responded that in the Army, generally, the policy is that SVCs need to have litigation experience before becoming an SVC, though, because of its size, that is not always the case. He added that over time, people have become more accepting of the job and he feels that two years as an SVC is about the right amount of time.

Chair Bashford asked about turnover and how often trial counsel in a sexual assault case, an SVC, or the defense attorney has to be replaced during a case. Colonel Kennebeck responded that special victim prosecutors, who are senior litigators with oversight of the sexual assault cases, are typically on three-year assignments. He said that trial counsel are typically in the job either 12, 18, or 24 months, and SVCs remain for a couple years. There is a learning curve to being an SVC, like defense counsel, and they all remain in their positions for two or three years.

Ms. Garvin asked about the precedential value of civilian case law on 18 U.S.C. § 3771 (Crime Victims' Rights Act), since those rights have been around since 2004 and are nearly identical to Article 6b. Major Pedden believes that, as a general matter, it is persuasive authority, but given that the rights are specifically enumerated in the Uniform Code of Military Justice, it is a duty of the court to first look to that body of law. Ms. Garvin also asked about the precedential value of cross-branch appellate courts. Major Pedden responded that they are generally cited as persuasive authority but not binding on other courts of criminal appeals. He noted that decisions from the CAAF are binding on all of the Services.

Major Pedden noted that there are appellate cases in progress now that will be addressing precisely what 6b means and how far it goes, referencing the *Martinez* and *Kitchen* cases. Ms. Garvin asked whether, given that Article 6b applies to victims of all crimes, there have been many civilian lawyers in military court helping protect the 6b rights of victims of non-sexual violence crimes. Colonel Kennebeck replied not in the Army, though Major Pedden said that, while unusual, it does happen in the Marine Corps.

Dean Harrison asked about the resources available and the training levels of defense counsel. Colonel Kennebeck replied that training is robust and that defense counsel, prosecutors, and SVCs go through trial advocacy courses. He noted that at Fort Belvoir, the Army has the Trial

Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) which employ highly qualified experts (HQEs). These organizations provide training at installations or in larger groups. That training is oriented towards either the prosecution or the defense of all crimes and there is typically sex assault-focused training. He added that he believes that both TCAP and DCAP are equally funded and resourced.

Dean Harrison asked whether there are any efforts to make sure there are not sentencing disparities, either within a Service or across the Services. Colonel Kennebeck referenced the Military Justice Act of 2016 which was just passed and requires a four-year study of military sentencing to determine whether sentencing parameters and judge alone sentencing are appropriate. Brigadier General Schwenk asked who is doing this review. Colonel Kennebeck did not know for sure but believes it is prescribed by Article 146 in the new Military Justice Act.

Military Sexual Assault Case Adjudication Data Analysis

Ms. Meghan Peters, an attorney-advisor on the JPP and DAC-IPAD staff, provided the initial overview of the JPP data collection process utilized to collect the adjudication data for 2015 sexual assault cases. She explained that the JPP had three statutory tasks: to examine (1) case dispositions, meaning whether or not a case went to court-martial; (2) the outcomes of those cases; and (3) the punishments rendered at courts-martial. The JPP was also tasked to look at appellate decisions, review sex assault convictions, and compare punishment data in military courts with punishment data in civilian, federal, and state courts.

She stated that JPP staff collected key court-martial case documents that chart out the procedural history of each case from the military Services. The JPP staff asked the military Services last year for access to all sex assault cases that were tried, dismissed, or otherwise resolved in fiscal year 2015.

Ms. Peters explained that the JPP recorded data from 738 cases that were resolved in FY 2015. Dr. Cassia Spohn, who was retained by the JPP to analyze the data, informed the Committee that she has been working with the JPP for a number of years, initially analyzing the 2012-2014 data, and then most recently the data analysis for the 2015 cases. She noted that of the 738 cases, 530 were penetrative offenses, and 208 were cases in which the most serious charge was a contact offense. About two-thirds of the cases were from the Army or the Air Force, and the other Services had a smaller number of cases.

Dr. Spohn reported that the typical accused was an enlisted Service member. She noted that almost all were male, and most were assigned to units in the United States or its territories when charges were preferred. She explained that this is not necessarily where the case occurred or where the incident occurred, but where the accused was stationed at the time that charges were preferred.

She noted that the information available on victims was limited but that the typical victim was female and two-thirds were Service members.

With respect to case dispositions, Dr. Spohn explained that almost three-fourths of the cases were referred to a court-martial, 16% received an alternative disposition, and 12% were dismissed without further action.

Next, she explained case outcomes for the cases in which the most serious charge was a penetrative offense. She reported that 25.8% percent of the defendants in 530 penetrative cases were convicted of at least one count of a penetrative offense, 21% were acquitted at trial, 14.2% received an alternative disposition, and 14.7% were dismissed without further action. She reported that the overall conviction rate for preferred cases in which the most serious charge was a penetrative offense was 49.8%.

With respect to contact offenses, Dr. Spohn reported, the modal outcome for these cases was conviction for a non-sex offense and almost 41% were convicted of something other than a sexual offense. She continued that 17.8% were convicted of a contact offense, leading to an overall conviction rate for contact offenses of 58.6%, 13% were acquitted, 22% received alternative dispositions, and 6% were dismissed without further action.

As for sentences, Dr. Spohn reported that 52.1% received both confinement and separation. Seventy-one percent of the cases resulted in some length of confinement, and almost 60% resulted in a punitive separation.

Dr. Spohn looked at the relationship between sentences and a variety of factors and found that the likelihood of confinement was greater if the victim was a civilian or if there were both civilian and military victims than if the victim was a member of one of the Military Services. She believes the fact that the confinement rate is the highest for those cases in which there is both military and civilian victims reflects in part the fact that by definition, those cases involve more than one victim.

Dr. Spohn also found that length of confinement was not affected by the Military Service of the accused, the rank of the accused, or the gender of the victim. She noted that cases involving military and civilian victims resulted in longer sentences than those that involved only civilian victims, and those cases that involved only military victims resulted in the shortest sentences. She further found that if the victim was a spouse or intimate partner, the sentence was substantially longer than if the victim was not the accused's spouse or intimate partner. Neither the rank of the accused, whether the accused was an enlisted member or an officer, nor the gender of the victim affected any of the outcomes.

Dr. Spohn's overall conclusions based on the 2015 data are that cases involving penetrative offenses have higher rates of case attrition, but conviction for these offenses results in harsher punishment. She found significant differences based on the Military Service of the accused, and she recommended the Committee look into those differences and whether they reflect differences in policies and practices.

She concluded that the status of the victim, military versus civilian, is an important factor in the analysis, and the relationship between the victim and the accused is a somewhat consistent predictor of how the case will be handled and the sentence that will be imposed.

Chair Bashford suggested that the Committee may be interested in looking into whether military victims have higher rates of attrition to see if that is a result of retaliation. She was also interested to see whether the more serious penetrative cases tend to have more evidence than a groping or if there is somehow a reluctance to convict because the consequences are so serious.

Chief McKinley observed that all branches of the Services follow the same UCMJ, but yet there are very different conviction rates. Mr. Kramer also commented on the striking difference in conviction and acquittal rates as compared to civilian courts. He noted that in the federal system, the conviction rate of cases that go to trial, which includes from some Indian reservations a fair number of sexual assault cases, is above 90%. He added that state courts are similarly high for sexual assault cases that are tried.

Dean Harrison asked whether the JPP collected data on the race of the victim or defendant. Ms. Peters responded that the information was not available in the documents the staff collected as they focused on the procedural outcomes of cases.

Ms. Garvin asked about whether there was data about male victims regarding whether the offenses were male-on-male or female-on-male. Dr. Spohn replied that she recalls that there were only five cases with female offenders.

Ms. Tokash asked whether the JPP looked at cases where the CCAs overturned convictions for insufficient evidence. Ms. Peters responded that they did and the analysis will be in the JPP's June 2017 report. The JPP looked at every issuance in FY 2015 from each Service CCA that involved a conviction on an Article 120 or 125 offense or an attempt, and looked at whether there was relief granted in any of those cases. She said the JPP has found very few cases each year–in the single digits–where there was a conviction overturned. She said typically some other defects in the trial affected the entire sentence, since there is unitary sentencing in the military.

Briefing on Department of Defense Annual Sexual Assault Reporting Data

Dr. Nathan Galbreath began his presentation to the Committee by explaining that he would be giving the members a high-level overview about how the Department of Defense views the problem of sexual assault. He noted that he was an Air Force investigator for 12 years before entering a health psychology program and working in a clinical capacity for the Air Force. He has been at SAPRO for the last 10 years.

He noted that DoD SAPRO represents the Secretary of Defense on this issue and is the central point of authority with regard to advising on prevention, response and oversight within the Department. The mission of SAPRO, he said, is to promote military readiness through sexual assault prevention advocacy and execution of the program as well as victim support. He explained that the SAPRO office falls under the Under Secretary of Defense for Personnel and Readiness and then under the Acting Assistant Secretary of Defense for Readiness, who is Dr. Elise Van Winkle. The SAPRO office is run by a two-star flag officer, Rear Admiral Ann Burkhardt, who has been in the position for two weeks.

Dr. Galbreath noted that SAPRO is an unusual policy office because it runs operations as well as policy, including the Safe Helpline, which is a 24/7 sexual assault hotline and online chatroom, a certification program for victim advocates, a web resource for SARCs and victim advocates called SAPR Connect, and the Defense Sexual Assault Incident Database (DSAID). He described DSAID as a congressionally-mandated database that was implemented in FY 2012 that captures all of the unrestricted and restricted sexual assault reports in the Department as well as case disposition information.

Dr. Galbreath reviewed the history of SAPRO which began in 2004 with a task force initiated by Secretary of Defense Rumsfeld. He discussed the resources available to victims of sexual assault in the military including sexual assault forensic exams and policy.

Chair Bashford asked whether DoD sends kits for analysis on a restricted report. Dr. Galbreath responded no, unless a victim requests it and changes his or her report from restricted to unrestricted. Chair Bashford suggested that it might help a victim to make a decision if his or her kit was a match to other kits. Dr. Galbreath said they are looking into this with the MCIOs, but also noted that they want to preserve a victim's confidentiality. Dr. Spohn asked whether there is a problem in the military, as has been seen in the civilian justice system, of untested kits. Dr. Galbreath said that for the military it is "not like what you see in the civilian world" and that now they are able to test kits with unidentified suspects through the national system check.

Dr. Galbreath explained the expedited transfer program that began in January 2012 to allow victims of sexual assault to move across a base or to another duty station so long as there is a "credible report" of sexual assault. He said the number of transfers has been growing every year. Brigadier General Schwenk asked who gets to decide whether a victim moves to a different unit or to another installation. Dr. Galbreath responded that the decision is the victim's and that Congress has also passed a law that allows the accused to be the one transferred if that is easier to facilitate.

Dr. Galbreath noted that in 2004, before SAPRO was established, there were 1,700 reports of sexual assault. Since that time, he explained, measures have been put in place to better track the information and that in 2005, when DoD enacted restricted reporting, the number of reports increased immediately and reports have been slowly but surely increasing each year. Describing sexual assault as an under-reported crime, Dr. Galbreath noted that SAPRO initiated a survey to better measure the extent of sexual assault incidents in 2007. He added that the Active Duty component completes these surveys, and the Reserve component completes separate surveys in alternate years.

Dr. Galbreath reported that the 2006 survey indicated about 34,000 sexual assaults (20,000 men and 14,000 women). He noted that because 85% of the military is male, their numbers are higher even though their rate of sexual assault is lower. He said the number of sexual assaults formally reported that year was 2,289, or only 7% of the 34,000 incidents of sexual assault. In 2015, he continued, the estimated number of sexual assaults based on the survey was down to 20,300, and the number of victims who were reporting was up 6,100 which indicated a reporting rate that had increased from 7% to 23%. He noted that the goal of SAPRO is to increase the proportion of Service members who choose to report every year.

Next, Dr. Galbreath described some of the differences between male and female victims. He said that men are more likely to experience sexual assault at the hands of multiple offenders and are more likely than women to experience it during duty hours. He suggested that they are also more likely to describe what they experienced as "hazing." Additionally, men are less likely to have been drinking. He said that 90% of sexual assaults in the military occur between people who know each other, which he said is what makes it such a huge readiness issue.

Dr. Galbreath explained that in the early years of the program, only about 13-15% of restricted reports were converted to unrestricted, but in the past couple of years that has increased to 20-21% which he believes indicates that people are more willing to participate in the military justice system. He said that the reason for conversions is not tracked, so they can't say exactly why the numbers are increasing.

Mr. Kramer observed that there has also been a very large increase in the numbers of restricted reports and asked Dr. Galbreath if he knows why. Dr. Galbreath suggested that the restricted report gives victims a protected way to find out more about the process and resources available. Brigadier General Schwenk noted that the SVC program was launched in recent years and could affect reporting. Dr. Galbreath agreed and added that one change he has seen as a result is that victims convert their reports more quickly than previously, and if they don't convert within the first month, they are unlikely to do so at all.

Mr. Markey asked how many of the cases that are converted from restricted to unrestricted move through the prosecution stage. Dr. Galbreath replied that this is a research project he has planned now that he has three years' of data in the DSAID system to review, but he has not yet done so.

Dr. Galbreath then discussed SAPRO's case disposition data. He said that of the 6,083 reported sexual assaults in FY 2015, about 25% were restricted reports that remained restricted. He explained that because the investigations of the unrestricted FY 2015 reports are not necessarily completed in FY 2015, trends in the disposition of these reports cannot be analyzed based on SAPRO data.

The next issue he discussed is the "substantiation" of allegations. Dr. Galbreath said that to the Department of Defense, substantiation means that evidence existed for commanders to take some kind of action based on the allegation. He indicated that substantiation in this context covers any criminal misconduct, even if it does not include the alleged sex offense.

Dr. Galbreath then reviewed his "waterfall" case disposition slides which indicated that of the 6,083 reports in FY 2015, 2,200 of those reports did not have dispositions by the end of the fiscal year, 2,783 did have dispositions, and the rest were not actionable because there was no jurisdiction under the UCMJ, or the case was handled by civilian or foreign jurisdictions. Of the 2,783 FY 2015 reports that did have dispositions, 926 cases resulted in charges preferred, 303 resulted in non-judicial punishment, and 208 resulted in adverse administrative actions. He added that there were 250 cases where the victim declined to participate, and 420 cases with insufficient evidence.

Ms. Garvin asked about the 73 unfounded allegations from FY 2015 and what definition of unfounded was being used. Dr. Galbreath replied that unfounded means that evidence existed that the crime did not occur, or that the accused did not commit the crime, or that the crime was baseless, meaning that it was improperly reported as a sexual assault and was actually something else.

Dr. Galbreath discussed the statistics on convictions, noting the SAPRO records were merely the "wave tops" of what is happening in the justice system and that the JPP and RSP looked more closely at the details of court-martial dispositions. He reported that DSAID can provide information on what happened to the penetrative or non-penetrative crimes if they were convicted and what was the most serious crime the accused was convicted of as required by Congress, but the granularity the legal system is interested in is not available in DSAID.

He noted that DSAID is primarily used by SARCs and victim advocates for case management and that legal officers input case dispositions into the system. He added that DSAID uploads information on unrestricted reports directly from the MCIOs and that SARCs load the information on restricted reports, noting there is no personally identifying information in the system for restricted reports.

Mr. Markey asked whether the MCIOs enter information into DSAID and whether it is used as an investigative tool to link cases through offenders. Dr. Galbreath indicated that the MCIOs enter data into their own systems that then interface with DSAID and that DSAID is not used by investigators for intelligence.

The last issues Dr. Galbreath discussed were reprisal, mistreatment, and ostracism, which has been an unintended consequence of trying to increase reporting of sexual assault. He noted that in 2014, two-thirds of women who experienced sexual assault in the previous year and made a report received a negative outcome or negative behavior associated with making the report. From the 2015 survey of the Reserve component, Dr. Galbreath explained that 41% of those who indicated they experienced sexual assault in the preceding 12 months didn't experience any negative outcome associated with making the report. Thirty-six percent indicated that they experienced negative behavior that would qualify as retaliatory and 23% experienced negative behavior, but not rising to the level of retaliation.

DAC-IPAD Strategic Planning Session

Chair Bashford noted that Committee Member Kathleen Cannon, who could not attend the meeting, had submitted a letter to the Committee and that Judge Brisbois had also submitted materials for the planning session. She asked Judge Brisbois to begin the discussion.

Judge Brisbois asked that the staff go through the bullet points in his document to identify where sources of information to answer his questions already exist and what they are. In light of the reviews that the RSP and JPP have conducted, Judge Brisbois suggested that this Committee could take a longer view and evaluate how well the changes already made are working and functioning.

Another observation offered by Judge Brisbois is that there is a considerable social, cultural aspect to the issue, particularly in light of the age demographic of 18 and 19 year olds who are coming out of a high school social environment where they are already misusing social media with sexting and nonconsensual publication of pictures and other material.

He indicated that he took what he heard at the January meeting and tried to incorporate the ideas into the planning document he developed as a starting point for discussion. He noted that from what was heard at today's meeting, some of the information is already available or will be collected soon. He suggested that the July meeting be devoted almost exclusively to strategic planning.

Chair Bashford also noted that from the information the Committee heard at the meeting, there is a lot of data that has been collected already and she asked Dr. Spohn to offer any suggestions about what the Committee should use the data for.

Dr. Spohn responded that there are more questions raised than answered by the data that has been analyzed so far. She recommended looking into differences across the Services and trying to understand why they exist and whether they can be attributed to different policies and practices or to levels of resources or differential training. She also expressed interest in the civilian versus military issue and looking more closely at cases involving intimate partners and spouses and the differing outcomes. She indicated that the data she reviewed has very little information about the victim other than status and gender. She is interested to see whether victims in intimate partner and spousal relationships are more likely to refuse to cooperate. She also noted that the data presented by Dr. Galbreath does not include any of the family cases, whereas that collected by the JPP does include these cases.

Chair Bashford raised the issue of the prosecution memos and whether all the Services write them for their cases. She suggested doing an RFI for prosecution memos for a period of time for cases where they decided they didn't have enough information to go forward.

Ms. Tokash noted that the most striking piece of data she heard was the 49.8% conviction rate. She is interested in conducting a more in-depth investigation to see why – whether it might be because there are not uniform standards of prosecution in the Armed Services, or because there is a push to get sex assault cases preferred and referred, or what other factors may be in play. She suggested making a request for commanders or counsel who are involved in these cases to give the Committee a better understanding of what is happening.

Chair Bashford wondered to what extent prosecutorial discretion plays a role. She said civilian prosecutorial agencies want to see proof beyond a reasonable doubt–not that they won't take a hard case, but they aren't going to take a case that has absolutely no chance of success. She's not sure if in the current military climate the issue is that cases are being brought that shouldn't be, or whether it is fact finders who don't like the cases. She suggested there has to be some structural reason there.

Ms. Tokash observed that, based on the day's presenters, R.C.M. 306 provides some factors for the commander to consider, but not necessarily a set of prosecutorial standards to actually lodge an indictment against a Service member.

Judge Grimm noted that there is no way to measure what it means when you advise a fact finder of proof beyond a reasonable doubt. He indicated that it really goes to the prosecutor's control of a decision. He said a prosecutor won't go to a grand jury if he or she didn't think it is a solid case, and if the grand jury does indict, if the prosecutor believes the case is shaky as it gets closer to trial, he or she can dismiss. In the military, he noted, it is not the professional JAGs making the final decision. In fact, he stated, it is a command structure in which the command has been told to take these cases seriously, that they must be investigated, that they have to provide services, and that the decision not to prosecute must be reviewed by a general or flag officer.

Judge Grimm noted that if there was a 25% acquittal rate in a U.S. Attorney's office, the U.S. Attorney wouldn't be there very long. He believes there is a staggeringly large percentage of cases that go to trial in the military and noted a fundamental difference between the way the two systems operate.

Mr. Kramer brought up the issue of fact finders and how one is supposed to have a jury of one's peers, however that almost never happens in civilian court. He noted that the civilian defendant is usually much different than the jurors, but in the military the fact finders are in the same profession, and the same situation. CMSAF McKinley commented that they will be of significantly different ranks. Though, as Mr. Kramer added, they are all in the same world.

Chief McKinley raised the issue of joint deployments and basing and is interested in how that affects military justice and variances in procedures and process.

Brigadier General Schwenk emphasized the importance of subcommittees to increase the amount of work that the Committee is able to accomplish. He suggested that one subcommittee be dedicated to data and reviewing what is available in the SAPRO report and from the JPP's data collection efforts and that they identify issues for further study and brief the full Committee on what the subcommittee believes the group should address. He suggested a second subcommittee to address the "IPAD" part–the investigation, prosecution, defense, special victims' counsel, the judiciary, etc. He noted that the staff could go through and identify all of the recommendations made by the previous panels that the DAC-IPAD might follow up on. He also suggested that this subcommittee could talk to other groups and individuals to get ideas, filter and prioritize them, and present them to the full Committee.

The third subcommittee, Brigadier General Schwenk suggested, could be the broader brush covering other things like command training and things that affect the military justice process, reporting, and retaliation. He agreed that the next meeting should devote a lot of time to strategic planning.

Dean Harrison seconded Judge Brisbois' idea about looking more closely at the data. He is interested in looking beyond a one-size-fits-all approach to doing things across the five Services and for small versus large commands. He is interested in characteristics such as whether a victim

is most likely to be on his or her first tour in the military, whether an accused is most likely on a first tour or more senior, whether training commands are more likely to have sexual assaults, and whether the race of the victim or perpetrator has any impact on the outcome.

Chair Bashford added that she is interested to know what differences there are between deployed and home stations and at looking at Japan following several recent incidents there. Dean Harrison also suggested reviewing isolated commands. Mr. Kramer suggested looking at whether there is greater prevalence of sexual assault at certain installations.

Chair Bashford stated that she liked Brigadier General Schwenk's idea of the three committees and she liked the idea of looking at retaliation. She also mentioned an interest in looking at what happens to people after a report–whether they stay in the Service, are promoted, how long they stay in, etc.

Chief McKinley requested that the read-ahead materials be provided to the Committee earlier. He also indicated that one-day meetings are too short and recommended day and-a-half meetings. Chair Bashford agreed.

Mr. Markey requested clarification on the edict of the committee and the meaning of reviewing cases and giving advice. He suggested that for the case review, from his lens as an investigator, they should look to see whether there are things that are being done successfully, and whether there are some things that might be helpful to learn from the civilian world. For instance, he noted the issue of victims dropping out and asked whether there is something happening during the investigative process that is pushing victims out, and that this would be something to look at.

Another issue Mr. Markey identified is the relationships between the JAGs and the investigators. Noting the 18 to 24 month rotation of prosecutors, Mr. Markey viewed that as something that makes things frustrating for investigators. He also highlighted the importance of looking behind the numbers and asking why–why victims are dropping out, why there are low prosecution and conviction rates.

Ms. Tokash suggested bringing in the people who tried and investigated the cases that the data is from and asking them questions. Chair Bashford noted that this may be best to do in a subcommittee.

Judge Brisbois followed up on Mr. Markey's comments and suggested that the Committee hear from the authorizing legislation's authors. Mr. Markey recommended that the Committee hear from the MCIOs in all of the branches because it sounded from the testimony at the meeting that things are not being done in a standardized, consistent way across the branches.

Chair Bashford noted that the Committee didn't hear much about caseload other than a reference to SVCs having 20 to 25 cases. She would like to know how many cases investigators and defense counsel have. She also referenced the JPP's Defense resources report and expressed interest in reviewing it and following up on its recommendations.

Dr. Spohn asked if there are written protocols for investigation, prosecution, and defense of sexual assaults in the military and suggested reviewing them. Chair Bashford noted that for cold case investigations, some cold case teams have protocols, and this might be the same. Major General Anderson suggested that this would be in Service regulations which should be easy to get. Captain Tideswell offered to draft a request for information to submit to the Services.

Chair Bashford asked for the group's thoughts on subcommittees and whether the group wanted to initiate the process now or wait until the next meeting. Brigadier General Schwenk suggested that the Committee start by dividing up internally, then make a request to DoD. Chair Bashford wanted to be sure that it would be possible to add members to the subcommittees later.

Chair Bashford indicated that she would like to have some smaller groups that could meet, talk and get a sense of what they need so the same discussion doesn't have to take place in July. Ms. Garvin asked whether a subcommittee could be formed before July, or whether the groups should focus on preparatory work. Captain Tideswell offered as an option that the Committee seek the cooperation of the general counsel once the subcommittees are set and hold small group teleconferences.

Brigadier General Schwenk suggested that the staff go ahead and gather the issues that have either been addressed and where no action was taken, or was partially taken, along with the questions the Committee itself has raised so that before the meeting in July the members can see the list and have considered their views on what to prioritize for this year and for the March report, and what to look at later. He supported the idea of bringing in the MCIO experts for the July meeting. He is interested to hear about what schools they go to for training and to review a syllabus of what is taught.

Major General Anderson agreed with Chief McKinley that training is an issue that needs to be looked at for all levels of command. She noted that considerable time is spent training SARCs, but only a small sliver of time is given to the command team for this kind of training. Chief McKinley feels that if command teams across all branches were better trained on how to deal with these situations, there would probably be a higher conviction rate because victims would be willing to stay in the game and go to court and fewer would leave. Mr. Kramer added that that might lead to a lower incidence of sexual assault in the first place.

Chair Bashford asked how people felt about moving to day and-a-half meetings. Dr. Spohn suggested that subcommittees could meet for part of that time in addition to conference calls or webinars. She said that she liked the idea of the data committee.

Dean Harrison expressed interest at looking into whether the decision-making process of the commander is influenced by things other than protecting the victim and finding the truth of the allegations–such as what it will do to his or her next promotional opportunity.

Chair Bashford asked Dr. Spohn to lead the data subcommittee and she agreed. She also suggested that Ms. Long would be a good person for the subcommittee if she is available because she is working with the Urban Institute currently on developing performance measures

for prosecutors. Brigadier General Schwenk also offered to serve on the data subcommittee. Chair Bashford suggested the Committee work to establish one subcommittee to start.

Judge Brisbois stated that he doesn't have the skill set for the data committee and that with his docket, availability might be an issue for him with respect to subcommittees. He advised against having a subcommittee start the planning process and recommended that the Committee have a full day of strategic planning.

Captain Tideswell agreed to prepare a document that identifies the issues for the Committee to consider at its July meeting.

Mr. Markey offered to develop and coordinate a subcommittee that looks at investigations, identifies performance indicators, and develops a definition of case reviews. Chair Bashford noted that Ms. Cannon indicated in her letter that she is interested in looking at staffing resources and impediments to the defense and she added that it is important to cross-pollinate expertise on the subcommittees.

Brigadier General Schwenk suggested establishing a case review subcommittee to come back in July with ideas for how the case reviews should work. Judge Brisbois disagreed, noting that the definition of case review is one of the strategic planning issues along with the purpose and goal that the whole Committee needs to consider before launching a subcommittee.

Ms. Tokash suggested having the Committee conduct the case review and identify issues to develop the subcommittees. Brigadier General Schwenk suggested that any interested Committee member could come in to go through case records with a subcommittee.

Judge Brisbois believes that the Committee needs to decide what to look for in the case reviews and what a case review means because that is the fundamental foundational strategic plan that drives everything for the next three-and-a-half years.

Captain Tideswell suggested that the first time block for July could be for the development of a definition of case review. Chair Bashford agreed and suggested everyone start thinking of what that would best look like. Judge Brisbois indicated that he envisions no briefings for the July meeting, so a one-day meeting should be sufficient. Chair Bashford asked Captain Tideswell to find out from Committee members whether it would be feasible for people to come in a day earlier.

Ms. Tokash asked if the members could submit their ideas to the Committee through the director. Captain Tideswell asked that everyone send their thoughts individually to her and she will compile them together for the group to receive ahead of the meeting. The DFO added that the Committee Chair should also be copied.

Public Comment

There were no public comments.

The DFO closed the public meeting at 5:17 p.m.

CERTIFICATION

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

Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of DAC-IPAD Public Meeting, Friday, April 28, 2017, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

2. Table of Contents
3. Public Meeting Agenda
4. Public Meeting Speakers' Biographies
5. Military Justice Process: Disposition Decisions, Courts-Martial, and Alternative Outcomes – DAC-IPAD Briefing, April 28, 2017
6. Abbott Sample Case File
7. Presentation on the Mechanics of a Military Sexual Assault Case, Documents and Forms
8. National Defense Authorization Act (NDAA) Provisions Regarding the Department of Defense Annual Report on Sexual Assault, Fiscal Years 2011 - 2017
9. Adjudication of Sexual Assault Offenses: 2015 Data, Cassia Spohn, Ph.D.
10. Sexual Assault Prevention and Response, Nate Galbreath, Ph.D., MFS, Deputy Director
11. DoD Sexual Assault Prevention and Response Office, Fiscal Year 2015 Reports of Sexual Assault, Completed Investigations, and Subject Dispositions
12. Some Initial General Thoughts for Consideration in Developing a Structure for a 4+ Year Work Plan for DAC-IPAD, by Committee Member Leo Brisbois
13. Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-PAD) Committee Planning Session Outline
14. Letter to the Committee from Ms. Kathleen B. Cannon, Committee member