



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

MINUTES OF JULY 21, 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 July 21, 2017 from 8:30 a.m. to 3:10 p.m. The Committee received an informational presentation on the mechanics of a sexual assault investigation from the Services’ criminal investigation organizations. Following the presentations, the Committee held a strategic 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 S. Bashford, Chair
Major General Marcia Anderson, U.S.
Army, Retired
The Honorable Leo I. Brisbois
Ms. Kathleen B. Cannon
The Honorable Paul W. Grimm
Dean Keith M. Harrison
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Mr. James P. Markey

Dr. Jenifer Markowitz
Chief Master Sergeant of the Air Force
Rodney J. McKinley, U.S. Air Force,
Retired
Brigadier General James A. Schwenk, U.S.
Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash (by phone)
The Honorable Reggie B. Walton

Absent Committee Member

Ms. Margaret A. Garvin

Committee Staff

Captain Tammy Tideswell, JAGC, U.S. Navy, 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
Mr. Chuck Mason, Attorney-Advisor
Ms. Meghan Peters, Attorney-Advisor
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor

Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)
Captain Joseph Ahlers, U.S. Air Force, Service Representative
Lieutenant Alexandra Nica, U.S. Navy, Service Representative
Dr. Paul Garst, Senior Advisor, Department of the Navy Sexual Assault Prevention and
Response Office
Mr. Stephen McLeary, U.S. Coast Guard, Service Representative
Mr. Christopher Redmond, Supervisory Special Agent, Violent Crimes Division, Office of the
Inspector General, U.S. Department of Defense
Major Wayne Shew, U.S. Marine Corps, Service Representative
Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Service Representative

Presenters

Mr. Michael Defamio - Division Chief, Family and Sexual Violence Division, Naval Criminal
Investigative Service Headquarters

Mr. Kevin Poorman, Associate Director, Criminal Investigations, U.S. Air Force Office of Special Investigations
Ms. Beverly Vogel, Senior Special Agent and Sex Crimes Program Manager, U.S. Coast Guard Criminal Investigative Service
Ms. T. L. Williams, Deputy Chief, Policy Branch, U.S. Army Criminal Investigation Command

MEETING MINUTES

The DFO opened the public meeting at 8:35 a.m. Chair Martha Bashford provided opening remarks and summarized the agenda for the meeting.

Mechanics of a Sexual Assault Investigation

Mr. Kevin Poorman, Associate Director, Criminal Investigations, U.S. Air Force Office of Special Investigations, explained that the presenters would be providing an overview of the organization, training, and policies of the military criminal investigation organizations and data and trend information for each Service. He noted that while there are a lot of similarities, there are also structural differences among the Services in the organization and delivery of investigation services.

Ms. T. L. Williams, Deputy Chief, Policy Branch, U.S. Army Criminal Investigation Command, provided an overview of the structure of the Army Criminal Investigation Command known as CID. It is commanded by a major general who reports directly to the Secretary and the Chief of Staff of the Army to avoid issues of unlawful command influence. She continued that eight battalions have command and control over 10 CID offices. There are 834 authorized agent positions, 706 of which are currently filled, including 30 civilian sexual assault positions. She also noted that CID is the executive agency for the U.S. Army Laboratory, which is a branch within the Defense Forensic Science Center and is responsible for all forensic examinations including sexual assault, drugs, DNA, chemistry, trace, and digital evidence.

Next, Mr. Michael Defamio, Division Chief, Family and Sexual Violence Division, Naval Criminal Investigative Service Headquarters, described the Naval Criminal Investigative Service's (NCIS) organization. He explained that NCIS is led by a civilian director who reports to the Secretary of the Navy through the Under Secretary of the Navy. NCIS is an all-civilian special agent force, with no active duty military in the NCIS chain of command. NCIS has 14 field offices, 10 of which are in the U.S. and four are overseas. There are 461 criminal investigating agents, 164 of whom are special agents dedicated to family and sexual violence investigations. NCIS also has an active duty program where members of the Navy and Marine Corps are assigned to NCIS offices and participate in investigations as well.

Ms. Beverly Vogel described the organization of the Coast Guard Investigative Service (CGIS), which is an independent and centralized investigative authority led by a civilian senior executive service (SES) director who reports directly to the Vice Commandant of the Coast Guard. There are 35 resident agent offices in the U.S. and abroad that report to eight regional offices. CGIS has 102 civilian, 89 active duty, and 149 Reserve CGIS special agents – for a total of 340 special

agents filling 381 authorized billets. Thirty-five special agents are designated as family and sexual violence investigators and are stationed in the U.S. and abroad.

Mr. Poorman told the Committee that in the Air Force, the Office of Special Investigations (AFOSI) commander reports directly to the Inspector General of the Air Force, and in turn, the Secretary of the Air Force. Though there are 1,800 agents, only about half are funded to work on criminal investigations. The others work on counterintelligence, cyber, and special security operations. The Air Force has investigators stationed at over 200 locations with 75 main offices in eight regions. 24 of the agents are specifically designated full-time sexual assault investigators and there are 23 lower level security force investigators detailed to OSI to help with sexual assault contact investigations and overseen by OSI agents.

Following the description of their organizations, each of the military criminal investigation organizations (MCIOs) officials discussed the training received by agents. The Army has an 80-hour advanced sexual assault training provided by the U.S. Army Military Police School and is working on a pilot program to train civilian investigators along with sexual assault prosecutors to better learn about and understand each other's roles. NCIS, AFOSI, and CGIS agents are trained at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia which is where most federal investigative agencies, other than the Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA), train. The Navy and Air Force also have supplemental military-specific and advanced sexual-assault related trainings and Ms. Vogel indicated that CGIS agents also participate in some of these courses.

Next, the MCIOs discussed their caseloads. Ms. Williams reported that Army CID opened investigations on over 11,000 felony crimes in fiscal year 2016, 2,500 of which were sexual assaults. The average length for a sexual assault investigation is 154 days and is often attributable to the transient nature of Soldiers, deploying, moving, and leaving the military. She reported that the average length of time for lab results in fiscal year 2017 is 74 days, though it is dropping.

Mr. Defamio reported just over 6,000 felony investigations for NCIS, 1,940 of which were for sexual assaults. He noted that this covers both the Navy and Marine Corps. The Navy had 893 total cases with an average case open for 129 days. The Marine Corps had 453 cases with a 132 day average investigation length. Most of the cases NCIS sees occurred off-base. Most are military subjects and about 10 percent are civilian subjects.

For the Coast Guard, Ms. Vogel stated that in fiscal year 2016 there were 1,962 total investigations initiated, 122 of which were adult sexual assault investigations. The average investigation duration is 133 days and other demographic data is similar to that described by NCIS.

For the Air Force, Mr. Poorman stated that sexual assault investigations make up about 40 percent of AFOSI's approximately 2,500 investigations per year – or about 1000 cases. The average length of investigation is 105 days. Twenty percent of the Air Force cases involve civilian suspects and 48 percent occur off-base.

The MCIOs discussed some of the complications presented by jurisdictional issues such as concurrent and exclusive federal jurisdiction and status of forces agreements with foreign countries. They also noted that their policies and procedures are similar across Services as to when evidence is taken, how it is handled, which laboratories are used and what the reports of investigation look like.

Mr. Poorman explained that since 2012 the Department of Defense Office of the Inspector General (DoD IG) has conducted three major assessments: (1) an assessment of the MCIOs for compliance with DoD policy and for investigation sufficiency; (2) an assessment of the training agents receive related to sexual assault; and (3) an assessment focused on MCIO policies related to adult-victim sexual assault investigations.

Chair Bashford thanked the presenters and began the question and answer session. She noted the statistic presented that nearly 50 percent of the cases are reported more than a month after the incident and found this to be extremely high. The presenters suggested several possible reasons, such as conversion of restricted reports to unrestricted and victims waiting until they finish basic training or move to another duty station to report an incident. Mr. Poorman added that the relationship between the victim and the subject may affect the reporting time period. He noted that the Air Force just had the Rand Corporation look at its sexual assault cases and they found that in 85 percent of the cases, the victim and subject knew or worked with each other – which may influence the decision to come forward.

Mr. Kramer asked the investigators where a restricted case file would be physically located. Mr. Defamio explained they would be processed by a Sexual Assault Response Coordinator (SARC). Mr. Poorman further explained if there was evidence in the case, like a sexual assault forensic examination kit, OSI would physically store it without the victim's identifying information. Mr. Kramer followed up by asking whether only the Army had a forensics laboratory. Ms. Williams affirmed that all of the Services use the Army's forensics laboratory including the Coast Guard. Mr. Kramer asked why the Army did not train its investigators at Glynco like the other Services. Ms. Williams explained that the Army, being the biggest Service, had its own Army-specific training.

Judge Brisbois asked how many restricted report forensic exam kits were housed at the Services' evidence facilities. None of the MCIO representatives had the exact numbers but indicated they could get them for the Committee if desired.

Dr. Spohn asked how many days after an incident a forensic medical exam would be performed in the military, noting that in Los Angeles it is within 72 hours. Mr. Poorman stated ten days in the Air Force. Dr. Markowitz noted, based on her experience working with DoD and the Services, that the time frame is 7 days from the date of incident at DoD medical facilities.

Dean Harrison inquired whether or not installation-specific crime statistics were required to be kept as is required of civilian police departments and college campuses. The Service investigator representatives all responded in the affirmative but noted that those statistics were generally compiled into the larger annual reports. Mr. Poorman explained that the Defense Incident-Based

Reporting System (DIBRS), which feeds into the National Incident-Based Reporting System, is used by the Services to record felony-level cases by type and by location.

Chief McKinley asked, based on the reality of joint base operations, whether there was any push to consolidate the investigator training programs for all of the Services. Mr. Poorman stated that DoD IG had looked into the issue of consolidated training and that he would defer to that report. Mr. Poorman added that he felt the training was very similar across the Services and when they did collaborate it was a positive experience.

Ms. Cannon asked whether or not there was a comparative analysis of cases that come out of different installations across the Services. Mr. Defamio explained that there was no consolidated report comparing bases or locales but that the agencies did have those numbers. He further explained that the number of cases on an installation is used to determine manpower requirements. Ms. Vogel stated that the Coast Guard has a SAPRO crime analyst who has compared the numbers across different locales and those numbers had been reported up the chain of command.

Judge Walton asked how diverse the investigator staffs were based upon gender and race. Mr. Defamio stated NCIS has 214 female investigators, consisting of one Native American, 14 Asian-Pacific Islander, 29 African American, 20 Hispanic, and 150 Caucasian investigators. He added that of the 815 male NCIS investigators, 3 are Native American, 32 are Asian-Pacific Islander, 64 are African American, 71 are Hispanic and 640 are Caucasian. Judge Walton then asked whether a Service member charged with a crime has access to a defense investigator. Mr. Defamio reported that at the present moment there are not defense investigators but it is “in the process” of being established. Ms. Vogel reported that the defense can request use of an investigator in the Coast Guard and Ms. Williams reported that in the Army, the defense could request agents to perform investigative tasks.

Ms. Bashford referred to the JPP’s findings that investigators reported having delayed access to complainants as a result of the appointment of special victim counsel and asked whether the data is kept on the time between the filing of an unrestricted report and the first interview of the victim. Ms. Williams stated that she did not have exact data on that issue and that it could not be easily pulled from the CID database. Mr. Defamio reported that NCIS does not keep data on the length of time from case opening to when investigators gain access to a victim. Ms. Bashford asked whether anecdotally, the MCIOs felt that the introduction of the counsel for the victim has delayed the initial interview. Mr. Defamio noted that at the inception of the special victim counsel program there were some significant issues with delays but now it was viewed as a positive program. He said that significant delays are now annotated in investigative reports and he hasn’t seen any in well over a year. Mr. Poorman and Ms. Vogel concurred with Mr. Defamio’s assessment. All three praised the victims’ counsel program overall.

Judge Brisbois followed up on his earlier question regarding defense counsel’s access to investigators and whether or not any investigative work conducted on behalf of the defense was kept confidential from the government. Ms. Williams stated that it was shared information in the Army. Mr. Poorman stated that investigators can work for the defense but information is only confidential if approved by the convening authority in the Air Force.

General Anderson asked whether or not investigators specialized in sexual assault cases. Ms. Williams explained that in the Army there is no specific track for sexual assault investigations except for civilian agents. Mr. Poorman stated that sexual assault was a violent crime and that all Air Force investigators were trained to investigate violent crimes.

Judge Walton asked the investigator panel at what point coordination occurs between a prosecutor and an investigator in a sexual assault case. Ms. Vogel stated “early and often.” Mr. Poorman referenced the DoD Instruction which requires 24-hour notification of the “team” which included prosecutors, victim advocates, and SARCs.

Judge Walton asked what percentage of Service members were represented by civilian attorneys as opposed to military defense attorneys. Mr. Poorman stated he did not have that data but in his experience, most were represented by military defense attorneys. In response to a question by Judge Walton about whether MCIOs have statistics regarding conviction rates, Mr. Poorman indicated that AFOSI does not have these numbers, but Mr. Defamio and Ms. Williams reported that NCIS and CID both track conviction rates.

Mr. Kramer asked why 20 percent of the Army and Air Force investigations involved a civilian suspect while only 10 percent of the Navy, Marine Corps and Coast Guard investigations involved civilian subjects. Mr. Defamio speculated it may be because there are not that many civilians on ships. Mr. Kramer then asked how many of the victims are civilian versus uniformed. Mr. Defamio reported that those numbers were available but not presently on hand. Responding to another question, Mr. Poorman stated that a recent Air Force study conducted by the Rand Corporation found that 85 percent of victims and suspects knew one another before an alleged incident. Mr. Defamio also noted that NCIS tracks the relationships between victims and suspects.

In response to further questions by the Committee regarding defense investigators, Captain Tideswell explained that the JPP had identified this as an issue in one of its recent reports and she noted that the Navy now has a pilot program where defense investigators are now imbedded in Navy legal offices, but the Navy was the only Service presently with such a program.

Ms. Bashford inquired about subpoena power in the investigation process. Mr. Defamio stated that investigators may apply for a DoD IG subpoena for certain violent crimes. Mr. Poorman stated that the Air Force uses the DoD subpoena process often. Mr. Redmond, from the Department of Defense Office of Inspector General, stated that the turnaround time to respond to subpoena requests was 48 to 72 hours. Mr. Sullivan added that Congress recently authorized the military judiciary to begin issuing investigative subpoenas by January 1, 2019. Judge Grimm followed up by asking what type of enforcement mechanisms would be available to the military judiciary. Mr. Sullivan stated that the Military Justice Act authorized military judges to take certain pre-referral actions, but that the implementing regulation had not yet been created to address the exact mechanics of that option. On the other hand, Mr. Sullivan noted, Congress has authorized the United States to go into U.S. District Court to enforce the subpoena against a civilian if the recipient doesn't comply.

General Schwenk asked the investigators whether they had concerns about restricted reporting. Ms. Vogel responded that her investigators now understood that it was an important option so that victims could tap into resources even if they were undecided about reporting the incident criminally. Mr. Poorman echoed Ms. Vogel's sentiments and added that whether or not a report is restricted or unrestricted, if a victim later does not want to cooperate there is no substantial difference in result. General Schwenk then asked what effect the expedited transfer process has had on sexual assault investigations. Mr. Defamio reported, at least anecdotally, that it extended timelines on witness interviews, but that it hasn't had a major impact on completing investigations. Ms. Williams explained that when a victim is transferred a new agent will need to build up rapport again which can take time.

General Schwenk then asked about the relationship between investigators and trial counsel towards the end of an investigation. Mr. Poorman stated that they do the best they can prior to closing an investigation to see that the case is sufficient, but it is inevitable that after closure of an investigation things arise. He said that AFOSI attends to them the best they can depending on "how probative they are, how serious they are, how much they would change an outcome to the case." Mr. Defamio stated that NCIS was required to keep the case open until final adjudication so that they can continue to handle specific requests from trial counsel through the trial. Ms. Williams stated that CID does close cases before final adjudication but that they will do more investigative activity if it's reasonable, noting that they have to make some judgement calls. Ms. Vogel stated that the process is very similar for CGIS.

Judge Walton asked the investigative panel what percentage of sexual assault cases were male on male. Ms. Williams and Mr. Defamio reported they could get that information to the panel. Mr. Poorman reported that out of 1,000 cases in the Air Force in 2016, 128 were male victims—so approximately 10 percent. Ms. Williams and Mr. Poorman also indicated that male on male sexual assaults had some hazing element to them.

General Schwenk asked the panel how they would change the system for the better. Ms. Williams stated she would ask for more people and more money. Mr. Defamio said he would like to see more surveillance cameras on the installations—in the barracks hallways in particular.

Dean Harrison asked Ms. Vogel about the CGIS Reserve agents she mentioned earlier and inquired whether they worked in law enforcement in their civilian lives. Ms. Vogel reported that they all did.

Chief McKinley asked whether records are kept regarding the Service members who separate in lieu of court-martial or those who receive non-judicial punishment. Mr. Defamio responded they would have data on the alternative dispositions but that they would only alert a local community if sex offender registration was required due to a conviction.

Next, Ms. Long asked the panel of investigators how they track their performance and how they know when they need to improve. Mr. Poorman explained that he welcomed the DoD IG sufficiency reviews which started in 2012 because they provided external peer review of the MCIO products. He noted that in the last two assessments there were no major investigational deficiencies in any of the cases. Mr. Poorman also explained that senior investigators review a

random selection of closed cases for sufficiency, providing additional quality control. Judge Grimm followed up on Ms. Long's question and asked the panel what they were doing to improve in light of the statistic of a roughly 25 percent acquittal rate in sexual assault cases. Ms. Vogel responded that her investigators do "hotwashes" with legal to specifically look at those issues. Mr. Poorman stated AFOSI did not do an assessment of their investigations but explained that a senior Air Force trial counsel does assess case files and shares conclusions on improvements. Ms. Williams explained that CID did not have any hard data on types of cases which resulted in acquittals but they did have an IG team which pulls random files at installations and reviews them for sufficiency.

Ms. Long noted that it is important to look at the varying complexities involved in cases when comparing outcomes and stated that her organization has worked with the Urban Institute and Rand Corporation to develop methods for evaluating conviction rates that capture these complexities. She also noted that the military has data that isn't available across the country making it easier to look at these issues.

Mr. Markey explained his involvement in assessing sexual assault investigations in civilian jurisdictions noting that one of the overarching goals is that no matter where a victim might present—to whatever organization within the system—that they get the same response. In his assessments he indicated he looks to see how effective, efficient, and consistent an organization is in their response. Some of the key variables he suggests looking at are investigator caseload, assignment length and turnover of personnel, selection of investigators and the first line supervisors who are overseeing the investigations and investigators. He noted that part of the effectiveness of the response is having a multi-disciplinary team that works together and understands each other.

Mr. Markey noted that in the civilian world, while all sexual assault kits are being submitted to the lab, not all are being tested and asked the MCIOs if this is the case in the military. Ms. Williams responded that all kits are being tested and probably more extensively than tested in a local lab. She also explained that all profiles detected at the lab are uploaded into the Combined DNA Index System (CODIS).

Ms. Bashford thanked the investigative panel for their time.

DAC-IPAD Strategic Planning Session

Captain Tideswell began by directing the members' attention to the legislative language which created the DAC-IPAD. Captain Tideswell explained that in the original bill Congress had listed several specific tasks for the DAC-IPAD to address. Captain Tideswell went on to explain that the original tasks did not end up in the final bill because Congress did not want to limit the DAC-IPAD's scope of exploration.

Next, Captain Tideswell explained that in the Military Justice Act of 2016, DoD was directed to implement a case management system by December 2020. Captain Tideswell recommended that based on the Committee members' expertise they may want to recommend to DoD the standards and criteria for the database.

Next, Ms. Bashford discussed case analysis and noted that the JPP studied only cases where charges had been preferred. She noted that the sexual assault investigation data for fiscal year 2016 provided to the Panel by the MCIOs indicates that only 15 to 20 percent of cases investigated were ever preferred and she is very interested in knowing the reason as to why so many cases are not preferred. Ms. Bashford suggested that the Committee should focus its efforts on penetrative offenses. Dr. Spohn noted that her data analysis showed that the outcomes are very different for contact versus penetrative offenses and that comparing them would be like comparing apples to oranges. She also supported reviewing only penetrative cases. Ms. Long raised a concern that perhaps in some instances non-penetrative cases may be mischaracterized and noted that the Committee may want to look at whether allegations were being charged appropriately.

Ms. Bashford and the Committee agreed they would like to look specifically at sexual assault cases beginning at the investigation stage, where charges were not preferred.

Judge Walton asked whether or not plea bargaining existed in the military system. Captain Tideswell explained pretrial agreements exist between the accused and the convening authority. She further explained that at a guilty plea a military judge will still sentence an accused but the accused will get the lesser of the judicial sentence or terms of the pretrial agreement. Mr. Sullivan then added that the Military Justice Act of 2016 will change the present plea-bargaining system to require the accused and the convening authority to reach a “sentencing range.” A military judge will then sentence within that pre-determined range. Alternatively, the accused could choose to plead without any sentencing range in place.

Ms. Bashford expressed an interest in looking to see if demographic factors such as rank correspond to disparities in preferral of charges, noting that the JPP found there to be little difference in outcomes based on rank once charges are preferred. She also indicated that one of the Committee’s primary goals should be looking at why the conviction rate for penetrative offenses is so low, and that it should also look at why so many sexual assaults in the military are reported a year or more after the incident, which she did not find to be the case in the civilian world. Dr. Markowitz suggested the Committee look at the number of cases that are converted from restricted to unrestricted as a factor.

Discussing the categories of cases the Committee should review, Ms. Bashford stated she believed the committee should look at a statistically significant sample of cases that resulted in acquittals and dismissals. Captain Tideswell explained that in cases of acquittals there was no full record of trial, just an abbreviated transcript and that in order to review those types of cases the Committee would need to have the audio files transcribed. She discussed the Committee issuing a request for information (RFI) requesting that audio recordings of these cases be preserved by the Services.

Judge Grimm expressed his interest in reviewing the JPP’s final report recommendations so that the Committee could avoid duplicating any work already performed by the JPP and use them to help direct the Committee’s focus. Captain Tideswell informed him that some recommendations have already been made by the JPP to DAC-IPAD such as continuing to conduct the data

analysis undertaken by the JPP. She noted that the Chair has already signed an RFI for fiscal year 2016 case files and reported that the data collection process is already underway.

Dr. Spohn raised the issue of what exactly a “case review” meant in terms of the DAC-IPAD’s mandate and asked whether the Committee has the ability to hire graduate students at criminology programs to collect the data. Captain Tideswell responded that there is a budget that provides the ability to contract out work on a limited basis.

Dr. Markowitz raised a concern about the Committee members reviewing confidential medical information in the investigation files which patients did not agree to release for this type of purpose. She advocated building in a process by which the members can protect the confidential medical information from being viewed.

Ms. Bashford recommended that a working group or subcommittee should handle case reviews and report back to the full Committee. Captain Tideswell identified the proposed members for the working group as Chair Bashford, Mr. Markey, Ms. Long, General Schwenk, Mr. Kramer, and Ms. Cannon. Ms. Bashford suggested that the working group look at some case files in August or September to identify challenges and recommend how the reviews should go forward as the subcommittee is being established.

In response to a question posed by Mr. Markey about the time it takes to review a case in the DoD IG investigative case oversight review process, Mr. Redmond, the DoD IG representative, reported that for the last DoD IG oversight report it took approximately eight to ten weeks working full-time for four to six people to review 400 case files. He explained that the DoD IG does not review case outcomes, but rather efficiency and compliance with DoD, Service, and Agency policies for its oversight function.

Dr. Spohn expressed interest in reviewing unfounded cases to determine if there are ways these cases could be improved so that they could move forward. Ms. Bashford suggested looking at alcohol as the basis for lack of consent, whether physical force or capacity is the issue, and the issue of delayed reporting to see if there are any common threads or differences in outcomes. She also suggested looking at patterns related to corroboration and external evidence.

Mr. Kramer felt that reviewing the quality of the investigation was an important factor because one of the reasons a case might not be preferred could be because evidence was mishandled by the investigators, making the quality of the investigation relevant to the outcome.

Dr. Markowitz emphasized the importance of looking at what successful convictions have in common as well as acquittals. Dr. Spohn similarly suggested that if the Committee was going to look at acquittals they should look at convictions in order to have something to compare to.

Ms. Bashford reiterated that it would be beneficial to have a working group look at a handful of cases before the next meeting and report back to the Committee on what is available to look at, what the challenges are, what data is collected and what isn’t in the files. Mr. Markey suggested that there are additional data points that could be collected on investigations such as noting when

witnesses were not interviewed, evidence wasn't collected, there was a lack of follow up, and when victims were treated poorly by first responders.

In response to questions by Committee members about the term “unfounding” cases, Mr. Redmond explained that while MCIOs used to have the authority to unfound a case [meaning to find the case false or baseless], that decision is now required to be made by a commander at the O-6 level. Judge Brisbois and Dr. Markowitz both noted that today there is no category of cases labeled “unfounded.”

Lieutenant Colonel Vergona, the Army's Service Representative, reiterated that cases can no longer be “killed” at the trial counsel level as used to be the case and that today the decision to go forward or not must be made by a commander at the O-6 level. Noting that 80 to 85 percent of cases don't have charges preferred, Ms. Bashford asked whether the O-6 issues a finding as to why a case does not go forward. Ms. Carson responded that the Committee heard testimony previously [at the April 28, 2017 public meeting] that while the convening authority's action on the case may provide some information about why the decision was made, it does not consistently contain this information.

Judge Grimm made the point that in light of impending changes to Article 33 of the UCMJ which deals with convening authority determinations whether or not to go forward, it may be irrelevant for the Committee to be looking at how charging decisions were made in the past. Mr. Sullivan explained the new statute, informing the Committee that the Military Justice Act of 2016 amended Article 33 to require that non-binding disposition guidance for convening authorities be issued by January 1, 2019. Mr. Sullivan said the non-binding guidance will establish factors that commanders, convening authorities, and judge advocates should take into account when exercising judgment on the disposition of charges and is to take into consideration the principles set forth for federal criminal prosecutions in the U.S. Attorney's manual.

Ms. Bashford then brought the Committee's attention to the [Article] 140a [UCMJ] requirement that DoD develop a uniform military justice system for data collection and management. She felt the Committee could make a lasting impact by studying and making recommendations on the criteria that should be used to track sexual assault cases. In response to Ms. Cannon's suggestion that the Committee look at the DoD IG report on its investigative case reviews, Captain Tideswell explained that the DoD IG has provided the Committee with its protocols and information on the database it uses to conduct case reviews. Captain Tideswell noted that these documents may be useful for a subcommittee or working group to study for developing the DAC-IPAD process.

Chief McKinley expressed strong interest in looking at the training of leaders at the squadron level on the UCMJ and making decisions on the disposition of sexual assault allegations. He would like to look at the training received by those in leadership positions across the Services on how to deal with a sexual assault.

Dean Harrison suggested the Committee speak with some convening authorities and staff judge advocates who have experience with the process.

Ms. Bashford suggested the Committee look at the written advice that staff judge advocates provide to convening authorities and whether recommendations are less candid because of discovery obligations, referencing the JPP Subcommittee recommendation on this issue.

Ms. Bashford asked the Committee to turn its attention to the statistical data collection options presented in the planning outline and for Dr. Spohn to explain the methodology utilized by the JPP in collecting and analyzing case data. Dr. Spohn noted that the JPP collected data only for cases that were preferred. She explained that the JPP collected data on the charges that were preferred, the disposition of those charges, information about the sentence, as well as limited demographic information about the victim and the suspect. Ms. Rozell explained that she has entered over 2,000 cases in the JPP database and the documents collected included charge sheets, Article 32 reports, pre-trial agreements, reports of results of trial, and actions taken after the fact by the convening authority. She added that the JPP also collected documents related to appellate review and outcomes. Ms. Rozell said that the JPP data collection was conducted by two members of the JPP staff.

Captain Tideswell explained that the data team created a system where the data in the system is tied to the actual case documents which could be pulled upon an inquiry. Ms. Carson stated that more data points could be added to the existing system and added that the document based system allows for quality control because the data is taken directly from the actual documents which can be reviewed. This document-based method is a best practice modeled after the U.S. Sentencing Commission. Mr. Redmond informed the Committee that DoD IG uses Microsoft Access for its database and that they had thousands of data points. He offered to provide a demo of the DoD IG system to Committee members if they wished.

Ms. Bashford stated that at the previous meeting they agreed that Dr. Spohn and Chief McKinley would be on the data working group. Mr. Markey also volunteered to be on the data Subcommittee. Captain Tideswell stated they could now start as a working group and once approved by DoD act as a Subcommittee.

Ms. Carson recommended that the working group should come up with a list of data points that would be beneficial for case reviews, explaining their significance.

Ms. Bashford noted that at the previous meeting there was a discussion regarding retention and the career path of victims after reporting a sexual assault. Chief McKinley added that the committee might want to review what impact a sexual assault report has on career progression. Dr. Markowitz suggested looking at the career paths of officer versus enlisted.

Ms. Bashford then suggested the Committee review data points on expedited transfer to determine the impact on the process of those transfers. Ms. Bashford then requested to hear from the defense bar and the special victim counsel. Ms. Bashford suggested that they begin working on the criteria for the DoD mandated database.

Dean Harrison asked about what type of training defense receive. Ms. Carson explained that training standards were addressed by the JPP and the services have been mandated to begin a litigation track for their judge advocates. The services are currently working on pilot programs.

Lieutenant Colonel Vergona, the service representative for the Army, stated trial counsel and defense counsel serve two years but sometimes it can be a 12-month tour. Captain Ahlers, the Air Force representative, stated that all counsel started as prosecutors typically for two years. They can then go on to be defense counsel or special victim's counsel and those tours can last two years. Ms. Bashford was also interested in seeing how often trial counsel and defense counsel transitioned off cases due to deployments or tour cycle.

Lieutenant Colonel Vergona stated that depending on where counsel was stationed they may have heavier caseloads and that on average counsel may carry 15 to 20 cases. Lieutenant Colonel Vergona also reported that judge advocates may spend time in the criminal law field and then go on to do other things like environmental law. LT Nica, the service representative from the Navy, went on to report the Navy had established the military justice litigation career track. The Navy has a board that selects personnel to the military justice track based on their experience. Lieutenant Colonel Vergona stated that the Army has skill identifiers that identify trial counsel and defense counsel with expertise. Lieutenant Colonel Vergona stated that the Congressional litigation track is being reviewed prior to implementation.

Judge Brisbois stated that there was an imbalance between government and defense resources. Ms. Cannon then raised the point that just calling a person a victim tilts things unfairly, as that is the issue the fact-finder must decide.

Ms. Bashford directed the Committee's attention back to the data points for possible collection. At an earlier session Ms. Bashford stated she had talked about analyzing how often turnover of counsel happens on sexual assault cases. Dr. Spohn stated she had written down several suggestions. The first was whether or not the victim participated in the expedited transfer program, whether the case was originally a restricted or unrestricted report, and a measure of what type of relationship the victim and offender were in. In other words, was it an intimate partner or not. Ms. Long stated that she would send the Committee an article which had some of the data points. Those included alcohol involvement, victim participation, prior relationship, delay in reporting, and evidence of bias or motive to lie on the part of the victim.

Next, Dr. Paul Garst, from the Department of the Navy SAPRO Office spoke from the gallery and stated that his office had looked at some of these data points. For one, some of the victims could be civilians he stated that he thought that number was ten percent. He also stated the Committee may want to differentiate between penetration versus contact offenses. Dean Harrison then asked whether there was a sub-category to indicate whether a civilian victim was affiliated with the military in some way.

Megan Tokash asked whether the database tracked the rank and experience of the trial counsel or defense counsel or whether there was a special victim's prosecutor on the case. General Anderson suggested looking at the type of training the O-6 receives in making decisions on case disposition. The Committee spoke about narrowing the training to what commanders receive on military justice.

Ms. Bashford then stated that she would like to know who makes the decision on the expedited transfer decision. Mr. Garst stated that the Service member's immediate commanding officer

decides whether or the allegation is credible and must make a decision within 72 hours. If it is rejected then it will receive a higher review. General Schwenk suggested that at the next meeting the Committee might want to hear from Service representatives who are actually involved in the program so that the Committee could benefit from their knowledge. Chief McKinley added he would like to hear about the training the Commanders receive on this issue. Ms. Bashford stated it might also be interesting to pull out the data on expedited transfers and whether or not a victim agrees to go forward.

Ms. Bashford then stated that at the previous session the Committee discussed establishing a working group for data which included Ms. Spohn, Mr. McKinley, and Mr. Markey. Ms. Bashford said she would like to start looking at a handful of cases to see how many of the data points discussed may be available from the case file. She announced that the members interested in the case review were Ms. Cannon, Mr. Kramer, Mr. Markey, Ms. Long, General Schwenk, herself, and Dr. Spohn.

General Schwenk suggested the Committee may want to set up a working group to look at expedited transfers, Article 140a, UCMJ regarding military justice data management, training for convening authorities, and training for defense counsel. Dr. Markowitz then again stated that during the case reviews there may be medical information that should not be shared in this setting. General Schwenk added that at the next meeting there could be an informational panel that would outline the expedited transfer as well as a panel on defense training.

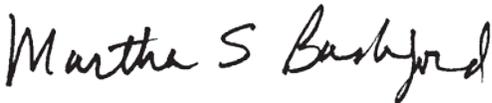
Public Comment

There were no public comments.

The DFO closed the public meeting at 3:10 p.m.

CERTIFICATION

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



Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of the July 21, 2017, DAC-IPAD Public Meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

2. Table of Contents for Read Ahead Materials
3. Public Meeting Agenda, July 21, 2017

4. Minutes of the April 28, 2017 DAC-IPAD Public Meeting
5. Public Meeting Speakers' Biographies
6. Summary of Regulations and Reports Related to Sexual Assault Investigations in the Armed Forces (DAC-IPAD staff prepared document)
7. DoD Instruction 5505.18, "Investigation of Adult Sexual Assault in the Department of Defense," (March 22, 2017)
8. DAC-IPAD Request for Information from DoD IG, RFI Set 2, Question 1 (Request Date: June 22, 2017)
9. DAC-IPAD Request for Information from Military Criminal Investigation Organizations (MCIOs), RFI Set 3, Questions 1–18 (Request Date: June 29, 2017)
10. DAC-IPAD Committee Planning Session Outline
11. DAC-IPAD Request for Information from DoD SAPRO and Service JAG Corps, RFI Set 1, Questions 1–3 (Request Date: June 20, 2017)
12. Legislative History: The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) (Staff prepared document)
13. Article 140a (New Provision) – Case Management; Data Collection and Accessibility
14. Power Point Presentation – MCIOs: Presentation to the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (July 21, 2017)
15. MCIO Organization Charts for CID, NCIS, AFOSI, and CGIS
16. DAC-IPAD Request for Information from Military Criminal Investigation Organizations (MCIOs), RFI Set 3, Questions 1–18 (Response Date: June 29, 2017) [Responses Included]