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

MINUTES OF OCTOBER 19, 2018 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 its tenth public meeting on October 19, 2018 from 9:35 a.m. to 4:40 p.m., during which the Committee heard testimony on the effects of a sexual assault investigation on accused Service members and perspectives of civilian sexual assault investigators. The Committee also conducted deliberations and voted on recommendations after receiving presentations from the DAC-IPAD Case Review Working Group regarding case reviews and Policy Working Group regarding expedited transfer. The Committee also received a briefing from DAC-IPAD staff regarding three Judicial Proceedings Panel recommendations related to Articles 32, 33, and 34 of the Uniform Code of Military Justice (UCMJ) referred to it for examination by the Department of Defense General Counsel and a briefing regarding a collateral misconduct study required under a provision of the National Defense Authorization Act for Fiscal Year 2019. Lastly, the Committee received an update from the DAC-IPAD Data Working Group.

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: https://dacipad.whs.mil.

PARTICIPANTS

Participating Committee Members
Ms. Martha S. Bashford, Chair
The Honorable Leo I. Brisbois
Ms. Kathleen B. Cannon
Ms. Margaret A. Garvin
The Honorable Paul W. Grimm
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 R. Schwenk, U.S. Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash (by phone)
The Honorable Reggie B. Walton

Absent Committee Members
Major General Marcia M. Anderson, U.S. Army, Retired

Committee Staff
Colonel Steven Weir, U.S. Army, Staff Director
Ms. Julie Carson, Deputy Staff Director
Dr. Janice Chayt, Investigator
Mr. Dale Trexler, Chief of Staff
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. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Dr. William Wells, Criminologist

Other Participants
Major Israel King, U.S. Air Force, Alternate Designated Federal Officer (ADFO)
Mr. Stephen McCleary, U.S. Coast Guard Representative
Ms. Janet Mansfield, U.S. Army Service Representative
Major Joy Hewitt, U.S. Air Force, Service Representative
Major Blake Peltz, U.S. Marine Corps, Service Representative
Mr. Jim Martinson, U.S. Navy Service Representative

Presenters
Ms. Kate Coyne, U.S. Marine Corps Defense Highly Qualified Expert
Sergeant Detective Kelley O'Connell, Boston Police Department
Sergeant Amanda Wild, Albuquerque Police Department

Major Steve Hohman, Baltimore Police Department

MEETING MINUTES

The ADFO opened the public meeting at 9:35 a.m. on October 19, 2018. Chair Martha Bashford provided opening remarks and also expressed the Committee's deepest sympathies to the family of Committee Member Keith Harrison, who passed away after a brief illness on August 15, 2018. Chair Bashford provided a summary of the agenda for the meeting and made a public announcement following the Committee's discussions during its administrative session: the DAC-IPAD, recognizing that the Committee is mandated to advise the Secretary of Defense not only on the investigation and prosecution of sexual assault in the military, but also on the defense of sexual assault, will hear testimony from individuals who have been accused of sexual assault offenses but were not charged, at a future meeting or meetings.

Effects of Sexual Assault Investigations on Accused Service Members

The presenter, Ms. Kathleen Coyne, explained that she is one of two civilian attorney advisors (formerly called HQEs) for the Marine Corps Defense Services Organization. She further explained that she is a career defense attorney, having spent 32 years of her professional life as a public defender and has worked for the last five years for the Marine Corps, training, assisting, and consulting with Marine Corps defense counsel.

Ms. Coyne stated that DoD initiatives over the past several years to address sexual assault have led to an unprecedented increase in sex crimes charging within the military, noting that many of those charged are ultimately acquitted. For the Marine Corps in fiscal year 2018, for example, she said that out of a total of 45 contested general court-martials, there were 12 complete acquittals and 23 partial acquittals. She further explained that many of the partial acquittals resulted in convictions for minor misconduct such as barracks violations or under-aged drinking. Significant numbers of those accused of sex offenses ultimately have their charges dismissed. Ms. Coyne reported that DoD-wide in 2017, the last year for which there are records from SAPRO, 776 sexual offenses were preferred. Of these, she noted, 105 cases, or 13.5% were dismissed.

Ms. Coyne emphasized that a sex crime accusation alone causes irreparable harm. She said at a minimum, Service members are put on legal hold for months, frequently over six months. She also explained that legal holds delay or cancel duty station transfers—which is especially onerous in places like Okinawa, Japan, where individuals are separated from their families and not allowed to return to the U.S. to reunify while there is a case pending. If scheduled for a competitive school or a special duty assignment, she continued, they will lose that opportunity which causes a reduction in competitiveness for promotion or reenlistment. She reported that accused are frequently publicly singled out by the command as a sex offender and their reputation within the unit and on the base is in tatters. She noted that this is particularly problematic in jury selection where the members are selected from the same command as the accused.

She also noted that many exonerated clients decide that they do not want to continue their careers in the military, resulting in the loss of training and experience for the Services. She stated others who would like to remain are denied the opportunity to do so by being refused a reenlistment approval, losing years of retirement that they have worked hard toward acquiring.

Ms. Coyne noted that although she works for the Marine Corps, she trains all branches of Service at an annual sexual assault defense training and she believes these issues are pervasive in all of the Services. She noted examples of Marines not being removed from "non-recommend" status for promotions for months after charges were dismissed and one Marine who lost a spot in medical school because he was delayed before the case was dismissed.

She explained that under the American Bar Association standards, prosecutors have an ethical duty not to bring charges when there is little likelihood of conviction beyond a reasonable doubt, yet in the military, even a preliminary hearing officer's finding of no probable cause frequently has no impact on the convening authority, who may still refer charges. Ms. Coyne noted one case where a convening authority sent a case to trial after a finding of no probable cause by the preliminary hearing officer (PHO) citing as his reason that his recommendation is consistent with the DoD sexual assault policy. She added that the Marine was acquitted, but not before his life was in tatters.

Ms. Coyne offered her suggestions for addressing the imbalance she sees in the system with respect to the accused. She said would reinstitute the Article 32 hearing as a robust tool for defense discovery and investigation. Previously, she explained, the Article 32 hearing is where the defense would conduct much of its investigation; under the current structure, this is not possible.

Her second recommendation was for defense investigators. She noted that the only branch that has defense investigators currently is the Navy. She said she has called every federal public defender in the country and confirmed that all have dedicated defense investigators. She said the average ratio is about one investigator to four attorneys. Ms. Coyne reported that the Marine Corps has zero defense investigators and that the attorneys are typically right out of law school with no training in investigations, noting the average combined experience of defense counsel, even when senior defense counsel are included in the calculation, is 14 months. Ms. Coyne also noted that unlike their counterparts in the federal court system, military defense counsel have no subpoena power.

She recommended that a finding of no probable cause made at the Article 32 hearing should be binding on the convening authority unless he or she chooses to appeal the decision to a magistrate or military judge or present new evidence to establish probable cause. Ms. Coyne explained that she believes the commander has a role in the process, but in the current system there is inordinate pressure upon commanders to refer cases and they are never going to get in trouble for referring a case to a court-martial and allowing members to sort it out. Ms. Coyne explained that in the Marine Corps, PHOs tend to be captains or reservists who are not criminal lawyers, so the appeal to a military judge offers a solution to commanders who disagree with the PHO's probable cause finding.

Ms. Margaret Garvin asked whether providing defense investigators would eliminate her request that the Article 32 return to its previous status as an investigation and discovery tool. Ms. Coyne said that it would, but only if there were a sufficient number of investigators.

Ms. Coyne recommended that the PHO be required to evaluate not just probable cause, but also whether or not there is sufficient admissible evidence to prove the case beyond a reasonable doubt. She added that this should be subject to judicial review just as the probable cause finding should be.

She reported that agents on the witness stand are testifying that they are being trained not to seek evidence that will contradict the complainant, but simply to accept the complainant's story. Ms. Coyne said that CID and NCIS investigators need to be trained to investigate and seek all evidence that will either confirm or disprove allegations.

Another recommendation Ms. Coyne suggested was to create a mechanism by which information identified by defense investigators can be confidentially shared with the convening authority before the preferral decision is made. She explained that currently any information shared with the convening authority goes to the prosecutor.

Regarding the involvement of alcohol, Ms. Coyne said she has only seen one or two sexual assaults in the military in the five years she has been doing this where alcohol was not a major factor in the case. She also recommended allowing a better early vetting of cases, which she believes will actually improve the outcome for everyone.

Ms. Coyne noted that it takes an extraordinarily long time to investigate a case before the referral decision is made in the military. She said that NCIS or CID may have had the case for a year to a year-and-a-half, while in the meantime, the defense has no investigators and the Article 32 will be scheduled within a week or two of referral and trial within three to six months. That is all the time the defense typically has to investigate and gather evidence.

Regarding defense experts, Ms. Coyne cited R.C.M. 703(d), which provides that when a party wants to use an expert in their case, they have to give notice to the other party with a complete description of the reasons for the request. In practice, she explained that only the defense does this. In five years she said she has never seen the prosecution serve such a notice on the party. Ms. Coyne explained that the process for defense counsel to request experts is to first explain the need to the prosecutor while trying not to divulge the entire case. If they say no, she continued, then defense counsel requests the expert from the convening authority, who routinely denies the request. She stated that they then must go to court to litigate what the expert will do for the defense's case. If the judge orders the expert, she said the prosecution is then given time to obtain an "adequate government substitute." This often has to be litigated as well. All of these steps further lengthen the time it takes to complete the case.

Perspectives of Civilian Sexual Assault Investigators

Sergeant Detective Kelly O'Connell explained that she is a detective assigned to the Boston Sexual Assault Unit. She said has been with the department for 32 years and with the Sexual

Assault Unit for over 9 years, both conducting investigations and as a supervisor. She explained that her unit is co-located with the domestic violence and human trafficking units and noted that they also have advocate-based programs located in their building which enhances their ability to work with victims in investigations. She said that her unit handles approximately 500 cases per year which come in as walk-in calls to the District, walk-ins at hospitals, or referrals by advocate programs in the city. Her unit also deals with colleges in the greater Boston area. She explained that the large universities have sexual assault-trained investigators who typically take the lead on those investigations unless they occur in the Boston jurisdictions.

Sergeant Detective O'Connell said they begin with an initial interview that is then forwarded to an investigation and presented to the District Attorney's Office. She said they follow trauma-informed approaches to interviewing, and noted that sexual assault investigations are unlike any other crime.

Sergeant Amanda Wild from the Albuquerque Police Department informed the Committee that she has specialized in sexual assault investigations for six years. She explained that Albuquerque has a family advocacy center where all of the violent crimes are housed including homicide, robbery, domestic violence, and sex crimes. She called it a one-stop place for victims of sexual assault that includes a sexual assault nurse examiner, rape crisis personnel, and adult and child protective services personnel.

Sergeant Wild stated that statistics show that a majority of the 911 calls for sexual assault are not made by victims, but by a third-party friend or family member, or if it has just happened, by someone who witnessed the actual assault. She explained that she is a big advocate for victims' rights. She advises victims to come in, sit down, and talk with investigators, understand how the investigation is going to go. If they understand the process, she said, they can retain the victim through the process. She emphasized that the criminal justice system is not the right process for everyone and that some just want to come in for validation that, yes, this did happen to them and was wrong, but they do not want to go and stand in front of a jury. Her unit is there to assist and help empower them.

Sergeant Wild said her department has a sexual assault backlog of nearly 5000 cases that were not investigated which they are reviewing to determine what went wrong. In a lot of the cases, they lost the victim's cooperation at the beginning and they are trying to determine why. She explained that they now have a victim notification process and a case review council that includes a rape crisis advocate, SANE nurses, the crime lab, the DA's office and the investigators. They meet and discuss the old cases and how to review them and how to best approach victim notification. She explained that they also have a multi-disciplinary team that meets once a month to discuss consistencies, best practices, and how they are going to keep and retain the victim throughout the process.

Major Steve Hohman is the Major Commanding Officer of the Baltimore Police Department's Special Investigation Section (SIS). He said that he has been with the BPD for 20 years, most of which has been spent in criminal investigations. He took command of the special investigations section in 2015. He explained that unlike robberies and shootings and homicide, sex offense

investigators have an opportunity to work with multidisciplinary teams which are a partnership with prosecutors, medical professionals, and advocates.

Major Hohman explained that SIS is responsible for investigating roughly 12,000 to 19,000 criminal investigations a year for the BPD. He said the sex offense and child sex offense units are a small part of that. He continued that the Department of Justice (DOJ), after an investigation of BPD patterns and practices several years ago, found there was evidence to suggest bias in the way BPD investigated sexual assaults. At the time, he noted, the clearance rate for rape in Baltimore was only eight percent.

In 2000, Major Hohman stated, the Baltimore Sun published a series of articles critical of the treatment of sexual assault victims by the BPD. They determined that the unfounded rate was well over 30 percent of reported sex offenses, which was many times over the national average. He said after the publication of those articles, the Department undertook a major overhaul of the sex offense unit, tripling the staffing, creating a cold case unit, and revamping the Baltimore Sexual Assault Response Team (SART).

Major Hohman believes the BPD has made great strides towards improving its response to sexual assault since then. He explained that they entered into a Federal consent agreement with DOJ and implemented an investigative checklist of over 30 key investigative tasks that must be completed [or if not, a reason provided] for every investigation, which ensures a thorough, timely, and unbiased investigation. They have also implemented a more robust supervisor review at regular intervals of 48 hours, 7 days, 14 days, 28 days, and 60 days.

Major Hohman explained that he has a weekly case review with the commander and the unit commander to evaluate cases for investigative thoroughness and administrative thoroughness. His unit also meets monthly with the SART to go over best practices and protocol. He commented that they created the first, trauma-informed, family friendly waiting room and interview room in a major police department.

Major Hohman stated that the Department is in the process of rewriting its entire sexual assault policy and unit standard operating procedures (SOPs). He attributes this renewed focus to the clearance rate last year of at least 50 percent, up from 30 percent a few years ago and well above the national average of 36 percent. He further reported that the unfounded rate has dropped to between five and eight percent, that they test nearly 90 percent of all rape kits, with a zero backlog for testing.

<u>Member Questions</u>:

Contradictory evidence

Chair Bashford asked the investigators whether they look for evidence to both corroborate and to contradict victims' statements. Sergeant Wild responded that they absolutely do and that if something contradictory comes up, they seek a second interview with the victim through the advocate. Sergeant Detective O'Connell agreed. She said they look at every aspect whether or not it is consistent with what the person is telling them or what they have seen. They bring

contradictory evidence forward and allow the victim to either talk it over with investigators or they identify the issue and close the case down at that point, rather than just letting it ride and then the court process falls apart completely. Major Hohman stated that even while under the consent agreement with DOJ, they go to great lengths to spell out suggested lines of questioning completely. He finds that this is why it is very important to involve advocates from the beginning, so they can explain how the process is going to go and explain to victims that the detectives have to ask certain questions as part of the criminal justice process. He believes that when an investigator develops a suspect, he or she should try to prove that the suspect didn't do it. If the investigator can't, then they have the right person.

Unfounding Decisions

Dr. Cassia Spohn asked Major Hohman how the BPD brought the unfounding rate down and asked each of the investigators how they define unfounding and what decision rules or SOPs they use for deciding whether those cases should be unfounded or not.

Major Hohman noted that the national average for unfounding is between five and ten percent. He indicated that BPD changed the policy on how patrol officers coded calls for service. He explained that officers can write a written report or give an oral code on a call, for which there are six or seven options. He said they found that many of the patrol officers were coding calls prior to involving investigators. For instance, he said, it was very common for a sex worker to report a sexual assault to a patrol officer, who then, based on the faulty assumption that a sex worker can't be a founded rape case, would code the call as unfounded before even involving an investigator.

He explained that in response, the BPD created a policy that patrol officers are not allowed to unfound a case on the scene. They have to write a report and call a detective for every single sexual assault call for service. He said in the last year there were roughly 880 sexual assault calls for service; and of those, 760 or more had a report or investigation conducted as a result.

Major Hohman reported that now, to unfound a case, it has to be presented to the SART prior to officially unfounding it and all of the 34-plus checklist items on the investigation have to be conducted. He conceded that not every item on the checklist is always applicable, but they have to at least take a look and answer as to why it's not applicable. He said, at the end of the day, it's really about meeting the elements of the Uniform Crime Report (UCR), not about determining that something didn't happen. He said the BPD definition of unfounding is that, for the purposes of a reported rape, the elements of the crime have to be met (at some minimal level) or it will be unfounded.

Major Hohman said that once the detective makes those findings, their immediate supervisor or sergeant reviews it and either approves it or sends it back. If it is approved, it goes to the unit lieutenant, then to Mr. Hohman as the commander, then it gets presented to the SART. He added that the SART's findings aren't binding, and the ultimate decision lies with the police department. Sometimes, after the SART, he noted, law enforcement will go back and follow up on any questions raised by SART partners before making a final decision.

In response to a follow up question from General James Schwenk, Major Hohman indicated that if the evidence supporting the elements of the crime is questionable and possibly doesn't even meet a probable cause threshold, they will err on the side of caution and keep the case open, even if it means they don't get the clearance, rather than unfounding it.

Sergeant Wild said the Albuquerque Police Department is very similar. She reported that they actually spend more time investigating their unfounded cases in order to prove that there is no evidence to support the crime. She said they have a very low unfounded percentage of about four to five percent. She said in the majority of the unfounded cases, they have evidence to support that the crime did not happen, such as surveillance videos, witnesses or alibis. She also noted that those cases typically have mental health issues involved as well. She continued that one reason they spend so much time investigating the unfounded cases is that those with mental health issues are the perfect victim. They are the ones perpetrators are looking for. She said if there is a finding of no probable cause in a case, they close the case out pending further leads, and then they reopen it any time new additional leads come forward.

Sergeant Detective O'Connell indicated that her unit doesn't really have a lot of unfounded cases. She said a patrol and a patrol supervisor respond to 911 calls and determine if a call is "an actual sexual assault" that the investigator will be notified about. She said when they get the case it has already been locally "triaged" by the patrol and the patrol supervisor if the report comes through the patrol or a hospital or a victim. She emphasized that the investigation is based on seeking corroborating evidence to assist in moving a case forward. She said most of the cases they see are domestic, where the victims and suspects know each other.

Investigative Relationship with Colleges

Mr. A. J. Kramer asked the investigators how they work with colleges and universities in their cities. Sergeant Detective O'Connell responded that some of the larger universities in Boston have their own trained sexual assault investigators who conduct their own investigations. She said they are in the process of developing an MOU with these larger schools. She said typically, if it's on their property, they handle the investigation and if they do not have the training to investigate, or it's a smaller school, her unit does the lead investigation. She said that alcohol is one of the key problems they see in the college cases and that these cases are very hard to prove unless there is information on their cell phones or social media.

Major Hohman said that Baltimore is unique in that only the BPD is allowed to investigate and follow up on campus crimes. Consequently, many of the colleges in Baltimore have a "sworn" police department on the campus, but others have just a civilian security office. He said regardless, BPD investigates sexual assault allegations. He said they essentially act as first responders. BPD has memorandums of understanding (MOUs) with around 13 area colleges. He said they also work closely with the universities' Title IX investigators to be sure they are in compliance with reporting requirements and they have done some joint training through a DOJ grant. He reported that a lot of these cases involve drugs or alcohol and as part of the consent agreement they have started to track these numbers but don't have good data yet. He said they do not unfound those cases. Typically it's a matter of consulting with the prosecutor to determine the level of incapacitation.

Sergeant Wild reported that Albuquerque has police in the public schools from middle school through university level but that they do get called and asked to assist. She said about 80 percent of their cases do involve drugs or alcohol. She said the University of New Mexico has a SART team and they participate as part of the monthly meetings.

Major Hohman responded to a question from Dr. Jenifer Markowitz about the SART team review of unfounded cases. He said as the case goes through the investigation process, they also consult with the state's attorney's office. He said they send reports every morning to their counterparts at that office so they are aware of every case and there is some consultation between the primary investigator and the attorney that's assigned to that case. At the conclusion of the investigation, if everyone in the police department agrees this is an unfounded case, it is presented to the full SART. The SART review is not binding but sometimes generates new areas of investigation.

Coordination with Prosecutors

Ms. Kathleen Cannon asked the detectives what their processes are to go to a prosecutor with a case or to choose not to and what standard they applied.

Sergeant Detective O'Connell said that after intake in their office, they have a 24-hour follow up with the victim. She said once they interview the victim they usually send up their initial report to the district attorney. She said this happens in all cases if there is an identified suspect, and typically the case is assigned [to a prosecutor]. She said if a suspect is not identified, the case typically becomes inactive in the investigators office and the DA does not assign the case to a prosecutor.

She said they have a quick turnaround in getting the DA's office involved and use their experts and assistance in triaging the evidence. As investigators, they do their own affidavits for search warrants but also have others review the decision-making process to make sure there is a proper investigation and it goes smoothly for a grand jury indictment.

Sergeant Wild said it is very similar in her office. She said once the detective has established probable cause and identified a suspect they begin working with the district attorney and they have a very close relationship with them. She said they meet with the DAs twice a month to review the investigators' cases and ensure they are capturing all the information the prosecutors need before they turn over the case to the prosecutor. Any time they have a case with no offender information, she said, that case is closed until they are able to identify a suspect, and it is not turned over.

If the detective has a suspect but doesn't believe there is probable cause, Sergeant Wild said, the detective will present the case at a case review meeting with the DAs to determine what additional evidence is needed to be able to prosecute the case. If law enforcement determines that they cannot establish probable cause after consulting with the DA, the case is closed pending further leads. Once they do establish probable cause, they release the case to the DA's office.

The DA reviews the case to determine if there is enough evidence for them to take it forward to a grand jury. If there is not, the DA's office will dismiss it.

Dr. Spohn asked whether they take cases to the DA prior to making an arrest and whether law enforcement then clears the case by exceptional means if the DA indicates they will not prosecute. Sergeant Wild responded that yes, they do send over cases for a grand jury, and if it comes back as a "true bill" law enforcement will get an indictment and do a warrant arrest.

Major Hohman reported that in Baltimore, they send reports to the state's attorney on a daily basis. He said when they decide whether they are going to charge or not, the minimum standard is probable cause. The policy is that they consult with the state's attorney prior to charging any felony case, though the Police Department still retains the authority to seek charges even if the state's attorney doesn't approve. Once the victim/witness articulates a crime, essentially, it reaches the threshold of probable cause. However, he noted, the attorneys have an obligation not to charge those cases if they think they can't prove it beyond a reasonable doubt.

At the end of the day, he said, it comes down to the UCR exceptional clearance versus bringing charges, so there is a large portion of cases where a crime is articulated and the probable cause burden of proof has been met for the UCR, but not for reasonable doubt, so it isn't going to trial. They present these cases to the state's attorney knowing that it is very unlikely charges are going to be filed as they need to get an official declination in order to exceptionally clear the case because it can't be proven beyond a reasonable doubt.

Probable Cause for Arrest

Mr. James Markey asked Major Hohman whether the probable cause decision he spoke of is probable cause to make an arrest. Major Hohman responded that investigators are authorized to make arrests, but they can't seek charges without a supervisor. The detective makes a determination that there's probable cause, then it goes through several layers of review at the sergeant and lieutenant's level. Then, by policy, they consult the state's attorney.

Sergeant Detective O'Connell explained that when a rape or domestic violence report comes in on a 911 call and an officer is dispatched, they will make the probable cause determination of whether to arrest and charge, but she indicated that that is not how her office receives most cases. She said when her office gets a case for investigation and determining whether it is a case to forward for charging, usually it is either walk-ins or a response to a hospital or a call to the office. Since the rapes will end up in Superior Court, they include the DA's office in making decisions in terms of going to the grand jury

Third Party Reports

Mr. Markey asked about third party reports. Sergeant Detective O'Connell said they don't normally take third party reports and in order to move forward they need a victim. Sergeant Wild said that they do not take third-party reports but they ask who the victim is and reach out or have an advocate reach out to them. They begin their investigations with the victim's statement. If it is a third party report, Sergeant Wild said, they want to make contact with the victim and ask why

they don't want to report in order to assess their safety. They check on their safety and let them know about services available to them. If they don't want to talk further, she said, that's it. However, if they want to come in and talk further, Sergeant Wild lets them know they can come in and discuss it and still have the option not to make the official report. If they say they would rather go the counseling route and not pursue the criminal justice process, the case is closed.

Sergeant Detective O'Connell said that when they receive a third-party report, they encourage that third party to do the outreach to the victim and let them know that is the only way law enforcement can go forward with the case. She said she would not cold call a person about an alleged allegation because it puts law enforcement in a position where they are potentially "outing" someone who is not ready to come forward.

Major Hohman commented that that is the nuance of sexual assault investigations. Investigators want to be trauma-informed but as a police department, they also have an obligation to investigate crimes that are brought to their attention. The BPD policy requires them to follow up on any felony allegation, whether it is made by a third party or not. He said the vast majority of the third party reports are from mandatory reporters such as a therapist or child protective services. He said they will open an investigation and they don't necessarily need the victim to make the case, but it is very difficult to do so. He said they would have an advocate reach out to provide them with information on how to report and inform them of the services available. He noted that victims can submit rape kits anonymously if they wish and they have to be kept for 20 years.

Case Clearance Rates

In response to a question from Chief Rodney McKinley, Major Hohman said they don't track statistics on conviction rates but that their clearance rate is about 55 percent cleared by arrest and end up with criminal charges, and 45 percent are cleared by exception. He noted that the vast majority of their exceptional clearances are for cases that are declined for prosecution, meaning they have identified a suspect, law enforcement felt probable cause had been reached, but the state's attorney can't prove it beyond a reasonable doubt. Of the remaining cases where the suspect is charged and goes to trial he estimated the conviction rate at around eighty-something percent.

Victim Nonparticipation

Chair Bashford asked what percentage of victims drop out of the process or stop cooperating during the investigative stage. Major Hohman said that is not a statistic they have historically tracked, but it is part of the consent decree that they start tracking it. He said that anecdotally, victims who are involved in sex working often fall out early in the process. He noted that once they are able to get a survivor in for an interview and start the process, they typically continue. Often, he continued, the drop off is in the very early stages reporting to a patrol officer or when they get a SAFE exam. Sergeant Wild said her experience is very similar. She said it matters who contacted the police. If the victim is not the one who originally reported, those have a higher rate of dropping out. She said about 60 percent of their victims do not want to participate.

Sergeant Detective O'Connell agreed with her colleagues and said that close to half of the victims drop out of cases from the beginning stages of investigation in Boston.

Judge Grimm asked the investigators how often victims drop out after the prosecutor has taken the case. Major Hohman said this issue is not unique to sexual assault victims—it is a pain to deal with the criminal justice system in Baltimore whether you are a witness or a victim, there are going to be multiple postponements. He said the system is overwhelmed and that is where it is really important to have advocates explain this to victims. Sergeant Wild agreed. She said once they hit pre-trial and they are interviewed by defense attorneys a lot drop out. Sergeant O'Connell agreed as well.

Case Review Working Group Presentation and Committee Deliberations on Initial Findings and Recommendations Related to Sexual Assault Investigative Case File Reviews

Ms. Kate Tagert, DAC-IPAD Attorney-Advisor, provided an overview of the Case Review Working Group's efforts over the last year. She explained that last October the DAC-IPAD sent a request for information (RFI) to the military investigative offices requesting case files for all penetrative sexual offense investigations that were closed in fiscal year 2017 (Oct. 1, 2016 – Sep. 30, 2017). The RFI asked for the data provided to include the reason or result for the case closure; for example, whether a case was referred to court-martial, or was no action taken because there was no probable cause. She thanked the military investigators for their excellent assistance in providing over 2,000 physical cases some of which were spread out all over the world.

Ms. Tagert explained that the CRWG developed a checklist to capture demographic data, evidentiary factors, as well as case complexity factors from each file. She said all of that information is currently being entered by DAC-IPAD Senior Paralegal, Ms. Stacy Powell, into a database. The checklist consists of 231 data points and it takes approximately thirty minutes to enter all of the data from one case. If there are multiple subjects or victims, it can take up to two hours.

At least two reviewers review each case, Ms. Tagert continued. To ensure accuracy, checklists are reconciled to compare the data from different reviewers and the investigative file is reviewed again by a staff attorney when checklist responses don't match on a case. She explained that this is only done for discrepancies on factual and demographic data elements; no answers are changed on the subjective questions, such as whether or not a case was decided properly, or whether the victim's statement established probable cause. Once all the data from the checklists have been checked and entered in the database, Ms. Tagert reported, the criminologist, Dr. William Wells, will code the data and provide an analysis.

Next, Ms. Powell explained the statistical data provided to the members. She explained that 152 investigative case files have been reviewed, which resulted in 166 separate case entries into the database. She noted that this variance is because each subject-victim combination constitutes one case for purposes of the data analysis. For the March 2019 DAC-IPAD report, Ms. Powell stated,

the CRWG will be analyzing and discussing those 166 cases, each of which was reviewed by one CRWG member and at least one staff member.

Ms. Tagert explained that CRWG members and staff will have completed their review and analysis of the entire universe of 2,069 investigative files for inclusion in the March 2020 report. She reported that the case files are categorized by the disposition of the sexual assault allegation as reported by the investigators. The categories for dispositions are: (1) no action taken on the sexual assault offense; (2) preferral of charges for a sexual assault offense; (3) nonjudicial punishment (NJP) for a sexual assault offense; or (4) administrative action for a sexual assault offense. Currently, there are 851 cases remaining for the staff to review with a completion goal of summer of 2019. Ms. Tagert clarified that the 166 cases that will be analyzed in the 2019 report consist of only the "no action" and "preferred" dispositions, which comprise the vast majority of case dispositions. In the files provided, NJP or administrative action dispositions for a sexual assault offense are exceedingly rare.

Objective 1: Predict Disposition Outcome

Next Ms. Tagert discussed the status of the CRWG objectives which were set forth in the March 2018 DAC-IPAD report. She explained that the first objective of the case reviews was to see whether the data that has been captured can predict the disposition or outcome in cases. According to Dr. Wells, the sample size of 166 cases reviewed is too small to allow a Service-by-Service analysis, it can only be used to assess the combined total of the 166 cases representing all Services—or DoD as a whole. Because the CRWG has found that there are differing standards applied in practice by the Services for preferring and referring cases, the working group believes that a Service-by-Service analysis will be more informative than one that combines all the Services together. Consequently this analysis will not be undertaken until all of the cases have been reviewed, and will be included in the March 2020 report.

Objective 2: Assess Service Disposition Categorizations

The second objective Ms. Tagert discussed is the assessment of the accuracy and consistency of Service case disposition classifications. For the 2019 report, Ms. Tagert explained, the criminologist will analyze the discrepancies between what the commander identifies as the reason for case closure, what the judge advocate opines, and what the MCIOs enter into their databases for reporting to the FBI. Documentation of the commander's decision is supposed to be included on what is known as the commander's action report. She noted that these are not uniform across the Services and there is a lot of ambiguity between the information CRWG members find in the case files and what is recorded on that document. Additionally, the command action reports are often not completely filled out. An example of the issue, Ms. Tagert noted, is that a commander might cite insufficient evidence as the reason why no action was taken, the judge advocate may indicate there was probable cause, and the MCIO clearance may indicate that the case was unfounded. This leads to considerable confusion as to why the cases were actually closed.

Objective 3: Capture and Report Demographic Information from Case Files

Ms. Tagert discussed the third objective of the CRWG which was to capture demographic information from the investigative case files reviewed to be used in future Committee reporting. She explained that these details will be provided for the random sample cases in the March 2019 report. She noted that the data will not be categorized by Service but as aggregated data for DoD as a whole. She explained that the 2020 report will include data categorized by Service for all of the cases.

Objective 4: Review and Assess Investigations to Identify Common Trends

Ms. Tagert explained that General Schwenk would be going over the findings of the CRWG at this point in their review in his discussion of the working group's findings and recommendations.

Objective 5: Assessment of Whether the Disposition Decision in Each Case Was Reasonable

Ms. Tagert noted that objective five—the CRWG's assessment of whether disposition decisions in each case reviewed were reasonable is the subjective question to be answered by each member based on their expertise and professional experience. She cautioned that the results of this question for the no action cases are based on the information available in the investigative case file only, so there may be important details not available to the reviewers to consider. She explained that the methodology that the CRWG members used will be explained in the report and discussed at the January meeting.

She re-iterated that every case from the initial review was reviewed by a committee member and a staff member and that if a case was marked unreasonable by any reviewer, a third attorney review was conducted. Preferred cases also included a review of the preliminary hearing reports and judge advocate advice if available in the DAC-IPAD court-martial database.

Ms. Tagert further noted that the CRWG members, beyond just reading cases, which was very time consuming, also held over ten hours of deliberations and testimony during that time. They spoke to military investigators, military defense counsel, military prosecutors, FBI analysts, and an assistant United States attorney.

Ms. Tagert presented a slide with the results of the CRWG analysis of reasonableness:

RANDOM SAMPLE: REASONABLE/UNREASONABLE DETERMINATION

	CATEGORY	# IN DATABASE	% REASONABLE (UNANIMOUS)[1]	% REASONABLE (MAJORITY)[2]	% UNREASONABLE (MAJORITY)[3]	% UNREASONABLE (UNANIMOUS)[4]
DOD	COMBINED	166	86%	8%	2%	4%
	NO ACTION	123	85%	8%	2%	4%
	PREFERRED	43	86%	7%	2%	5%

Definitions:

[1] **REASONABLE (UNANIMOUS)**: All reviewers of case file agreed that command action was reasonable.

[2] **REASONABLE (MAJORITY)**: Two out of three reviewers of case file agreed that command action was reasonable.

[3] **UNREASONABLE (MAJORITY)**: Two out of three reviewers of case file agreed that command action was unreasonable.

[4] **UNREASONABLE (UNANIMOUS)**: All reviewers of case file agreed that command action was unreasonable.

General Schwenk explained that one of the reasons there is a DAC-IPAD is to bring people in with certain expertise and experience and let them exercise their independent professional judgment, which is what the CRWG members did in reaching their conclusions on the reasonableness of the disposition decisions. He further explained that they decided not to lump the results together into just reasonable and unreasonable categories, but to let the results speak for themselves and each person can draw their own conclusions as to what the results mean.

Next General Schwenk reviewed the findings and recommendations of the CRWG stemming from the members' independent judgement of case reviews and the testimony received.

Issue 1: Investigative Case Closure (Clearance) Classifications

> **CRWG Finding 1**: The case closure (clearance) classifications utilized by military investigators are set forth in DoDM 7730.47-M-V1. The CRWG found during its case reviews that these classifications are confusing and applied inaccurately and inconsistently by investigators.

General Schwenk indicated that the CRWG would continue to monitor this as it reviews the remaining 800+ cases and report back to the Committee.

> **CRWG Finding 2**: Investigators use the information from command disposition/action reports to determine appropriate case closure classifications.

General Schwenk explained that the issue of whether this should be the case and how this is being done is something the CRWG is going to continue to monitor, but this finding indicates that the command disposition action reports are important for reasons beyond just documenting what happened.

Issue 2: Probable Cause Determinations, Unfounding, and Submission of Fingerprints to Federal Databases

CRWG Finding 3: DoDI 5505.11 "Fingerprint Card and Final Disposition Report Submission Requirements," states that military subjects' fingerprints are to be submitted electronically to the FBI when a determination is made that probable cause exists (defined as a determination that there are reasonable grounds to believe that an offense has been committed and that the person to be identified as the offender committed it) in coordination with the servicing SJA or legal advisor. In no case is this to be earlier than apprehension (in the military), or the subject interview. DNA submissions, in accordance with DoDI 5505.14 "Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders," have similar requirements.

CRWG Finding 4: The CRWG received testimony and found during its case reviews that the point during the investigative process at which the subject's fingerprints and DNA are taken, the probable cause determination is made, and the subject's fingerprints and DNA are submitted to federal databases vary widely in the military.

CRWG Finding 5: From the testimony received by the CRWG and its review of case files, the CRWG finds that there is significant confusion among investigators, judge advocates, and commanders as to the meaning of the terms probable cause (reasonable grounds to believe) and unfounded (false or baseless), when and by whom probable cause and unfounded determinations are made, and how they are documented throughout the investigative process.

General Schwenk reported that this finding comes from looking at the investigative files. He noted that there are inconsistencies within the case file and from one case to the next. He stated that the CRWG will continue to look at this.

Issue 3: Investigator Discretion

CRWG Finding 6: Military investigators testified that they are required to follow a checklist of investigative actions regardless of the facts of a particular case and that they have little discretion to determine which investigative actions provide value in a case.

General Schwenk explained that the CRWG got to this finding as the members discussed the case reviews and he noted that one would comment that they couldn't believe all the work the MCIO did on a case that was not going to go anywhere and they realized others were seeing this trend too. He said the CRWG then asked the investigators how much discretion they have in determining what investigative actions to take and there was a sense that they did not feel they had discretion from the checklist of things they are supposed to do, similar to what the Baltimore major discussed this morning. He indicated that the CRWG was going to continue to look into this.

CRWG Finding 7: In the course of conducting case reviews, the CRWG found that nearly all case files include the same series of investigative actions, including

photographs of incident locations and extensive interviews of coworkers and other character witnesses whether relevant to the case or not.

General Schwenk reported that he wasn't sure if the CRWG would be able to come up with a solution for what could help complete investigations in a more timely manner, but that the CRWG would continue to look at the issue and come back to the Committee.

CRWG Finding 8: It is problematic that in some cases in which, appropriately, no action is taken against an accused Service member, investigations are taking over six months to complete. Lengthy investigations often have significant negative consequences for accused Service members as well as victims.

Issue 4: Documentation of Command Disposition Decisions and Action Taken

CRWG Finding 9: Accurate and uniform documentation of a commander's disposition decision, the reason for the decision, and any disciplinary action taken for alleged violations of the Uniform Code of Military Justice is essential to:

a. create complete, reviewable military justice records;

b. enable military justice federal advisory committees such as the DAC-IPAD and the future Article 146, UCMJ, Military Justice Review Panel to conduct statutory sexual assault and other military justice reviews and assessments;

c. ensure military criminal investigative agencies accurately report crime data to federal law enforcement agencies and databases; and

d. ensure that federal criminal databases routinely searched by employers and others required to conduct criminal background checks reflect accurate and timely information about the disposition of allegations made against Service members.

CRWG Finding 10: DoDI 5505.18, which promulgates DoD's sexual assault investigation policy, requires the commander of the Service member who is a reported subject of an investigation to provide the MCIO, in writing, all disposition data within 5 business days of disposition to include: (1) any administrative, non-judicial punishment, or judicial action that occurs as a result of the investigation; or (2) a declination of command action when no action is taken.

CRWG Finding 11: Section 535 of the FY 2019 NDAA requires the Secretary of Defense to establish a uniform command action form, applicable across the Armed Forces, for reporting the final disposition of cases of sexual assault in which (1) the alleged offender is a member of the Armed Forces; and (2) the victim files an unrestricted report on the alleged assault.

CRWG Finding 12: Military investigators and judge advocates testified to the CRWG and DAC-IPAD that documentation of command action is required to officially close a

case. Investigators reported that they often have difficulty obtaining this documentation from commanders in a timely manner.

CRWG Finding 13: The command disposition/action reports that are found in investigative files are often unclear, incomplete, inaccurate, and inconsistent within and across the Services.

CRWG Finding 14: Command disposition/action reports that are found in investigative files frequently include SAPRO-defined terms such as "command action precluded" which often causes confusion, inconsistencies, and inaccurate reporting by MCIOs and others required to report crime data utilizing standardized legal and investigative terms.

CRWG Finding 15: It is unclear from the command disposition/action documentation found in investigative case files what source documents or other written information is utilized by commanders in filling out command disposition/action reports. Command disposition/action reports sometimes conflict with source documents reviewed by CRWG members and staff.

CRWG Finding 16: Staff judge advocates testified that they do not routinely assist commanders in completing command disposition/action reports.

CRWG Recommendations

CRWG Recommendation 1: In developing a uniform command action form in accordance with section 535 of the FY 2019 NDAA, the Secretary of Defense should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

CRWG Recommendation 2: [The Secretary of Defense] should ensure that the standard set of options for documenting command disposition decisions are based on recognized legal and investigatory standards that are uniformly defined across the Services and accurately reflect command action source documents.

CRWG Recommendation 3: [The Secretary of Defense] should ensure judge advocates or equivalent civilian attorneys review and provide advice to commanders in completing command disposition/action reports in order to ensure accuracy and completeness of the documentation.

CRWG Way Ahead

The CRWG will continue to monitor the important and problematic issues identified with (1) investigative case closure classifications; (2) probable cause and unfounding determinations and submission of fingerprints to Federal databases; (3) investigator discretion; and (4) documentation of command disposition decisions and action taken.

Next the Committee deliberated on findings and recommendations.

Ms. Garvin asked, with respect to section 535 of the FY 19 NDAA requiring the command action report if the victim files an unrestricted report of sexual assault, if Congress meant to limit the requirements to cases where the victim files an unrestricted—as opposed to a third party or mandatory reporter making the reports. She suggested the CRWG consider this question and continue to look at it.

Chair Bashford asked for a vote on CRWG recommendation one. Recommendation one was adopted by unanimous agreement of the members.

Next Chair Bashford asked for discussion and a vote on CRWG recommendation two requiring a standard set of options for documenting disposition decisions. The Committee members voted unanimously in favor of recommendation two. Chair Bashford asked for discussion regarding recommendation three—that judge advocates or civilian attorneys review and provided advice to commanders in completing command action reports to ensure accuracy and completeness. General Schwenk noted that the CRWG did consider whether judge advocates should be required to submit the forms. The working group felt, after some discussion, that commanders still should do this.

Ms. Garvin asked whether this advice would be documented anywhere or whether it was informal. General Schwenk responded that the recommendation is just to make sure an attorney has eyes on the document and helped the command in preparing it. Whether DoD, in implementing guidance wants to require a record of that, is something the CRWG didn't discuss. Ms. Bashford asked for a vote and recommendation three was adopted by unanimous agreement of the Committee members.

Committee Deliberations on Expedited Transfer—Final Assessment

Ms. Terri Saunders, DAC-IPAD Attorney-Advisor, presented the Policy Working Group's update on its expedited transfer policy assessment.

Ms. Saunders explained that in its March 2018 Annual Report, the DAC-IPAD provided an overall assessment of the DoD expedited transfer policy, finding that the policy is an important sexual assault response initiative and strongly recommending it be continued and further improved. The Committee also made four recommendations.

She explained that the DAC-IPAD made six interim assessments regarding the expedited transfer policy and asked the PWG to continue to review these issues. The PWG also reviewed one additional related issue.

In looking at the seven issues for continued review since the March 2018 report, the Policy Working Group heard from a wide variety of groups of people from the Services and DoD, including: mid-level and senior commanders and senior enlisted leaders; SVCs and VLCs and their program managers; DoD and Service SAPR program representatives; Service SARCs; Service special victim prosecutors and defense organization heads; Service MCIOs; and Sexual assault victims who received expedited transfers.

The PWG also submitted a request for information to the Services and DoD requesting information and data on all expedited transfer requests submitted in fiscal year 2016 as well as sexual assault–related transfers of accused Service members from each of the Services in response to a request for information. The PWG received and reviewed this data in making its assessments.

Issue 1: The expedited transfer option is not available to Service members who make restricted sexual assault reports.

DAC-IPAD March 2018 Interim Assessment:

The DAC-IPAD believes that the development of a workable option allowing Service members who make restricted reports to request and receive expedited transfers without triggering an investigation would be beneficial for certain victims. The PWG will continue to explore this issue.

> **PWG Recommendation 1**: The Secretary of Defense expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:
>
> a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.
>
> b. The victim's commander and senior enlisted leader, both at the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the alleged offender's identity or other facts of the case—enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
>
> c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the alleged perpetrator not being held accountable for his or her actions or the loss of evidence should the victim later decide to unrestrict his or her report.

General Schwenk commented that this is clearly the most controversial of the recommendations. He noted that the witnesses the PWG heard from were split on the issue, including splits within each panel or group such as victim advocates, or trial counsel or others. He emphasized that it really was a split of opinion. General Schwenk stated that from his personal point of view, the purpose of the expedited transfer program is to help the victim recover. There are now victims who file restricted reports, the purpose of which is to help them recover, yet they are precluded

from the expedited transfer which could be of help for many of the same reasons it is helpful to those filing unrestricted reports. He emphasized that he feels this is the right thing to do for victims, and the military clearly can do it. He noted that DoD has recognized that by allowing it to be done now as an exception to policy but that he thought the Committee should recommend more than the status quo.

Chair Bashford asked whether the same aim could be reached by someone filing an unrestricted report and then immediately declining to participate, and rather than launching a full investigation, where everyone is interviewed, they could simply stop the investigation.

General Schwenk responded that administratively, Ms. Bashford's suggestion would be easier, but the downside would be that there is no restriction on who knows about the report, whereas with the recommended approach, the victim retains as much of the restricted status as possible.

Dr. Markowitz noted that the expedited transfer program is used [by defense counsel] as a potential motive to fabricate at trial, so if there is the possibility for expedited transfer in a restricted case, that takes some of this motive off the table as a defense tactic. She stated that there are a variety of reasons why having expedited transfer for restricted cases ends up being beneficial. Chief McKinley added that there may be a situation where, because of the atmosphere at installation X, the person doesn't want to file an unrestricted report there, but they want to get away from the situation, and this gives them the ability to do so. Then, if they want to go ahead and file an unrestricted report when they get to the new installation, they may do it. He sees many positives with this recommendation.

Ms. Saunders also noted, regarding allowing a victim the choice to curtail the investigation, which a number of the MCIO witnesses that the PWG heard from were against this idea. They were particularly concerned about their liability if the perpetrator re-offends after they stopped an investigation at the request of a victim.

Judge Leo Brisbois asked for clarification about whether losing and gaining commanders would be notified of the identity of the accused. Ms. Saunders confirmed that only the victim's name would be provided to the gaining and losing commanders for purposes of facilitating the expedited transfer.

Chair Bashford then asked for a vote to approve PWG recommendation one. It was unanimously adopted by the Committee.

Issue 2: Inadvertent disclosures by victims to their commands of sexual assaults and reports of sexual assault made by third parties deny Service members the opportunity to make a restricted report and protect their privacy, if they so desire.

DAC-IPAD March 2018 Interim Assessment:

The DAC-IPAD believes that victims who lose the ability to make a restricted report, whether because of third-party reports or because they are unaware of the consequences of reporting to a member of their chain of command, may benefit from being able to restrict further disclosure or

investigation of the incident if they wish to protect their privacy. The PWG will continue to explore this issue.

> **PWG Recommendation 2**: The Secretary of Defense establish a working group to review whether victims should have the option to request further disclosure or investigation of a sexual assault report be restricted in situations in which the member loses the ability to file a restricted report, whether because a third party has reported the assault or because he or she discloses the assault to a member of the chain of command or military law enforcement. The working group's goal should be to find a workable solution that would, in appropriate circumstances, allow the victim to request the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes and should also consider whether existing safeguards are sufficient to ensure victims are not improperly pressured by the alleged offenders, or others, to request termination of the investigation.
>
> This working group should consider implementing the following requirements in such a policy:
>
> a. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
>
> b. The investigative agent be required to get supervisory or MCIO headquarters-level approval to close a case in these circumstances.
>
> c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place, such as notifying the third-party reporter of the MCIO's decision to honor the victim's request.
>
> d. Cases in which the alleged offender is in a position of authority over the victim be excluded from such a policy.
>
> e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the alleged offender based solely on the reporting witness' sexual assault allegation.

General Schwenk noted that he finds this recommendation more difficult than the first one, which is why the PWG decided not to make a specific recommendation but to refer it to a working group within DoD. He said the adverse consequences of doing this can be significant, and the administration is still harder. Ms. Cannon asked why not have a DAC-IPAD working group take a further look at it. General Schwenk responded that he was concerned that the issue was complex enough that they might miss something important and it is better to have the people with a vested interest in it—DoD—and the appropriate expertise sit down and do it.

Chair Bashford noted that it seems like the recommendation refers only to inadvertent disclosures, and asked why exclude those who may simply change their mind? Dr. Markowitz noted that this is one of the reasons to have a DoD working group look at this. The most evident cases are those with inadvertent disclosures and this is what brought it to the attention of the PWG. Ms. Bashford asked additional questions about how the requirement that no administrative or disciplinary action could be taken against the accused would work during the period of time the allegation was unrestricted and how long that should be. General Schwenk concluded that ultimately he thinks it is important enough that it needs to be looked at but that he isn't sure the DAC-IPAD is best equipped to deal with all the complexities involved.

Dr. Spohn expressed her opinion that this issue is important because, in the context of reviewing cases, the CRWG has seen a lot of cases in which the victim has said they weren't actually sexually assaulted, yet a full-blown investigation is undertaken nevertheless, including interviewing people they perhaps don't want interviewed. She saw this as a waste of resources and in some ways, a violation of privacy of the alleged victim.

Chair Bashford then called for a vote on PWG recommendation two, regarding advice to DoD to set up a working group to implement a "claw-back" policy for unrestricted reports. The Committee unanimously approved this recommendation.

Issue 3: The approval standard and the purpose of DoD's expedited transfer policy are not sufficiently clear or comprehensive.

DAC-IPAD March 2018 Interim Assessment:

The DAC-IPAD believes the purpose, standards, and criteria outlined in the expedited transfer policy should be further evaluated and clarified. The PWG will continue to explore this issue.

> **PWG Recommendation 3**: The Secretary of Defense revise the DoD expedited transfer policy to include or clarify the following points:
>
> a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should make decisions regarding such requests based upon that goal.
>
> b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery. (e.g., proximity to the alleged offender or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).

c. Eliminate the requirement that a commander determine that a report be credible and, instead, add to the criteria commanders must consider in making a decision on an expedited transfer request "any evidence that the victim's report is not credible."

PWG Recommendation 4: Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five work days.

General Schwenk explained that the data the PWG requested indicates that the transfers don't take place for four to six to eight weeks, so extending the current 72-hour approval to five days wouldn't make much difference in the timing of the actual transfer. However, it will make a big difference in the quality of the advice that the victim is going to get from the command in making the decision as to whether or not to request a transfer.

General Schwenk also added that when the JPP went out and talked to commanders in the field, he asked commanders whether their standard in considering these requests was best interest of the command or best interest of the victim. He noted that there was a lot of silence, confusion, and disagreement, so he felt strongly that it should be stated in the policy as it is in this recommendation. He further noted that commanders said they really hated having to assess the credibility of the allegation based on an investigation that has just started. So if there is no information that quickly comes in to indicate that the allegation is not credible, to make it easier on commanders, and in line with the presumption in favor of granting the request, the report should be enough.

Ms. Cannon suggested they remove the word "clarify" from the sentence to now read "…Secretary of Defense revise DoD expedited transfer policy to include the following points…"

Chair Bashford called for a vote and recommendations three and four were unanimously approved with the friendly amendment discussed.

Issue 4: The expedited transfer policy includes temporary or permanent intra-installation moves as well as moves to new installations or locations.

DAC-IPAD March 2018 Interim Assessment:

The DAC-IPAD is concerned that Service members who initially receive an intra-installation expedited transfer may be penalized if the transfer does not resolve the problems in their situation and they subsequently request a second expedited transfer to leave the installation. The PWG will continue to explore this issue.

PWG Final Assessment:

Having spoken to numerous presenters from the Services and DoD—SVCs and VLCs, SARCs, SAPR personnel, assignments personnel, prosecutors, and defense counsel—the Committee has determined that the current expedited transfer policy is working for both victims and command.

There was discussion about the final assessment being too broad in stating the expedited transfer policy is working. The Committee agreed to narrow the language to "the expedited transfer policy regarding this issue is working…"

Issue 5: The expedited transfer policy is limited to Service members who are victims of sexual assault and does not include Service members whose civilian spouses or children are sexual assault victims, even though all may face exactly the same difficult situations at the installation or may equally benefit from moves to a new location.

DAC-IPAD March 2018 Interim Assessment:

The DAC-IPAD believes that the expedited transfer policy should be a complete program without gaps in eligibility within the military community, and thus should include family members. The PWG will continue to explore this issue.

> **PWG Final Assessment**:
>
> Since the DAC-IPAD's initial review of this issue in the March 2018 Annual Report, Congress enacted a provision in the National Defense Authorization Act (NDAA) for Fiscal Year 2019 which expands the expedited transfer policy to include Service members whose dependents are victims of sexual assault by other Service members, thus effectively resolving this issue. This section states:
>
> The Secretary of Defense shall establish a policy to allow the transfer of a member of the Army, Navy, Air Force, or Marine Corps whose dependent is the victim of sexual assault perpetrated by a member of the Armed Forces who is not related to the victim.

The Committee members noted approvingly that this provision was included in the NDAA after the DAC-IPAD raised the issue in its last report.

Issue 6: The Department of Defense and military Services collect only limited expedited transfer data on victims of sexual assault and collect no data on transfers of alleged offenders.

Previous DAC-IPAD Recommendation from March 2018 Report:

The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it.

> **PWG Recommendation 5**: The Military Services track and report the following data in order to best evaluate the expedited transfer program:
>
> - Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the gender and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the

actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final

- Data on the number of accused transferred; the grade and job title of the accused; the gender and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final

- Data on victim participation in investigation/prosecution before and after an expedited transfer

- Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers

- Data on the type of sexual assault offense (penetrative or contact) alleged by victims requesting expedited transfers

- Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with Service members of similar rank and years of service

- Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with Service members of similar rank and years of service

- Data on victim satisfaction with the expedited transfer program

- Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault

Chief McKinley commented that he found it quite puzzling how little information the Services were able to provide on transfers of accused Service members. He noted that collecting this information leads to much greater understanding of the program and its value. Dr. Spohn noted that a number of the data elements will not be relevant with respect to expedited transfers for restricted reports.

Chair Bashford asked why marital status was asked for victims receiving expedited transfers but not accused. This was noted and it was agreed by the Committee to be added to the data requirements for both victims and accused.

Mr. Markey asked who would be responsible for the collection and reporting of this information and what sort of resources would be required to do this. Ms. Saunders responded that this is the information the DAC-IPAD requested for fiscal year 2016 from the Services, and it wasn't easy

for them to put it together. It would be something the Services would have to work out. Chair Bashford noted that it looks like a lot of this information is being collected already, just not centralized.

Ms. Cannon commented that the requirement to track career progression seemed to be a complicated one. She also asked about also tracking this for the accused. Chair Bashford noted that this requirement is tied to the effect of the expedited transfer only, not the long term effects of being accused, which is likely the more relevant question for accused. Ms. Bashford noted that this is a good recommendation for the Policy Working Group to take up. Mr. Markey stated that he didn't know what the ultimate goal of collecting this information is. Chief McKinley noted that the purpose is to assess the effectiveness of the policy itself and whether it has any long-term benefit for victims.

Chair Bashford called for a vote and the data collection recommendation was unanimously accepted by the Committee.

Issue 7: Some active duty Service members who are sexually assaulted are not able to successfully return to duty even after an expedited transfer, because their need for transitional assistance is not met.

DAC-IPAD March 2018 Interim Assessment:

The DAC-IPAD believes that some active duty Service members who are sexually assaulted are in need of transitional assistance before they are able to successfully return to duty. The PWG will continue to explore this issue.

> **PWG Recommendation 6**: The Secretaries of the Military Departments incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.

Chair Bashford called for a vote on recommendation six. It was unanimously approved by the Committee.

Briefing and Committee Deliberations on Judicial Proceedings Panel Recommendations Referred to the DAC-IPAD for Examination Related to Articles 32, 33, and 34 of the Uniform Code of Military Justice

Ms. Meghan Peters, DAC-IPAD Attorney-Advisor, explained to the Committee that there are five JPP recommendations that were forwarded by the DoD General Counsel to the DAC-IPAD to examine in June of this year. She noted that two of the recommendations ask for analysis of data that is already being collected in the DAC-IPAD's court-martial database, so those recommendations will be addressed and included in the DWG's analysis for the March 2019 report. She stated that today's presentation covers the three remaining JPP recommendations, all

of which concern Uniform Code of Military Justice (UCMJ) provisions governing how cases are selected for prosecution in the military.

Ms. Peters explained that the recommendations relate to Articles 32, 33, and 34 of the UCMJ. She then gave a brief overview of the of the relationship of the articles, stating that the UCMJ, in Article 32, provides an accused with a right to a preliminary hearing before any charge can be referred to court-martial. Once the Article 32 hearing is held, she continued, or if it is waived by the accused, the staff judge advocate (SJA) then must advise the convening authority, in accordance with Article 34 of the UCMJ, of certain parameters indicating whether there is probable cause that the offense occurred and jurisdiction over the accused. The SJA also provides the convening authority with a recommendation as to the disposition of the case.

Ms. Peters next explained that after reviewing the charge sheet, the results of the Article 32 hearing, and the SJA's Article 34 advice, the convening authority decides whether or not to refer some or all of the charges to trial. She noted that the convening authority bases this decision on the guidance set forth in Article 33 of the UCMJ.

Ms. Peters provided the Committee with background on the JPP's recommendations. She explained that the three recommendations stemmed from information gathered by the JPP subcommittee during installation site visits undertaken in the summer of 2016. She reported that the subcommittee members talked to panels of defense counsel, special victims' counsel, commanders, staff judge advocates, and victim services personnel. The overwhelming sentiment expressed by those interviewed in the field was that the Article 32 preliminary hearing was less robust than in the past; that it was a common perception that convening authorities feel pressure to refer sexual assault charges to court-martial; that the charging standard of probable cause was too low; and concern that there was a very high acquittal rate.

In light of those findings by the JPP, Ms. Peters relayed the three recommendations the JPP made to the DAC-IPAD and the Secretary of Defense for further study of these issues:

JPP Recommendation 55: Article 32 Preliminary Hearings

> The Secretary of Defense and DAC-IPAD continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose.
>
> This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience, and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the Military Services provide the defense with independent investigators.

JPP Recommendation 57: Article 33, Disposition Guidance

After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and SJAs are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

JPP Recommendation 58: Article 34, SJA's Pretrial Advice

The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense.

This review should also consider whether such a change would encourage the SJA to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Ms. Peters, Ms. Nalini Gupta, DAC-IPAD Attorney-Advisor, and Ms. Saunders, next provided further background details regarding the specifics of the three UCMJ articles at issue. Ms. Peters followed these briefings with a discussion of the proposed plan for evaluating the recommendations. She proposed that a small working group of two to four members undertake a deeper study of these issues, noting that the DAC-IPAD staff will work administratively to identify members interested in participating in the study.

Ms. Peters proposed that the three recommendations be evaluated by the working group sequentially rather than simultaneously, particularly because the Article 33 assessment can't be conducted until the new Article 33 guidance is issued in January 2019 and has been in place for a reasonable amount of time. She explained that the working group could determine witnesses to be invited to provide testimony and the information that should be brought to the full Committee on these topics, and assist the staff in developing requests for information. She also noted that the DAC-IPAD staff will work with the members administratively to determine who might be interested in working on this project.

Ms. Peters suggested to the Committee that in addition to forming a working group, the DAC-IPAD could task the staff to review documents from its court-martial database and collect statistical information on Article 32 hearings for sexual assault offenses conducted in fiscal year 2017. The staff could review documents from these Article 32 hearings, which is the most recent data that is complete in the DAC-IPAD's court-martial database. She explained that the documents would provide information such as the rank of hearing officers, whether recommendations were followed by the SJA, and the ultimate result of the case. She noted that this data analysis could be conducted in time for inclusion in the March 2019 report.

Ms. Peters next proposed that for the March 2019 report, the Committee include the background and an overview of the recommendations and the underlying UCMJ articles, a list of key areas of concern highlighted by the JPP and the DAC-IPAD working group, and analysis of 2017 Article 32 documents. Additionally, she continued, the report could include any responses to requests for information developed and received prior to the report's completion date. Finally, Ms. Peters proposed, the report could lay out the plan and timeline for the continued study and analysis of the recommendations to be included in subsequent reports.

In conclusion, Ms. Peters noted that the DAC-IPAD staff would be happy to work with any of the members to discuss and develop issues for the working group. She proposed five issues/questions the working group may want to consider for analysis:

1. Should the Article 32 officer's determination that a charge lacks probable cause be given more weight by the convening authority?

2. Should such a finding bar referral to court-martial?

3. What is the best way to give the PHO's report more weight?

4. Should PHOs be military judges or have a certain level of military justice experience?

5. Should the scope of the Article 32 preliminary hearing be broadened?

Chair Bashford advised that a small-scale working group would be good for this analysis and she reported that one Committee member has already indicated interest in participating. She asked if the rest of the Committee was in favor of referring these questions to a working group.

General Schwenk commented that Articles 32, 33, and 34 should be looked at by small working groups, but that the issue of defense investigators should either be looked at by the Policy Working Group or the Committee rename the PWG the "defense" working group and let any current PWG members have the opportunity to step off and allow other members the opportunity to join. He suggested that the Defense Working Group look at all the defense issues, such as the many that were discussed today and in previous testimony, in addition to defense investigators.

Ms. Cannon voiced her concern that the JPP has already made a recommendation regarding defense investigators and it is two years down the road and it still isn't implemented. She

suggested recommending as a united panel that defense investigators be implemented immediately, and that there is no need for further study on the issue.

Chair Bashford commented that the defense issues were good to explore, but she isn't sure the DAC-IPAD is in a position yet based on the little testimony it has heard, to act. Dr. Markowitz noted that the Committee has heard affirmative testimony that defense investigators are something the defense needs, and the Committee heard it again today. She agreed with Ms. Cannon that they can say the JPP has recommended it, and it is still a priority for the DAC-IPAD.

Colonel Weir suggested that because the Article 32 hearing is a topic that is new to start working on and one where there is data to be evaluated, that the Committee may want to tackle that recommendation first and the other two recommendations will be examined once the new changes have been implemented and have had time to develop. As those roll out, he continued, the Committee may want to look at site visits six months down the road, next summer. He noted with the size of the staff, tackling the recommendations one at a time may be the best use of the resources.

Chair Bashford suggested the small working group be formed and the addition of defense issues to the PWG portfolio. Ms. Peters said the working group could begin on Article 32 now and accomplish what is possible before the March report comes out. Chair Bashford agreed. General Schwenk added that the working group should come back to the full Committee with a plan of action that they are going to do with respect to all three recommendations.

Chair Bashford concluded that it would be a good idea if the majority agrees, to authorize a small working group to look at the UCMJ issues and report back, and to have the PWG take on some of the defense issues, prioritize them, with the idea that the Committee may have enough information to include a recommendation on defense investigators for its March report. Ms. Bashford asked for a vote in favor her described plan. The committee members unanimously agreed.

Briefing on Fiscal Year 2019 NDAA Required Collateral Misconduct Study and Committee Deliberations

Ms. Julie Carson, DAC-IPAD Deputy Staff Director, first noted that the Committee's diligent collection of court-martial and investigative data has been recognized by Congress, resulting a new data collection task to the Committee. She explained that this project involves tracking incidents of collateral misconduct of victims who have reported a sexual assault. Ms. Carson first reviewed the provision in the fiscal year 2019 National Defense Authorization Act (NDAA) that requires the study.

Section 547, FY 2019 NDAA, Public Law 115-232 (Aug 13, 2018):

> REPORT.—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD shall submit to the congressional defense committees a report that includes…the following:

1. The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.

2. The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).

3. The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

Next, she highlighted a few observations about the task: the first is that the report is due in September 2019, which is very soon. Second, she noted the ambiguous language that asks "the Secretary of Defense 'acting through' the DAC-IPAD" to undertake the study. Another issue Ms. Carson raised is that additional DAC-IPAD staffing would be needed to undertake the study unless current projects are paused; plus, the study will require access to a substantial volume of personnel and legal documents. Of particular concern, she explained, is that the provision requires a report every two years after the first one is due; however, the DAC-IPAD ends in 2021 and will no longer be in existence by the date the second report is due.

Ms. Carson presented an option to the Committee. She suggested that the DAC-IPAD could do its part on the front end of the study and develop a detailed plan for how the study should be conducted, clearly define the parameters, and develop a meaningful analytical framework for reviewing the data to present to the Secretary of Defense for execution and preparation of the required reports for Congress. She noted that this approach would utilize the expertise of the Committee members to consider the issue and the best way to capture the information requested to provide meaningful data to Congress. The next step, she said, would be to determine the resources required. DoD could then determine how it wants to execute the study. Following this approach, Ms. Carson continued, the next step for the Committee would be to define the terms. She noted that "covered individual" is the only term defined in the provision itself. To define "collateral misconduct," she suggested referencing the DoD SAPRO regulation (DoDI 6495.02) which defines the term as "victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident." The DoDI provides examples of collateral misconduct as underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders.

As for the definition of a victim of sexual assault or "covered victim," Ms. Carson suggested further limiting this definition for purposes of the study to active duty Service members who have made an unrestricted report of sexual assault in the timeframe covered by the study. The purpose of this proposed limitation is to define a baseline population for whom military justice and personnel records will be identifiable and that comprises the group about whom Congress is most concerned with respect to this policy issue.

Ms. Carson suggested that further limiting the studied population to Service member victims who made unrestricted sexual assault reports against active duty Service members, serves to both more specifically describe the key group about whom Congress is concerned and ensures that there will be military jurisdiction over the sex offense and alleged offender and therefore investigative records should exist that can be reviewed. Based on the FY 2017 SAPRO Report data, Ms. Carson explained that under the proposed baseline population, the records to be studied would be narrowed from a total of 5,110 unrestricted reports made in FY 2017 to 2,486 unrestricted reports involving allegations by a Service member, against a Service member.

Other terms Ms. Carson identified that would need to be specifically defined are what it means for a victim to be "accused of misconduct," and what it means for "adverse action" to be taken for such conduct. Once these terms are defined, the Committee will need to determine what timeframe will be reviewed, what records will be reviewed and how the information will be interpreted and analyzed. Ms. Carson also noted that the Committee would need to decide whether just statistical information should be captured or whether qualitative data such as taking witness testimony as to trends and patterns and conducting site visits to interview commanders, practitioners, and Service members in the field. Ms. Carson suggested that it may be best to do one study then determine what the best way to capture the most useful information would be going forward and recommend that form or process to make the issue more easily trackable in the future.

Following up on Colonel Weir's explanation of the CRWG's current process of documenting victim collateral misconduct from the fiscal year 2017 investigative case files, Ms. Carson noted that the CRWG is tracking whether victims engaged in collateral misconduct such as under aged drinking or adultery based on witness statements in the files; however, she noted that the data collected is only for penetrative sexual assault cases. The CRWG is not reviewing sexual contact case files. Colonel Weir suggested sending RFIs to the Services to determine what it will entail to capture the information the DAC-IPAD deems necessary to conduct the study. The DAC-IPAD could then incorporate this information into the resource requirement portion of its recommendation for the study.

General Schwenk suggested that the staff, assisted by the DFO, sit down with the Services to determine how best to get the information needed, then the DoD General Counsel's Office can figure out what the statutory language about the DAC-IPAD "acting through" the Secretary of Defense means. The DAC-IPAD can work with the Services to come up with what the report should look like, and then hand it off to DoD and the Services to collect the data, put it in a format the DAC-IPAD comes up with, and submit it to Congress, with a copy to DAC-IPAD. Then the DAC-IPAD can decide whether it is something the Committee wants to look at in more depth, once the data is collected.

Ms. Cannon commented that the DAC-IPAD staff is already very busy with ongoing projects. She suggested the staff reach out to the Services, determine what kind of issues there are going to be, and then bring the information back to the Committee. She also asked what motivated Congress to require the study. Colonel Weir explained that anecdotally, people believe victims aren't coming forward because they are afraid of punishment for collateral misconduct and that this has a chilling effect on the process. He explained that the DAC-IPAD staff has not received

any guidance from DoD on what the ambiguous tasking language in this NDAA provision means and what the DAC-IPAD's role should be. He suggested that the DAC-IPAD could help DoD since the Committee has developed some expertise in looking at case files and identifying collateral misconduct, however if the Services don't have some way to track collateral misconduct, the Committee won't be able to get that information by the September 2019 report date.

Chair Bashford suggested that the Committee craft an investigative plan that can be executed by DoD. She also noted that the non-military CRWG members reviewing case files would not necessarily pick up on all of the collateral misconduct, such as barracks visits or other regulation infractions. Mr. Kramer commented that the requirement is to track those who are accused of collateral misconduct, which would mean there has been an investigation launched either by the command or by military police. He noted that if the worry of Congress is on the retaliatory effect, they are interested in whether collateral misconduct has been used or threatened against the person rather than just whether they have engaged in it. Ms. Carson commented that the first step to analyze the issue would be to see how many engaged in collateral misconduct, then to narrow it down to how many were investigated and then how many actually received adverse actions for it.

The Committee members discussed whether collateral misconduct is something that commanders should be including on the newly required disposition forms and whether there would be a separate form for victim collateral misconduct or whether it would be part of the sexual assault disposition form. Ms. Jennifer Long noted that in an Air Force case file she reviewed the initial disposition authority stated in his memorandum that there was no action taken against the victim for collateral misconduct, so it is possible that some Services are already collecting information along these lines.

Chair Bashford commented that she feels the Committee is fulfilling its task if it suggests a baseline population and provides the data it has collected in its review of the investigative files. Ms. Carson asked any of the members who are interested in talking with the staff about developing the questions and providing input on how to move forward, to let us know. She asked the Committee whether it wanted to address this study in the March 2019 DAC-IPAD report or wait until the September due date for the collateral misconduct study to address it. Dr. Markowitz commented that she did not see an immediate benefit to having something about this study in the March 2019 report when there is a clear due date of September, especially since the language isn't particularly clear about what it is the DAC-IPAD is being tasked to do.

General Schwenk commented that the language in the NDAA provision could be read to mean that the Secretary of Defense has the requirement to conduct the study and not the DAC-IPAD; it could be that the Secretary is just required to see that the Committee is informed, so the DAC-IPAD can decide whether it wants to look further at the issue. General Schwenk recommended that the Committee mention the new NDAA requirement in the annual report and note that the DAC-IPAD has begun coordinating with the Services on it.

Data Working Group Update

Ms. Stayce Rozell, DAC-IPAD senior paralegal, began by informing the Committee that the Data Working Group has been actively collecting court-martial documents for fiscal year 2017. She explained that Dr. William "Bill" Wells is now working with the staff and he is beginning his analysis of the FY 2017 data. She reported that the DWG has submitted its RFI Set 10 to the Services requesting the FY 2018 court-martial case names and documents. She noted that the DWG has received the case lists from all the Services except the Coast Guard and the next step is to start coordinating with the Services to collect the case documents.

Mr. Chuck Mason, DAC-IPAD Attorney-Advisor, advised the Committee that the DWG will present the multivariate data and analysis for fiscal years 2016 and 2017 at the January DAC-IPAD meeting. He referenced the data charts presented by the DWG for the March 2018 report and indicated that the updated charts will all be presented in January. Mr. Mason further noted that because of the timing of the RFI for 2018 cases, the DWG is essentially nine months ahead of schedule for producing the FY 2018 analysis.

General Schwenk asked if the DWG is working with DoD SAPRO to find out about next year's SAPRO report. Mr. Mason responded that the DWG and SAPRO plan to coordinate this year to ensure the data is consistent. He explained that now that the DAC-IPAD is receiving FY 2018 case information before the SAPRO report is released, the DAC-IPAD staff will be able to provide information, such as identification of duplicate cases, to SAPRO to factor into its data before it releases its next report. Colonel Weir, explained that he recently met with Dr. Elizabeth Van Winkle who oversees SAPRO in DoD and that they agreed to work together to explain any differences in the numbers.

Ms. Bashford asked Mr. Mason if there were any roadblocks the DWG is running into. He responded that there are no issues at all at this point.

Public Comment

There were no public comments.

The Alternate DFO closed the public meeting at 4:40 p.m.

CERTIFICATION

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

Martha S Bashford

Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcripts of October 19, 2018 Committee meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

2. Meeting Agenda
3. Memorandum from the Department of Defense General Counsel, Subject: Assessment of Judicial proceedings Since Fiscal year 2012 Amendments Panel (JPP) Recommendations 54, 55, 57, 58 and 60 (Jun 7, 2018)
4. Excerpt from the JPP Subcommittee Report on Barriers to the Fair
5. DAC-IPAD Staff Proposed Plan for DAC-IPAD Review of Judicial Proceedings
6. DAC-IPAD Staff Prepared Information Paper: JPP Recommendation 55
7. DAC-IPAD Staff Prepared Information Paper: JPP Recommendations 57 and 58 Regarding Articles 33 and 34, UCMJ
8. Appendix 2.1 Non-Binding Disposition Guidance
9. U.S. v. Barry, No. 17-0162 (C.A.A.F. Sept. 5, 2018)
10. Aaron Mehta, *Mattis Wants Commanders to Rely More on UCMJ for Disciplinary Problems*, ARMY TIMES (Aug. 14, 2018)
11. Memorandum from Sec'y of Def. to Sec'ys of the Mil. Dep'ts et al., subject: Discipline and Lethality (Aug. 13, 2018)
12. Geoff Ziezulewicz, *UCMJ crackdown: Why Mattis Thinks Commanders Have Gone Soft on Misconduct*, MILITARY TIMES (Sep. 10, 2018)
13. Written Statement of Colonel (Ret) Jay Morse, to the DAC-IPAD
14. Public Comment from Save Our Heroes to DAC-IPAD (4 September 2018)
15. CRWG PowerPoint Presentation to DAC-IPAD (19 Oct 2018)
16. PWG Expedited Transfer PowerPoint Presentation to DAC-IPAD (19 Oct 2018)
17. PWG Articles 32,33 and 34, UCMJ PowerPoint Presentation to DAC-IPAD (19 Oct 2018)
18. PowerPoint Presentation on Requirement to Report Collateral Misconduct to DAC-IPAD (19 Oct 2018)