



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

MINUTES OF AUGUST 23, 2019 PUBLIC MEETING

AUTHORIZATION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee” or “DACIPAD”) 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 thirteenth public meeting on August 23, 2019, from 9:02 a.m. to 4:28 p.m. The Committee was presented with a summary of the fiscal year 2018 conviction and acquittal rates for sexual assault cases closed during the fiscal year. DAC-IPAD staff provided an overview of the draft Department of Defense (DoD) *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization* submitted to the DAC-IPAD for input by the DoD general counsel in accordance with section 547 of the fiscal National Defense Authorization Act for Fiscal Year 2019. The Committee then received testimony from representatives from each of the Military Services, including the U.S. Coast Guard, that were involved in the data collection for the report. The Committee also heard testimony from three panels composed of the Military Services’ criminal law/military justice division chiefs; the special victims’ counsel/victims’ legal counsel program managers; and the Military Services’ trial defense service organization chiefs. The three panels provided insights regarding military sexual assault conviction and acquittal rates, the case adjudication process, and victim declination in the military justice process. Next, the Committee received updates from its Case Review Working Group and Data Working Group. Lastly, the Committee deliberated on the testimony received during the meeting regarding the DoD collateral misconduct report and the Military Services’ responses to its questions regarding conviction and acquittal rates, the case adjudication process, and victim declination in the military justice process.

LOCATION

The meeting was held at Doubletree by Hilton Crystal City, 300 Army Navy Drive, Arlington, Virginia.

MATERIALS

A verbatim transcript of the meeting and 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
Honorable Leo I. Brisbois
Ms. Kathleen B. Cannon
Ms. Margaret A. Garvin
Mr. A. J. Kramer
Ms. Jennifer G. Long
Mr. James P. Markey
Dr. Jenifer Markowitz
Chief Master Sergeant of the Air Force
Rodney J. McKinley, Retired
Brigadier General James R. Schwenk, U.S.
Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash

Absent Committee Members

Major General Marcia M. Anderson, U.S.
Army, Retired
The Honorable Paul W. Grimm
The Honorable Reggie B. Walton

Military Service Representatives

Major Paul Ervasti, U.S. Marine Corps, Judge Advocate, Military Justice Policy and Legislation
Officer, Military Justice Branch, Judge Advocate Division
Lieutenant Adam Miller, U.S. Coast Guard, Legal Intern, Office of Military Justice
Ms. Janet K. Mansfield, U.S. Army, Chief, Programs Branch, Criminal Law Division, Office of
the Judge Advocate General
Lieutenant Colonel Jane M. Male, U.S. Air Force, Deputy of the Military Justice Division, Air
Force Legal Operations Agency
Captain Josephine VanDriel, U.S. Air Force, Chief, Victim and Witness Policy

Presenters

Committee Staff

Colonel Steven Weir, U.S. Army, Staff
Director
Ms. Julie Carson, Deputy Staff Director
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Patricia Ham, Attorney-Advisor
Mr. Glen Hines, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
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
Mr. Dale Trexler, Chief of Staff
Dr. William "Bill" Wells, Criminologist

Other Participants

Mr. David Gruber, Alternate Designated
Federal Officer (ADFO)

Lieutenant Colonel Adam Kazin, U.S. Army, Policy Branch Chief, Criminal Law Division,
Office of the Judge Advocate General
Lieutenant James Kraemer, U.S. Navy, Head of the Sexual Assault Prevention and Response
Policy Branch, Criminal Law Division, Office of the Judge Advocate General
Major Paul Ervasti, U.S. Marine Corps, Judge Advocate, Military Justice Policy and Legislation
Officer, Military Justice Branch, Judge Advocate Division
Lieutenant Colonel Jane M. Male, U.S. Air Force, Deputy of the Military Justice Division, Air
Force Legal Operations Agency
Lieutenant Adam Miller, U.S. Coast Guard, Legal Intern, Office of Military Justice
Colonel Patrick Pflaum, U.S. Army, Chief, Criminal Law Division
Captain Robert P. Monahan Jr., U.S. Navy, Deputy Assistant Judge Advocate General (Criminal
Law) and Director, Office of the Judge Advocate General's Criminal Law Policy Division
Lieutenant Colonel Adam M. King, U.S. Marine Corps, Military Justice Branch Head, U.S.
Marine Corps Judge Advocate Division
Colonel Julie Pitvorec, U.S. Air Force, Chief, U.S. Air Force Government Trial and Appellate
Counsel Division
Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice
Colonel Lance Hamilton, U.S. Army, Program Manager, Special Victims' Counsel Program
Captain Lisa B. Sullivan, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program
Lieutenant Colonel William J. Schrantz, U.S. Marine Corps, Officer-in-Charge, Victims' Legal
Counsel Organization, Judge Advocate Division, HQMC
Colonel Jennifer Clay, U.S. Air Force, Chief, Special Victims' Counsel Division
Ms. Christa A. Specht, U.S. Coast Guard, Chief, Office of Member Advocacy Division
Colonel Roseanne Bennett, U.S. Army, Chief, Trial Defense Service
Commander Stuart T. Kirkby, U.S. Navy, Director, Defense Counsel Assistance Program
Colonel Valerie Danyluk, U.S. Marine Corps, Chief Defense Counsel of the Marine Corps
Colonel Christopher Morgan, U.S. Air Force, Chief, Trial Defense Division, Air Force Legal
Operations, Joint Base Andrews
Commander Shanell King, U.S. Coast Guard, Chief of Defense Services Division

MEETING MINUTES

The ADFO opened the public meeting at 9:02 a.m. Chair Martha Bashford provided opening remarks welcoming those in attendance and summarized the agenda for the meeting.

DAC-IPAD Data Working Group Presentation of Conviction and Acquittal Rates and Overview of the Department of Defense Draft Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization

The DAC-IPAD staff director, Colonel Steven Weir, opened the meeting by providing an overview of the Department of Defense draft *Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*. He explained that Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232) requires the Secretary of Defense to submit a biennial report to the congressional defense committees. The

Secretary's reports must include three statistical data elements: (1) the number of instances an individual identified as a victim of a sexual assault in the case files of a military criminal investigation was accused of misconduct or crimes considered collateral to the investigation of sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct or crimes; and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action against those individuals. Colonel Weir explained that the DAC-IPAD received a draft DoD collateral misconduct report that included data collected by each of the Military Services in June 2019 and that the DAC-IPAD's input regarding the report is due to DoD by September 16, 2019. The DAC-IPAD staff met with the Military Service representatives who were involved in the data collection process on July 9, 2019, to better understand how the information in the report was identified and gathered. He explained that it was clear from reviewing the report and the discussion with the Military Service representatives that there were differences in methodology and definitions across the Military Services. He advised the Committee members that they would deliberate on the draft report later in the meeting.

Mr. Chuck Mason, DAC-IPAD attorney-advisor, next presented the Committee with an overview of the sexual assault court-martial case adjudication outcomes based on the Data Working Group's collection of case documents from all military sexual assault cases closed during fiscal year 2018. Mr. Mason presented findings of conviction and acquittal rates for penetrative and contact offenses and provided comparisons of the conviction rate when a case is decided by a panel member jury versus those decided by a military judge noting that acquittal rates are higher for penetrative sexual assault cases adjudicated by a member panel than those decided by a military judge. However, he also highlighted that member panels found defendants in sexual contact cases guilty of the offense more often than military judges, but judges convicted defendants of non-sex offenses more frequently.

The Committee members inquired about an analysis of other charges that might be included in a case, and whether there are similarities in civilian judge or jury case outcomes. Mr. Mason explained that the current SharePoint website used for data collection makes analysis of outcomes by offense difficult. He stated that in order to accomplish a more sophisticated analysis, the data would need to transition to a database system that tracks each individual offense as a unit, and then combines those units into the case.

DAC-IPAD Member Question and Answer Session Regarding the Department of Defense draft Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization

Service representatives involved in the data collection and drafting of the Department of Defense (DoD) collateral misconduct report answered questions from the Committee and provided their perspectives regarding the Military Services' collection of collateral misconduct data, definitions of key terms, and methodologies followed. Noting the variances in methodologies and definitions followed by the Military Services, Chair Bashford asked the panel whether they agreed that they should be using the same definitions for the same terms in the collateral data reports. The Service representatives unanimously agreed that the DoD report would be much more useful if uniform definitions had been used by the Military Services. Lieutenant Colonel

Adam Kazin, U.S. Army, noted that the Military Services did get together and try to coordinate definitions, but that there were differences of opinions and cultural differences that made this difficult.

The Military Service representatives also agreed that the congressional directive to provide collateral misconduct data was a beneficial exercise for their policy development. Major Paul Ervasti, U.S. Marine Corps, specifically noted that pulling the data revealed that in the Marine Corps, 70% of the victims who received adverse action for collateral misconduct had also received disciplinary action for misconduct prior to the sexual assault allegation—a trend of which the Marine Corps was not previously aware. Major Ervasti also highlighted that reviewing the Service member victim cases revealed a high percentage of cases in which Service member victims were being separated six months to a year after the report of sexual assault for a mental health condition or other underlying issue. He felt that this warrants further study.

The Military Services each indicated that they don't currently track the number of victims receiving adverse actions for collateral misconduct, but going forward, for the purpose of the collateral misconduct report requirement and as part of the 140a uniform standards initiative, victim case data will be added to their case management systems.

The Military Services' definitions and criteria also varied in what they classified as a "false report" in the draft collateral misconduct report and whether or not this information was included in the report as collateral misconduct. The Military Services also varied in whether they included the occurrence of cross-claims of sexual assault—a subject in the allegation then reported having him or herself been sexually assaulted by the alleged victim—as collateral misconduct. Further, cases in which a third party reported a sexual assault that turned out to have been a mistake (e.g., the incident was consensual) were treated as false reports by some Military Services. Lieutenant Colonel Jane Male, U.S. Air Force, told the Committee it would be useful for the Military Services to have a uniform definition of and to know whether a false allegation should or should not be included in the collateral misconduct reporting.

Panel 1: Perspectives of Military Services' Military Justice Division Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process

The panel of Military Service Military Justice Division chiefs answered questions from Committee members related to Request for Information (RFI) Set 11 for which written answers were provided to the DAC-IPAD by the Military Services in July 2019. The first question from the Committee was whether the Article 32 statute and its implementing rule (Rule for Courts-Martial 405) as currently drafted provide an effective check against charges for which there is no probable cause. The Military Service representatives for the Army, Navy, Marine Corps, and the Air Force agreed that the FY14 National Defense Authorization Act changes to the Article 32 preliminary hearing have reduced the procedural requirements. The government frequently makes its case now in an abbreviated hearing and only with the paper file. Nevertheless, the Military Service Representatives each agreed that the preliminary hearing still serves a valid function for a "neutral and detached" hearing officer to be presented with the evidence which often includes law enforcement's recorded interviews with the victim and other witnesses. They

also underscored the value of the hearing officer's probable cause determination and disposition recommendation to the staff judge advocate and convening authority.

Colonel Julie Pitvorec, U.S. Air Force, noted, in affirming the value of the Article 32 hearings, that frequently in the Air Force, and other Military Services as well, sitting military judges who understand the probable cause standard very well are the ones who serve as preliminary hearing officers.

Judge Brisbois asked the panel whether a finding of no probable cause by the preliminary hearing officer resulted in dismissal of the charges without prejudice. The military justice chiefs agreed that a finding of no probable cause at the Article 32 hearing does not necessitate a dismissal without prejudice, and that in each Military Service the final determination on probable cause is held at the staff judge advocate (SJA) level. The Military Service representatives unanimously agreed that the Article 32 hearing determination should not be binding. The Marine Corps representative, Lieutenant Colonel Adam King, expressed concern that making the Article 32 binding would negate the role of the staff judge advocate who currently has the responsibility to evaluate probable cause. He stated that such a change would result in the convening authority abdicating his or her role of making the disposition decision to the preliminary hearing officer. He further noted that preliminary hearing officers typically lack the qualifications and experience of the SJA though he conceded that there are some instances in which military judges have served as preliminary hearing officers. The other military justice chiefs largely agreed with Lieutenant Colonel King's assessment. One noted that the Article 32 hearing is beneficial because it provides an opportunity—though one that is rarely taken up—for victim testimony as well as for the defense to present challenges to the charges, giving the preliminary hearing officer useful information to prepare a comprehensive charging analysis for the staff judge advocate and convening authority.

Chair Bashford noted that the Military Services tout how experienced, neutral, and well-trained preliminary hearing officers are, until asked whether their findings of no probable cause should be binding. She added that since few complainants actually elect to testify at the preliminary hearing and since the SJA has access to greater information, why should the military even bother to have a preliminary hearing? The Coast Guard military justice chief responded that it was intended as a check on the "awesome plenary authority of the convening authority." He argued that it would be preferable to go back to the pre-2014 Article 32 process. The other Military Service representatives tended to agree, however all agreed that the PHO's "fresh look" at the charges in a case even under the current, less robust system, is beneficial.

Dr. Markowitz asked the panelists what suggestions they would make to improve the current Article 32 process. Colonel Patrick Pflaum, U.S. Army, suggested that it would be helpful if the powers of the Article 32 officer to seek evidence that he or she believes is missing in the case were broadened. Lieutenant Colonel King suggested that the idea of having military judges serve as Article 32 officers was worth further analysis as well as improving the capability to conduct remote proceedings and improving technology in the courtrooms. Colonel Pitvorec felt that young judge advocates need to be trained that the Article 32 is a floor not a ceiling with respect to the amount of evidence presented. She noted that all of the evidence that would be beneficial to a convening authority in making the disposition decision should be presented by the

government. Captain Robert Monahan, U.S. Navy, cautioned against further radical change to the system after the drastic changes of the Military Justice Act of 2016 noting that every change of significance has second and third order effects that may not be anticipated.

The next issue posed to the military justice chiefs by the Committee was how the Military Services reconciled the desire to allow a victim to have his or her day in court with the non-binding disposition factors such as whether the admissible evidence will likely be sufficient to obtain and sustain a conviction. Colonel Pitvorek confirmed that in the Air Force, if the probable cause standard has been met and there is a credible, cooperating victim, the case goes forward, noting that evidence continues to be accumulated as the case goes forward.

The Coast Guard and Marine Corps military justice chiefs agreed that in their respective Military Services, if a victim wants to participate and there is probable cause, sexual assault cases typically go forward. Captain Tasikas noted that convening authorities are not going to be second guessed if they send a case to court-martial, but they are if they don't send it. Captain Monahan explained that in the Navy, on the other hand, cases that meet the probable cause standard but have a very low probability of a conviction should not be taken to trial and that it does not serve the interests of justice to try such cases. However, he felt strongly that in the hard cases where likelihood of success is unclear, the case should be taken to trial.

Colonel Pflaum explained that in the Army there is not a policy regarding victims' preference, but it is a key factor that is important to convening authorities because in the interest of justice, the victim's views and desires matter and are important, but it also has to be weighed against the other factors, such as the availability of admissible evidence. Colonel Pitvorek noted that one of the benefits of referring a case is that in the Air Force they are seeing the SVC and defense counsel get together and discuss alternate dispositions that both the victim and accused are satisfied with—something that doesn't happen prior to referral. She said these discussions often result in a discharge in lieu of court-martial or other alternative disposition.

Captain Tasikas commented that the probable cause standard allows the Coast Guard to send a case to court-martial with a low probability of conviction for the sex offense but for which there is sufficient evidence for a conviction for other misconduct, such as adultery and fraternization. This, he explained, is the difference in philosophy between the military and civilian justice systems.

Ms. Jennifer Long asked the military justice chiefs about their definition of reasonable likelihood of conviction, noting that determining the strength or weakness of a case can be subjective and varies based on one's experience. The Navy's military justice chief responded that at its core, it is a subjective standard, but that a workable objective standard is to ask, based on experience, whether a reasonable finder of fact should return a guilty verdict based on the evidence. The Marine Corps chief commented that the standard for the SJA's recommendation to the convening authority should be factual and legal sufficiency to obtain and sustain a conviction. He said the Marine Corps relies on experience, but also the case law from appellate factual sufficiency reviews. Colonel Pitvorek added that even though the Air Force does not use the reasonable likelihood of conviction standard, if a victim is clearly not credible—as in contradicted by all the other evidence of the case—the Air Force is not blind to that in making referral decisions.

Ms. Meghan Tokash noted that the panelists had mentioned additional evidence may be presented to the SJA after the Article 32 hearing and asked for some examples of what that evidence might be. Colonel Pflaum gave the example that it might take a long time to get the report back from the digital forensic examiner or witnesses that the defense might find that the government didn't have at the preferral stage. He noted that if the government waits until its case is perfected to prefer charges, it can take too long, indicating that preferral triggers processes that help determine the right answer on a particular case. Captain Monahan agreed, giving electronic evidence as an example that takes a long time to develop.

Colonel Pitvorek noted that MJA 16 has really changed the landscape on this, because previously trial counsel could not issue subpoenas until referral, which greatly delayed the discovery of important evidence—especially that involving social media. Now under the MJA 16 which allows pre-referral subpoenas, this has changed, but since it is not yet fully implemented, the effect of the change on military justice remains unclear.

As a criminal defense attorney, Ms. Kathleen Cannon noted that in state court, preliminary hearings are binding but can be overruled with legal process by the prosecution. She expressed concern with some of the things the military justice chiefs pointed out as problems of proof availability at the Article 32 hearing, noting that if the preliminary hearing were binding, the government would be more inclined to have the evidence it needed or to take continuances. She said that in her jurisdiction they have the social media at the preliminary hearing and suggested that a binding Article 32 hearing would reduce the number of close-call cases that have to be dealt with post-32 as well as the number of suspects having to deal with the consequences of a delayed decision. Colonel Pflaum expressed concern that the binding Article 32 would lead to unnecessary delay. Captain Monahan felt that a binding Article 32 would negate the role of the SJA as the probable cause check in the system and Lieutenant Colonel King added that in his experience he hasn't seen new evidence come in post-32 as the factor that sways a convening authority to move forward. For Lieutenant Colonel King the issue is that a binding Article 32 would require the convening authority to abdicate the role of making the ultimate disposition decision and would cut the SJA's informed decision and advice out of the process. Colonel Pitvorek stated that in her opinion, she would like to see a preliminary hearing officer's decision have more weight, and for those cases with probable cause, the SJA can take into consideration the disposition options and the sufficiency of the evidence that is available.

The next question the Committee asked each panelist to answer was how, in practice, SJAs convey the information contained in the Article 32 report to the convening authority. Colonel Pflaum responded that in the Army, the Article 32 report is in the file, and if there is a negative finding, it is highlighted in the SJA's Article 34 advice. He said it depends on the case and the convening authority whether they read everything or whether the SJA orally summarizes the information for them. Each of the other Military Service representatives agreed. The Air Force and Coast Guard representatives noted that the convening authorities they have worked with read everything and ask a lot of questions in an effort to make the right decision.

Panel 2: Perspectives of Military Services' Special Victims' Counsel/Victims' Legal Counsel Program Managers Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process

The second panel was composed of the Military Services' special victims' counsel (SVC) and victims' legal counsel (VLC) program managers who responded to similar questions from the Committee.

The first question posed to the panel by the Committee concerned the panelists' written RFI responses that, from their perspective, the judge advocates serving as preliminary hearing officers (PHOs) typically lacked extensive experience with sexual assault cases. The SVC program manager from the Army stated his belief that having PHOs with the experience and expertise to adequately assess the evidence was very important. He further emphasized that regardless of the PHO's expertise, the best person for the final determination of probable cause is the SJA because of his or her experience and the additional resources available to him or her, such as the special victim prosecutor, senior trial counsel, and trial counsel to advise on things that may not have been raised at the preliminary hearing. Each of the other Military Services' SVC program managers agreed. Colonel Jennifer Clay, U.S. Air Force, noted that in the Air Force military judges often conduct preliminary hearings but they are not always available to do so. The Navy VLC program manager explained that the Navy recently stood up a reserve unit of preliminary hearing officers who are prior active duty judges who also have litigation experience from the civilian careers. However, he said, the size of the unit does not meet the demand for PHOs at this time. When this group is not available the Navy utilizes its military justice career track judge advocates who have extensive litigation experience to serve as preliminary hearing officers.

Chair Martha Bashford asked the panel whether they have had clients testify at Article 32 hearings since the 2014 change permitting victims to refuse to do so. The SVC/VLC program managers agreed that although some clients opt to participate and provide testimony at the hearing, most choose not to.

Noting the high acquittal rate, and that victim representatives have advised how devastating an acquittal is to a victim, Ms. Bashford asked the program managers whether they thought the referral standard should be higher than probable cause. All of the program managers agreed that the standard should not be changed, and the Army SVC program manager noted that the system has protections built in already to ensure the system works fairly. The Navy VLC program manager reported that Navy clients often express that even though they are disappointed or devastated at an acquittal, they feel that they are treated fairly in the process when given an opportunity to present to a finder of fact what happened to them.

Retired Chief Master Sergeant of the Air Force Rod McKinley asked how many victims separate from the Service after an acquittal. All of the program managers indicated that they did not know or collect this information.

Brigadier General (Retired) Jim Schwenk asked the program managers whether they saw any value to the Article 32 at all from a victim's perspective. The Air Force program manager

responded that the feedback from the field in the Air Force is that it is beneficial to have an independent officer with legal training take a close look at the evidence and make a recommendation and written report. He also noted that expediting the process overall would be very helpful for victims too. The other Military Services program managers agreed.

Dr. Cassia Spohn asked the panelists what, in their experience, have been the reasons victims decline to cooperate in the process after having made an allegation of sexual assault. The Marine Corps program manager responded that feedback from the field indicates that the desire to put the issue behind them and move on with their lives is typically what drives victims to stop participating. The other Military Services' representatives generally agreed, adding that third party reports and victims' desire to protect their privacy were also reasons.

Chair Bashford asked the panel whether they supported the Committee's recommendation to allow victims to make their reports restricted in the event of a third party report or disclosure to the chain of command. All of the program managers supported this proposal, with the caveat of allowing the commander or MCIO to retain the ability to act or respond as needed in the interest of good order and discipline.

Panel 3: Perspectives of Military Services' Trial Defense Service Organization Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process

The Committee next directed questions to a panel composed of trial defense service chiefs from each of the Military Services. In response to the Committee's question regarding the weight that should be given to a victim's wishes, the defense chiefs agreed that some consideration should be given to the victim's wishes, but that it shouldn't overcome the sufficiency of the evidence to obtain and sustain a conviction.

Colonel Christopher Morgan, U.S. Air force, expressed concern over the "profound impact" of a sexual assault allegation and the lengthy military justice process on a Service member. He noted that even if acquitted, the accused Service member is typically eager to administratively separate out of frustration with the process.

In response to a question from Mr. A. J. Kramer asking what kind of additional evidence is provided to the SJA after the Article 32 hearing, Colonel Valerie Danyluk, U.S. Marine Corps, indicated that she found the idea of SJAs considering additional evidence not presented at the Article 32 hearing perplexing and noted that the Marine Corps defense organization would like the finding of no probable cause at the Article 32 to be binding. She also added that the defense chiefs are not opposed to the government being able to bring the case back for another hearing if additional evidence is presented. Commander Stuart Kirkby, U.S. Navy, commented that he finds no military reason to prevent the finding of no probable cause at an Article 32 hearing from being binding. None of the defense chiefs were able to cite statistics as to how many times a convening authority has gone forward with a case after a finding of no probable cause at the Article 32, but all agreed that it does happen. Colonel Morgan noted that it does seem concerning that the an SJA does not have to explain or document why he or she finds probable cause in cases in which the PHO finds probable does not exist..

Ms. Kathleen Cannon asked the defense chiefs what changes, other than making the no probable cause determinations binding, would improve the Article 32 process. The Navy and Air Force defense chiefs both noted that the calling of live witnesses, even if just the investigating agent, would improve the truth-finding process. Colonel Morgan also added that expanding the powers of the PHO to direct the government to produce evidence and to sanction failures to appear would help. Colonel Roseanne Bennett, U.S. Army, noted that making the Article 32 binding would itself bring about the other recommended changes.

Ms. Bashford commented that she has seen several PHO reports in which the PHO finds probable cause, points out serious credibility issues with the victim, but ultimately decides it is up to the court-martial to resolve these witness credibility issues. The Army defense chief stated that she thinks credibility should absolutely be part of the Article 32 determination, especially in the “he said, she said” cases where credibility is the central issue. She noted that an assessment of credibility is always done in an administrative investigations and wondered how a PHO could determine probable cause without a credibility determination. Colonel Bennet also noted that inspector general investigations also involve credibility determinations when there is conflicting testimony and that there is case law as well as a panel instruction for determining credibility. The defense chiefs agreed that guidance on determining credibility should be formalized and included as factors that the PHO is to consider. The Coast Guard defense chief added that it should be a factor, but not be mandated that a PHO consider it, because in some cases it is impossible to determine. She felt it might have the unintended consequence of the government not including the video interviews of the alleged victim.

Judge Leo Brisbois asked the defense chiefs whether they were seeing the same pressure to take non-Article 120 cases to trial that they are seeing for the sexual assault cases. Commander Kirby responded that the pressure isn’t there for non-Article 120 cases. He added that the pressure for sexual assault cases is to get to the Article 32 hearing. For example in a simple assault case or a drug case, they may never get to the Article 32 before a deal is made for administrative discharge or other alternative disposition, so there isn’t the issue of cases with no probable cause moving forward or with PHOs and SJAs disagreeing.

Case Review Working Group Status Update

Ms. Kate Tagert, DAC-IPAD attorney-advisor and Ms. Theresa Gallagher, DAC-IPAD attorney provided an update on the case review data project. Ms. Tagert reported that the working group’s review of more than 2,000 investigative case files including preliminary hearing reports is complete. She explained that the information collected from each case file is currently being entered into a database by DAC-IPAD staff for analysis with an anticipated completion in early spring 2020. She noted that the working group will also potentially be drafting questions for site visits to answer questions raised by the data once analysis is complete.

Chair Bashford raised the issue of the proposed site visits and asked if there were any members opposed to the idea of members conducting site visits. No members voiced opposition therefore Ms. Bashford stated that the Committee will go ahead and start planning the trips. Chair Bashford also reminded the members about the Committee’s approval to form an Article 32

working group and requested that any members interested in serving on the Committee please let Colonel Weir know.

Data Working Group Presentation of 2018 Case Adjudication Data Report Plan

Mr. Chuck Mason, DAC-IPAD attorney advisor and Dr. William Wells, DAC-IPAD criminologist presented the Committee with the sexual assault case adjudication data for fiscal years 2015 through 2018 including the multi-variate analysis completed by Dr. Wells. Mr. Mason noted the steep decline in sexual assault cases from 780 in fiscal year 2015 to 574 cases in fiscal year 2018. He also noted that the Military Services are not able to provide accurate case lists that match the criteria set by the DAC-IPAD. Mr. Mason summarized that most of the results for fiscal year 2018 are consistent with the data from previous years. He advised the Committee that a draft of the 2018 data report will be provided for their review.

Committee Deliberations on: Department of Defense Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization; Presenter Testimony; Services' Written Responses to DAC-IPAD Questions Regarding Conviction and Acquittal Rates, the Case Adjudication process, and Victim Declination; DAC-IPAD Future Planning

Colonel Weir opened Committee deliberations by recommending that based on the testimony the Committee received at today's meeting regarding the Department of Defense collateral misconduct report, that the staff draft a letter to the Secretary of Defense pointing out some the problems with the report discussed today. He recommended the Committee provide uniform definitions of terms for consistency across the Military Services, and that the Committee determine how reports designated as false by the Military Services should be treated with respect to classification as collateral misconduct. Chair Bashford suggested eliminating that category from the report which was seconded by Dr. Jen Markowitz. Colonel Weir suggested the Committee define what exactly qualifies as collateral misconduct. The Committee deliberated and agreed to acknowledge false reporting in the report, but not include it in the definition of collateral misconduct.

Ms. Bashford suggested the recommendation that the Military Services include both penetrative and contact cases. Colonel Weir raised the issue of the need for uniformity across the Military Services about what stage in the process the case is counted, noting that all collateral misconduct can only be reported after a case has closed and action has been taken on the misconduct. The Committee also discussed the need for a specific definition for "accused of collateral misconduct" and for "adverse action." The Committee discussed a recommendation that the Military Services specify what the collateral misconduct and adverse action, if received was for each incident.

General Schwenk suggested that the Committee address the Article 140a issue regarding the need for a uniform, document-based database up front in the letter to the Secretary of Defense. General Schwenk also cautioned the Committee to carefully consider before asking for more information from the Military Services than what is required by Congress. Chair Bashford

commented that she is a believer in more information and that Congress should understand that there is a range of adverse things that happen to Service members for collateral misconduct, most of which seem to be fairly minor. Colonel Weir highlighted the major finding of the DoD report, which is the small percentage of Service member victims identified as potentially committing collateral misconduct. He advised the Committee that once the Committee votes on the way forward, the staff will draft a letter and provide it to the members for their input and on September 12 the Committee will have a public meeting telephonically to vote whether to approve the letter.

Judge Brisbois made the motion to approve as the way forward that the staff draft a letter including term definitions; clarifying what cases the Military Services should pull; and recommending the inclusion of the adverse actions taken in future reports. Chair Bashford seconded the motion, none opposed, and the motion passed.

Public Comment

There were no requests for public comment.

With no further comments or issues to address, the meeting concluded.

The DFO closed the public meeting at 4:28p.m.

CERTIFICATION

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

A handwritten signature in black ink that reads "Martha S. Bashford". The signature is written in a cursive, flowing style.

Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of August 23, 2019, Committee Public Meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

1. Meeting Agenda, DAC-IPAD Public Meeting, August 23, 2019
2. Biographies of Meeting Presenters
3. DAC-IPAD Staff Prepared: RFI Set 11 Combined Responses MJ
4. DAC-IPAD Staff Prepared: RFI Set 11 Combined Responses SVC
5. DAC-IPAD Staff Prepared: RFI Set 11 Combined Responses TDS
6. Letter and Collateral Misconduct Study from the Department of Defense General Counsel, (June 11, 2019)
7. Memorandum from the Department of Defense General Counsel, Subject: Collateral Misconduct Report (March 12, 2019)
8. DAC-IPAD Staff Prepared: Additional Information Regarding DoD Collateral Misconduct Report
9. DAC-IPAD 2019 Report 03 Excerpt
10. DAC-IPAD Staff Prepared: DAC-IPAD Analysis Charts of DoD Collateral Misconduct Report
11. DAC-IPAD Staff Proposal for 2020 DAC-IPAD Site Visits
12. Article 34, UCMJ
13. Article 32 and 33, UCMJ
14. DAC-IPAD Staff Prepared: August 2019 Case Law Update
15. Non-Binding Disposition Guidance