



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

MINUTES OF SEPTEMBER 14, 2019
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 fourteenth public meeting on September 14, 2019, from 11:10 a.m. to 12:18 p.m. via teleconference. The Committee conducted deliberations on its letter in response to 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 by the DoD General Counsel to the DAC-IPAD for its input in accordance with section 547 of the fiscal National Defense Authorization Act for Fiscal Year 2019.

LOCATION

Public access to the telephonic meeting was provided at the DAC-IPAD office conference room located at 875 N. Randolph Street, Suite 150, 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
Major General Marcia M. Anderson, U.S.
Army, Retired
Ms. Kathleen B. Cannon
Ms. Margaret A. Garvin
The Honorable Paul W. Grimm
Ms. Jennifer G. Long
Mr. James P. Markey
Chief Master Sergeant of the Air Force
Rodney J. McKinley, Retired
Brigadier General James R. Schwenk, U.S.
Marine Corps, Retired
Ms. Meghan A. Tokash
The Honorable Reggie B. Walton

Service Representatives

Captain Josephine VanDriel, U.S. Air Force
Major Paul Ervasti, U.S. Marine Corps*
Lieutenant Adam Miller, U.S. Coast Guard
Mr. Jim Martinson, U.S. Navy*
Lieutenant Colonel Adam Kazin, U.S. Army*

* via teleconference

Absent Committee Members

The Honorable Leo I. Brisbois
Mr. A. J. Kramer
Dr. Jenifer Markowitz
Dr. Cassia C. Spohn

Committee Staff

Colonel Steven Weir, U.S. Army, Staff
Director
Ms. Julie Carson, Deputy Staff Director
Ms. Nalini Gupta, Attorney-Advisor
Ms. Patricia Ham, Attorney-Advisor
Ms. Marguerite McKinney, Analyst

Other Participant

Mr. Dwight Sullivan, Designated Federal
Officer (DFO)*

MEETING MINUTES

The DFO opened the public meeting at 11:10 a.m. on September 14, 2019. Colonel Steven Weir, DAC-IPAD Staff Director, provided the opening remarks welcoming those in attendance, noting that the meeting was scheduled on a Saturday to allow the Committee to meet its deadline of September 16, 2019 for providing input regarding collateral misconduct to the Department of Defense General Counsel.

Committee Deliberations on its Analysis of and Recommendations Regarding the Department of Defense's 2019 Sexual Assault-Related Collateral Misconduct Report and Future Report Requirements

The Committee conducted final deliberations and voted on whether to approve a letter from the Committee chair on behalf of the Committee to the Secretary of Defense containing the Committee's analysis of and recommendations regarding the Department of Defense's 2019 sexual assault-related collateral misconduct report and future report requirements. Colonel Weir began the deliberation session by reviewing the draft letter prepared by the DAC-IPAD staff, noting that it also contained comments and edits suggested by Committee members since the last

DAC-IPAD public meeting and deliberations held on August 23, 2019. Colonel Weir noted on page three of the draft letter an edit submitted by General Schwenk, who suggested adding a footnote containing the number of false reports of sexual assault reported by each Service. General Schwenk stated that the footnote should also include the total number of reported Service member victims to give perspective to the number of false allegations. Ms. Long added that along with the number of false allegations, the letter should note that these reports were classified by the Services as false allegations. The Committee agreed to this edit.

Ms. Long expressed that she wanted the letter to describe or explain that the Services defined a “false allegation” of sexual assault broadly, even including situations in which third parties made a report of a sexual assault that a victim later clarified was consensual. Colonel Weir read proposed language drafted by the staff in anticipation of this issue. Ms. Long and Ms. Garvin both agreed that the proposed language addressed their concerns. It was agreed that it would be added to the letter.

Colonel Weir explained that the DAC-IPAD staff met with the Service Representatives and those who worked on the DoD report from each Service in July to clarify the different methodologies for data collection employed across the Services. He noted that at that meeting the Service representatives told the staff that it would be very helpful if the Committee drafted uniform definitions for the terms discussed in the underlying legislation. Subsequently, the staff collaborated with the Services to draft meaningful definitions that the Services could all follow for the next report. He explained that this is where the detailed definitions in the draft letter came from.

General Schwenk expressed misgivings about the narrow proposed definition of collateral misconduct and said that he would not vote in favor. He commented that the reason people care about collateral misconduct is because it might deter the reporting of sexual assault. Therefore, he felt that any misconduct that might come to light in an investigation would be a deterrent, not just the narrowly defined instances contained in the proposed definition. Colonel Weir explained that the Services wanted to limit the definition of collateral misconduct to misconduct close in time to the actual sexual assault. Chair Bashford expressed concern that broadening the definition of collateral misconduct to include all misconduct that might reasonably deter someone from reporting opens up the inclusion of unrelated incidents that are just too remote from the sexual assault. Judge Grimm agreed with Ms. Bashford, likening broadly defining collateral misconduct to pulling a thread on a sweater—the more you pull, the more it unravels. Ms. Garvin also expressed concerns about the proposed definition, noting that there has been considerable discussion at the policy level about trying to ensure that victims are not inappropriately punished for collateral misconduct if the intent is to encourage reporting. Therefore, she said she was not comfortable voting for a specific definition for collateral misconduct.

Colonel Weir read the DoD policy definition that defines “collateral misconduct” as “victim misconduct that might be in time, place, or circumstance associated with the victim’s sexual assault incident.”¹ Ms. Bashford commented that the letter’s proposed definition essentially

¹ Dep’t of Def. Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, Glossary (Mar. 28, 2013, Incorporating Change 3, May 24, 2017).

reiterates the DoD definition with some additional language about being punishable under the Uniform Code of Military Justice. She asked if the Committee would adopt the proposed definition of collateral misconduct, which was:

“Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual assault, and directly related to the incident that formed the basis of the sexual assault allegation. The collateral misconduct must have been discovered as a direct result of the report of sexual assault and/or the ensuing investigation into the sexual assault.”

Colonel Weir took a roll call vote on the proposed definition of collateral misconduct. Eight members voted in favor and three were opposed. The proposed definition was adopted. Those opposed were Ms. Garvin, General Schwenk, and Judge Walton.

Colonel Weir next reviewed the letter’s proposed definition of “suspected of,” which aligned with the definition found in military case law. The proposed definition was:

“Instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.”

Judge Walton raised a concern that the term “believed” was too vague. Ms. Carson explained that the language was taken directly from the case law definition. General Schwenk added that “believe” is a well-established term in the military justice world and stated that he did not have a problem with the term. Judge Walton stated that if there is a common understanding within military law as to what the term means, he was comfortable with it. There were no other concerns raised.

Colonel Weir next discussed the definition of “adverse action,” informing the Committee that the proposed definition was developed in close coordination with the Military Services and was specifically limited to four types of adverse actions that the Services are able to accurately and uniformly track: (1) letters of reprimand (or Service equivalent) or written record of individual counseling in an official personnel file; (2) imposition of nonjudicial punishment; (3) preferral of charges; and (4) initiation of an involuntary administrative separation proceeding.

Chair Bashford pointed out that the supporting sentence—“The Committee recognizes the existence of other adverse proceedings or actions that could lead to discharge”—was inconsistent with the fact that the proposed definition included involuntary collateral misconduct-related discharges. Her suggested edit was to change the word “discharge” to “loss.” After a robust discussion, the members approved, by a mixed vote, the following amended sentence: “The Committee recognizes the existence of other adverse administrative proceedings or actions such as loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to re-enlistment or reclassification, and adverse performance evaluations or Service

equivalent.” The vote was eight members in favor and three members opposed. The members opposed were Chair Bashford, Mr. Markey, and General Anderson.

Colonel Weir next reviewed the enclosures to the letter. He explained that the first enclosure was the draft DoD report provided to the DAC-IPAD for analysis in accordance with the NDAA. He informed the members that the second enclosure was a chart showing the variances in definitions and methodology followed by the Military Services in collecting the data. The third enclosure, Colonel Weir explained, comprised the aggregated statistics taken from the Services’ individual reports. He noted that the staff’s overarching impression from the data is that only a very small number of Service member victims were accused of collateral misconduct and even fewer received adverse action for it.

Once the review of the letter and enclosures was finished, Ms. Bashford made a point to thank the Services for the “heavy lift” of pulling all of the data together on collateral misconduct and then going back and pulling more information when asked by the DAC-IPAD for more details. She also thanked the staff for their efforts particularly given the dearth of guidance provided by Congress.

With that, Colonel Weir asked to take a vote of the Committee to approve the complete draft letter and enclosures, as amended during the deliberation session. He noted that while some members voted “no” on specific portions of the definitions, those definitions did pass by majority vote, and the question now is whether each member approves the entire document for submission to DoD. By a roll call vote, the members unanimously approved the draft collateral misconduct letter and enclosures, as amended.

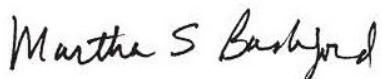
Public Comment

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

The DFO closed the public meeting at 12:18 p.m.

CERTIFICATION

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



Martha Bashford
Chair

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in
the Armed Forces

MATERIALS

Meeting Records

1. Transcript of September 14, 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, September 14, 2019
2. Draft DAC-IPAD Collateral Misconduct Letter for Member Review and Edits, Sept. 6, 2019
3. Enclosure 1: Draft DoD Report Reviewed by DAC-IPAD and Supplemental Service Information
4. Enclosure 2: Comparison of Service Collateral Misconduct Definitions and Methodologies in Draft DoD Collateral Misconduct Report (June 2019)
5. Enclosure 3: Comparison of Service-Provided Collateral Misconduct Data in Draft DoD Collateral Misconduct Report (June 2019)
6. Enclosure 4: Supplemental Information from the Services Related to the June 2019 Draft Department of Defense Collateral Misconduct Report