



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

MINUTES OF NOVEMBER 15, 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 fifteenth public meeting on November 15, 2019, from 9:00 a.m. to 3:30 p.m. At this meeting the Committee heard from Mr. Don Christensen, President of Protect Our Defenders, on his organization’s perspective regarding military sexual assault prosecutions, victim access to information, and sentencing. The Committee conducted final deliberations and voted to approve its *Sexual Assault Case Adjudication Data Report* for fiscal years 2015 through 2018. The Committee received a presentation by its Case Review Working Group on the working group’s observations and findings after reviewing more than 2,000 sexual assault investigative case files closed in fiscal year 2017, followed by Committee deliberations.

The DAC-IPAD’s Policy Working Group provided a status update and the Committee deliberated on the Military Services’ written responses to questions and testimony received at its August 23, 2019, public meeting related to sexual assault conviction and acquittal rates, victim participation in the military justice process, Article 32 preliminary hearings, and the referral process for sexual assault cases. The DAC-IPAD Staff Director and staff provided updates to the Committee on the Department of Defense’s recent sexual assault-related collateral misconduct report and the input provided by the Committee; the military installation site visit plan for DAC-IPAD members in 2020; and sexual assault court-martial attendance by Committee members.

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
Major General Marcia M. Anderson, U.S.
Army, Retired
The Honorable Leo I. Brisbois
Ms. Kathleen B. Cannon
The Honorable Paul W. Grimm
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
Ms. Meghan A. Tokash
The Honorable Reggie B. Walton

Absent Committee Members

Ms. Margaret A. Garvin
Mr. A. J. Kramer
Ms. Jennifer G. Long
Dr. Cassia C. Spohn

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

Service Representatives

Major Paul Ervasti, U.S. Marine Corps, Military Justice Policy and Legislation Officer, Judge Advocate Division
Ms. Janet K. Mansfield, U.S. Army, Chief, Programs Branch, Criminal Law Division, Office of the Judge Advocate General

Mr. James S. Martinson, U.S. Navy, HQE, Criminal Law Division, Office of the Judge Advocate General
Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice
Captain Josephine VanDriel, U.S. Air Force, Chief, Victim and Witness Policy

Other Participant

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

Presenter

Mr. Don Christensen, President, Protect Our Defenders

*Telephonic participation

MEETING MINUTES

The DFO opened the public meeting at 9:00 a.m. Chair Martha Bashford provided opening remarks welcoming those in attendance and explained the purpose and agenda for the meeting. In her remarks she stated that on November 1, 2019, she assigned issues related to Articles 32, 33, and 34 of the Uniform Code of Military Justice to the DAC-IPAD Policy Working Group. She explained that the issues related to these UCMJ articles were recommended to the DAC-IPAD for review by its predecessor, the Judicial Proceedings Panel, and also by the Department of Defense General Counsel in a June 2019 letter to the DAC-IPAD.

Protect Our Defenders' Perspective on Military Sexual Assault Prosecution, Victim Access to Information, and Sentencing

Mr. Don Christensen informed the Committee that there are three issues that Protect Our Defenders believes are of concern in the military justice system: sentencing; the prosecution/conviction rates; and access to “discovery” materials for victims and their counsel. Mr. Christensen reported that the military sentencing process is virtually unchanged since George Washington headed the Continental Army.

Mr. Christensen stated that he looked at Air Force court-martial results for a six month period that were published monthly up until June of this year. He explained that there were 33 cases in which an accused was convicted of a sexual assault, and expressed concern that in 10 of those cases the accused received no confinement. He believes this is a process problem and that the military should adopt the federal sentencing model which includes judge-alone sentencing and allows judges to order restrictions such as supervision or treatment upon inmates' release from confinement. He contrasted federal sentencing with the military's process which requires no follow-up once a Service member serves his or her sentence.

Mr. Christensen stated that there is not an ideal conviction rate, however he said that the military's conviction rate of less than 30% for penetrative sexual offenses and around 14% for contact offenses indicates that something is wrong. Of further concern, he noted, is that the DoD Sexual Assault and Prevention Office's Annual Reports (SAPRO Report) show that in fiscal year

2015 there were 255 convictions, but in 2018 there were only 108, even though there were more allegations in 2018. He feels this should be setting off alarm bells.

From his own experience serving as an Air Force judge advocate for 23 years, he explained that he believes the low conviction rate is due in large part to the relative lack of experience of military prosecutors compared to their civilian counterparts, noting that a special victim prosecutor may have 20 to 25 “trials” in their tenure as a litigator, only about 10 of which are contested trials, as opposed to civilian counsel who may have 20 or 30 years’ experience with 500 cases under their belt. The solution, he believes, is legislative, and he hopes the DAC-IPAD will advise Congress that the military needs career prosecutors and defense counsel.

He noted similar concerns about military judges’ lack of experience and tenure on the bench. Mr. Christensen recommended that trial judges serve for at least five years and appellate judges for at least 10.

Next, Mr. Christensen discussed victim access to information related to the court-martial. He explained that he represents victims and that he has been denied “discovery” because he was a civilian and not a military lawyer. He relayed that the special victims’ counsel (SVC) in a case had evidence that she was told she could not share with Mr. Christensen as a civilian counsel. He said that would never happen for a civilian defense counsel, who is entitled to the same documents as the military defense counsel. He does not believe that the Privacy Act is a bar to victims’ access to their own statements or that the Freedom of Information Act is a solution to victim discovery.

The other problem area with respect to victims’ access to information Mr. Christensen addressed involves victims’ inability to obtain the results of forensic tests such as DNA tests, sexual assault forensic exams (SAFE), and digital analysis of the victim’s cell phone. He noted that the consequence is that a victim’s counsel cannot provide adequate advice to his or her client whether to go forward with the case or not. His recommendation is that victims, at a minimum, should have routine and complete access to anything that they have said and that has been recorded by the United States Government.

Committee Vote on the DAC-IPAD’s Sexual Assault Court-Martial Adjudication Data Report Case Review Working Group Presentation and Deliberations

Mr. Chuck Mason, DAC-IPAD Attorney-Advisor, asked the Committee to vote whether to approve the data report that was presented to the members for deliberation at the August 23, 2019, DAC-IPAD Public Meeting. The report was unanimously approved for publication by the Committee.

Next, Mr. Mason asked for a Committee vote whether to approve a proposed request for information (RFI) for submission to the Military Services requesting the names of military justice cases completed in fiscal year 2019. He explained that the proposed request this year would ask for all cases closed with a preferred charge under the Uniform Code of Military Justice, not just sexual assault cases. He stated that the purpose of the expanded request is to be able to determine which cases are responsive to the DAC-IPAD’s sexual assault case criteria and

to then ask for the documents related to sexual assault. The Committee approved the request unanimously.

Case Review Working Group Presentation and Deliberations

Retired Marine Corps Brigadier General James Schwenk, the Case Review Working Group (CRWG) Chair, informed the Committee that the working group completed its review of adult penetrative sexual assault investigative case files for cases that were closed in FY17. He reported that about two-thirds of the data collected from the case files has now been entered into the DAC-IPAD's database and submitted for analysis by DAC-IPAD criminologist, Dr. Bill Wells. General Schwenk explained that the CRWG members reviewed a total of 321 out of the approximately 2,000 FY17 cases, and the staff have reviewed all of the cases, with the objective of providing a stand-alone report in 2020. This report will provide descriptive data by Military Service from the case files as well as bivariate and multivariate analysis of case factors that may be predictive of whether charges would be preferred in a given case. Further, the report will include an analysis of characteristics in cases that result in no action and acquittals as well as subjective determinations on command decisions based on the Committee members' professional expertise.

General Schwenk stated that the purpose of this briefing to the Committee is to provide the CRWG's general impressions based on each member's review of the case files and related case documents. He noted that the findings and observations of the CRWG will help in developing questions for the Committee's site visits in 2020.

The following three findings and nine observations were then presented to the Committee by CRWG members:

Proposed Finding 1: Statements of sexual assault victims taken by military criminal investigators often lack sufficient detail and appropriate follow-up questioning by the investigator. The lack of detail and follow-up questioning in these made it difficult to properly assess an appropriate disposition for the case.

The Committee unanimously approved the finding.

Proposed Finding 2: Investigators need more discretion to tailor the investigation to the specific facts of the complaint. There needs to be a mechanism early in the investigation for assessing complaints for closure, where appropriate.

- (a) The investigation and resolution of sex assault complaints frequently take longer than the facts necessitate;
- (b) All complaints receive the same level of investigation without the investigation being tailored to the allegation;

(c) In some cases, investigations continue, irrespective of the victim's preference, even when the victim asserts there was no sex assault or where the elements of a sex assault were not established;

(d) Our review of investigative case files leads us to conclude this practice of untailed investigations is not an effective use of time and resources, and it confirms our previous finding from March 2019, which is listed below, which was based on testimony from military investigators.

The Committee unanimously approved the finding.

Proposed Finding 3: Immediately following an allegation of sexual assault, the subject's command routinely imposes some form of administrative action, including, but not limited to, suspension of security clearances and administrative holds prohibiting favorable personnel actions such as promotions, educational opportunities, moves, and awards. These actions have negative personal and professional impact on the subject.

The Committee unanimously approved the finding.

Observation 1: Article 30 of the UCMJ directs that commanders and convening authorities determine what disposition should be made of charges in the interest of justice and discipline. Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found in cases where there was an indication of the rationale for the disposition decision consideration primarily of the following factors: consideration of probable cause; sufficiency of the evidence; multiple victims; victim preference; and the declination of other jurisdictions to prosecute.

Observation 2: In many cases the victim's preference as to disposition seems to receive more weight by convening authorities than the consideration of whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial. The Article 33 non-binding disposition guidance may not give appropriate weight to the sufficiency of the evidence factor.

Observation 3: While judge advocates often provided investigators advice on probable cause for submission of fingerprints and DNA to federal databases, it is unclear what, if any, advice on appropriate disposition factors, including advice on probable cause, judge advocates provided to the initial disposition authority.

Observation 4: The initial disposition authority often did not identify which factors were considered significant in the disposition decision and currently is not required to do so. This created, or appeared to create, some impact or effect on the credibility, consistency, and transparency of how these decisions are being made, which lends itself to the fact of questioning how the process is working or not working when decisions, hopefully, we believe, are being made on sound legal principles.

Observation 5: Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's (PHO) analysis and conclusions are useful to SVCs, VLCs, and defense counsel in advising their clients and SJAs and convening authorities in rendering advice and making decisions on the charges, probable cause, jurisdiction, and dispositions.

Observation 6: Based on reviews of the investigative files and Article 32 reports, the CRWG noted that sufficient evidence for a probable cause determination is not always presented at the Article 32 hearing. The Article 32 PHO should be presented with sufficient evidence to support a probable cause determination at the Article 32 hearing where it is subject to be challenged by the defense.

Observation 7: The lack of a binding probable cause determination by the PHO, allowing the staff judge advocate (SJA) to come to a different conclusion on probable cause without explanation, reduces the usefulness of the Article 32.

Observation 8: Many sexual assault cases are being referred to courts martial when there is insufficient evidence to support and sustain a conviction.

(a) The Article 32 PHO do not consistently include in their reports an evaluation of whether there is sufficient admissible evidence to support a conviction. Such an evaluation would be helpful to subordinate commanders, convening authorities, and SJAs.

(b) Article 34 requires SJAs to provide convening authorities a binding determination of probable cause as the standard for referring a case to trial. Probable cause may not be the appropriate standard for referring a case to trial.

(c) Staff judge advocates rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice, and they are not required to do so. Including such an analysis, as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in trial, the court-martial, would be helpful to convening authorities.

(d) Many cases did not seem to afford consideration of the sufficiency of evidence to obtain and sustain a conviction, the same deference accorded in the U.S. Attorneys' Manual.

Observation 9: Currently, Article 34 prohibits convening authorities from referring charges to a general court-martial unless the SJA provides written advice that the specification alleges an offense, that there is probable cause to believe the accused committed the offense, and that jurisdiction over both the person and the offense exists. Additionally, the SJA must provide a written recommendation as to the disposition to be made in the interest of justice and discipline. The SJA's Article 34 pretrial advice to the convening authority often consists of conclusions without explanation. These unexplained conclusions are not useful in assessing factors relevant to a referral determination. The Article 34 pretrial advice would be more helpful to convening authorities if they included detailed explanation for the SJA's conclusions.

Chair Bashford asked the Policy Working Group to continue exploring the issues raised in observations 1 through 9.

Policy Working Group Presentation

General Schwenk, acting as the interim chair of the Policy Working Group (PWG), and Ms. Terri Saunders, DAC-IPAD Attorney-Advisor, advised the Committee that the PWG met in October to discuss the way ahead and how to approach the review of issues related to Article 32 preliminary hearings and the referral process. Ms. Saunders explained that the PWG members agreed to begin by looking at Article 32, UCMJ, followed by a review of the pretrial process from preferral to referral. She said that the group's goal is to gather additional evidence on Article 32 hearings and the referral process, including military installation site visits next year. She noted that the working group will gather information and report it to the Committee for inclusion in the 2021 DAC-IPAD annual report.

Ms. Saunders then reviewed a summary of Article 32 data collected by the staff from the DAC-IPAD's case adjudication database for cases closed in fiscal years 2017 and 2018 in which an Article 32 hearing was held, the most serious offense charged was a penetrative sexual offense, and the preliminary hearing officer (PHO) found there was no probable cause for one or more penetrative sexual offenses.

She explained that the question posed by the Committee at the August 23, 2019, meeting was how often the PHO finds no probable cause exists for a sexual offense, and how often those offenses are referred to trial. Ms. Saunders reported that in FY18 the PHO found no probable cause for a least one penetrative sexual offense, in about 16% of vases and that in FY17 it was 22%.

She explained that the special court-martial convening authority (SPCMCA) is the individual who orders the Article 32 hearing to be held, and once the hearing is complete, the SPCMCA reviews the report and has the option of either dismissing the charges or sending the case forward to the general court-martial convening authority for disposition. Ms. Saunders noted that in FY18, the majority of cases in which the PHO found no probable cause were dismissed and most were dismissed at the SPCMCA level. She added that the exception is the Army, in which most of the cases were referred to court-martial rather than dismissed.

Ms. Saunders reported that in FY18, out of 52 penetrative sexual assault charges for which PHOs found no probable cause, a total of 18 were referred to court-martial. She noted that when Army cases are taken out, only seven such cases were referred to court-martial, and of these seven, three were dismissed after being referred.

Ms. Saunders next reviewed the FY17 cases and stated out of 80 penetrative sexual assault charges for which PHOs found no probable cause, 32 were referred to court-martial. She also explained that the majority of PHOs were in the grade of O-4 and O-5, and that the grade did not seem to be a factor in whether or not the convening authority acted consistently with their determinations.

An observation the group noted was that the Military Services, for the most part, provided well-developed Article 32 reports with factual summaries and thorough analysis. Ms. Saunders added that amendments to the Article 32 process implemented in January of this year now require the PHO to provide analysis, which should lead to more well-developed analysis in preliminary hearing officers' reports.

Sexual Assault Victim Collateral Misconduct Report Status Update

Colonel Steven Weir, DAC-IPAD Staff Director, provided the Committee with an update on the Sexual Assault Victim Collateral Misconduct Report stating that the final report was submitted to DoD on behalf of the DAC-IPAD on September 16, 2019. He explained that along with the report was a request that the Secretary of Defense provide the DAC-IPAD a written response with his approval or disapproval of the DAC-IPAD recommendations by November 1, 2019.

Colonel Weir informed the Committee that on October 2, 2019, the DoD General Counsel, Mr. Paul Ney, responded in a letter to the Chair. Mr. Ney informed the Chair that he had forwarded the DAC-IPAD's report to the Joint Service Committee on Military Justice for its analysis and asked for their recommendations by March 13, 2020. Colonel Weir added that Mr. Ney also commented that he was appreciative of the DAC-IPAD's involvement to provide a thorough and complete report for the Secretary and his Department to review and make policy determinations or recommendations. He noted that the next required collateral misconduct report is due in 2021.

Committee Deliberations on the Services' Responses to DAC-IPAD Request for Information Set 11 and Testimony from the August, 23, 2019 DAC-IPAD Public Meeting

Ms. Meghan Peters, DAC-IPAD Attorney Advisor, explained that the purpose of this session of the meeting is to gather the members' thoughts, impressions, and comments on the information they have received to date regarding the Article 32 preliminary hearing process; Article 33 non-binding disposition factors; Article 34 advice required prior to referral; the DAC-IPAD's conviction and acquittal rate data; and victims' decisions to decline participation in the investigation or prosecution of sex assault cases. She asked the members to provide feedback: (1) to identify specific research questions for further study; (2) to identify specific Article 32 reforms for consideration; (3) to suggest other stakeholders the Committee may want to hear from; and (3) to identify specific tasks the PWG may want to undertake. She added that the DAC-IPAD should plan to leverage the military installation site visits in 2020 to help answer the questions the Committee develops concerning these substantive topics.

Ms. Peters identified the following issues raised in presenter testimony and RFI responses that the Committee may want to explore: (1) as a result of Congress's changes to the Article 32, preliminary hearings are no longer a comprehensive review of available evidence; (2) since the FY14 NDAA changes, more preliminary hearings are waived; (3) victims rarely testify at the Article 32 preliminary hearing; (4) at some preliminary hearings, no witnesses testify; and (5) according to the Rules for Courts-Martial, the PHO cannot compel evidence at the hearing.

Ms. Peters reported that based on the staff's review of the data, in FY18, out of all penetrative and contact sexual assault cases eligible for an Article 32 hearing, an Article 32 hearing was held

in 70% of the cases. She noted that FY16 and FY17 were roughly the same statistically. Chair Bashford expressed interest in why more are being waived. Ms. Peters referred to the testimony of the defense counsel at the August 23, 2019, DAC-IPAD public meeting during which they raised the issue of the PHO not being able to compel evidence. She noted again that the 2019 changes to the UCMJ will require a more robust analysis in the preliminary hearing reports, but that it remains to be seen how helpful they will be to convening authorities.

General Schwenk suggested that the Committee may want to look at the purpose of the Article 32 preliminary hearing and address the fundamental question of why the military has them, and if it is going to have them, what the purpose should be. Judge Grimm agreed that determining the purpose of the Article 32 hearing, even if it would require amendment of Article 32, is a proper function of the Committee. Ms. Tokash stated that when talking about whether probable cause exists, the more proper question might be whether there is evidence to obtain and sustain a conviction.

Ms. Peters asked the Committee members for their impressions of the statistic that 16% to 20% of the Article 32 hearings held result in findings of no probable cause for a penetrative sexual assault. General Schwenk responded that there should be zero cases that don't have probable cause because the real question in determining whether to go to a court-martial should be whether there is evidence beyond a reasonable doubt. Judge Grimm stated that probable cause does not speak to the likely outcome of the case, and if instead the factor was, as would be applicable to prosecutors in the federal system—the ability to obtain and sustain a conviction—that would be a more helpful recommendation.

Ms. Cannon explained that in her jurisdiction there is a time limit for conducting the preliminary hearing and that the judicial officer can grant delays. She added that the hearing can include hearsay such as a qualified investigator testifying to what a complaining witness might have said, or what another witness may have said. General Schwenk proposed that the PWG look at the efficacy of having some kind of initial time limit for a preliminary hearing, and allowing the PHO to grant delays.

The members then discussed potential reforms mentioned in the August meeting testimony and some of the potential problems presenters highlighted. One such concern was the ramifications of making the Article 32 PHO's finding of no probable cause binding and giving the PHO more power. The RFIs asked the Military Services to consider creating an alternative in which the SJA has to justify disagreement with the PHO's finding of no probable cause in writing. The members discussed that the military justice chiefs were not in favor of making a PHO's determination of no probable cause binding, noting the rationales they offered such as: (1) convening authorities are well-positioned to make an independent probable cause determination, and they should be imbued with the power to make their judgment in the case in the interest of good order and discipline and justice; and (2) the current format of the preliminary hearing does not provide a sufficient vetting of the evidence and therefore isn't where the dispositive decision on the case's sufficiency should be made. The defense counsel, on the other hand, universally favored making the PHO's determination of no probable cause binding.

Ms. Tokash highlighted the military justice chiefs' point that a binding Article 32 hearing could erode a victim's right to be heard, and also that it could erode a defendant's due process rights, especially in the 20 cases in FY18 that were referred to court-martial, regardless of the fact that a lawyer said there was no probable cause. She expressed that she found that the sentiments from the military justice chiefs didn't comport with the actual case files the DAC-IPAD analyzed. She stated her opinion that the [no] probable cause determination should be binding.

The Committee agreed that the Policy Working Group should further analyze the binding nature of the Article 32 hearing determination.

Ms. Peters noted that the victim's view as to disposition at referral wasn't always included in the documents in the case files reviewed. She noted that some referral documents showed that there was a change, but in many cases the victim's preference wasn't documented. She explained that this information may have been included in the prosecution merits memo or a case analysis memo that was not part of the case file provided to the DAC-IPAD. Ms. Peters then highlighted that an SJA may be privy to some information which a preliminary hearing officer isn't, such as interviews beyond the initial law enforcement interviews, digital forensics examinations, and additional witness testimony.

Ms. Peters explained that there isn't a lot of information available yet on the new post-hearing written submissions authorized for the Article 32 preliminary hearings conducted on or after January 1, 2019. She noted that the defense, the government, and the victim have a day or two after the preliminary hearing to provide written materials on what they think the disposition recommendation should be. She explained that before referral, a written submission is prepared after the preliminary hearing; the SJA consults with his or her prosecution team to discuss their assessment of the case; and the victim may exercise his or her right to express a preference as to disposition, which will come, usually in writing, to the prosecution team and is then provided to the SJA prior to a referral decision.

Judge Brisbois explained that the purpose of grand juries and preliminary hearings is to help the government perfect its case, and act as a check and balance on excessive prosecutorial action. He said that the Article 32 preliminary hearing currently is not serving that function. He suggested that the PWG and the DAC-IPAD recommend what the Article 32 substantive function should be, how it serves as an analog to the state and federal systems, and how it provides a tool for good order and discipline.

Ms. Cannon questioned the usefulness of the Article 32 preliminary hearing if it is "just another set of eyes." She added that if it is considered a Constitutionally-charged oversight of the prosecution and a protection for the accused, the Committee should consider strengthening it. Chief McKinley agreed and added that if the preliminary hearing had more teeth in it, and it could determine whether to dismiss or not, it would be better for the victim and the accused.

Ms. Peters reviewed the CRWG's observations of the Article 33, UCMJ, disposition guidance that became effective January 1, 2019, noting that the Military Services, in their responses to the DAC-IPAD's RFI and in their representatives' August testimony, universally agreed that two of the disposition factors—the ability to obtain a conviction and the victim's preference as to

disposition of the case—are important to consider. She referenced the Air Force military justice chief’s testimony that when there is probable cause and a credible, cooperating victim, the Air Force leans towards referring sexual assault cases to court-martial. She also noted that when the Military Services were asked about reasons a case would be referred to court-martial when the ability to obtain a conviction is low, they talked about the interest of good order and discipline, of having a high visibility case, or potential ramifications to the unit and the military community around the conduct at issue. The Military Services also mentioned the safety of the community and honoring the victim’s preference to have their day in court. Ms. Peters asked the Committee members if they had any questions on the disposition guidance that would be useful for the site visit discussions.

General Schwenk questioned whether Appendix 2.1 (Non-Binding Disposition Guidance to Article 33) was in the correct place in the MCM and suggested that it should be looked into. He also expressed concern about the language in Appendix 2.1 that convening authorities “should consider” the guidance factors, commenting that in his opinion the guidance should require that convening authorities “must consider” the disposition factors. He also suggested that the PWG look at the Article 34 advice letter and assess the relevant information the convening authority will need to have an understanding of the case, such as an explanation of the relevant factors, the SJA’s assessment of likelihood of conviction, and the victim’s preference.

Ms. Peters noted that the JPP recommendations suggested that the DAC-IPAD evaluate the implementation of Article 33, UCMJ, to assess its effect, if any, on the referral of sexual assault cases. Ms. Peters explained that the Committee has not received meaningful testimony for this task to date, and therefore the site visits could provide an opportunity to ask practitioners how the new guidance is affecting their calculation on the referral decision.

Mr. Markey agreed and suggested that the question to ask is whether convening authorities know about the non-binding guidance form and if it is in use. He also suggested questions could be asked about training received about the new guidance and if convening authorities feel that the guidance is clear and effective in allowing them to make decisions.

Chair Bashford expressed concern that the overriding of the PHO’s determination of no probable cause and the perception that convening authorities are never going to get into trouble by sending a case to court-martial are what is underlying the high acquittal rate.

Ms. Peters asked the Committee members if they thought the Military Services were applying the Article 33 disposition guidance differently and, if so, whether that is a problem. Chair Bashford responded that it’s hard to know since there are few documents that reflect which of the factors convening authorities relied on. Mr. Markey added that there seems to be a disparity in how decisions are made and what process is used to make those decisions.

Ms. Peters next discussed the testimony received by the Committee regarding the value of conviction and acquittal rates, and the factors that contributed to the conviction and acquittal rates. She stated that the testimony from the Military Services was that conviction rates alone are not very useful in evaluating the health of the system. Ms. Peters also noted that high acquittal rates could be indicative of too many cases being referred or preferred and that other factors that

may contribute to acquittals are: the use of alcohol and its effect on victims' and witnesses' memories; a prior relationship between the victim and the accused; delayed reporting; counterintuitive behavior; presence or absence of digital evidence; and impeachment evidence of character or truthfulness. Chair Bashford responded that the same factors are as prevalent in civilian cases, and the conviction rate isn't 20 percent.

Ms. Peters asked the Committee members for any additional comments on the conviction and acquittal rate data, the Military Service's RFI responses, and testimony that they would like to add. Chief McKinley found it notable that the acquittal rate was substantially higher for member panels than in judge-alone sentencing. Chair Bashford and Ms. Tokash both made the point that the 20% conviction rate is indicative of a problem in the military justice system. Dr. Markowitz noted that the lion's share of the problem for the conviction rate is in the Article 33 and 34 decision-making process. Chair Bashford added that the Committee should look at the data on instances when the CRWG thought that there was enough evidence to sustain a conviction but there was an acquittal, noting there could be something at the trial level causing this. Ms. Cannon suggested the Committee hear the perspectives of judges regarding their impressions and opinions of the trial process.

Colonel Weir added that the Committee may want to consider why roughly 30% of victims decline to participate in the process. He added that none of the special victims' programs track the reasons for victim declination. He suggested that if the length of time for the case to be adjudicated is the reason for a majority of declinations, then tracking that data would help to inform department policy for time limits.

2020 Military Installation Site Visit Update

Mr. Glen Hines, DAC-IPAD Attorney-Advisor, explained to the Committee that the purpose of the site visits is to meet with and speak to the various stakeholders and to gather information in order to formulate findings and recommendations. He added that judges would be included in the panel discussions, noting that the JPP site visits included retired military judges who gave their unbiased opinion of the Article 120 and how it could be improved.

Mr. Hines provided a sample agenda and noted that the panels would be conducted in a non-attributional format to allow the participants to feel comfortable to give their honest opinions. He said the roundtable panels would be composed of three to six members of a stakeholder group. He informed the Committee members that the site visits will include training installations where the Committee participants will meet with individual Service members and trainees to find out whether they were trained about sexual assault and, if so, what they learned from the training. He added they would also be touring Service member living quarters.

Mr. Hines explained that a packet of staff-prepared discussion topics and questions would be provided to the Committee soon for member input. He emphasized his appreciation for the extensive assistance the Service representatives provide to the Committee in coordinating the logistics of getting on the installation; getting to the reserved meeting place; and having the needed resources.

Court-Martial Observations Update

Ms. Theresa Gallagher, DAC-IPAD Attorney-Advisor, provided the Committee members with an update on the Court-Martial Observation Project. She explained that the goal is to have all of the DAC-IPAD members observe a penetrative sexual assault court-martial with a jury by December 2020, and to have at least one trial in each Military Service observed. She explained that the criteria for selecting courts-martial for members to attend are that it is a penetrative sexual assault case that has a not guilty plea in place and a panel for the forum. The purpose, she said, is to observe and assess the current policies and practices in the court room. Additionally, the state of training and experience of all the participants in the trial will be observed, which will help inform the site visits and the development of discussion questions.

Ms. Gallagher explained that she identifies sexual assault trials for the members to attend by searching the e-dockets of each Military Service and based on the dates and location of the trial. The Committee members decide which trials to attend. She explained that the Military Services provide points of contact at the location of the trial and are critical in assisting with the logistics as well as providing timely updates of any changes in the trial. Ms. Gallagher explained that at the trial a charge sheet can be provided for members' review. She said that a checklist is provided that assists members in recording their observations as the trial goes along. A DAC-IPAD staff member will be in attendance at each of the court-martial trials, and will be completing the checklist as well. She encouraged the members to review the list of upcoming trials and sign up for a trial convenient to their schedules.

Meeting Wrap-Up

Colonel Weir reported that the Chair will be meeting with the Secretary of Defense and the Secretaries of the Military Departments on December 17, 2019. Additionally, he stated that the staff is working to procure a database, and recently met with a member of the Department of Defense Office of General Counsel (DoD OGC) staff about an e-discovery database. He explained that DoD OGC is planning to contract for an e-discovery system that is cloud-based and that would likely work for both the needs of the DAC-IPAD and of the Military Justice Review Panel. Colonel Weir noted that at this time, the DoD OGC system appears to be the best solution. He said the proposal will be out after the first of the year and the DAC-IPAD staff will be working closely with OGC as it moves forward.

Finally, Colonel Weir advised that the next public meeting is scheduled for February 14, 2020, with a preparatory session on February 13, 2020. Additionally, in advance of drafting the annual report, a telephonic public meeting may need to be scheduled prior to the February meeting. He said additional public meetings in 2020 are scheduled for May 15, August 21, and November 6.

Public Comment

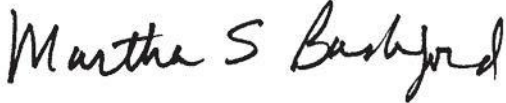
There were no requests for public comment.

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

The DFO closed the public meeting at 3:30p.m.

CERTIFICATION

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



Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of November 15, 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, November 15, 2019
2. Mr. Don Christensen, President, Protect Our Defenders
3. Letter from Protect Our Defenders (January 31, 2019)
4. Written remarks from Mr. Don Christensen, President, Protect Our Defenders (November 15, 2019)
5. DAC-IPAD Staff Prepared: Article 32 No Probable Cause Charts
6. Article 32, 33, and 34 Statutes, Uniform Code of Military Justice
7. DAC-IPAD Staff Prepared Presentation: Deliberations Regarding Article 32, 33, and 34, UCMJ