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

MINUTES OF FEBRUARY 14, 2020, 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 sixteenth public meeting on February 14, 2020, from 9:00 a.m. to 3:26 p.m. At this meeting the Committee received testimony from former military judges about their views on the current military justice system and military sexual assault cases—including their perspectives on the conviction and acquittal rates for sexual assault. The Committee conducted final deliberations on its draft Fourth Annual Report.

A Military Service Representative briefed the Committee on the new tasks for the DAC-IPAD contained in the National Defense Authorization Act for Fiscal Year 2020. Lastly, DAC-IPAD staff provided updates to the Committee on the military installation site visit plan for members in 2020 and sexual assault court-martial attendance by Committee members.

LOCATION

The meeting was held at The Westin Arlington Gateway Hotel, 801 N. Glebe Road, 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*
Mr. A. J. Kramer
Ms. Jennifer G. Long
Mr. James P. Markey
Dr. Jenifer Markowitz
Brigadier General James R. Schwenk, U.S. Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash*

Absent Committee Members
The Honorable Leo I. Brisbois
Chief Master Sergeant of the Air Force Rodney J. McKinley, Retired
The Honorable Reggie B. Walton

Committee Staff
Colonel Steven Weir, U.S. Army, Staff Director
Ms. Julie Carson, Deputy Staff Director
Ms. Theresa Gallagher, 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
Colonel Patrick D. Pflaum, U.S. Army, Chief, Criminal Law Division, Joint Service Committee
Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice
Ms. Asha Vaghela, Senior Civilian Military Justice Attorney, Air Force Legal Operations Agency
Captain Josephine VanDriel, U.S. Air Force, Chief, Victim and Witness Policy

Other Participant
Mr. Dwight Sullivan, Designated Federal Officer (DFO)

Presenters
Colonel (Ret.) Andrew Glass, U.S. Army
Colonel (Ret.) Jeffery Nance, U.S. Army
Captain (Ret.) Bethany L. Payton-O'Brien, U.S. Navy
Colonel (Ret.) J. Wesley (Wes) Moore, U.S. Air Force

*Telephonic

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.

Military Judges' Perspectives Regarding the Military Justice System and Military Sexual Assault Cases—Including Conviction and Acquittal Rates

The Committee heard from four retired military judges who provided testimony about their experiences presiding over sexual assault cases in the military justice system: Colonel (Ret) Andrew Glass, U.S. Army; Colonel (Ret) Jeffery Nance, U.S. Army; Captain (Ret) Bethany L. Payton-O'Brien, U.S. Navy; and Colonel (Ret) J. Wesley (Wes) Moore, U.S. Air Force. The panelists began with a brief summary of their professional biography and training courses they attended on criminal law and military judge courses.

Member Questions:

Experience with VLC and SVLC

Chair Bashford asked how the VLC/SVLC programs have affected the court-martial process in terms of witness preparedness.

CAPT Payton-O'Brien said that the VLC program really changed sexual assault cases by protecting the victims, perhaps now to an extreme degree. Before the VLC program, victims were dragged through the mud and it was a free-for-all against the victim, but the victims would generally testify at an Article 32, which was a good opportunity for a prosecutor to see how the individual would fare under cross-examination. Now, however, most victims assert their right not to come to an Article 32. Thus, victims come into court sometimes unprepared for what is going to happen. Cross-examination was the opportunity for defense counsel to show how the victim prepared with the prosecution and refused to talk with the defense. It's a disadvantage to the government and to the case if the victim refuses [to participate in the Article 32] as is their right. She said something is now missing from the process. The investigators aren't asking the tough questions during the investigation.

COL Moore responded that the VLCs' great purpose is empowering victims and preparing them for the difficult process they will face. Overall, it has been a positive development. Before the VLC program, the prosecutor was responsible for taking care of the victim, but they didn't always have the victim as their primary concern. He didn't believe that the VLC program skewed the results, but agreed that there now are fewer opportunities to evaluate the victim's testimony, which is a double-edged sword. Of course, the VLCs can advise the victim to testify and engage in interviews, to great effect.

COL Nance agreed with the other panelists and added that the program has improved over the years. The training got better and the advice got better.

COL Glass explained that, as a judge, his concern was with the fairness of the trial. He said that the SVC program is a double-edged sword because the Army has placed experienced trial litigators in the SVC program and there aren't enough experienced trial litigators to go around. Now, there are people trying cases without a lot of experience. These are complicated cases with discovery issues, complicated expert issues, and an inexperienced lawyer can't do it well. Another problem COL Glass described was the last minute *Brady* material disclosed either during trial or on the eve of trial. There may be lengthy trial delays because expert analysis and testimony is required, which takes a long time with the current contracting process. So, while the process for victims has gotten better, the system is facing unforeseen challenges.

Low Conviction Rates for Penetrative Offenses

Judge Grimm asked the panelists to comment on the statistics that show the overall conviction rate across the services for penetrative offenses is shockingly low when compared with the state systems. The DACIPAD wants to understand the explanation for the statistics and what factors go into those numbers. He asked whether the panelists think there is a correlation between the experience level of prosecutors and the fact that military personnel policies move lawyers out of these jobs frequently.

COL Glass answered that there is some truth to the view that the Army tries cases that the civilians don't. He has experience trying cases to acquittal that the civilians wouldn't take. But he doesn't believe that is the overriding factor. He believes that the bigger problem is the ability to retain lawyers who love to try cases. The JAG Corps promotion model tells people that to be successful, you have to be a Staff Judge Advocate, and to become a general officer you have to have operational experience. Specialization in the JAG Corps is perceived as bad, except for contract law specialists. There are a lot of really good prosecutors who aren't allowed to stay in the courtroom. The SVP program is just a band-aid. There are a lot of talented SVPs, but the problem is they move on too quickly. There is no SVP-for-life program. Of course, we need people with military justice experience as SJAs, but you don't need that much experience. In order to break this personnel management model, the system needs significant change. We could have civilian experts on staff. Currently, civilian defense counsel go down-range and try cases in theater.

COL Moore described his experience in the Air Force as markedly different than that of his Army colleagues. He couldn't think of a case where the performance of the SVP was the reason for an acquittal. The bigger problem is that the reality for SVPs and senior prosecutors is that the job is grueling. It requires tons of travel because the cases are tried around the country, not centralized. The Air Force loses really good litigators because it is tough to have a life and a family in those jobs. He would consider how to make these jobs more appealing. On the question posed by Judge Grimm about the factors that explain the higher acquittal rate, he said that the chief factor is that "beyond a reasonable doubt" is a very high standard. The Air Force takes cases that the civilian sector wouldn't take. There is risk in those cases and when that risk results in acquittals, it isn't necessarily a sign that anything is wrong with the system. He said that the pendulum is swinging back and re-centering on whether cases should go to trial. For a long time, everything needed to go to trial. He anticipates that the pendulum probably will recenter

somewhere with more prosecutions than before it started to swing, but less than what they see now.

Mr. Kramer followed up with a question about why the military takes cases that the civilians would not take. Was there pressure that these cases should be tried?

COL Nance stated that he trusts the generals to make decisions on referral. He believes the system should remain a commander's system. But, he also believes there is tremendous pressure on commanders to just send sexual assault cases to trial and let the judge and/or panel members decide. That's they military's dynamic and they have to live with the result that where there are bad facts and it's a bad case, there will be an acquittal.

COL Glass agreed with COL Nance and pointed out as examples of high-profile cases where someone had to make a tough call and that tough call went public and impacted their promotion. He said he has been the judge where the government did not have a good faith basis to bring the case to trial but with all due respect to the generals, they want to get promoted. He suggested the system could insulate those commanders by instituting a standard like the DOJ standard. It wouldn't take away their discretion.

CAPT Payton-O'Brien explained that even with the military justice career track in the Navy, they can't keep good people who want to try cases. Retention is a problem. She retired in 2017 because after 16 years of doing military justice, she was told there were no more military justice jobs for her. In addition, they put operators in charge of litigation shops. The commanding officers haven't been in a courtroom in a long time and they don't know military justice. The workload for prosecutors has changed as well. They used to try a lot more cases than they try today. Previously, new prosecutors got experience with AWOL and drug cases and little specials. Those cases aren't tried anymore because they are dealt with administratively or with non-judicial punishment. Also, prosecutors don't have enough support staff so they find themselves making copies and they can't keep up with discovery obligations. Judges end up dealing with discovery issues right before trial because prosecutors are understaffed. Cases now languish in the system. A year is a really long time for a case, both to the victim and the sailor facing charges. With respect to the question about pressures on commanders, she said that she used to always put the decision in writing if they didn't recommend going forward with a case. Then, the commanders could rely on the prosecutorial merits memo. They might choose to go forward anyway. Commanders want to be promoted and there are ramifications for them if they are not seen as tough on good order and discipline or ignoring the desires of the victim.

COL Moore discussed the different pressures on the military justice system compared with state and local prosecutors. The SJA and commander don't run for re-election and they don't have to worry about their conviction rate because it isn't a factor in whether an SJA is successful. The greater latitude for the military to take the tougher cases to trial isn't a bad thing. That fact means that the acquittal rate will be higher, but that is a manageable cost. However, he didn't think they should be taking everything that goes to trial now.

COL Moore explained that he disagreed with the others on the panel about the need for specialization. He found it helpful to change jobs and areas of expertise in his career. He

believed he was a better military judge after having been a SJA. He also believed that the SJA's office is the best place to train the next generation of prosecutors.

The Article 32 Process and the Question of a Binding Probable Cause Decision

Ms. Cannon asked whether Article 32 preliminary hearing officers ("PHOs") should have binding decision-making capability with respect to the probable cause determination and whether that change would insulate commanders from the competing interests—including ethical issues—they face.

COL Nance has thought a lot about that issue and the pluses and minuses of both sides of the question. He came up with a hybrid preferral process with five elements. First, the GCMCA could send the case to a binding Article 32 for any offense, not just sexual assault. The current Article 32 would be the default. Second, for a binding Article 32, the PHO would have to be a military judge or full-time magistrate judge (active duty or reserve). Third, probable cause remains the correct standard as described in RCM 406, which is the same standard applied in the civilian criminal justice system. Fourth, if no probable cause is found, the government can return with new evidence and "reenergize" the hearing. Fifth, only a "no probable cause" finding would be binding. This preserves the GCMCA's authority and doesn't erode the current protections for an accused. Currently, we use part-time magistrates and he would create the concept of a full-time magistrate as a senior O-4 who would only do magistrate duties and Article 32s and supervise the part-time military magistrates.

COL Glass agreed with COL Nance's proposal. He observed that one logistical issue that would arise has to do with assignments policies for this new full-time magistrate concept. Some Army posts have only one judge. It would be hard to add an O-4 billet because they just don't have the bodies. The upside of a full-time magistrate program is that it would allow the system to develop judges. Another idea would be to have judges be the Article 32 PHOs, but the same problem with staffing would exist.

COL Moore explained that in the Air Force, judges do almost all of the Article 32 hearings for sexual assault cases. They would do them by video teleconference so they could do the hearing in the morning and then spend the afternoon writing the report. If a judge is making the "no probable cause" determination, then it can be binding, subject to the opportunity to come back and present additional evidence.

CAPT Payton-O'Brien agreed with the suggestion to make the Article 32 "no probable cause" determination binding if the government later has the opportunity to come back with new evidence and revisit the case. She said the real problem with the Article 32 is that the government just gives the PHO a paper case, with no cross-examination of witnesses (because most witnesses don't testify), so it's a foregone conclusion. The defense counsel may ask for witnesses, but the witnesses decline if they're civilians and the government's position is that their testimony is cumulative with the paper. In the Navy, NCIS declines to appear, claiming that they're civilians. The PHO is usually an O-3, O-4, or sometimes an O-5 hearing the evidence. She thinks it is a hollow process because the only evidence is what's in the investigation, which isn't always thorough. Investigators in sexual assault cases seem to only follow a check-list and

fail to delve deep into issues such as credibility that would be important to know at the Article 32 phase.

Prosecution Standards Akin to US Justice Manual

Ms. Tokash asked the panel of judges to comment on the lack of a required prosecution standard, akin to the U.S. Justice Manual, and its impact on the acquittal rate. Would it be helpful to have a standard that required admissible evidence sufficient to obtain and sustain a conviction?

COL Moore said that a higher standard could remedy the pro forma nature of the Article 32 investigation. Right now, not a lot of evidence is needed to meet the probable cause standard. If the goal is to find minimal evidence to establish probable cause, then the status quo works. But if the goal is more information and an evaluation of witness credibility, those aren't probable cause determinations. In that case, the higher DOJ standard makes sense.

COL Glass agreed that having a standard would make a huge difference, but he also said that it can't fix all the issues out there. One underlying issue is who makes the discretionary call. If there is a higher standard and the discretionary call is made by an experienced prosecutor making a recommendation to an experienced commander, that's different than somebody who only has had two or three cases. The prosecution standards are dramatically different. He described cases in which he heard an RCM 917 motion to dismiss a sexual assault case in which base-level facts required for the government to meet its burden had not been proven. He noted that cases can have things go wrong where witnesses fail to appear or change their testimony. But sometimes the case shouldn't have been in the courtroom. Although this doesn't happen frequently, even once is problematic for the system because a lawyer should have made the ethical call.

COL Nance agreed with the previous comments and said that if the purpose is to get more convictions on sexual assault cases, having a higher standard will reduce the number of bad cases at trial and reduce the number of acquittals. But if the goal is to "pull back the mists of uncertainty in the public" about the military justice system by having all cases go to trial and then living with the results, a higher standard is not going to achieve that goal.

Changes to the Article 32 Process

Ms. Long observed that she doesn't believe the statistics indicate whether the military acquittal rate is better or worse than the civilian world because such comprehensive data don't exist. With respect to the Article 32, she noted that preliminary hearings in the civilian world are more robust than the current Article 32 process. She asked whether the panelists can envision a different kind of hearing process that would be protective of victims but also more fair to the accused and fair to the process.

CAPT Payton-O'Brien answered that she doesn't necessarily believe the victim's presence is necessary for a fair or thorough hearing, although defense counsel would certainly like the opportunity to cross-examine the victim. The problem is when the agent or prosecutor just puts in the report, which may only have a summary, but not a statement or testimony or audio or video. That isn't helpful to the process. And agents shouldn't decline to testify because they

believe they are "protected" as civilians. They work for the Department of the Navy and civilian law enforcement should testify. In the civilian world, sometimes the police officer is the only person to testify, which at least provides some testimony and an opportunity to determine probable cause. She doesn't believe the solution is to return to the old-style all-day Article 32 where all the witnesses were paraded in. But something in between would be better. The government now claims that anybody whose name is in the report with a statement is cumulative and doesn't need to testify. While the Article 32 doesn't have to be a full discovery tool as it used to be, the defense still should have the opportunity to call witnesses and that isn't happening. A more thorough investigation, at least on the matter of credibility, would help the determination by the commander. Now they receive a report that says, probable cause is met, but don't go forward and here is why, or go forward, but know the case will result in an acquittal. She doesn't believe the objective should be to obtain more convictions. The objective is to present the case. The objective of the Article 32 isn't to perfect the government's case, but to have an evaluation of the evidence.

COL Moore reiterated that leaving the standard at probable cause will not change the system because the prosecutor won't show more cards than necessary to meet that low standard. If more needs to come out, then the standard has to be raised or perhaps the rules of admissibility at the Article 32 should be changed. The system can handle the change. Everyone adapts well.

Ms. Long asked why the probable cause standard would need to change when the civilian standard at the preliminary hearing is probable cause and they don't have this issue. Is the change in standard at the Article 32 necessary for a change in behavior?

COL Moore answered that perhaps the underlying rules can be changed. For example, perhaps the cumulativeness standard should be tightened up, or perhaps cumulativeness should be eliminated as a consideration, or military judges could stand up to the prosecutor and ask for a witness.

COL Nance said he believes a more robust Article 32 hearing would be useful in providing information, so the person who makes the referral decision makes an informed decision with the most information. That seems a positive thing.

COL Glass said there is a public benefit to having these hearings on TV, with critical portions closed as needed. There is no public benefit to a paper case. They should also find the statistic to know how often the defense waives the 32 in a sexual assault case because there is no benefit and it's not fair. There were some very public misuses of the Article 32 system in the past, but there are misuses now too. There is a middle ground. The system should have someone trained to require more information.

Expert Witnesses

Mr. Kramer asked about the ability of defense counsel to obtain experts and the procedure required and whether that should be changed.

COL Nance said the process should be changed because it's almost impossible for the defense to get experts. It shouldn't have to be approved by the prosecutor. The defense should be funded and there should be a warrant officer at TDS headquarters in charge of dispensing money for experts. The Chief of TDS is an adult and can make sure there are no abuses for frivolous requests. Ultimately, the military judge decides whether an expert testifies.

COL Glass agreed there needs to be a pot of money for the defense.

COL Moore said the system in the Air Force works well. His experience was that experts were getting appointed and funded. But if it's broken in the other services, he agreed it makes sense for TDS to be in charge of some money.

CAPT Payton-O'Brien agreed that the Air Force seems to do this well. In the case she tried in the Air Force, the convening authority granted multiple experts. Her experience in the Navy is that defense counsel struggle to get experts just for consultation because convening authorities deny that. Now, as an appellate attorney reading records, she described her shock at how often the government fights over experts and the delays in granting experts after motions. She agreed the system should allow the defense the opportunity to seek consultation because the government has that right with all the tools at its disposal.

Mr. Kramer asked why Naval medical experts would be hesitant to be involved.

CAPT Payton-O'Brien answered that nobody relishes the idea of testifying in court. Plus the military medical system is overstressed with patient care, and retirees and dependents can't even be seen anymore. There aren't enough doctors and they don't have enough time. The civilians have experts who do this for a living.

Dr. Markowitz asked whether the panelists believe that experts are being used effectively at trial.

CAPT Payton-O'Brien answered that in the Navy, experts are involved in sexual assault trials. How effective they are is expert-specific, although for the most part she thinks they are effective. Cases aren't necessarily more complicated than 20 years ago, except with the forensics involved with computers, cell phones and social media, like Snapchat. She doesn't believe it's a fair playing field, however. The defense has to beg for an expert and is often dismissed with the assumption that they're experienced enough to do the trial without an expert. But defense counsel can't testify so they need a consultant to help who can then become an expert witness.

COL Moore said that, for the most part, experts are very helpful and well employed. Overall, the experts work equal cases for the government and defense so they have great credibility. Occasionally experts have been advocates in disguise and they were not persuasive and had a negative impact on the case. In sexual assault cases, alcohol is almost always involved so he described the education experts provided on issues like blackout and the effects of alcohol on memory. Those are invaluable to judges and members evaluating the evidence.

COL Nance agreed with COL Moore that most experts provide pertinent information. The main struggle for counsel is figuring out whether they need an expert. He said the HQE program does

a great job helping counsel through the expert process and the decision whether to have an expert.

COL Glass agreed that most expert witnesses are professional although sometimes he wondered why they testified. In death penalty cases, defense counsel get all the experts they want. Millions of dollars are spent on experts in capital cases and maybe there could be greater balance.

Military Rules of Evidence 412 and 513

Ms. Garvin asked the panelists to share their experiences with Military Rules of Evidence 412 and 513 and particularly SVC and VLC involvement. She also asked them to discuss their experiences with the constitutionally required exception and how/whether that is impacting the trials and the role of the SVC/VLC on that issue.

COL Glass described his experience with the old 412 and all the various changes to 412 as well as litigating 513 issues. He said that VLC are really good on 412 perhaps because they collaborate with the government and rarely offer a different argument. Under the old 513, he recalled a few cases where medical records were disclosed under a protective order and were huge in determining guilt. He also recalled cases where personality disorders were disclosed in the release of medical records that went directly to the claim. He remembered a diagnosis of a personality disorder that undermined the claim of sexual assault because the person had difficulty telling the truth. The defense was always able to have a heyday with the release of that information. He worried as a judge about information that he never saw that could implicate whether it was a fair trial or a just process or a just verdict.

COL Nance also described working through the changes in the rules. As a military judge without a law clerk, he worried that he would miss something in the stack of medical records. He didn't have the time and was afraid he would miss something that should be released because he didn't know what he was looking for or didn't understand what he saw. With time, counsel became more experienced and could narrow their scope in terms of knowing what they wanted.

COL Moore agreed that 513 made the job of reviewing psychotherapist patient records more difficult, but he also believed that the system now protects those confidential records better than before. Before 513, the old default position was to release everything, subject to a protective order, then fight about admissibility at trial. Under the old system there was not consideration of the victimization that caused. The value of the VLCs is that they can waive the privilege for huge amounts of records after talking with the victim. So the quality of decision is better now because often the victim only had an issue with disclosing a little part of the record. 513 is an area where an expert can help the court perhaps on a confidential basis and helpful to defray the workload.

CAPT Payton-O'Brien explained that the annual sexual assault-focused training for judges was invaluable on 412 and 513 issues. She agreed that a court expert is invaluable when the judge has to evaluate mental health records to determine if anything needs to be released. The challenge for the court and for counsel is that although somebody may have sought mental health treatment, they don't know why and they worry about what they are missing or don't know. And sometimes

the mental health issues arise at sentencing. Then the case must be continued, but it's too late in the game to be vetted.

Command Decisions Involving Referral of Sexual Assault Cases without Sufficient Admissible Evidence to Obtain and Sustain a Conviction

Ms. Long asked about command decisions and cases going forward when the command doesn't believe there is a credible claim or that the person did it. She asked whether there is a solution to check the decision making to ensure that cases that shouldn't go forward ethically because they don't have admissible evidence or don't have testimony but they're going forward because a commander is afraid of not getting promoted. What is the check on that problem?

COL Nance said he believes in the commander's system. Military justice is different and it should be different. Commanders should be involved in the system. He hasn't seen the unethical decision. This isn't about the close call or the "flip the coin" cases. He believes that commanders take the decision seriously, even though they feel pressure at times from without and from the civilians that oversee the system. He hasn't experienced a commander referring a case to trial that isn't a true case or that hasn't a chance in the world of success.

COL Glass said that military judges don't know what they don't know and don't know what went on behind the scenes. He can't know what happened in the SJA's meeting with the commander, but he was involved in bridge the gap sessions where they discussed what counsel did right and wrong in the case. He has asked whether there was a different ethical standard for sexual assault cases than just a general crimes case. He also recalled situations where he thought they were narrowly close to referring a case just to see what happens, which he thought was problematic. Cases can't just be thrown up against the wall because that is a service member's life on the line. There's also a significant price to pay for the victim who has to go to trial. One way to make it better is to invest in people with experience. It has to be a commander-based system, but the military can improve its training. He is fine with the DOJ standard because they can train to that standard. The SJA or the SVC can also have the moral authority to put their advice in writing. And the politicians also have a role. Every time a politician doesn't like a decision, they have to remember that commanders are vested with the authority to make the tough call.

COL Moore said that most of the commanders he advised were impressive, loyal and courageous people. He didn't see evidence that a commander would fail to make the tough decision because of career implications. In his day, if the SJA said there was no probable cause to go forward, that took the matter out of the convening authority's hands and he couldn't refer over that recommendation. That was a check in the system. Whenever he advised a commander not to go forward on charges, they would coordinate that decision with victim's counsel and the victim. It's a bit like a doctor with a good bedside manner who isn't sued for malpractice. Even if a decision is a negative one, you can explain why and the thought process.

CAPT Payton-O'Brien recalled a case where she wrote a memo that she didn't believe the crime occurred. Not that it didn't happen but based on the evidence. But she expressed concern about inexperienced trial counsel who may not have the experience to evaluate a case. So a new

counsel may not believe the accuser but if the government chooses to go forward is the counsel in an ethical quandary? She doesn't believe so. She recalled being the fact finder on a case where she convicted and it later came out that the convening authority had concerns about the case. What was their concern if she thought at court that there was sufficient evidence? Convening authorities see evidence that doesn't always come into court. They need the authority to say "I'm not going to take it." Commanders need to be able to make these hard calls. They don't always get the best advice from inexperienced prosecutors or SJAs.

Sentencing

Judge Grimm said the committee heard from active duty military judges that they were reluctant to speak to the DACIPAD because they felt they should not explain a reason for a sentence they announced, because of appellate decisions. Those judges felt they should just announce the sentence without an explanation. But in the federal system, the announcement of the sentence and the reason for it is an enormous part of the process. With the federal sentencing guidelines, judges must explain how they evaluated a number of factors to include the seriousness of the offense and the prior history and characteristics of the defendant and how the sentence is necessary to serve the purposes of sentencing. Although much of the federal sentencing system would not be good for the military system, one thing that seems important is the ability to comment on a sentence. His second question was for the panelists to comment on whether the convening authority should have the ability to change a sentence after the trial.

COL Glass answered that when he was a judge, there were many times when he felt like the accused needed a good butt-chewing from a judge to have an impact and he did that in cases where he didn't give jail time or a sentence that would be subject to appellate review. He doesn't see a problem with judges giving a reason for the sentence, but it matters how experienced the judge is and whether they know not to say things contrary to what is allowed. He noted that there is a mandatory appeal process in the military which is an awesome protection for the accused. Regarding the second question about whether the convening authority should be able to change a sentence, yes they should. As a defense counsel he was able to mitigate sentences for individuals and it made a huge difference in their lives. Some warfighting divisions give sentences that are too harsh and need to be mitigated. The system isn't fair if Bob gets 2 years at Ft. X and at Ft. Y the same set of facts gets 50 years. Most of the time commanders get it right and we trust them with a lot of authority.

COL Nance said he would be afraid of a system where judges explained the reasons for their sentence because in the military justice system there aren't sentencing reports and there aren't sentencing guidelines. He's afraid that, in the current system, judges would create more appeals by saying something wrong or construed as wrong. In his current job, he explained that he does bond hearings. Whenever he denies or grants a bond he explains that he finds the respondent would be a danger to the community or a flight risk. Nothing more. Regarding the second question about whether the convening authority should be able to change a sentence, yes they should. He believes in the commander system and trusts them. The ability to correct a sentence is an important escape valve.

COL Moore said that if a judge were to articulate the basis for a sentence, it should be explained against some standard. If judges were given a standard, they can articulate why they complied with that standard. They do that already when dealing with challenges for cause. But the current standard in the military justice system is from no punishment to 30 years, and that isn't a framework for the judge to make comments. His experience with military juries is that they felt completely at sea when it came to sentencing because of the lack of any real standard between the minimum and the maximum. Regarding the second question about whether the convening authority should be able to change a sentence, the system has to have somebody with the clemency power to take care of unforeseeable results.

CAPT Payton-O'Brien answered the clemency question first. On the Court of Appeals, they rarely granted relief in sentencing because they believed that clemency was the convening authority's job. Convening authorities shouldn't be limited to correcting errors but should have the ability to grant true clemency. They don't have that ability in most cases now. Now, clemency post-trial matters have to be submitted very quickly after trial and there's not much power for the convening authority left. And post-trial good conduct isn't going to be available within the first month after trial. With respect to the question about judges' comments on sentences, she said she rarely did it. When she sat on the appellate court, she reviewed records of trial where she asked why did the judge say that? She didn't want to be challenged on the next case because she made a comment about a particular sentence. She also argued that the military needs sentencing guidelines. Members have no experience with previous cases to draw upon, although judges do. Without guidelines, individuals receive very disparate sentences for sexual assault convictions which isn't fair. Why would one person serve 7 years for the same offense as the next guy with only a 2 year sentence?

Acquittals and Alcohol

Chair Bashford asked whether the panelists were surprised by verdicts where the members acquitted but they would have found somebody guilty, particularly when there were issues with incapacitation by alcohol.

COL Moore suggested that his mindset was very different when he tried a case with a panel. In panel cases, he did not consider what his result would have been because he's focused on the many other issues in the case—instructing the panel and the rulings. He intentionally wanted to keep his mind open so he didn't come across as slanted. Members often asked him after a case whether he thought they got it right. He would answer that if they went through the process and believed in their verdict, then they got it right. Perhaps the court reporters would be the better barometers about whether the case outcome was right. He was rarely surprised by the findings. He was frequently surprised by the sentence, because they varied greatly and members had so little guidance.

COL Nance agreed with everything COL Moore said.

COL Glass also agreed with COL Moore's description of how he listened to a case. With respect to sentencing, he was known as a very harsh sentencer.

CAPT Payton-O'Brien said that her "wow" was about the leniency of sentences in sexual assault cases. Members who sentence these case have no parameters, other than what's being asked for by either side and they come back with less than anything any side asked for. They take their job and their oath very seriously. But members have expressed concerns about how tough these cases are. But she never thought they got it wrong on a verdict.

COL Nance added that one of the great strengths of the military justice system is the professional juries, i.e. the panels. The panels are smart and they take their duties seriously. They get it right 90% of the time and they have tremendous experience.

Chair Bashford turned the question back to the acquittal rate. She disagreed with Ms. Long and believes that the acquittal rates are unheard of in the civilian system. Said she took tough cases and had much higher conviction rates. So if the members are getting it right 90% of the time, then the problem, if there is a problem, is upstream.

COL Glass asked the rhetorical question of how long the civilian prosecutors have been doing their job. In the military, the most experienced prosecutors have five-seven years prosecuting cases. The military does a good job reconciling very difficult issues based on the evidence that is developed and presented. The vast majority of military panels are college-educated, experienced people. But the prevailing fact is that, as good as these young prosecutors are, they don't keep them in these positions where they develop that feel, that ability to know this is a good case, and how to present the evidence. He then told a story about a SVC who failed to reintroduce evidence that could have gotten in under the excited utterance exception to the hearsay rule.

COL Moore asked the question: what is a healthy acquittal rate? Zero would be unhealthy because that would mean the military isn't taking the difficult cases. 80% is probably unhealthy too. The middle ground would be an indication that they're taking the tough cases, but not incurring all of these costs. Because there are costs for everybody in a court-martial. Costs to the victim in going through the process and being cross-examined at trial. There's costs to the accused. Airmen facing court-martial have the highest suicide risks. So what is enough to be worth those costs? The first issue is the investigations. They have to become more thorough. Investigators have to ask the tough questions of victims. They don't always do that. In the last 10 years, investigators have taken statements at face value and not asked the probing questions that will get harder to explain as the trial approaches. They need better investigations and additional trial counsel investigations. The other important thing is trust in the people who have the prosecutorial discretion to go forward. Whether it's the SJA or the convening authority, we have to trust them and accept that they occasionally will make bad decisions, and their decisions will get public scrutiny. That's the cost of any system. But overcorrecting for every bad decision on an anecdotal basis isn't the way to go. If the problem is not having the evidence, then the system has to develop the evidence.

CAPT Payton-O'Brien responded to Chair Bashford's point about going upstream. She suggested going even further upstream to the component of alcohol. How are these servicemembers getting to the point where so much alcohol is consumed when they're supposed to be trained on these dangers? She has heard about training that says one drink is enough to negate consent. Then they have to educate members about what the law says. The law does not

say that if you have one drink, you can't consent. If that were the law both the offender and victim would be court-martialed because they both were drinking. Better intervention training—in some of these cases, she wonders why nobody intervened. Where are the supervisors in the barracks? She said some of her clients, alleged offenders, ask her why they're the perpetrator when the woman was the aggressor towards them.

BGen Schwenk asked two questions. First, he asked the panel to comment on the NDAA language reporting that military judges may be interpreting RCM 1001(c) too narrowly and are limiting victim impact statements during sentencing hearings. He asked them to comment on whether judges are permitting other witnesses to testify about the impact of the crime.

COL Glass explained that he just followed the rule and limited victim impact statements to what the rule required. He's seen victim impact statements work effectively and ineffectively. He's seen them entirely in writing.

COL Nance also said he had limited victim impact statements in situations where the statement included comments or references to evidence that had been excluded as unfairly prejudicial or for some other reason. He always gave the members an instruction about how they should consider the victim impact statement. And he remembered a case where the statement involved a victim recommending a specific sentence, which is not allowed.

COL Moore said that he couldn't recall having limited a victim impact statement. In his experience, the VLC does a good job preparing them and modifying them if rulings in the proceedings required adjustments.

CAPT Payton-O'Brien remembered limiting a statement that had a recommendation for a particular sentence and it was removed. She agreed with COL Moore that the VLC do a good job helping prepare these statements. The only problem she saw was that the statement wouldn't be provided to the Government until late, at the moment the person came in.

Guardian ad Litem For Minor Victims

BGen Schwenk asked the panel to comment on the HASC question about the practicality of creating a guardian ad litem program and whether it could be an effective process to represent the best interest of minor victims following a sex offense. He told the panelists they could share ideas even after this panel via email and they would include their thoughts in the record.

COL Nance recognized that the GAL role differs from the SVC, but in his experience the SVCs helped the child, the family, and the custodial parent. He said a GAL is a reasonable need especially when the custodial parent's interest doesn't dovetail with the child victim's interest. He has worried about what the child's real interest is, personal interest, and legal interest. He noted that many military stations are located where there are private, nonprofit organization that offer GAL services for children. Perhaps the military could help fund those organizations with a cooperative agreement to serve military kids.

COL Glass asked how such a program might work. He wondered if the military would retain a civilian lawyer or teach new JAGs in legal assistance to be GALs. A civilian attorney could do this work. There may not be enough to support a full time GAL position at a small location. He observed that SVCs are getting to know the child although he said no one knows what happens behind the scenes when there are competing interests.

Deliberation and Discussion

Chair Bashford said they had 20 minutes to discuss the testimony they heard from the panel.

Mr. Markey shared his thoughts first. He said that the testimony described the same gaps and challenges they've heard before. Everyone is concerned about improving the process and ensuring that the process is fair and equitable, and that individuals involved have knowledge, skill and the ability to do their jobs, with the resources and tools they need. He noted the range of opinions about the Article 32 and some think it is valuable and others say it is not as valuable as it could be or should be. The Article 32 is an area of concern. He said that today's panelists all strongly support the current preferral and referral decision to be with the command. He said he's trying to resolve the conflict of confidence in the commander's ability to make these decisions, and yet, the SJAs and other staff who provide the legal information and decision making don't have a lot of experience or much training. So he questions how the command can make a good decision based on information brought to them.

Ms. Cannon heard overwhelming support for the idea that the Article 32 should be a valuable evidentiary process where a true vetting of the issues takes place. She agreed with the judge who discussed 4 criteria to consider for what is important about the Article 32. She also focused on the point about the importance of defense experts, and there has to be independence from the prosecution and independent funding. She also appreciated the idea of experts for the court.

Ms. Long commented on the need for a process to support specialized, experienced trial attorneys to stay in the military system. So the creation of a true Special Victims Unit within the military justice system of trial attorneys, of prosecutors able to bring a breadth of experience, along with training and expertise, and to be rewarded, or at least not penalized from a career perspective. There needs to be support for people staying in that position. Although there wasn't a consensus on that point, it was a credible argument to Ms. Long. She also noted that there hasn't been nuanced training to help people to be victim-centered while also thoughtfully and thoroughly fleshing out an interview and following up on things that are inconsistent or appear that way by asking follow-up questions consistent with a good investigation without abusing a victim.

Ms. Garvin agreed with the previous points and she discussed the question raised about the purpose of the process, especially in the context of whether changes should be made to the Article 32. Is the purpose to get more convictions or to pull back the curtain? So before the DACIPAD makes recommendations, it's good to consider the purpose in the grander analysis of military justice. She made three other observations. First, the experts support a very interesting idea that is happening in some civilian courts, about sentencing guidelines. Second, she heard consistency that the SVCs and VLCs are doing a good overall job helping and protecting the

victim, even though that results in a less smooth process at times. She doesn't want to lose sight of the good job they are doing protecting the rights of the victim, even if it means it delays the system.

Dr. Spohn observed that all four judges said the military services take cases to trial that the civilian world wouldn't. Her question, which wasn't answered on the panel, is why? Is the reason because the military refers cases to court-martial using a probable cause standard, which many civilian prosecutors' offices wouldn't do? In the arena of sexual assault, civilians would use something approaching a proof-beyond-a-reasonable-doubt standard before taking a case to trial. She said in Los Angeles, that was their explicit standard in sexual assault cases, and they would not take the case to trial unless there was some type of corroboration of the victim's allegations. She said the interesting question is why the services take cases to trial that the civilian world wouldn't. She noted that the panelists talked about some sort of political pressure to prosecute these cases. The other issue that struck her is the analysis of the yearly data that shows the acquittal rate is much higher for cases tried by a panel of members than by judges. Yet the judges said they felt the panel members were making appropriate decisions, which means a bit of a disconnect. She suggested asking the question whether different kinds of cases are going before a panel of members as opposed to a judge? She said the data may be able tease out some of that information.

Chair Bashford said it would be interesting to see, in the cases where alcohol was a documented factor, whether those were more likely to go before a panel of members or a judge?

MG Anderson added that he agreed with the comment about experts needing to be resourced across the defense, the prosecution, and the court so they have access to experts. Shee was struck by the judge who said he was reading the DSM and trying to understand medical information in a victim's file. She said that was a recipe for error. Second, she said she worked at the Second Circuit at the time when the sentencing guidelines were imposed in the federal courts. There was a great deal of resistance among the judges, which subsided over time. But the fact was that there was a huge disparity in sentencing. And add the fact that military panels are tasked with recommending a sentence and there's going to be opportunities for a great range of punishment. So she would consider seriously sentencing guidelines or something maybe softer than the original version of the sentencing guidelines, but something that provides more guidance to a panel than just here is the max and here is the minimum.

Mr. Kramer said he had recently read about a disagreement about whether sentencing guidelines are too high in certain cases. He can't understand why they can't get an answer on why the acquittal rate is so high compared with the civilian courts, not only on sexual assault cases, but any type of case. He's troubled by the fact that they can't get an answer to that, better than just "we take cases that civilians wouldn't take." He's also troubled by the alcohol, although they give the servicemembers training. The same thing goes on at college campuses. They get training too, and routinely, alcohol is involved in college campus sexual assaults. He's not sure there is an answer to that; it's just a fact of life. Finally, regarding sentencing, he heard the judges all agree that it's a bad idea to give reasons for sentence. He would have thought just the opposite, both for the victim and for the defendant, that it is important to give reasons for why the sentence

is being imposed. That was strange. He has strong feelings about sentencing guidelines, but it just seems it would give parties some kind of why.

Ms. Garvin made a comment about the judges didn't want to put the reasons for the sentence on the record. They said it was because of appellate review, and not saying something they shouldn't say, which flagged for her training moments to understand permissibility, but also the sentencing guidelines to understand range. But for procedural justice, the more transparency there is at every step of the process, the more the accused and victim, as well as other system actors, understand and have faith in the system. While their comments were understandable, it was also a little disturbing through a procedural justice lens.

Ms. Cannon was interested in following up on the pilot program described by COL Glass where a prosecutor or defense attorney could stay in the position. She is interested to know more about that program. She also would like to know the statistic about how often the Article 32 is waived by the defense as being unhelpful.

Chair Bashford said she believes that data has been gathered and it could be found.

Ms. Garvin returned to the discussion on the Article 32. She didn't hear any of the panelists articulate a desire to return to the old Article 32, although there was consistency for a more robust 32 that involved some evidentiary items. She didn't recall hearing that the judges wanted a cross-examination of the victim. It was about ensuring the defense can get witnesses in the room and have testimony, but not a return to the victim being there.

Ms. Tokash agreed with Mr. Kramer that they need to understand the allegation that the military is taking cases that the civilians aren't. She heard the judges characterize what are considered "hard cases" or that the military is taking "hard cases." But she wants to know, is the military characterizing these cases as hard because of the facts or because they don't have a prosecution standard like the civilian prosecutors have? By way of example, many Assistant US Attorneys are taking to trial what they would characterize as hard cases involving sexual assault. For example, sexual assault on airplanes in flight, sex trafficking cases, child exploitation cases, but they still take them to trial because prosecutorial decision-making processes in the DOJ are evidence-driven. She was struck by COL Glass' comment that the prosecution standards in the military and civilian systems are dramatically different, and COL Glass found himself wondering "How are we here? Why are here? If we are here, something went really wrong with the case or he didn't consider that the case should see the inside of a courtroom." She said she thinks it is important to examine what the military's purpose is, and that perhaps a higher standard would reduce the number of bad cases and acquittals.

Judge Grimm thanked the judges for their time and said that they make him proud that the military attracts people of their dedication, thoughtfulness, and service. His first observation was on the standard for bringing a case to trial. This is a critical issue. A standard that requires admissible evidence sufficient to move forward seems to him to be an essential clarification that they should consider and explore. His second point was a sentencing standard. He heard a reluctance by the panelists to express a view without a standard, and that if there was a standard, that it would govern. He believes it is essential to have a standard for a sentence that is imposed.

He agrees with Mr. Kramer's concern about the guidelines approach, but there should be a standard, and every sentence, whether recommended by a panel or a judge, should meet that standard. He said it is essential for transparency to explain the reason for the sentence. To simply go from nothing, a reprimand to 30 years with no explanation is disruptive for the system and invited criticism about the transparency, the consistency of the system, and to the ultimate detriment of the phenomenal efforts the military has made to get around this issue. Next, the experience of attorneys is an important factor. He thinks there would be tremendous pushback in the military to having career paths for prosecutors, but these are hard cases. Regardless of the standards, t highlights the need to have people with the experience to do it. It advantages no one to have inexperienced folks doing this because it's not fair for the victim, not fair for the defendant, and not fair for the military. Next, experts. Something needs to be done to give equal access to experts to the Government, the defense, and to the court, where needed, without going to some bean-counters who view this as nothing more than a long and demanding process to justify it. Alcohol is an enormously significant factor, which surprises no one, because the military has a large population of young people in the same demographic as college kids, where binge drinking is not just a phenomenon, but it is a goal—drink for the purpose of becoming so under the influence that you don't know what's going on. And when alcohol is involved it makes the facts more difficult as to whose version to believe. He thinks the guardian ad litem issue is an interesting idea, but in the federal system, there is a statute allowing for GAL but there is no funding. If you're going to require it, you have to have funding, otherwise it is creating an expectation that cannot be fulfilled.

Ms. Long commented on conviction rates. She said this is an area they are steeped in, and it's certainly an area to look into. But there is no comprehensive evidence that exists actually showing the civilian rate is much worse that what they're talking about here, Each of the nation's 2600 jurisdictions has a different rate of prosecution and a different number of cases going forward. She doesn't believe they can look to the US Attorney's office because they simply do not do the same cases that state and local prosecutors do with the same volume. They just don't have the jurisdiction to do it. One of the challenges when she works with state and local jurisdictions is knowing that they are prosecuting all of the cases that exist. She thinks this is a big question across the country. Not only what is the actual rate of conviction, but how do we measure like-case to like-case. We haven't done it yet, but there are ways of doing it. People think they know what the conviction rate is, but when you look at the data, she doesn't think it is what they think it is. So she would caution the group to mark this as something to look into and try to make the comparison.

Dr. Sphon agreed and thinks it also depends on whether they calculate convictions based on reports in the civilian world, based on arrests, or based on cases that are taken to trial. In Los Angeles—she pulled up their data—there were five acquittals out of 5,000 cases, 5,000 reports. But there were only 600 arrests out of 5,000.

Ms. Long asked how many were tried out of those.

Dr. Spohn doesn't know how many were tried because some pled. There were 390 convicted.

Ms. Long asked 390 out of 5,000?

Dr. Spohn answered it depended on the denominator.

Ms. Long said you have to care about that denominator of what is happening. If the big number was 5031, does that mean that 4,000 of them were false? That's the question they have to get at.

Committee Final Deliberations on the DAC-IPAD's Draft Fourth Annual Report

DAC-IPAD Staff Director, Colonel Steven Weir, explained that the purpose of this session of the meeting is to allow the Committee to deliberate on the draft Fourth Annual Report. He advised that prior to the public meeting the Members had reviewed and provided their comments on the draft report. Those comments were incorporated into the draft report and reviewed by the Members at the previous day's administrative preparatory session. At that meeting, the Committee identified technical edits and issues for deliberation at today's meeting.

Colonel Weir reviewed the technical edits made to the report and noted that throughout the report the term sexual assault was changed to sexual offense. Chair Bashford then led the discussion regarding the following deliberative issues:

Page 16: Comment 19 regarding the sentence, "While some victims' counsel agreed to the follow-up interview, other counsel requested that the MCIO send written questions for the victim to answer, which is a less-than-ideal method for developing information."

The Committee unanimously agreed to amend the sentence to read, "While some victims' counsel agreed to the follow-up interview, other counsel requested that the MCIO send written questions for the victim to answer, which is often a less-than-ideal method for developing information from a law enforcement perspective."

Page 18: Second paragraph, regarding the words "shape" and "swiftly" in the sentences, "Most case files revealed that investigators did not have discretion to shape the scope and nature of the investigation, or to choose to pursue investigative steps that they deemed appropriate based on the facts of a particular allegation. Investigators need the ability to tailor the scope of an investigation to the facts of that case, including the ability to swiftly close investigations when appropriate."

The Committee unanimously agreed to amend the sentence to read "Most case files revealed that investigators did not have discretion to pursue investigative steps that they deemed appropriate based on the facts of a particular allegation. Investigators need the ability to tailor the scope of an investigation to the facts of that case, including the ability to close investigations in a timely and appropriate fashion."

Page 31: Comment 39 regarding the word "concerned" in the sentence, "The Committee is most concerned about those cases reviewed in which the victim's preference to go forward to trial prevailed even though there was insufficient admissible evidence to obtain and sustain a conviction."

The Committee unanimously agreed to amend the sentence to read, "The Committee is interested in further analyzing those cases reviewed in which the victim's preference to go forward to trial prevailed even though there was insufficient admissible evidence to obtain and sustain a conviction."

Page 33: Comment 43 regarding the word "ensure" in the sentence, "The implementation of the judge advocate consultation and advice provisions of the new Disposition Guidance should be followed up on through site visits to ensure judge advocate advice is being conveyed to the initial disposition authority at a time and in an appropriate manner to inform the decision about what action, if any, to take on an allegation."

The Committee unanimously agreed to amend the sentence to read, "The implementation of the judge advocate consultation and advice provisions of the new Disposition Guidance should be followed up on through site visits to assess whether judge advocate advice is being conveyed to the initial disposition authority at a time and in an appropriate manner to inform the decision about what action, if any, to take on an allegation."

Page 36: Comment 46 regarding the use of the word "troubled" in the sentence, "The DAC-IPAD was troubled to see in some cases charges and specifications for a penetrative sexual offense were preferred that the preliminary hearing officer determined were not supported by evidence establishing probable cause to believe that the accused committed the offense."

The Committee unanimously agreed to amend the sentence to read, "The DAC-IPAD has concerns regarding cases in which charges and specifications for a penetrative sexual offense were preferred that the preliminary hearing officer determined were not supported by evidence establishing probable cause to believe that the accused committed the offense. The DAC-IPAD will continue to investigate these issues."

Page 36: The last sentence, "CRWG reviewers express concern that referring cases to trial by general court-martial that the preliminary hearing officer determined lacked probable cause to believe the accused committed a penetrative sexual offense circumvented the benefits of the hearing's adversarial process."

The Committee unanimously agreed to amend the sentence to read, "Case Review Working Group reviewers expressed concern about cases referred to trial by general court-martial that the preliminary hearing officer had determined lacked probable cause to believe the accused committed a penetrative sexual offense. If such referrals were based on evidence not presented at the hearing, the benefits of the hearings adversarial process were lost."

Page 39: Observation 8, "Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction."

The Committee unanimously agreed to amend the sentence to include footnotes that refer to the portions of the report that addresses the limitations of the case file review to the investigative case files and the investigator's summary of key information.

Page 41: Comment 59 regarding the sentence in Observation 9, "The Article 34 pretrial advice would be more helpful to convening authorities if it included detailed explanations of the staff judge advocates' conclusions."

The Committee unanimously agreed to amend the sentence to read, "The Article 34 pretrial advice could be more helpful to convening authorities if it included detailed explanations of the staff judge advocates' conclusions."

Page 42: Comment 60 regarding the sentence, "The better practice is to provide written explanations, with further oral explanation as necessary."

Page 42: Comment 61 regarding the sentence, "A written legal analysis and rationale could enhance fairness, due process, and transparency in the military justice system – benefits that do not seem to be outweighed by a need for confidentiality."

The Committee unanimously agreed to amend the two sentences to read, "The better practice is to provide written explanations, with further oral explanation as necessary. A written legal analysis and rationale could enhance fairness, due process, and transparency in the military justice system."

The Committee reviewed the accompanying charts and agreed to minor edits for ease of reading.

Page 59: Comment 67 regarding the sentence, "The Department of Defense (DoD) does not collect information on the legal outcome of cases in which the victim is the spouse or an intimate partner; therefore the statistical data for fiscal years 2012 through 2014, collected by the Judicial Proceedings Panel (JPP), do not include the legal outcomes of those classes of cases and will not be included in the historical discussion to follow."

The Committee unanimously agreed to amend the sentence to read, "The statistical data for fiscal years 2012 through 2014, collected by the Judicial Proceedings Panel (JPP), do not include the legal outcomes of cases in which the victim is the spouse or an intimate partner, and will not be included in the historical discussion to follow."

Page 70: Comment 69 regarding the addition of quotes around *Allegations of Sexual Assault.*

The Committee unanimously agreed to amend the heading to read *"Allegations of Sexual Assault"*.

The Committee discussed the Chapter 4 charts related to collateral misconduct. The Committee deliberated Table 4.2 and the *False Statements (not including false reports)* data and unanimously agreed to delete that portion of the table since it was not counted as a type of alleged collateral misconduct. For consistency, the Committee agreed unanimously to eliminate the pie charts in favor of Table 4.1.

At the conclusion of the review, Chair Bashford made the motion to approve the 2020 Fourth Annual Report as amended. The Committee unanimously approved the report.

2020 Military Installation Site Visit and Members Attending Sexual Assault Courts-Martial Update

Mr. Glen Hines, DAC-IPAD Attorney-Advisor, briefed the Committee on the military installation site visit plan. He explained that in advance of each trip the attending Members would receive a packet containing various topic areas and questions for the practitioners and stakeholders at each location. He stated that each trip is comprised of at least four Committee Members. He explained that he is working closely with the Service Representatives to facilitate the planning with the local points of contact at each site.

BGen Schwenk inquired about the organization of the questions for each group of stakeholders. Mr. Hines explained that he had discussed with Dr. Bill Wells, DAC-IPAD Criminologist, how to refine and organize the topics and questions along with instructions that will be customized to each site location. This will allow the information received to be in a more objective format and less susceptible to being anecdotal.

Mr. Jim Markey asked about the representation of disciplines at each of the sites. Mr. Hines explained that each session would be with a different stakeholder. The trial counsel might be one session, defense counsel in another or the VLCs, investigators, commanders, or convening authorities. He added that at the two training bases that are scheduled, there is a planned period to meet with the recruits and trainees in entry-level training.

Mr. Hines concluded that he would circulate a schedule of the planned site visits to the Committee along with a point of contact for arranging their travel.

Ms. Theresa Gallagher, DAC-IPAD Attorney-Advisor, provided the Committee with an update of the Member attended court-martial observations. She stated that since the last meeting in November, two Members attended courts-martial. She added that she recently forwarded to them a list of over 80 sexual assault courts-martial scheduled to take place between now and June. She encouraged the Members to review the list and let her know if they are available to attend a court-martial.

2020 National Defense Authorization Act Presentation and Discussion

Colonel Patrick Pflaum, Chief, Criminal Law Division, Office of The Judge Advocate General of the Army, provided the Committee with a briefing on the key provisions in the National Defense Authorization Act for Fiscal Year 2020 that impact the DAC-IPAD.

The first section Colonel Pflaum noted was Section 535, which extends the DAC-IPAD from its initial five-year charter to 10 years with an expiration date of February 8, 2026. He then covered Section 550, requires establishment of the new Defense Advisory Committee on the Prevention of Sexual Assault. The charter of this committee states that it shall advise the Secretary on "[t]he prevention of sexual assault, including rape, forcible sodomy, other sexual assault, and other

sexual misconduct involving members of the Armed Forces, as well as the policies, programs, and practices of the Department as it relates to the prevention of sexual misconduct." Colonel Pflaum explained that there will be matters of joint interest with the new Defense Advisory Committee and the DAC-IPAD and the statute requires coordination between the two.

The next statutory provision Colonel Pflaum discussed was the requirement to conduct an assessment of racial, ethnic and gender disparities in the military justice system. Colonel Pflaum pointed out that the Article 146a report requirement on the Services will drive a task to the DAC-IPAD to conduct: 1) a review and assessment by fiscal year of the race and ethnicity of members of the Armed Forces accused of penetrative sexual assault or contact sexual assault offenses in an unrestricted report; 2) a review and assessment by fiscal year of the race and ethnicity of members of the Armed Forces against whom charges were preferred and; 3) an assessment of the race and ethnicity of those members of the Armed Forces who were convicted of a penetrative sexual assault or other contact sexual assault offenses. He stated that a report is required from the DAC-IPAD to the Secretary of Defense and the House Armed Services Committee (HASC) and the Senate Armed Services Committee (SASC) that sets forth the results of those reviews and assessments.

Colonel Pflaum covered three additional tasks for the DAC-IPAD included in the conference report on the NDAA. The first task is for the DAC-IPAD to conduct an assessment of other justice programs such as mediation or restorative justice programs that might be appropriate to assist the victims of alleged sexual assault, particularly where that sexual assault may not have proceeded to a criminal prosecution. The second task is an assessment under RCM 1001(c) of victim impact, which affords victims a special right to provide input to the court-martial with respect to victim impact and mitigation. He explained that the concern is that some military judges have interpreted this rule too narrowly, and as a result, it is limiting what survivors are permitted to say during sentencing hearings in a way that does not fully inform the court of the impact of the crimes on the survivors. The third task in the conference report is related to guardians ad litem and a study the Department of Defense is required to conduct.

Colonel Pflaum then covered a series of provisions that do not have specific tasks to the DAC-IPAD, but are of interest. He stated that in Section 536, there is a special statutory provision that requires the DoD to establish procedures to enable the return of personal property collected from a victim as part of a sexual assault forensic examination. Next, he covered Section 538, which requires the following: the notification to the victim of each significant development in the processing of their case; the documentation in the case file of the victim notifications; and the documentation of the victim's preference for the handling of the case through the military justice system or the civilian system.

Colonel Pflaum reported that there are two sections by statute that increase the manpower allocated to the investigation and victim assistance in sexual assault cases. He stated that Military Criminal Investigative Organizations must increase their number of digital forensic examiners by at least 10, and increase the number of sexual assault investigators such that they can process their cases within six months from the initiation of the investigation. Additionally, the Victim/Witness Liaisons are required to fill their shortages across all the Services by December 19, 2020.

Colonel Pflaum then discussed Section 540C, which requires the Secretary of Defense by June 2020 to establish a policy to ensure timely disposition of sexual assault prosecution decisions, most importantly a decision not to prosecute a particular case.

The next three sections Colonel Pflaum addressed covered statutory provisions that direct the DoD to conduct specific training. The statute requires specific training for initial disposition authorities (IDAs) designed to train convening authorities on the exercise of their disposition authority. He explained that Section 540B, directs specific training on the role of commanders in the military justice system. The training is to include investigation, prosecution, victim and assistance rights, retaliation prevention, healthy command climate to facilitate reporting, and any other matters that the Secretary of Defense may deem as appropriate. The third section Colonel Pflaum discussed was Section 540D, which requires the Secretary of Defense to develop and issue a comprehensive policy to reinvigorate the prevention of sexual assault. He stated the policy is designed to include education and training and programs designed to encourage and promote healthy relationships, empowerment of noncommissioned officers, fostering of social courage to promote intervention, processes and mechanisms to address behavior on the continuum of harm, prevention of alcohol abuse, and any other matters that the Secretary deems appropriate.

Colonel Pflaum provided the provisions categorized as affecting the prosecution of sexual assault. He noted that Section 540J requires a pilot program providing defense investigators. He stated that the programs across the Services are to be as uniform as possible and that a defense investigator may not speak to a victim of an offense, except by a request made through a counsel (SVC or another counsel). Colonel Pflaum stated that Section 543 amends 10 USC 1567a, Subparagraph A to provide that the notice of a military protective order must take place within seven days of the issuance. It also establishes a reporting requirement for the Services to track the number of military protective orders issued and the number that are reported to civilian authorities. Next, in Section 550 there is an additional provision to protect disclosures that are made as part of the Catch A Serial Offender Program. He stated that this provision provides protections to victims who choose to participate in the program. He stated that Section 550 makes clear that anything the victim says as part a disclosure in the program does not affect the status of their report and is protected from disclosure under the Freedom of Information Act.

Next, Colonel Pflaum stated that Section 541 makes clear that Special Victims' Counsel or Victims' Legal Counsel must assist victims with regard to incidents of retaliation. It also directs that by December 20, 2024, staffing levels for Special Victims' Counsel or Victims' Legal Counsel be such that the average client load is 25 cases for each counsel. Additionally, Section 542 mandates that absent exigent circumstances, a Special Victims' Counsel or Victims' Legal Counsel be available to a victim within 72 hours of the request.

Colonel Pflaum explained that Section 548 is a new statute that expands the availability of counsel to domestic violence victims, which is in addition to the legal assistance they are entitled to under 10 USC 1044. The statute also requires a report to Congress in April 2020 on how the Services are going to implement the requirement and what resources, training and other provisions may be necessary for the program's expansion.

Colonel Pflaum discussed Section 550C, which makes clear that Special Victims' Counsel are to receive special training on the local laws that are applicable in the jurisdiction in which they practice. Chair Bashford expressed her concern regarding the amount of time it takes to learn the local laws of the jurisdiction and considering how often personnel are transferred from installation to installation. Colonel Pflaum responded that it would be incumbent on the Services to look at those nuances and tailor their programs appropriately.

Colonel Pflaum then highlighted the eight provisions that require reports by the Department of Defense to Congress on various aspects of the military justice system.

1) A recommendation for the establishment of a separate sexual harassment punitive article. Colonel Pflaum explained that currently punishment of sexual harassment is through Article 93 of the UCMJ or through violations of any applicable Service regulations or policies that address sexual harassment. He stated that this provision is asking the Department of Defense to assess the issues involved in creating a separate UCMJ article to address sexual harassment.
2) Section 540F requires the Department of Defense to assess the feasibility and advisability of an alternative military justice system for felony level offenses, where an O-6 judge advocate with significant criminal litigation experience outside the chain of command of the accused makes preferral or referral decisions. By statutory terms, it requires an assessment of other military justice systems throughout the world. The study is due 300 days from the passage date of the NDAA.
3) Under Section 540H, the Department of Defense is to study and assess the feasibility and advisability of establishing or expanding a policy that is currently applicable only within the Air Force. The United States Air Force Academy's Safe to Report policy provides immunity to victims who may have engaged in certain forms of collateral misconduct that occurred during or predicating their sexual assault, or that were discovered during an investigation of a sexual assault. Colonel Pflaum noted the recent introduction of a bill in both the House and Senate that would create a military-wide "Safe to Report" provision by statute.
4) Section 540K requires a study to conduct an assessment as to the feasibility and advisability of expanding the protections available to victims who make restricted reports. Colonel Pflaum explained that this would allow victims to make restricted reports to other particular members such as law enforcement, members of their chain of command, a military sponsor or a third party. He stated that DoD is required to consult with the DAC-IPAD and the report is due in June of 2020.
5) The provisions of Section 540L ask the DoD and the DAC-IPAD to study the feasibility and advisability of establishing a guardian ad litem program. Colonel Pflaum stated that the study is limited to determining whether a guardian ad litem program would be appropriate for military dependents who are victims or witnesses in a crime under the UCMJ. He added that the provision directs the DAC-IPAD to study the advisability of providing a guardian ad litem upon the report of any sex-related offense for any victim who has not attained the age of 18.
6) Colonel Pflaum stated that Section 540M is noteworthy because it requires a GAO study of the implementation of the statutory requirements on sexual assault prevention and response in the military over the period of 2004 to 2019.
7) Section 542 directs a study of the feasibility and advisability of establishing and maintaining civilian positions to support Special Victims' Counsel or Victims' Legal Counsel. Colonel

Pflaum explained that for those Services that don't have, by policy, civilians assigned as paralegals or other legal assistants to help their Victims' Legal Counsel or Special Victims' Counsel, this study asks whether that might be appropriate to maintain continuity of representation and also the preservation of institutional knowledge in assisting victims in this capacity.
8) Section 548 requires the Services to provide counsel to domestic violence victims. Colonel Pflaum explained that the statute requires the DoD to report how the Services are implementing the requirement, what additional resources might be necessary, and any additional laws or policy changes that will be required.

Colonel Pflaum concluded by mentioning Article 37, which was previously titled Unlawfully Influencing the Action of the Court, is now statutorily titled Command Influence. He stated that this is the most significant statutory change to the unlawful command influence statute since 1968. He explained that it now protects preliminary hearing officers, and Special Victims' Counsel. It provides two significant expansions that previously had not been included: 1) authorizes statements regarding criminal activity and offenses that do not advocate for a particular disposition or a particular court-martial finding or sentence, or do not relate to a particular accused, and allows more communication between superior and subordinate authorities in discussing military justice matters, as long as the superior does not direct a specific disposition or substitute the superior's discretion for the subordinate's discretion; and 2) requires an accused to show prejudice to receive relief. The violation must materially prejudice a material right of the accused in order to obtain relief under Article 37.

Dr. Markowitz asked Colonel Pflaum if Section 538 and the notification of significant events relates to the investigatory process rather than submission of kits or the analysis of kits. He responded that he read it to be solely addressing process as it moves through each step.

Public Comment

Chair Bashford introduced Ms. Jennifer Elmore, who requested to speak to the DAC-IPAD regarding her experiences in the military and civilian justice systems. Ms. Elmore stated that she is a survivor of sexual assault committed by her father, a retired U.S. Army Major General. She stated that for the last five years, she has lived as a victim through the investigation, the prosecution, and the defense of her sexual assault first through the military justice system and currently through the civilian justice system.

She explained her purpose to speak at the meeting was as a representative for a broader group of military sexual assault survivors known as Survivors United. She explained that they are a group that has come together to provide a room for voices of victims and their experiences navigating the military justice system. She stated they have ongoing conversations with legislators on specific concerns and spoke last year to legislators regarding sentencing and the restrictions placed on victims in that process. She explained the restrictions severely limit what a victim may include in their victim impact statements, as well as the delivery of those statements. She provided specific examples including redlining of statements before being given, not being allowed to complete the statement, and being cut off by judges. She expressed her hope that as the Committee continues to gather data in different areas, this specific topic would be included.

Ms. Elmore concluded her testimony by thanking the Committee for their work to improve the military justice system, and asked if there were any questions.

BGen Schwenk asked if in addition to the victim statement issue, there were any other categories of concern. Ms. Elmore responded that she would provide a complete list of Survivors United's areas of concern to the DAC-IPAD staff.

Mr. Kramer asked if she had an opinion regarding whether the judge at sentencing should provide their reasoning for the imposed sentence. Ms. Elmore replied that she supports the judge providing the reasoning for the imposed sentence as well as the reasoning for acquittal. She explained that it is to the benefit of the victim and the accused to know the reasoning behind whatever judgment is made.

Ms. Cannon asked about her experience testifying at a preliminary hearing. Ms. Elmore stated that she was counseled prior to the hearing that work had been done to protect victims from having to testify at the preliminary hearing. She replied that in her case, the advisors felt it was important for the judge to hear from her in the preliminary hearing, but that it was her choice to testify. She expressed that it was difficult to be cross-examined and have judgments made on different aspects and activities. She stated that it was a learning experience to see what was thrown out, and what was kept in based on the validity of her testimony. She added based on this experience, she would have been better prepared for the court-martial, had the case made it there.

Ms. Garvin inquired about her testimony regarding the redlining of victims' statements, and if her organization's members had that experience. Ms. Elmore confirmed that members of her organization have had the experience of their statements being redlined.

Meeting Wrap-Up

Colonel Weir advised the Committee that the next public meeting is May 15, 2020, and he would provide them with a complete list of dates for their planning purposes. He emphasized the importance of the Members attending a court-martial for observation and submitting questions in advance of the site visits.

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

The DFO closed the public meeting at 3:26 p.m.

CERTIFICATION

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

Martha S Bashford

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

MATERIALS

Meeting Records

1. Transcript of February 14, 2020, 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, February 14, 2020
2. Minutes from the November 15, 2019, DAC-IPAD Public Meeting
3. Presenter Biographies
4. Initial Draft of *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces Fourth Annual Report*
5. Fourth Annual Report Draft Charts, Chapter 2 - Article 32 Comparative Analysis by Military Service for Fiscal Years 2017 and 2018
6. Fourth Annual Report Draft Charts, Chapter 3 - Disposition of Penetrative Sexual Assault and Contact Sexual Assault Offenses by Military Service of the Accused for Cases Completed in Fiscal Year 2018
7. Fourth Annual Report Draft Charts, Chapter 4 - Charts, Analysis of collateral misconduct in sexual assault cases closed between April 1, 2018 and March 31, 2019
8. Excerpted Military Justice and Other Sexual Assault Related Provisions from the National Defense Authorization Act for Fiscal Year 2020