

UNITED STATES DEPARTMENT OF DEFENSE

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DEFENSE ADVISORY COMMITTEE ON INVESTIGATION,  
PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT  
IN THE ARMED FORCES (DAC-IPAD)

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PUBLIC MEETING

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FRIDAY  
OCTOBER 19, 2018

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The Committee met at One Liberty  
Center, Suite 1432, 875 North Randolph Street,  
Arlington, Virginia, at 9:30 a.m., Ms. Martha  
Bashford, Chair, presiding.

PRESENT:

MS. MARTHA S. BASHFORD, Chair  
HON. LEO I. BRISBOIS  
MS. KATHLEEN CANNON  
MS. MEG GARVIN  
HON. PAUL W. GRIMM  
MR. A.J. KRAMER  
MS. JENNIFER GENTILE LONG  
SGT. JAMES "JIM" MARKEY, Ret.  
DR. JENIFER MARKOWITZ  
CMSAF RODNEY J. MCKINLEY, Ret.  
BGEN JAMES R. SCHWENK, USMC, Ret.  
DR. CASSIA C. SPOHN  
MS. MEGHAN A. TOKASH \*  
HON. REGGIE B. WALTON

**STAFF:**

COL. STEVEN WEIR, USA, Staff Director  
MS. JULIE CARSON, Deputy Staff Director  
MR. DALE TREXLER, Chief of Staff  
MAJ. ISRAEL KING, USAF, Alternate Designated  
Federal Officer (ADFO)  
DR. JANICE CHAYT, Investigator  
MS. NALINI GUPTA, Attorney-Advisor  
MR. CHUCK MASON, Attorney-Advisor  
MS. MEGHAN PETERS, Attorney-Advisor  
MS. STAYCE ROZELL, Senior Paralegal  
MS. TERRI SAUNDERS, Attorney-Advisor  
MS. KATE TAGERT, Attorney-Advisor

**PRESENTERS:**

MS. KATHLEEN COYNE, U.S. Marine Corps Defense  
Highly Qualified Expert  
MAJ. STEVE HOHMAN, Baltimore Police Department  
SERGEANT DETECTIVE KELLEY O'CONNELL, Boston  
Police Department  
SERGEANT AMANDA WILD, Albuquerque Police  
Department

**ALSO PRESENT:**

MAJ. JOY HEWITT, USAF, Service Representative  
MS. JANET MANSFIELD, U.S. Army Representative  
MR. STEPHEN McCLEARY, USCG, Service  
Representative  
MAJ. BLAKE PELTZ, USMC, Service Representative

\*Present via teleconference

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:36 a.m.)

3 MAJ. KING: Good morning everybody.

4 As Acting DFO, I officially open this public  
5 meeting of the DAC-IPAD. I do note that the  
6 agenda has recently changed from what it  
7 originally began with a testimony from an  
8 individual whose sexual assault testimony our  
9 committee will hear later today.

10 MS. BASHFORD: Thank you, Major King.

11 Good morning. I would like to welcome the  
12 members and everyone in attendance today to the  
13 10th meeting of the Defense Advisory Committee on  
14 Investigation, Prosecution and Defense of Sexual  
15 Assault in the Armed Forces, or DAC-IPAD.

16 The Secretary of Defense appointed 16  
17 members to the committee, 13 of whom are  
18 physically present today. Two committee members  
19 are not able to attend, Major General Marcia  
20 Anderson and Ms. Meghan Tokash.

21 Ms. Tokash will be joining us  
22 telephonically later this morning. And it is

1 with a very heavy heart and great sadness that a  
2 report that the third committee member not with  
3 us today, Savannah Law School associate dean and  
4 professor of law, Keith Harrison passed away on  
5 August 15th, 2018 after a brief illness.

6 Dean Harrison was a beloved member of  
7 this committee, as well as a dear friend,  
8 colleague, leader, father and husband, with a  
9 distinguished career of over 30 years in legal  
10 education as both a teacher and an administrator.

11 He was especially proud of his service  
12 as a judge advocate in the U.S. Coast Guard  
13 before beginning his academic career.

14 Dean Harrison's kindness, wisdom and  
15 contagious enthusiasm will be deeply missed by  
16 all of us at the DAC-IPAD and we hold his family  
17 in our thoughts and prayers as we meet today.

18 The DAC-IPAD was created by the  
19 Secretary of Defense in accordance with the NDAA  
20 for fiscal year 2015 as amended. Our mandate is  
21 to advise the Secretary of Defense on the  
22 investigation, prosecution and defense of

1 allegations of sexual assault and other sexual  
2 misconduct involving members of the armed forces.

3 Today's meeting is being transcribed.  
4 The complete written transcript will be posted on  
5 the DAC-IPAD website.

6 We will begin the meeting with  
7 testimony from a Marine Corps civilian defense  
8 expert, who will speak about the effects of  
9 sexual assault investigations on accused service  
10 members in cases where no charges are preferred.

11 This will be followed by testimony  
12 from a panel of civilian investigators from  
13 Boston, Baltimore and Albuquerque.

14 After a break for lunch, the committee  
15 will resume with a presentation from the DAC-  
16 IPAD's case review working group on its review of  
17 166 investigative case files and the working  
18 group's initial findings and recommendations.

19 This will be followed by the  
20 committee's final deliberations, on the  
21 Department of Defense expedited transfer program  
22 and a briefing from DAC-IPAD staff on three

1 recommendations from the judicial proceedings  
2 panel that the DOD general counsel has asked the  
3 DAC-IPAD to examine for its March 2019 report.

4 After that, the committee will receive  
5 a briefing on a provision from fiscal year 2019  
6 NDAA, that tasks the DAC-IPAD to report on victim  
7 collateral misconduct related to sexual assault.

8 For its last session, the committee  
9 will receive an update from the DAC-IPAD's data  
10 working group. Each public meeting of the DAC-  
11 IPAD includes a period of time for public  
12 comment.

13 We've received no requests for public  
14 comment at today's meeting. If a member of the  
15 audience would like to comment on an issue before  
16 the committee, please direct your request to the  
17 DAC-IPAD's staff director Colonel Steven Weir.

18 All public comments will be heard at  
19 the end of the meeting and at the discretion of  
20 the chair. Written public comments may always be  
21 submitted for committee consideration.

22 The DCA IPAD recognizing that we are

1       advising not only on the investigation and  
2       prosecution on sexual assault in the military but  
3       also on the defense of sexual assault, remains  
4       committed to hearing testimony from individual  
5       who have been accused of sexual assault where no  
6       charges were ultimately brought. And the impact  
7       that these accusations have had on personal lives  
8       and their military careers. Such testimony will  
9       be heard by the full DAC-IPAD at future meeting  
10      or meetings.

11                   Thank you all for being here. Ms.  
12      Coyne, you have the chair and you may begin  
13      whenever you're ready. Thank you for coming.

14                   MS. COYNE: Thank you, Madame Chair.  
15      Good morning members of the committee.

16                   My name is Kathleen Coyne. I'm one of  
17      two civilian attorney advisors, formally called  
18      HQEs, which is how they've been referred to in  
19      your prior reports for the Marine Corps Defense  
20      Services organization.

21                   I'm a career defense attorney. I  
22      spent 32 years of my professional life as a



1 public defender. For the last five years, I've  
2 been privileged to train, assist and consult with  
3 Marine defense counsel.

4 Thank you for the opportunity to  
5 address the impact of charges which were  
6 preferred or referred but ultimately withdrawn or  
7 dismissed.

8 These views are based on my personal  
9 observations. They don't necessarily reflect the  
10 views of the Marine Corps, the Department of the  
11 Navy or the Department of Defense.

12 DoD initiatives over the past several  
13 years to address sexual assault have led to an  
14 unprecedented increase in sex crimes charging  
15 within the military. Many of those charged are  
16 later acquitted.

17 For example, in the Marine Corps, in  
18 fiscal year 2018, out of a total of 45 contested  
19 general court-martials, there were 12 complete  
20 acquittals and 23 partial acquittals.

21 Many partial acquittals were for -- or  
22 many partial convictions rather were for minor

1 misconduct like barracks violations or under aged  
2 drinking. Significant numbers of those accused  
3 of sex offenses ultimately have their charges  
4 dismissed.

5 For example, DoD wide in 2017, the  
6 last year for which we have records from SAPRO,  
7 776 sexual offenses were preferred, of these 105  
8 cases or 13.5 percent were dismissed. And I've  
9 had the opportunity to check with your staff and  
10 the number that you have is 13.8 percent. So,  
11 the numbers do correlate.

12 A sex crime accusation alone causes  
13 irreparable harm. At a minimum, service members  
14 are put on legal hold for months, frequently over  
15 six months.

16 Legal holds delay or cancel duty  
17 station transfers, which is especially onerous in  
18 places like Okinawa or Japan where individuals  
19 are separated from their family and will not be  
20 allowed to return to the U.S. to reunify while  
21 there is a case pending.

22 If scheduled for a competitive school

1 or a special duty assignment, they will lose that  
2 billet. That causes loss of competitiveness for  
3 promotion or reenlistment. If selected for  
4 promotion, that will be held up, frozen during  
5 the case and sometimes even after a dismissal.

6 They are frequently publicly singled  
7 out by the command as a sex offender and the  
8 accused's reputation within the unit and on the  
9 base as a whole is in tatters.

10 As a side note, this is particularly  
11 problematic in jury selection where our members  
12 are selected from the same command as the  
13 accused.

14 Other do not work or associate with  
15 the accused. If he seeks a transfer after the  
16 dismissal, his reputation will often proceed him.

17 Many exonerated clients decide that  
18 the career that they had envisioned in the  
19 military is no longer for them and that results  
20 in the loss of training and experience on the  
21 part of the services who have invested in these  
22 service members.

1 Others who would like to remain are  
2 denied the opportunity to do so by being refused  
3 a reenlistment approval. They've lost years of  
4 retirement that they have worked hard and  
5 diligently towards acquiring.

6 Military protective orders are  
7 routinely imposed, which cause severe limits on  
8 socializing and even the ability to interact with  
9 work colleagues.

10 In at least one case that resulted in  
11 a young Marine who lived in a barracks being  
12 unable to eat in the chow hall. On the personal  
13 side it prevents the accused from living actively  
14 until the case is resolved.

15 It forces him to explain to a wife, to  
16 parents, to siblings or children that they've  
17 been accused of a heinous crime. It may limit  
18 their ability to participate in a child's  
19 sporting or extracurricular activities.

20 It may destroy marriages. It has  
21 resulted in the loss of child custody. The mere  
22 charges will put the individual in a DNA database

1 and it is extremely difficult, if not impossible  
2 to be removed from that DNA database once you're  
3 entered.

4 A seizure of personal property, like  
5 phones, computers and other electronic devices is  
6 very common and is almost impossible to have  
7 returned.

8 I put together a few real-world  
9 examples of where charges were withdrawn but  
10 lasting harm was done to the exonerated Marine.  
11 I want to say that although I'm here on behalf of  
12 the Marine Corps, I do have experience talking  
13 with many members of all branches of the  
14 services.

15 In fact, we train all branches of the  
16 service at our annual training on defending  
17 sexual assault cases. So, I've had an  
18 opportunity to ask and inquire about what's going  
19 on in the other services, and I believe this is  
20 pervasive. In one case, charges were dismissed  
21 after motion.

22 So, the case had been preferred. It

1 was referred. And trial management order was  
2 issued, motions filings, deadlines were met and  
3 there was a litigated 39a.

4 So, we're talking about a significant  
5 period of time into the case. And the charges  
6 were dismissed when the motions revealed serious  
7 credibility issues about the complainant. After  
8 dismissing the charges, headquarters' battalion  
9 refused to take him off non-recommended status  
10 for promotion for months.

11 Finally headquarters battalion  
12 attempted to NJP the marine for having sex in the  
13 barracks, but they charged a violation of an  
14 order that wasn't even in effect at the time of  
15 the incident.

16 Ultimately, he received a 6105  
17 counseling. His overseas orders were cancelled  
18 and never reinstated. To date his promotion has  
19 not been back dated. On top of all of this, a  
20 reporter from the San Diego Union Tribune did a  
21 story in the paper based only on the charge sheet  
22 and any time you Google this young Marine, that

1 story comes up.

2 In another case, after a young PFC had  
3 his case dismissed post-Article 32, he was given  
4 a 6105 counseling that stated that after the  
5 command had opened a sexual assault investigation  
6 it found that he had entered a female student  
7 Marine's room without permission.

8 However, this case was specifically  
9 dismissed after the Article 32 preliminary  
10 hearing officer found that there was no forensic  
11 evidence whatsoever tying the accused to that  
12 room.

13 The barracks duty officer testified  
14 that no one had been in the hallway that morning  
15 and the complainant said, it could have been  
16 another individual who entered her room.

17 The mere use of the word "sexual  
18 assault" in a 6105-counseling form is probably  
19 going to prevent this young marine from  
20 reenlisting.

21 MS. BASHFORD: Ms. Coyne, can I  
22 interrupt you?

1 MS. COYNE: Sure.

2 MS. BASHFORD: You mentioned a 6105  
3 counseling three times. What is that?

4 MS. COYNE: Oh, I apologize. That is  
5 a written formal counseling that is entered into  
6 the military -- at least in the Marine Corps --  
7 in the military service member's record and  
8 remains there for the pendency of their career.

9 MS. BASHFORD: Thank you.

10 MS. COYNE: In another case, a Marine  
11 who was placed on legal hold, actually lost a  
12 seat in medical school because he was delayed  
13 before the case was dismissed.

14 Under ABA standards, as I'm sure all  
15 the prosecutors in the room know, prosecutors  
16 have an ethical duty not to bring charges where  
17 there is little likelihood of conviction beyond a  
18 reasonable doubt.

19 Yet in the military, even a hearing  
20 officer's finding of no probable cause at the  
21 preliminary hearing, at the Article 32,  
22 frequently has no impact on the convening



1 authority, a non-lawyer, who may choose to prefer  
2 charges

3 -- I'm sorry -- refer charges nevertheless.

4 In one case, an O5, lieutenant colonel  
5 preliminary hearing office, so a relatively  
6 experienced, in fact for military purposes, a  
7 very experienced judge advocate found no probable  
8 cause.

9 I've read the preliminary hearing  
10 officer's report. I've also read the response of  
11 the convening authority, which said, my -- sent  
12 the case to trial specifically and the reason  
13 was, quote "My recommendation is consistent with  
14 your sexual assault policy."

15 That was the justification for pushing  
16 the case beyond a finding of no probable cause.  
17 The Marine was acquitted but not before his life  
18 was completely in tatters.

19 I'm not saying that sexual assault  
20 allegations should not be fully investigated and  
21 if appropriate referred to a court-martial. But  
22 fear of looking weak on sexual assault must not

1 permanently take the reputation of a service  
2 member with an unprovable but explosive  
3 accusation.

4 The accusation alone permanently  
5 impacts the innocent accused. It's readily  
6 apparent I believe that some reform of the system  
7 is imperative. These consequences cannot be  
8 erased once the charges are brought.

9 But the sooner an innocent client  
10 exits the system, the better and less damaging  
11 will the accusation be. I've been asked to offer  
12 some specific suggestions to address the  
13 imbalance towards the innocent accused.

14 One, my advice would be to reinstitute  
15 the Article 32 preliminary hearing as a rebuts  
16 tool for defense discovery and investigation. As  
17 you all may be aware, the only branch right now  
18 who has defense investigators is the Navy.

19 One of the justifications for the  
20 original robust Article 32, was that, that was  
21 where the defense would conduct much of its  
22 investigation. We now no longer have access to

1 that.

2 Most Article 32s are a paper shuffle  
3 and coming -- as an aside from my prepared  
4 remarks -- coming from a background of  
5 California, when we moved from a hearsay  
6 preliminary hearing -- or from a non-hearsay  
7 preliminary to a hearsay preliminary hearing, we  
8 found that there was a significant increase in  
9 acquittals when prosecutors did not have access -  
10 - did not choose to put the witness on the  
11 witness stand.

12 And I believe that, that is also  
13 happening in the military now. So, I believe  
14 that the Article 32 should be a robust  
15 investigative tool and it should include the  
16 right to call defense witnesses and liberally  
17 grant a request for defense witnesses,  
18 particularly where they're co-located at the site  
19 of the hearing.

20 We have situations in which we have  
21 asked individuals who are on the base where the  
22 preliminary hearing is being held and have not

1       been allowed to call those witnesses at the  
2       Article 32 because of the very narrow vision on  
3       the part of the preliminary hearing officer that  
4       only issues related to probable cause would be  
5       relevant.

6                To the affect that the credibility of  
7       the complainant is not an issue related to  
8       probable cause.  Something we take great issue  
9       with.  We believe that you can never predicate  
10      probable cause on a witness testimony if that  
11      witness has impeaching material that the hearing  
12      officer has not heard.

13               BGEN SCHWENK:  May I interject?  How  
14      do you reconcile that -- I understand.  How do  
15      you reconcile that with the federal grand jury  
16      system?

17               I mean there's no defense opportunity  
18      to cross or call witnesses in the probable cause  
19      determinations, like those system are not  
20      generally seen to be sort of lacking merit?

21               They get a, you know, the conviction  
22      rates aren't appreciable to the word, then you're

1 saying without -- that you're saying they are in  
2 the military system?

3 MS. COYNE: I have an answer for that,  
4 sir.

5 BGEN SCHWENK: Well that's why I asked  
6 the question.

7 MS. COYNE: Okay. Every federal  
8 defender in this country has dedicated defense  
9 investigators and I've actually done the  
10 research. I've cold-called every federal  
11 defender in the country.

12 The average numbers are about one  
13 investigator to four attorneys. We have zero  
14 investigators. Our attorneys are right out of  
15 law school by in large. If you combine -- for  
16 the last time we did the calculation, if you  
17 combine senior defense counsel and defense  
18 counsel's experience, their combined average  
19 experience was 14 months.

20 They have no training in  
21 investigation. The first case that they may  
22 receive assigned to them is maybe, it will be a

1 sex offense, and it may be a life taught sex  
2 offense.

3 They have no, they have no subpoena  
4 power, which is also very common in the federal  
5 system, so that they can obtain investigative  
6 materials by way of subpoena and using a skilled  
7 and trained investigator, with appropriate  
8 investigative tools and a database.

9 BGEN SCHWENK: Thank you. Okay. Go.

10 HON. GRIMM: Okay. I wonder if I  
11 could ask you -- I'd like to you have fly up  
12 about 50,000 feet and look down on the landscape.  
13 You spent 30 years as a public defender in a  
14 criminal justice system.

15 As one of the challenges is to the  
16 function of the military justice system is  
17 distinctly different than the criminal justice  
18 system in that we understand that it has the  
19 promotion of order, an order of discipline and it  
20 has a disciplinary purpose for the force itself.

21 That has been the explanation given as  
22 to why the military does not want to have this

1 function taken away and given to career  
2 prosecutors and defense attorneys, along the line  
3 of the systems that would happen in the civilian  
4 criminal justice system.

5 And inherent in that is the ability  
6 for example to have a convening authority make  
7 decisions that are not being driven by the  
8 prosecutor who has to prosecute the case, his  
9 evaluation and the evidence, the judge  
10 advocate's, the staff judge advocate's opinion as  
11 to whether or not the case should go forward or  
12 not in an independent way.

13 And that in and of itself is affected  
14 by how that commander may view the function of  
15 the prosecution investigation of the cases, as  
16 part of the broader function of the military.

17 As long as that duality exists, are  
18 you ever going to have reforms that address the  
19 core of what you're talking about, or are you  
20 just essentially putting Band-Aids on a problem  
21 that will resurface in some other way if you have  
22 the command involved in these decisions in terms

1 of the charges?

2 MS. COYNE: First of all, I don't  
3 think good order and discipline is ever achieved  
4 by conviction of an innocent person.

5 HON. GRIMM: I'm not disagreeing with  
6 that. I'm saying, though, as the system where  
7 those who make the decisions, who as to whether  
8 it is referred are not bound to follow the  
9 recommendation of the prosecutor.

10 MS. COYNE: Well that --

11 HON. GRIMM: If the prosecutor in the  
12 civilian system does not believe that there's  
13 probable cause, they don't take it to the grand  
14 jury to begin with.

15 This is why we don't get the kinds of  
16 concerns, at least in the federal system, with  
17 regard to bringing charges to the grand jury  
18 whereas judge, my judicial colleague has pointed  
19 out, there's no right to cross examine.

20 But what you have, is you have a  
21 system where the prosecutors with their ethical  
22 responsibilities and guidance as to what is, what



1 has to be present before you bring a charge may  
2 define the decision.

3 That doesn't happen in your pre-  
4 structured environment, the way in which the  
5 structure is created. So as long as you have  
6 that, how are you going to address the problems  
7 fundamentally?

8 Of course, I'm not undermining the  
9 concern that you have. I share that concern.  
10 But how are you going to fix it within the  
11 current structure?

12 MS. COYNE: Well I believe, and I have  
13 a suggestion that anytime there is a finding of  
14 no probable cause made at the Article 32 hearing,  
15 that, that decision should be binding on the  
16 convening authority unless he chooses to appeal  
17 the decision to a magistrate or military judge or  
18 present new evidence to increase the level of  
19 probable cause.

20 So, I believe that the commander has  
21 a role in the process. I do not believe that the  
22 current system, where there is inordinate

1 pressure, social pressure, often unacknowledged  
2 upon commanders, that they're never going to get  
3 in trouble by referring a case to a jury or a  
4 court-martial and allowing the members to sort it  
5 out.

6 Absent increased intestinal fortitude  
7 on the part of our commanders, I think what we  
8 need to do is allow them the, if you will --

9 HON. GRIMM: Coverage.

10 MS. COYNE: That is a word. Top cover  
11 is what they say in the Marine Corps of saying,  
12 okay, well I disagree with this finding, but I  
13 want -- my gut says go forward.

14 I want a gut check with somebody with  
15 more experience. Now right now, PHOs are -- I  
16 mean unless the case is extraordinarily serious,  
17 the PHOs tend to be first to our captains or  
18 reservists, sometimes reservists with a family  
19 court practice or a, you know, wills and trust  
20 practice, so they're not that conversant with  
21 criminal law.

22 If we instead say, okay, you feel

1 strongly about that, commander. Let's run this  
2 up the flag pole and see what a very experienced  
3 military judge says. And then allow that to be  
4 the failsafe. And I believe that, that is, would  
5 answer the problem.

6 HON. GRIMM: Does that create in your  
7 mind problems with being now you're involving the  
8 judiciary into decisions about charging?

9 That's a concern that I have. I don't  
10 disagree with an experience prosecutor. I also  
11 understand that there could be merit saying that  
12 the Article 32 has to be, if it finds no probable  
13 cause, that's binding absent additional evidence,  
14 or some other change in the underlying factual  
15 posture of what was that the --

16 MS. COYNE: So heard.

17 HON. GRIMM: (Simultaneous speaking).  
18 And I also agree with the notion that you want to  
19 have experience at the preliminary hearing  
20 officer level that has the, more than your 14-  
21 month example with combined experience. But is  
22 there concern that you have about involving the

1       judiciary?

2                   I mean we've taken in the military  
3       great pains to take the military judges away from  
4       the ordinary command structure.

5                   Are we throwing them into doing  
6       something in terms of the charging sufficiency  
7       outside the context in which they usually get it,  
8       which a motion to dismiss the charges or some  
9       other relief in the context in the charges going  
10      forward?

11                  MS. COYNE: I don't believe so. And  
12      that is informed by my experience in California  
13      with the hearsay prelim. When a prelim finds no  
14      probable cause, the prosecutor's entitled to re-  
15      file those charges. And that is subject to a  
16      motion to a judge to review. We call it a 995  
17      motion because it's Penal Code Section 995.

18                  And the question then to the judge is  
19      a dual one. Was the preliminary hearing  
20      magistrate correct in his legal assessment? Or,  
21      has the prosecutor submitted additional  
22      sufficient evidence to overcome that?

1                   HON. GRIMM: Like a motion to dismiss  
2 or to suppress on the base, unlike a probable  
3 cause as a basis?

4                   MS. COYNE: Right, right. And judges  
5 do that every day. They are uniquely trained to  
6 do that. He's not -- the military judge is not  
7 saying, yes, convening authority, good order and  
8 discipline. Go forward.

9                   He is strictly making a legal  
10 decision. And that's what we train judges to do.  
11 That's what we expect judges to do. That's what  
12 they do every day. We've already got this.

13                   We've got a paradigm in at least one  
14 state that I practiced in for 25 years, 24 years  
15 after a hearsay prelim was instituted and it  
16 worked, you know, as a defense counsel, not  
17 always as well as I would have liked it to, but  
18 it did work.

19                   HON. GRIMM: That's very helpful.  
20 Thank you.

21                   MS. BASHFORD: I want to make sure we  
22 get through your recommendations before we do too

1 many more questions. I think --

2 MS. GARVIN: I'm sorry, chair. I have  
3 a question about this recommendation, about the  
4 32, the one you started with?

5 MS. COYNE: Yes.

6 MS. GARVIN: If there were  
7 investigators assigned to defense, does that  
8 mitigate your request for the 32 to go to a  
9 different iteration?

10 MS. COYNE: Well the answer is yes.  
11 However, we would need sufficient -- and this was  
12 my final recommendation. So, can I --

13 MS. GARVIN: Of course.

14 MS. COYNE: -- run through and then I  
15 get there and then we can talk about it?

16 So, the other option I believe is we  
17 can require the PHO to evaluate not just probable  
18 cause but whether or not there is sufficient  
19 evidence, admissible, likely to be admissible to  
20 prove the case beyond a reasonable doubt.

21 And that the PHO should have to make  
22 that finding and report on it. I believe that if

1 the PHO said, yes, there's probable cause.

2 No, there's not likely to be  
3 sufficient admissible evidence to secure a  
4 conviction, I think that also ought to be subject  
5 to judicial review in the same way that I just  
6 described.

7 The other thing is a question of  
8 training NCIS, CID investigative agents in sex  
9 crimes. We've spent a lot of time over the past  
10 decade at least in training them to, in victim  
11 led investigations.

12 And look, as somebody's who's worked  
13 in the criminal justice system for many, many  
14 years, whose clients are often victims of sexual  
15 assaults, I will say to you that I think it's  
16 good that we have victim led investigations.

17 But I also know that we are being told  
18 by agents on the witness stand that they're being  
19 trained not to seek evidence that will contradict  
20 the complainant. Simply to accept the  
21 complainant's story.

22 So, if you want to effectuate a change

1 a level before a case is ever preferred, you  
2 train CID and NCIS investigators to respectfully  
3 investigate and seek evidence that will confirm  
4 or disprove allegations.

5 And, you know, I just want to lay out  
6 my bona fides. I'm a long-time public defender.  
7 My younger sister and brother were both police  
8 officers. My brother is -- just retired as a  
9 decorated detective. My sister also was a police  
10 officer.

11 They do a hard job and they try to do  
12 it well. This is a failure of our training them.  
13 And I believe that if we train them, they will  
14 follow their training.

15 I don't think however that is ever  
16 only the answer to just train our law enforcement  
17 better because as the Supreme Court has described  
18 it, law enforcement is often a competitive  
19 business.

20 So, we want to move more towards an  
21 objective investigation, but that alone will  
22 never solve the problem. Finally, every service



1 branch utilizing the Navy model, which is  
2 currently in effect, should have access to  
3 independent, dedicated, trained defense  
4 investigators in sufficient numbers to assist the  
5 early investigation and development of factors,  
6 which weigh on charging decisions.

7 And create a mechanism to share that  
8 information confidentially with the convening  
9 authority before he makes the preferral decision.

10 And the reason for that is, right now we can  
11 share evidence that we may have been able to  
12 cobble together as the defense counsel that bears  
13 on the charging function.

14 And we may share that with the  
15 convening authority but when we do that, that's a  
16 direct pipeline to the prosecutor. So, any --  
17 and remember investigations, defense  
18 investigations are almost always driven by  
19 confidential, privileged client communications.

20 So we're in a very -- we're not in  
21 equipoise but we're in tension with representing  
22 our client in the hopes of having him exit the

1 system as soon as possible and, you know, trying  
2 to knock out the charge before it gets filed and  
3 the realization, there are very real social  
4 pressures which may lead to the case being  
5 charged and giving up this information to the  
6 prosecution may enable them to prosecute our  
7 clients.

8 So, I think that there has to be a  
9 mechanism for that confidential sharing of  
10 information. So, in terms, to address your  
11 issue, Ms. -- is it Garvin?

12 MS. GARVIN: It is, yes.

13 MS. COYNE: Okay. Ms. Garvin, here's  
14 the situation. In my opinion, defense  
15 investigators might obviate the need for as  
16 robust a preliminary hearing.

17 But it will never solve the problem if  
18 the way out of this -- alone -- if the way out of  
19 the system is in order to convince the FO that  
20 there's no probable cause, if we're not allowed  
21 to call witnesses to establish that.

22 So, I think that -- I understand right

1 now -- and to veer off topic just a little bit.  
2 There's a very strong commitment that  
3 complainants will not be required to testify at  
4 the preliminary hearing. Complainants are not  
5 even required to speak to prosecutors.

6 I can tell you, the prosecutors are as  
7 frustrated with that as defense counsel in many  
8 cases. You know, the military justice, indeed  
9 any criminal justice system is like a three-  
10 legged stool.

11 If you make one leg longer than the  
12 other, the whole situation will topple over. And  
13 if for example, in California we have the hearsay  
14 prelim. After the first couple of years it were  
15 in effect, prosecutors saw a dramatic decrease in  
16 convictions from when they did the hearsay  
17 prelim.

18 So now routinely, prosecutors in child  
19 abuse, sexual abuse and domestic violence cases  
20 routinely take every case to a preliminary  
21 hearing, so that the witness can be tested.

22 But more importantly, in California

1 there is a hearsay prelim, the hearsay  
2 complainant is always permitted to be impeached  
3 by anything that they would have been impeached  
4 with if the witness had testified live. We do  
5 not have that provision.

6 Now when the Article 32 changes were  
7 being proposed, I was tasked by our then CDC,  
8 Colonel Steve Newman to look at the hearsay  
9 prelim and, you know, compare it with my  
10 experience.

11 I believe Senator Boxer was actively  
12 involved in drafting that and it tracked at that  
13 time pretty well the hearsay preliminary hearing  
14 in effect in California.

15 By the time it made it out of  
16 committee and into the law, every defense leaning  
17 protection of the preliminary hearing had been  
18 stripped out. So, the problem is that we have,  
19 in many ways, over balanced the system. And that  
20 does not advantage complainants.

21 It does not advantage victims because  
22 if victims are shielded from meeting with

1 prosecutors, from meeting with defense attorneys,  
2 which they can always refuse to do that in the  
3 civilian side.

4 But if they have no exposure to that  
5 and they step into the courtroom arena without  
6 having been exposed to that, they have  
7 unreasonable expectations of what is likely to  
8 occur in the courtroom.

9 And as one chief or senior -- I'm  
10 sorry -- regional VLC had to write to a convening  
11 authority that the client, all the client wanted  
12 was a conviction of which she could give her  
13 victim impact statement. That was what she  
14 wanted.

15 The convening authority was refusing  
16 a settlement that both the trial counsel, defense  
17 counsel -- oh, I'm sorry -- and VLC had approved.  
18 And Major Minikus, who was the western regional  
19 VLC, wrote a letter explaining that to force a  
20 complainant to go to trial under those  
21 circumstances with unreal expectations of what  
22 would happen could only serve to retraumatize

1 her.

2 In that particular case, it was  
3 undisputed that something happened. But the  
4 question was, as it often is in these cases where  
5 both parties have taken, have some alcohol  
6 onboard.

7 And I will tell you quite frankly, I  
8 have not seen more than one or two sexual  
9 assaults in the military in the five years I've  
10 been doing this where alcohol was not a major  
11 factor in the case.

12 So, I think that under those  
13 circumstances in allowing a better early vetting  
14 of the case will actually improve the outcome for  
15 everyone.

16 HON. GRIMM: Could I ask a question  
17 about one of your recommendations? I just want  
18 to flush it out a little bit.

19 You mentioned that particularly and  
20 for example we could combine the dedicated,  
21 qualified defense investigators for the defense  
22 as well as for the prosecution and develop

1 defense information, you suggested that there  
2 should be some thought the committee should give  
3 to recommending that there be a mechanism of any  
4 confidential defense information brought to the  
5 attention of the convening authority without  
6 having to share that with the prosecutor.

7 Here's the question that I have. If  
8 the convening authority has to make the ultimate  
9 decision and is, has to justify that to the  
10 command structure and is going to consider  
11 information that was, as we would say in the  
12 legal community, ex parte, can I think then, how  
13 is that convening authority to explain the basis  
14 for a decision for example not to move forward  
15 that is influenced by a defense investigative  
16 information that was confidentially shared that  
17 the government was not aware of, had no ability  
18 to try and to do a read of -- I don't know how  
19 that could proceed in a way. I understand why  
20 the ability to make sure that where there is  
21 defense information that ought to be considered  
22 as to whether or not the charges go forward,

1 having that be available is a commendable goal.

2 But I don't see how it can operate if  
3 it was confidential and was going to influence a  
4 decision, when the decision itself is subject to  
5 a requirement to be explained and review by  
6 evidence. How would that operate?

7 MS. COYNE: Well I think it operates  
8 like submitting a declaration under seal. When  
9 he says, I'm predicating this in part on  
10 confidential defense information, see attached  
11 sealed envelope of said information.

12 HON. GRIMM: And then that act gets  
13 seen by who upon review?

14 MS. COYNE: Well whoever the convening  
15 authority has to justify it to in order to not to  
16 go forward on the 120. I mean if he's the  
17 ultimate deciding authority, I mean, you know, if  
18 it's the CG, then that's the person who would  
19 ultimately receive it.

20 My concern is this, that mechanism  
21 ought to exist at the, at the defense discretion.  
22 Obviously not every case can it be required of



1 the defense that they do that. Sometimes that  
2 information may not exist early enough.  
3 Sometimes there'll be a tactical decision that  
4 they should not share that information.

5           However, I think that you are looking  
6 at a system driven by a commander, who's not a  
7 lawyer and when you do that, you're going to have  
8 to come up with unique and innovative ways to  
9 deal with information. And that's the one that I  
10 think works.

11           Now would we have to, you know, spend  
12 some time creating that mechanism, consciously  
13 think about it? Absolutely, sir. But do I think  
14 that because something is initially seen as  
15 difficult, that it is not worthwhile to pursue?

16           No, I do not. I think that one of the  
17 things that I see every day is people's lives  
18 being destroyed by these accusations. When you  
19 talk about 13 percent, more than one out of ten  
20 referred charges -- I'm sorry, strike that --  
21 preferred or referred charges is later dismissed.

22           One out of ten, that is a huge number

1 I believe, an unacceptably large number. And the  
2 sooner that we can exit those, usually young men,  
3 almost overwhelming young men out of the system,  
4 the more just our system will be.

5 And whatever else has happened, and I  
6 am the daughter of a career Marine, and I am the  
7 sister of a Marine, and I will tell you that the  
8 one thing that you have to say about every single  
9 person who is a member of the armed services, is  
10 they have taken an oath to defend us at peril of  
11 their life.

12 I think the least we can do is give  
13 them the same level of due process that any  
14 civilian expects in any courthouse in the land.

15 MS. CANNON: Ms. Coyne, you've  
16 indicated that investigation is an area that is  
17 needed earlier in the process. Two questions  
18 about that. When is an investigator available to  
19 the defense? And two, how many investigators are  
20 available?

21 In other words, if there's one for --  
22 tell us how the investigation works?

1 MS. COYNE: Well right now, I've been  
2 with the DSO for five years. During that time,  
3 we've had two investigators granted. We had to  
4 go to court to get it and in both of them they  
5 involved individuals who were having to be  
6 investigated in a foreign language.

7 So, in one case we had a Vietnamese  
8 client. It was a homicide case, a child  
9 homicide. And in order to develop information  
10 relevant for sentencing mitigation, we had to go  
11 to her home community where virtually everyone  
12 was Vietnamese-only speaking. We were authorized  
13 20 hours of an investigator for that homicide  
14 investigation.

15 In another case, also a homicide that  
16 occurred in the Caribbean, almost all the parties  
17 were Creole-speaking. So, we needed to obtain  
18 it, and this was a military prosecution of a  
19 military service member for a homicide committed  
20 while on leave. And ultimately that case  
21 resulted in a plead to a firearms charge.

22 But again, we were given a very

1 limited number. In my five years with the Marine  
2 court, those are the only two cases we've ever  
3 had an investigator in.

4 So, we have no investigators. And  
5 we're frequently given the idea that a military  
6 judge can order them where necessary as a, quite  
7 frankly anodyne to our request, when reality does  
8 not match that.

9 There is a lack of -- even if we have  
10 our young people, our young defense counsel  
11 trained in how to do investigations, something  
12 which is, defense investigations are unique from  
13 law enforcement investigations, just in the terms  
14 of mitigation and extenuation, which the  
15 standards of care requires that we do an active  
16 investigation on sentencing issues as well as  
17 guilt.

18 So just in extenuation and mitigation,  
19 frequently investigators need to have social  
20 science backgrounds and things of that nature,  
21 which our folks don't have. They don't know that  
22 background. So, while they're trying to learn

1       how to try a case and the military law and run  
2       motions, they are having to try to figure out,  
3       how do I interview this witness?

4                 We have to take our 4421, legal men,  
5       our legal services support specialists, clerks  
6       and use them as provers. By in large, these are  
7       PFCs to lance corporals or corporals who have  
8       also no training, who may only be in the defense  
9       billet for 12 months.

10                And we are asking them to act as  
11       provers because to interview a witness without a  
12       prover puts us in violation, a likely violation  
13       of our cannons of ethics, including the Navy  
14       rules of professional responsibility.

15                MS. BASHFORD: When you do your next  
16       question though I want, just for some  
17       prospective, in addition to the assistance of the  
18       special victim's detectives that we have and have  
19       had as prosecutors, I was just trying to count, I  
20       have six dedicated, full-time investigators to  
21       supplement the police work just for Manhattan.

22                So, it's six full-time, with sex

1 crimes experience.

2 MS. COYNE: And what I would point out  
3 is, not only does the prosecution have  
4 prosecution NCIS, CID, sometimes state or federal  
5 law enforcement, they have dedicated CID agents  
6 within the complex trial teams to execute just  
7 those, what we used to call DA investigator  
8 functions.

9 I have spoken with the CID agents in  
10 the CTT, and they have both told me, yeah, you've  
11 guys got to have investigators. And, you know,  
12 my response was, from your lips to God's ears.  
13 Please.

14 One of the things is that it takes an  
15 extraordinarily long period of time sometimes in  
16 the military to investigate a case before the  
17 referral decision is made. So, the NCIS, CID,  
18 the law enforcement folks may have had the case  
19 for a year to a year-and-a-half. The case was  
20 referred. We have no investigators.

21 They want to do an Article 32 hearing  
22 within a week or two, and then they want to set a

1 due course trial date so that they're -- I mean  
2 we're on a rocket docket. They're trying to get  
3 us to trial on a case they spent a year-and-a-  
4 half investigating, in three to six months in a  
5 situation where we have no investigators.

6 And a shop, one of the largest shops  
7 in the Marine Corps is at Pendleton. We have, I  
8 think right now 14 attorneys but one of them,  
9 we're going to end up with 15 in a minute.

10 We have two support staff, a corporal  
11 and a lance corporal. And they have to open  
12 files, handle discovery, do everything  
13 administrative in the office and be available as  
14 provers for an investigation.

15 So, you have this lance corporal who  
16 has files piling up behind him, getting called in  
17 by attorneys saying, come in here quick. I have  
18 to do an interview. I need you to make, to be my  
19 prover, to make my notes, to do what I have to do  
20 and be available to testify.

21 It is, it is, it is an unacceptable  
22 situation in any public defender's office in the

1 country. And I have worked in the Philadelphia  
2 defender's office. I've worked in Binghamton,  
3 New York. I've been a federal public defender  
4 and I was a San Diego County public defender for  
5 26 years. And nobody, nobody does what we do.

6 MS. CANNON: Let me just follow up on  
7 your question about experts.

8 MS. COYNE: Okay.

9 MS. CANNON: Is there a disparity in  
10 being able to obtain experts in these cases?

11 MS. COYNE: Absolutely. Military --  
12 the rules for court-martial, 703(d), provides  
13 that whenever anyone wants to use an expert in  
14 their case -- it says any party -- they have to  
15 give notice to the other party with a complete  
16 description of the reasons for doing that.

17 In practice, only the defense does  
18 that. In five years, I've never seen the  
19 prosecution serve such a notice on the party. We  
20 have to ask the prosecutors, please, sir, may I  
21 have an investigator? I mean I feel like Oliver  
22 Twist. And then we go to the convening



1 authority.

2 So, the prosecutor gets to say, yes,  
3 I think they need this expert or no, I don't  
4 think they need the expert. Now of course, the  
5 prosecutor only has the information we give them.  
6 We've got to give them our entire case to justify  
7 getting an expert.

8 If the convening authority says no,  
9 which is routine, I've very -- unless the case is  
10 a homicide, I've never seen a convening authority  
11 pony up with an expert at the first request.  
12 Then we have to go into the court and we have to  
13 litigate.

14 And the three things that we have to  
15 prove in a military system is, we have to prove  
16 what the expert will do for us, why they're  
17 necessary and why the attorney can't do it for  
18 themselves. And that last one has me completely  
19 baffled. Right?

20 Why can't I be a pediatric forensic  
21 neurologist? Because my undergraduate degree is  
22 in history and English, and I have a law degree.

1 I haven't been a neurologist. I don't know  
2 anything about neurology. I mean I'm being -- it  
3 is somewhat humorous. But I mean we see that.

4 And then we go in and for example --  
5 and this is a real-world case that has happened.  
6 We go in and we say, we need this expert. And  
7 this expert has agreed to do all of the pretrial  
8 work, review the discovery, review medical  
9 records, write a report, consult with counsel --  
10 everything short of testimony, \$10,000.

11 Now anybody practicing in the civilian  
12 world would think, wow, that's a deal. I mean,  
13 \$10,000 for that kind of an expert. We will go  
14 in and the prosecutor will unilaterally, for no  
15 reason, consulting nothing say, no. You can have  
16 \$5,000.

17 The convening authority will say,  
18 okay, \$5,000. You can't buy half the car, okay?  
19 \$5,000 will not answer the mail. So, we have  
20 that problem.

21 Then we have the problem of the -- we  
22 sought an expert. The expert has given us an

1 opinion that is consistent with our defense. We  
2 go in and ask for the expert. The judge orders  
3 the expert.

4 Now the prosecution is given time to  
5 obtain a so-called adequate government  
6 substitute. We laughingly call this the  
7 inadequate government substitute because what  
8 happens is, the prosecutor's thinking, I don't  
9 want Dr. Expert coming in. I'd rather have  
10 master's degree, not-so-expert coming in. And  
11 then we're forced to litigate that.

12 So, one of the problems and the way  
13 the expert problem feeds into the investigative  
14 problem is, our attorneys are having to spend so  
15 much time litigating for resources that they  
16 don't have time to prepare their case or to  
17 investigate the case in the way that they should.

18 MS. BASHFORD: We have time for just  
19 one more question. And Jennifer, I saw your hand  
20 your hand up. Do you want to go, too? The clock  
21 is ticking.

22 MS. LONG: All right. And my question

1 was, and of the many things I wanted to ask you,  
2 you had made a statement that the investigators  
3 are being trained not to seek contradictory  
4 evidence in these cases, in sexual assault cases,  
5 which I would just posit is not in the terms of  
6 prosecution perspective.

7 But it's not a victim -- that's not  
8 what we teach when we teach investigations, which  
9 we feel is common-formed and victim-centered.

10 But I'm wondering if you could expand  
11 on who is teaching investigators that they should  
12 not? Basically, what you're saying is they're  
13 being taught not to conduct thorough  
14 investigations in these cases. Is that correct?

15 MS. COYNE: Well when we get an NCIS  
16 agent -- when I say we, obviously I'm a civilian.  
17 I'm not sitting at counsel table.

18 I'm sitting in the spectators, wishing  
19 I could throw a pencil at my attorney's head  
20 sometimes because, you know, I'm like, you're  
21 missing it, you're missing it. Not because  
22 they're unprepared in the sense of, they've done

1 everything they can to get prepared, but we just  
2 haven't been given enough time.

3 So, I'm sitting in the spectators, but  
4 I am hearing the testimony. And the testimony  
5 is, when asking the NCIS agents, did you do this?  
6 No. Why didn't you do it? Well because, you  
7 know, we're not trained to do that. We are  
8 trained to do this.

9 So, I've heard that answer over and  
10 over again. As to who's training them? I don't  
11 know. We can't get copies of their -- they fight  
12 us on getting copies of their training manuals so  
13 that we can see what the rules are given to them  
14 for conducting investigations.

15 But over and over again, what we see  
16 are leads, which are clearly within the text of  
17 the statement given by the complainant, which are  
18 simple not investigated. It's like we have the  
19 complainant's statement. We're done now.

20 And that is terribly unfair, and I  
21 think it's unfair to the victim and the accused.

22 MS. BASHFORD: I'm going to let Mr.

1 Markey have one final.

2 MR. MARKEY: Thank you for being here  
3 today. And your presentation has been very  
4 helpful. You went through some logistical side  
5 effects of QC and somebody that's been the target  
6 of a sexual assault investigation.

7 MS. COYNE: Yes.

8 MR. MARKEY: One of the things that  
9 was concerning to me that you said, and hopefully  
10 you can explain a little bit is when somebody has  
11 been identified as a target, as the suspect in a  
12 sexual assault investigation, they are singled  
13 out as a sex offender by command. Can you  
14 describe what that looks like?

15 MS. COYNE: Well that looks like a  
16 PMB, you know, a professional military brief is  
17 called together. And it may be at the senior NCO  
18 level will call a crowd together and say, you  
19 know, we've had this happen.

20 Now remember, these are small groups  
21 of people and they understand -- even if the  
22 client is not named -- the facts that they're

1 talking about.

2 In other situations, we've had guys  
3 who are taken out of their assignment and who are  
4 basically sat at a desk on a quarter deck and do  
5 nothing all day long. We have our attorneys --  
6 or sorry -- our clients who are in legal hold are  
7 transferred to headquarters battalion where  
8 everybody, you know, all the broken toys go.

9 So, it's a public acknowledgement that  
10 these people have been accused. So, it runs the  
11 gamut from how it happens.

12 We've seen commanders, when something  
13 happens send out a written notice, basically, I  
14 will not tolerate sexual assault within the  
15 command, but it's triggered by an incident, which  
16 is being actively investigated. So, in all those  
17 ways that's what happens.

18 MS. BASHFORD: Ms. Coyne, thank you so  
19 much for coming. We appreciate your testimony.  
20 We'll be on break until 10:40 when we'll be  
21 hearing from some civilian sexual assault  
22 investigators. Thank you again.

1           (Whereupon, the above-entitled matter went  
2 off the record at 10:33 p.m. and resumed at 10:43  
3 a.m.)

4           MS. BASHFORD: Okay, we're now being  
5 joined by Sergeant O'Connell, Sergeant Wild, and  
6 Major Hohman.

7           If you could just briefly introduce  
8 yourself before your remarks, keeping in mind we  
9 do have your bios? Sergeant O'Connell, let me  
10 start with you.

11          SGT. O'CONNELL: Good morning, my name  
12 is Kelly O'Connell I'm the detective assigned to  
13 the Boston Sexual Assault Unit. I've been with  
14 the Department 32 years since November.

15          I've been assigned over to sexual  
16 assault for nine years. Previous to that, I  
17 coordinated the Human Trafficking Taskforce in  
18 Boston in developing a trafficking unit in Boston  
19 over in the sexual assault unit.

20          MS. BASHFORD: Sergeant Wild?

21          SGT. WILD: Thank you, I'm from the  
22 Albuquerque Police Department. I have had about



1 six years of investigation specializing in sexual  
2 assault.

3 I've been over at the SASCRANS unit,  
4 which is actually active and our cold case. So  
5 we have approximately 5000 cases that we're  
6 revisiting, getting tested on the sexual assault  
7 backlog, and going forward and revisiting, we've  
8 been able to identify a lot of issues on how  
9 these cases fall through the cracks and how we're  
10 actually progressing through the actual system at  
11 this time.

12 MAJ. HOHMAN: Good morning, my name is  
13 Steve Hohman, I'm the Major Commanding Officer of  
14 the Baltimore Police Department special  
15 investigation Section.

16 SIS is comprised of about 13 different  
17 units of which our sexual assault investigators  
18 and our child abuse detectives are assigned.  
19 I've been with the BPD and in about 10 days I'll  
20 start with my 20th year with the BPD.

21 Most of that time has been in criminal  
22 investigations. I've spent about eight years in

1 the homicide unit as a Detective, a Sergeant, and  
2 a Lieutenant, commanded a couple of district-  
3 level detective squads, and I've been in SIS  
4 since 2015.

5 I look forward to talking about this  
6 important topic with everyone here. One of the I  
7 think unique aspects about the BPD right now is  
8 that we are currently under a Federal consent  
9 agreement with the Department of Justice of which  
10 the sex offense investigations are a big part.  
11 So I think that'll be helpful here.

12 Thank you.

13 MS. BASHFORD: Do you have remarks?  
14 Why don't we start with you, Sergeant O'Connell?

15 SGT. O'CONNELL: As I stated, I've  
16 been with the Sexual Assault Unit for over nine  
17 years and conducting investigations as a  
18 supervisor. I supervise the cases we are  
19 assigned.

20 We co-located and have a family  
21 justice center in Boston, which co-located out of  
22 domestic violence and the crimes in the human

1 trafficking unit. We have some crossover  
2 investigations.

3 Coupled with that, we also have  
4 advocate-based programs which are also in a  
5 building which also enhances our ability in our  
6 investigations and working with victims providing  
7 assistance through advocate-based programs out of  
8 our office, with the victims.

9 Our unit primarily handles 500 cases  
10 a year. Of those cases, they are either 911  
11 calls or walk-in calls to our Districts or walk-  
12 ins for our hospitals, or referral by advocate  
13 programs that work with the City.

14 As well as coordinating, we handle a  
15 large college component with the City. We have  
16 over 35 either colleges or community colleges in  
17 the greater Boston area.

18 So on average, we have a population of  
19 650,000 and you could probably add another  
20 150,000 students coming into our city every year.  
21 So, we have a high population of young adults who  
22 are out in the college experience.

1                   Primarily, luckily for us, our  
2 colleges and for the most part the large  
3 universities, have sexual assault trained  
4 investigators and primarily they run the  
5 investigations unless the jurisdictional issues  
6 occur in Boston jurisdictions, where we take the  
7 lead in the investigations.

8                   How we do our investigations, direct  
9 in terms of trial-informed and evidence-based, in  
10 terms of how we go forward on our investigations.  
11 Detectives primarily conduct our interviews with  
12 the supervisor or the C-level investigation.

13                   And it starts from an initial  
14 interview and then forwarded into an  
15 investigation where we follow that and present  
16 that to our District's Attorney's Office and  
17 really hands-on directly coordinates with our  
18 District Attorneys in terms of charging  
19 mechanisms, whether the case comes forward  
20 immediately if it's an arrest.

21                   For example, one direct patrol can  
22 make an arrest on scene. Typically, if that is

1 not the case, the case is coming to our office.

2 A majority of the cases come in  
3 through referrals of our investigation and that  
4 is much more efficient in terms of whether  
5 they're going to do it in the District Court or a  
6 grand jury indictment in the Superior Court. So  
7 that is procedurally how we do it.

8 In terms of our training with our  
9 detectives, they receive 40 hours of  
10 investigative school training initially when they  
11 do come in our office and we focus in, as I  
12 stated, on trauma-informed approaches in terms of  
13 how people are interviewing.

14 This is an area that we're going to  
15 use in terms of the most difficult cases to do  
16 because it's a very grey area. And we are a  
17 paramilitary organization so similar to our  
18 military in terms of procedures around how we  
19 handle cases based on probable cause and internal  
20 to the criminal process.

21 We have rules of how we do that within  
22 the world of sexual assault. I have a retired

1 clerk who's Ms. Cheap. We don't know sexual  
2 assault because we don't know the crime and if  
3 you can understand what that means in terms of  
4 violation of someone's body then you have to  
5 treat it as unlike any other crime in terms of  
6 how you investigate.

7           And that goes from the moment that you  
8 meet a victim and how you handle that victim to  
9 through the investigation into the prosecutorial  
10 mode and how we treat victims, and also how we  
11 handle the investigations in terms of looking  
12 objectively at the evidence and bringing the  
13 evidence-based approach in terms of our  
14 investigation, bringing the best case forward for  
15 our determination as to whether we charge or not  
16 charge a case through the District Attorney's  
17 office.

18           So in terms of looking at the  
19 questions that we received in terms of what  
20 questions were raised, there were many and  
21 hopefully, we can help you in terms of answering  
22 whatever questions you do have for us.

1                   SGT. WILD: Hello. Again, Amanda  
2 Wild. Our investigations are very similar, we do  
3 have a family advocacy center where all of our  
4 violent crimes are housed as far as homicide,  
5 robbery, domestic violence, and sex crimes.

6                   It's all in one building and then it's  
7 a very non-police atmosphere, which I think  
8 that's pretty much the standard that you have.  
9 And it's a one-stop place for victims of sexual  
10 assault.

11                   Right across the hall, we have our  
12 SANE, we have our rape crisis, we have adult  
13 protective services, we have CYFD. We have  
14 advocates that can get restraining orders. Part  
15 of our unit is split so we have active cases that  
16 we're dealing with.

17                   And one thing that I always make known  
18 when we come out and we do outreach is the fear  
19 of the blue suit. Victims of sexual assaults do  
20 not want to report to that blue suit or whatever  
21 uniform it is. It's an intimidation factor.

22                   So we always allow them to know

1 there's other ways to report a sexual assault.  
2 The reality is crimes don't get reported just  
3 like a robbery, they don't call 911 when  
4 somebody's still in the actual facility.

5           They don't know where to place, they  
6 ran, they don't know where they were, and it's  
7 delayed. They're processing that, did that  
8 really just happen to me? What just happened to  
9 me? And it takes time for that processing and  
10 that reality to kick in.

11           Once they are safe, now it's where do  
12 we go? It's embarrassing to have a police car  
13 standing out or parked in front of your house.  
14 Victims don't want to have to report that.

15           Our stats show that a majority of our  
16 victims are not who actually called 911, it's a  
17 third-party friend, a family member. Or if it is  
18 an acute where it's just happened, it's somebody  
19 who's witnessing the actual assault.

20           So we're getting calls in many  
21 different ways because our family advocacy center  
22 is our big place where victims can feel free to



1       come in and speak to a trained investigator.

2                       We walk in, and I always call it my  
3       Mr. Rogers sweater, we cover our backs then, we  
4       make sure that it is a non-confrontational --  
5       they're not the ones who are being interrogated.  
6       We make sure that they understand what their  
7       rights are.

8                       I'm a big advocate for victim's  
9       rights. I believe that empowering the victim who  
10      has just been sexually assaulted, giving them the  
11      information they need to determine how the best  
12      process is for them to handle this.

13                      I am a tool to be used. If they want  
14      justice, it is their determination on how they  
15      get justice. If they want to go through the  
16      legal system, I am there to assist them. So any  
17      information that I can provide to them before  
18      they're willing to come forward is my duty.

19                      I always advise everybody come in, sit  
20      down, and talk with us, understand how we're  
21      going to do this investigation, where we're going  
22      to go. If they understand it, we can retain that

1 victim throughout the actual process.

2 The criminal justice system is not for  
3 everyone. It is not the right process for  
4 everyone. Somebody may be able to come in and  
5 just need that validation that, yes, this did  
6 happen, yes, this was wrong, but I do not want to  
7 go stand in front of a jury. So how do we help  
8 them get there?

9 Our unit is there to assist and help  
10 them, and we believe in the victim's rights. We  
11 believe in empowering the victim to go through.  
12 One of the big things that we have on our sexual  
13 assault backlog is with almost 5000 cases that  
14 were not investigated, we were able to identify  
15 some key issues.

16 Where did we let the victim down? A  
17 lot of that is from the original standpoint. We  
18 did not believe the victim when they came in,  
19 whether that was the blue suit, whether that was  
20 the second conversation of why were you drunk?

21 Whatever it is, we lost that victim so  
22 the case did not continue. We're revisiting, we

1 have a victim notification process, we also  
2 created a case review counsel. This isn't just a  
3 Police Department issue, it's the stakeholders'  
4 issue.

5 We bring in a rape crisis advocate, we  
6 bring in SANE nurses, the crime lab, the DA's  
7 office, the investigators, and we're discussing  
8 these old cases and how do we move this case  
9 forward through a case review?

10 Before we make contact with that  
11 victim, we want to know all the evidence, we want  
12 to know what the questions from the District  
13 attorney's office, and then what is the best  
14 approach to notify that victim?

15 So in Albuquerque we have a lot of  
16 diversity, we have the colleges, we have Kirtland  
17 Air Force Base, and we've had to learn with a  
18 multidisciplinary team that we all have to be  
19 united.

20 If they go to the campus, they have  
21 the same practices as they do at Albuquerque for  
22 Bernalillo County. So we meet once a month as a

1 multidisciplinary team to discuss consistencies,  
2 best practices, and how we're going to keep and  
3 retain the victim throughout the process.

4 Thank you.

5 MAJ. HOHMAN: Thanks, and good morning  
6 again. I want to start by thanking the Committee  
7 for inviting me to speak about this important  
8 topic.

9 As we all know through recent events,  
10 the topic of sexual assault has been at the  
11 forefront of our national conversations. While  
12 some of the information and reaction to that  
13 information have been at times troubling, I am  
14 encouraged that people are willing to talk about  
15 it and have conversations about it.

16 One thing that I have learned through  
17 investigating sexual assault is that outcomes are  
18 better when you work together, investigators,  
19 medical professionals, prosecutors, and  
20 advocates.

21 If the national attention facilitates  
22 people partnering and working together, then I

1 say that's a good thing. As I mentioned, I'm  
2 about to begin my 20th year with the BPD, most of  
3 that time has been working robberies, murders,  
4 shootings, drugs.

5 If you had told me I was going to end  
6 up working in sexual assault investigations, I  
7 wouldn't have believed you but I could tell you  
8 that the last few years of my career have  
9 probably been some of the most rewarding.

10 Unlike robberies and shootings and  
11 homicides, sex offense investigators have an  
12 opportunity to work with multidisciplinary teams.  
13 You have heard some mention of that earlier.

14 Again, it's partnerships and  
15 prosecutors, medical professionals, and advocates  
16 that really make this type of investigation  
17 unique and very rewarding. As I mentioned, in  
18 2015 I took command of the special  
19 investigations section.

20 We're responsible for investigating  
21 roughly 12,000 to 19,000 criminal investigations  
22 a year for the BPD. The sex offense and child

1 sex offense units are a small part of that.

2 At the time that I took command, the  
3 Department of Justice was just finishing a review  
4 of the sex offense and the cases as part of its  
5 investigation of the patterns and practices  
6 within the BPD.

7 Unfortunately, the DOJ, where there  
8 was not an official finding, did find there was  
9 evidence to suggest that there was bias in the  
10 way that we investigate sexual assaults in  
11 Baltimore. And there really was a lack of  
12 Federal investigations.

13 To make matters worse, at the time,  
14 the clearance rate for rape in Baltimore was a  
15 dismal eight percent. Unfortunately, this was  
16 not the first time that the BPD had made the news  
17 for the wrong reason.

18 Around the year 2000, the Baltimore  
19 Sun published a series of articles that reveal  
20 that sexual assault victims were not being  
21 treated properly by BPD officers and detectives.

22 They found the BPD unfounded rate was

1 well over 30 percent of reported sex offenses,  
2 many times over the national average.

3 The Department then undertook a major  
4 overhaul of the sex offense unit, we tripled the  
5 staffing, and created a cold case unit and  
6 revamped Baltimore SART, which is our sexual  
7 assault response team.

8 The Mayor's Office for the first time  
9 established a coordinator at her Office of  
10 Criminal Justice, at the time, his office of  
11 Criminal Justice. They were tasked with  
12 spearheading and coordinating SART and also  
13 overseeing some of the BPD reforms.

14 At that time, it appeared the BPD had  
15 learned its lessons and we were dedicated to  
16 showing best practices and investigating  
17 incidents thoroughly in a trauma-informed manner.

18 Unfortunately, as time passed,  
19 however, the urgency to maintain those new high  
20 standards, began to wane. As detectives retired,  
21 got promoted or reassigned, they were not  
22 replaced and command leadership changed often

1 during that time.

2 When the DOJ finding report was  
3 issued, it was clear that we had dropped the  
4 ball. That is not to say that we are not and  
5 still are not talented, dedicated pros still  
6 working in the unit.

7 The failure was not of the individual  
8 investigators but a failure by the Agency in  
9 general. We failed to prioritize sex offense  
10 investigations. That said, I'm happy to say that  
11 since that time in the last three years, we have  
12 made tremendous strides towards improving our  
13 response to sexual assault.

14 As I mentioned, we're currently under  
15 that Federal consent agreement that has been  
16 signed, and there's many, many mandates specific  
17 to the way we conduct sexual assault  
18 investigations.

19 That said, we didn't wait for the  
20 signing of the official consent decree to get  
21 started. We started to implement some of the  
22 changes prior. We implemented an investigative



1 checklist of over 30 key investigative tasks that  
2 must be completed for every investigation.

3 This ensures a thorough, timely, and  
4 the most importantly, unbiased investigation. We  
5 made a more robust supervisor review, Sergeants  
6 now have to submit reports outlining case reviews  
7 at regular intervals, 48 hours, 7 days, 14 days,  
8 28 days, and 60 days.

9 Supervisors and commanders audit those  
10 reports on a regular basis to ensure compliance.  
11 We have a weekly case review with myself with the  
12 commander and the unit commander of the unit to  
13 scope cases for investigative thoroughness and  
14 administrative thoroughness.

15 And then we also meet monthly with our  
16 SART partners to go over best practices and  
17 protocol. We created a soft, trauma-informed  
18 family friendly waiting room and interview room,  
19 the first of its kind in a major police  
20 department.

21 We also are in the process of  
22 rewriting our entire sexual assault policy and

1 our unit SOPS. As a result over the last year,  
2 we sustained clearance rates of at least 50  
3 percent, up from 30 a few years ago, almost 15  
4 points above the national average of 36 percent.

5 Our unfounded rate has dropped between  
6 five and eight percent over those last few years.  
7 We test nearly 90 percent of all of our rape kits  
8 and we have a zero backlog for testing.

9 DNA testing recently helped us solve  
10 decades-old cases which resulted in sentences of  
11 109 years in one case and life in another, just  
12 to name a few examples.

13 We've made great progress but there's  
14 still a lot of work to be done. We will be under  
15 the consent agreement for many years to come and  
16 continue to improve as a result.

17 The truth is that there's so many  
18 sexual assault survivors that do not wish to  
19 report and we must do better to provide a system  
20 that allows survivors to feel safe, have  
21 confidence in the system, so that we hold  
22 perpetrators accountable.

1                   It is clear by convening this  
2                   committee that each of you are committed to  
3                   making this a priority.

4                   Just in closing, my overarching  
5                   recommendation would be that you continue to stay  
6                   the course, make it a priority, use the resources  
7                   of the professionals that are tasked with the  
8                   response.

9                   I want to thank you again for being  
10                  here. On behalf of the Baltimore Police  
11                  Department, we're honored to be a part of this  
12                  process. I look forward to answering any  
13                  questions you may have.

14                  MS. BASHFORD: I'm going to start it  
15                  out and then I'll go to Dr. Spohn.

16                  As people on the very front line,  
17                  where everything gets initiated, particularly  
18                  Sergeant Wild, you talked about empowering  
19                  victims to see they get justice, but are you also  
20                  looking to see if you can either corroborate or  
21                  find evidence that contradicts?

22                  I know you said you don't want to

1       interrogate them but sometimes hard questions  
2       have to be asked. I'm going to start with you  
3       but then see what the rest of you think as well.

4                   SGT. WILD: Absolutely. As an  
5       investigator, you're determined to find the  
6       facts, which if you're doing the investigation  
7       and there is something that contradicts, then  
8       that's a second interview.

9                   And this also working with your  
10      advocate. Anytime that you're going to have go  
11      back in working with an advocate and letting them  
12      know, look, the evidence is supporting something  
13      else.

14                   We always suggest the advocate is  
15      right, let them know, hey, look, there's been a  
16      fork in the investigation, I have to revisit this  
17      interview.

18                   And advise the advocate of, yes, we're  
19      going to have to ask, and I've always told the  
20      victims I would much rather get that answer here  
21      with the two, three of us, versus leaving you up  
22      for a defense attorney later.

1                   And doing a thorough investigation.  
2                   So absolutely, I believe that you have to find  
3                   the facts of the case, the complete case, and  
4                   find out what actually took place. And that's a  
5                   full investigation.

6                   MS. BASHFORD: Sergeant O'Connell?

7                   SGT. O'CONNELL: I think that I can  
8                   certainly agree with Amanda in terms of how our  
9                   investigations are conducted in this.

10                   Definitely, when we say it's an  
11                   objective approach but also an informed approach  
12                   and working with victims and with advocates and  
13                   as well as with our District attorneys in terms  
14                   of approaching the victim when we are identifying  
15                   if an investigation if an investigation has  
16                   brought up some inconsistencies, and spanning  
17                   ahead of that and getting ahead of that  
18                   information that has been brought to our  
19                   attention so that we can sit down with the victim  
20                   and see what's an explanation for that.

21                   And a lot of times there is. We have  
22                   to realize that when we're dealing with a trauma

1 assault, there's multiple things that are going  
2 on with that victim in terms of their  
3 neurobiology and if they've had training with  
4 trauma-informed neurobiology, other trauma,  
5 that's a used component of the victimization, and  
6 trying to understand that.

7 We have to train our investigators not  
8 so much on the patrol side and that could be an  
9 issue that we run into a lot of times.

10 But in terms of having a consistent  
11 investigation, we are looking at every aspect  
12 whether it consists with what the person was  
13 telling or what we've seen, that has to be  
14 brought forward so that if they're going through  
15 a criminal process, the victim is aware and is  
16 either able to talk that over with us or we  
17 identify an issue that we just close that case  
18 down at that point versus just letting it ride  
19 and getting to a point where it's a court process  
20 and it falls apart completely.

21 MS. BASHFORD: Major Hohman, given  
22 that you're under a consent decree, do your

1 investigators feel able or empowered to ask  
2 difficult questions when necessary?

3 MAJ. HOHMAN: Yes, so we've actually  
4 taken great lengths to really spell it out in our  
5 SOP, even suggesting certain lines of  
6 questioning.

7 As they mentioned as well, I think  
8 it's very important to involve advocates early on  
9 in the process to explain how the interview's  
10 going to go, that a detective may have to ask  
11 certain questions because we are preferring a  
12 criminal procedure eventually.

13 I had an old homicide sergeant that  
14 used to tell us that when you develop a suspect,  
15 you should try to prove that they didn't do it,  
16 right? So, if you can't do it, you have the  
17 right person, right?

18 So I think it's kind of that larger  
19 big-picture that not only do we have a duty to  
20 the victim, we have a duty to the entire system  
21 to conduct a thorough investigation, follow the  
22 evidence where it goes, so if that means

1       exonerating a person of interest or suspect, then  
2       that's what it means.

3                But I think transparency and open  
4       conversations with the victims and their  
5       advocates is really important to lay out the lay  
6       of the land, if you will, this is how it's going  
7       to work.

8                And truthfully, in the past we've felt  
9       unsure of that, not just from a Police Department  
10      standpoint but an advocacy standpoint because I  
11      think there's this notion to provide services,  
12      therapy, things of that nature, but not so much  
13      explain the criminal justice system to survivors  
14      that are navigating uncharted territory.

15               DR. SPOHN: Major Hohman, you  
16      mentioned the issue of unfounding which is  
17      something that a number of Police Departments  
18      have been subjected to some pretty negative  
19      attention, Baltimore, New Orleans, and others  
20      over the past couple of decades.

21                So I'm wondering whether, and if so,  
22      how you brought your unfounding rate down and I'd



1 like to ask each of you how you define unfounding  
2 and what decision rules or SOPs you use for  
3 deciding whether those should be unfounded or  
4 not.

5 MAJ. HOHMAN: So, after the 2000  
6 articles appeared in the Baltimore Sun, again,  
7 national average is between 5, maybe as high as  
8 10 some years, right?

9 We were only 32 percent, that's  
10 obviously an astounding number, and what we  
11 found, actually was that patrol officers were --  
12 we kind of have two options when you get a call  
13 for service.

14 You can write a written report or get  
15 an oral code and there's about six or seven  
16 different options for the oral coding, and what  
17 we had found was many of our patrol officers were  
18 coding the calls prior to involving  
19 investigators.

20 It's very common for a sex worker to  
21 report a sexual assault and the patrol officer,  
22 who is basically making an assumption that since

1 you're sex worker, this can't be a founded rape  
2 case, and coding the call before even involving  
3 the investigators.

4 So in 2000, we created a policy that  
5 patrol officers are not allowed to unfound a case  
6 on the scene so, essentially, they have to write  
7 a report and call a detective for, every single  
8 sexual assault call for service.

9 The only exception to that is if they  
10 arrive and it's abundantly obvious that the call  
11 was originally coded in error, meaning the 911  
12 dispatcher made an error and the call came out  
13 for a sexual assault but they showed up and it's  
14 a hold-up at a 7/11.

15 Obviously, that's not a sexual assault  
16 and they can code that out. But short of that,  
17 every other incident is reported to a detective.  
18 I want to say the last year there were roughly  
19 880 sexual assault calls for service; of those,  
20 760 plus had a report or investigation conducted  
21 as a result.

22 Truthfully, the unfounded issue was

1 not much of a concern with the consent decree. I  
2 think that part of why our investigations fell  
3 off in between that time period was that we were  
4 really, really focused on the unfounded and we  
5 had some really good policies on the unfounded,  
6 but the thoroughness of the rest of  
7 investigations kind of fell off.

8 So, now for us to unfound the case, it  
9 has to be presented to our SART prior to  
10 officially unfounding it. So, all of those 34-  
11 plus checklist items on the investigation have to  
12 be conducted.

13 It's not to say that every item is  
14 applicable, but they have to at least take a look  
15 or give an answer as to why it's not applicable.  
16 And at the end of the day, it's really about  
17 meeting the elements of our UCR, uniform crime  
18 report.

19 So if those elements aren't met, we're  
20 not saying something didn't happen, what we're  
21 saying is that for the purposes of UCR, for the  
22 purposes of a reported rape, the elements of the

1 crime had to be met so we would unfound that  
2 case.

3 Once the detective makes those  
4 findings, their immediate supervisor or sergeant  
5 reviews that and either approves or sends it  
6 back, then the unit lieutenant, and then it would  
7 go to me as the Commander, and then we would  
8 present that to our SART.

9 While the SART's findings aren't  
10 binding, the ultimate decision lies with the  
11 Police Department. There have been instances  
12 where questions have been raised.

13 Let's go back and follow up on that so  
14 we can see what the interest of that is before we  
15 make a final decision.

16 GEN. SCHWENK: Would you say that  
17 unfounded to Baltimore Police Department means  
18 more like false or baseless, or something  
19 happened but not enough for probable cause, or  
20 something else?

21 MAJ. HOHMAN: So the first threshold  
22 would be whether the elements of the crime were

1 met for the purposes of the UCR.

2 GEN. SCHWENK: Just some evidence, no  
3 matter how minimal?

4 MAJ. HOHMAN: Correct.

5 GEN. SCHWENK: So it probably is even  
6 below probable cause.

7 MAJ. HOHMAN: And quite frankly, we  
8 are on the side of caution.

9 If it's questionable, we're going to  
10 keep the case even if it means keeping it open  
11 and we don't get the clearance, we're going to  
12 keep it open rather than unfounded.

13 GEN. SCHWENK: So you're close to  
14 almost false or baseless because there's enough  
15 evidence, or if there's any evidence, on any  
16 case, you'll go forward. It's only if there's a  
17 gap.

18 MAJ. HOHMAN: And in very few cases do  
19 we have where a victim survivor will come in and  
20 completely recant the story. The only time that  
21 we really would say this is a false report is if  
22 we had video evidence --

1 GEN. SCHWENK: More baseless than  
2 false.

3 MAJ. HOHMAN: Absolutely.

4 SGT. WILD: I think Albuquerque Police  
5 Department are very similar to what the Major  
6 said.

7 GEN. SCHWENK: Except for getting a  
8 consent decree soon?

9 SGT. WILD: We are under DOJ but it's  
10 for use of force, separate subject. However, we  
11 actually spend more time in investigating our  
12 unfounded than we do to prove that there is no  
13 evidence to support that crime.

14 We have a very low percentage. We're  
15 probably about four percent, four to five  
16 percent. The majority of those we have evidence  
17 to support that the crime did not happen. Hence  
18 surveillance videos, witnesses, alibis that  
19 deplace.

20 And those ones we typically find with  
21 mental health issues so we look back over the  
22 mental health and they may have been a victim in

1 their youth and certain things are retriggering,  
2 and those are the ones that we're seeing more of  
3 the unfounded due to the fact that there is some  
4 instability as far as that.

5 And the reason why we spend the most  
6 time investigating those is we've also found out  
7 that those with mental health are the perfect  
8 victim, those are the ones the perpetrators are  
9 looking for.

10 So we never want to have to assume,  
11 oh, yes, it's just this person. We do the full  
12 investigation and we have to make sure that if  
13 we're going to put that stamp of unfounded, there  
14 is no evidence and we have evidence to support it  
15 did not happen versus the other way.

16 If we're not able to find probable  
17 cause, then we close the case out pending further  
18 lead, and then we go and reopen it any time new  
19 additional leads come forward.

20 SGT. O'CONNELL: In terms of unfounded  
21 in, let's say, Boston's jurisdiction, first off,  
22 in terms of case law in terms of cases that we

1 have to backlog of our sexual assault kits, we do  
2 have a backlog.

3 We have had that issued without  
4 jurisdiction. We test all reported cases that  
5 are reported to our Department. What we've seen  
6 is a bump-up in unreported cases, where the kits  
7 is done but they're not reported to the police,  
8 and we take evidence jurisdiction by collecting  
9 those cases as follows.

10 Those kits are not counted unless that  
11 person comes forward. They may come forward a  
12 week or month or typically, you hold the kit for  
13 a year or six months of keeping it.

14 We've just had a statutory change in  
15 Massachusetts with the kits but in terms of the  
16 cases unfounded, in my time here, you can argue  
17 that we rarely unfound.

18 We don't really have a lot of  
19 unfounded cases, we have cases that are brought  
20 initially to our investigators where in terms of  
21 patrol, in terms of a 911 call, patrol would be  
22 response.



1                   They respond as well as the patrol  
2 supervisor and who goes along with them in  
3 response to that scene, it's a determination to  
4 see, number one, is it an actual sexual assault  
5 that we're going to be notified on.

6                   Sometimes, typically, it will just  
7 send a notification to us so there's different  
8 levels in terms of how cases are referred to us.  
9 So once we do get a case, it's already been  
10 locally triaged by patrol if it's through a  
11 patrol or if it comes into a hospital or to the  
12 victim themselves.

13                   Our investigation is based on evidence  
14 collection and in terms of identifying once it's  
15 back in the system, so how to corroborate and  
16 that's where the evidence-based approach and  
17 corroboration to assist a case moving forward.

18                   As far as the victims, we're well  
19 aware in terms of how these cases can be  
20 difficult. When you're dealing with cases like  
21 domestic where they know each other as an  
22 acquaintance or contacts which primarily the

1 military has, they know who the victims are.

2 And most of our cases are those types  
3 of cases. Our police cases they do not know  
4 their assailant, though those are certainly  
5 lower. So we have to objectively identify the  
6 evidence to help corroborate a case going  
7 forward.

8 MR. KRAMER: Thank you. First of all,  
9 Sergeant O'Connell, great game by the Red Sox  
10 last night. I have a question first for you but  
11 for everyone.

12 You talked about the number of  
13 colleges in Boston and universities, and there's  
14 two parts.

15 I didn't understand, are they allowed  
16 to do their own investigations and are they ever  
17 referred to you? Or they're just handled in the  
18 university disciplinary system?

19 SGT. O'CONNELL: As I stated, some of  
20 the larger universities have their own sexual  
21 assault investigators so they're trained and they  
22 conduct their own investigations.

1           We are currently in the process with  
2           the larger schools we have, it's developing an  
3           MOU with them. We have one currently in the  
4           Southeast and that is actually in effect, but the  
5           other schools we are working between our legal  
6           and their legal in terms of how you share  
7           information.

8           Particularly because of the  
9           jurisdictional issues where if they have the  
10          investigation, if it's on their property, they  
11          handle the investigation and if they do not have  
12          the training to investigate, it's the smaller  
13          schools where we're the lead investigators on  
14          that.

15          But the MOU was helpful in terms of  
16          exchanging information, particularly for public  
17          safety matters if there are assailants out there  
18          that certainly everyone should be well aware of  
19          in terms of public safety.

20          So it's an MOU approach that we're  
21          working with our college staff, and also, we have  
22          our SART teams that we meet with regularly in

1 terms of working with our own college.

2 MR. KRAMER: So this is the second  
3 part which is for everyone, and both you and  
4 Sergeant Wild talked about the number of  
5 universities in your cities and Johns Hopkins is  
6 involved right now obviously.

7 And you talked about people being away  
8 from home and young kids being away from home.  
9 And we've heard testimony and new materials about  
10 the number of sexual assault cases that involve  
11 alcohol.

12 And I wonder if that's true when  
13 you're talking about especially the cases  
14 involving maybe university students or in  
15 general, and the particular problems that present  
16 when there's alcohol or excessive alcohol,  
17 especially excessive alcohol use involved.

18 SGT. O'CONNELL: I'm sure that my  
19 colleagues can back this but alcohol is probably  
20 one of the key problems in terms of dealing with  
21 particularly younger students and even our  
22 millennial population out there is the nuances of

1 social media and in terms of what they are  
2 constantly bombarded with.

3 There's multiple factors in terms of  
4 what goes on with their lives, but alcohol is  
5 certainly a major problem that we see,  
6 particularly with case intakes. And when it  
7 comes to sexual assault, there aren't witnesses.

8 It's usually two people and two people  
9 only, and it's going to be a matter of what each  
10 of those individuals are employed.

11 And so that's why these are difficult  
12 cases to investigate because unless we have  
13 information from their cell phones, unless we  
14 have social media that we're able to investigate  
15 into making identification as to what's going on  
16 with the relationship, these are difficult cases  
17 to do.

18 MAJ. HOHMAN: So I would just echo  
19 that. Baltimore is kind of unique in that only  
20 the BPD is allowed to investigate and follow up  
21 on felony crimes so many of the colleges in the  
22 Baltimore area have a sworn Police Department,

1 others have a security office.

2           Regardless of whether their police are  
3 sworn or civilian, the BPD still investigates  
4 sexual assault investigations. Now, they will  
5 essentially act as first responders or the  
6 equivalent to what our patrol officers would do.

7           And we have MOUs I think with 13 of  
8 the area colleges, including some that are in the  
9 surrounding jurisdictions because we find that  
10 many come to Baltimore for the clubs or the  
11 sporting events and the assaults that take place.

12           We also work really closely with each  
13 of the universities' Title IX investigators to  
14 make sure that both the college and BPD are in  
15 compliance with the Title IX reporting.

16           In fact, we just finished up some  
17 training that was provided through a DOJ grant  
18 with about 13 different colleges where we all  
19 trained together. That said, a lot of our cases  
20 involving colleges are drug or alcohol  
21 facilitated.

22           It's one of the things that we have

1 begun to start the track as a result of the  
2 consent agreement.

3 We didn't necessarily track the  
4 numbers so we still don't have really accurate  
5 numbers on how many cases are drug or alcohol  
6 facilitated, but we do test for that as part of  
7 our state exams and I would say that we do not  
8 unfound those cases.

9 Typically, it's a matter of consulting  
10 with the prosecutor to determine the level of  
11 incapacitation.

12 SGT. WILD: So with Albuquerque, we  
13 also have police in the full schools. So  
14 Albuquerque Public School has their own so we  
15 have all the way from the middle school, high  
16 school, and community colleges as well as the  
17 university.

18 So, it is not just one Agency. We  
19 work hand in hand with multiple Agencies and  
20 again, as I stated before, we want to be  
21 consistent due to the fact that we are the  
22 largest Agency in New Mexico and that is what we

1 do.

2 We deal with over 500 of our cases a  
3 year. We do get called and asked to assist, to  
4 shadow, or even take the lead, especially when  
5 we're processing crime scenes.

6 If there's beverages and they want to  
7 test for any kind of drug-facilitated sexual  
8 assault, we're there to assist with the  
9 interviews and so forth.

10 About 80 percent of our cases do  
11 involve alcohol or drugs in one way or another.  
12 It is our responsibility to determine what the  
13 level was on one or both sides and, yes, the  
14 sexual assault usually only takes place between  
15 two people.

16 There might be an animal or two in the  
17 room, we're not that skilled to interview. But  
18 we do know that we can lead up to the actual  
19 moment so was there a party? Did somebody see  
20 the individual walk into the bathroom? Was that  
21 individual bonding?

22 So there's a lot of evidence that we



1 can still determine based upon the before. Were  
2 they able to consent? Did we have somebody who  
3 watched them do shot after shot and was  
4 staggering down the hall and they fell over four  
5 times?

6 That's the evidence that we're going  
7 to be looking for when they say I don't know what  
8 happened. I woke up and this was the state of my  
9 dress or this is what I believe happened. We  
10 work the case backwards.

11 What is the last memory? Let's go  
12 from there and we start looking at what the  
13 evidence can produce. Was there any kind of  
14 explanation for the blackout? A lot of times  
15 when we're dealing with the kids at the parties,  
16 there may be antidepressants on board.

17 Were they a contributor with the  
18 alcohol because one anti-depressant and two  
19 beers, now we're dealing with somebody who maybe  
20 had a drug intoxication of six, seven beers. Did  
21 they eat?

22 We start going through and

1 establishing the actual verification of how much  
2 alcohol, how much did you have to eat? And then  
3 we piece it back together. So, yes, alcohol is a  
4 big part of every one of our investigations,  
5 whether we're eliminating it as a factor or  
6 confirming that, yes, there was.

7 Working with each of the Agencies,  
8 especially the colleges, we have to have that  
9 relationship, we have to have that support and be  
10 able to give them.

11 The University of New Mexico, they do  
12 have the SART team, we do have them as part of  
13 our monthly meetings where we have that  
14 relationship and at a moment's noticed we can  
15 call and chat with them whenever we need to.

16 DR. MARKOWITZ: Major Hohman, I just  
17 wanted to get a little bit of clarification on  
18 one point and I'll try to keep this pretty brief.  
19 You mentioned in your response about unfounded  
20 cases that you take those unfounded cases back to  
21 your SART before you will actually unfound them.

22 So I just want to clarify, am I to

1 understand that you actually will run unfounded  
2 cases by the full SART and get the opinion of  
3 victim advocates, your medical folks, on sort of  
4 the direction of the investigation before you  
5 will unfound the case?

6 MAJ. HOHMAN: So typically, the case  
7 will be presented once the investigation has  
8 concluded. The detectives conducting the  
9 investigation, he or she will report their  
10 findings to their Sergeant, the Sergeant will  
11 review and make a determination.

12 So as it goes through the process,  
13 assuming that everyone in the Police Department  
14 agrees this is an unfounded case, it does not  
15 reach the elements of the crime. During that  
16 process, they'll also confer interview the  
17 state's attorney's office.

18 So we call them 24-hour Boards but  
19 it's essentially a summary of the preliminary  
20 reporting and investigation. Every morning we  
21 send those reports to our counterparts at SAFE.  
22 So they're aware of every case.

1           As it evolves throughout the process,  
2           there's some consultation with the attorney  
3           that's assigned to that case and the primary  
4           investigator.

5           That said, it goes to the SART meeting  
6           which is comprised of that coordinator from the  
7           Mayor's Office, the Police Department, our SAFE  
8           nursing program, which is a nursing hospital for  
9           us, our primary advocacy center, its turnaround,  
10          and then we also have an additional group called  
11          an MCASA, and they also provide legal advice and  
12          do a lot of lobbying for legislation.

13          So they're also involved in that  
14          process as well, and then finally, the state's  
15          attorney. So we essentially will present a  
16          summary of the case with the victim information  
17          redacted, suspect information redacted.

18          And essentially have a conversation  
19          about it. Again, it's not binding because the  
20          Police Department ultimately has the  
21          responsibility to report whether it's UCR or not  
22          but again, there's been multiple incidents where

1 we've said this looks unfounded to us and maybe  
2 an advocate will chime in and say maybe I'll take  
3 a look at this, or the prosecutor will say I'll  
4 look at that.

5 Medical may provide some information  
6 that we haven't thought about and we'll go back  
7 and reinvestigate that. In terms of once we  
8 report that through our UCR process, we don't  
9 send it officially to be unfounded until we have  
10 that SART review.

11 HON. WALTON: You may have already  
12 provided some insight on what I'm going to ask  
13 you, but the first issue you talked about was the  
14 fact that an allegation is made within the  
15 military about a sexual assault and it frequently  
16 does, it adversely impacts a member's career.

17 In your experience, once someone comes  
18 forward and makes an allegation of sexual  
19 assault, how prevalent is it that that is a  
20 totally fabricated or false report?

21 MAJ. HOHMAN: So I don't have the  
22 exact numbers so, again, it's somewhere around

1 that five to eight percent total that are  
2 unfounded.

3 So it's a smaller portion of that  
4 where we said this is completely baseless. As my  
5 colleague pointed to, a lot of those cases  
6 involved survivors with some sort of mental  
7 health issue.

8 And that's where we mostly see the  
9 cases where it's a complete fabrication.  
10 Obviously, there's something going on with the  
11 mental health. So I don't have an exact number  
12 on that.

13 Quite frankly, it's not made for us.

14 SGT. WILD: As I mentioned, most of it  
15 is the mental health and when we stop and ask  
16 when we review those ones, a lot of those ones  
17 don't actually have the offender named or if they  
18 do it's the same offender over and over again.

19 So the ones that we're actually seeing  
20 fault allegations with an offender who has been  
21 named in them are very minimal. Those are the  
22 ones that they're very few and far between.

1                   SGT. O'CONNELL: I would also to  
2 confirm with that with municipal with  
3 jurisdiction in terms of maybe allegations on the  
4 homeless population and our opioid situation that  
5 we're currently dealing with.

6                   But it's matters where those  
7 allegations that have come forward. But in the  
8 triage that are typically handed to our patrol,  
9 we also show our -- we can certainly clarify what  
10 that was that this investigation was going to  
11 handle or if it's a matter of just primarily an  
12 ETP who's had multiple issues.

13                   Our first priority is to handle it in  
14 that matter and handle a mental health portion of  
15 those kinds of cases that are coming to our  
16 office.

17                   Handling that first and triaging that  
18 aspect of those cases, we then go back at that  
19 and if we need to report or get involved in that  
20 case to make any kind of determination that in  
21 fact this kind of case had happened in terms of  
22 those types of cases.

1 MS. CANNON: Thank you for being here.  
2 I wondered as to each of your Agencies what the  
3 process is to go to a prosecutor with a case or  
4 choose not to go to a prosecutor and make a  
5 decision in house what the standard is to go or  
6 not go.

7 And then what happens if it goes to  
8 the prosecutor? Does it end up coming back to  
9 you?

10 SGT. O'CONNELL: The are cases that we  
11 do intake to our office, typically we have a 24-  
12 hour follow up with that victim.

13 If we don't interview that victim  
14 within a timeframe of the immediate notification  
15 to our unit, we do a follow up with that victim  
16 and we have it to be processed with them and  
17 start an investigation.

18 From that moment, we usually send up  
19 our initial report and follow up to our District  
20 Attorney. All of our cases are referred, if  
21 there is an identified suspect, typically they  
22 are assigned.



1           If there's no identified suspect, that  
2 case is not assigned until that investigation  
3 identifies a suspect.

4           If they don't, then more than likely,  
5 it will probably just become inactive in our  
6 office and the DA's office typically will not  
7 assign those cases.

8           But we have a very quick turnaround in  
9 terms of getting our District attorney's office  
10 on board. Particularly on cases where we see  
11 that it's going to go to a grand jury or  
12 indictment phase, we use their experts and  
13 assistance in terms of triaging in terms of  
14 whether it's a crime scene or if it's affidavits.

15           As investigators we do our own  
16 affidavits for search warrants but also have our  
17 people to review in the decision-making process  
18 in terms of making sure we do a proper  
19 investigation and that it goes smoothly in terms  
20 of a grand jury indictment.

21           SGT. WILD: Again, very similar.

22           We do our own investigations. Once

1 we've established probable cause in that there's  
2 any questions as far as what the District  
3 Attorney is wanting from us, we have a close  
4 relationship with them.

5 We meet with the District Attorneys in  
6 our office twice a month and review our cases.

7 And to ensure that we're sending the  
8 cases with the crime scene photos with whatever  
9 else the District Attorney is wanting, whether  
10 it's an Uber receipt to verify that there was a  
11 movement to it, we meet with them to determine,  
12 okay, this is our pace, this is where we're at,  
13 and is there anything else that you're wanting as  
14 far as the investigation before we release the  
15 full case?

16 Anytime that we have a case with no  
17 offender information, that case is closed until  
18 we are able to identify. So those cases we do  
19 not turnover.

20 MS. CANNON: So just to clarify, are  
21 you saying that as with the Sergeant that you  
22 send all cases to the District Attorney and you

1 don't make a call in closing them?

2 SGT. WILD: If we have probable cause  
3 and an offender identified, yes, the case gets  
4 sent to the prosecution.

5 GEN. SCHWENK: Who makes the  
6 determination of probable cause?

7 SGT. WILD: The detectives.

8 GEN. SCHWENK: So the detective says  
9 I have a suspect but I don't think I have  
10 probable cause, then what happens?

11 SGT. WILD: We review that case with  
12 the District Attorney's office and we'll sit down  
13 and that will be a case that we present at the  
14 case review and determine right now the detective  
15 does not feel there's enough evidence, what does  
16 the District Attorney's office need to be able to  
17 prosecute this case?

18 And that's when we sit down and we  
19 discuss what other evidence may help establish  
20 the probable cause for us to move this case  
21 forward? Otherwise, the case is closed pending  
22 further leads.

1 MS. BASHFORD: So who's actually  
2 making the decision, though? The detective says  
3 I don't have probable cause and you take it to  
4 the DA, is the DA saying I agree or is the DA  
5 saying I disagree?

6 SGT. WILD: The District Attorney has  
7 the right to assist us. We will forward the case  
8 to the District Attorney's office. It's law  
9 enforcement's responsibility to establish that  
10 probable cause.

11 And then we release it to the District  
12 attorney's office. If they review the case and  
13 determine there's not enough for them to take  
14 forward to a grand jury, they will dismiss it on  
15 their site.

16 DR. SPOHN: Does it only occur after  
17 arrest?

18 SGT. WILD: No, we have a case law  
19 where we have ten days to actually submit our  
20 case once we actually make an arrest. The  
21 reality is, there's times when we're not able to  
22 complete our investigation within that ten days,

1 especially if there's a party.

2 If we're interviewing 32 people, it's  
3 impossible for us to do justice to that case  
4 under that circumstance, especially if it's a  
5 consent issue.

6 So, we would at that time, even though  
7 we had an offender identified and was in custody,  
8 we may at that time do a restraining order and  
9 tell them no contact, release, and continue our  
10 investigation to ensure it's completed upon the  
11 release to the District Attorney's office.

12 DR. SPOHN: The question is do you  
13 take cases to the District Attorney's office  
14 prior to making an arrest, and if the District  
15 Attorney says we wouldn't file this case even  
16 clarified exceptional needs and not make an  
17 arrest?

18 SGT. WILD: Yes, we do send over cases  
19 that we will send for a grand jury, and if at  
20 that time it comes back as a true bill, we will  
21 get an indictment and do a warrant arrest on  
22 that.

1 MAJ. HOHMAN: So the BPD has kind of  
2 a multi-layered approach to that so if it's a  
3 child case we're required by law to issue a  
4 report within 10 days to Child Protective  
5 Services and 30 days to our state's attorney.

6 Our sexual assault investigators are  
7 split. Our child sex assault detectives are co-  
8 located at Baltimore child abuse center with an  
9 attorney from the State's attorney's office  
10 embedded with them.

11 So they're really talking on a daily  
12 basis, each new case they're briefed an every  
13 morning. If it's a child sex trafficking case  
14 within 24 hours we could be at a conference that  
15 includes the state's attorney so they're briefed  
16 from the very beginning.

17 And then finally on the adult cases,  
18 as I mentioned before, we're sending those  
19 reports to the state's attorney on a daily basis.

20 Now, in terms of when we start to  
21 think about whether we're going to charge or not,  
22 that process, as my colleagues mentioned, the

1 minimum is probable cause.

2 If the detective feels that there's  
3 probable cause, then we need to have a  
4 conversation on charging. Our policy is that we  
5 consult with the state's attorney prior to  
6 charging any case, any felony.

7 That said, the Police Department still  
8 retains the authority to seek charges even if the  
9 state's attorney doesn't approve per se. But in  
10 practice, it's mostly these cases, and I think  
11 what we're really kind of getting at here are the  
12 cases where there's likely probable cause but not  
13 enough to prove beyond a reasonable doubt.

14 Your first speaker talked about that  
15 a lot within the system and the detectives and  
16 the supervisors really have a feel for those  
17 types of cases where typically they're  
18 acquaintance cases, the victim survivor will  
19 articulate the crime.

20 And essentially, once you have that  
21 victim/witness articulate a crime, essentially,  
22 it reaches the threshold of probable cause.

1                   But again, how do you prove that  
2 beyond a reasonable doubt? And attorneys have an  
3 obligation not to charge those cases if they  
4 think they can't prove that.

5                   HON. GRIMM: Major, let me follow up  
6 with that. I'm in the District of Maryland where  
7 the court has that executive leave that you've  
8 been referring to.

9                   As you know in the Maryland system,  
10 anyone can walk into a District Court  
11 Commissioner who is not an attorney but who is a  
12 judicial officer, they're there 24 hours a day, 7  
13 days a week and swear out of a criminal  
14 complaint.

15                   Often times, those are domestic  
16 connected, when I was in the State's Attorney's  
17 office in Baltimore County we would get those a  
18 lot. and that is a charging document that is now  
19 a charge.

20                   Where do you all come in when that  
21 occurs? It's initiated by someone who has gone  
22 through a Commissioner and the Commissioner has



1 made a determination of probable cause of the  
2 charge or issue.

3 Now we have a Maryland District Court  
4 criminal case pending. Where does the Police  
5 Department come in in those cases?

6 MAJ. HOHMAN: So fortunately, we have  
7 a really good working relationship with the Court  
8 Commissioners in Baltimore. If a citizen applies  
9 for charges for sexual assault, they'll contact  
10 us.

11 HON. GRIMM: Before the Commissioner  
12 allows the charge to be issued?

13 MAJ. HOHMAN: Correct.

14 HON. GRIMM: And so you're in there  
15 from the very beginning of events?

16 MAJ. HOHMAN: Yes, so we're involved.  
17 obviously, a few slip through the cracks every  
18 now and again, right? But then again, that's  
19 ultimately up to the State's Attorney whether or  
20 not they're going to continue with the charges.

21 And more likely than not, if that  
22 scenario were to occur, it was an incident that

1 we weren't aware of so they would likely call us  
2 in to do an investigation.

3           So really at the end of the day, it  
4 kind of comes down to that UCR exception of  
5 clearance versus charges so we have a large  
6 portion of cases where, again, a crime is  
7 articulated, we have met the burden for UCR, we  
8 have met the burden for probable cause, but we're  
9 not there on a reasonable doubt they're taking it  
10 to trial.

11           So we will present those to the  
12 State's Attorney knowing that it is very unlikely  
13 that charges are going to be filed and we need to  
14 get an official declaration for us to  
15 exceptionally clear that case, essentially for  
16 the purposes that it can't be proven beyond a  
17 reasonable doubt.

18           MR. MARKEY: Thank you so much for  
19 being here and for the service to your community.  
20 I want to investigate the roles and  
21 responsibilities of the investigators. This is  
22 my question, the first one is we're talking about

1 probable cause.

2 Are we talking about a probable cause  
3 decision that it sounds like all of your ADTs  
4 allow your investigators to make that  
5 determination sometimes independently and  
6 sometimes with the assistance of your  
7 prosecutorial office.

8 And is that a probable cause  
9 determination to make an arrest?

10 MAJ. HOHMAN: So our investigators are  
11 authorized to make arrests, however, by law they  
12 can do that, right? The rules within our Police  
13 Department, they can't seek charges without a  
14 supervisor.

15 So they make a determination that  
16 there's probable cause but it's going to go  
17 through several layers of review at the Sergeant  
18 level and the Lieutenant's level.

19 And then for policy, we consult with  
20 the State's Attorney. Again, we can override the  
21 State Attorney's decision. They may agree they  
22 may feel the case isn't there, we want more.

1                   And at the end of the day, we may say,  
2 no, we think we're there and we're going to  
3 charge the case anyway. That's rare.

4                   Typically, we're all on the same page  
5 but it would be a very rare situation where a  
6 detective would go out on their own and get  
7 charges without talking to a Sergeant,  
8 Lieutenant, and consulting the State's Attorney's  
9 office.

10                   That would be against our policies.

11                   SGT. O'CONNELL: In terms of patrol,  
12 if a 911 call comes in, just in terms of  
13 clarifying, if it's pertaining to a 911 response  
14 so they arrive on scene and they have a scene and  
15 they have a victim, a criminal victim, and they  
16 have corroboration in terms of a senior assailant  
17 and the identification process has been done.

18                   And typically these are on the low-end  
19 numbers of cases where we get these cases coming  
20 into our units because it's a response by patrol  
21 and they have the type of situation where they  
22 have probable cause to make an arrest.

1           And if it's a rape situation or a  
2 domestic violence situation, typically they're  
3 going to go with the PC and they're going to  
4 charge. More so than not with domestic cases  
5 from the statute of domestic laws in  
6 Massachusetts, they shall arrest and if there's a  
7 charge, then that will get charged.

8           But that is typically not the norm for  
9 cases that we get referred to us. Usually, it's  
10 either working or a response to a hospital or  
11 it's a call into our office in terms of us doing  
12 the investigation and determining do we have a  
13 case that's going to go forward?

14           And if there's probable cause to go  
15 and charge it in the District Court, we handle  
16 other than just rapes and attempted rapes, we  
17 have dealt with assault and battery.

18           We've either tried that in the  
19 District Court, but the rapes which will end up  
20 in the Superior Court is more of a process of  
21 going through a grand jury process, including the  
22 District Attorney's in terms of making decisions

1 in terms of going to the grand jury.

2 MR. MARKEY: I had one follow up along  
3 with prosecutorial discretion and that's the  
4 third-party report.

5 And your initial information is the  
6 victim that's reported to somebody else is unable  
7 or does not want to proceed with a formal  
8 investigation. How do you handle that particular  
9 type of case?

10 SGT. O'CONNELL: Typically, most of  
11 the reports, we get a lot dealing with children  
12 and those reports are processed and handled  
13 differently, they go through a different process  
14 either with the Department of Children and  
15 Families or if it comes into the schools.

16 Typically, we don't normally take  
17 third party reports but in order for us to move  
18 forward, we need a victim. We're going to need a  
19 victim to go to a court proceeding and to go to  
20 trial, the accuser has the right to meet their  
21 accuser in a court proceeding.

22 So, understanding all that but keeping

1 and trying to focus these cases in terms of  
2 giving victims options and them not wanting to  
3 come directly to us and working with advocates  
4 and establish a conversation with them.

5 It may take a week or two before we  
6 get the victim to come to our office but working  
7 with an advocate-based approach to do give that  
8 victim an option in terms of how and when they  
9 want to come forward is the method that we try to  
10 handle in these cases.

11 SGT. WILD: As far as third-party  
12 reporting, no, we don't take third-party but we  
13 would say who is the victim, can we reach out,  
14 and we'd have an advocate reach out or I would  
15 actually make a phone call as I've done with  
16 previous military.

17 They referred to me saying it's a  
18 third party wanting me to go ahead and open up a  
19 case. I explain to them we have to have the  
20 victim. We begin our investigations by the  
21 victim's statement and that's the critical piece.

22 If we have a victim who's not wanting

1 to proceed and is not wanting me to go through,  
2 the limited information that the third party is  
3 getting leaves a very open investigation.

4           There are many different types of  
5 criminal sexual penetration and if we walk in and  
6 interview a suspect on a criminal sexual  
7 penetration without knowing the allegations,  
8 without interviewing the victim, without doing  
9 the background, checking with the witnesses,  
10 checking surveillances, looking at all the  
11 evidence, you're walking into an interrogation or  
12 an interview with a suspect without all your  
13 facts.

14           Then basically, you're asking  
15 somebody, well, did you do this? They say no and  
16 you're stuck. Your investigation is very limited  
17 and it's incomplete. In New Mexico, the old  
18 saying is no victim, no crime.

19           So first and foremost, we go right  
20 back to the empowerment of the victim. Is the  
21 victim safe? A lot of the victims as we stated  
22 know their offender.



1                   This is somebody who they thought they  
2 could trust, whether it was an acquaintance or  
3 somebody who they've been in a relationship with.

4                   So, first and foremost, if it's a  
5 third party we want to make contact with that  
6 victim to say, okay, why the hesitation? Why are  
7 you not wanting to report?

8                   That's my first concern, getting  
9 through that part.

10                  MS. BASHFORD: Would you reach out to  
11 somebody, if you get a phone call that says adult  
12 victim was the victim of a sexual assault, you  
13 would reach out to that person?

14                  SGT. WILD: Absolutely, we have CPS,  
15 Child Protective Services, where we get referrals  
16 regardless of --

17                  MS. BASHFORD: For adults?

18                  SGT. WILD: They're adults. We'll say  
19 a 21-year-old was drunk the other night and  
20 reported a sexual assault.

21                  We'll reach out to them and let them  
22 know that, hey, look, we've got a third party,

1 there's no report documenting. It is basically  
2 are you safe, are you okay, are you aware of the  
3 services that are available for you? If they  
4 tell us I don't want to speak to you, thank you,  
5 have a nice day.

6 We don't go any further, however, if  
7 they want to come in and sit down and talk to us,  
8 we tell them you have the right to come in, tell  
9 us what's going on, discuss it, and still have  
10 the option to never put it in black and white  
11 into a police report.

12 You are not obligated to report it but  
13 you should before you make that decision to not  
14 report, have all your facts. Know what may  
15 happen or may not happen and here are the  
16 resources and the availability for you.

17 And if they come in and talk and say,  
18 you know what, I want to go the counseling  
19 approach, I don't want to do the criminal  
20 justice, we respect that and we close the  
21 communication with them.

22 SGT. O'CONNELL: Just to confirm that,

1 I could tell you that what we would do with a  
2 finding report and make a phone call into our  
3 office, we would report that third-party person  
4 to do that outreach to that victim.

5 I would not want to make a cold call  
6 to a person about an alleged allegation that they  
7 may or may not have done. It puts law  
8 enforcement in a situation that you're outing  
9 somebody when they're not ready to come forward  
10 to law enforcement.

11 So we would work with that third party  
12 to say we do need that victim to come and report  
13 to us. That's the only way we could go forward  
14 on a case.

15 To make those calls, it puts you in a  
16 precarious situation that in Massachusetts we  
17 have a rape shield law that covers that victims  
18 come forward to us.

19 We see this a lot with colleges, you  
20 get roommates and RAs who think that they're  
21 going to do the reporting for that victim and  
22 it's understandable, they're making the right

1 decision, they're trying to engage that victim,  
2 but it's ultimately the victim's decision to come  
3 forward.

4 So we've got to be careful on how we  
5 handle those cases.

6 MAJ. HOHMAN: I would just echo that  
7 really is the nuance of sexual assault  
8 investigations. You want to be trauma-informed  
9 but as a Police Department, you also have an  
10 obligation to investigate crimes that are brought  
11 to your attention, right?

12 So for us at BPD, we're required to  
13 follow up on any felony allegation, whether it's  
14 third party or not. The vast majority of our  
15 third parties are there's mandatory reporters,  
16 whether it's a therapist that reports a child  
17 abuse years later or CPS worker.

18 But in the same situation, we would  
19 open an investigation, and again, most cases  
20 don't involve witnesses but perhaps there is a  
21 witness so maybe you can collaborate the case  
22 with the evidence through witnesses or maybe

1 other evidence collected.

2 You don't necessarily need the victim  
3 to make the case.

4 Obviously, it's very difficult to move  
5 forward without the victim but typically, we  
6 would take the same approach as perhaps having an  
7 advocate reach out or that third party reporter  
8 provide them with information and say if you want  
9 to report, this is how you do it, these are the  
10 services that are available to you.

11 And then for us, we have John and Jane  
12 Doe rape kit reporting so you can anonymously  
13 submit for a rape kit. The legislation passed  
14 just two years ago which requires us to keep  
15 those rape kits for 20 years.

16 So, we keep those in evidence.

17 CMSAF MCKINLEY: The number of cases  
18 that come to you, do you actually know the  
19 percentage of those cases that actually go to  
20 trial?

21 And once they go to trial, do you know  
22 the conviction rate?

1 MAJ. HOHMAN: So we don't track the  
2 conviction rate, the State's Attorney's office  
3 tracks their conviction rates, so our clearance  
4 rate is about 50 percent currently.

5 Of those, it's almost 50/50 in terms  
6 of criminal charges and exceptional. It's about  
7 55 percent cleared by arrest, 45 cleared by  
8 exception. So there's exceptional clearances  
9 that obviously don't go to trial.

10 We don't track the reason for the  
11 exceptional so it can be any of the approved  
12 reasons -- the suspect's died, the suspect's in a  
13 non-extradition state, things like that.

14 But the vast majority of our  
15 exceptions are cases that are declined for  
16 prosecution. So we have identified a suspect, we  
17 felt that probable cause has been reached but the  
18 state's attorney can't prove it beyond a  
19 reasonable doubt.

20 So that's not going to trial. Of the  
21 remaining case where a suspect is charged, the  
22 vast majority who do go to trial, I would say

1 just anecdotally, the conviction rate is probably  
2 somewhere in the 80s so pretty successful.

3 Maryland also just passed a law where  
4 you can enter prior bad acts that you're not  
5 necessarily convicted of.

6 So we had, essentially, a serial  
7 rapist that had beat us five or six times at  
8 trial because he claimed that the encounter was  
9 consensual.

10 Laws have been passed that you can now  
11 enter these prior charges into evidence. So  
12 that's great for us.

13 MS. LONG: I think I have a brief  
14 question and it's not one that's been testified  
15 to. I'm wondering if you received any special  
16 training to handle intimate partner sexual  
17 violence and if you think that's important in  
18 being able to do your job?

19 SGT. WILD: I think it is critical.  
20 Like I said, the majority of the offender's  
21 victims, the relationship is somebody they've  
22 dated or an acquaintance or something.

1           So having that additional training,  
2           yes, there are classes out there and there's  
3           conferences out there to give us a better  
4           understanding of getting through.

5           Again, when you're dealing with a  
6           domestic violence situation, the very first  
7           things that we look at is, is this individual  
8           going to feel safe reporting?

9           If I don't tackle that issue first and  
10          foremost, the victim is going to sit there with  
11          their arms crossed and look at me and say nothing  
12          happened. So, the first thing we do when we walk  
13          in is, first, you have these rights and first,  
14          let's make sure you feel safe.

15          Do you have a place to go afterwards?  
16          Do you need a restraining order? We've  
17          established that net groundwork first when we're  
18          dealing with the domestic violence and we are  
19          honest.

20          We're not going to walk in there and  
21          say he's going to be, or she, under arrest and  
22          we're going to put them away and they're never



1 going to go out. We establish that baseline and  
2 communication from the first part.

3 And that training is critical to  
4 understand the dynamics, especially with domestic  
5 violence.

6 Looking back at the history of some of  
7 these cases where it's like we've been to that  
8 place multiple times reference a domestic  
9 violence, and now we have a third party or a 911  
10 call that now a sexual assault took place, those  
11 are things that we have to take a look at and  
12 review.

13 If we make that arrest that night,  
14 that's a phone call to the District Attorney's  
15 the next morning and saying we have a duty to  
16 protect and we cannot in good faith release this  
17 individual as we continue our investigation, and  
18 this is why.

19 This is the totality of this. We've  
20 been to this house numerous times, there's been  
21 reports of domestic violence, but it's again,  
22 training is critical when it comes to dealing

1 with intimate partners.

2 SGT. O'CONNELL: I could also say  
3 Boston has been trained, particularly the beauty  
4 of having us all in one location is the ability  
5 that we can actually train together. So that's  
6 in terms of what the relationships are.

7 Typically, in domestic situations it  
8 goes hand in hand, their investigations with our  
9 investigations and we know that typically,  
10 victims within domestic violence situations the  
11 first thing on their mind is not that sexual  
12 assault, it's their safety and the safety of  
13 typically children in that household.

14 That's what their priority is and  
15 responding to these investigations is primarily  
16 safety factors. We consider what their rights  
17 are, we show you some protective orders and  
18 making sure they feel safe. Maybe the next step  
19 should be, okay, let's do a home story.

20 MAJ. HOHMAN: So our domestic violence  
21 unit is also under special investigation command  
22 so they cross-train with each other and our

1 sexual assault policy and SOPs reference how to  
2 deal with domestic violence-related cases.

3 To touch on the Court Commissioner  
4 issues, that's a potential gap where victims of  
5 domestic violence can go to the Court  
6 Commissioner and seek charges.

7 But if there's a mention of sexual  
8 assault, they still give us a class. In terms of  
9 the domestic violence case, we may charge the  
10 domestic assault more quickly than the sexual  
11 assault just because we do have a preferred  
12 arrest policy as well.

13 So we may charge a domestic-related  
14 assault and continue to work a sexual assault  
15 investigation.

16 MS. BASHFORD: I just have one last  
17 quick question before we break, what percentage  
18 of your victims drop out of the process or stop  
19 cooperating during the investigatory stage?

20 MAJ. HOHMAN: So for us, that's not  
21 something that we've historically tracked. It's  
22 again part of the consent decree that we're going

1 to begin to start tracking that.

2 Again, anecdotally speaking, we have  
3 found that the victims that are involved in sex  
4 working often times fall out early on in the  
5 process.

6 Once we are able to get a survivor in  
7 for an interview and start that process, it seems  
8 that they continue in the process. Often times,  
9 where they drop off will be in the very early  
10 stages, reporting into a patrol officer, maybe  
11 getting a safe exam.

12 I think there's that safety factor  
13 when they get checked out medically, when they  
14 get a safe exam.

15 And then after that, I think if  
16 they're going to drop off, it's at a very early  
17 stage. Once we get them in and kind of explain  
18 the process and bring the advocates on board, I  
19 feel like we're going to keep them involved in  
20 the process.

21 SGT. WILD: Ours are very similar,  
22 it's that first contact and it's the first

1 approach. Who contacted the police? Will they  
2 make a big issue?

3 If the victim is not the one who made  
4 the original phone call or are the ones who have  
5 reached out to law enforcement, we see a higher  
6 rate of dropping off.

7 So these ones are the ones that maybe  
8 the neighbor heard the screaming and yelling, we  
9 get there and they didn't want our involvement to  
10 begin with.

11 And so the detectives are we have  
12 difficulties following up with them. Or the  
13 younger ones where mom or dad may be in the  
14 influence of saying, no, you've got to come  
15 forward.

16 Once we get them into the interview  
17 room, they're not wanting to participate. Again,  
18 it's all about is the victim ready to move  
19 through and to what level do we need to make them  
20 a survivor?

21 We do see at 60 percent, victims not  
22 wanting to participate.

1 MS. BASHFORD: 60?

2 SGT. WILD: 60. And it really depends  
3 on which avenue they're wanting to go.

4 And that is all up to the victim as  
5 far as communicating but as my colleague over  
6 here said, once we get them in, we explain to  
7 them and we empower them, that's when we retain  
8 them.

9 It's when they don't trust law  
10 enforcement or they don't trust the system, they  
11 don't get past their original reporting. And  
12 it's usually not them who are doing the  
13 reporting, which is another factor that we have  
14 that's fallen off.

15 SGT. O'CONNELL: I want to say that in  
16 Boston we do a very good job in terms of data  
17 collection with our DB.

18 In terms of data collection or in  
19 terms of cases going forward and demographics,  
20 unfortunately, we don't have the staff in terms  
21 of we have clerical staff to actually help with  
22 data collection in capturing the questions that

1 you're asking.

2           So in terms of generalities, I have to  
3 concur with my colleagues in terms of probably  
4 close to half 50 percent ranking in terms of  
5 cases from -- and that's from the beginning parts  
6 in terms of our investigation in terms of them  
7 dropping off.

8           That we're able to get involved in  
9 cooperating and moving forward, it remains less  
10 trickle down depending on the investigation as  
11 moved forward in terms of if we're able to go  
12 forward to the criminal process.

13           Those numbers would be lesser but I'd  
14 say it's fairly high in terms of the unique drop-  
15 off.

16           HON. GRIMM: To follow up on that  
17 point, I take it that you're talking about the  
18 victim dropping out prior to the time that the  
19 prosecutor gets it and takes it into court?

20           I know that in Maryland where I am  
21 familiar, and the Major will confirm this, once  
22 it gets to court, there can be instances, this is

1 one of the frustrations as a state's attorney,  
2 was that they could refuse to testify.

3 Now, there's a limited number of  
4 instances under Maryland law when a spouse can  
5 refuse to testify after they've gone the domestic  
6 violence, and that could be just violence whether  
7 it's sexual assault or not, do you have any sense  
8 of when the prosecutor takes it from you, they're  
9 going forward with it and they get into the  
10 trial, the frequency with which the victim then  
11 decides I'm exiting the process here?

12 Because that could be an additional  
13 population of ones where they do notwithstanding  
14 the fact that they have cooperated throughout the  
15 time that you have all processed the case.

16 MAJ. HOHMAN: So I would say with  
17 Baltimore, it's not unique to sexual assault  
18 victims, it's every victim. It is a pain in the  
19 backside to deal with the criminal justice system  
20 in Baltimore, whether you're a witness, a victim,  
21 you're going to have multiple postponements.

22 And again, it could wear out and



1 that's really any victim. A robbery victim, I  
2 just want the report so I can get a new iPhone,  
3 right?

4 I'm not looking to spend a year and a  
5 half of my life talking about this specific  
6 robbery.

7 So that's kind of the general  
8 consensus across the board and it's really just  
9 the system is overwhelmed, staffing, and I would  
10 just say that's where it's really important to  
11 have the advocates explain that.

12 I think our advocates are very, very  
13 good with therapy and services but explaining  
14 that is huge.

15 SGT. WILD: I'd have to agree. A lot  
16 of it is we're spending two, three years down the  
17 line and we have pre-trial interviews where a  
18 victim is subjected to a defense attorney before.

19 And I think once we hit that pre-trial  
20 where they're getting the you did this, you did  
21 that, that's where we're losing the victims.

22 This is just the beginning and I think

1 a lot of it is the court's intimidating and being  
2 upfront when we have that victim from the get-go  
3 and having the advocates explain this isn't going  
4 to be done in two weeks, this is something that  
5 this is a process and once we get those to the  
6 DA's office, then you may have to go into a grand  
7 jury.

8 From there, you're going to have to do  
9 pre-trial, the different steps. And again, from  
10 the very get-go, if the victim is aware of that,  
11 we maintain it but if you don't have that  
12 understanding from the get-go, two years down the  
13 line, I don't want to do this anymore and that's  
14 where they finally say, no more, I need to move  
15 on.

16 SGT. O'CONNELL: In Boston we see that  
17 as well. That's why we have them informed from  
18 the very beginning in terms of what they're going  
19 to be dealing with.

20 Unfortunately, we cannot control what  
21 goes on administratively within our jurisdiction  
22 in terms of backlogs and push-offs. It kills the

1 case when two or three times we have  
2 postponements because there's a homicide trial  
3 that has to get done first and someone is  
4 incarcerated and those issues.

5 So those are factors that are beyond  
6 the control of anybody in terms of trying to have  
7 the victims on the stand understand that.

8 Thank you all for coming and sharing  
9 your experiences with us. We appreciate it and  
10 we'll be resuming at 1:10 p.m. with General  
11 Schwenk and Ms. Taggart's presentation on the  
12 Case Review Working Group. Thank you so much.

13 (Whereupon, the above-entitled matter  
14 went off the record at 12:12 p.m. and  
15 resumed at 1:15 p.m.)

16 BGEN SCHWENK: I will be going through  
17 a number of slides that will be an overview of  
18 what we've been doing and how, and they'll also  
19 read one bit of data as sort of a, I don't know,  
20 tantalizing information about what may be coming  
21 out of our case reviews. And then I will talk to  
22 you about some findings that the Case Review

1 Working has made and three recommendations for  
2 your consideration.

3 So, Kate, it's all yours.

4 MS. TAGERT: All right. Good  
5 afternoon. As General Schwenk said, we're just  
6 going to be updating you on our progress, as well  
7 as going over the initial findings and  
8 recommendations.

9 In October of last year, the DAC-IPAD  
10 sent a request for information to the military  
11 investigative offices for all penetrative sexual  
12 assault investigations that were closed in fiscal  
13 year 17. The RFI requested that the data of  
14 these cases include the reason or result for  
15 closure, for example refer to court-martial or no  
16 action taken because no probable cause. And I  
17 just want to publicly thank the military  
18 investigators. Some of them are here today.  
19 We've requested over 2,000 physical cases. Some  
20 of those cases were out in the field across the  
21 globe, so, administratively, that was a huge pull  
22 for them and we thank them.

1           Once the data was received, Jan, our  
2           investigator, culled through and removed cases  
3           that were not responsive to the RFI itself,  
4           meaning that the military never had jurisdiction  
5           over that potential defendant or the subject or  
6           victim were deceased. At the same time, during  
7           the lead-up to us actually receiving the cases in  
8           early 2018, the case review working group was  
9           creating a checklist. The checklist is in your  
10          read-ahead materials, and I believe that you've  
11          seen it before when you were discussing 140a, but  
12          it captures demographic data, evidentiary factors  
13          that may be relevant at trial in sexual assault  
14          cases, as well as case complexity factors. All  
15          of that information is currently being placed  
16          into our database.

17                 The database itself has been a very  
18                 time-consuming endeavor. Justin Coughlin is here  
19                 today, as well, and he has really been helpful in  
20                 actually creating the database and working  
21                 through the many issues that Stacy and I have had  
22                 when we're figuring out how the data needs to be

1 put into the system. So thank you, Justin.

2 Stacy, in addition to helping create  
3 the database, is the person that puts the data in  
4 it. In just one case, there are 231 data points  
5 that are put into this database. And, on  
6 average, she can input four to five cases.  
7 Sometimes, they take her 30 minutes. If there  
8 are multiple subjects and multiple victims, it  
9 can take up to two hours.

10 Finally, in order to ensure that the  
11 demographic data is correct between reviewers and  
12 a staff attorney, each checklist has been  
13 reconciled. So, for example, if one of the  
14 reviewers has put that a safe was done in a  
15 military hospital and another reviewer on the  
16 same case said that it was done in a civilian  
17 hospital, there's a quality review check that  
18 someone actually goes into the case file to  
19 reconcile that answer based on what was factually  
20 correct. That is only done on factual and  
21 demographic questions. No answers are changed  
22 for the subjective ones, such as whether or not

1 the case was decided properly or whether or not  
2 the reviewer felt that the victim's statement  
3 established probable case.

4 BGEN SCHWENK: Stacy, I want to  
5 apologize for all my errors in my case reviews.

6 MS. POWELL: It's all right, sir.  
7 It's all right.

8 MS. TAGERT: Last week, we finished  
9 inputting our initial case reviews into our  
10 database. The staff is still working out the  
11 kinks to ensure that the information is as  
12 accurate for the criminologist so that Dr. Wells,  
13 who is also here today, can actually decipher  
14 what the data means. He doesn't -- although he's  
15 up to speed on military justice, a lot of the  
16 information that we put into the database we need  
17 to explain to him what it is.

18 Once the data is ready for his review,  
19 it will be given to him and he will have to code  
20 the data himself and later provide an analysis.

21 I'm going to have Ms. Powell explain  
22 the numbers of case reviews that your colleagues

1 have completed. For purposes of the database, as  
2 well as the case review, keep in mind that, even  
3 though you may have one physical investigative  
4 file, the reviews are based on victim and subject  
5 so that for every subject and victim combination  
6 there are those specific facts, as well as  
7 whether or not the commander made a reasonable  
8 decision in deciding whether or not to take no  
9 action or preferral. So you probably don't  
10 remember, but the numbers will be different than  
11 what we read previously. They've actually  
12 increased based on that analysis.

13 MS. POWELL: Thank you, Kate. Good  
14 afternoon, Chair Bashford, Committee members.  
15 Thank you for allowing me this time to brief you  
16 on the record what your fellow colleagues have  
17 been doing.

18 This is a representation of Case  
19 Review Working Group members' investigative case  
20 file reviews on no action taken and preferred  
21 case categories. What you may notice here is  
22 that there are a difference in numbers, and Kate



1 has already alluded to what fact that this  
2 results was, so when you look at, there was a  
3 difference between the number reported by the  
4 services versus how many cases were reviewed and  
5 then totals being what we reviewed as physical  
6 investigative case files and then, in turn, what  
7 ends up into the database. So that does result  
8 from the multi-suspect and the multi-victim  
9 cases. So they may have reviewed 152  
10 investigative hard-copy files, but, with those  
11 combinations, you end up with more numbers into  
12 the database. So, for example, if you have one  
13 accused and two victims, then we have three total  
14 cases out of that into the database, which then  
15 increases our numbers which Kate has already  
16 spoken about. So then the 152 investigative case  
17 files that have been reviewed here is now 166  
18 cases within the database for those specific  
19 reasons.

20 In looking towards the March 2019  
21 report, we will be analyzing and discussing those  
22 166 cases that are within the database that, of

1 course, were reviewed by one member and one  
2 staff. And I've already spoke about the no  
3 action taken, preferred, equaling the 166.

4 Looking then to the March 2020 report,  
5 the complete universe of cases is 2,069, which  
6 includes no action taken, preferred,  
7 administrative action, and non-judicial  
8 punishment, so those other two categories that we  
9 were not focusing on earlier. Right now, we have  
10 851 cases left remaining for the staff to review,  
11 and it is our goal as of now to be complete with  
12 those reviews by the summer of 2019.

13 And if nobody has any questions, I'll  
14 turn it back over to Kate.

15 MS. TAGERT: All right. So as we're  
16 going through our objectives that we've had in  
17 the 2018 report, I just want to make sure that we  
18 understand that we're only talking about no  
19 action cases and preferred cases. We're not  
20 looking at NJP, administrative actions.

21 And the first objective that we have  
22 is that we want to see whether or not the data

1 that we've captured can predict disposition  
2 outcome between no action and preferral. After  
3 speaking with Dr. Wells, the sample size that we  
4 have, 166, although we could produce a DoD  
5 analysis that would be representative of the  
6 whole, we could not do a service-specific  
7 analysis to answer that question. We feel it's  
8 important to do a service-specific analysis  
9 because the testimony that the DAC-IPAD has  
10 received, as well as in the Case Review Working  
11 Group, is that there are different, across the  
12 services there are very different standards in  
13 preferring and referring cases and, therefore, to  
14 lump them altogether, you may not be getting as  
15 accurate information as if we're able to look at  
16 are they separate from the Air Force, separate  
17 from the Navy and the Marines and I won't forget  
18 the Coast Guard.

19 So, unfortunately, we're not going to  
20 be able to produce that in 2019, but we will be  
21 able to give you that study for our 2020 report  
22 after all the cases have been reviewed.

1           One of the things that we've been  
2     discussing, you certainly heard from the  
3     investigators this morning, is the idea of the  
4     different service disposition categorizations.  
5     For the 2019 report, analysis we will be able to  
6     do is the discrepancy that we've seen in our case  
7     reviews between what the commander has assessed  
8     why the case was closed, what the JAG has stated  
9     the closure was based on, what the MCIOs have  
10    inputted into their system, as compared to what  
11    has been cleared in DIBRS. And what we've seen  
12    is that the source documentation for these types  
13    of decisions are supposed to be on what's known  
14    as a commander's action report. Again, those  
15    aren't uniform across the services, and we see a  
16    lot of ambiguous information between the case  
17    file and that document. Also, there are issues  
18    with the documents themselves not being filled  
19    out, and there just seems to be confusion as to  
20    why cases are closed and for what reason. For  
21    example, a commander might cite insufficient  
22    evidence as to why no action was taken, a judge

1 advocate might find there was probable cause but  
2 the case is cleared as unfounded. So just on its  
3 face, it's difficult to determine why that  
4 particular case was closed. And General Schwenk  
5 is going to be talking to you about our findings  
6 and recommendations on that issue.

7 Objective three, we will be able to  
8 provide the demographic information in the 2019  
9 report from the set of cases that the Committee  
10 members have reviewed. However, that will not be  
11 service specific for the same reasons that I  
12 spoke about earlier. That will be based on a  
13 DoD-wide comparison.

14 General Schwenk will be talking to you  
15 in a few moments about some of the things that  
16 the Case Review members have issue spotted on the  
17 investigations. And our objective five has  
18 always been the subjective question. The DAC-  
19 IPAD members have been chosen based on their  
20 expertise and professional experiences, and,  
21 although the data itself will be interesting,  
22 they have answered the subjective question of

1 whether or not the command's action to take no  
2 action was reasonable based on the investigative  
3 case file alone.

4           So I don't want to bore you about the  
5 minutia of the methodology that the Case Review  
6 Working Group members used. That's going to be  
7 for the report in January when we go over that.  
8 But what's important for when we get to our  
9 findings is that, for all 166 cases, all of them  
10 have been reviewed by a member and a staff  
11 member. If either one of those parties stated  
12 that that case was unreasonably decided, it went  
13 to a third attorney for review, so it was never  
14 just one person looking at the cases. What was  
15 interesting about that is, even though it's an  
16 eclectic and diverse group from a criminologist,  
17 a defense counsel, an investigator, and  
18 prosecutors, staff member or committee member,  
19 for the most part, the decisions were the same.  
20 So that was interesting.

21           Also, when we're talking about the  
22 preferred cases, the reviewers not only looked at

1 the investigative case file but they were able to  
2 look at the data that the data group has, which  
3 are the 32 reports and the judge advocate's  
4 advice if it was available. So anything that was  
5 in that file, and some of them included victim  
6 declinations, that was reviewed, as well, for the  
7 preferred cases when making the decision of  
8 whether or not the preferral was reasonable.

9 And your colleagues, beyond just  
10 reading cases, which was time consuming, they  
11 also held over ten hours of deliberations.  
12 During that time, they spoke to MCIO  
13 investigators, military prosecutors, military  
14 defense counsel and now civilians, FBI analysts,  
15 and an assistant United States attorney out of  
16 Minnesota.

17 On the screen here and in your  
18 PowerPoint slides is the DoD initial assessment  
19 of the reasonableness of command action. So in  
20 purple, you will see that that is the DoD  
21 combined, so out of 166 cases, 86 percent of  
22 those 166 there was a unanimous agreement that

1 the decision was reasonable. In 8 percent of  
2 those cases there was at least one member out of  
3 the three that determined that it was  
4 unreasonable. And in 2 percent, it was two out  
5 of three - four unreasonable. And the reason  
6 that we have broken it down to show kind of where  
7 there's a mixed opinion is because you don't want  
8 to discount potentially the minority that said  
9 that it wasn't reasonable, but you also don't  
10 want to lump those altogether as unreasonable.  
11 So we've given a mixed opinion so that everyone's  
12 voice was heard as to who reviewed that case.

13           So for the no action cases, only 8  
14 percent of cases was it unanimously -- sorry -- 4  
15 percent unanimously held to be unreasonable that  
16 there wasn't even a preferral on the case,  
17 keeping in mind that preferral is a probable  
18 cause determination. And for the preferred  
19 cases, it was 5 percent, meaning that 5 percent  
20 of the cases that were reviewed it was found that  
21 it was unreasonable to even prefer the case. But  
22 for the rest of the decisions, it seems to be,



1 you know, in the 80-percent range of  
2 reasonableness for either decision.

3 So if anyone has any questions on how  
4 those numbers were created, I'm open to  
5 questions. Otherwise, I'll pass it on to General  
6 Schwenk.

7 BGEN SCHWENK: Let me just say that a  
8 lot of the data that you'll be hearing from us in  
9 the future will be the predictive, of whether  
10 this factor is predictive of a certain outcome,  
11 and that's going to be objective. But this one  
12 that Kate just briefed on the reasonableness, we  
13 could find no way to do as an objective matter.  
14 It had to be inherently subjective. And we  
15 figured, as the DAC-IPAD has said in the past on  
16 other issues, one of the reasons there is a DAC-  
17 IPAD is to bring people in with certain expertise  
18 and experience and let them exercise their  
19 independent professional judgment, which is what  
20 we did with the members of the working group in  
21 reaching that conclusion.

22 In my personal opinion, the reason

1 we're not lumping things together and saying if  
2 it's two to one reasonable we're going to call it  
3 reasonable or two to one unreasonable we're going  
4 to call it unreasonable is just the let the  
5 numbers speak for themselves. Each person had a  
6 vote, the vote is there, draw your own  
7 conclusions and we'll let everybody draw whatever  
8 conclusion they want.

9 Okay. Now what I want to do is talk

10 --

11 MS. GARVIN: General, I'm sorry. I  
12 have a process question just to make sure I'm  
13 understanding the methodology. So a staff member  
14 and a committee member on all of them and only if  
15 one of those two marked it it went to a third?

16 MS. TAGERT: Yes.

17 BGEN SCHWENK: Unreasonable, marked it  
18 unreasonable, right.

19 MS. GARVIN: So how many went to the  
20 third person?

21 MS. TAGERT: How many went to the  
22 third --

1           BGEN SCHWENK: All the ones in the --  
2           10 percent, so 16 or 17 or something.

3           MS. GARVIN: Okay. I just wanted to  
4           make sure I was reading that right.

5           BGEN SCHWENK: Right. Eight and two,  
6           ten percent. I guess it's possible some of the  
7           four percent went to a third person if all three  
8           people said --

9           MS. TAGERT: Do you want the actual  
10          number of cases?

11          MS. GARVIN: Yes.

12          MS. TAGERT: For the no actions, there  
13          were five unanimous unreasonable cases. For the  
14          preferred, there were two unanimous unreasonable.  
15          For the reasonable majority for no action, there  
16          were ten. For the reasonable majority for  
17          preferred, there were three. For the  
18          unreasonable majority for no action, there were  
19          three. And for the unreasonable majority for  
20          preferred, there was one.

21          BGEN SCHWENK: Twenty-four, right?  
22          Something. Okay. So while I tried my very best

1 to keep the members to the grindstone in  
2 reviewing cases, they insisted to think and,  
3 therefore, we couldn't resist from coming up with  
4 findings and recommendations for the whole DAC-  
5 IPAD to consider. All of them stem from our  
6 independent judgment on our case reviews and what  
7 we saw during the case reviews and the people  
8 that on the previous slide you saw were witnesses  
9 before the CRWG and people we heard from at the  
10 DAC-IPAD meetings.

11 So the first issue, there's three  
12 issues that we thought were important and you  
13 should be aware of, but we're not ready to go  
14 anywhere with it. So I just wanted to give you a  
15 heads-up and tell you we're going to continue to  
16 monitor and assess those issues.

17 So the first issue is investigative  
18 case closure classifications. So that's when a  
19 military criminal investigative organization says  
20 we're ready to close this case out, what  
21 classifications are we going to use to describe  
22 the case when we input it into the federal

1 system?

2           So our first finding is there's a DoD  
3 manual that sets forth what standards, what  
4 classifications to use, and the second sentence  
5 is the important one, the CRWG found during its  
6 case reviews that these classifications are  
7 confusing and applied inaccurately and  
8 inconsistently by investigators. Okay. I think  
9 Kate was mentioning about inconsistencies between  
10 source documents and ultimate decisions on  
11 classification types. And so we're going to  
12 continue to monitor that as we go through the  
13 remaining 800 cases and we'll get back to you on  
14 that.

15           Okay. Second finding is investigators  
16 use the information from command disposition  
17 action reports to determine appropriate case  
18 closure classifications. Issue of whether they  
19 should and how is something we're going to  
20 continue to monitor, but this tells us that  
21 command disposition action reports are actually  
22 important for reasons beyond just saying what

1 happened and that leads into one of the issues  
2 that I'm going to talk about in a few minutes.  
3 Okay. That's the first issue.

4 Second issue, the probable cause  
5 determination, the decision to unfound a case,  
6 and the submission of fingerprints to federal  
7 databases. So there's a DoD instruction that  
8 tells us when, tells DoD when fingerprints will  
9 be submitted electronically to the FBI, when  
10 things are supposed to go to the FBI, when to  
11 make a probable cause determination, defining  
12 probable cause, and putting other information of  
13 when this is supposed to be done. In no case is  
14 it supposed to be before apprehension, etcetera.  
15 So that tells us where the information comes  
16 from.

17 The next finding, finding four, the  
18 CRWG received testimony and found during its case  
19 reviews that the point during the investigative  
20 process of which a subject's fingerprints and DNA  
21 are taken the probable cause determination is  
22 made and the subject's fingerprints and DNA are

1 submitted to federal databases vary widely in the  
2 military, whether it's because the DoD standards  
3 are broad enough that you can drive a truck  
4 through them and so there's room for different  
5 ways or they're just not followed all the time,  
6 but we noted there are sufficient inconsistencies  
7 to warrant making a finding and alerting you that  
8 that's an issue we'll continue to look at.

9           Okay. Finding number five. From the  
10 testimony received -- this is, again, on probable  
11 cause determinations, etcetera. From the  
12 testimony received by the CRWG and its review of  
13 the files, we find that there is significant  
14 confusion among investigators, judge advocates,  
15 and commanders as to the meaning of the terms  
16 probable cause and unfounded, even though they're  
17 defined as the slide shows, when and by whom  
18 probable cause and unfounded determinations are  
19 made and how they are documented throughout the  
20 investigative process. Okay. That's just from  
21 looking at the case files. There's  
22 inconsistencies within the case file and from one

1 case to the next. So we're going to continue to  
2 look at that.

3 Next finding, military investigators  
4 testified they're required to follow a checklist  
5 of investigative actions, regardless of the facts  
6 of a particular case, and that they have little  
7 discretion to determine which investigative  
8 actions provide value in a case. We got started  
9 on this one because we found, in talking with one  
10 another, one member would say, man, I just  
11 reviewed a case and you can't believe all the  
12 work that MCIO did on a case that was going  
13 nowhere to begin with, and the other person would  
14 say, well, I had one of those, too. And we  
15 started talking, and we realized we thought we  
16 were running into quite a few of those. So we  
17 asked the investigators how much discretion do  
18 you have, and the investigators said, well, we  
19 have discretion but we don't really think we have  
20 discretion, we think that there's certain  
21 investigative, like the Baltimore major told us  
22 this morning, there's certain things that we're



1 supposed to do on a checklist and so we do them.  
2 Even when taking the photos of the motel where  
3 the incident occurred eight years ago may or may  
4 not be particularly helpful, all 42 photos will  
5 be in the file so that you can review them. So  
6 we're going to continue to work on that.

7 Okay. That takes care of the first  
8 part of investigator discretion.

9 Next one, finding seven, in the course  
10 of conducting case reviews, the CRWG found that  
11 nearly all case files include the same series of  
12 investigative actions, including photographs of  
13 incident locations and extensive interviews with  
14 co-workers and other character witnesses, whether  
15 relevant to the case or not. It goes in with the  
16 previous one about how much discretion do they  
17 have, so we'll continue to look at that.

18 Our finding number eight, it's  
19 problematic in some cases in which appropriately  
20 no action is taken against accused service member  
21 investigations are taking over six months to  
22 complete. Lengthy investigations often have

1 significant negative consequences for accused  
2 service members, as well as victims, as we heard  
3 this morning. So whether we'll come up with any  
4 magic thing to try to make investigations be kind  
5 of accomplished in a more timely manner, I don't  
6 know, but we're going to continue to look at it  
7 and come back and talk to you.

8 Okay. The last issue is the issue of  
9 command disposition actions, the documents we use  
10 to designate what the command disposition  
11 decision was. And this one we not only came up  
12 with the issue, we also came up with what we  
13 think are some recommendations for your  
14 consideration. So when I'm finished, you all can  
15 discuss it and debate it and, if the Chair  
16 allows, you vote on it.

17 So, anyway, here we go. Based on  
18 slide number 20, if you're counting, based on our  
19 review of penetrative sexual assault  
20 investigative files for cases closed in 2017 and  
21 testimony received during various meetings, we  
22 make the following findings and recommendations.

1 Okay. Finding number nine, accurate and uniform  
2 documentation of a commander's disposition  
3 decision, the reason for the decision, and any  
4 discipline action taken is essential to, A,  
5 create complete reviewable military justice  
6 records and, B, enable military justice federal  
7 advisory committees, such as us and the future  
8 Article 146 military justice review panel, to  
9 conduct statutory sexual assault and other  
10 military justice reviews and assessments. We  
11 made that finding to depict how important we  
12 think this issue is.

13 Okay. It's also important because, C,  
14 ensure military criminal investigative agencies  
15 accurately report crime to federal law  
16 enforcement databases, which we talked about  
17 earlier and this completes that connection. And,  
18 D, ensure the federal criminal databases  
19 routinely searched by employers and others  
20 required to conduct criminal background checks,  
21 reflect accurate and timely information about the  
22 disposition of allegations on service members.

1           Okay. So if it's important, then we  
2 go on to CRWG finding ten. The DoDI which  
3 promulgates the sexual assault investigation  
4 policies requires the commander of the service  
5 member who's the suspect to provide the MCIO in  
6 writing all disposition data within five business  
7 days, and that includes -- I will take it by the  
8 laughter from the peanut gallery that there is a  
9 perception, undoubtedly incorrect, that  
10 commanders are not timely in their reporting of  
11 commander disposition decisions. Okay. At any  
12 rate, any administrative non-judicial punishment  
13 or judicial action or declining to take action,  
14 that's important that that also be included.

15           Our finding 11, the law just recently  
16 signed, the National Defense Authorization Act  
17 for FY 2019, has a section 535 that requires  
18 SECDEF to establish a unified command action  
19 form. And on one of our read-aheads in our  
20 binder is a copy of the law. It's sort of short  
21 and sweet, but it's there. So SECDEF is going to  
22 have to establish a uniform command action form

1 applicable across the armed forces for reporting  
2 the final disposition of cases of sexual assault  
3 in which the alleged, you know, we have  
4 jurisdiction and there's an unrestricted report  
5 so there's actually something to work off of.

6 Okay. That's a finding. Next  
7 finding, finding 12, military investigators and  
8 judge advocates testified that documentation of  
9 command action is required to officially close a  
10 case and the investigators -- no more laughter,  
11 please -- investigators reported they often have  
12 difficulty obtaining this documentation in a  
13 timely manner.

14 Next finding, the command disposition  
15 action reports that are found in investigative  
16 files are often unclear, incomplete, inaccurate,  
17 and inconsistent within and across the services.  
18 And if we ever get to the point, we'd be happy to  
19 bring you examples because it happens frequently.

20 Okay. Finding 14, command disposition  
21 action reports that are found in investigative  
22 files frequently include terms that are defined

1 within sexual assault prevention and response  
2 office regulations, such as command action  
3 precluded, which don't have a counterpart in  
4 criminal justice. And so it's another term that  
5 has to somehow fit with criminal legal terms, and  
6 we found that the fit is not very good and,  
7 therefore, it ends up being confusing.

8 Finding 15, it's unclear from the  
9 command disposition action documentation found in  
10 investigative files what source documents or  
11 other written information is used by commanders  
12 in filling out their disposition reports. And  
13 the command disposition reports sometimes  
14 conflict with source documents that were in the  
15 investigative files we looked at. The command  
16 report said one thing, and we had a document from  
17 a judge advocate that said something different.

18 Okay. The last finding, finding  
19 number 16, staff judge advocates testified they  
20 do not routinely assist commanders in completing  
21 command disposition action reports. Okay. So at  
22 that point, we hope, the CRWG hoped that the rest

1 of you would feel like this is a problem that  
2 ought to be addressed, so here are three  
3 recommended actions.

4 CRWG recommendation number one, CRWG  
5 recommendation one: in developing a uniform  
6 command action form in accordance with Section  
7 535 of the NDAA for FY 19, the Secretary of  
8 Defense should establish a standard set of  
9 options for documenting command disposition  
10 decisions and require the rationale for those  
11 actions, including declinations to take action.  
12 We found a number of, not to harp on one  
13 particular service, but a number of Marine cases  
14 that were really well done in the command  
15 disposition reports because not only were they  
16 accurate with any source documents we found, but  
17 they also had a couple of sentences explaining  
18 the rational for the decision, which made  
19 reviewing those cases a heck of a lot easier than  
20 the ones where I just check a box and that's all  
21 you knew. So that's our first recommendation.

22 Second recommendation: the Secretary

1 of Defense should ensure that the standard set of  
2 options for documenting command disposition  
3 decisions are based on recognized legal and  
4 investigative standards that are uniformly  
5 defined across the services and accurately  
6 reflect command source documents. Okay. So this  
7 is sort of like what we said on 140a when we did  
8 the report on 140a, have a standard form, have  
9 standard terms, define the terms clearly. So  
10 that's what the first two recommendations goes.

11 The third recommendation: the  
12 Secretary of Defense should ensure judge  
13 advocates or equivalents of attorneys review and  
14 provide advice to commanders in completing  
15 command disposition action reports in order to  
16 ensure accuracy and completeness of the  
17 documentation. That should probably say in order  
18 to help ensure because judge advocates aren't  
19 perfect either, but the team on disciplinary  
20 actions of judge advocate and command should work  
21 together all the way through, which includes the  
22 final command disposition report.



1                   So those are our three  
2                   recommendations. And just as a summary, we're  
3                   going to continue to look at, number one,  
4                   investigative case closure classifications;  
5                   number two, the probable cause and unfounding  
6                   determinations and fingerprint submission  
7                   standards; and number three, investigator  
8                   discretion.

9                   And that is that.

10                  CHAIR BASHFORD: Okay. So the CRWG  
11                  has made three recommendations to the DAC-IPAD as  
12                  a whole. We have some time, not a lot, if  
13                  there's any issues to discuss or questions for  
14                  General Schwenk who is what? Leaving? But then,  
15                  ultimately, we have to vote whether to adopt  
16                  these recommendations or not.

17                  So as to recommendation one,  
18                  establishing a standard set of options for  
19                  documenting the disposition and the rationale, is  
20                  there any discussion anybody would like to have  
21                  about that? Are people --

22                  MS. GARVIN: I actually have a

1 potentially remedial afternoon question. So  
2 Section 535 of the FY 19 NDAA that this is kind  
3 of building off of uses the vocabulary on the  
4 second prong of the victim files an unrestricted  
5 report, that's the language that comes out of  
6 that. Is that literal or is that cumulative,  
7 meaning is it literally when the victim, him,  
8 her, their self, has initiated the unrestricted  
9 action or is it any time that an unrestricted  
10 report exists?

11 MS. TAGERT: I doubt Congress has  
12 thought about that.

13 MS. GARVIN: I know. And so since our  
14 recommendation is based on that, I'm just  
15 wondering if that's something that should be  
16 considered now or if maybe the case review should  
17 go back and, not go back but continue to think  
18 about that.

19 MS. TAGERT: So the recommendation  
20 from case review only pertains to unrestricted  
21 reports.

22 MS. GARVIN: But all or -- the reason

1 I'm asking is because the recommendation number  
2 one says "in developing the uniform command  
3 action in accordance with 535 of the NDAA 19,"  
4 which has what I believe is language out of  
5 Congress with regard to unrestricted reports  
6 because it says victim filed the unrestricted  
7 report, which might only be a portion of the  
8 unrestricted reports if it went unrestricted  
9 because someone in the command chain. Am I  
10 making sense? So are we making a recommendation  
11 on all unrestricted reports? Is that what the  
12 working group is recommending with this --

13 BGEN SCHWENK: Yes, I think that's  
14 what the working group was all -- and we'll  
15 clarify that. If you guys vote in favor, when we  
16 write it up we will write it up.

17 MS. GARVIN: Congress has, I believe  
18 --

19 BGEN SCHWENK: Narrowed it to the  
20 third party --

21 MS. GARVIN: Or inadvertently used a  
22 lack of clarity in their vocabulary.

1 CHAIR BASHFORD: A number of the cases  
2 that we've reviewed start where the victim tells,  
3 wants it reported but doesn't go directly to the  
4 MCIO.

5 Any further discussion? Okay. Then  
6 I would put CRWG recommendation one to a vote by  
7 the DAC-IPAD. In favor?

8 (Chorus of ayes.)

9 CHAIR BASHFORD: Megan Tokash?

10 MS. TOKASH: Yes.

11 CHAIR BASHFORD: Okay. So that was  
12 unanimous. Okay. Recommendation number two,  
13 standard set of options for documenting  
14 disposition decisions based on recognized  
15 standards that are uniformly defined and  
16 accurately reflect the source documents.

17 Any discussion as to any aspect of  
18 that? Then I would put that to a vote. Does the  
19 DAC-IPAD, as a whole, vote to adopt  
20 recommendation number two? In favor? Megan?

21 MS. TOKASH: Yes.

22 CHAIR BASHFORD: Unanimously passes

1 again. General Schwenk, you're cooking here.

2 BGEN SCHWENK: I was against both of  
3 those.

4 (Laughter.)

5 CHAIR BASHFORD: And, finally, number  
6 three, that judge advocates or civilian attorneys  
7 review and provide advice to commanders in  
8 completing these reports to assure accuracy and  
9 completeness. Any discussion?

10 BGEN SCHWENK: Let me just say that we  
11 did consider whether judge advocates should be  
12 required to submit the forms, and we felt, after  
13 some discussion, the commanders still ought to do  
14 it, just the judge advocates ought to do their  
15 role of advice and work with the command.

16 CHAIR BASHFORD: In favor of adopting  
17 recommendation number three?

18 MS. TOKASH: Yes.

19 CHAIR BASHFORD: Ms. Garvin?

20 MS. GARVIN: Can I ask -- I'm sorry.  
21 I had a question before --

22 BGEN SCHWENK: Go ahead.

1 MS. GARVIN: So the recommendation  
2 doesn't detail this. I'm just curious if that's  
3 part of it or not, which is would this advice be  
4 documented anywhere or is this, like, informal  
5 advice and could --

6 BGEN SCHWENK: Ours doesn't address  
7 whether it's formal or informal. Our purpose was  
8 just to make sure a judge advocate or civilian  
9 equivalent attorney had eyes on the document and  
10 helped the command in preparing this. You know,  
11 whether in implementing guidance, DoD wants to  
12 say there needs to be a record of that, you know,  
13 that I was advised by a judge advocate, you know,  
14 or something, I don't know. We didn't go there.

15 MS. GARVIN: Okay. I'm fine then.

16 CHAIR BASHFORD: So that was passed  
17 unanimously. And I just, from looking at some of  
18 these, whether they were saying command action  
19 precluded and command action is only really  
20 precluded if the accused isn't a military member  
21 or is dead. That was being used sort of way too  
22 much because he wasn't dead and was, in fact, a

1 member of the military.

2 Okay. So we've adopted those three  
3 recommendations. Thank you, General Schwenk.

4 BGEN SCHWENK: Let me thank the  
5 members and the staff. Each case takes two to  
6 three hours, and the members kept flying in on  
7 their own to sit there and go through these  
8 cases, which, for those of you who have done case  
9 reviews, can be really long and boring. So the  
10 staff was great at coming up with skits. But if  
11 we thought we had it bad doing 166 cases, how  
12 about 1200 cases by the staff already and nearly  
13 800 more to go of which the members will help  
14 with none, you know. So my hat is off to all the  
15 staff that have done the work thus far and will  
16 continue to do it.

17 Just to give you a heads-up, our goal  
18 is to be done by next summer so that it will  
19 make, this first crunch will make the 2020 report  
20 with Dr. Wells's analysis. I told Dr. Wells we'd  
21 try to give him at least a week to work on it, so  
22 he needs to get up to speed.

1                   CHAIR BASHFORD: Okay. So Ms.  
2                   Saunders, we're going to now, we're going to  
3                   start with the expedited transfer final  
4                   assessment, which means we need to get a  
5                   different PowerPoint up there.

6                   MS. SAUNDERS: Chair Bashford and  
7                   Committee members, I'll be presenting the Policy  
8                   Working Group's update on the expedited transfer  
9                   policy. And while we're waiting for the slides  
10                  to come up, let me just orient you to your  
11                  materials briefly.

12                 CHAIR BASHFORD: Could you move your  
13                  microphone a little bit closer?

14                 MS. SAUNDERS: Is this a little bit  
15                  better? Okay. Tabs 21 through 25 of your  
16                  materials relate to this topic. However, we're  
17                  only going to be going, we're not going to be  
18                  going through all of those materials right now.  
19                  Tab 22, for example, has the more full report on  
20                  expedited transfer and, from that report, we have  
21                  pulled the findings and recommendations for the  
22                  issues, which is actually at Tab 21. However, we



1 did meet yesterday and made some changes to that  
2 document, so in your blue folder you should have  
3 an updated version of that which is called "The  
4 Department of Defense Expedited Transfer Policy  
5 and Related Issues" and it has a blue box on the  
6 top. Also, there's a set of slides in there for  
7 you. And just so you know, the slides really are  
8 just the recommendations with a little bit of an  
9 intro, so, primarily, we'll be going through this  
10 document.

11 So it looks like they're up now.

12 Okay.

13 Just to go to provide some background,  
14 as you recall, in the last DAC-IPAD annual report  
15 this committee made the initial assessment of the  
16 expedited transfer policy. And, essentially, you  
17 found that the policy itself was an important  
18 sexual assault response initiative and strongly  
19 recommended it be continued and further improved.

20 Additionally, you made four  
21 recommendations related to the expedited transfer  
22 policy in that report. You also identified six

1 additional issues that you would ask the Policy  
2 Working Group to continue reviewing. And in the  
3 course of reviewing that, of course, the Policy  
4 Working Group found an additional issue that they  
5 also wanted to take a look at, making a total of  
6 seven.

7 In looking at these additional issues,  
8 which we'll get to in just a minute, the Policy  
9 Working Group talked to a wide variety of groups  
10 of people from the services and DoD. They talked  
11 to commanders, special victims' counsel, SAPR  
12 personnel, SARCs, special victim prosecutors and  
13 defense counsel, and investigators. And,  
14 importantly, the Policy Working Group also talked  
15 to a panel of sexual assault victims who had  
16 received expedited transfers, and they told us  
17 about their experiences with that.

18 Additionally, in addition to speaking  
19 with all of those witnesses, the Policy Working  
20 Group also provided a request for information to  
21 the services and DoD requesting data and  
22 information on expedited transfers of victims and

1 those accused of sexual assault. And so that is  
2 also in your materials that you have today.

3 So moving right into the issues and  
4 the assessments and recommendations, issue A is  
5 the expedited transfer option is not available to  
6 service members who make restricted sexual  
7 assault reports. And in the DAC-IPAD's interim  
8 assessment that you made back in the March 2018  
9 report, the DAC-IPAD believed that there was a  
10 workable option that would allow service members  
11 who do file restricted reports to request and  
12 receive expedited transfers, and you asked the  
13 Policy Working Group to continue looking at that.  
14 I will say up-front that the Policy Working Group  
15 did put some of the harder, more difficult to  
16 tackle issues right up-front here, so, hopefully,  
17 you will find that they get easier as we go  
18 along. But this is one of the tougher ones, I  
19 think, that the working group found.

20 To give you some background on this,  
21 the statute for expedited transfer does not  
22 differentiate between service victims who file

1 restricted or unrestricted reports in granting  
2 expedited transfers. However, the DoD policy  
3 does. The DoD policy currently only allows  
4 expedited transfers for those victims who file  
5 unrestricted reports.

6 So, essentially, the status right now  
7 is if a victim wants to remain anonymous, wants  
8 to maintain her privacy, she can do so and either  
9 file a restricted report or file no report at  
10 all. However, then she may be in that situation  
11 where she has to see the alleged offender on a  
12 day-to-day basis, if they work together. She  
13 would also not have the option to try to move to  
14 a location where she might be closer to a support  
15 network.

16 Alternatively, that victim may choose  
17 to file an unrestricted report where she can then  
18 request an expedited transfer. That would  
19 automatically initiate an investigation which  
20 that victim may not want.

21 What we heard from a lot of special  
22 victims' counsel and other victim support

1 personnel is what they typically see in these  
2 cases is a victim who files an unrestricted  
3 report and then immediately requests or states  
4 that she does not want to cooperate with the  
5 investigation and does not want to make a  
6 statement. So that allows that victim to request  
7 an expedited transfer but also not continue to  
8 engage with the investigation.

9           However, the downside of that that we  
10 have heard is, under the MCIOs, under the  
11 investigator's policy, they're required to  
12 continue investigating that. They can't just say  
13 we're going to stop at this point. So that  
14 investigation may include interviewing the  
15 victim's co-workers, family, friends, things that  
16 the victim just may not want to have happen.

17           The response system panel, which was  
18 two panels before this one, actually made a  
19 similar recommendation in their 2014 report. And  
20 in response, the DoD did put out a policy letter  
21 to the services telling the services that they  
22 could request an exception to policy if they

1 wanted to pursue that. So far, that has not  
2 happened. So we're essentially in the same  
3 position that they were at four years ago.

4 Of all of the witnesses that the  
5 Policy Working Group heard from on this issue,  
6 there was no consensus of opinion, as you might  
7 imagine. There were really great arguments for  
8 allowing those who file restricted reports to  
9 request expedited transfers. Some of the main  
10 arguments that they made were it's always good to  
11 give victims more options, it will allow that  
12 victim to move to a situation where she might be  
13 more comfortable and, perhaps in doing so, may  
14 then choose to file an unrestricted report.

15 Some of the arguments that the Policy  
16 Working Group heard against that were that they  
17 want to hold offenders accountable. There is a,  
18 the DoD policy does state a preference for  
19 victims filing unrestricted reports of sexual  
20 assault, and that is so that they can hold  
21 offenders accountable.

22 Also, what was brought up by several

1 witnesses is in the last report the DAC-IPAD  
2 discussed trying to mitigate this perception that  
3 there's an abuse of the expedited transfer  
4 policy. The argument was if we now open this up  
5 to members who file restricted reports, you're  
6 only going to increase that perception. So there  
7 were arguments on both sides, and I don't think  
8 there was any one consensus from the victims or,  
9 excuse me, from the witnesses on that.

10           Having heard all that testimony, the  
11 Policy Working Group makes the following  
12 recommendation, Policy Working Group  
13 recommendation one: the Secretary of Defense  
14 expand the expedited transfer policy to include  
15 victims who file restricted reports of sexual  
16 assault. The victim's report would remain  
17 restricted, and there would be no resulting  
18 investigation.

19           The DAC-IPAD further recommends the  
20 following requirements: Number one, the decision  
21 authority in such cases should be an O6 or flag  
22 officer at the service headquarters organization

1 in charge of military assignments, rather than  
2 the victim's commander. Number two, the victim's  
3 commander and senior enlisted leader both at the  
4 gaining and losing installations should be  
5 informed of the sexual assault and the fact that  
6 the victim has requested an expedited transfer  
7 without being given the alleged offender's  
8 identity or other facts of the case, enabling  
9 them to appropriately advise the victim on career  
10 impacts of an expedited transfer request and  
11 ensure that the victim is receiving appropriate  
12 medical or mental healthcare. And number three,  
13 a sexual assault response coordinator, victim  
14 advocate, or special victims' counsel or victims'  
15 legal counsel must advise the victim of the  
16 potential consequences of filing a restricted  
17 report and requesting an expedited transfer, such  
18 as the alleged perpetrator not being held  
19 accountable for his or her actions or the loss of  
20 evidence should the victim later decide to  
21 unrestrict his or her report.

22 Would any of the Policy Working Group



1 members like to chime in on your thoughts on this  
2 issue?

3 BGEN SCHWENK: Yes, I think this is  
4 clearly the most controversial of the  
5 recommendations. Interestingly, when Terri said  
6 that witnesses split on the issue, they also  
7 split within each panel. So, you know, victim  
8 advocates would say one thing and the other  
9 victim advocate would think something different.  
10 Trial counsel would say, the other trial counsel  
11 something different. So it really is a split.

12 From my personal point of view, the  
13 purpose of the expedited transfer program is to  
14 help the victim recover. And we have a group of  
15 victims who file restricted reports, and the  
16 purpose of that was to help people recover and,  
17 yet, they're precluded from expedited transfer  
18 where they could get better help. And the  
19 restricted report becomes a sort of unrestricted  
20 report, let's be honest, because the likelihood  
21 of the word getting out increases the more people  
22 that know. That's got to be part of the advice

1 that they get on our number three, you know, when  
2 they get advice ahead of time and do you really  
3 want to do this. So that's important for them to  
4 know and for us to admit in making this  
5 recommendation.

6 But, nonetheless, I think that it's  
7 the right thing to do for the victims, for the  
8 restricted report people, and the military  
9 clearly can do it. DoD has recognized that by  
10 allowing it to be an exception to policy. It's  
11 just a matter of doing it.

12 And so, rather than leaving the status  
13 quo, I thought it was important to try to nudge  
14 them along by making a recommendation, just do  
15 it.

16 CHAIR BASHFORD: Could you achieve the  
17 same aim if somebody who filed an unrestricted  
18 report but immediately declined, if rather than  
19 launching the full-bore investigation where they  
20 talked to everybody, you know, and get everybody  
21 talking the way they do, if they simply followed  
22 that I do not want to cooperate with this, I do

1 not want any investigation to happen? Which  
2 would be easier to achieve?

3 BGEN SCHWENK: Administratively, I  
4 think the latter would be easier because you  
5 wouldn't worry about people knowing about it.  
6 It's an unrestricted report where everybody can  
7 talk about it and everybody can know it. Plus,  
8 the expedited transfer program could then run the  
9 way it currently runs. Go to the immediate  
10 commander, you know, do the appeal process. You  
11 wouldn't have to change any of that.

12 The downside is everybody knows and it  
13 all goes out. We've completely removed any  
14 restricted nature. If we do it the way we  
15 recommend it, then you do retain, I think, in  
16 most cases, a good amount of restricted so that  
17 fewer people would know and it would help the  
18 victim.

19 DR. MARKOWITZ: One of the things that  
20 at least I see from my perspective is that the  
21 expedited transfer program is used potentially as  
22 motive to fabricate at trial. And so if we have

1 the potential for expedited transfer in a  
2 restricted case, we take some of that off the  
3 table. If you have the ability to get an  
4 expedited transfer without having to go  
5 unrestricted, that takes some of that issue off  
6 the table. It is not one of those things that  
7 can then be used as a hammer potentially in cases  
8 where you have a victim at trial who has received  
9 an expedited transfer to be closer to family or  
10 to end up at an installation that may have a  
11 perception of being a more favorable assignment  
12 or what have you.

13 So I think that there are a variety of  
14 reasons why having expedited transfer for  
15 restricted cases ends up being beneficial. And  
16 so I second what General Schwenk was saying about  
17 this, I think, being a positive thing.

18 CMSAF MCKINLEY: You may also have a  
19 situation where, because of the atmosphere of  
20 where that person resides in installation X, that  
21 they don't want to file an unrestricted and so  
22 they'll go restricted, but they want to get away

1 from that situation. And this gives them the  
2 ability to go through a situation at another  
3 installation where they have more support and  
4 maybe at that installation, if they want to go  
5 ahead and file an unrestricted report and go  
6 ahead after the perpetrator. So there's many  
7 positives that we see.

8 MS. SAUNDERS: And I will say, Chair  
9 Bashford, too, your suggestion, that's getting  
10 into a little bit of the next issue and some of  
11 the arguments we heard against allowing the  
12 victim to unrestricted and then curtailing the  
13 investigation. Some of the MCIO witnesses that  
14 we had speak to us were against that idea. I  
15 think their idea was, one of the things we heard  
16 is, you know, I don't know that I want my 24-  
17 year-old investigator out there in the field to  
18 have that much discretion. That was one thing we  
19 heard. There was also the concern about having,  
20 about potential liability. If my commander  
21 knows, you know, who that perpetrator is, if we  
22 have a named perpetrator, then what happens if

1 that person re-offends? What happens if we do  
2 not investigate this case and that perpetrator  
3 re-offends. So that was just one argument that  
4 came up.

5 CHAIR BASHFORD: Any other comments?  
6 Are you asking us then to vote on your  
7 recommendation one?

8 MS. SAUNDERS: Yes, ma'am, if you're  
9 ready to. If you would like to have more  
10 discussion or if you have any additional  
11 questions, I'm happy to answer them.

12 MS. LONG: I have a question. Did you  
13 consider having the command -- if I missed this,  
14 I'm sorry. I thought I understood that the  
15 commander of the place where the victim would be  
16 moving would know, but the perpetrator would  
17 remain where they are under the command. So is  
18 there something then that if that perpetrator  
19 ended up moving before the report was  
20 unrestricted that information then follows that?  
21 I say perpetrator. The accused follows to  
22 counter the concern that you may have a

1 perpetrator who could re-offend without someone  
2 knowing?

3 MS. SAUNDERS: I don't know that we  
4 really talked about that in our working group.

5 MS. LONG: I mean, I see problems with  
6 it. I'm just trying to think of how to solve the  
7 issue that you raised, which was one I was just  
8 trying to balance, having heard this. I mean, I  
9 think it should be available. Obviously, I'm  
10 just trying to think of what you do.

11 BGEN SCHWENK: One of the good things  
12 about -- this isn't perfect, but I think it's a  
13 step forward. But one of the things is, I think  
14 it's number two, if I have it there somewhere,  
15 letting the gaining installation commander and  
16 senior enlisted know. So if I'm the victim and I  
17 move over there and I'm over there and my suspect  
18 or alleged perpetrator shows up, I know they know  
19 I can go to my command to get help about this is  
20 a problem. And then, working together, they can  
21 decide whether it's appropriate to go try to do  
22 something to keep the person away, you know,

1 maneuver where we're stationed on the  
2 installation, whatever they can do. So at least  
3 there's, we really thought it was important that  
4 the gaining people know what's going on so they  
5 can administer to the person.

6 MS. LONG: That was my question. I  
7 thought that that person wasn't going to know.

8 BGEN SCHWENK: No, they are going to  
9 know, so there's a place to go for help besides  
10 the SARC, somebody with some authority.

11 MS. LONG: So then what do you mean  
12 then --

13 BGEN SCHWENK: The victim, the victim,  
14 I can go to my commander because the commander  
15 knows I'm a victim. I'm not spilling beans. And  
16 I can say you're not going to believe who I just  
17 ran into at the PX, you know, he's here or she's  
18 here. And then they can work with me, I have  
19 somebody to work with. So it's not a perfect  
20 solution, but at least it gives them assistance  
21 at a commander level to try to work through that  
22 kind of a problem.



1 MS. SAUNDERS: And I think, in  
2 addition, there would be somebody at the  
3 headquarters level who would know that the  
4 identity of the perpetrator, the person who is  
5 actually acting on the expedited transfer because  
6 they would be working at the assignments branch.  
7 That might be an additional check on that issue  
8 to make sure that you're not transferring an  
9 accused to the same place as a victim.

10 MS. LONG: Does that have a negative  
11 impact on that accused then in some way?

12 BGEN SCHWENK: Yes. I mean, the hard  
13 part on that is the administration of having that  
14 because if you're suddenly flagging somebody's  
15 file so that, you know, do not transfer to X,  
16 pretty soon everybody is going to know what that  
17 means, you know. And so I'm not sure -- but we  
18 didn't go there.

19 MS. GARVIN: And if I may, I mean,  
20 what we were looking at is the articulated  
21 purpose of expedited transfer not for safety  
22 reasons but health and recovery of the victim.

1 That's what's already articulated. It's already  
2 on why it's supposed to exist, and it is already,  
3 by law, available to restricted and unrestricted.  
4 We just have policy right now that says, oh,  
5 we're not going to give it to you unless you ask  
6 for an exception. And so we've made it really  
7 hard to get that which is actually available by  
8 law, and so let's be true to our word, let's make  
9 it available, and let's focus on health,  
10 recovery, and setting up a survivor to access  
11 what he, she, or they might need.

12 HON. BRISBOIS: So I guess I just need  
13 to be clear about this, the information that's  
14 being provided because this is a restricted  
15 report transfer that we're talking about. So the  
16 leaving and gaining commanders are told that the  
17 person asking for the transfer is a victim, but  
18 that's all they're told.

19 MS. SAUNDERS: That's correct.

20 HON. BRISBOIS: Okay. So I was a  
21 little confused as to them knowing or not knowing  
22 the identity to the perpetrator alleged. That

1 would require at the gaining facility for the  
2 victim then to make their own determination  
3 whether to ID that person, which, at that point,  
4 it would become an unrestricted report.

5 BGEN SCHWENK: Well, it can still be  
6 restricted because if you did it this way, the  
7 gaining, your new commander and senior enlisted  
8 leader know you're a victim. So now I can decide  
9 when I see whoever at the PX, I can decide am I  
10 going to handle this myself, talk to my friends,  
11 or am I going to go to my commander or my senior  
12 enlisted and say I got a problem, can you help  
13 me. They already know I'm a victim. Now I can  
14 tell them the perpetrator is here.

15 HON. BRISBOIS: Yes, and that's what  
16 I meant. That's when it becomes a --

17 BGEN SCHWENK: But it's the victim's  
18 decision to tell them anymore.

19 HON. BRISBOIS: That's right. And  
20 that's what I was getting at.

21 BGEN SCHWENK: Right. And that's  
22 where we kept it, in the victim's hands.

1 HON. BRISBOIS: So it doesn't change  
2 current practice in terms of who controls  
3 reporting or not reporting the alleged offender.

4 BGEN SCHWENK: The MCIO --

5 HON. BRISBOIS: That's still a  
6 victim's determination.

7 BGEN SCHWENK: Yes.

8 CHAIR BASHFORD: I don't see where it  
9 says that the 06 or flag officer in charge of  
10 military assignments would know the accused's  
11 name. Did I understand you to say that they  
12 would know who the accused was?

13 HON. BRISBOIS: Well, that was my  
14 purpose of my question. They will not know  
15 unless and until the victim changes their mind  
16 about making it an unrestricted report.

17 BGEN SCHWENK: Whether the people at  
18 the personnel unit know the facts of the case, I  
19 don't think we ever talked about them knowing  
20 that. They just know there's a restricted  
21 report, period, end of discussion, and a request  
22 for an expedited transfer.

1 MS. SAUNDERS: I think there are a  
2 number of details that I think --

3 BGEN SCHWENK: Sure.

4 MS. SAUNDERS: -- any kind of working  
5 group that would sit down and put this together  
6 would have to work through.

7 BGEN SCHWENK: A lot more than we  
8 thought of, I'm sure. But these are the bare  
9 bones.

10 CMSAF MCKINLEY: There's also, later  
11 on we'll introduce another recommendation that  
12 will kind of marry up with this and weave into  
13 this also.

14 CHAIR BASHFORD: Is there any further  
15 discussion on this? Then I'm going to ask the  
16 panel to vote as to whether to accept the Policy  
17 Working Group recommendation number one about  
18 expedited transfers for restricted report people.  
19 In favor? Megan? I didn't hear. Megan, are you  
20 there?

21 MS. TOKASH: Can you hear me?

22 CHAIR BASHFORD: Now I can, yes.

1 MS. TOKASH: Okay, good.

2 CHAIR BASHFORD: Are you in favor --

3 MS. TOKASH: Yes.

4 CHAIR BASHFORD: -- that? Okay, good.

5 So I believe that passed then unanimously. Well,  
6 if that was the hardest one, we're going to float  
7 right through the rest. Okay. Ms. Saunders.

8 MS. SAUNDERS: Moving on to the next  
9 issue, this is issue b, inadvertent disclosures  
10 by victims to their commands of sexual assaults  
11 and reports of sexual assault made by third  
12 parties denies service members the opportunity to  
13 make a restricted report and protect their  
14 privacy if they so desire. The DAC-IPAD's  
15 interim assessment in your last report was that  
16 you believe there should be a workable solution  
17 to allow victims who are in this situation who  
18 did not want to have the sexual assault reported  
19 be able to restrict the additional investigation  
20 of the sexual assault, and then you asked the  
21 Policy Working Group to continue looking at this.  
22 The background on this, if you recall

1 last October, we had a group of commanders who  
2 appeared before the DAC-IPAD and one of the  
3 commanders in that group said if I have one  
4 recommendation that I could make to this panel it  
5 would be to have some kind of mechanism where a  
6 victim could say I did not intend for my sexual  
7 assault to be unrestricted. A third party  
8 reported it or I inadvertently told a mandatory  
9 reporter, but I did not mean for this to go  
10 forward as an unrestricted report, to have some  
11 kind of mechanism for that victim to be able to  
12 pull that back, to be able to, I think the term  
13 was re-restrict that report.

14 So that's where that came from, and  
15 several other commanders echoed that initial  
16 commander in saying that that should be a policy  
17 that should go forward.

18 Some of the victims or, excuse me,  
19 some of the witnesses who, just like the last  
20 issue, there was a split of opinion on the  
21 witnesses who came and spoke to the Policy  
22 Working Group on this with, you know, kind of

1 evenly split with a number of them who supported  
2 this idea. Again, it gives victims more options,  
3 and maybe, if that victim is in a more  
4 comfortable situation in the future, she would  
5 then choose to un-restrict the report. Also, if  
6 the victim chooses, if the report is  
7 inadvertently sent to investigation and now the  
8 investigators go out and they begin interviewing  
9 all these people, often against the victim's  
10 wishes, many people were concerned that that was  
11 traumatic to that victim, that you may be re-  
12 victimizing that victim by doing that. And,  
13 ultimately, it's difficult, if not impossible, to  
14 take any kind of criminal action when you have an  
15 uncooperative victim.

16 Arguments against the policy, similar  
17 to the last one, are if you have a named  
18 perpetrator in this case, in this case you would  
19 have an investigator who would probably know, who  
20 would likely know the identity of that  
21 perpetrator to say we're not going to investigate  
22 this, you are potentially opening up that command



1 to liability. You potentially have a perpetrator  
2 out there who could re-offend.

3 And also another argument that was  
4 brought forward is if that victim later, maybe a  
5 year later or some period of time later decides  
6 to un-restrict their report, now you have lost  
7 the potential to gather all of this evidence  
8 because it's stale.

9 So those were generally the arguments  
10 both for and against this recommendation, which  
11 leads to Policy Working Group recommendation two,  
12 "The Secretary of Defense establish a working  
13 group to review whether victims should have the  
14 option to request further disclosure or  
15 investigation of a sexual assault report be  
16 restricted in situations in which the member  
17 loses the ability to file a restricted report  
18 whether because a third party has reported the  
19 sexual assault or because he or she discloses the  
20 assault to a member of the chain of command or  
21 military law enforcement. The working group's  
22 goal should be to find a workable solution that

1 would, in appropriate circumstances, allow the  
2 victim to request the investigation be  
3 terminated. The working group should consider  
4 under what circumstances, such as in the interest  
5 of justice and safety, a case may merit further  
6 investigation, regardless of the victim's wishes,  
7 and should also consider whether existing  
8 safeguards are sufficient to ensure victims are  
9 not improperly pressured by the alleged offenders  
10 or others to request termination of the  
11 investigation.

12 This working group should consider  
13 implementing the following requirements in such a  
14 policy. Number one, the victim be required to  
15 meet with an SVC or VLC before signing a  
16 statement requesting that the investigation be  
17 discontinued so that the SVC Or VLC can advise  
18 the victim of the potential consequences of  
19 closing the investigation. Number two, the  
20 investigative agent be required to get  
21 supervisory or MCIO headquarters-level approval  
22 to close a case in those circumstances. Number

1 three, the MCIOs be aware of and take steps to  
2 mitigate a potential perception by third-party  
3 reporters that allegations are being ignored when  
4 they see no investigation is taking place, such  
5 as notifying the third-party reporter of the  
6 MCIO's decision to honor the victim's request.  
7 Number four, cases in which the alleged offender  
8 is in a position of authority over the victim be  
9 excluded from such a policy. Number five, if the  
10 MCIO terminates the investigation at the request  
11 of the victim, no adverse administrative or  
12 disciplinary action may be taken against the  
13 alleged offender based solely on the reporting  
14 witness's sexual assault allegation."

15 Are there any members of the working  
16 group that want to speak to this?

17 BGEN SCHWENK: I consider this one  
18 harder than the first one but easier for the DAC-  
19 IPAD because we basically punt it to a working  
20 group rather than making a direct recommendation  
21 that SECDEF do this. The reason I think it's  
22 harder is because I really see the adverse

1 consequences of doing this is hard. You know,  
2 the adverse consequences can be significant, the  
3 administration of doing it is harder, and I was  
4 not convinced in my own mind that we were ready  
5 to make a full recommendation that SECDEF do this  
6 unless we did a lot more work. And rather than  
7 do that, we decided we're still probably going to  
8 miss something because this is complex and it  
9 involves lots of people, and so then someone had  
10 the idea why don't we say this is important, Mr.  
11 Secretary, and it's so important you ought to put  
12 a working group together and look at, which then  
13 allowed us to say what things should they look at  
14 that worried us, and we put those things in to  
15 the recommendation. So that's my thought.

16 MS. CANNON: Why not do that  
17 yourselves instead of having another group look  
18 at it? You would have looked at it and you've  
19 seen some problems that are starting to show  
20 flags. Rather than have somebody else pick up  
21 this and maybe have to go back a ways to catch  
22 up, why not, since we're still going on with

1 other things, why wouldn't the Policy Working  
2 Group maybe take a further look at it, rather  
3 than set up another group?

4 BGEN SCHWENK: Well, somebody said  
5 that at the Policy Working Group meeting and the  
6 answer was, one, this is really complex and we're  
7 going to miss something anyway, and so better to  
8 have the people with the most vested interest in  
9 it, DoD, and the expertise sit down and do it  
10 than us on something that's this complicated. So  
11 there may be other --

12 MS. CANNON: So just to clarify,  
13 you're not talking about setting up another group  
14 like this.

15 BGEN SCHWENK: No.

16 MS. CANNON: You're talking about  
17 going back inside and finding out who are the  
18 people who are going to be the players and let  
19 them work this out?

20 BGEN SCHWENK: Yes, yes, get the MCIOs  
21 involved and the services and have them all get  
22 together and say, okay, how would we do this and

1 does that make any sense, and see what they come  
2 up with. And then we can monitor whatever they  
3 come up with.

4 CHAIR BASHFORD: Two questions. One,  
5 it seems as though this recommendation is really  
6 only involving sort of inadvertent disclosures.

7 BGEN SCHWENK: Yes.

8 CHAIR BASHFORD: What about if  
9 somebody simply changes their mind? It's like  
10 three days into an unrestricted report and  
11 they're like, whoa, this is not what I wanted to  
12 have happen, why exclude them from being able to  
13 restrict the report?

14 DR. MARKOWITZ: I'm not entirely  
15 certain we are. I think that's part of the  
16 calculus in all of this, and I think that's part  
17 of why, as General Schwenk said, this requires, I  
18 think, some significant analysis internally in  
19 terms of how this goes about. I think we  
20 initially did start out by talking about these as  
21 inadvertent disclosures, but I think part of the  
22 conversation has morphed into an understanding

1 that people don't always recognize what  
2 investigations entail as they get into this and  
3 what disclosing something, what reporting  
4 something actually means fully in the process of  
5 the military justice system.

6 So I don't know that we've closed the  
7 door to the possibility that that exists, but,  
8 again, it's an enormous process issue and I don't  
9 know that an outside advisory committee can fully  
10 vet this in a way that makes sense. I don't know  
11 if --

12 MS. GARVIN: Well, I was just going  
13 to, it's like the issue came to us from the  
14 larger group as the inadvertent disclosure. But  
15 in ours, we ended up talking about those a little  
16 bit and not precluding it. So in our assessment,  
17 it's not limited specifically to --

18 CHAIR BASHFORD: And then your sub  
19 five, it says no administrative or disciplinary  
20 could be taken based solely on the reporting  
21 witness's allegation. Does that leave open  
22 during that period of time when it was

1 inadvertently unrestricted, that even if it then  
2 becomes restricted adverse action could be taken?

3 BGEN SCHWENK: Yes, I think that one  
4 comes from if it takes a couple of days and in  
5 that time some witness comes forward and says I  
6 actually saw this happen, here's what happened,  
7 the MCIO is now going to think I can make a case  
8 just with the witness, I don't even need the  
9 victim anymore. And we didn't think we wanted to  
10 preclude that from happening, necessarily, no.  
11 DoD obviously can do what they want, but we  
12 limited it to we didn't want to preclude that  
13 situation from being permissible.

14 CHAIR BASHFORD: So this  
15 recommendation would be from the DAC-IPAD to DoD  
16 to take a look at this?

17 BGEN SCHWENK: Yes.

18 MS. LONG: Can I ask another process  
19 question that I should probably know? If you  
20 were to just recommend to DoD that they do this,  
21 would the ultimate outcome be that they put  
22 together a working group to see if they did it?



1                   BGEN SCHWENK: Yes.

2                   MS. LONG: So then going back to  
3 Kathleen's, is there a reason not to just  
4 recommend this outright since we'll get the same  
5 result, they'll figure out if they can actually  
6 do it or if you think this is the best thing but  
7 other people who are more expert to figure out?  
8 Is that sort of why --

9                   MS. GARVIN: The latter part, yes.

10                  MS. LONG: Okay. That makes sense.

11                  BGEN SCHWENK: Yes, I'm not sure it's  
12 the best thing, but I think it's important enough  
13 that it needs to be looked at. But I'm not sure  
14 it's the best, so somebody --

15                  CMSAF MCKINLEY: This was not an easy  
16 thing. We wanted to be able to handle it  
17 ourselves but, because of the complexity and the  
18 importance of this, we thought it best to move it  
19 forward.

20                  DR. SPOHN: I think this is important  
21 because, in the context of reviewing the case  
22 files, the Case Review Working Group in which the

1 victim is approached and said, whoa, I wasn't  
2 sexually assaulted and, yet, there's a full-blown  
3 investigation nonetheless, including interviewing  
4 people who perhaps does not want to be  
5 interviewed and it's a waste of resources and  
6 it's also, in some ways, a violation of privacy.  
7 We did see a lot of those cases in our case  
8 review.

9 HON. BRISBOIS: What are the chances  
10 that, you know, DoD, SECDEF and his advisors,  
11 kind of adopt in part and reject in part and kick  
12 it back to us?

13 BGEN SCHWENK: I don't know that they  
14 would kick it back to us. I think, if an  
15 advisory committee recommends SECDEF take a look  
16 at something, they're going to put together a  
17 memo put together a working group and they're  
18 going to look at it. So we know we'll get an  
19 honest look from within the department.

20 You know, coming out the other end,  
21 they could put out a policy, sort of like what we  
22 say but better because they've thought about it

1 more. They could do, well, we're not ready to go  
2 there yet but, on a case by case exception to  
3 policy basis, you know, like the last issue we  
4 talked about, we're willing to look at it or they  
5 can do anything. But I don't think they're  
6 likely to send it back to us since we sent it to  
7 them, you know, so . . .

8 MS. SAUNDERS: Of course, I suppose  
9 it's possible they could send a part of it back.  
10 Later on this afternoon, we'll be talking about  
11 the recommendations from the JPP that were -- but  
12 it's a little bit of a different situation.

13 HON. BRISBOIS: It's a little  
14 different, but that's what triggered it in --

15 BGEN SCHWENK: Yes, but there it was  
16 a JPP saying give it to those guys, you know.

17 MS. SAUNDERS: Right. But it's a  
18 different situation, though.

19 CHAIR BASHFORD: Well, are there any  
20 further comments, questions? All right. Then  
21 I'm going to ask the Committee to vote on Policy  
22 Working Group recommendation two, advice to DoD

1 to set up a working group to implement sort of a  
2 claw-back policy. In favor? Megan? Megan, can  
3 you hear us?

4 MS. TOKASH: Can you hear me?

5 CHAIR BASHFORD: Yes, I can hear you  
6 now.

7 MS. TOKASH: Yes.

8 CHAIR BASHFORD: Okay.

9 MS. TOKASH: Thank you.

10 CHAIR BASHFORD: So Judge Grimm was  
11 not -- are you in favor?

12 HON. GRIMM: Yes.

13 CHAIR BASHFORD: A unanimous.

14 BGEN SCHWENK: Megan, are we keeping  
15 you awake wherever you are?

16 MS. TOKASH: Yes, you are. It's a  
17 very invigorating conversation.

18 MS. SAUNDERS: Sometimes on the phone  
19 there's a little bit of a delay.

20 MS. TOKASH: Yes, I think maybe this  
21 is a delay, but I can hear you all okay.

22 CHAIR BASHFORD: Okay, great. Ms.

1       Saunders, moving along.

2                   MS. SAUNDERS: Moving along to the  
3 next issue, issue C, the approval standard and  
4 purpose of DoD's expedited transfer policy are  
5 not sufficiently clear or comprehensive. The  
6 DAC-IPAD's interim assessment in the last report  
7 basically just says that it should be further  
8 evaluated and clarified, certain aspects of the  
9 report.

10                   In looking at the DoD expedited  
11 transfer policy, the Policy Working Group, you  
12 know, again, spoke to many witnesses on this  
13 issue, and some of the things that came up were  
14 the current DoD policy identifies two intents,  
15 which is to address situations in which a victim  
16 feels safe but uncomfortable and also to assist  
17 in the victim's recovery by moving them to a new  
18 location. Many of the presenters also testified  
19 that really the primary purpose of this is to  
20 assist victims in their recovery, and that should  
21 really be the overriding purpose of the program.

22                   Another issue that came up is this

1 issue of the credible report. Under the existing  
2 policy, the commander, in order to grant the  
3 expedited transfer -- first of all, within the  
4 policy, there is a presumption for granting it,  
5 so that's one unique aspect of this policy to  
6 begin with. But then, on the other hand, the  
7 commander, in order to grant it, must find  
8 credible information in order to grant it.  
9 Often, what will happen is these reports will  
10 come in or these requests will come in at the  
11 very beginning of an investigation, so that  
12 commander may not have very much, if any,  
13 information at all about the sexual assault.  
14 They can try to get with the investigators. That  
15 victim may or may not have made a statement at  
16 that point. So now this commander, within 72  
17 hours because that's the statutory time period  
18 that they have to make a decision, that commander  
19 is now being forced into this situation where  
20 there's a presumption to grant it but I don't  
21 really have the information that is being  
22 required by this policy to do so. So that kind

1 of puts them in a quandary.

2 What we're finding and what we're  
3 seeing through some of the data that was sent to  
4 us by the services and the DoD was that 97  
5 percent of these requests were granted. So, you  
6 know, in terms of having this credible report,  
7 many of the witnesses wondered is this even  
8 really necessary to have this standard when we're  
9 granting the vast majority of these anyway?

10 One of the issues that also came up  
11 was this 72-hour time period. That is statutory.  
12 Many of the witnesses felt this is, in fact the  
13 majority of the witnesses felt this is just too  
14 short of a time. The main reason of that is not  
15 to find out new information about the case but  
16 because, as a commander or a senior enlisted  
17 leader in that unit, if a victim is requesting an  
18 expedited transfer, they want to have the  
19 opportunity to talk to that victim, to be able to  
20 talk to the assignments personnel to determine  
21 what is the best thing for this victim in terms  
22 of staying in their career field, going to a

1 different career field, what location would be  
2 best for this person and to be able to counsel  
3 that victim on those options.

4 For example, if a request comes in on  
5 a Friday afternoon, now, you know, they're  
6 probably not going to be able to reach the  
7 personnel they need to be able to reach at the  
8 headquarters level. So the recommendation would  
9 be to increase that time period, and that was  
10 pretty unanimous across all of the witnesses that  
11 the Policy Working Group spoke to.

12 Another point that got brought up was,  
13 well, the time period to grant or disapprove the  
14 request is 72 hours. Once it's granted, it  
15 typically takes a month and a half to two months  
16 before that victim is actually able to move. So  
17 granting a little more time in the beginning is  
18 probably not going to make a very big difference  
19 in the overall length of time.

20 So having considered all of that  
21 information, the Policy Working Group makes two  
22 recommendations on this issue. The first is



1 Policy Working Group recommendation three. The  
2 Secretary of Defense revise the DoD expedited  
3 transfer policy to include or clarify the  
4 following points: Number one, the primary goal of  
5 the DoD expedited transfer policy is to act in  
6 the best interest of the victim. Commanders  
7 should make decisions regarding such requests  
8 based upon that goal. Number two, the single  
9 overriding purpose of the expedited transfer  
10 policy is to assist in the victim's mental,  
11 physical, and emotional recovery from the trauma  
12 of sexual assault. This purpose statement should  
13 be followed by examples of reasons why a victim  
14 might request an expedited transfer and how such  
15 a transfer would assist in a victim's recovery,  
16 e.g. proximity of the alleged offender or to the  
17 site of the assault at the current location,  
18 ostracism or retaliation at the current location,  
19 proximity to a support network of family or  
20 friends at the requested location, and the  
21 victim's desire for a fresh start following the  
22 assault.

1                   Number three, eliminate the  
2                   requirement that a commander determine that a  
3                   report be credible and instead add to the  
4                   criteria commanders must consider in making a  
5                   decision on an expedited transfer request "any  
6                   evidence that the victim's report is not  
7                   credible."

8                   And the next recommendation, Policy  
9                   Working Group recommendation four is that  
10                  Congress increase the amount of time allotted to  
11                  a commander to process an expedited transfer  
12                  request from 72 hours to no more than five  
13                  workdays.

14                  Any comments from the Policy Working  
15                  Group?

16                  BGEN SCHWENK: As to the latter first,  
17                  the 72 hours and five days, one of the things  
18                  that somebody pointed out in one of our  
19                  discussions was the transfer doesn't take effect  
20                  for four to six to eight weeks anyway, so the  
21                  difference of two days in the long term doesn't  
22                  make that big a difference but it makes a lot of

1 difference in the quality of advice that the  
2 individual, the victim, is going to get from the  
3 command in making the decision. So that's  
4 something to throw out on that.

5 I think I have to bear responsibility,  
6 I guess, for the recommendation three issues  
7 because when the JPP went out and talked to the  
8 commanders in the field and one of the questions  
9 was what standard do you use in deciding these  
10 things, the commander said, well, I have to  
11 consider all these factors and then the answer  
12 is, yes, that's what the instruction says,  
13 consider all these factors, but what's your  
14 standard? Your normal standard as a commander is  
15 best interest of the command, but this is all  
16 about the victim, so do you do best interest of  
17 the victim or command? And there was a lot of  
18 silence, and then there was confusion and  
19 disagreement.

20 So that sort of got me thinking, gee  
21 whiz, if they ever rewrite this policy, maybe  
22 they ought to just take that on and, hence, the

1 recommendations that you see flowing from that.

2           The credibility one, almost every  
3 commander to a person said they really hated  
4 having to make a credibility determination based  
5 on an allegation and an investigation that just  
6 started and, you know, how the heck am I supposed  
7 to do that? It puts me in a terrible situation.  
8 I don't want to be there. So our recommendation  
9 is it's still a good idea to consider credibility  
10 but not in the sense the commander has to  
11 determine whether it's credible. It's is there  
12 any evidence that it's not? You know, so if  
13 somebody comes in and says it's all a lie, that's  
14 something you ought to consider. But in the vast  
15 majority of the cases, like I never even saw one  
16 in our reviews, but in the vast majority of the  
17 cases that's not the case. There's an allegation  
18 and an investigation. There's nothing quickly  
19 that comes in and says that that allegation is  
20 not credible. So we tried to keep it but spin it  
21 the other way to make it easier on commanders but  
22 still leave it as an issue that's potential in a

1 case, potentially available in a case. My  
2 thoughts.

3 CHAIR BASHFORD: I think if you're  
4 going to have difficulty when you're saying the  
5 purpose statement followed by examples of  
6 reasons, and you said, you know, for example,  
7 retaliation at the current location. I can't  
8 imagine somebody saying that we took that, if  
9 there's retaliation at your location, then the  
10 commander should deal with that issue, as opposed  
11 to, well, let's push this someplace else. I just  
12 don't see -- people are concerned about  
13 retaliation already, and so to add that as a  
14 reason for an expedited transfer seems to say  
15 we'll, instead of dealing with a problem, we'll  
16 just push it aside kind of.

17 MS. SAUNDERS: Although that is  
18 actually in the statute.

19 CHAIR BASHFORD: Is it? Okay.

20 MS. SAUNDERS: That's actually the  
21 only one that's listed in the statute so as to  
22 reduce the possibility of retaliation against a

1 member for reporting a sexual assault. I think  
2 they're looking at it from the victim's  
3 perspective. The commander would still probably  
4 would certainly investigate that retaliation but  
5 . . .

6 CHAIR BASHFORD: Any other comments  
7 from anybody? Yes?

8 MS. CANNON: What did you mean by  
9 clarify? What is it specifically that you want  
10 them to clarify? Because it's in the top and  
11 then you have three points. Was there something  
12 in particular that you really wanted them to  
13 clarify?

14 BGEN SCHWENK: Well, clarify the  
15 policy. I mean, that, again, could be read,  
16 could be read the Secretary of Defense revise the  
17 DoD expedited, revise DoD instruction whatever  
18 and clarify the expedited transfer policy on the  
19 following points or to make the following points.  
20 It's the policy that needs to be clarified. It  
21 doesn't say whether the commander is supposed to  
22 say or make a decision based on the interests of

1 the victim or in the interest of the command.

2 MS. CANNON: I was just wondering if  
3 you need it clarified at all and just say . . .

4 BGEN SCHWENK: Oh, okay, sure. That  
5 works.

6 MS. CANNON: That was easy.

7 BGEN SCHWENK: I'm in charge of your  
8 group, and I'm an impediment to progress. At  
9 least that's what my wife says, I don't know.

10 CHAIR BASHFORD: So that would then  
11 read SECDEF revise DoD expedited transfer policy  
12 to include the following points?

13 BGEN SCHWENK: Yes.

14 CHAIR BASHFORD: Any further  
15 discussion? All right. Then with that friendly  
16 amendment, I ask that we vote as to whether or  
17 not we're going to adopt recommendation three,  
18 which has how many points? Three points. All in  
19 favor?

20 MS. TOKASH: Yes.

21 CHAIR BASHFORD: Unanimous.

22 MS. SAUNDERS: We heard you, Megan.

1 CHAIR BASHFORD: We heard you  
2 beautifully that time. Ms. Saunders, continuing.

3 MS. SAUNDERS: Do you want to vote on  
4 recommendation four?

5 CHAIR BASHFORD: Oh, I'm sorry, I  
6 didn't realize that was the second one. Yes,  
7 four. All in favor. That's the extending the  
8 time. Ms. Tokash?

9 MS. TOKASH: You cut out at the last  
10 part there.

11 CHAIR BASHFORD: That is extending the  
12 processing request from 72 hours to no more than  
13 five workdays.

14 MS. TOKASH: Yes.

15 CHAIR BASHFORD: Okay. Unanimous.

16 MS. TOKASH: Thank you.

17 CHAIR BASHFORD: Thank you.

18 MS. SAUNDERS: Moving on to Issue D,  
19 the expedited transfer policy includes temporary  
20 or permanent intra-installation moves as well as  
21 moves to new installations or locations.

22 And the DAC-IPAD's interim assessment



1 was -- there was concern that was brought up by a  
2 witness at a previous panel that, if you have a  
3 victim who takes a transfer within the  
4 installation and then, thinking that that will  
5 revolve the problems but then perhaps continues  
6 to run into the alleged perpetrator or has  
7 additional issues -- if she then requests another  
8 expedited transfer to a different location, that  
9 that might be problematic for her or it may not  
10 be granted.

11 She may be looked at negatively for  
12 making that additional recommendation or request.

13 Having spoken to numerous witnesses on  
14 this issue, it appears that that is really just  
15 not an issue. We heard from a lot of victim  
16 service personnel -- SVCs, SARCs -- and basically  
17 they said, you know, we've encountered these  
18 situations and they're dealt with on face value.  
19 So we really don't see that this is a big issue.

20 So the policy working group's  
21 recommended assessment on this is, "Having spoken  
22 to numerous presenters" from services -- "from

1 the services and DoD, SVCs, VLCs, SARCs, SAPR  
2 personnel, assignments personnel, prosecutors and  
3 defense counsel, the committee has determined  
4 that the current expedited transfer policy is  
5 working for both the victims and command."

6 Is that any -- are there any  
7 objections to that language?

8 MS. TOKASH: No.

9 MS. SAUNDERS: Okay.

10 CHAIR BASHFORD: That's with respect  
11 to the --

12 MS. SAUNDERS: No. Oh, right.

13 CHAIR BASHFORD: -- intra-installation  
14 only? Because you are making recommendations --  
15 you've made recommendations to change the policy  
16 to some extent.

17 MS. SAUNDERS: Right.

18 BGEN SCHWENK: Yes, and we state, it's  
19 overly broad, at the end.

20 CHAIR BASHFORD: Just --

21 BGEN SCHWENK: The current expedited  
22 transfer policy regarding this issue.

1 CHAIR BASHFORD: Yes.

2 BGEN SCHWENK: So just to narrow it to  
3 this issue.

4 CHAIR BASHFORD: Oh, this issue being  
5 the end --

6 BGEN SCHWENK: When we write it up the  
7 --

8 CHAIR BASHFORD: -- the repetitive --

9 BGEN SCHWENK: -- versus interim.

10 CHAIR BASHFORD: -- request?

11 MS. SAUNDERS: Okay, yes, we're up to  
12 Issue E. And I thank the working group for  
13 looking at that and coming back with an  
14 assessment, and things are good.

15 BGEN SCHWENK: Well, we have to find  
16 something might be there. But there was no there  
17 to --

18 MS. GARVIN: There was no -- right.

19 MS. SAUNDERS: Okay. Moving on to  
20 Issue E, the expedited transfer policy is limited  
21 to service members who are victims of sexual  
22 assault and does not include service members

1 whose civilian spouses or children are sexual  
2 assault victims, even though all may face exactly  
3 the same difficult situations at the installation  
4 or may equally benefit from moves to a new  
5 location.

6 The DAC-IPAD's initial assessment of  
7 this was that the policy working group should see  
8 if there's a way to expand the policy to include  
9 this. However, before the policy working group  
10 was able to get too far along on this issue, the  
11 2019 NDAA came out with this exact provision in  
12 it.

13 So, the assessment would be, since the  
14 DAC-IPAD's initial review of this issue in the  
15 March 2018 annual report, Congress enacted a  
16 provision in the National Defense Authorization  
17 Act for fiscal year 2019 which expands the  
18 expedited transfer policy to include service  
19 members whose dependents are victims of sexual  
20 assault by other service members, thus  
21 effectively resolving this issue.

22 This section states -- and this is

1 from the statute -- "The Secretary of Defense  
2 shall establish a policy to allow the transfer of  
3 a member of the Army, Navy, Air Force or Marine  
4 Corps whose dependent is the victim of sexual  
5 assault perpetrated by a member of the Armed  
6 Forces who is not related to the victim."

7 I'll open it up to the Committee,  
8 whether you feel that this goes far enough or  
9 that this resolves the issue.

10 MS. GARVIN: I think, reassessed, it  
11 resolves the issue.

12 CHAIR BASHFORD: I think we should  
13 claim credit for it, from our --

14 (Simultaneously speaking)

15 MS SAUNDERS: Well, interestingly,  
16 this provision was in the same provision of the  
17 NDAA that expanded the expedited transfer program  
18 to include those who go to the family advocacy  
19 program, which was this panel's previous  
20 recommendation.

21 So I think it's a fair thing. I think  
22 it's fair to say that it was probably because of

1 this committee.

2 CHAIR BASHFORD: Well, I thought so --

3 BGEN SCHWENK: And even if it wasn't,  
4 we should take credit for it.

5 MS. SAUNDERS: Exactly, exactly.

6 Okay, Issue F. The Department of Defense and  
7 military services collect only limited expedited  
8 transfer data on victims of sexual assault and  
9 collect no data on transfers of alleged  
10 offenders.

11 And the background on this is --  
12 especially with regard to the alleged offenders -  
13 - is that, you know, within the DoD policy  
14 itself, one of the options that the commander can  
15 consider is, rather than bringing the expedited  
16 transfer to the victim, would be to move the  
17 accused.

18 So this group went out and requested  
19 some information from all the services and from  
20 DoD on, you know, expedited transfer information  
21 on both victims and the accused for 2016. That  
22 information is in your materials at Tabs 24 and

1 25.

2 The information that -- we were able  
3 to get most of the information that we requested  
4 for victims. It was not easy to come by, and I  
5 think that we heard that they had to go to  
6 multiple sources within each service to try to  
7 gather this information. It was not something  
8 that they were keeping track of, most of it,  
9 necessarily. So it was kind of a heavy lift for  
10 the services to be able to produce that.

11 With regard to the accused, only a  
12 couple of the services were able to produce,  
13 really, any information on how many accused  
14 service members were being transferred.

15 And even when we spoke with  
16 representatives from the Defense Services for the  
17 services, they do not track it either. So right  
18 now, that is just information that is not being  
19 tracked by, it appears, anyone.

20 And only very limited information is  
21 being tracked by the DoD and its services with  
22 regard to victims, such as the numbers, the

1 percent that's granted and the percent that's  
2 denied.

3 One instance where we have already  
4 seen where this information or gathering  
5 additional information could be useful, in the  
6 DAC-IPAD, in its last report, made an assessment  
7 that there's not widespread abuse of the  
8 expedited transfer policy.

9 One of the pieces of information that  
10 the DAC-IPAD used to come up with that assessment  
11 was information provided by the services. Back -  
12 - and in the JPP, when the JPP went out on these  
13 site visits, they heard from numerous people --  
14 prosecutors, defense counsel, a lot of different  
15 people that -- this is -- this program is, you  
16 know, there's definitely a perception that this  
17 is being abused.

18 Many people have this perception.  
19 They think all these victims are filing false  
20 reports so that they can to go Hawaii or, you  
21 know, California or somewhere that they really  
22 want to go to.



1           Looking at the information which is at  
2 your tabs, you know, you see that not everyone is  
3 going to, you know, Hawaii or California and that  
4 many, you know, a lot of people are coming from  
5 Fort Hood; a lot of people are going to Fort  
6 Hood.

7           So there's no -- it appears that  
8 assignments are being, are based on the victim's  
9 wishes, but also where a geographically available  
10 location for that person to go.

11           So that's, perhaps, some information  
12 that the services can take back to show people to  
13 say, no, you know, we've looked at this. It's not  
14 really being abused, as you might have thought.

15           So this led to the policy working  
16 group Recommendation 5, and this is a long one.  
17 I apologize. It reads, "The military services  
18 track and report the following data in order to  
19 best evaluate the expedited transfer program:

20           "Data on the number of expedited  
21 transfer requests by victims; the grade and job  
22 title of the requester; the gender and race of

1 the requester; the origin installation, whether  
2 the requester was represented by an SVC or VLC;  
3 the requested transfer locations; the actual  
4 transfer locations, whether the transfer was  
5 permanent or temporary, the grade and title of  
6 the decision maker and appeal authority, if  
7 applicable; the dates of the sexual assault  
8 report, transfer request, approval or disapproval  
9 decision and appeal decision and transfer and the  
10 disposition of the sexual assault case, if  
11 final."

12 The next bullet is -- there we go.

13 "Data on the number of accused transferred; the  
14 grade and job title of the accused; the gender  
15 and race of the accused; the origin installation,  
16 the transfer installation; the grade and title of  
17 the decision maker; the dates of the sexual  
18 assault report and transfer; whether the transfer  
19 was permanent or temporary and the disposition of  
20 the sexual case, if final.

21 "Data on victim participation in the  
22 investigation and prosecution before and after an

1 expedited transfer; data on the marital status  
2 and/or the number of dependents of victims of  
3 sexual assault who request expedited transfers;  
4 data on the type of sexual assault offense,  
5 penetrative or contact alleged by victims  
6 requesting expedited transfers; data on service  
7 retention rates for sexual assault victims who  
8 receive expedited transfers compared with sexual  
9 assault victims who did not receive expedited  
10 transfers and with service members of similar  
11 rank and years of service.

12 "Data on the career progression for  
13 sexual assault victims who receive expedited  
14 transfers compared with sexual assault victims  
15 who did not receive expedited transfers and with  
16 service members of similar rank and years of  
17 service.

18 "Data on victim satisfaction with the  
19 expedited transfer program and, finally, data on  
20 the expedited transfer request rate of service  
21 members who make unrestricted reports of sexual  
22 assault."

1 Chief, I know you had a lot of  
2 thoughts on this.

3 CMSAF MCKINLEY: On the expedited  
4 transfer of the accused, I really found it quite  
5 puzzling how little information we have on that.  
6 We don't know how long it takes for the  
7 reprocessing to get approved.

8 We don't know how long it takes to PCS  
9 that person. And two branches of service don't  
10 track one single bit of what happens to the  
11 accused. And, you know, so we'd like to find out  
12 more about that.

13 But at the end of the day, I think  
14 getting more information on really what happens  
15 on the expedited transfer approval will make it  
16 better as far as how long we retain those  
17 valuable members of our military, both the victim  
18 and the accused, and how successful the expedited  
19 transfer program is on the gain end. So all this  
20 information, I think, will make us a whole lot  
21 smarter on the program.

22 MS. SAUNDERS: And I think they heard

1 from -- a number of the witnesses said, well, you  
2 know, some of the SARCs said, once the victim  
3 transfers, we don't know whether she's receiving  
4 the services she should be receiving.

5 You know, what's happening with her  
6 career. Whether she stays in the military --  
7 there were, you know, there was one report that  
8 had said, I think it was like 40 percent of  
9 sexual assault victims separate from the service  
10 shortly thereafter.

11 And so, being -- right now, I don't  
12 think the services are really tracking this  
13 information, so being able to track career  
14 progression and separation rate of victims would  
15 be -- many people thought would be very helpful.

16 DR. SPOHN: So some of the data  
17 elements that were recommended to be selected  
18 seem to be selected seem to be irrelevant if the  
19 victim filed a restricted report. You need to  
20 specify that in the --- I mean, for example, data  
21 on the accuser -- I'm assuming that you'll not --

22 MS. SAUNDERS: Oh, right.

1 MS. SPOHN: -- expect that to be.

2 CMSAF MCKINLEY: That's a great point.

3 MS. SAUNDERS: No, that is. That is  
4 a good point. So if this program were -- if  
5 expedited transfers were expanded to those that  
6 filed a restricted report, that would have a huge  
7 investment

8 (Simultaneously speaking)

9 DR. SPOHN: Well, you're transferring  
10 the accused of a restricted report.

11 PARTICIPANT: Because would know who  
12 it was, right?

13 MS. SAUNDERS: No, but the victim  
14 would.

15 CHAIR BASHFORD: Yes, and what's the  
16 rationale between and asking for marital status  
17 and dependents of victims and not asking for  
18 similar data for -- if the accused are the ones  
19 being transferred?

20 MS. SAUNDERS: I think that might have  
21 related to -- I'm trying to remember what  
22 somebody said. It might have relate going back

1 to the family advocacy program because that  
2 program was not available to them in terms of the  
3 victim being married to the accused and also how  
4 easy or difficult it is for that victim to  
5 transfer when they have children, especially if  
6 they have children with the accused.

7 But we could certainly add that in.

8 CMSAF MCKINLEY: I've already gone,  
9 added it in.

10 MS. SAUNDERS: Added it?

11 CMSAF MCKINLEY: It may have been --

12 CHAIR BASHFORD: It just wasn't clear  
13 to me if this was -- is -- if this is for the  
14 marital, you know --

15 MS. SAUNDERS: I think it was --

16 CMSAF MCKINLEY: Yeah.

17 CHAIR BASHFORD: -- the dependent  
18 spouse or something or if this is just generally  
19 for victims.

20 MS. SAUNDERS: I can certainly add  
21 that in.

22 CHIEF MCKINLEY: We have no problem

1 adding that in.

2 MS. SAUNDERS: Yes.

3 CHAIR BASHFORD: It would be victims  
4 of sexual assault who request expedited transfers  
5 or same data for accused transfer because they're  
6 not requesting it.

7 MS. SAUNDERS: Right, accused service  
8 members who are connected or --

9 CHAIR BASHFORD: You had a comment  
10 before?

11 MR. MARKEY: I did. So I'm thinking  
12 of the execution of this recommendation. So I  
13 guess I'm curious to where this rests right now  
14 and then, logistically, who would be responsible  
15 for the collection, reporting of this information  
16 and what sort of resources would be required to  
17 move this recommendation.

18 MS. SAUNDERS: Well this is basically  
19 information we did request for fiscal year 2016  
20 from the services. And it was not easy for them.  
21 It did require kind of a heavy lift because they  
22 were not already tracking it.



1                   And I don't think there was one  
2                   location that they were able to go to to get all  
3                   of this information.  Some, you know, the special  
4                   victim counsel might have some information.

5                   I'm actually not even entirely sure  
6                   where all of the different locations within each  
7                   service had to go to get the information.  So I  
8                   think that would be something that, you know, the  
9                   services would have to work out if they were  
10                  going to do that.

11                  MR. MARKEY:  I'm not opposed to what  
12                  information they had to look at.  I'm just  
13                  curious if they did -- if anybody did or provided  
14                  information as to what this would look like with  
15                  their service.  What sort of resources are they  
16                  going to have to use in order to complete this or  
17                  to comply with this.

18                  MS. SAUNDERS:  I don't -- we did not  
19                  do any kind of study with that.  I'm sure there  
20                  will be a fair amount of resources and personnel  
21                  that would be required.  Perhaps it could be done  
22                  in association with the 140-Alpha project that

1 you all discussed at the last meeting. But I  
2 think that --

3 CHAIR BASHFORD: It seems like a lot  
4 of this is being collected, just not centralized,  
5 right?

6 MS. SAUNDERS: I think so. I think  
7 they were, you know, they were able to, for the  
8 most part, answer questions that we asked. It's  
9 -- I'm sure there was a lot of behind-the-scenes  
10 work that went into getting that, so. And the  
11 services were very responsive in providing this  
12 information.

13 MS. BASHFORD: Kathleen?

14 MS. CANNON: I have, with regards to  
15 Number -- well, it's not numbered -- data on  
16 career progression.

17 MS. SAUNDERS: Yes.

18 MS. CANNON: That seemed like a  
19 complicated one to figure out in comparison to  
20 somebody else, because who knows what different  
21 factors might be playing into it. And how can  
22 you compare a sexual assault victim who has

1 expedited transfer and one who wasn't?

2 And that presumes they're in the same  
3 position. So I think that's a complicated one.

4 MS. SAUNDERS: Absolutely.

5 MS. CANNON: But it would be  
6 interesting to see what the progression was. I  
7 don't know about the comparison, if you're able  
8 to do that.

9 MS. SAUNDERS: And that may not be --  
10 you're right. That would be very complex.

11 MS. CANNON: And my Part 2 of that is,  
12 what about seeing what happens with the accused  
13 and the progression he or she had as a -- well, I  
14 don't know, as a result, but just kind of a -- I  
15 don't know if you can say as a result -- and  
16 that's what that kind of implies.

17 MS. SAUNDERS: Right.

18 MS. CANNON: Right?

19 MS. SAUNDERS: But you're --

20 CMSAF MCKINLEY: We've actually talked  
21 about that also because, you know, you can have -  
22 - be an accused for, say, a period of two years,

1 you know. And during that period of two years,  
2 you can't get promoted. You can't have PCS, no  
3 security clearance, et cetera, et cetera.

4 So if the person comes back and  
5 they're found innocent or at the end of two  
6 years, they've missed those promotional  
7 opportunities.

8 Well, for the most part, it's the same  
9 as the victim because the victim, depending on  
10 which branch of service and which promotion  
11 system each branch of the service has, they may  
12 be passed over because of going back and forth to  
13 mental health, not able to study, not able to  
14 perform the job at the optimum level or whatever.

15 So they're -- they miss the  
16 promotional opportunity too. And so looking at  
17 the effects of both the victim and the accused  
18 during a sexual assault, I think, is an important  
19 piece that our military has skipped over, you  
20 know.

21 And I think it's important that, you  
22 know, we go back and look and, you know -- and

1 what can we do for that person. If a person is a  
2 victim of sexual assault/rape and it turns out  
3 they are a victim, then that takes two years.

4 In that period of time, they've missed  
5 out on so many boards and everything else. Are  
6 we just going to say, too bad? Or should we go  
7 back and look at that and say, what can we do for  
8 that victim?

9 And it's about taking care of our  
10 people that serve our country. And, you know,  
11 and for no fault of their own, they've been  
12 victimized and continue to be victimized. You  
13 know, we've got to look at how we can take care  
14 of them.

15 MS. CANNON: I agree. I just don't  
16 know that that's what this asks for.

17 CHAIR BASHFORD: Because this is tied  
18 to the expedited transfer only.

19 MS. SAUNDERS: Right.

20 CHAIR BASHFORD: Not long-term effects  
21 of what does being accused in terms of --

22 CMSAF MCKINLEY: And with the 140-

1 Alpha, we're asking for those retention type  
2 things and so some extra data in 140-Alpha that  
3 we've been using it to load information on public  
4 data.

5 MS. SAUNDERS: And in terms of the  
6 accused, that was one of the pieces of  
7 information, I think, that the working group  
8 wanted to know, was what was the ultimate  
9 disposition?

10 So if you're moving the accused, what,  
11 ultimately, happened with that case? Are we  
12 seeing a lot of cases where nothing happens and,  
13 yet, maybe this person is still suffering all  
14 those effects of having been moved.

15 We really know nothing at all about  
16 transfers of the accused.

17 CHAIR BASHFORD: I'd say it's a good  
18 recommendation for policy working group to take  
19 up.

20 MS. SAUNDERS: To take -- what's going  
21 on with that?

22 MR. MARKEY: I just have one more

1 question. So maybe I'm missing it, so the goal  
2 of collecting this data is to assess an expedited  
3 transfer --

4 MS. SAUNDERS: To assess --

5 MR. MARKEY: -- program or to --

6 MS. SAUNDERS: Yes.

7 MR. MARKEY: -- identify what's  
8 happening with people that have expedited  
9 transfers. I guess I don't know what the  
10 ultimate goal --

11 CMSAF MCKINLEY: I'd say it's both.

12 MR. MARKEY: -- of collecting this  
13 data is.

14 CMSAF MCKINLEY: It's absolutely both  
15 because one of the things we don't know is, on an  
16 expedited transfer, I mean, we transfer a person  
17 from this base to the next base -- we don't know  
18 if, long-term, about the success of that.

19 Is the person separated for the first  
20 six months and -- or are we, as a military, as a  
21 country, taking care of that person to the point  
22 where they want to stay in and have a career?

1           And until you start tracking that and  
2           evaluating that, we can't make that  
3           determination.

4           MR. MARKEY: So who would crunch that  
5           at the end? Who would be responsibility to  
6           assess and analyze that data and then --

7           MS. SAUNDERS: You know, I -- right  
8           now we're suggesting that services collect this  
9           data. They could use that for their own, you  
10          know, benefit. It could be something that, in  
11          the future, the 140-Alpha would be collected  
12          through that and the 146 panel that follows this  
13          one would look at.

14          But I think that the point was, as the  
15          chief said, you're looking at the policy itself.  
16          What is the -- how effective is the policy? Are  
17          there changes that need to be made to the policy?

18          Maybe some of this data could help  
19          them take a look at that. But also to individual  
20          victims or the accused in terms of their long-  
21          term, how are -- you know, what is happening with  
22          them long-term.



1 MS. GARVIN: One of the things, I  
2 think, that we heard was, right, the 140-Alpha's  
3 starting to collect. We're starting to get lots  
4 of data points. None of these were really in  
5 there.

6 And so just start to process anything  
7 about this program and some others. These were  
8 additional data points that can be useful. Not  
9 laying out how you would ever think about  
10 causation, right, we're like what would data  
11 points that need to be, start to be collected so  
12 that program could be evaluated at some point in  
13 a much more rigorous fashion than -- right now  
14 what we have is semi-anecdotal.

15 CHAIR BASHFORD: I think we're  
16 recommending we collect this -- if we doubt that  
17 they collect this data, and then I suppose we can  
18 take a look down the road and see if it's  
19 actually useful data that's being collected.

20 But we're in a little bit of a time  
21 crunch, so unless there's any other discussion of  
22 this recommendation, Number 5, the data

1 collection and both for the victim and the  
2 accused.

3 In favor? Ms. Tokash?

4 MS. TOKASH: Yes.

5 CHAIR BASHFORD: Okay, that's  
6 unanimous. So, Ms. Markowitz had stepped away,  
7 so absent Ms. Markowitz.

8 MS. SAUNDERS: Final issue is Issue G.  
9 Some active duty service members who are sexually  
10 assaulted are not able to successfully return to  
11 duty even after an expedited transfer because  
12 their need for transitional assistance is not  
13 met.

14 And the background for this is the  
15 policy working group did hear from several  
16 victims who had received expedited transfers and  
17 also from other witnesses who talked about this  
18 issue.

19 And, in fact, the mother of a sexual  
20 assault victim talked about her daughter's  
21 experiences, which was very compelling, to the  
22 working group. The issue that came out was that,

1 for some victims, existing outpatient mental  
2 health treatment may not be enough, even with an  
3 expedited transfer, to be able to fully recover  
4 and return to duty.

5 So there should be some mechanism or  
6 some other option for those victims who request  
7 it to be able to get additional, either in-  
8 patient treatment or go to a Wounded Warriors  
9 Center or something like that, you know, in order  
10 to fully recover or to be able to return to a  
11 fully functional member of the unit.

12 And then this would be regardless of  
13 -- this is not directly just for those who get  
14 expedited transfers. It could be for victims who  
15 do not get expedited transfers.

16 And so the recommendation is the  
17 Secretaries of the military departments  
18 incorporate into policy, for those sexual assault  
19 victims who request it, an option to attend a  
20 transitional care program at a military medical  
21 facility, Wounded Warrior Center or other  
22 facility in order to allow those victims

1 sufficient time and resources to heal from the  
2 trauma of sexual assault.

3 And we did hear from some witnesses  
4 who said they had heard of this happening.  
5 They've known a victim who has gone to inpatient  
6 treatment and gotten additional care. It just  
7 doesn't seem to be in, you know, in the expedited  
8 transfer policy or other policy that this is a,  
9 you know, something to consider.

10 CMSAF MCKINLEY: For Wounded Warriors  
11 out there suffering from PTSD, we offer them the  
12 transition center for Wounded Warriors to be able  
13 to recover before they're expected to go back to  
14 full duty.

15 Someone who is filing sexual  
16 assault/rape, we offer nothing like that.  
17 They're put back into duty, but no one knows,  
18 really, what happened to them, and they're  
19 expected to be full duty.

20 And to offer this, you know, and  
21 especially, if it's an expedited transfer,  
22 imagine someone comes in, sexually assaulted.

1 They wanted expedited transfer, but in the  
2 process, they go to a transition center and they  
3 get real assistance before they arrive at their  
4 new duty location.

5 So they need more follow-up round as  
6 a troop to be able to perform their duties. And  
7 that's at the request, probably, based upon a  
8 mental health evaluation and that person  
9 requested some type of transition center.

10 That transition center could be, you  
11 know, basically on-duty, just -- or it could be  
12 in-place for the military placement, maybe, for  
13 four to six weeks, you know. But to offer that,  
14 we already have transition centers out there that  
15 work with PTSD and all this other stuff.

16 To offer that to sexual assault  
17 victims, I think, would be a home run for them  
18 and also and to retain them, so keeping those  
19 people in the service because now we have better  
20 taken care of them.

21 CHAIR BASHFORD: Anyone else? I now  
22 would ask that we vote whether or not to accept

1 Recommendation 6. In favor?

2 FEMALE PARTICIPANT: Yes.

3 CHAIR BASHFORD: I think that was  
4 unanimous. Let me -- yes? Okay. Thank you very  
5 much for all the hard work that the policy  
6 working group has done. And thanks for your  
7 exposition of this, so.

8 MS. SAUNDERS: Thank you.

9 CHAIR BASHFORD: And now we have --  
10 you're not going any place.

11 MS. SAUNDERS: No, I know.

12 CHAIR BASHFORD: You're sitting still  
13 here. Just stretching.

14 (Off microphone discussion)

15 CHAIR BASHFORD: Just for my  
16 understanding, for the upcoming afternoon, are  
17 there any more things that need to be voted on by  
18 the DAC-IPAD or just -- we're just getting  
19 information?

20 MS. SAUNDERS: Just receiving  
21 information.

22 CHAIR BASHFORD: Thank you. Okay,

1 because we're starting to shrink a little bit.

2 MS. PETERS: Yes, I'm still here.

3 CHAIR BASHFORD: Excellent.

4 MS. PETERS: Sorry.

5 CMSAF MCKINLEY: Aren't we supposed to  
6 be deciding how we're going to proceed on this?  
7 I mean, there -- I'm not voting, but I guess you  
8 make the decision -- and I'll let you handle it,  
9 on how we proceed.

10 CHAIR BASHFORD: In terms of -- I  
11 think there will be a decision point of -- go  
12 about this.

13 (Off record discussion)

14 MS. PETERS: Okay. Good afternoon.  
15 If I can get us started, this briefing is about  
16 the memorandum that the committee received from  
17 the Department of Defense Office of General  
18 Counsel in June of this year asking that we  
19 examine some recommendations from the Judicial  
20 Proceedings Panel.

21 And Tab 2 of your read-ahead materials  
22 is where that memorandum exists. I think we've

1 briefly run it by you all, I think, in a previous  
2 session. But, for your reference, it's there at  
3 Tab 2.

4 And the copy of the recommendations  
5 are in there, and I'm going to go through some of  
6 them in this presentation. The goal today is,  
7 again, to give you an overview of these  
8 recommendations that you are being asked to  
9 analyze.

10 Give you a little bit of background  
11 information and, just initially, for the staff to  
12 propose a way ahead to examine these issues. So,  
13 can I get the -- thanks -- on to the next slide.

14 There are five total JPP  
15 recommendations that were forwarded by the DoD  
16 Office of General Counsel. We received these in  
17 June of this year. The full proposal for  
18 analyzing these, just for reference, are in Tabs  
19 5 and 6 of these read-ahead materials.

20 And it's from Tabs 5 and 6 that I  
21 developed the briefing. Two of the  
22 recommendations that we received asked for



1 analysis of data that's already contained in the  
2 DAC-IPAD's court-martial database. So those  
3 issues are already being incorporated into the  
4 analysis that will be in the DAC-IPAD's reports.

5 So today we want to address the three  
6 remaining recommendations. They really concern  
7 UCMJ provisions around how cases are selected for  
8 prosecution in the military.

9 And at this point, again, just for  
10 background, the JPP has issued a number of  
11 recommendations. We're not aware of DoD's formal  
12 response to a lot of them, but the memorandum we  
13 received says that at least OGC has reviewed the  
14 JPP's recommendations.

15 So there may also be more to follow  
16 from OGC in the future or from DoD in regards to  
17 other JPP recommendations. But they at least  
18 want us to look at these.

19 So before I get into the three  
20 recommendations, they're about process. And this  
21 is a slide meant to just capture where we are in  
22 the process when we talk about the

1 recommendations that you've been asked to look  
2 at.

3 The recommendations primarily concern  
4 Articles 32, 33 and 34 of the UCMJ. So at the  
5 Article 32 stage, you're dealing with charges  
6 that have been preferred, so sexual assault  
7 charges, a penetrative or contact offense has  
8 been preferred.

9 Under the UCMJ, you have to have an  
10 Article 32 preliminary hearing, or the accused  
11 has a right to one, before any charge can be  
12 referred to a general court-martial.

13 Once an Article 32 hearing is held or  
14 it's waived, the staff judge advocate has to  
15 advise the convening authority of certain  
16 parameters so that there's probable cause,  
17 there's jurisdiction and advises to the  
18 disposition that should be made of the case.

19 Then the convening authority, armed  
20 with a charge sheet, an Article 32 hearing  
21 result, and the staff judge advocate's advice can  
22 decide whether or not to refer some or all of

1 those charges to trial. And that's going to be  
2 based on a number of factors.

3 I think Melanie's going to discuss the  
4 issues around those factors and the complications  
5 around the -- or the complexities of the referral  
6 decision in just a bit.

7 So to move us along, the  
8 recommendations that came to us from the JPP  
9 derived from information the JPP received from  
10 its subcommittee. So the Judicial Proceedings  
11 Panel tasked its subcommittee to conduct site  
12 visits to various military installations across  
13 all of the military services back in the summer  
14 of 2016.

15 They asked the subcommittee to address  
16 a number of issues in the JPP's charter, which  
17 spanned, I guess, everything around  
18 investigation, prosecution and defense,  
19 consequently, of sexual assault in the Armed  
20 Forces.

21 So the members went around to a number  
22 of installations. They talked to prosecutors,

1 defense counsel, special victims counsel,  
2 commanders, staff judge advocates, Victim  
3 Services personnel. And they brought the  
4 information back and looked for common threads  
5 and common trends.

6 The themes that stood out across  
7 whatever area you're practicing in, whatever  
8 service you're in or whatever location you're in,  
9 the themes they kept hearing, generally, were  
10 that the Article 32 preliminary hearing, as of  
11 that time, was less robust than it had been in  
12 the past; that people commonly perceived there's  
13 pressure on convening authorities to refer sexual  
14 assault charges to court-martial.

15 There was pervasive concern about a  
16 low standard of probable cause for referring  
17 charges to court-martial and that there was a  
18 relatively high acquittal rate for sexual assault  
19 offenses.

20 So with that background, the Judicial  
21 Proceedings Panel made Recommendation 55  
22 regarding the Article 32 preliminary hearing.

1 And this has been charged to you all to analyze.

2 And the recommendation is as follows:

3 "The Secretary of Defense and the DAC-  
4 IPAD continue the review of the new Article 32  
5 preliminary hearing process which, in the view of  
6 many counsel interviewed during military  
7 installation site visits and according to  
8 information presented to the JPP, no longer  
9 serves a useful discovery purpose.

10 This review should look at whether the  
11 preliminary hearing officers in sexual assault  
12 cases should be military judges or other senior  
13 judge advocates with military justice experience  
14 and whether a recommendation of such a  
15 preliminary hearing officer against referral,  
16 based on lack of probable cause, should be given  
17 more weight by the convening authority.

18 This review should evaluate data on  
19 how often the recommendations of preliminary  
20 hearing officers regarding case disposition are  
21 followed by convening authorities and determine  
22 whether further analysis of or changes to the

1 process are required.

2 In addition, because the Article 32  
3 hearing no longer serves as a discovery mechanism  
4 for the defense, the JPP reiterates its  
5 recommendation presented in its report on  
6 military defense counsel resources and experience  
7 in sexual assault cases; that the military  
8 services provide the defense with independent  
9 investigators."

10 The next recommendation for you to  
11 analyze is JPP Recommendation 57. That concerns  
12 Article 33 of the UCMJ, non-binding disposition  
13 guidance to judge advocates and commanders.

14 It says, as follows: "After case  
15 disposition guidance under Article 33 UCMJ is  
16 promulgated, the Secretary of Defense and DAC-  
17 IPAD conduct both military installation site  
18 visits and further research to determine whether  
19 convening authorities and staff judge advocates  
20 are making effective use of this guidance in  
21 deciding case dispositions.

22 They should also determine what

1 effect, if any, this guidance has had on the  
2 number of sexual assault cases being referred to  
3 courts martial and on the acquittal rate in such  
4 cases.

5 And, finally, the JPP made a  
6 recommendation 58 concerning Article 34, the  
7 staff judge advocate's pretrial advice, and they  
8 recommended that the Secretary of Defense and the  
9 DAC-IPAD review whether Article 34 of the UCMJ  
10 and Rule for Court-martial 406 should be amended  
11 to remove the requirement that the staff judge  
12 advocate's advice to the convening authority,  
13 expect for exculpatory information contained in  
14 that advice, be released to the defense upon  
15 referral of charges to courts martial.

16 This review should determine whether  
17 any memorandum from trial counsel that is  
18 appended to the file should also be shielded from  
19 disclosure to defense.

20 This review should also consider  
21 whether such a change would encourage the staff  
22 judge advocate to provide more fully developed

1 and candid written advice to the convening  
2 authority regarding the strengths and weaknesses  
3 of the charges so that the convening authority  
4 can make a better-informed disposition decision.

5 The lettering and the formatting on  
6 these slides is something we did to make it more  
7 readable for ourselves as well as for you all.  
8 But, obviously, they aren't really in paragraph  
9 form.

10 If I can give you some background on  
11 the articles that were examined in these  
12 recommendations -- I'm going to just review  
13 Article 32. My colleagues will handle Article 33  
14 and 34 and place them in better context.

15 So the Article 32 changes occurred  
16 around what -- or went into effect in the  
17 beginning of 2015, really the end of 2014. I  
18 think it was December 26, 2014. It was a pivotal  
19 moment of change for the Article 32.

20 Up until that point, it has,  
21 historically, been a thorough and impartial  
22 investigation into the truth and form of the



1 charges. A military victim could be compelled to  
2 testify -- as could any military member.

3 An Article 32 investigation served as  
4 a means of discovery. That wasn't in the  
5 statute, but it's in the discussion, as sort of a  
6 discussion in guidance paragraph in the manual.

7 That was the system that judge  
8 advocates lived with for a time. Come 2015, we  
9 have what is still the current version that  
10 Congress changed -- again, in the FY-14 and in  
11 the NDAA.

12 They said that this is now a  
13 preliminary hearing. So, I'm sorry, we -- I  
14 think I've been using preliminary hearing  
15 throughout. It used the Article 32  
16 investigation. As of 2015, it's now a  
17 preliminary hearing.

18 It's specifically not an  
19 investigation, and it actually says that it's not  
20 intended to serve as a means of discovery, so  
21 they've made that purpose clear.

22 They also limited the inquiry at the

1 32 to the following: whether each specification  
2 alleges an offense, whether there's probable  
3 cause to believe that the accused committed the  
4 offense; whether there's jurisdiction and what  
5 disposition should be made of the case.

6 Previously, the Article 32  
7 investigation asked whether there were reasonable  
8 grounds to go forward to court-martial and to  
9 what type of court-martial. So, but this is a  
10 little bit more specific, and it's now  
11 specifically a probable cause determination.

12 Of note, just to make things a little  
13 bit more challenging for us, come 1 January 2019,  
14 we'll have more changes to the Article 32.

15 These are not necessarily structural  
16 changes or all that drastic. What will go into  
17 effect in 2019 is language in the Article 32  
18 statute and in the implementing rules that are  
19 just more consistent with the other articles in  
20 UCMJ.

21 So they're more consistently seen that  
22 this is a probable cause. And previously, there

1 was some variation around that.

2 The other major change is that the  
3 statute now requires a more robust written  
4 analysis of the charges and the evidence  
5 supporting the charges.

6 I think this is really a codification  
7 of good practice. I think you might survey the  
8 field and find that a lot of this was going on  
9 pretty frequently. But now they've actually made  
10 specific requirements for what the Article 32  
11 preliminary hearing officer needs to do and write  
12 up about the evidence.

13 This is intended to give the staff  
14 judge advocate and the convening authority a more  
15 informed analysis to ensure that there's a robust  
16 analysis of the evidence available at the Article  
17 32.

18 Arguably, there's some verbiage  
19 changes in the implementing rules that may,  
20 depending on how practitioners implement this,  
21 expand the scope of the evidence allowed at this  
22 probable cause hearing.

1 I think the language said previously  
2 evidence necessary to hit those four purposes I  
3 read. And now it's information relevant to  
4 making a probable cause determination. And  
5 there's some other slight tweaks that can also  
6 maybe provide legal room to bring in more  
7 evidence.

8 There's also a post-hearing sort of  
9 written submission that's allowed now that wasn't  
10 allowed previously. And that's something that  
11 can be developed with further research.

12 So that's the historical background on  
13 Article 32. And just to be a little bit more  
14 specific about what the JPP found, not just from  
15 the site visits broadly, but from the site visits  
16 with respect to Article 32 and what they then  
17 heard in evidence because they had follow-on  
18 meetings after those installation site visits by  
19 the subcommittee.

20 Generally, there was widespread  
21 concern among practitioners. The Article 32 is  
22 now a paper drill. They're not just not hearing

1 from the military victim anymore. They're not  
2 hearing from any witnesses in a lot of these  
3 hearings.

4 The subcommittee heard about a 15-  
5 minute Article 32. There was -- it was raised as  
6 an issue that the preliminary hearing Officer  
7 recommendations are not necessarily followed.  
8 They don't have to be, and they may not be  
9 followed even when they recommend or find that  
10 that no probable cause exists.

11 So the JPP was concerned with whether  
12 any additional changes to the process are needed.  
13 And they reiterated the issue about defense  
14 investigators and the need for them.

15 That brings us back to an issue that  
16 I think our witness this morning mentioned, but  
17 the Article 32 concerned the JPP in two respects.  
18 One, there was a discovery function to it that is  
19 no longer there.

20 But, two, they did understand that the  
21 Article 32 was functioning to provide less  
22 information to the convening authority. Or at

1 least, that was the concern and that was the  
2 perception they have based on the information  
3 they received.

4 So that was the reason behind their  
5 recommendations. So with regard to the issue of  
6 defense investigators, we have, fortunately, I  
7 think, heard that some of the, I think, JPP and  
8 the RSP addressed this issue of defense  
9 investigators.

10 Some of those recommendations -- while  
11 we haven't received a formal response from DoD,  
12 as I noted before, Congress in the FY-18 NDAA, or  
13 I should say the House of Representatives asked  
14 for a briefing.

15 The House Armed Services Committee  
16 asked to specifically receive from the services  
17 information pertaining to recommendations of the  
18 JPP concerning defense counsel. So that defense  
19 investigator recommendation from the JPP came  
20 from a report.

21 There were other recommendations  
22 around resourcing, defense counsel, expert

1 witness assistance. And, let me see the last one  
2 was the experience and training of defense  
3 counsel.

4 So the JPP raised a number of issues,  
5 one of which was defense investigators. Congress  
6 asked for a briefing, and we found out DoD  
7 responded this summer. The update from that  
8 response, from DoD to Congress is, one, the Navy  
9 has defense investigators. I think we already  
10 heard that anecdotally.

11 The Air Force is in the process of  
12 producing or employing defense investigators.  
13 And we've also heard the staff has received  
14 information subsequent to this report the Army is  
15 hiring defense investigators.

16 What form that takes, how many, how  
17 that's working out, we don't know. But this is  
18 the progress on that issue. Separately, the  
19 services briefed Congress on the remaining issues  
20 raised about resourcing, the funding of experts  
21 for defense and the training and experience of  
22 defense, which we can go into in the future to

1 the extent the committee wants to look into that  
2 and understand the follow-up on that, that issue  
3 raised by the JPP.

4 CHAIR BASHFORD: But according to this  
5 DoD's involved with that, right?

6 MS. PETERS: Yes, ma'am.

7 CHAIR BASHFORD: Okay.

8 Ms. PETERS: So with that, I'll turn  
9 it over to Terri Saunders.

10 MS. SAUNDERS: Thank you. So  
11 following the Article 32 hearing or the waiver,  
12 if that's what happens, the next step in the  
13 process would be that that Article 32 report  
14 would go up to the general court-martial  
15 convening authority for a disposition decision.

16 One, Article 34 of the UCMJ requires  
17 that before that convening authority can refer  
18 charges to a general court-martial, the convening  
19 authority must receive written pre-trial advice  
20 from the staff judge advocate.

21 The -- yes, here we go. The Article  
22 34 specifically says that the convening authority



1 may not refer charges to a general court-martial  
2 unless the SJA advises that the specification  
3 alleges an offense of the UCMJ, there's probable  
4 cause to believe the accused committed the  
5 offense and a court-martial would have  
6 jurisdiction over the offense and the accused.

7           And the staff judge advocate also  
8 provides a recommendation to the convening  
9 authority as to disposition. One piece of this,  
10 too, is that if the convening authority refers  
11 charges to a general court-martial, the staff  
12 judge advocate's pretrial advice must be provided  
13 to the defense.

14           Where -- this was raised in the JPP as  
15 an issue going back to what Meghan just spoke to  
16 you about, with the Article 32 hearings now being  
17 less robust, the concern of the JPP was that less  
18 information is now being provided to the  
19 convening authority.

20           So that convening authority does not  
21 have, perhaps, all the victim testimony or some  
22 of the other eye witness testimony to consider

1 that they might previously have had under the old  
2 style Article 32 investigation.

3 So now, to supplement that, what many  
4 of the Services are doing are providing a  
5 prosecution merits memo or similar type document  
6 where the trial counsel, in that case, briefs the  
7 staff judge advocate, provides strengths and  
8 weaknesses of the case, credibility issues,  
9 evidentiary issues -- all those types of things  
10 that would typically be at issue in a case like  
11 this.

12 And, however, if the staff judge  
13 advocate is now limited in the ability to provide  
14 that information in writing to the convening  
15 authority, because if the case is referred to  
16 trial, that would then be a part of the staff  
17 judge advocate's advice and would then have to be  
18 sent to the defense.

19 So they would, obviously, have this  
20 information regarding the strengths and  
21 weaknesses of the case. So this was obviously of  
22 a concern to the JPP and they made the

1 recommendation to -- that it should be considered  
2 whether or not that should be withheld from the  
3 defense in those circumstances.

4 I'm going to turn it over to Nalini to  
5 talk about the types of advice and the  
6 information the convening authority must  
7 consider.

8 MS. GUPTA: Thank you, Terri. Good  
9 afternoon, everyone. So I will discuss  
10 specifically Article 33 and the recommendation  
11 from the JPP around that.

12 So one of the issues that's already  
13 been alluded to is that during these site visits,  
14 the JPP subcommittee heard time and time again  
15 that main council believed that the standard in  
16 the military for referral of charges, which is  
17 probable cause, is too low.

18 And based on this information in the  
19 site visits as well as further research and based  
20 on further witnesses heard up on the JPP, the JPP  
21 recommended that the following standard be  
22 considered for referral to court-martial.

1           "The charges are supported by probable  
2           cause and there's reasonable likelihood of  
3           proving the elements of each offense beyond  
4           reasonable doubt using all only evidence likely  
5           to be found admissible at trial."

6           The JPP was not the only entity  
7           looking at the referral standard. The military  
8           justice JSC group was also looking at this. That  
9           was another DoD entity. And they recommended a  
10          new Article 33 on disposition guidance.

11          And when Congress passed the Military  
12          Justice Act of 2016, one of the articles included  
13          was the new Article 33 disposition guidance. But  
14          this article states that the president shall  
15          direct the Secretary of Defense to issue non-  
16          binding guidance regarding factors that  
17          commanders, convening authorities, staff judge  
18          advocates and judge advocates should take into  
19          account when exercising their duties with respect  
20          to disposition of charges and specifications in  
21          the interest of justice and discipline under  
22          Articles 30 and 34.

1           Such guidance shall take into account  
2           the appropriate consideration of military  
3           requirements when principles contained in  
4           official guidance of attorney general to  
5           attorneys for the government with respect to  
6           disposition of federal criminal cases in  
7           accordance with the principle of fair and even-  
8           handed administrative of federal criminal law.

9           So the part that's highlighted on the  
10          slides, the principles contained in official  
11          guidance of the attorney general, is more  
12          commonly referred to as the U.S. attorney's  
13          manual, and I know many of you are very familiar  
14          with this manual.

15          Section 927.220 of this manual  
16          contains a standard for when a U.S. attorney  
17          should commence or recommend federal prosecution.  
18          And specifically, the manual states, "The  
19          attorney for the government should commence or  
20          recommend federal prosecution if he or she  
21          believes that the person's conduct constitutes a  
22          federal offense and that the admissible evidence

1 will probably be sufficient to obtain and sustain  
2 a conviction."

3           There are three escape hatches, the  
4 first being that no substantial federal interests  
5 would be served by prosecution. The second would  
6 be -- the second is that the person is subject to  
7 effective prosecution in another jurisdiction.  
8 And the third is that there is this inadequate  
9 non-criminal alternative to prosecution.

10           So pursuant to the new Article 33, the  
11 Joint Service Committee published for public  
12 comment draft disposition guidance in the Federal  
13 Register. That is contained in Tab 7 of your  
14 read-aheads.

15           And I wanted to emphasize that this is  
16 still a draft. It's not final. But whatever the  
17 JSC decides and is signed-off by the president  
18 will go into effect on January 1st, 2019.

19           There's a seven-page document, and I  
20 included a couple slides to highlight some  
21 interesting issues in this disposition guidance.  
22 So the disposition, that guidance, contains

1 factors to consider in making disposition  
2 decisions. And there are 14, which are included  
3 on this slide as well as the next slide.

4 The first one I want to highlight is  
5 H -- the -- it's the one in blue. So one of the  
6 factors to consider is the admissible evidence  
7 will likely be sufficient to obtain and sustain a  
8 conviction in a trial like a court-martial.

9 So this is language very similar to  
10 what you just heard about in the U.S. attorney's  
11 manual. What's significant is, unlike the U.S.  
12 attorneys manual, this is not the standard used  
13 to determine whether or not prosecution should be  
14 commenced, but it is one of 14 factors.

15 The standard for referral in the  
16 military remains probably cause. So this may be  
17 an issue that the DAC-IPAD chooses to pursue  
18 whether on site visits -- and we'll talk more  
19 about it probably again later.

20 And this is a significant departure  
21 from the U.S. Attorneys manual. Just to  
22 highlight -- I won't name all 14 factors, but to

1 highlight a couple other factors, the first three  
2 are very military-specific factors -- commission-  
3 related responsibilities of the command whether  
4 the offense occurred during wartime, combat or  
5 contingency operations and the effect of the  
6 offense on the moral, health, safety, welfare and  
7 good order and discipline of the command.

8 And the last factor I'll highlight is  
9 Factor E. In cases involving an individual who's  
10 a victim under Article 16, the use of a victim as  
11 to the situation.

12 Those are the remaining factors and  
13 another aspect of the disposition guidance is  
14 that it impedes five inappropriate  
15 considerations. I won't read all five of them,  
16 but I do want to highlight D and E.

17 D is the possible effect of the  
18 disposition determination on the commander or  
19 convening authority's multi-career, or other  
20 professional or personal circumstances. E,  
21 political pressure to take or not to take  
22 specific actions in the case.



1           So this is obviously addressing issues  
2 you've heard about throughout the day about  
3 political pressure being a concern in military  
4 justice.

5           With that, I will turn it back to  
6 Meghan to speak about project plan for addressing  
7 these recommendations.

8           MS. PETERS: So you know that means  
9 we're nearing the end of the presentation. We  
10 propose that the committee form a working group  
11 to look at these issues. Something small we  
12 think that -- smaller numbers because I think  
13 some of our working groups now have maybe 7  
14 members, 6 members.

15           And we could probably continue working  
16 with something like two to four members and look  
17 at these issues sequentially rather than all at  
18 once. And a couple reasons for that are the  
19 Article 32 recommendations have multiple parts to  
20 it.

21           But some of those can at least be  
22 analyzed right now because there's not -- they've

1       been persisting, so those issues will likely  
2       still persist and not be too much affected by the  
3       changes come January 2019.

4               Whereas, issues with regard to Article  
5       33 disposition guidance and Article 34 really  
6       might need time to take effect before you can  
7       fully analyze them. So we would need time well  
8       beyond January 2019 to really fully analyze those.

9               And of course, Article 32, that  
10       committee, could continue to look at them. This  
11       working group would work closely with the staff to  
12       really determine which presenter is the full  
13       committee you should hear from. And something  
14       might be handled better in a working group setting.

15               But this primarily, we envision, would  
16       be a -- the working group coming up with what  
17       witnesses and what information should go before  
18       the full committee on these topics. But the  
19       working group members could also help the staff  
20       prepare, you know, requests for information to  
21  
22

1 send to DoD and the services.

2 And this working group could really  
3 sort of dig down into these issues and decide in  
4 the future are things like installation site  
5 visits advisable. It's certainly mentioned in  
6 one of these recommendations, but the working  
7 group could be the ones to come up with a  
8 specific proposal and bring that to the full  
9 committee for discussion after it's been  
10 developed in a small group.

11 So we think that's the way the working  
12 group could work with the staff from this point  
13 going forward or whenever you all decide to do  
14 that. And, again, as to when this working group  
15 is formed, that is up to you all.

16 I think this is the first time that we  
17 are proposing this. We leave it to you. We can  
18 work with you all as an administrative matter  
19 after the meeting to determine the way forward if  
20 a working group is advisable and who would be on  
21 that.

22 But beyond just the formation of a

1 working group, I just wanted to note that the  
2 staff has access to other types of information  
3 and other ways to move forward, and that is  
4 through a request for information and things like  
5 that, for the Article 32.

6 We have documents. We have documents  
7 from the court-martial database. We have Article  
8 32 reports and the disposition of those cases.  
9 So what the staff can undertake is a document  
10 review of every Article 32 for cases tried in  
11 2017 because that's what we currently have on  
12 hand.

13 And that information would bring to  
14 light things about the rank of the hearing  
15 officer, whether the recommendations were  
16 followed by the SJA, the ultimate result of the  
17 case and maybe some other issues that go along  
18 with a detailed document review.

19 So that's information we already have  
20 on hand. And the staff proposes making that part  
21 of the research and analysis. And I think some  
22 of that could be accomplished in advance of the

1 March '19 report because that's staff work that  
2 we can do on our end.

3 So to look at the near-term and long-  
4 term goals, the staff notes that the  
5 recommendations or the OGC member says, could you  
6 please comment on these recommendations in your  
7 next annual report, which is coming up quickly.

8 What we propose is that in that report  
9 the committee does a background and overview of  
10 the recommendations and the underlying UCMJ  
11 articles, identifies some key issues of concern -  
12 - those highlighted by the JPP. Of course, any  
13 concerns you may have in addition to that from  
14 this and any subsequent work or on the issues.

15 We provide analysis available from our  
16 existing Article 32 documents. And any requests  
17 for information that we get responses on before  
18 the report. And then, of course, we can lay out  
19 the plan for future analysis of these issues.

20 And so it's like whether the DAC-IPAD  
21 intends to conduct site visits in 2020. So  
22 because we're looking at -- we propose that

1 Article 32 is the issue that's ripe for review,  
2 this is an example of proposed questions for  
3 analysis from the staff.

4 And, of course, the staff can work  
5 with any of you all offline or offline outside of  
6 the meeting session to develop these issues if a  
7 working group to form. But these are just a few  
8 because they bear on things mentioned in the  
9 recommendations, such as should the finding of  
10 the Article 32 preliminary hearing officer be  
11 binding if they find no probable cause exists?

12 That's something mentioned, by the  
13 way, just this morning. By binding, I mean,  
14 should it bar referral to court-martial.

15 Are there other ways to give the  
16 hearing officer's report more weight and that  
17 borrows from the raising of the JPP uses or to  
18 say do we want it to be a hard line, bright line,  
19 black and white or is there something that we can  
20 just do to give this more weight, like make the  
21 hearing officers have -- be judges, have higher  
22 rank.

1                   And is there an issue with the scope  
2 of the Article 32 that the committee could look  
3 at? So, again, we can work with you all to  
4 develop these and other issues, some more  
5 specific questions in your read-aheads. But  
6 that's where we propose starting this topic.

7                   So the first issue is, ma'am, whether  
8 you would like to consider forming a working  
9 group for this and the other issues and how you  
10 want to proceed from here.

11                   And this is something we, again, could  
12 just discuss today; decide another day. But I  
13 just leave it to you for your initial thoughts.

14                   CHAIR BASHFORD: I think a small-scale  
15 working group would be good. I know one person  
16 has already said they would be interested to  
17 participate. And so that's good.

18                   I think we should authorize a working  
19 group. And if we can get people to do it, great.  
20 If not, we'll figure out some other way to  
21 address the issues.

22                   People in favor of referring these and

1 these questions to a small working group, if we  
2 can do it?

3 BGEN SCHWENK: I think we ought to do  
4 32, 33 and 34 small working groups except for the  
5 part about defense investigators. And I think  
6 either give it to the policy working group or  
7 have a defense working group or rechange --  
8 rename the policy working group as the defense  
9 working group and let people get off the thing  
10 they want to get off and new people get on.

11 Because then they can look at all the  
12 defense issues, the many issues we heard today  
13 we've heard in previous testimony; the ones that  
14 they just mentioned that, besides the defense  
15 investigators.

16 And then that group, when they think  
17 they've got stuff for us to consider, can come  
18 back to us and say, all right, here's a bunch of  
19 issues and here's where things stand. And we  
20 think this is -- we monitor, just like we've been  
21 doing -- monitor, needs to change and go from  
22 there.



1           But I really think the defense needs  
2 to focus and that's a way to give them a focus  
3 and to give that other working group something to  
4 do now that they've finally gotten under -- I  
5 mean, out from underneath the expedited transfer.

6           MS. CANNON: My concern about one of  
7 the things in here, the defense investigators in  
8 particular, it seems the JPP has already made a  
9 recommendation. We're still two years down the  
10 road and that's not being -- it's being  
11 implemented in part and not totally.

12           I'm not -- I mean, there are some  
13 things that are a given and then there's some --  
14 it seems like there should be some prioritizing  
15 right now. Yes, do this. Do this now and have  
16 us say, as a united panel, we recommend that this  
17 be implemented immediately, that they get the  
18 defense investigators.

19           I don't know how much more  
20 inquiry/research needs to be done when they've  
21 already made that recommendation. Two years down  
22 the road, we see it's still popping up. So

1 that's one of my thoughts.

2 My other thought is, I concur.

3 CHAIR BASHFORD: I wouldn't know that  
4 we would need to rename the policy working group,  
5 but it is a --

6 BGEN SCHWENK: Well, no -- a policy.

7 CHAIR BASHFORD: -- a good area to  
8 explore. I think several of the JPP  
9 recommendations are similar recommendations we've  
10 made to it. They just are all -- we only can  
11 recommend. I don't know that we're really in a  
12 position, as a body, to say it based on a little  
13 bit of testimony we've heard, but like do it now.

14 BGEN SCHWENK: I took Kathleen's  
15 comments to mean that if the defense issue goes  
16 to the policy working group, all defense issues,  
17 they should feel free to come up and prioritize  
18 what they have instead of waiting, like we  
19 normally do, till we have a bundle of things to  
20 bring up.

21 They should feel like if there's one  
22 they think has been looked at, studied and

1 they're ready to roll, they can roll that one up  
2 and then continue with the other ones later.

3 MS. CANNON: Well, also, the point  
4 about the investigations, no, we haven't had a  
5 thorough discussion about it. But they've  
6 already recommended it. Why are we even -- if  
7 they recommended it, what are we supposed to do  
8 with that except say it's popping up here, too,  
9 and it sounds like a good recommendation. Why  
10 don't you do it?

11 Well, I don't want to keep doing what  
12 the JPP did, and I already came to a  
13 recommendation. So it doesn't seem like that's  
14 our job.

15 DR. MARKOWITZ: And we did hear from  
16 the defense that they --

17 MS. CANNON: Yes.

18 DR. MARKOWITZ: -- they do -- I mean,  
19 we have had affirmative testimony that that is  
20 something that they need. We heard it again  
21 today. This wasn't the first time we've heard  
22 that that is something that they need, and why.

1           This reinforced other testimony that  
2 we've heard, so I don't think it was introduced  
3 to us today. I do think we've had testimony that  
4 enforces the need for that. So I would agree  
5 with Kathleen that we are at a place where I  
6 think we can say JPP's recommended it.

7           We've heard it as well in testimony  
8 where we weren't actually even eliciting that  
9 information. But it's spilling over in the work  
10 that we're doing. We feel pretty comfortable in  
11 saying that this -- it's still a priority for us.

12           And on top of that, we're going to  
13 tackle these other things that folks have punched  
14 it on, and we're going to put it back on the  
15 radar. So I would second the prioritization and  
16 focus on that.

17           BGEN SCHWENK: Somebody on the staff  
18 was mentioning to me that the RSP made a  
19 recommendation -- no action. The JPP made a  
20 recommendation -- no action. And then, towards  
21 the end of its life, it made the same  
22 recommendation that's been made twice and

1 something happened.

2 So sometimes there may be benefit of  
3 keeping -- I mean, it may seem redundant, but  
4 there can be a benefit to repeating -- we're a  
5 new group of 17 or 16 people and we think the  
6 same thing as those other guys.

7 COL. WEIR: It appears to me the way,  
8 reading general counsel's memorandum, that if  
9 this committee looks at the recommendations and  
10 then says, you know what, the JPP recommendations  
11 were spot-on. We concur with their  
12 recommendations.

13 That's the kind of sense I get about  
14 now, is they're looking for further verification  
15 that the JPP was on target. And just like the  
16 stars created JPP defense investigators, you  
17 know, apparently, if three people say it's a good  
18 idea, three different committees, maybe it's  
19 three strikes and you're out -- we're going to  
20 implement it.

21 But it feels like we're kind of faced  
22 with the approach where we can actually take the

1 Article 32. We have the data that we can come up  
2 with that will be -- talk about how many 32s were  
3 waived; how many 32 officers recommended not  
4 going forward; how many times that recommendation  
5 was not followed; which followed an acquittal and  
6 then provide that data.

7 But the other two we're going to have  
8 to take some time because it's not implemented  
9 yet. So we could send out an RFI and ask for  
10 more information, but really, since the  
11 implementation is not happening, and what would  
12 take us a good year for us to figure out the  
13 practitioners were working out how it's going to  
14 be applied in practice.

15 Looking at the other two issues, maybe  
16 one is premature at this time, but we have  
17 nothing to look at. And that's been part of the  
18 problem. And Congress keeps rolling out the law,  
19 and it changes, we don't know -- because we don't  
20 have a body of data to look at to see if this  
21 change was significant in the practice, in the  
22 sexual assault/rape.

1           So I think we just plug away with  
2 Article 32. And we have the other two in the  
3 back of our minds. As those roll out, start  
4 going to site visits. Six months down the road  
5 maybe next summer after, you know, say, hey, how  
6 is this working.

7           That seems to me to be a small group  
8 of people, but the best way to employ the people.

9           CHAIR BASHFORD: So what do you need  
10 the panel to offer on this? A small working  
11 group to look at these and the policy working  
12 group to turn to include defense matters in their  
13 portfolio?

14           MS. PETERS: Yes, that would be good.  
15 And then if you want the working group to begin  
16 Article 32 now, accomplish what's possible before  
17 the report -- the next report comes out.

18           CHAIR BASHFORD: Goes out, yes.

19           MS. PETERS: Right.

20           BGEN SCHWENK: That working group  
21 should come back to us with a plan of action of  
22 what they're going to do so that we can see what

1 they intend to do with 32 and later with 33, 34.

2 And they're going to have to wait some  
3 on 32, also, because if part of the data is how  
4 often -- how is it accepted by the GCMCA and the  
5 GCMCA suddenly does look at the likelihood of  
6 success of trial, you know, we're not going to  
7 know that until a year from now -- or maybe not  
8 even a year from now, but we can get started.

9 COL. WEIR: And then part of this --  
10 part of what you do in the military, you should  
11 never leave a meeting early because when you do,  
12 like Chief McKinley, you get assigned to things.

13 And so the policy area --

14 BGEN SCHWENK: You mean Chief Defense?

15 CHAIR BASHFORD: Well, I think it  
16 would be a good idea if everybody agrees or if  
17 the majority agrees, to authorize a small working  
18 group, if you can pull it together, to look at  
19 these issues; report back to us, have Policy take  
20 on some of these defense issues, prioritize them  
21 with the idea, if possible, that by our next  
22 meeting we might be able to have enough



1 information to include a recommendation on  
2 defense investigators for our report.

3 I don't know, but if that's clear  
4 enough to vote, in favor?

5 MS. PETERS: Yes.

6 CHAIR BASHFORD: Thanks. That was  
7 unanimous, for those who are here? Great.

8 (Off microphone conversation)

9 CHAIR BASHFORD: It sounds right.  
10 He's just passed. Anything else?

11 MS. PETERS: No, ma'am. That's it.

12 CHAIR BASHFORD: Okay, great.

13 MS. PETERS: So thanks for your  
14 understanding.

15 CHAIR BASHFORD: I think we're  
16 scheduled for a brief break. We've gone over a  
17 little bit, but we'll start just 4:00 or just  
18 after with Ms. Carson.

19 (Whereupon, the above-entitled matter  
20 went off the record at 3:55 p.m. and resumed at  
21 4:03 p.m.)

22 CHAIR BASHFORD: Senator Gillebrande

1 has asked for -- I'm not quite sure what to it  
2 called because I don't go to FACA jail -- a  
3 update, an unofficial reason on what we've been  
4 up to.

5 And if there's any other member of the  
6 committee scheduled for the afternoon of October  
7 31st, if there's any other member of the  
8 committee who would be interested in  
9 participating, please let our staff know. Thank  
10 you.

11 MS. CARSON: Thank you. Okay, I know  
12 everybody's tired so I'm just going to run  
13 through this very quickly, and it's not going to  
14 take much thinking at all.

15 I'm Julie Carson, the deputy staff  
16 director for the DAC-IPAD. And thank you all for  
17 listening to me today. What I take as high  
18 praise for the DAC-IPAD, you all have proved so  
19 diligent and interested in the data and military  
20 justice collection of data that the FY19 and NDAA  
21 has tasked the DAC-PAD with another data  
22 collection project.

1           This time it has to do with collateral  
2 misconduct committed by the victims of -- who  
3 have reported sexual assault. So I'm just going  
4 to go through the statute very quickly and a few  
5 proposed ideas.

6           And it's going to end up with the same  
7 place the last one did -- one or two people that  
8 are interested in this collateral misconduct  
9 study. Let me know and we're just going to end  
10 up putting together a plan for this. And so let  
11 me just get through the statute first.

12           And here is the other kicker.  
13 September 30, 2019 is when this report is due,  
14 and not less frequently than every two years  
15 thereafter. The Secretary of Defense, acting  
16 through the DAC-IPAD, shall submit to the  
17 Congressional Defense Committees a report that  
18 includes the following.

19           And I've shortened it to you.  
20 Essentially, they want to know the number of  
21 sexual assault victims accused of collateral  
22 misconduct for the previous two years -- oh,

1       sorry -- the number of sexual assault victims  
2       receiving an adverse action for collateral  
3       misconduct and the percentage of sexual assault  
4       victims receiving either an accusation or an  
5       adverse action for collateral misconduct.

6                So it's purely a data request. So  
7       next are my few observations about this request.  
8       First of all, the report's due in September,  
9       which -- of next year, which is really pretty  
10      very soon for this project.

11               The next thing is that additional DAC-  
12      IPAD staffing would be needed to undertake the  
13      study. The most current projects are paused, so  
14      we're pretty -- already pretty maxed out. And  
15      this is going to be a pretty good lift.

16               The next is the study will require  
17      access to a substantial volume of personnel and  
18      legal documents. And the biggest problem is the  
19      DAC-IPAD will no longer be in existence after the  
20      first report is issued in 2019, so it cannot be  
21      doing any of the subsequent reports.

22               So next slide. What can the DAC-IPAD

1 do? Well, first thing I suggest is the DAC-IPAD  
2 define its role, and this is new language we've  
3 never seen before -- acting through the Secretary  
4 of Defense, acting through the Defense Advisory  
5 Committee is tasked to do this report.

6 So as not particularly clear, but  
7 here's an option. The DAC-IPAD could operate on  
8 the front end of this study by defining the  
9 parameters, the terms, the suggested way to go  
10 forward to collect this information and proposing  
11 it in a detailed way to the Department of Defense  
12 of the Secretary of Defense for execution.

13 And then the expertise on this panel  
14 will have been utilized to think about the issue  
15 and think about the best way to capture it for  
16 usefully providing useful information to  
17 Congress. And the next step will be the  
18 resources which will be an issue DoD can  
19 determine how they want to handle.

20 So if we take that approach, the next  
21 thing we do is define the terms. And I've gone  
22 through the key terms which I won't even --

1       there's only one term defined in the statute,  
2       which is what is a covered individual, which is a  
3       victim of sexual assault in the case files at the  
4       MCIOs, which is also a little unclear.

5               What is collateral misconduct? So I  
6       looked to the DoD SAPRO-regulation and they  
7       define victim misconduct -- collateral  
8       misconduct, the victim misconduct that might be  
9       in time, place, or circumstance associated with  
10      the victim's sexual assault incident.

11              And then it offers a few examples such  
12      as underage drinking, alcohol offenses, adultery  
13      and fraternization. Next is what is a victim of  
14      sexual assault. The NDAA defines it as any  
15      individual who's identified as a victim of sexual  
16      assault in the case files.

17              Well, a proposal here is let's  
18      identify exactly who Congress is probably most  
19      interested in hearing about. And that is the  
20      service members. So what if we say it's a  
21      service member victim and potentially -- who's  
22      accusing a service member, accused.

1           That way we're talking about somebody  
2 where -- we're talking about a group where  
3 they're going to be records we can identify in  
4 the military that -- for civilians and other  
5 categories may be more difficult to track.

6           So another reason to do it is the  
7 number of reviews that will have to be done. If  
8 you look at the FY-19, FY-17 SAPR report, there  
9 were 5,110 unrestricted reports. But if you look  
10 at just the number of unrestricted reports  
11 involving allegations by a service member against  
12 a service member, you cut it down to 2,486  
13 reports, so that's your baseline.

14           You want to know, out of that group of  
15 people, how many were accused of collateral  
16 misconduct and how many were -- received adverse  
17 action for collateral misconduct. So that's what  
18 --

19           COL. WEIR: If I can interrupt you  
20 just for a second. So the Case Review Working  
21 Group's been going through the investigating  
22 files. Part of our data, one of our points was

1 collateral misconduct.

2           So when see that the victim was  
3 underage drinking, we make a note of that. When  
4 we see the suspect is underage drinking, we make  
5 a note of that.

6           If we see there was fraternization, if  
7 he brought a female into the barracks in  
8 violation of barracks policy, that's one of the  
9 things that -- or she went into the barracks and  
10 didn't sign in.

11           But in these files that we're looking  
12 at from the MCIOs, there's no determination made  
13 in the file as to what happened with that  
14 collateral misconduct. So what is -- what will  
15 be required is to go out with an RFI to the  
16 Services to see if they somehow collect that  
17 information.

18           Because we'll see in a -- and I'll  
19 speak to CID -- we'll see in a CID file, there's  
20 been an allegation of adultery against the  
21 victim. We forward that. We don't -- for  
22 underage drinking, we don't investigate underage



1 drinking. They send it back to the command.

2 So we don't know what happened at that  
3 point, so that's going to require to see if the  
4 services are tracking that. Because if they're  
5 not, I don't know who is. If the victim received  
6 a letter, a counseling statement, we don't know  
7 that.

8 And I'm not sure that would be tracked  
9 in any other service's military justice actions  
10 that we can access. So it's just not there  
11 someplace that's easily retrieved.

12 So we need to be aware of that before  
13 we jump in with both feet, that this is something  
14 that we could come up with the outline on how  
15 this is going to work and maybe send out an RFI  
16 to the Services and say, hey, do you guys collect  
17 this and get the responses back and then we can  
18 have that information to go in the September 2019  
19 report.

20 MS. CARSON: Okay, so the next slide.  
21 So the next definition we need to talk about is  
22 the -- what is an MCIO case file because, as

1 we've known from the work we've done with the  
2 MCIOs so far, they have investigations.

3 They don't open investigation on  
4 everything for various reasons that I know, if it  
5 was an incident that happened prior to service,  
6 as a civilian, there's no UCMJ jurisdiction.

7 So that's another limiting thing we  
8 could put on the parameters and ask for cases  
9 where an investigation file was opened.

10 Next slide, next question is, what  
11 does accused of misconduct mean? And Option 1  
12 and Option 2 are essentially ways to look for  
13 whether or not a victim has been -- is being  
14 investigated for something. But my sense of what  
15 the real question is, is was there -- was the  
16 victim engaging in misconduct.

17 And that's what Colonel Weir just  
18 alluded to, that we're picking up from the case  
19 files now. You can tell if there was  
20 fraternization or if there was underage drinking  
21 or some of the typical kinds of collateral  
22 misconduct.

1           So the next question is, then just  
2 list what adverse actions are we interested in  
3 following up or considering? And those may not  
4 all be even considered adverse actions. We just  
5 listed examples of all the different adverse and  
6 administrative things that could happen to a  
7 person, so, as an example of that list.

8           Then the procedure for collecting  
9 data, and this just outlines that. And so just  
10 outlines the way that we can look at this issue,  
11 setting a baseline, determining the date of the  
12 sexual assault report, identifying any adverse  
13 actions.

14           And the next slide, reviewing the  
15 documentation of any adverse actions, then to  
16 determine victims who are accused of misconduct  
17 would entail looking through 2,000 files to  
18 determine whether there was misconduct engaged  
19 in.

20           And then the statistical required  
21 question would be to calculate the percentage of  
22 the baseline population that was found to have

1 engaged in collateral misconduct as well as the  
2 percentage receiving an adverse action for that.

3           So that's what the study would entail.  
4 The next question is, would there be more to do  
5 than just look at the numbers such as evaluating  
6 the qualitative data, taking testimony from  
7 witnesses, doing site visits, discussing  
8 collateral misconduct, if there were trends or  
9 patterns that have been observed by commanders,  
10 practitioners, soldiers, sailors, airmen in the  
11 field.

12           The next step would be figuring out  
13 the resources that are -- would be required to  
14 execute this project, which we can calculate.  
15 And then this last step would be recommending the  
16 data elements to document how to collect this  
17 information going forward because it's not really  
18 realistic to do this every two years.

19           It may be worth doing a study and then  
20 coming up with the best way to collect collateral  
21 misconduct information going forward so it's more  
22 easily done and trackable.

1           So that's the proposal for including  
2           in the FY -- in our March 2019 report the  
3           suggestion is that we think through a plan to  
4           suggest and include that information in the  
5           report and then allow DoD to determine what --  
6           how or what to do to execute the plan.

7           CHAIR BASHFORD: So if I understand  
8           correctly, we can tell them for fiscal year 2017,  
9           the number of cases that somebody has been  
10          engaged, either suspect or the victim has been  
11          engaged in collateral misconduct because it's a  
12          data point we're collecting?

13          COL. WEIR: Pending --

14          MS. CARSON: Or pending the -- so  
15          there's still a whole category of cases for FY-17  
16          that this committee won't have.

17          CHAIR BASHFORD: But we could --

18          MS. CARSON: But you could attribute  
19          that accused, the number for the penetrative.

20          CHAIR BASHFORD: And then suggest that  
21          we get RFIs for all of those people or just put  
22          out a plan of analysis to kick right back to DoD?

1 MS. CARSON: Well, I think Colonel  
2 Weir was suggesting RFIs to determine how hard  
3 this is to do. So get the information from the  
4 Services about what it would entail to do this  
5 project.

6 And we'd incorporate that into our  
7 resource requirement rather than execute --  
8 really getting your head around the project is  
9 Step 1, before you actually go execute the  
10 project, and this is a big one.

11 So I think it's worth really  
12 understanding what it's going to take and letting  
13 the expertise of the panel say, this is how we  
14 would do it. So do the --

15 BGEN SCHWENK: Don't you guys normally  
16 talk to the Services, you know, regularly on  
17 stuff besides just doing paper RFIs?

18 MS. CARSON: Yes. Yes.

19 BGEN SCHWENK: What if you sat around  
20 a table and said -- and get somebody from  
21 Israel's office and sit around the table and say,  
22 what do you guys -- we got to do this.

1                   We're not doing it alone. We can  
2 shoot you RFIs and you can shoot yourselves and  
3 then go get us the data. Or we can all figure  
4 out how to do this. And then the DoD General  
5 Counsel's Office can decide what does that crazy  
6 language mean. And --

7                   (Simultaneously speaking)

8 -- and my thought is what we want is the crazy  
9 language to mean we work with the Services and  
10 come up with what the report should look like and  
11 then say, thank you very much. Good luck, DoD.  
12 We hope everything turns out great.

13                   And then they go collect the data, put  
14 it in some format that matches what we come up  
15 with and they submit it -- and give us a copy.  
16 And then we can decide whether it's something we  
17 want to jump on and look at in more depth and  
18 once we see what's there.

19                   But -- so, anyway, that would be my  
20 preference, but I really think the way to start  
21 with them and see if you can't work some system  
22 out of how to do it. And then once you do, then

1 it's easy. Then you just write the RFI  
2 consistent with whatever you guys decide.

3 MS. CANNON: I just think it's a lot  
4 to ask of our staff who's actually started, in  
5 your comments, saying that the DAC staff were all  
6 kind of committed. When does the IPAD end?

7 MS. CARSON: 2021

8 BGEN SCHWENK: March 2021 for that.

9 MS. CANNON: Why did you say September  
10 19 --

11 MS. CARSON: After the September 2019  
12 report. First report's due September of 2019.

13 MS. CANNON: Okay, I misunderstood.  
14 Sorry.

15 MS. CARSON: So after that report,  
16 we've --

17 (Simultaneously speaking)

18 MS. CANNON: My point is, I don't  
19 think it's enough to just say staff, you know,  
20 you're going these -- you're having contacts  
21 anyway. I think the idea of trying to figure out  
22 directives -- back at you -- and maybe -- what I



1 hear you saying is you'd like help from the  
2 committee?

3 MS. CARSON: Right.

4 MS. CANNON: To do that?

5 MS. CARSON: Just input, you know,  
6 would be a good opportunity for the committee  
7 just to talk on this issue, to us, and then we'll  
8 meet -- we'll write it up.

9 MS. CANNON: Perhaps a proposal you  
10 might have about what you think and maybe, based  
11 on what the General's saying, you know, that  
12 talking it up with the contacts you have -- what  
13 kind of problems are we going to get and then  
14 coming to us.

15 We can talk it through. It's kind of  
16 new, right, brand new. The other question I have  
17 is why has this happened, you know, where you got  
18 the motivation for this?

19 MS. CARSON: I'm not sure.

20 MS. CANNON: Is there some kind of  
21 allegation or something out there that --

22 COL. WEIR: Anecdotally, people

1 believe that victims (audio cut out) aren't  
2 coming forward because they're afraid of  
3 collateral misconduct and that has some sort of  
4 chilling effect perhaps on the process.

5 So, but we've had testimony from a  
6 victim who was -- she was underage drinking and  
7 she was happy to be punished because if she  
8 didn't, she was different than the rest of the  
9 people who were underage drinking at the party.

10 She didn't want to be not punished  
11 while all of her peers and friends were being  
12 punished because that -- you know, she did that  
13 and lived it. And was an old memo in 2004 that  
14 came out that said you're not really supposed to  
15 look for evidence conduct committed by the victim  
16 until after the process has ended.

17 And then you take some kind of action  
18 based upon what you think should be done at the  
19 lowest level to get the message sent. So I think  
20 the -- and, believe me, none of us, as I as the  
21 director and Julie as the Deputy Director, we  
22 have not received any guidance from the

1 Department of Defense on what that means.

2 So we're trying to craft this thing to  
3 help them help themselves. And we have some  
4 expertise in looking at the files determined  
5 that, yes, there is some collateral misconduct.  
6 But absent the Services collecting that  
7 information, they would be the ones doing it, I  
8 don't know if Specialist Susie Smith got a  
9 counseling statement or an Article 15 for  
10 underage drinking and her no-action taking place.

11 There's no way for us to know that.  
12 Now, if the Services don't have some way to track  
13 that, then, you know, there's -- we're not going  
14 to be able to get that information. They would  
15 have to start tracking that right now for the  
16 September '19 report and you know how quickly  
17 that's going to happen.

18 CHAIR BASHFORD: I think we should  
19 craft an investigative plan that can be executed  
20 by DoD. And the other thing that's crossed my  
21 mind is when your Case Review Working Group, non-  
22 military background members have been reviewing

1 the files, they might not have picked up on all  
2 of the collateral misconduct.

3 Underage drinking, yes, but barrack  
4 visits -- barrack visits might have gone like  
5 this, so --

6 BGEN SCHWENK: We don't know the  
7 installation regulations that are the things they  
8 often worry about. Who knows, so.

9 MS. CARSON: I don't think you'd ever  
10 get every --

11 BGEN SCHWENK: You do the best you  
12 can.

13 MS. CARSON: -- potential collateral  
14 misconduct. You just identify the top four or  
15 five.

16 BGEN SCHWENK: You just do the best  
17 you can.

18 COL. WEIR: When you look at this,  
19 it's intuitive that both of them are 18. When  
20 you look at the age, they're 19. You figure that  
21 out and date of birth from what's in the files,  
22 so you know they're both drunk, so underage

1 drinking.

2 But most of the collateral misconduct  
3 is on the accused side. You know, he's the one  
4 that's married; she's not -- you know, that kind  
5 of thing.

6 MR. KRAMER: But it's only if they've  
7 been accused of collateral misconduct, right?

8 COL. WEIR: Well, that's the other  
9 thing. If there's no --

10 MR. KRAMER: Well, I know, but that's  
11 what it said.

12 MS. CARSON: They say accused. My  
13 sense is they want to know the difference between  
14 the people who are potentially going to get in  
15 trouble for it but don't and the people who do,  
16 which I would say engaged versus --

17 COL. WEIR: But Mr. Kramer, that's a  
18 perfectly valid point. The accused in the  
19 military justice system means something. You've  
20 been accused of an offense.

21 There's been an investigation been  
22 launched. The military police have started an

1 investigation into this. You're command has done  
2 an informal investigation. But there's something  
3 that puts you as -- you're suspected of  
4 committing this offense.

5 MR. KRAMER: Because if -- the worry  
6 is the retaliatory effect on some or many --  
7 however victims. It seems to me like, just the  
8 fact that there was some collateral misconduct  
9 isn't what they're looking for.

10 They're looking for where collateral  
11 misconduct has been used against the person or  
12 threatened or some type of active use of it as  
13 opposed to just the person may have engaged in  
14 it.

15 MS. CARSON: Again, I think you're  
16 reducing the pool with each step. The biggest  
17 pool is how many engaged in it.

18 MR. KRAMER: Well, that's what I was  
19 going to --

20 MS. CARSON: Yes, so the next smaller  
21 pool is how many of those people were  
22 investigated or accused or some command or and

1 MCIO investigation opened on them where their  
2 record right are all clumping.

3 Then the next one, is how many were  
4 charged with -- had charges show up in the  
5 military justice system versus how many got some  
6 other kind of adverse action.

7 MR. KRAMER: But it helps take care of  
8 the problem with the case Working Group of non-  
9 military people not being able to pick up. And I  
10 thinking the case working group do all the work  
11 on this, by the way.

12 MS. CANNON: Hey, there.

13 COL. WEIR: I was going to say this is  
14 data collection. And Cassia's not here.

15 MR. KRAMER: It's both. It's both --  
16 both of them.

17 COL. WEIR: Cassia's not here, it's  
18 data collection.

19 CHAIR BASHFORD: But I do think we're  
20 doing, fulfilling our request if we suggested a  
21 baseline population, a parameter. Put it -- give  
22 them the data we have collected in our review of

1 these number of cases of this type of crime.

2 This is what we have found. Victims  
3 who've engaged, this is what we have found, the  
4 suspects who have engaged. And, you know, in  
5 order to find out what actually happened, I  
6 suspect they're going to have to pull all of  
7 those personnel files and ask them to have -- at  
8 it.

9 MS. CANNON: Do you need us to do  
10 something?

11 MS. CARSON: No, I think if anyone  
12 that's here now is interested in visiting with us  
13 about how we're going to write-in the questions,  
14 if you send questions or informal sit-down what  
15 we're going to do, just let me know. And we'll  
16 move forward.

17 MS. CANNON: September report?

18 MS. CARSON: Well, I guess that's a  
19 question for you. Do we want to address this in  
20 the report? And the due date for this report is  
21 September of 2019. Do we want to complete the  
22 component of DAC-IPAD complete for the March 2019



1 report? Do you want to address it separately or  
2 do you want to give yourselves till September  
3 2019?

4 CHAIR BASHFORD: If we can --

5 DR. MARKOWITZ: It seems like a big  
6 lift.

7 CHAIR BASHFORD: All of the case -- I  
8 think we should be able to say, of the cases that  
9 have been reviewed so far, we've identified X  
10 number of instances on the part of this and on  
11 the part of that.

12 I mean, it would be nice to have a  
13 little bit of data, but that's all you're going  
14 to be able to say, is X number of cases for our  
15 baseline group. If we can punch that in and if  
16 it's all fed into the data -- not if you have go  
17 through the back and look at all the reports  
18 though.

19 MS. CANNON: That doesn't seem like  
20 it's fulfilling what they're asking for. I mean,  
21 the cases we looked at are very few compared to  
22 the -- I mean, we had a random sample, that was

1 significant for our purposes.

2 But it seems to me that what this  
3 would more call for is, in the future, collecting  
4 this so that you can answer that question. And  
5 giving parameters, like you say, about why are  
6 you are collecting. And then, from there, you  
7 can draw out some of these conclusions.

8 But we can't go -- we can't create  
9 something that we haven't collected, right. So  
10 it would be more, these are the things that we  
11 should be collecting and the Services should be  
12 collecting it so that the DoD can make an  
13 assessment.

14 MS. LONG: So then, on that data  
15 collection sheet that we talked about, one of our  
16 others, then you're going to want to align that  
17 SM and say that someone indicates accused or  
18 accuser was disciplined or some action was taken  
19 -- was for the collateral misconduct and then  
20 what that was.

21 I'm just trying to help on that degree  
22 -- 50 different data sheets.

1                   CHAIR BASHFORD: But that could be a  
2 long time later, right, after adjudication?

3                   MS. LONG: Well, I'm just thinking for  
4 those disposition sheets that we say if they're  
5 making a uniform one where, presumably, either  
6 the commander has to fill it out with a no-action  
7 or at the end of the case something happens.

8                   Whatever that final document is, it  
9 has to indicate if something's going to be taken.  
10 Because that's when the decision will be  
11 happening anyway, right?

12                  MS. PETERS: What's interesting is we  
13 would have them verify -- the Services, for that  
14 individual, she's -- even if she's the victim of  
15 sexual assault, gets her own form. So it's not -  
16 - her form is not associated, then, with the  
17 suspects.

18                  MS. LONG: Right, I'm just wondering  
19 if, for purposes of data collection, if we want  
20 your people to have control over this to have to  
21 indicate no action taken or -- because it would  
22 be within the same people's control, right?

1       Wouldn't be a commander without it.

2                   COL. WEIR:  There would be a separate

3       --

4                   DR. MARKOWITZ:  It would be a  
5       different component.

6                   COL. WEIR:  -- command disposition  
7       form for victim's misconduct and then he would  
8       have to fill out the underage drinking.  And he  
9       would have to fill out what he did or what she  
10      did as well, so.

11                   (Simultaneous speaking)

12                   MS. LONG:  I guess I'm just thinking  
13      maybe something on whatever your -- is there --  
14      you don't want to combine anything on a --

15                   FEMALE PARTICIPANT:  They're not  
16      necessarily the same command.  The victims --

17                   (Simultaneously speaking)

18                   DR. MARKOWITZ:  Right, the victim is  
19      in a different command.

20                   MS. LONG:  But I have seen in a recent  
21      case review in an Air Force file where the  
22      initial decision authority in his memorandum did,

1 in fact, identify that there was no action taken  
2 in response.

3 So it's possible that some Services  
4 are already somewhere along the lines, starting  
5 to collect.

6 BGEN SCHWENK: Can you read the  
7 beginning of the statute again, Secretary of  
8 Defense, working through -- what does it say?

9 MS. CARSON: Not later than September  
10 30, 2019 and not less frequently than once every  
11 two years thereafter, the Secretary of Defense,  
12 acting through the DAC-IPAD, shall submit to the  
13 Congressional Defense Committees a report that  
14 includes the following.

15 BGEN SCHWENK: You can read that as  
16 meaning that the Secretary of Defense has the  
17 requirement and not us. He just acts through us  
18 so that we're informed, knowledgeable and can  
19 decide whether it's something we want to look at.

20 DR. MARKOWITZ: I mean, I guess,  
21 getting back to your original question, I don't  
22 know why we would put the additional stress on

1 the staff and on the committee as well to get  
2 something done by the report date.

3 When there's a clear delineation of  
4 September, when this is due, it seems like  
5 there's a lot of conversation and there are a lot  
6 of members who are not here to have this  
7 conversation right now.

8 I don't know -- I mean, maybe somebody  
9 can see a benefit to having something in the  
10 report for March, but I'm not readily identifying  
11 an immediate benefit to having something in that.

12 And so, because the language doesn't  
13 seem to be particularly clear about what it is  
14 we're being tasked to do; the information seems  
15 to be complicated in terms of what we need to  
16 actually produce -- it just doesn't feel like a -  
17 - it doesn't feel urgent enough to get something  
18 into the March report.

19 Why not give ourselves till September  
20 to come up with a cogent plan to provide a way  
21 forward?

22 COL. WEIR: My recommendation is that

1 it's not in the March report. We can have a  
2 placeholder, right. We've got enough stuff to  
3 worry about getting -- really wrapping around the  
4 issue and not get involved with this.

5 BGEN SCHWENK: I think all we have to  
6 do is address it. It happened this year. It's an  
7 annual report. We need to tell them it happened.  
8 So we say, in this section of this NDAA,  
9 Congress, da-da. They did -- they said this. The  
10 DAC-IPAD has started coordinating with the  
11 Services to figure out how to comply with the  
12 statute.

13 CHAIR BASHFORD: The DAC-IPAD will be  
14 taking it under advisement. I wouldn't go so far  
15 as to say that we're --

16 BGEN SCHWENK: Yes, I mean, that's all  
17 I'd say. But I think we have to mention it  
18 because it happened this year, but we don't have  
19 to say any more than we're working on it.

20 Then the next report we can say, and  
21 we've decided that we're letting the Secretary do  
22 it and we're here to see what he comes up with.

1 CHAIR BASHFORD: Roger. Thank you.

2 MS. CARSON: Okay, thank you.

3 BGEN SCHWENK: Boy, I sure wish we got  
4 an update on the Data Working Group.

5 CHAIR BASHFORD: Can't wait for Data  
6 Working Group update.

7 MS. ROZELL: All right, so we're going  
8 to be even shorter than everyone today. So we  
9 are the Data Group. We're working with the Data  
10 Working Group to collect court-martial documents.  
11 And we have done that through FY-17.

12 So right now Dr. Wells is on board.  
13 We've given him the case documents or the case  
14 files for him to start his analysis. And we have  
15 also put out our next RFI Set 10 for the FY-18  
16 report. And we have received the initial listing  
17 of cases from all the services except for the  
18 Coast Guard.

19 MR. MASON: They have too many cases.

20 MS. ROZELL: Yes, I know. The Air  
21 Force has been granted a week delay, so once they  
22 have that information to us then we'll -- I will



1 start working with the services to identify a  
2 time and a place when we come out there and start  
3 collecting.

4 I have had a great breakthrough with  
5 the Navy-Marine Corps where they granted me  
6 access to download those records from their  
7 website. So it's less manpower on the services  
8 and less manpower for me to have to actually go  
9 out to physically get those case files.

10 That's where we are at right now. I  
11 have already started inputting the data on the  
12 cases that I've started to download for one of  
13 the Services. So that's where we stand as of  
14 now.

15 MR. MASON: The DAC-IPAD is going to  
16 receive -- the committee will receive all of the  
17 analysis, the multi-variant analysis for FY-16  
18 and '17 at the January meeting. So it will be a  
19 data-heavy meeting that day.

20 If you remember last year, or earlier  
21 this year when we did all those tables and charts  
22 -- you're going to get all of that in January,

1 for two years the second time.

2 CHAIR BASHFORD: Excellent, love that.

3 MR. MASON: And the great part about  
4 the RFI this year is we are essentially nine  
5 months ahead of schedule where we were last year  
6 by working with the Services. So we're making  
7 progress, and it's exciting now because we are  
8 bringing in a lot of information very quickly.

9 BGEN SCHWENK: And you're working with  
10 SAPRO to find out what to do about next year's  
11 SAPRO report data?

12 MR. MASON: We are -- we're going to  
13 try to correlate to make sure that we're all  
14 reporting the same information. And we are able  
15 to tell, based on how many files reported to us,  
16 when there's a duplicate or if something falls  
17 out.

18 And we're going to be able to provide  
19 that back to SAPRO and work with them to see if  
20 they're reporting the same thing that we are so  
21 that there isn't conflict between the two  
22 reports.

1 COL. WEIR: Sir, I had a meeting with  
2 Dr. Van Winkel who oversees that area. And it  
3 was exactly on this issue. And she was correct -  
4 - the DAC-IPAD numbers and SAPRO numbers ought to  
5 be the same or very, very close.

6 And so what we're going to do now with  
7 the space is work with their point of contact to  
8 make sure, if there's a discrepancy, that we can  
9 explain it. And so the numbers are going to be -  
10 - they're very close, so there'll be a footnote  
11 why or not. So that's the goal. So if they have  
12 any more -- two reports pretty much say the same  
13 thing -- on the court-martial side.

14 MR. MASON: And, sir, if you recall,  
15 this past -- for FY-17, we were delayed until  
16 SAPRO published their numbers. SAPRO got their  
17 numbers on October 15th, and we were getting our  
18 numbers on October 15th.

19 So we are actually working in parallel  
20 rather than having to wait till May for the  
21 information that they already have.

22 So we should be able to be in lock-

1 step essentially with them and have numbers that  
2 are very similar.

3 BGEN SCHWENK: All right, so by the  
4 time their report comes out in May we already  
5 know what these are and why?

6 MR. MASON: Yes, and they'll be able to  
7 explain it and we'll be able to explain it.

8 BGEN SCHWENK: Explain it, right.  
9 Okay, thank you.

10 CHAIR BASHFORD: Are there any  
11 roadblocks you're running into?

12 MR. MASON: At this point, no. We're  
13 full steam ahead. It's very refreshing.

14 BGEN SCHWENK: And do you guys have a  
15 plan of action yet on collateral misconduct  
16 studies?

17 MR. MASON: Since you said that was  
18 Dr. Spohn, I would defer to her. And so she has  
19 left, but I'm unable to tell you, sir. We  
20 haven't -- our hands are pretty full with just  
21 the court-martial data. And we will --

22 BGEN SCHWENK: Oh, your hands are

1 full.

2 CHAIR BASHFORD: Anything further?

3 Then, Major King?

4 MAJ. KING: With that, then, this  
5 meeting of the DAC-IPAD is closed.

6 (Whereupon, the above-entitled matter  
7 went off the record at 4:39 p.m.)

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Before: US DOD

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Court Reporter

**NEAL R. GROSS**

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