

## 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  
JANUARY 25, 2019

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The Committee met in the Monument View Room at the Doubletree by Hilton Crystal City, 300 Army Navy Drive, Arlington, Virginia, at 9:00 a.m., Ms. Martha Bashford, Chair, presiding.

## PRESENT:

Ms. Martha S. Bashford, Chair  
Major General Marcia M. Anderson, U.S. Army  
(Ret.)  
Hon. Paul W. Grimm  
Ms. Jennifer Gentile Long\*  
Mr. James P. Markey  
Dr. Jenifer Markowitz  
CMSAF Rodney J. McKinley, USAF (Ret.)  
Brig. Gen. James R. Schwenk, USMC (Ret.)  
Dr. Cassia C. Spohn  
Ms. Meghan A. Tokash\*  
  
Hon. Reggie B. Walton

**STAFF:**

Major Dwight Sullivan, Designated Federal  
Officer  
Col. Steven Weir, USA, Staff Director  
Ms. Julie Carson, Deputy Staff Director  
Mr. Dale Trexler, Chief of Staff  
Dr. Janice Chayt, Investigator  
Dr. Alice Falk, Editor  
Ms. Theresa Gallagher, Attorney-Advisor  
Ms. Nalini Gupta, Attorney-Advisor  
Ms. Amanda Hagy, Senior Paralegal  
Mr. Chuck Mason, Attorney-Advisory  
Ms. Meghan Peters, Attorney-Advisor  
Ms. Stacy Powell, Attorney-Advisor  
Ms. Stayce Rozell, Senior Paralegal  
Ms. Terri Saunders, Attorney-Advisor  
Ms. Kate Tagert, Attorney-Advisor  
Ms. Patricia Ham, Attorney-Advisor  
Ms. Marguerite McKinney, Analyst  
Dr. William Wells, Criminologist

**PRESENTERS:**

Lieutenant Colonel (Retired) Joseph "Jay" Morse,

USA

Colonel (Retired) Doug James, USAF

Colonel (Retired) David "Wil" Riggins, USA

\*Present via telephone

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

2 (9:00 a.m.)

3 MR. SULLIVAN: Good morning. I'm  
4 Dwight Sullivan, the Designated Federal Officer  
5 of the Defense Advisory Committee on  
6 Investigation, Prosecution, and Defense of Sexual  
7 Assault in the Armed Forces, better known as the  
8 DAC-IPAD.

9 Public comments will be heard at the  
10 end of the meeting at the discretion of the  
11 Chair. It would be inappropriate for anyone in  
12 the public gallery to make a comment at any other  
13 time.

14 However, written public comments may  
15 always be submitted to the Committee for  
16 consideration. This meeting is open. Ms.  
17 Bashford, you have the time.

18 CHAIR BASHFORD: Thank you, Mr.  
19 Sullivan and good morning. I would like to  
20 welcome members and everyone in attendance today  
21 to the 11th meeting of the Defense Advisory  
22 Committee on Investigation, Prosecution, and

1 Defense of Sexual Assault in the Armed Forces, or  
2 DAC-IPAD.

3 Of the 15 committee members, ten  
4 members are present this morning and another  
5 member will be joining us, will be joining us  
6 telephonically.

7 Five members were not able to attend.  
8 Judge Leo Brisbois, Ms. Kathleen Cannon, Ms.  
9 Margaret Garvin, Ms. Jennifer Long and Mr. A.J.  
10 Kramer.

11 The DAC-IPAD was created by the  
12 Secretary of Defense in accordance of the NDAA  
13 for a Fiscal Year 2015 as amended. Our mandate  
14 is to advise the Secretary of Defense on the  
15 investigation prosecution and defense of  
16 allegations of sexual assault and other sexual  
17 misconduct involving members of the Armed Forces.

18 Please note that today's meeting is  
19 being transcribed and a written transcript will  
20 be posted on the DAC-IPAD website. We will begin  
21 the meeting with testimony from three former  
22 service members about their experience as service

1 members accused of sexual assault.

2 That Panel will be followed by a  
3 court-martial data presentation provided by the  
4 Committee's Data Working Group.

5 After a break for lunch, the Committee  
6 will receive a presentation from its case review  
7 working group on statistical data from the  
8 working groups review of investigative case files  
9 closed in Fiscal Year 2015, involving penetrative  
10 sexual assault defenses.

11 For the final session, the Committee  
12 will review and conduct deliberations on the  
13 initial draft on its annual report, findings and  
14 recommendations.

15 Each public meeting of the DAC-IPAD  
16 includes a period of time for public comment. We  
17 have received one written public comment prior to  
18 today's meeting from Mr. Michael Conzachi,  
19 Director of Investigations at Save Our Heroes.  
20 That comment has been posted to our website and  
21 copies are available at the sign in table.

22 So far we have received no request for

1 public comment at today's meeting. As Mr.  
2 Sullivan said, if a member of the audience would  
3 like to make a public comment on issues before  
4 the Committee, please direct your requests to the  
5 DAC-IPAD Staff Director, Colonel Steven Weir.

6 All public comments will be heard at  
7 the end of the meeting at the discretion of the  
8 Chair. Written comments may always be submitted  
9 for committee consideration.

10 Thank you all for being here today.  
11 And, Lieutenant Colonel Morse, you may begin when  
12 you're ready. Thank you.

13 LT. COLONEL MORSE: Thank you very  
14 much. Good morning, my name is Jay Morse, I'm  
15 grateful for this opportunity to share with you.

16 My experience is in the Army as  
17 someone accused of assault. I intend for my  
18 comments to focus on how this allegation has  
19 impacted me, both my last year in the Army and  
20 the five years since then.

21 I'd like to supplement my previously  
22 written comments and I welcome any and all

1 questions. And I hope that we can engage in some  
2 meaningful dialogue.

3 Some brief background. I was  
4 commissioned as an Aviation Second Lieutenant in  
5 the Army in 1993 as serving as an ROTC cadet. I  
6 was selected for what's called a Funded Legal  
7 Education Program in 1998.

8 I graduated from law school in 2001  
9 and switched over to be a judge advocate later  
10 that year.

11 I had served in various positions  
12 between January of 2002 and March of 2014, when  
13 an accusation was made against me. Those  
14 included positions, including, as a prosecutor,  
15 as a defense counsel and a supervising defense  
16 counsel, as deputy staff judge advocate and as a  
17 staff judge advocate.

18 My second to the last job in the Army  
19 was as the chief of the Trial Counsel Assistance  
20 Program, of which I suspect many of you are  
21 familiar.

22 During the, about two years and change



1 that I was the chief of TCAP, myself and  
2 approximately 30 other civilian and Military  
3 attorneys lead the training, instruction, advice  
4 of every prosecutor in the U.S. Army.

5 In addition, at the same time as the  
6 chief of TCAP, I supervised as part of those 24,  
7 or excuse me, as part of those 30, 24 special  
8 victim prosecutors located at bases around the  
9 world who took the lead on prosecuting or  
10 advising on all cases involving special victims.  
11 So not just sexual assault but domestic violence.  
12 And child victims as well.

13 In addition, I was one of a small  
14 handful of people that I believe really took the  
15 lead in representing the U.S. Army to Congress.  
16 A handful of times, ten to 15 times, I personally  
17 briefed either members of Congress or their  
18 staffs, on how the Army was handling sexual  
19 assault.

20 In addition, while I was the chief of  
21 TCAP, I was selected to be the lead prosecutor in  
22 the case of U.S. v. Sergeant Bales. Which is a

1 16 homicide case occurring in Afghanistan.

2           Myself and about ten other attorneys  
3 and paralegals, port Navy efforts of about 100  
4 other people, to prosecute Sergeant Bales.

5           I have been previously selected to  
6 attend senior service college, and I deferred  
7 that for a year. And probably ahead of most my  
8 peers.

9           In early 2014 I was selected to be the  
10 Staff Judge Advocate of the 1st Cavalry Division  
11 later on that summer.

12           On or about February 21st of 2014, I  
13 was informed that a colleague claimed that I  
14 groped and tried to kiss her at about 1 o'clock  
15 in the morning in my hotel room, at a conference  
16 in March of 2011.

17           At some point this allegation against  
18 me was leaked to the press on March 5th of 2014.  
19 Every major news outlet ran my name, my title, my  
20 picture and the accusation against me.

21           I had to talk to my girlfriend, call  
22 my mother in Nevada, sent an email to a small

1 group of family and close friends to let them I  
2 would be on national news that night. I actually  
3 got an email the next day from a friend in London  
4 to say that I made The Guardian.

5 Perhaps most importantly, or at least  
6 relevant, this story aired the night before a  
7 Senator Kirsten Gillibrand sponsored a bill to  
8 remove sexual assault from a Military chain of  
9 command, was put to a vote on the senate floor.

10 Much of my negative experience since  
11 I left the Army is a direct result of what you  
12 could probably still find on the internet should  
13 you Google my name.

14 I was ultimately fired from my job at  
15 TCAP. I was given what's called a locally-filed  
16 letter of reprimand, which essentially means it  
17 goes in a desk drawer and is supposed to  
18 disappear once you either PCS. Once you either  
19 move from that assignment, or in my case, leave  
20 the Army.

21 CHAIR BASHFORD: I'm sorry --

22 LT. COLONEL MORSE: Go ahead.

1 CHAIR BASHFORD: -- what is PCS?

2 LT. COLONEL MORSE: I'm sorry. Yes,  
3 so permanent change of station.

4 CHAIR BASHFORD: Thank you.

5 LT. COLONEL MORSE: So you can have an  
6 officially-filed letter that becomes part of your  
7 file. It can be used against you later  
8 essentially.

9 But locally-filed is supposed to be,  
10 for all intents and purposes, a counseling  
11 statement.

12 CHAIR BASHFORD: Thank you.

13 LT. COLONEL MORSE: In October of 2015  
14 I retired honorably as Lieutenant Colonel.

15 I don't want to re-litigate my case  
16 here today, and I'm certainly, though I'm willing  
17 to answer any questions, what I want to make  
18 clear and ensure there's no confusion, that at no  
19 point did I assault my accuser, at no point did I  
20 do anything that could be misinterpreted as non-  
21 consensual interactions.

22 The primary intent, I understand of

1 the Panel and of me, is to help understand how  
2 allegations of assault effect those accused, and  
3 whether or not there might be instances of how  
4 the Army, or even civilian leadership, might not  
5 fairly affect this position.

6 I could unhappily talk about this for  
7 hours, and I'm happy to talk to any of you any  
8 time, any place, in further detail. But I'll try  
9 to focus my comments on a few of my experiences.

10 After the accusation I was given no  
11 tasks or responsibilities. I had to move to an  
12 empty office away from my team. And was told to  
13 stay away from them.

14 I had a top secret SCI security  
15 clearance, that was suspended. Once the, it's  
16 called a flag, once that flag was removed, then  
17 essentially you can reinitiate your clearance, I  
18 was told that because I was going to retire that  
19 there was no need to do it. And so I do not have  
20 a clearance.

21 Before the investigation was complete,  
22 I was told that I was removed from my following

1 position as a staff judge advocate of the 1st  
2 Cavalry Division, and I was also removed from the  
3 list of selectees for senior service college.

4 After receiving my letter of  
5 reprimand, but prior to the General making the  
6 final determination, I was told that if I did not  
7 submit a request to retire the reprimand would be  
8 filed in my official file. I would then face a  
9 separation board and whatever comes after.

10 My selection board for the rank of  
11 Colonel was meeting just a few weeks actually  
12 after the filing of the reprimand. I was told  
13 that I needed to withdraw my name from  
14 consideration for the rank of Colonel.

15 I believe that I was competitive to be  
16 promoted. If I had been promoted and if I had  
17 served three years at the rank of Colonel,  
18 instead of retiring as a lieutenant colonel, my  
19 retirement pay over the next 40 years of my life  
20 would have been about \$2 million more than  
21 retiring as a lieutenant colonel.

22 I was notified after the final

1 determination, it was made locally, I was  
2 notified by my senior rater that my file would go  
3 in front of a Grade Determination Board to make a  
4 determination as to what rank I should retire.

5 I should clarify, I was notified  
6 twice. The first notification listed a Deputy  
7 Undersecretary of the Army as the approval  
8 authority of my grade, my retirement grade.  
9 That's in accordance with the regulation.

10 About two days later I received a  
11 subsequent notification that said the Secretary  
12 of the Army would personally act on my case.

13 I don't know if this is typical. I do  
14 know that the regulations states that the default  
15 is of a Secretary of the Army acts on people  
16 retiring in the rank of one-star general and  
17 above.

18 During the investigation phase,  
19 multiple witnesses voluntarily contacted my  
20 defense attorney with information that was  
21 relevant to my case. As a result, a battalion  
22 commander in my chain of command, under the order

1 from the advising staff judge advocate, so a  
2 colonel judge advocate, ordered me to cease  
3 conducting my defense.

4 The specific order said that if me or  
5 anyone acting on my behalf, to include my defense  
6 counsel, spoke to anyone about the case, we would  
7 be in violation of a lawful order and we could  
8 both be charged with interfering with an  
9 investigation.

10 The advising trial counsel, or the  
11 advising prosecutor in this case, when making a  
12 determination as to whether or not I should be  
13 titled, which I can talk about in more detail, he  
14 told my attorney they would not consider the  
15 credibility of either me or my accuser. This is  
16 contrary to the, specifically contrary to the  
17 regulation.

18 The regulation that determines whether  
19 or not should be titled says that you are  
20 supposed to determine or assess credibility,  
21 given the totality of the circumstances and the  
22 source of the information.



1           If I can shift to after the Army  
2           leaking this accusation to the press has affected  
3           me in various ways. Literally from the day I  
4           retired.

5           This has been five years. The  
6           examples I'm going to give you have occurred just  
7           over the last five months.

8           I had an offer from a local think tank  
9           to write several blog posts about the training of  
10          NATO forces. The offer was withdrawn shortly  
11          after someone in that organization Googled me.

12          A colleague and I had an oral  
13          agreement with the U.S. Air Force JAG School at  
14          Maxwell Air Force Base to provide a week long  
15          advance communications course to mid-level judge  
16          advocates. About ten days before that course,  
17          the JAG school called my colleague and told him  
18          that he could come, I was not welcome.

19          I've applied to three executive MBA  
20          programs in the last few months. I addressed my  
21          exit from the Army and what any selection  
22          committee might find should they Google my name

1 in each one of those applications. All three  
2 schools denied my applications.

3 One school, I asked all three for  
4 feedback, only one did. They stated that their  
5 main concerns were regarding my ability to fit  
6 with their program and specifically because  
7 "their institution relies so heavily on close  
8 student interaction and effective teamwork."

9 There are a long list of reasons that I probably  
10 should not go to a top 20 MBA program, but my  
11 ability to be part of a team is not one of them.

12 I've had Global Entry for the last  
13 three years. Global Entry, as you know, is one  
14 of the programs that allows you to bypass customs  
15 and border patrol.

16 I've had it for three years. I've  
17 made literally 20 to 30 trips, international  
18 trips, without interruption. Without any sort of  
19 an issue.

20 In November, so just a few months ago,  
21 I was coming back from Mexico on my way to  
22 Seattle, I was pulled out of a line and told that

1 I required additional questioning because in  
2 2014, their computer said that, 2014, I was  
3 arrested for assault and that I was given a  
4 reprimand.

5 I was recently offered a permanent  
6 position with one of my clients. I've been doing  
7 consulting for about the last year.

8 Before accepting I had a very, very  
9 long talk with the leadership, essentially to  
10 make sure they knew everything and also to ask  
11 them what they were going to do when someone in  
12 their organization inevitably Googled me. They  
13 assured me they had done their homework and that  
14 it was not going to be an issue.

15 About two weeks later I was told that  
16 someone in the organization Googled me, the  
17 permanent offer was rescinded. I still work with  
18 that organization, but I do it as a contractor.

19 On a very personal basis, I can't  
20 properly articulate to you how I feel the Army,  
21 JAG Corps leadership, treated me over the last  
22 year of my time in the Army.

1           I had a very strong sense of self, a  
2 pretty strong opinion of what I believe my role  
3 in the world was and that changed. A profound  
4 sense of justice and fairness and what I believe  
5 my role in that process was.

6           And frankly, I didn't know what to do  
7 with myself if I didn't belong to something  
8 bigger than me. Because of this I've become  
9 withdrawn, depressed.

10           I used to be someone who always sought  
11 out challenges and leadership opportunities and  
12 had a very strong desire to make the world, and  
13 those around me, better. And I just don't  
14 anymore.

15           It's effected the way I interact with  
16 my family, with my girlfriend, with my former  
17 colleagues, and generally, with the world around  
18 me. I don't know, and this has been five years,  
19 it's at the point where it's absurd frankly.

20           I don't know what it takes to get me  
21 back to the type of person I think I was before.  
22 But I hope that today is maybe the beginning.

1 Thank you for your time.

2 CHAIR BASHFORD: Thank you. Colonel  
3 James.

4 COLONEL JAMES: Thank you, Chairman  
5 Bashford, I appreciate it. Panel Members, thanks  
6 for letting me be here today.

7 Colonel Weir, great job setting  
8 everything up, I really appreciate it.

9 It is an honor to be here. And, Jay,  
10 thank you for your comments.

11 My name is Doug James, as she said.  
12 I'm a retired Air Force Colonel, a fighter pilot  
13 by trade. I flew the A-10 and the F-15.

14 I now fly for a major airline, I run  
15 my own consulting business and more most  
16 importantly, I'm honored to be the president of a  
17 non-profit for falsely accused service members.

18 And I'll just say, Jay's comments are  
19 typical of what I see every day at my non-profit.

20 I'm here today to offer my testimony  
21 on my personal experience with the Military  
22 judicial system. Specifically, what happened to

1 me after a false allegation, which was a  
2 byproduct of a very hostile and protracted  
3 custody battle from my wife's ex-husband.

4 My objective is not to only provide  
5 you with my personal testimony but I'm going to  
6 try to meld in what I see every day in the common  
7 threads and Save Our Heroes. We just heard some  
8 of them.

9 Unfortunately, the common thread of  
10 career killing, family destruction and the lack  
11 of holding proven false accusers accountable has  
12 turned the Military judicial system into a threat  
13 of national security. I don't say that lightly.

14 I worked hard at the Air Force, with  
15 the Air Force. I flew the A-10 and F-15 for my  
16 first eight years. Then I had an assignment to  
17 the Pentagon, CENTCOM Headquarters in Tampa and  
18 then Pacific Air Force Headquarters in Hawaii.

19 While at these three assignments I was  
20 a senior colonel, so I was able to work with  
21 today's Who's Who in senior leadership, in both  
22 the Military and the civilian world.

1           I spent half my career on active duty,  
2           the other half as a reservist. But 21 out of 28  
3           years was active duty. That's a number that's  
4           very important later on.

5           There's no doubt my career was on an  
6           upward trajectory. In Winter of 2013, while I  
7           was living in Southern California, my wife's  
8           custody battle reached a level where we felt her  
9           husband's threats, her ex-husband's threats, were  
10          to be taken seriously.

11          I was drilling a PACAF at the time.  
12          I had a personal meeting with my two-star and I  
13          explained to him about the threats to our family  
14          and asked if he needed full-time help.

15          Without hesitation, the two-star  
16          needed to fill a critical O-6 fighter pilot  
17          billet due to a last minute assignment change.  
18          It was perfect for both of us.

19          I could get my wife out of the  
20          dangerous situation and help my PACAF. Little  
21          did I know that decision was going to be the end  
22          of my Military career.

1                   This same two-star would be my  
2                   convening authority and conveniently forget about  
3                   my dangerous situation at home.

4                   Just after arriving at PACAF I learned  
5                   I screened for brigadier general. I never cared  
6                   about rank my entire career, but it was exciting  
7                   to have an opportunity to take my senior  
8                   leadership to the next level.

9                   My short-lived accomplishment ended in  
10                  July of 2013 when a new reservist two-star boss  
11                  of mine told me I was under investigation for  
12                  accusation of a sexual assault. I was shocked  
13                  and could not believe my wife's custody battle  
14                  made it into the Air Force.

15                  After I got a hold of myself, I had a  
16                  great discussion with my new boss. I told him  
17                  about the situation with my wife's ex-husband,  
18                  why I was at PACAF full-time in the first place.

19                  And after hearing my story, he  
20                  counseled me to work my butt off and was sure the  
21                  situation would resolve itself. We were both  
22                  confident the Air Force would look at the



1 entirety of the situation and dismiss my case  
2 shortly.

3 Little did I know my career actually  
4 ended at that point. It's important to note that  
5 an allegation will end your career.

6 I take pride in saying I worked my  
7 butt off as a deputy assistant director for all  
8 of operations in the Pacific while being  
9 investigated for a completely baseless  
10 allegation.

11 My whole family assumed the Air Force,  
12 would see how baseless this allegation was. I  
13 never lived with my stepdaughter, and in fact, I  
14 was never alone with her because of my wife's  
15 fear of her ex-husband. And I had orders to  
16 prove the multiple times I was in Tampa and et  
17 cetera, et cetera.

18 A CD of his threats, phone messages  
19 and even pictures were given to the OSI, Office  
20 of Special Investigation. None of this critical  
21 information ever made the OSI's final report.

22 In fact, my wife's testimony was

1 reduced to three-quarters of a page while the ex-  
2 husband's baseless rambling testimony made up  
3 most of the report.

4 We eventually learned the Air Force  
5 was not interested in the truth and more  
6 interested in appeasing Congress. The Air Force,  
7 quite honestly, was going to do everything  
8 possible to convict me for something I didn't do.

9 At Save Our Heroes, in reference to  
10 the UCMJ we say, your guilty until proven guilty.  
11 Sadly, I felt this firsthand.

12 I was trailed to the OSI for almost a  
13 year and a half. The team, whose tactics I'm not  
14 going to talk about here, but all with the goal  
15 to disregard the truth, and at a minimum, convict  
16 me for some sort of derived collateral charge.

17 Remember, a conviction for a derived  
18 collateral charge allows the Military to  
19 statistically show a conviction for sexual  
20 assault.

21 In summer of 2014, a year after the  
22 investigation, I have started, I sat down with my

1 four-star boss at the time, and I sat down with  
2 him one-on-one, and he was one of the only few  
3 people on base that knew what was going on, and I  
4 said, you can help me find the next job. Because  
5 that was the next step for brigadier general.

6 And he said, no, I can't, with the  
7 investigation going on. I told him I understood,  
8 and I was done.

9 The four-star asked me if I could help  
10 through the summer because they needed help. I  
11 still considered him a mentor, even at that  
12 point, because I had worked for him four times  
13 through both of our careers. So I agreed.

14 I found out later the four-star wrote,  
15 in emails that summer, let's just send him to a  
16 court-martial and see what happens. This was a  
17 guy I looked up to.

18 Two days before my last day on active  
19 duty in August 2014, I called retirements to make  
20 sure my paperwork was ready to go. I had  
21 preplanned everything a month prior with my  
22 retirement, perhaps I figured it was going to be

1 just a quick confirmation call.

2           Unfortunately, it wasn't. The GS-9  
3 told me my retirement was on OSI hold. Yet, no  
4 officer in my chain had the leadership competency  
5 to tell me I couldn't retire.

6           The whole thing, the whole time I kept  
7 thinking, the Air Force will figure this out.  
8 I'll get an apology from somebody high up and  
9 even get a retirement ceremony.

10           I went back to my civilian airline and  
11 waited for my retirement. My security clearance  
12 was suspended in September of 2014. In Fall of  
13 2014, at my wife's urging, I hired a civilian  
14 lawyer for \$40,000. That's the going rate.

15           I couldn't believe I needed to hire a  
16 lawyer when it was so obvious this was a  
17 fabricated story. Just after my arraignment in  
18 September 2014, my Military lawyer gave me a  
19 heads up the Air Force Times would be posting an  
20 article about me the following Monday.

21           Immediately I got a hold of the VP at  
22 my civilian airline and asked for a conference

1 call. My wife and I sat down with him, the VP  
2 was awesome.

3 I knew him quite awhile because I had  
4 just interviewed three months prior for the  
5 flight OPS VP job at my airline. I was a  
6 finalist for the position. One of two people.

7 Little did I know, at the same time of  
8 interviewing for the VP job the OSI was asking  
9 the airline questions about me. Needless to say,  
10 I never got the job.

11 During our conference call I explained  
12 what happened about the news article. I will  
13 never forget what he said.

14 We see this all the time with  
15 employees going through divorces and custody  
16 battles, I'll have my ex-FBI guys check it out.  
17 If we think you're good to go, we'll let you keep  
18 flying, if not, you're grounded. And I thought  
19 that was reasonable.

20 I never heard from my airline again.  
21 And I continue to fly.

22 My airline had just treated me with

1 more respect than the Air Force. I think that's  
2 part of the reason we got a pilot shortage to be  
3 quite honest.

4 In 2015, August 2015, two months  
5 before my planned court-martial, I couldn't take  
6 it anymore. The stress was getting to me and my  
7 family, I needed to start preparing for the  
8 trial.

9 I asked PACAF to put me on full-time  
10 orders so I could prepare, because remember, I'm  
11 a reservist at this point. My request got denied  
12 by Colonel Stickle. The Colonel in charge of all  
13 my type of reservists in the Air Force.

14 Colonel Stickle told me on the phone,  
15 and I quote, "you don't deserve orders because  
16 you're going to a court-martial." I questioned  
17 her and said, it sounds like you think I'm  
18 guilty.

19 I then told her my civilian airline  
20 treated me better than the Air Force, an  
21 organization I was willing to die for. Her  
22 answer was another classic. They should, we only

1 get you two weeks a year.

2 I couldn't believe what I heard. I  
3 answered, I guess you don't know my career.  
4 Remember, I had worked 21 out of 28 years.

5 A reservist one-star was assigned to  
6 make sure I was okay. They call him the wing  
7 man. Kept pushing the decision all the way to  
8 the new PACAF commander, General Robinson.

9 There was no way I was going to fly  
10 out in a civilian airline this close to the  
11 court-martial. General Robinson was awesome.  
12 She signed off on the orders.

13 But why did it take a four-star to  
14 sign off on them? Four emails later proved  
15 Colonel Stickle's barbaric thought process was  
16 manifested up and down the chain of command.

17 Unbelievably, my case was dropped two  
18 weeks before my court-martial for reasons I've  
19 never been told. In fact, when my lawyer called  
20 me with the news he said, I've never seen this  
21 before, take the gift and go away.

22 He emphasized that many times, and

1 actually had a Military lawyer call me to  
2 reinforce it, yes, these were serious red flags.  
3 The damage was done, I retired two days later.

4           There was no discussion about keeping  
5 me, I was a liability. Within a month, three  
6 general officers in my chain of command quietly  
7 retired, to include the convening authority who  
8 brought me on active duty and knew the whole  
9 story in the first place. Remember, he knew  
10 everything.

11           The Air Force never asked the Air  
12 Force Times to take the article off the net. So,  
13 Jay, I understand what you're saying.

14           At my lawyers urging, the Air Force  
15 Times wrote one sentence in an article six months  
16 later saying, all charges against Doug James have  
17 been dropped due to new evidence.

18           Now, keep in mind, I didn't know what  
19 the new evidence was. So I asked my Military  
20 lawyer for the new evidence. And she told me  
21 there was no evidence and sometimes the press  
22 gets it wrong.



1                   Again, through FOIA, I found out the  
2 Air Force had actually written public affairs  
3 guidance, it's a PAG. And in that PAG were  
4 questions to answer the press if they asked.

5                   And one of them specifically was,  
6 charges were dropped due to new evidence. The  
7 Air Force lied to me.

8                   The Air Force told me they couldn't  
9 take the original article down because they had  
10 nothing to do with the Air Force Times. The Air  
11 Force Times article finally came down when I sent  
12 the editor a FOIA email written to the chief of  
13 staff and the Secretary in the Air Force about my  
14 case.

15                   I was able to get the article off.  
16 The Air Force lied to me again. Unfortunately,  
17 as Jay has just said, there is still a dead link  
18 which will be there forever.

19                   I'm still feeling the effects today.  
20 My case was dismissed without prejudice, which as  
21 you know, that means the Air Force can hold it  
22 over me for eternity.

1           A year ago, my wife was reunited with  
2 her kids. The things we've learned is shocking.  
3 I will not go into details, but I know the Air  
4 Force knows about their horrific life. Keep in  
5 mind, they were my dependents.

6           Unfortunately, because of the  
7 disposition of the case, I've been paying \$1,000  
8 a month for the kids to live in the apartment. I  
9 can't be anywhere near them because of the Air  
10 Force and reprisal.

11           I spend about \$800 a month into  
12 counseling to get them back to normal in maturity  
13 levels. These kids were abused to their dad to a  
14 level you can't imagine, but the Air Force  
15 ignored it and would rather have destroyed a  
16 dedicated O-6's life.

17           It took me over a year to get my  
18 security clearances back after the dismissal.  
19 And the only reason why I got them back is  
20 because I went through the help of the late  
21 Senator McCain, who is my Senator, and Senator  
22 Sinema. Now Senator Sinema, was my congressional

1 representative at the time.

2 Both were fantastic. And I have a lot  
3 of respect for our new senator.

4 But why would it take working through  
5 my congressional delegation to get my clearances  
6 back?

7 My DNA is still in the FBI Database.  
8 The Air Force just blew me off when I asked for  
9 help. I've written numerous agencies to have it  
10 taken out.

11 And as you've heard in previous  
12 testimony, the last quarter, that's almost  
13 impossible to do. Interestingly enough, all the  
14 Military lawyers and prosecutors in my case have  
15 been promoted.

16 The lead prosecutor is now a sitting  
17 judge at Travis Air Force Base. He has a history  
18 of destroying people's lives.

19 The JAG who was advising the convening  
20 authority is now a one-star. And I don't  
21 understand how those people, who propagated a two  
22 and a half year investigation over a baseless

1 allegation, single handedly destroying three  
2 generals and a single colonel's career got  
3 promoted.

4           There have been some blessings in  
5 disguise. My wife was so shocked this case would  
6 even move forward. She went to ASU Law School.  
7 As you know, it's a top 25 law school. She  
8 passed the Arizona bar this July, one of the  
9 toughest in the country, and is now working for a  
10 leading Military defender here in D.C. Very  
11 proud of her.

12           I would argue her education and legal  
13 maturity is higher than 80 percent of those in  
14 the Military prosecutor, JAG Corps today.

15           Most importantly though, what I  
16 learned over my entire career is helping over 300  
17 others in the same situation as the president of  
18 Save Our Heroes.

19           We are picking up a client every two  
20 weeks. Military justice, injustice, is  
21 destroying lives every day.

22           I will conclude by emphasizing, this

1 is a national security issue and the impacts to  
2 me, personally, are immeasurable. Four highly  
3 decorated senior officers lost their jobs because  
4 the Military justice system could not read a  
5 calendar.

6 If you think I'm joking, ask the Air  
7 Force why the case against me was dropped.

8 The monetary impacts can't be  
9 calculated. I lost both a chance at brigadier  
10 general and the VP at the airline I love.

11 With today's electronic medium, what  
12 future opportunities am I going to lose because  
13 of a dead link, and we've already heard that with  
14 Jay.

15 Unfortunately, I think my case is just  
16 the tip of the iceberg. Thank you for your time,  
17 I really, really appreciate it and I'll be happy  
18 to answer questions later.

19 CHAIR BASHFORD: Thank you. Colonel  
20 Riggins.

21 COLONEL RIGGINS: Gentlemen, thank you  
22 for your remarks. And, Colonel Weir, thanks for

1 the invite to be here today, I appreciate it.

2 Good morning, ladies and gentlemen, my  
3 name is Wil Riggins. Thank you for the  
4 opportunity to address the Committee. Today, of  
5 all days, is my 54th birthday.

6 I understand my purpose here today is  
7 to inform the Committee with regard to the impact  
8 and allegation of sexual assault had on my career  
9 and my private life.

10 While preparing these remarks, it  
11 occurred to me that simply sharing my story would  
12 fall woefully short of actually providing an  
13 understanding, true understanding, of the impact  
14 this allegation had on me, my career and my  
15 family.

16 After all, prior to my own experience,  
17 I certainly have heard of others in similar  
18 situations. Dealing with the allegations and  
19 trying to manage the ball out of having life, as  
20 they knew it, came to a dramatic and painful  
21 pause while subsequent events unfold.

22 So, I supposed I was informed about

1 the potential impact, but I can assure you that  
2 until I experienced the horror myself, I did not  
3 understand the depth and breadth of the crushing  
4 impact on those who I love and care most about,  
5 on the everyday mundane functions of our lives.  
6 And certainly, not on my own emotional health or  
7 on my professional life.

8           For this reason, I need your help  
9 today to effectively create a level of  
10 understanding that I believe must go beyond  
11 simply informing in order to be effective.

12           In preparation for today's  
13 discussions, I reviewed all of your online  
14 professional biographies. That review revealed a  
15 simple fact.

16           You were all asked to serve on this  
17 committee because each of you have invested the  
18 daily sweat and toil, the education and training,  
19 the sacrifice in commitment as required to  
20 achieve consistent excellence, and to be  
21 recognized as experts and leaders within your  
22 fields and to advance to a pinnacle that is

1 beyond most of your peers, and possibly, even  
2 beyond your own expectations.

3 You also have my biography for  
4 reference.

5 Like you, I had arrived at the  
6 mountain top of my Army career in 2013. Having  
7 achieved success in every level during the  
8 preceding 26 years, since my graduation from West  
9 Point in 1987.

10 I had been selected for multiple  
11 promotions and advanced military and civilian  
12 education opportunities well ahead of my peers.  
13 Like you, that success came at a significant  
14 personal price.

15 In my case, that included long hours,  
16 time spent away from families and friends, missed  
17 birthdays, sporting events. But also, exposure  
18 to extreme danger on foreign soil. Not only to  
19 myself but exposure to subordinate soldiers, men  
20 and women, who were my responsibility.

21 On July 2nd of 2013 I formally learned  
22 that I was one of 35 officers selected from a



1 field of over 3,500 colonels to be selected for  
2 promotion for brigadier general in the Army.

3 Judging from your bios, most of you,  
4 if not all, can relate to the elation and the joy  
5 that I experienced, along with my entire family,  
6 with that promotion announcement.

7 Here's where I need your help.  
8 Because I need you to reflect on your own  
9 background, your own history, your promotion, job  
10 announcement, appointment or nomination to either  
11 your current position or that earlier position,  
12 that in your mind marks the absolute peak of your  
13 professional accomplishments.

14 That moment where you realize that you  
15 had achieved something truly amazing. A time  
16 when you felt unparalleled elation.

17 Now, I need you to imagine that in the  
18 midst of your elation and the excitement shared  
19 with loved ones and close friends, you become  
20 subject of an allegation of wrong doing. Pick  
21 your own poison.

22 It could be cheating on an examine,

1 plagiarizing a thesis, stealing. Or in my case,  
2 the allegation that I sexually assaulted another  
3 West Point cadet 27 years earlier in 1986.

4           Regardless of what allegation you  
5 chose, you know first and foremost that you did  
6 not commit the offense, yet, the more you affirm  
7 that fact the more vehemently your accuser  
8 claimed that you did.

9           The other condition to imagine, and  
10 it's very real, as we've heard earlier, is  
11 whatever the allegation you chose, it represents  
12 a perceived epidemic of wrong doing that's  
13 determined by Congress, and the media, where  
14 aggressive action must be taken at any cost, to  
15 eliminate similar future offenses within your  
16 profession.

17           For this reason, your appointment,  
18 announcement or promotion is publicly delayed  
19 while you are formally charged with the offense.  
20 Like Doug, my DNA still remains in the DNA  
21 database.

22           The ensuing investigation involves

1 family members across the country and the friends  
2 you haven't seen or spoken with in years. You  
3 may not even have accurate contact information  
4 for somebody.

5 At this point, you're determined to  
6 clear your name. After all, your entire  
7 professional career and every accomplishment  
8 you've ever achieved is now at stake.

9 In my case, my 70-year old mother in  
10 Florida was one of the first to be interviewed as  
11 part of my six month investigation. Followed  
12 closely by my wife, who is here this morning, my  
13 sister, my college roommates and other friends  
14 from college.

15 Your family loves you, so they are all  
16 in and support you in every way possible. But  
17 you can see, and you hear in their voices, the  
18 stress and concern. And you remember, they  
19 didn't choose this, they're only dealing with  
20 this for my sake.

21 After a long, painful and exhausting  
22 six month investigation you're told the outcome,

1 "there was insufficient evidence to establish  
2 probable cause to believe that you committed the  
3 offense."

4           Throughout the investigation your  
5 family has been rock solid with their support,  
6 but you can visually see the fatigue and stress  
7 the ordeal has had on them. You can also see it  
8 when you look in the mirror. And you feel it all  
9 of the time.

10           You stop counting the number of  
11 sleepiness nights months ago. Your friends have  
12 been mostly supportive, at least to your face.  
13 But you've heard a couple of them say that there  
14 must be something to the allegation, "it's taken  
15 this long and you still haven't gotten that  
16 promotion."

17           Nevertheless, you breathe a cautious  
18 sigh of relief now that the investigation is  
19 over, thinking that you can finally resume your  
20 life. The elation you felt months before at your  
21 once in a lifetime achievement has faded, but you  
22 still believe that you have much to offer your

1 profession in this new position of elevated  
2 responsibility.

3 So you inquire as to the status of  
4 your promotion but hear nothing for another five  
5 months. Then, an official in your field  
6 determines that a panel should be assembled to  
7 revisit your selection for the screened job.

8 Interestingly, this panel process is  
9 how you were chosen initially. But you support  
10 the process and are pleased to learn that a  
11 second panel reviewed your complete body of work,  
12 and also reviews the complete investigation  
13 outcome, before arriving at the exact same  
14 decision that the first panel made. And that is,  
15 you were the best person qualified for this  
16 promotion.

17 In my case, the Secretary of the Army  
18 was the official who ordered a promotion review  
19 board of five Army generals to review my file,  
20 and the investigation, before making a  
21 recommendation on my promotion.

22 That promotion review board

1 unanimously upheld the decision on my initial  
2 promotion board by recommending, again, that I be  
3 promoted.

4 Another month passes before you learn  
5 that the official, in my case the Secretary of  
6 the Army who assembled the panel, decided to  
7 ignore the findings of the panel and punitively  
8 withdraw the support for your nomination.

9 You, your friends and your family are  
10 devastated. You don't understand because your  
11 expertise and qualifications for the position  
12 have been affirmed twice now.

13 Most recently in full light of the  
14 false allegation made against you, and the  
15 related investigation. So I ask you, what would  
16 you do next?

17 I requested a 15 minute office call  
18 with the Secretary of the Army, 15 minutes, to  
19 try to understand his decision making rational.  
20 That request was flatly rejected.

21 Again, I have to ask you to imagine  
22 yourself in this situation. You've been denied a

1 once in a lifetime opportunity that you  
2 previously had earned, but now on top of that,  
3 you've been disgraced and humiliated across the  
4 entire breadth of your profession.

5 So, even returning to the position you  
6 held previously is not an option. Again, think  
7 about what you would do in that situation.

8 For my wife and I, we elected to  
9 exercise the only options we believed were  
10 available to us at the time. I filed two sets of  
11 paperwork.

12 The first was for retirement from the  
13 Army. The second was a lawsuit for defamation.  
14 Forty-nine months and \$200,000 later, about 15  
15 miles from where we are right now, a Fairfax  
16 County juror of four men, I'm sorry, of four  
17 women and three men, determined that the  
18 allegation was indeed a lie with intent to  
19 defame.

20 The amount of damages they awarded was  
21 record setting, because according to one jury  
22 member, "we wanted to make sure nothing like this

1 would ever happen again."

2 So I ask you to place yourself in some  
3 of the situations that I experienced during the  
4 period beginning July 2013 and continuing over  
5 the next four years when the Secretary of the  
6 Army decided to ignore the recommendations of two  
7 promotion boards and take unqualified punitive  
8 action against me.

9 I believe that was the only way for  
10 this Committee to truly understand how perversely  
11 my case was handled by the Army and Department of  
12 Defense and how devastating the impact was. I  
13 truly hope you took the opportunity to image  
14 yourself in a similar situation, because, as you  
15 heard this morning already, it's happening to  
16 current service members far too often.

17 I also hope that at some point during  
18 these remarks you came to the same conclusion as  
19 that juror, it should never happen again. Thank  
20 you all for your time and attention and I look  
21 forward to answering your questions.

22 CHAIR BASHFORD: Thank you.



1 Questions? Oh, I'll start them.

2 Lieutenant Morse. Colonel Morse,  
3 sorry. If you said it, I missed it. How long  
4 was the investigation into the allegation of your  
5 case?

6 LT. COLONEL MORSE: It was, from  
7 accusation until filing of a reprimand, was about  
8 four months. And then the grade determination  
9 board lasted another six or seven months, I  
10 think.

11 CHAIR BASHFORD: Thank you.

12 BGEN SCHWENK: So, what would you guys  
13 recommend to change the system to fix some or one  
14 or more of the things that you experienced, or  
15 that you know others have experienced, that  
16 didn't work well?

17 COLONEL JAMES: In my position at Save  
18 Our Heroes, we actually made eight trips to the  
19 Capitol this last year. And we've analyzed this  
20 as well as we can.

21 We're only 40 volunteers, but we do  
22 have a lot of legal people on our team. And we

1 hooked up with some well-known and well-connected  
2 people here in D.C.

3 And basically, we've boiled it down to  
4 a couple of suggestions. And I saw Ms. Coyne's  
5 testimony from last time. Very, very good by the  
6 way.

7 But her suggestion was a little more  
8 band-aid. And I think, Judge Grimm, I think you  
9 used that term if I remember correctly. Anyway,  
10 we think it's at a very high level.

11 Right now, basically one senator can  
12 ruin a general officer's career. We think, and  
13 we're driving to have at least ten senators, in  
14 writing, say that the general officer is not fit,  
15 whatever, on a nomination.

16 We also believe strongly in  
17 eliminating the Feres doctrine. And I'm sure you  
18 know the Feres doctrine. But that would help in  
19 a lot of these cases, and it would help in Wil's  
20 case.

21 Having a chance to hold the prosecutor  
22 accountable, much like was done in the Duke

1 Lacrosse case.

2 And then, and this falls to what  
3 happened with all of us here, and we think you  
4 got to keep these investigations out of the  
5 newspaper. We are finding that once they get  
6 into the newspaper, that person is dead.

7 Literally.

8 Because the service must save face.  
9 They put them in there in the first place and now  
10 they have to save face and they're going to go  
11 for some sort of collateral charge to make it  
12 look good. We're seeing that all the time.

13 And I think Jay's is a perfect example  
14 how they're using non-judicial type punishment in  
15 not going through the normal system. Which is  
16 exactly against what Secretary Mattis wanted in  
17 the letter he wrote about six months ago.

18 So that would be my recommendation.  
19 That's what we're working with our people in the  
20 Hill on. And we'll make at least eight more  
21 trips in 2019.

22 HON. GRIMM: Can I ask you a follow-up

1 on that question, Colonel?

2 COLONEL JAMES: Yes, Judge.

3 HON. GRIMM: Your experience was, is  
4 that the announcement to the press came from  
5 within the Air Force itself as opposed to from  
6 the accuser or from someone else, is that what --

7 COLONEL JAMES: Well, how mine came  
8 about was they found an Air Force Times writer  
9 fishing around on the docket. And I guess he  
10 gave my lawyer a heads up he was going to post  
11 something on the next Monday. So that's how mine  
12 got in there.

13 But, I mean, that's all it takes is a  
14 reporter to go through the docket and then put  
15 something in the paper.

16 HON. GRIMM: Because, if the  
17 information was publicly available information  
18 and there was no action by the Military service  
19 to bring that to the attention of the reporter,  
20 how would that be possible to prevent that from  
21 getting in the press, one of your recommendations  
22 was, don't disclose this information to the press

1       until such time that there is some event, such as  
2       a charge or something that would be public  
3       record, how could this Committee make  
4       recommendations to the services themselves that  
5       would prevent premature disclosure of this  
6       information to the press? Do you have any  
7       thoughts on that?

8                   COLONEL JAMES: I don't. But I know  
9       of two that I'm working right now that are very  
10      high profile. I won't go into details.

11                   But it was almost like there was a  
12      chest-beating going on by the services to get it  
13      out. I think that's very unfair. And we've  
14      heard the reasons why already. And it's going to  
15      be very unfair to these two cases.

16                   BGEN SCHWENK: Colonel Morse or  
17      Colonel Riggins, did you guys --

18                   COLONEL RIGGINS: Yes.

19                   BGEN SCHWENK: -- have anything you  
20      wanted to add about the case?

21                   LT. COLONEL MORSE: It's all right if  
22      I go after you?

1                   BGEN SCHWENK: Okay.

2                   COLONEL RIGGINS: I certainly have  
3 some thoughts here and absolutely agree with  
4 everything that Doug commented on, based on my  
5 personal experience.

6                   The other thing that strikes me in all  
7 of these situations is that there is this  
8 constant mantra of epidemic, and I believe, and I  
9 saw personally, and knowing a little bit about  
10 these gentlemen's cases as well, having that  
11 mantra continue on and one leads a perception  
12 that these are not individual cases, that each  
13 have to be looked at and weighed on their own  
14 merit.

15                  I think somewhere along the way we  
16 lost the basic focus that every single  
17 accusation, every single event, every one of  
18 these, has got to be looked at as a separate  
19 standalone case.

20                  And in all of those cases, both the  
21 perceived victim and the accused, have rights  
22 that need to be absolutely protected. I think

1 some of that is informational in nature. It has  
2 certainly processed, focused in nature.

3 And I know in my case, for the  
4 Secretary of the Army, the review that I talked  
5 about, where he was able to back away from the  
6 promotion review board's case, I mean, those were  
7 reviewed by both the Army Inspector General and  
8 then the Department of Defense Inspector General.

9 And so, essentially punitive action  
10 was allowed with no finding of wrongdoing. And,  
11 again, in my mind, it's because we've got this  
12 tidal wave where we say we've got this epidemic  
13 and so we stop looking at the individual aspects.

14 I think if we, more than anything  
15 else, we need to refocus on that.

16 BGEN SCHWENK: Thank you.

17 LT. COLONEL MORSE: I think two  
18 things, and one touches upon what Colonel Riggins  
19 said.

20 This is the same thing I said every  
21 time I went to Congress before all this happened  
22 to me. I mean, every single staffer or

1 representative or senator I talked to, I said,  
2 this is two separate systems you're talking  
3 about. This is how we treat someone who alleges  
4 that they've been assaulted, and this is how we  
5 treat someone whose been accused of being  
6 assaulted.

7 And I think that what we've done, I  
8 think because of congressional oversight, and I  
9 mean over, in both terms, as in too much in  
10 oversight, we've created one system. So we've  
11 essentially said, if you follow that trail the  
12 conclusion is that anytime a victim makes a  
13 statement it is, by default, true.

14 And there is no circumstance where  
15 someone whose claiming that she was assaulted,  
16 whatever, lied. And it's just not true.

17 It's created a situation where there's  
18 nothing I can do to defend myself. Nothing. No  
19 matter what the evidence.

20 A specific example, as it relates to  
21 Judge Grimm's statement about leaking this to the  
22 media. I was 40 years old, I had never been



1 married, I was single at the time. I think I had  
2 a reputation as an outgoing guy.

3 I'm sure that CID, I believe that the  
4 investigation was leaked by someone from the CID  
5 Office in Germany, watch all the other  
6 allegations come rolling in. When none did, and  
7 part of that is based on, this person who accused  
8 me, this isn't just a, this person ordered me to  
9 come to his hotel room and assaulted me, this is  
10 five pages of statements that I feel I was able  
11 to overwhelming disprove. But none of that  
12 matters.

13 Because if you say anything that puts  
14 into question the victim's credibility or why the  
15 victim would lie, then you are perceived as  
16 victim shaming or if you then put more weight or  
17 more credibility to the accused, you're going to  
18 get taken to task by Congress.

19 So, two separate things. One is,  
20 understand that these are two separate systems  
21 and they can be two separate systems, and they  
22 should be two separate systems.

1           If a person comes in and says I was  
2 assaulted, it's okay to say, I'm sorry this  
3 happened to you and I believe you and we're going  
4 to do a proper investigation. It's also okay to  
5 go back later and tell her, we did an  
6 investigation and we're not, we don't think you  
7 lied, what we're saying is we don't think there's  
8 enough evidence to go forward and we're not going  
9 to. That's okay to do.

10           The second part of that is the role of  
11 the attorney in this. I think that a staff judge  
12 advocate has an obligation to uphold the law at  
13 all costs.

14           My fear is that that has been, that's  
15 been subordinated to a desired protector  
16 convening authority. And so, as an advisory  
17 staff judge advocate, if you tell the convening  
18 authority there is not evidence here, not only  
19 not evidence to not go forward, there's not  
20 evidence for probable cause and there's not  
21 evidence for titling, then you've just placed  
22 that convening authority at risk of being

1 promoted to the next rank or even a lateral  
2 transfer.

3 And so, if I were you, I would ask  
4 some staff judge advocates if they believe that  
5 they've given, what they believe their obligation  
6 is to their convening authority, they're sure  
7 that he or she is --

8 BGEN SCHWENK: Absolutely.

9 LT. COLONEL MORSE: -- he or she is  
10 ready for promotion to the next rank and how that  
11 advice might play out if they advised to not go  
12 forward on sexual assault charges.

13 CHIEF MCKINLEY: I have a multi-  
14 layered question for each one of you. First off,  
15 I want to thank you for your service. I served  
16 alongside each one of you and I want to thank you  
17 for all that you've done for our country.

18 I also want to make a statement that  
19 the Air Force Times is not an official Air Force  
20 magazine. We all have our opinion on them but  
21 it's not from the Air Force.

22 I want to ask you, for your defense

1 counsel, each one of you had the Military defense  
2 counsel, did you feel that they were properly  
3 trained and willing and had the time to put forth  
4 on your cases?

5 Do you think there was undue pressure,  
6 like you, Colonel Morse, to the JAGs and so  
7 forth, convening authorities, to really try to  
8 find guilt and, we all served because it's all  
9 about mission and how did your cases affect  
10 mission capability and the morale of the people  
11 surrounding you? Thank you.

12 LT. COLONEL MORSE: If I could answer  
13 the second question first. You know, one of my,  
14 I have never wanted to turn this into, for me, I  
15 never wanted to turn this into me being like a  
16 poster child for a men's advocacy group.

17 That's not the person I've been,  
18 that's not how I lead in the Army. I believe  
19 that I have treated everyone who's ever worked  
20 for me fairly.

21 And I would ask all of you to go back  
22 and interview every single woman who ever worked

1 for me and see if any of the allegations against  
2 me are consistent with any of their experiences.

3 I bring that up because, what I do  
4 fear is that you now have, you potentially have a  
5 situation where a male senior officer will never  
6 ever be in a room with the door closed with a  
7 subordinate female. Won't take a, won't share a  
8 taxi with her TDY, will get separate rental cars  
9 or whatever it might be.

10 It's created, as we all know,  
11 perception is more important than reality. It's  
12 created this perception that if I am anywhere  
13 with a female soldier or a female airman or a  
14 female Marine or a female sailor, I'm putting  
15 myself at risk of an accusation that I cannot  
16 defend. And I think it's awful.

17 I think it's, some of the absolute  
18 best people I've served with were women judge  
19 advocates. And to think that this situation has  
20 the unattended consequences that they're  
21 potentially discriminated against more than they  
22 were before is troubling to me.

1                   But that's not my story to tell. You  
2 ought to call some women in here and ask them if  
3 they, if my experience has affected their  
4 experience in the JAG Corps since this happened.

5                   CHIEF MCKINLEY: Okay.

6                   COLONEL JAMES: Chief, thanks for your  
7 question. First of all, I want to clarify in the  
8 Air Force, hopefully I didn't lead people astray  
9 by thinking it was by the Air Force, but my point  
10 of that was, if I could have taken the article  
11 out, I think somebody from the Air Force could  
12 have taken the article out.

13                   Your question about defense counsel.  
14 I had two Military defense counsels. The first  
15 one was actually my best. He was a young  
16 captain, good guy. I got frustrated and fired  
17 him because I couldn't understand why this thing  
18 was going on.

19                   Then I ended up getting a major who  
20 was supposed to be the best ADC in the Pacific,  
21 because I was in the Pacific at the time. And  
22 she was okay.

1           The only thing, she didn't understand  
2           what SAID meant. I asked her one day, you know  
3           what SAID is? And I don't, most of you probably  
4           know, sexual allegations in divorce.

5           I thought that was kind of  
6           frustrating. And another comment I asked her, I  
7           said, how is this thing continuing, I don't  
8           understand what evidence they have. And she's,  
9           well, they have very strong testimony from a 15  
10          year old kid. That frustrated me.

11          As far as, I did not see any effects  
12          of mission capability effects at the time. I had  
13          a very high profile position.

14          Hats off to my leadership at PACAF at  
15          the time. There were only about three people on  
16          base that even knew what was going on. The four-  
17          star, the three-star and probably the two-star.  
18          And obviously all the other side guys chasing  
19          after me.

20          I was able to, my boss was, my  
21          immediate boss was gone a lot, so I was in the  
22          very close hold meetings with only about six of

1 us in the room, twice a week. Which was great.  
2 They treated me as a professional, as I thought  
3 they should.

4 Things started breaking down towards  
5 the end though. After a year, when I said I'm  
6 done, actually, my last day on active duty I  
7 represented PACAF on a very high profile, and it  
8 just happened in the Pacific.

9 So I can honestly say I was treated  
10 with respect and professionalism until my last  
11 day. But, after the whole thing ended, you will  
12 have to go back and ask, Chief, some of your  
13 friends, but the entire PACAF leadership was  
14 decimated. And that goes back to my national  
15 security issue.

16 If a meth addict from LA can destroy  
17 PACAF leadership like that, what could a spy from  
18 a bad actor state do? So, I will stand by what I  
19 said.

20 COLONEL RIGGINS: Chief, thanks for  
21 the question. You know, in terms of the military  
22 defense aspect to the question, and I'm not sure



1       how the other services do it, but in the Army  
2       once you are selected for promotion to general  
3       officer -- from a personnel standpoint you are  
4       handled a little bit differently.

5                 One of the ways you are handled  
6       differently is if you do have a need for military  
7       representation you are typically given one of if  
8       not the most senior staff judge advocate member  
9       that is available on staff.

10                And initially I was assigned a  
11       lieutenant colonel who was the branch chief for  
12       defense here at Fort Myers, right next door.  
13       About a week into the investigation I was told  
14       that I was getting reassigned by the JAG office  
15       to a major, a very competent young man, but it  
16       was his first assignment as a defender, so before  
17       that he had only been in a prosecutorial role.

18                You know, he represented himself well  
19       and did a fair job. I mean there were a couple  
20       of issues that we had to work through. And,  
21       ultimately, at the end of the six month  
22       investigation that was conducted by the Criminal

1 Investigative Division in the Army, you know,  
2 there was no finding of wrongdoing.

3 Part of the issue though is that I  
4 asked the question -- and it really didn't hit  
5 home with me at the point that the outcome of the  
6 investigation was published, it took a couple of  
7 months while I was waiting to see, okay, what's  
8 next.

9 I learned through the more senior  
10 defense attorney that the outcome of failure to  
11 establish probable cause is not the same as what  
12 Jay talked about, and when he said, look, we  
13 don't have any reason to take this forward.

14 And so what the outcome of the  
15 investigation did, and, quite frankly, I think  
16 counsel was, their hands were tied in terms of  
17 what they could do for me here, we were left in  
18 this middle ground, not guilty, but not innocent.

19 And so I asked the question, I called  
20 CID, I even talked to the one-star director of  
21 CID in the Army and he admitted to me in  
22 conversation that there is a reluctance, unless

1 the accuser goes back and admits that they made a  
2 false allegation there is a reluctance for the  
3 investigation to go down the road and say we have  
4 no reason to believe that this allegation is  
5 valid.

6 Well, so in the meantime we're stuck  
7 in the middle and that's why, you know, the word  
8 "Colonel" is on my nametag today instead of  
9 Brigadier General. We've got to figure out a way  
10 to get out of that gray space.

11 LT. COLONEL MORSE: If I could add to  
12 that titling decision. So basically there is --  
13 You can get titled for an offense. The standard  
14 is that it's supposed to be credible.

15 So if we have, in my case, a trial  
16 counsel who says I'm not going to assess either  
17 party's credibility, and to go back to one of my  
18 previous answers, I do believe that's because if  
19 you either as a prosecutor or even as a defense  
20 attorney if you bring up evidence that suggests  
21 that the claimant is not credible then that is  
22 called victim-shaming and it's automatically

1 discounted.

2 So the titling decision is supposed to  
3 be if credible evidence exists. It's a very,  
4 very low standard but it has absolutely outsized  
5 ramifications if you title somebody with an  
6 offense.

7 To go back and get it overturned is  
8 nearly impossible. There are two circumstances.  
9 One is, as the Colonel said, is that it's  
10 basically the wrong person, completely. There is  
11 DNA evidence, the alleged victim comes back and  
12 overturns her claim.

13 The other is if there is new evidence.  
14 In my case I actually presented what I believed  
15 was new evidence, two brand new statements that  
16 were undeniably, overwhelmingly, contradicted  
17 very key points in my accuser's statement, I mean  
18 overwhelmingly.

19 CID came back with their answer. Nine  
20 separate people on the Board said that I provided  
21 no new evidence. A couple of them said all I did  
22 was to serve to victim-shame.

1                   These are in written statements that  
2 when you read it you're just, you have the sense  
3 of like I don't, are we reading two separate  
4 documents, like it's not based on any sort of  
5 reality.

6                   And I do think it's because of a  
7 reluctance that if we don't title someone or if  
8 we don't take some sort of action then our  
9 convening authority at some point is going to get  
10 in trouble.

11                   COLONEL JAMES: I totally agree with  
12 what Jay said. In my experience at Save Our  
13 Heroes we are seeing a tendency now in the last  
14 six months to go the non-judicial punishment  
15 route because here's what happens, and Wil and  
16 Jay are both good examples of this and I have  
17 seen it multiple times.

18                   I've got a lieutenant commander in the  
19 Navy in this exact situation. Accused goes  
20 through like all this and figures out that, you  
21 know, it didn't happen, but now they are a  
22 liability.

1           They can't put their name in front of  
2 Congress to be promoted because they are afraid a  
3 senator, specifically a senator, because it's  
4 senators that approve it, will see that and start  
5 asking questions, so they are done.

6           So typically what they will do is, you  
7 know, what they did to Wil and I, just basically  
8 get us out or find the non-judicial punishment  
9 route so they can go back now and say we did  
10 something. That's typically what we are seeing  
11 at Save our Heroes.

12           CHAIR BASHFORD: I have a question  
13 because due to your rank and length of service  
14 you are somewhat atypical of the bulk of the  
15 people who are accused.

16           How do you think your experiences  
17 differ from that of say an E-3 or a private,  
18 somebody who is 19, 20, 21, or do you think they  
19 differ at all?

20           LT. COLONEL MORSE: I mean I think I  
21 had the fortunate or unfortunate experience of  
22 knowing how the system worked basically, you

1 know, from bottom to top, and I don't think our  
2 young soldiers know that.

3           What I don't think is different is  
4 that they are still immune to the same pressures.  
5 Even if they have a company commander or a  
6 battalion commander who might be taking action  
7 those commanders are still being advised by the  
8 same staff judge advocates, or trial counsel who  
9 answer to those staff judge advocates who are  
10 still ensuring that action is taken.

11           I don't think they are able to do  
12 things like, you know, afford outside counsel to  
13 ask specifically, in my case, for a regional  
14 defense counsel, someone that I thought, someone  
15 who I admired and wanted to represent me.

16           I don't know that young soldiers have  
17 that same experience. I also think you just --  
18 And the fact is an E-4 does not have the same  
19 power or wherewithal or knowledge of the Army,  
20 you know, that a 40-year-old O-5 does.

21           COLONEL JAMES: That's a great  
22 question, ma'am. That's why our organization

1 exists, for that young E-3/4/5/6.

2 You know, a colonel can figure it out.  
3 But I just put myself back when I was a second  
4 lieutenant and a captain was the big guy as a  
5 second lieutenant.

6 I can't even imagine being an E-3 or  
7 E-4, and typically what we are seeing, and,  
8 again, I'm using my experience, and I see this  
9 all the time, they'll go to the young E-3 or E-4  
10 and say, hey, if you go to a court-martial you're  
11 going to get 25 years so you might want to just  
12 plead, you'll get three years, you'll get kicked  
13 out, but you'll be good to go.

14 What they don't tell him is he's going  
15 to be a registered sex offender for the rest of  
16 his life. So those are the people I am trying to  
17 get.

18 We've got one case going on now it  
19 went that exact scenario that I just said and  
20 we're helping him and they told him -- Just don't  
21 plead to something you didn't do.

22 Get a court-martial, go to a court-



1 martial. They have now denied the court-martial  
2 and given him an LOR. And you know what's going  
3 to happen now, they're going to kick him out.

4 And he is a class act. I mean he's a  
5 fantastic kid, so we're going to do everything we  
6 can.

7 COLONEL RIGGINS: Chairwoman, thank  
8 you for the question, it really is a good one. I  
9 would echo, you know, I mentioned the civil court  
10 case that I had and when that hit the news in  
11 August 2017 my email inbox immediately filled up  
12 with emails and requests for information about  
13 how I did what I did and it spanned the spectrum  
14 of rank and it included a lot of parents.

15 And the parents typically were  
16 involved with the young enlisted service members  
17 exactly that you are talking about, because, you  
18 know, there is absolutely a realization, it's  
19 already been said there that, you know, these are  
20 19, 20, 21 year olds who are absolutely, they are  
21 already in a situation that is unlike anything  
22 they have ever experienced before because they

1 are in the military.

2 They are still trying to figure this  
3 out. Now they are dealing with something that is  
4 going to affect the rest of their life and in a  
5 lot of cases they don't even realize it but their  
6 parents do.

7 And so I would tell you that within 45  
8 days after, you know, my case hitting the news I  
9 probably had 30 to 35 different sets of folks  
10 contacting me.

11 And, again, I can think right now at  
12 least seven of those cases it was parents and in  
13 every one of them I picked up the phone and I  
14 talked to them and I said, hey, how can I help  
15 you.

16 In many cases I referred them to Doug  
17 and to the organization there and in some other  
18 cases I actually ended up talking to them about  
19 attorneys and in some cases linking their  
20 attorneys up with the civil attorney that I ended  
21 up hiring.

22 But what you find, especially for some

1 of those young enlisted folks, you know, they  
2 come from, you know, low or middle class  
3 families, they certainly -- We know that service  
4 members don't have the resources it would take to  
5 fend for themselves, but I would tell you their  
6 families don't either.

7 And so they are truly in a situation  
8 where they have no recourse other than to take  
9 what is offered and in some cases it does really  
10 become a, well, what's, you know, what looks to  
11 be the lesser, and far too often we have seen  
12 cases, and I have had parents tell me, well, you  
13 know, my son has been offered a reduced, you  
14 know, offense plea, what do you think.

15 I felt woefully inadequate to answer  
16 the question. But the fact that they were even  
17 offered that and, you know, again, back to the  
18 point we made earlier, their case hadn't been  
19 heard at that point, the investigation wasn't  
20 even done.

21 I mean this was pre-conclusion of the  
22 investigation and these are offers that are

1 already being made, hey, go ahead and plead  
2 guilty to save us all the time, because this is  
3 part of an epidemic and you are just swept up in  
4 the wave. We've got to do better.

5 CHAIR BASHFORD: I have a follow-up.  
6 Since a letter of reprimand can end a career or a  
7 finding of insufficient evidence to go forward  
8 can end a career, Colonel James, you had said,  
9 you know, sometimes your advice is go ahead and  
10 hold out for the court-martial.

11 If you are acquitted by a court-  
12 martial do you have any sense of what that does  
13 to your career, if anything?

14 COLONEL JAMES: Yes. I will stand by  
15 what I said earlier, you are done with an  
16 allegation alone. You're done. But at least you  
17 can clear your name, you know, you go to the  
18 court-martial.

19 What Wil said is so true. I get more  
20 phone calls from parents than anything else and  
21 my heart drops when I hear somebody has pled  
22 because they're done, you know, so, yes.

1 MS. TOKASH: I have a question for Mr.  
2 James. This is Meghan Tokash calling  
3 telephonically.

4 CHAIR BASHFORD: Sure, please.

5 MS. TOKASH: Thank you, Chair  
6 Bashford. Mr. James, you used the term "proven  
7 false accusers" in your opening remarks and to me  
8 as a federal prosecutor the words "proven" and  
9 "false" have special meaning and in some cases  
10 they have legal implications.

11 Can you please explain what you mean  
12 when you used the term "proven false accusers"  
13 and how you prove that accusations are false in a  
14 trial before a judge or a jury?

15 COLONEL JAMES: Sure. Thanks for the  
16 question. Again, I am not a lawyer. Sometimes  
17 we in the flying world thing we are, but I'm not,  
18 and my wife keeps me under control, but --

19 (Off microphone comments.)

20 COLONEL JAMES: Thank you, sir.

21 (Laughter.)

22 COLONEL JAMES: Thank you, sir. Those

1 words, ma'am, were used very specifically. We  
2 have one proven false accuser that we have, and I  
3 don't know what the term would be, but we are  
4 following in our organization.

5 I won't go into the details because  
6 this isn't the forum for it, but it was in two  
7 different courts. We have written two letters to  
8 the FBI over it, and, in fact, I made a phone  
9 call to the FBI field office over this issue.

10 This person is collecting VA benefits.  
11 This is a whole other enchilada that should be  
12 brought up in a different forum. So I understand  
13 what that word means and in my term, you know,  
14 ma'am, I am not aware, again, but this was proven  
15 in two different court settings.

16 HON. GRIMM: Could I just follow --  
17 (Simultaneous speaking.)

18 MS. TOKASH: So do you mean acquittal?

19 HON. GRIMM: Yes, that's what I was  
20 going to ask, are you saying that there were  
21 charges brought by this person that went to trial  
22 in a criminal context where the jury found the

1 accused not guilty? Is that what you mean by --  
2 (Simultaneous speaking.)

3 COLONEL JAMES: Yes, sir. One was  
4 actually appellate level and the other was  
5 actually a Board of Inquiry.

6 HON. GRIMM: Okay, where the official  
7 result of whatever the Board or the court was  
8 determined that the accused was not guilty or not  
9 responsible?

10 COLONEL JAMES: Yes, Judge.

11 HON. GRIMM: Did those specific  
12 findings include a discussion of credibility? I  
13 think what Ms. Tokash is trying to get to is that  
14 sometimes there are specific comments in a  
15 court's review of evidence that comments on  
16 credibility.

17 Were there comments on the credibility  
18 as being the reason why that was the finding or  
19 would you have us understand that if a charge  
20 proceeds to an adjudication and the accused is  
21 not found responsible that that means that the  
22 accusation was false, do you equate that as being

1 the same thing?

2 COLONEL JAMES: This one was blatantly  
3 obvious. And, ma'am, I know your background. I,  
4 like Wil, studied all the bios and I know your  
5 background, a victim, and I appreciate everything  
6 you are doing, because I understand the other  
7 side of the coin, too. This one was --

8 MS. TOKASH: I was a defense counsel  
9 too.

10 COLONEL JAMES: Yes. Judge, this one  
11 was a clear cut credibility issues and the person  
12 who was accused was a Navy lieutenant commander  
13 on a boat who she didn't even know and NCIS at  
14 the time investigated it and admitted that on  
15 their investigation.

16 So hopefully that answers your  
17 question.

18 HON. GRIMM: I think it does.

19 MS. TOKASH: It does.

20 COLONEL JAMES: The interesting thing  
21 though, back to this particular case and what  
22 we've been talking about, this poor lieutenant



1 commander is waiting to get promoted to commander  
2 but because of the issues we've talked about he's  
3 been on hold for almost two years.

4 HON. WALTON: Let me ask a question.  
5 It seems to me that all of you are expressing the  
6 underlying reason why you think you were not  
7 treated fairly, and that's political pressure,  
8 whether it be political pressure externally for  
9 the military or within the military.

10 As a federal judge I don't have that  
11 type of pressure because I am insulated from that  
12 type of political pressure. Understandably there  
13 has to be a disciplinary system within the  
14 military, but is there any way that the military  
15 system can be totally fair and impartial when  
16 those external and internal political pressures  
17 are in play?

18 LT. COLONEL MORSE: You know, I don't  
19 have an answer to that but I do have maybe some  
20 thoughts, and this goes back to when Senator  
21 Gillibrand first posed, so 2014, when she first  
22 presented a bill for the Senate floor.

1           If I recall correctly one of her  
2 suggestions was that all determinations be turned  
3 over to judge advocates. And I thought at the  
4 time you will see charges and conviction, you  
5 will see charges plummet if you did that.

6           You might see convictions go up, but  
7 my belief was that you would see charges plummet  
8 because now you have a trained judge advocate who  
9 is looking at the facts and not making a  
10 determination of I believe this person or not,  
11 but making a determination as to whether or not  
12 this meets a legal standard and if I should take  
13 this forward to trial.

14           I don't know if the answer is to give  
15 this purely to judge advocates to take authority  
16 out of the hands of commanders and to remove  
17 Congress's ability to provide oversight to that  
18 judge advocate, because my personal experience, I  
19 believe that the advising staff judge advocate in  
20 my case gave orders based on a desire to ensure  
21 his convening authority was not going to come  
22 under scrutiny by Congress.

1           I mean ordering a defense attorney to  
2 stop talking to witnesses is so unbelievably  
3 offensive to me, unbelievably offense, and I  
4 think that his advice was a direct result of  
5 concern about congressional oversight for his  
6 convening authority.

7           So I think if you take it out of the  
8 hands of commanders and give it to judge  
9 advocates you have to ensure that they then don't  
10 fall under the same scrutiny that the commander  
11 had done previously.

12           COLONEL JAMES: Judge, thank you for  
13 the question, sir. It's important to note that  
14 Save Our Heroes is an apolitical organization. I  
15 have been in Senator Gillibrand's office a couple  
16 times. I appreciate what she is doing.

17           We feel it's definitely political  
18 influence and that's why the senatorial approval,  
19 ten senators or more, we have worked through that  
20 issue.

21           We think it has nothing to do with the  
22 crime, it's just the crime of the day, the

1 politically incorrect crime of the day. Next  
2 year it could be something different, somebody is  
3 trying to drive some sort of political agenda,  
4 and I think the system is ripe for that.

5 One we are seeing trending now is, you  
6 know, you've seen it in the newspapers, certain  
7 situations happen overseas and the law of armed  
8 conflict question.

9 So I think you might see that trend in  
10 the next couple years and I will tell you from  
11 our organization we are going to be helping those  
12 people just as, you know, now it's sexual  
13 assault, but in two years it might be something  
14 different. That's why we think this senator  
15 thing is so important.

16 MG ANDERSON: I have a question. Oh,  
17 you're going to, Colonel Riggins you're going to  
18 respond to that? I'll let you finish.

19 COLONEL RIGGINS: Yes, ma'am, if I  
20 may.

21 MG ANDERSON: I'll let you finish.

22 COLONEL RIGGINS: Yes, Judge, and I'll

1 try to keep it short, but, you know, I think back  
2 to the case that -- Your question is absolutely  
3 excellent and I am probably more prone to  
4 answering it in the negative.

5 I do believe it's a top-down problem.  
6 I believe it has to start with the most senior  
7 leaders within the Defense Department but it goes  
8 higher than that and it absolutely goes to the  
9 power of the purse that controls Defense spending  
10 and Defense promotions.

11 The Senate Armed Services Committee,  
12 the House Armed Services Committee, we know the  
13 roles that they play. When statements come out  
14 of those bodies that say we have to do to  
15 something at any cost -- I hate to draw the  
16 analogy, but those are the same kind of  
17 statements that were made that led to a very  
18 unfortunate historical incident in Vietnam in My  
19 Lai.

20 When you make just blanket categorical  
21 statements like that we need to do anything, pick  
22 whatever it is, at any cost, you open a flood

1 gate there and people will interpret that  
2 differently, and I think we have seen many cases  
3 where that is exactly the case.

4 So it creates a command environment  
5 where from the top down you have individuals  
6 interpreting that.

7 In 2013 the way the Secretary of the  
8 Army at the time interpreted it -- So we had  
9 conflicts going on, as everybody here knows, on  
10 two different battlefields, Afghanistan and Iraq.

11 The Secretary of the Army's number one  
12 priority for 2013 had nothing to do with combat  
13 operations, it had nothing to do with training  
14 for combat operations.

15 The Secretary of the Army's number one  
16 priority in 2013, and you can look it up, it's  
17 still online, was complete eradication of sexual  
18 assault in the ranks of the Army.

19 Now I'll leave it to you to determine  
20 how realistic of a goal was that anyway, complete  
21 eradication, because we all know the military is  
22 nothing but a reflection of society.

1                   And I applaud the efforts that are  
2 going on to properly identify and to punish  
3 validated cases of sexual assault, please don't  
4 misinterpret.

5                   But when we have a command influence  
6 that says at any cost realize that will be  
7 interpreted in ways that none of us I think if we  
8 were under the microscope and we were on the  
9 receiving end of that we'd be comfortable with.  
10 Thank you.

11                   MG ANDERSON: My question is kind of  
12 a follow-on a little bit to what General Schwenk  
13 asked you regarding suggestions or  
14 recommendations you might make and it kind of  
15 goes to the damage to your reputations along the  
16 lines of information that is still in the DNA  
17 database, and your experience, Colonel Morse,  
18 trying to get back into the country and finding  
19 yourself on some kind of a list.

20                   So I guess I am kind of leaning in the  
21 direction of do you have recommendations to  
22 suggest to us that would address this issue of

1 the DNA database, your ability to travel when, in  
2 your cases, you know, there were no, you  
3 basically were found, it was unfounded, is there  
4 something you could suggest along those lines?

5 LT. COLONEL MORSE: Let me clarify  
6 first the allegation against me wasn't unfounded,  
7 but that's part of my concern is that I was  
8 titled for these offenses.

9 The titling is what has -- Google is  
10 one thing. The titling has affected me less so.  
11 Like these other two gentlemen, my fingerprints  
12 and DNA are in a file somewhere as well.

13 The process has affected me. So if  
14 defense investigators, if commanders feel  
15 compelled to find something no matter what so  
16 that they can then tell their commanders or  
17 Congress that I took certain action then it's --  
18 I mean it eliminates the need for any sort of a  
19 regulation or a standard because no one is  
20 following it anyway.

21 When I provide evidence that I believe  
22 clearly fits the definition of new evidence and



1       instead that's spun as victim-shaming then you've  
2       essentially, you've got a rule without any sort  
3       of purpose or enforcement.

4               I think -- I mean one way to do it is,  
5       or one suggestion is that the defense bar has  
6       more resources than they do right now. I was as  
7       a defense counsel and a prosecutor as well.

8               The way you interact with criminal  
9       investigators who are supposed to be neutral is a  
10      very, very different relationship and it's a very  
11      different experience.

12              As a defense counsel if I wanted  
13      something done I did it myself. If I asked an  
14      investigator to go do a follow-up interview  
15      typically the investigator would not do it.

16              If they did do it and the evidence was  
17      potentially favorable to my client, and this is  
18      my experience as one accused as well, if the  
19      person being interviewed has information that is  
20      favorable to me, to the accused, then the  
21      investigator didn't want anything to do with it.

22              I had two witnesses actually have to

1 write their own separate statements because CID  
2 had four questions for them and when they  
3 answered negatively to each question they weren't  
4 interested in the other answers, so two full long  
5 statements all with very relevant evidence.

6 The way it's set up right now, because  
7 the government controls all resources for the  
8 defense, especially in the early stages, as a  
9 defense counsel or someone accused you don't have  
10 access to the information that might be able to  
11 help your client.

12 HON. GRIMM: Could I go down that  
13 path, please, Colonel, on General Anderson's  
14 question?

15 LT. COLONEL MORSE: Yes, sir.

16 HON. GRIMM: What specific resources  
17 do you believe that military defense counsel who  
18 are assigned to defend accused in these types of  
19 offenses should have that they do not have?

20 I am hearing part of it, you're saying  
21 separate investigators, is that what you are  
22 saying?

1           HON. GRIMM: Yes, and I think that the  
2 CID could follow the sort of career path that  
3 judge advocates do. I felt like I was both a  
4 better prosecutor and a better defense attorney  
5 and a better supervisor of trial counsel having  
6 served as both a defense attorney and as a  
7 prosecutor.

8           Why can't a CID investigator do the  
9 same thing? Why can't he or she serve a term as  
10 a defense investigator and then go back to serve  
11 as a government investigator?

12          HON. GRIMM: Any other resources other  
13 than investigators?

14          LT. COLONEL MORSE: You know, I don't  
15 know. I believe in -- In my experiences I  
16 believe in, let me say this the right way. I  
17 believe in the power of judge advocates.

18                 I believe that if you went as an  
19 individual you would find overwhelmingly  
20 attorneys who want to do the right thing.

21                 I think the higher up that you get and  
22 the more likely you are going to get your head

1 chopped off if you stick your head out too far  
2 then people start becoming beholden to political  
3 pressures.

4 I do believe that judge advocates  
5 receive great training both as prosecutors and  
6 defense attorneys, and, frankly, from some of the  
7 people in the room here right now.

8 I don't think that needs to be  
9 changed, but I do think an ability to have an  
10 investigator that can go out and find information  
11 and that information is going to be confidential  
12 and privileged, that that investigator has the  
13 same credibility as a government investigator  
14 has.

15 That's the other problem is if in a  
16 civilian world you might get labeled as a defense  
17 hack or as a government hack and because you  
18 carry that sort of background with you any  
19 information you give is automatically conditioned  
20 based off of what type of a hack you are.

21 I think in the military because you  
22 serve both as a defense and a prosecution you are

1 less likely to be labeled that way and I think  
2 you could do the same with investigators.

3 HON. GRIMM: So that would be, your  
4 thought would be is that as opposed to a separate  
5 defense investigative service with its own  
6 resources, its own chain of command, its own  
7 individuals that it responds to, that you believe  
8 that if it was part of CID, for example, in the  
9 Army --

10 LT. COLONEL MORSE: No, sir, the  
11 reverse. I think that you could treat it more  
12 like judge advocates. I mean the trial defense  
13 services in the Army is stovepiped.

14 So, Judge, individual judge advocates  
15 can go back and forth, and many do, and, frankly,  
16 the best ones do. You could do the same for  
17 criminal investigators.

18 HON. GRIMM: But within the CID  
19 command, right? So you would have --

20 LT. COLONEL MORSE: No, you could make  
21 them a separate --

22 HON. GRIMM: A separate one.

1 LT. COLONEL MORSE: Separate one.

2 (Simultaneous speaking.)

3 LT. COLONEL MORSE: Just the  
4 individuals go back and forth, yes, sir.

5 HON. WALTON: Colonel Riggins, if you  
6 had outside counsel representing you obviously  
7 the prescription imposed could not have been  
8 done, right?

9 LT. COLONEL MORSE: Is that question  
10 to me, sir?

11 HON. WALTON: Yes.

12 COLONEL RIGGINS: Could you ask that  
13 one more time?

14 HON. WALTON: You indicated that there  
15 was an intrusion in the ability of your lawyer to  
16 interview --

17 COLONEL RIGGINS: Yes, absolutely.

18 HON. GRIMM: If you had outside  
19 counsel that would not have been the case, right?

20 COLONEL RIGGINS: You know, I don't  
21 know, and the way that that played out was that I  
22 was given this order, my judge advocate, or my

1 defense counsel filed a writ with the Army Court  
2 of Criminal Appeals.

3 The Defense Appellate Division, who is  
4 normally supposed to defend any government orders  
5 refused to defend that order at appellate court.

6 The day of or the day before, I  
7 believe, that that was supposed to go in front of  
8 the Army Court of Criminal Appeals the government  
9 withdrew their order and said that the  
10 investigation was complete.

11 All that is fact. My opinion is that  
12 that was a lie. I think they withdrew it because  
13 they knew that it was illegal and it was wrong.

14 The evidence I would give to that is  
15 witnesses were still contacting my defense  
16 counsel as much as a week later saying, hey,  
17 investigators just talked to me about your case.

18 So I don't know that an outside  
19 counsel would have fared any better.

20 HON. GRIMM: To follow-up on Judge  
21 Walton's question, are you saying that your  
22 concern would be -- What I think Judge Walton was

1 saying was a military defense attorney ordered or  
2 threatened with criminal charges of obstructing  
3 an investigation if you continued to ask  
4 questions with respect to this investigation in  
5 order to defend your client.

6 A civilian attorney could, is not  
7 subject to be charged in a court-martial, but are  
8 you suggesting that had you had a civilian  
9 attorney who continued to try to contact  
10 witnesses and gather evidence in your defense  
11 that the command would then have interpreted that  
12 as your action through your attorney and then  
13 taking action against you?

14 COLONEL RIGGINS: I think if I had a  
15 civilian attorney and that attorney did not file  
16 a writ with ACCA and instead said basically thank  
17 you but I'm going to continue to do my own thing,  
18 I believe I would have been, I believe that would  
19 have been an additional -- Had I been charged, I  
20 was never charged with anything, I believe that  
21 would have been an additional issue.

22 HON. GRIMM: So that's the protection



1 of having outside counsel not part of the  
2 military system would not address some of the  
3 concerns that you have expressed?

4 COLONEL RIGGINS: Maybe, maybe not.  
5 All I would add is that, you know, the way you  
6 respond to being accused of a crime and the way  
7 you handle yourself throughout that process is a  
8 very, very personal thing.

9 Throughout the process I made a  
10 determination early when a lot of people were  
11 telling me basically burn the house down, to  
12 include some of my own seniors in the JAG Corps.

13 My very personal thought was I want to  
14 conduct myself in a way that I believe I have  
15 conducted myself over the last 20 years and I  
16 wanted to conduct myself in a way that my peers  
17 and colleagues are going to admire and continue  
18 to respect me for and I wanted to conduct myself  
19 in a way that five years from now or ten years  
20 from now I'm going to be proud of how I conducted  
21 myself, and I think if I would burn the house  
22 down I would not be proud of myself.

1 COLONEL JAMES: I couldn't agree more.  
2 One of the things I am proudest about is I was  
3 going to represent and represented PACAF in front  
4 of the PACOM Commander on my last day at work.

5 And, General Anderson, I just want to  
6 answer the question you asked, too. In my case,  
7 my case has been dismissed without prejudice.  
8 What I think the better thing to do would have  
9 been investigate me, I understand that, and if it  
10 takes a year fine, I think it should have taken  
11 six months, honestly.

12 I think everything was done in my  
13 opinion perfectly to that point. I was still  
14 working. Like I said I was still in some of the  
15 very high profile meetings, blah, blah, blah, but  
16 where it broke down was after that.

17 There comes a point where you have to  
18 say nothing happened and dismiss it with  
19 prejudice. There should be no reason it can't be  
20 dismissed with prejudice.

21 Keep in mind it's costing you \$1000 a  
22 month to put my stepdaughter in an apartment down

1 the street because I can't be anywhere near her  
2 because, as you all know, under the USMJ I am  
3 retired so they can call me back any time, and so  
4 there has got to be -- and I have been told, I've  
5 been working on it and I have been told it's  
6 almost impossible to do that, too, get it  
7 dismissed with prejudice.

8 COLONEL RIGGINS: And, General,  
9 understand I would echo that as well. I  
10 mentioned the outcome of the investigation being  
11 in the gray space, neither innocent, you know,  
12 nor guilty.

13 I think we've got to be willing to  
14 make that call, we've got to get to that point.  
15 I think Colonel Morse's point about a defense  
16 investigator, based on a conversation I had with  
17 the Commander of Army CID, is absolutely a valid  
18 recommendation going forward.

19 Again, from the words of a one-star  
20 general who is responsible for all CID, there was  
21 no effort to ever prove that the event didn't  
22 happen. There was only an effort to confirm that

1 the allegation was true.

2 That's such a different viewpoint,  
3 especially when you are on this side of the  
4 table. Thank you.

5 CHAIR BASHFORD: I just want to follow  
6 up on one thing because there are cases where  
7 there is insufficient evidence. You're not  
8 saying it didn't happen, you're not saying it did  
9 happen, you're saying I don't really know, I  
10 can't decide, I do know there is insufficient  
11 evidence to bring charges forward.

12 And I think in the civilian world that  
13 rarely has an impact on a suspect because nothing  
14 happened. But I think it's much harder in the  
15 military world because there are cases where you  
16 simply don't know what happened.

17 What do you think chain of command  
18 should do in those situations? Should they treat  
19 it as a declaration of innocence? Do they run  
20 any risks of having somebody still in positions  
21 where the ultimate conclusion was we just don't  
22 know?

1 COLONEL RIGGINS: Chair Bashford,  
2 thank you for the question. I thought about this  
3 quite a bit. I'm certainly not, you know, a  
4 constitutional scholar, but to me it comes back  
5 to a very simple concept and that is you are  
6 innocent until proven guilty.

7 I know that is an over-simplification  
8 in this case, but I think it's absolutely  
9 applicable. There was -- You know, in the course  
10 of an investigation if you can't prove guilt then  
11 where does that leave you, and, you know, in the  
12 courtrooms that you all see where does that leave  
13 you?

14 I just think that there is a different  
15 viewpoint within the military because of the  
16 stigma and an unwillingness. And, again, you  
17 know, the chief investigator for the Army is  
18 saying we never tried to look at it from that  
19 angle, that's not what we do. Why not?

20 I mean can we not do that? Are we  
21 incapable of doing that? Is that maybe not the  
22 right thing to do, you know, in some cases, in

1 all cases?

2 I think that's a question we need to  
3 take a look at.

4 COLONEL JAMES: Ma'am, we have to  
5 solve that problem because this is -- I'm serious  
6 on what I said, this is a national security  
7 issue.

8 We are seeing -- I sat down and talked  
9 with some of these contacts here in D.C., they're  
10 pretty knowledgeable, and we spent an hour and a  
11 half across the way there talking about it, and  
12 they say it boils down to simple game theory.

13 There are people out there that  
14 realize what benefits they get if they make an  
15 accusation. One is an automatic PCS of their  
16 choice, permanent change of station, VA benefits,  
17 so it's going to get worse.

18 There are actually Facebook pages out  
19 there that talk about how to do this, so we have  
20 to get a handle on it. I think it's at epidemic  
21 levels now, but we have to get a handle.

22 And that is a great question. That's

1 probably the panacea right there.

2 LT. COLONEL MORSE: I don't think it's  
3 some of these cases we just don't know what  
4 happened, I think most of the cases we just don't  
5 know what happened.

6 That's a reason that you have things  
7 like credibility assessments. That's a reason  
8 why you have judge advocates that are supposed to  
9 follow the law and apply standards to  
10 determinations every step along the way.

11 I go back to some of my original  
12 comments that these are two separate systems. I  
13 mean it doesn't have to be you lied or you're  
14 guilty, it can be it's okay to say we just don't  
15 know what happened here and we're still going to  
16 provide all the resources that we have to ensure  
17 that someone who alleges that they have committed  
18 a, someone who alleges they have been assaulted  
19 is provided every resource possible.

20 I would agree with Colonel James that  
21 there are people out there who would make claims  
22 just so they can get favorable treatment. I

1 think it's this big and who cares.

2 If you are going to have a person or  
3 two who abuses the system, that's everything.  
4 Sex assault doesn't make it special. Soldiers  
5 since the beginning of time have abused the  
6 system, a small number of soldiers have abused  
7 the system for their favor.

8 That doesn't mean that you completely  
9 swing the pendulum the other way so that it  
10 causes so much unfairness for people who are  
11 accused. You can have it both ways.

12 SGT. MARKEY: Chair Bashford?

13 (Off microphone comments.)

14 SGT. MARKEY: First of all thank you  
15 for being here today. Part of this committee is  
16 designed for the investigation, prosecution, and  
17 defense, so I think it's important to have your  
18 testimony here today for us as we move forward.

19 I am hearing a couple different things  
20 just as an initial observation, and I have a  
21 question. One is I am hearing political and  
22 cultural issues that are occurring within the



1 military, a bigger tackle than maybe the  
2 technical aspects of your investigative and the  
3 process you went through.

4 So I wanted to look at more of what  
5 are some opportunities in the technical aspects,  
6 and I know there has been some testimony about  
7 the quality, the unbiased, the fairness of your  
8 investigation and the process that you went  
9 through.

10 And I think Colonel Riggins mentioned  
11 that investigators said that they didn't -- I  
12 forget your exact words, but we wouldn't look at  
13 this from that particular angle, meaning that  
14 they would only look at one side of the issue.

15 I can tell you if any of my  
16 investigators ever came to me and said that they  
17 probably would not be investigators for me  
18 because we are, we are supposed to be objective,  
19 unbiased, and fair from the very beginning of the  
20 investigation. The minute we show some sort of  
21 bias we are no longer credible as an  
22 investigator.

1                   And I know, Lieutenant Colonel Morse,  
2                   you mentioned something about the command staff  
3                   making a certain decision, so there is a sore  
4                   point where the investigation information is  
5                   collected, witnesses are interviewed, documented,  
6                   evidence is collected, and it eventually comes to  
7                   somebody within your chain of command to make a  
8                   decision about what they want to do with this  
9                   case, preferral of charges or not.

10                   So we've had testimony from all angles  
11                   regarding the current process and whether that is  
12                   a fair and objective process to have somebody  
13                   within in your chain of command make a decision  
14                   about you or somebody else that might be within  
15                   that person's chain of command deciding that.

16                   So we have heard all kinds of  
17                   statements about whether that should be continued  
18                   as a process or whether that's a process that  
19                   needs to be reviewed.

20                   Do you feel in your opinion within  
21                   your particular situations that that was an issue  
22                   you were concerned about or do you think that

1 that was not an issue that was of concern?

2 LT. COLONEL MORSE: Are you talking  
3 about the effect of a commander making a  
4 decision?

5 SGT. MARKEY: Yes.

6 LT. COLONEL MORSE: So I'll give you  
7 another very, a specific example to me, so please  
8 don't apply this to my experience at large.

9 I was told before I went in for my  
10 official reading for my officer letter of  
11 reprimand, again, that if I did not file a  
12 voluntary retirement that the letter would be  
13 filed in my permanent file.

14 This was told by the military, the  
15 advising staff judge advocate. When I went  
16 through my reading the general went around the  
17 room and asked everyone else in the room what  
18 their recommendation was, so either official  
19 file, local file, or get rid of it.

20 He asked the sergeant major and he  
21 said local file. He asked the staff judge  
22 advocate and he said I'll talk to you afterwards.

1           He asked my first line supervisor and  
2 my first line supervisor said throw it away, this  
3 isn't, throw it away, this isn't even just a  
4 local file, tear it up. The evidence has proven  
5 that he didn't do this.

6           He is already not going to be a  
7 colonel. When he said that the two-star general  
8 jumped down his throat a little bit and he said  
9 we're not here to determine whether or not  
10 Colonel Morse can be a Colonel, he can dust  
11 himself and serve after this.

12           It was clear at that point to me that  
13 whatever was told to me was from the JAG Corps  
14 and not the commander. So that's my opinion,  
15 that's not fact.

16           Based on my experience I believe the  
17 JAG Corps ensured that I submitted my letter of  
18 retirement, not the two-star general, not the  
19 commander.

20           I think if the commander had -- There  
21 was evidence to me that the commander didn't care  
22 if I continued to serve or not.

1 I think that, again, when you have  
2 both commanders, especially at high levels, when  
3 you have commanders and judge advocates who are  
4 advising them and every case is potentially a  
5 high profile case.

6 This was not the case, you know, 15 years  
7 ago or ten years ago. You had limited high  
8 profile cases that got congressional attention.  
9 Now every single sex assault allegation is a high  
10 profile case, somebody is watching.

11 Commanders and judge advocates are  
12 human beings and they are going to be affected a  
13 certain way.

14 If they think that if they don't find  
15 a case, right, I mean the titling decision, if  
16 they say this is unfounded or if our stats show  
17 that we unfound a large number of cases that's  
18 going to get somebody's attention and it causes  
19 you to change your decision-making process and it  
20 causes judge advocates to change how they advise  
21 and it causes commanders to change how they might  
22 give a certain disposition.

1                   SGT. MARKEY: So do you think the  
2 commanders are in a position to make that  
3 decision?

4                   Do you think they should have the  
5 authority or do you think somebody outside the  
6 commander who has direct supervision over that  
7 unit or those people should be in a position to  
8 make those decisions in these cases?

9                   LT. COLONEL MORSE: So I'm going to  
10 play lawyer and say I don't know. There is a lot  
11 of different answers.

12                   What I will tell you is that  
13 commanders need real authority to do their jobs.  
14 Commanders need real authority to effect good  
15 order and discipline.

16                   Judge advocates need real authority to  
17 advise on the law and not based on politics.  
18 Commanders need real authority, whether that is  
19 direct or indirect, real authority to make  
20 decisions that effect could order and discipline.

21                   When they are getting told, or believe  
22 that they getting told, because, again,

1 perception is more important than reality, if  
2 their perception is that if I don't act a certain  
3 way on this one particular case I am not going to  
4 get promoted, I am not going to get a lateral  
5 transfer, then it's going to change the way they  
6 make a decision.

7 It's very hard to say I don't believe  
8 evidence is sufficient therefore I'm not finding  
9 this case. That's a hard thing to do. People  
10 don't like confrontation.

11 It's very easy to say let's just  
12 court-martial it and see what happens, let's just  
13 kick it over to the court-martial system and let  
14 them do whatever they want to do.

15 COLONEL JAMES: I have a very strong  
16 answer for that. I believe the convening  
17 authority is a dead man walking, a woman walking,  
18 one way or the other, because they are either  
19 going to put an innocent person in jail or their  
20 career is over.

21 We've got historical evidence of that.  
22 And I won't go into details, but a very famous

1 one in the Air Force in 2013, somebody I respect  
2 a lot lost her job over a decision she made.

3 That goes back to the non-judicial  
4 route that I talked about earlier. This is how  
5 they are saving themselves is they are going the  
6 non-judicial route so that they can say, yes, we  
7 took care of it non-judicially.

8 So I agree with what Jay is saying, if  
9 they have the authority, which they do now, as  
10 the convening authority to make that decision let  
11 them make the decision.

12 Keep the politics out of it. If they  
13 think that is their constitutional or UCMJ  
14 authority and they decide the person, it did not  
15 happen, then let them make that decision.

16 COLONEL RIGGINS: Yes, Sergeant  
17 Markey, thanks for the question. And I wanted to  
18 go back, you know, if I gave you the impression  
19 that I felt that any of those investigators were  
20 biased in any way against me I led you completely  
21 astray on that because I never felt that way with  
22 any of the investigators I worked with.



1 I do believe how you approach a  
2 question and how you approach, you know, what  
3 your start point is affects your viewpoint of  
4 what the outcome possibilities are, and I think  
5 that's all I was trying to eliminate.

6 In my case, just to echo what these  
7 gentlemen have already said, you know, one of my  
8 last jobs in the Army was as a Brigade Commander.  
9 I had a successful brigade command.

10 But I thought about the effect on my  
11 peer brigade commanders when the Secretary of the  
12 Army makes a decision, and so he was levels  
13 above, you know, as I think now at least five  
14 levels above the convening authority in my case,  
15 so the convening authority, you know, six months  
16 down the road said, insufficient evidence, you  
17 know, let's move on.

18 But then the Secretary of the Army  
19 comes back and now it's a political clout and a  
20 political capital question and it gets back to  
21 exactly the question I think that Doug came up  
22 with, you know, am I going to end a career or am

1 I going to subject the Army to more scrutiny,  
2 congressional scrutiny, that we are not being  
3 tough on sexual assault. His decision point was  
4 very clear.

5 And you have to realize when the  
6 Secretary of the Army takes the input from  
7 promotion review boards and takes all the input  
8 that has come up to him through the uniform  
9 branches, and I didn't mention I met with the  
10 Vice Chief of Staff from the Army, the second  
11 highest four-star in the Army, and I had his  
12 support going forward.

13 So I don't know what happened with the  
14 Chief of Staff, but I do know what happened with  
15 the Secretary, so there were only two more levels  
16 there.

17 But when the Secretary of the Army  
18 makes a statement like that you know as well as  
19 anybody who has served in uniform the flow-down  
20 effect, the command influence, that that has and  
21 the ripple down effect that's going to have  
22 throughout the formation, and that's exactly what

1 happened in my case.

2 So, you know, no question, I agree  
3 with the statement on convening authorities but I  
4 think we've got to realize the influence that is  
5 causing them to be dead people walking is  
6 happening at a much higher level.

7 And, you know, unless we give them  
8 some top cover at that higher level, the  
9 convening authorities, from that higher level, I  
10 don't know that we can solve the problem.

11 HON. GRIMM: Colonel Riggins, when the  
12 first steps were taken to explore what to try to  
13 do with the problem of sexual assault within the  
14 United States military a number of options were  
15 discussed both within and without the military.

16 One option that was discussed not  
17 within the military, or at least not publicly  
18 portrayed as being within the military, was that  
19 perhaps that type of offense should not be within  
20 the Uniform Code of Military Justice and the  
21 military should not prosecute.

22 That was resisted by the military for

1 the reason that there was concern that the  
2 function of the military justice system is to  
3 promote the good order of discipline within the  
4 military.

5 COLONEL RIGGINS: Correct.

6 HON. GRIMM: That also makes a  
7 tremendous amount of sense when you are dealing  
8 with the type of military offenses that the  
9 Uniform Code of Military Justice has.

10 You don't hear any other oversight of  
11 any other aspect of the military justice system  
12 except for this slice.

13 Would it be better for the protection  
14 of the rights of the victim, would it be better  
15 for the protection of the rights of the accused,  
16 and better for the military to remove the type of  
17 pressures that you have alluded to if these types  
18 of offenses were removed from the Uniform Code of  
19 Military Justice and were to be investigated,  
20 prosecuted, and handled as in the civilian  
21 community?

22 COLONEL RIGGINS: Judge, that's been

1 a question that we have been struggling with for  
2 a long time and I know, you know, if I put on my  
3 old brigade commander hat I had a very strong  
4 impression --

5 (Simultaneous speaking.)

6 HON. GRIMM: Right, a different view  
7 than you might --

8 COLONEL RIGGINS: You're absolutely  
9 right. It's amazing, you know, what a difference  
10 a day made between, you know, when I was in  
11 command of that brigade versus when I came out of  
12 command of that brigade and then went through  
13 this experience.

14 So that brigade commander would have  
15 answered your question absolutely, you know, the  
16 commander and their command responsibility for  
17 good order and discipline within a unit is as old  
18 as our country and that responsibility exists  
19 whether you are in the continental United States  
20 or whether you are deployed on foreign ground and  
21 people are shooting at you and, you know, it's an  
22 issue of whether somebody is, you know,

1       retreating in the face of the enemy.

2                       So to caveat a one size fits all  
3       answer to your question I just don't think I can  
4       do it wearing either hat, before or after  
5       command.

6                       I think, and I thought this along, and  
7       my wife and I have discussed this and I discussed  
8       this with my civilian attorney, you know,  
9       throughout the civil trial that we had, and, you  
10      know, maybe there are some triggers that should  
11      be implemented just based on the experiences that  
12      we've had where it would be necessary to pull  
13      this jurisdiction away from the typical command  
14      channels.

15                      I am very reluctant to say that though  
16      because there are second and third order effects  
17      in that that I think are very, very difficult  
18      first of all to measure, second of all to  
19      comprehend, and third of all if you don't  
20      understand, you know, what those second and third  
21      order effects are the absolute worst time to find  
22      out about it is when we have the absolute

1 treasure of our country facing the enemy.

2 I don't want to use that as a crutch,  
3 but I really -- The stakes are high. And so I  
4 certainly would be willing, after having gone  
5 through the experience and having commanded and  
6 having been responsible and had UCMJ authority  
7 over, you know, thousands of soldiers, I would be  
8 willing to have that conversation to look for  
9 triggers and times when maybe that makes sense to  
10 do it.

11 In terms of saying an absolute every  
12 time, I don't think I could get there.

13 HON. GRIMM: Thank you.

14 COLONEL JAMES: Judge, when I came on  
15 to Save Our Heroes a couple years ago I would  
16 have said a violently yes, let's take them out.

17 I have matured in that decision  
18 process as I go through this. I honestly think  
19 it boils down to politics and the political  
20 influence of the UCMJ.

21 You are assuming that this type of  
22 crime or whatever will be the one. What if it is

1       like I think two years down the road it's  
2       something else, so I think it boils back to we  
3       have to have a way to keep the UCI out of it,  
4       Unlawful Command Influence, out of the system.

5               So I agree with Wil, I would hate to  
6       see us take the commander out and then find out  
7       on the battlefield we needed it.

8               DR. SPOHN: One of the things that we  
9       have been doing as a committee is looking at  
10      sexual assault cases, penetrative sexual assault  
11      cases, from Fiscal Year 2017 and the outcomes of  
12      those cases.

13              We have reviewed, or we have data on  
14      about 2000 of these cases and what we see is that  
15      in 80 percent of these cases no action was taken  
16      and no charges were preferred.

17              And I think this is what has, whether  
18      it's a crisis of confidence in the military, I  
19      mean data like that have been used by Congress  
20      and other agencies to illustrate the lack of  
21      seriousness with which this crime has taken. How  
22      would you interpret that figure?



1           LT. COLONEL MORSE: I would want to  
2 know why. I mean I think this is part of the  
3 problem that we take these statistics and just  
4 apply a blanket rule to them and say that because  
5 you are not doing, because my presumption is that  
6 if there are more charges and more convictions  
7 then you must be doing your job and because there  
8 are fewer charges and convictions you are not  
9 doing your job, and I think that's false on its  
10 face.

11           I think that that is -- I am not a  
12 political guy but I think when people start  
13 saying things like that that's political  
14 pressure, right, because that resounds with the  
15 American public.

16           I would want to know all those cases.  
17 I was a budget officer for the JAG Corps and  
18 someone asked me how much does it cost to do a  
19 court-marital and I said it depends, what are the  
20 facts. This is the same.

21           So our, you know, 80 percent is that  
22 a no action taken because we are investigating or

1 -- I would want to know the reason behind those  
2 facts. I don't think you can draw a conclusion  
3 from just that statistic.

4 DR. SPOHN: But people do.

5 LT. COLONEL MORSE: Of course they do.  
6 This is what I said, I mean perception is more  
7 important than reality.

8 So as human beings we have to be as  
9 senators, as convening authorities, as  
10 Secretaries of the Army, we have to be bigger  
11 than that and say that you might think perception  
12 is more important than reality, but we're trying  
13 to deal in truth and we're trying to have answers  
14 that meet truth not perception.

15 COLONEL RIGGINS: Yes, Dr. Spohn, I'd  
16 go back to, you know, the point I tried to make  
17 earlier on where we really need to treat each of  
18 these cases individually on some of the merits,  
19 and that's hard to do and it certainly doesn't  
20 resonate well when there are statistics that are  
21 put out there and, you know, we're never going to  
22 get ahead of that, right, I mean they're always

1 going to be out there.

2 But I think that is an opportunity for  
3 strategic level leadership to step up and do  
4 exactly what these gentlemen just talked about  
5 and say, look, we pledge a few things here,  
6 right, one is we will always, always investigate  
7 every one of these things and we're going to go  
8 down and we're going to get beyond the statistics  
9 into the details, right. We need to do that.

10 And that's not just for, you know, a  
11 sexual assault related, I mean that's anything  
12 that's going on, you know, in the military and I  
13 think we've got a great group of investigators  
14 who do that kind of work.

15 But then we've got to be able to act  
16 on the outcome of that either way, right, without  
17 worrying about, you know, the political influence  
18 that comes with potentially making what's  
19 perceived as the politically wrong decision.  
20 That's the challenge I think.

21 DR. SPOHN: Thank you.

22 CHAIR BASHFORD: Do any of the members

1 have anything further to ask the panel?

2 (No audible response.)

3 CHAIR BASHFORD: Thank you all for  
4 coming. I want to thank the staff, for I know it  
5 was hard to assemble to come.

6 I don't know what your schedules are,  
7 but if you have time you might be interested in  
8 two of the data presentations we are doing, which  
9 is the presentation of sexual assault court-  
10 martial data right after our break and then after  
11 lunch the presentation of the investigative case  
12 file data.

13 You are more than welcome to join us  
14 if you have the time. Thank you again for  
15 coming. We'll take a 10-minute break.

16 (Whereupon, the above-entitled matter  
17 went off the record at 10:56 a.m. and resumed at  
18 11:10 a.m.)

19 CHAIR BASHFORD: Okay, Mr. Mason,  
20 Dr. Wells, Ms. Rozell, you're now going to be  
21 presenting us with your sexual assault court  
22 martial data. Is that correct?

1 MR. MASON: Yes, ma'am.

2 CHAIR BASHFORD: You have it.

3 MR. MASON: Thank you, ma'am.

4 Everybody, we have the PowerPoint behind you, but  
5 you all have a copy of the slides with you. And  
6 this is a variation of what you saw yesterday,  
7 with modifications, based on clarifications that  
8 I could make so that the charts are a little  
9 clearer for you.

10 What we'll be discussing is the  
11 descriptive statistics for FY 2015 through 2017.  
12 And then, Dr. Wells is going to do his  
13 multivariate analysis takeaways, which are for  
14 FY 2016 and 2017.

15 Just for situational awareness, the  
16 multivariate analysis that you see at the end of  
17 the data chapter where it says, FY15, and then  
18 there's a bunch of bullet points, and then FY16  
19 and '17 in the text of the chapter of the bullet  
20 points, those are a combination of the  
21 multivariate analysis that Dr. Spohn did for  
22 2015.

1                   Those are her text and there will be  
2                   a footnote citing back to the analysis that she  
3                   did for the JPP previously. And then, the '16  
4                   and '17 are actual texts from the work that  
5                   Dr. Wells did.

6                   All of the tables that support all of  
7                   the charts that we're seeing today are in the  
8                   Appendix, like we did last year, and they are the  
9                   source materials for '15, '16 and '17, so that  
10                  that material -- if somebody wants to check our  
11                  work, so to say, they can look at the data points  
12                  and then reconstruct where we came up with our  
13                  results.

14                  BGEN SCHWENK: So, are you saying that  
15                  we trust Dr. Wells' 2016-2017, but when we look  
16                  at 2015 from that Spohn person --

17                  MR. MASON: There's a big red flag.

18                  BGEN SCHWENK: Yeah, we're not sure  
19                  about that?

20                  MR. MASON: Absolutely.

21                  BGEN SCHWENK: Okay.

22                  MR. MASON: And actually, Dr. Wells

1 requested the footnote. So, that should tell you  
2 where -- you know, much like yesterday, him  
3 saying that we do the simple work. He may have a  
4 problem with Dr. Spohn. So, we will have to  
5 discuss that later.

6 All right, so the first slide that  
7 you're going to see is that in the cases that are  
8 documented by the DAC IPAD that are in our  
9 database at this point, for FY15, '16 and '17,  
10 you can see a slight downward trend.

11 One question that has been raised is,  
12 as the numbers change, you see it in later  
13 charts. You'll see where different results are  
14 being realized.

15 That's as -- as we do quality control  
16 on the database and we update files, as well as  
17 add in new files that we're constantly receiving  
18 that we'll see on the Court of Appeals, that a  
19 case is out and it's on appeal but we don't have  
20 it, we'll go out and ask for it.

21 And you can see where we've added  
22 approximately 30 cases just in the FY16 numbers,

1 that were not included in the analysis last year,  
2 but are included at this point.

3 BGEN SCHWENK: And these count all  
4 three types of courts martial?

5 MR. MASON: Yes, this is all cases  
6 that we have in. So, for FY 17, anything that  
7 went to -- any charges that were preferred that  
8 are sexual assault are included in that number.

9 So, if it then went to NJP, it's still  
10 in that 658 number. That's just the number of  
11 cases for that fiscal year that are currently in  
12 our database.

13 BGEN SCHWENK: Okay, so it's not  
14 necessarily court martial.

15 MR. MASON: No. That is just -- it's  
16 all cases that are in the system that had a  
17 charge preferred for sexual assault that meet our  
18 initial standards.

19 BGEN SCHWENK: Right. And sexual  
20 assault charges, we're just talking anything  
21 under 120.

22 MR. MASON: Yes, sir. And there's a



1 few other categories how it falls in. And that's  
2 also in the report that explains where they come  
3 from.

4 MS. ROZELL: In addition to forcible  
5 sodomy under Article 125.

6 MR. MASON: On the next slide you'll  
7 see -- this is similar to what you saw yesterday  
8 in the preparatory session. We have FY15, '16  
9 and '17, the Military Service of the accused.

10 The last column has been added, and it  
11 is the percentage of the Force in FY2017. So,  
12 what you're able to do now is to look and see  
13 that in our database the Coast Guard is three  
14 percent of the cases for FY17.

15 As a percentage of the total force,  
16 they were 3.1 percent. So, there's parity  
17 between how many cases we have in our database,  
18 compared to what is their total force percentage.

19 That last column, you'll see on the  
20 next slide, is sourced from our tables that we  
21 have for '15, '16 and '17 -- you're only seeing  
22 '17 here -- that explains what the population is

1 for each service, percentage-wise, versus the  
2 cases that are in the database. And there's no  
3 change to the FY17 slide as a representation,  
4 that you're seeing today.

5 On the next slide we have the sex of  
6 the accused. And there's no change to this  
7 slide. It is again showing that it's fairly  
8 consistent that 99 percent of the accused from  
9 '15, '16 and '17 are male, and roughly less than  
10 one percent are female accused.

11 As a question that was raised  
12 yesterday on terminology, you can now see there's  
13 just FY17. Here's a representation, and this  
14 change will be made on the other slides.

15 But rather than say rank of the  
16 accused, it now is titled Pay Grade of the  
17 Accused. And that was just a concern that was  
18 raised, so it's been modified.

19 Going to -- since we just were talking  
20 the accused at that point, we now go to the sex  
21 of the victim, that we can tell from our database  
22 what we are observing.

1                   And again, it's fairly standard  
2                   between '16 and '17, that 93 percent of the  
3                   victims in the cases that we have seen are  
4                   female. Roughly six percent between '16 and '17  
5                   are males, and then, less than one percent  
6                   is -- the victims are both male and female  
7                   against an accused.

8                   So, you'll have multiple victims in a  
9                   case, and then, less than one percent, when there  
10                  are those multiple victims, it's going to be both  
11                  male and female.

12                  On the next slide, this is -- where  
13                  we're going to be looking now, this slide and the  
14                  next one that we're going to look at, you have an  
15                  option -- and I need direction from you,  
16                  please -- on which version you would like to see  
17                  in the report.

18                  It's not as much of an issue on this  
19                  first one that we're looking at, which is the  
20                  instances of you having male accused, and what  
21                  the sex of the victim is.

22                  So, whether the male is just

1 assaulting males, assaulting females only, or  
2 both male and female, the difference between the  
3 two charts is just how we represent it -- whether  
4 it's a percentage or the actual number of  
5 incidents we have in each situation.

6 It is okay to have this chart remain  
7 percentages because we're talking such a large  
8 number and you just use a percentage.

9 And on the next slide, where we talk  
10 about female-accused sex of the victims, do just  
11 numbers, because the concern was, yesterday when  
12 we had 60 and 40 percent, that -- what does that  
13 really mean when we're talking such a small  
14 number, when it's three and two.

15 So, in FY17, when we had a female-  
16 accused -- you can see there were five female-  
17 accused in our entire database for '17. So,  
18 rather than using percentages, the suggestion was  
19 use numbers.

20 So -- and we can have different -- we  
21 can do the male-accused with percentages and the  
22 female-accused with numbers, or we can do them

1 both with percentages, or we can do them both  
2 with numbers. It just depends on how you're  
3 comfortable with the representation.

4 HON. WALTON: Do any of the statistics  
5 reflect how many victims are transgender?

6 MR. MASON: No, sir. We don't have  
7 that information. Is there -- is there a  
8 preference?

9 DR. MARKOWITZ: I certainly think that  
10 for female -- for the female assailants, that we  
11 need the specific number.

12 MR. MASON: Okay.

13 DR. MARKOWITZ: I think that it's  
14 pretty important. I don't have a particular  
15 preference in regards to the male-accused. But  
16 certainly for the female-accused I think we need  
17 the specific number, because it is such a low  
18 number.

19 I agree that the percentage would be  
20 somewhat -- not necessarily misleading, but it  
21 doesn't paint the specific picture.

22 MR. MASON: Doesn't give you

1 granularity of what we're actually looking at.

2 DR. MARKOWITZ: Exactly. So, that  
3 would be my particular preference.

4 HON. GRIMM: Does it have to be one or  
5 the other?

6 MR. MASON: We can put both in if you  
7 would like both in. Absolutely. I mean, I  
8 could -- I don't know if combining them on the  
9 same slide will work

10 HON. GRIMM: No no no no. I'm not  
11 talking about that.

12 MR. MASON: Okay. No, we could have  
13 all four charts very easily. That's not a  
14 problem.

15 CHAIR BASHFORD: Do you have  
16 percentages for the male-accused and numbers for  
17 the female-accused?

18 MR. MASON: We can do that, as well.

19 CHAIR BASHFORD: If I see the numbers,  
20 I immediately start trying to do the percentages  
21 for the big numbers, but I'm just not that good.  
22 So --

1 MR. MASON: So, if the direction that  
2 you're feeling more comfortable with is, I will  
3 leave the male-accused sex of victims as  
4 percentages, and for female-accused sex of  
5 victims, we will go to the individual numbers.  
6 Okay.

7 And when you see the draft report at  
8 the next version, when you actually are going for  
9 the approval, it will reflect those charts  
10 accordingly.

11 Okay, so the next couple of slides  
12 we're not going to have any changes. With  
13 respect to court martial data and the victim  
14 relationship to the accused, this is something  
15 that we're able to add in as a chart this year.

16 And the reason that it wasn't included  
17 last year -- and also goes to the reason of why  
18 we're only looking at FY15, '16 and '17 on these  
19 charts -- is, prior to FY15 we were not able to  
20 get the number specifically and how it was being  
21 requested through the JPP with respect to  
22 other -- the intimate relationship distinction --

1 intimate partner or spouse relationship.

2 In '15, '16 and '17, we've been able  
3 to get that, and we will be getting it again in  
4 FY18. So, rather than trying to compare two  
5 different sets of data that do not have all the  
6 same variables, we've dropped off the '12, '13  
7 and '14 Fiscal Years in our representation.

8 We haven't removed them from the  
9 database, so we still have that information. But  
10 we're just not going to be reflecting it in our  
11 analysis, because we want to show that all the  
12 variable are present in all the cases that we've  
13 added.

14 So, it is a new chart, but it does  
15 show you, again for FY15, '16 and '17, what type  
16 of activity we were seeing, or what type of  
17 relationship we're seeing between the victim and  
18 the accused.

19 On the next slide we talk about number  
20 of victims per case. And again, there isn't  
21 anything drastically different in this. The  
22 numbers are very similar, and between '15, '16



1 and '17 it's fairly standard, or fairly  
2 consistent, I should say.

3 This chart has not changed from what  
4 you saw yesterday with the type of sex offense  
5 charged -- penetrative versus contact. Again,  
6 the question that was raised earlier, what cases  
7 are in our database? And we look at the most  
8 serious charge offense with respect to a sexual  
9 assault.

10 So, it's either a penetrative is the  
11 most serious category, or a contact offense is  
12 the most serious category. And then, we break it  
13 down from there.

14 What you can see in this has been  
15 fairly consistent that the most serious offense  
16 charged -- type of sex offense charged -- is  
17 going to be a penetrative at 73-74 percent, and  
18 then contact offenses, right around 26 to 26½  
19 percent.

20 DR. SPOHN: For accuracy, you might  
21 change the title to Most Serious Sex Offense  
22 Charge, because some of those cases have both

1 kinds of cases.

2 MR. MASON: Okay.

3 DR. SPOHN: Both kinds of offenses.

4 MR. MASON: Okay, be glad to. Okay,  
5 the next slide is talking about Article 32  
6 Hearings, and it will be the slide after this, as  
7 well. This is an issue that we started  
8 discussing last year.

9 As the Article 32 Hearing changed in  
10 format and, essentially, substance, we wanted to  
11 track how many 32 hearings were actually being  
12 held, versus how many are being waived, and what  
13 might be happening.

14 As we mentioned at the beginning, the  
15 number of cases that we received in FY17 was  
16 lower than what we received in FY16. However,  
17 it's interesting when you look at FY16 and FY17  
18 on this chart, if you do a percentage, it has not  
19 changed in the number of held-versus-waived for  
20 the last two years.

21 So, even though we had a drop in the  
22 number of cases that we have in our database, in

1 this -- for this statistic the number has  
2 remained constant.

3 And then, on the next slide, you can  
4 see what happens when we're talking about the  
5 actual 32 waivers, how many times that a case is  
6 being waived -- an Article 32 Hearing that's  
7 being waived -- but there is not a pre-trial  
8 agreement that's requiring them to waive it.

9 The percentage when they were waived  
10 that involved a contact offense, the percentage  
11 that were waived involving a penetrative offense,  
12 and then the conviction rate when the Article 32  
13 was waived.

14 Last year, that was an issue that was  
15 brought up in the discussions by the committee,  
16 was, what was happening when FY15 we had an  
17 almost 80 percent conviction rate, and then in  
18 FY16 it dropped down to 47.

19 We were curious to see where it was  
20 going to go. It has bounced back up to almost 62  
21 percent. We don't know why. And it's something  
22 that the data working group -- again, what these

1 numbers show is what we can see in our database,  
2 but we don't have the reason behind it.

3 So, with the data working group, they  
4 may be coming back to the full committee with,  
5 here's guidance or suggestion of where we might  
6 want to go with further research to see what's  
7 happening.

8 And I should put as a side note, we  
9 have all the FY18 data, or we're in the process  
10 of adding that now. So, in six months or so we  
11 should be able to come back to you and say,  
12 here's what happened in FY18, and we'll be able  
13 to look at four years and make some better  
14 decisions on research at that point, because  
15 we'll have four solid years of data.

16 CHAIR BASHFORD: Chuck, what is  
17 considered a conviction to be included in the  
18 conviction rate?

19 MR. MASON: That it is a conviction on  
20 any offense.

21 CHAIR BASHFORD: Anything.

22 MR. MASON: Anything. Just that they

1 went to a 32 or waived the 32, but yet still had  
2 a conviction or not.

3 CHAIR BASHFORD: So, it could be  
4 dereliction of duty.

5 MR. MASON: Absolutely. The next  
6 slide -- case disposition court martial type --  
7 gives you an illustration of all of the cases  
8 that we have where the sexual assault was  
9 preferred. How are these cases being handled?

10 It doesn't necessarily mean that a  
11 sexual assault is being handled at that level.  
12 It just -- it's in our database on how was it  
13 resolved if it did go to court martial. And  
14 you'll see the numbers are fairly consistent --  
15 right around, you know, just pushing 80 percent  
16 for a general court martial, a little under 20  
17 percent for your special, and just about five  
18 percent for your summary court martial.

19 The next two slides are, again, a  
20 decision point. I would like some guidance from  
21 you, if possible, of which style you would  
22 prefer. The original what you saw yesterday was

1 case disposition by Military Service of the  
2 accused, and it says, FY2017.

3 We have this slide -- this chart will  
4 be created for '15, '16 and '17, but I was just  
5 showing you '17 for discussion purposes.

6 The next slide shows you when you  
7 break out each of the court martials and whether  
8 it was a penetrate -- courts martial, or whether  
9 it was penetrative or contact.

10 Now, it is a bit of an eye chart when  
11 it goes in this direction. It can be cleaned up  
12 with shading or other ways to demark the  
13 different categories. But if you like the  
14 additional information, we can work with the  
15 second slide to provide that detail.

16 DR. MARKOWITZ: Personally, I like the  
17 detail. I know I wasn't here yesterday for this,  
18 but for me I definitely like the detail. And so,  
19 if you are able to provide that shading, that  
20 for -- just knowing the way that I use data like  
21 this, that would be really helpful.

22 MR. MASON: Okay.

1 DR. MARKOWITZ: So, I personally would  
2 like it.

3 MR. MASON: It's not a problem to  
4 create this. It's a few more keystrokes, but  
5 we'll be glad to get it done and we'll do it for  
6 '15, '16 and '17, so you can compare the three  
7 years against each other.

8 BGEN SCHWENK: I agree with what Jen  
9 said. Backing up, when the Chair asked a  
10 question about the conviction rate and the answer  
11 was, dereliction of duty or anything else, I  
12 personally don't care about dereliction of duty  
13 or anything else.

14 What I care about is, was there a  
15 conviction on the sexual offense that was  
16 charged. So, maybe we can't for this year, but  
17 for some year in the future when we're putting  
18 statistics together, I'd like to see the  
19 conviction rate of the penetrative sexual offense  
20 when the 32 was waived, and the conviction rate  
21 of the contact offense when the 32 was waived, so  
22 I really get an idea of what's happening with the

1 sexual assault offenses.

2 And so, that's on that slide. That's  
3 slide 16, I guess? And then, on slide 17, we  
4 have case disposition. So, my gut is, they're --  
5 all the sexual assaults are put together on '17.  
6 But my gut is, well, the penetrative ought to be  
7 going to GCNs, generally speaking, and the  
8 contact probably not so much. But if we could  
9 break that down in the future --

10 MR. MASON: The next slide. We're  
11 getting there.

12 BGEN SCHWENK: Oh, we're getting  
13 there?

14 MR. MASON: Yes, sir.

15 BGEN SCHWENK: Okay. All right.

16 MR. MASON: Based on comments from  
17 yesterday, we're going to get there.

18 BGEN SCHWENK: All right, you know me  
19 well, you can shut me up. Thank you.

20 MR. MASON: And, sir, I will --

21 BGEN SCHWENK: Sorry to bother you.

22 MR. MASON: Okay. Sir, if we can do



1 the Article 32 before the report goes to the  
2 final draft, I'll be glad to.

3 BGEN SCHWENK: Right. I mean, if you  
4 can't, I'm just --

5 MR. MASON: We'll give it a try.

6 BGEN SCHWENK: Sure.

7 MR. MASON: If not, it'll definitely  
8 be included in the next round.

9 BGEN SCHWENK: Okay, thank you.

10 MR. MASON: Yes, sir. So, the next  
11 slide, Case Disposition, Penetrative Offense  
12 Preferred and Contact Offense Preferred.

13 The question yesterday was with the  
14 wording, whether it was as accurate as it could  
15 be -- whether it was misleading or not. Because  
16 the question became, we shouldn't be seeing  
17 penetrative offenses actually going to a summary  
18 court martial.

19 We went into the database to look at  
20 FY17 to see exactly what was happening, and there  
21 are ten cases where a summary court martial, a --  
22 the most serious offense charged, or preferred is

1 a penetrative offense.

2           However, in six of those ten cases it  
3 was actually referred to the summary court  
4 martial. And in two of those instances they were  
5 found guilty of it. I believe they were found  
6 guilty of contact, ultimately, but not the  
7 penetrative.

8           So, even though we shouldn't be seeing  
9 these cases going to a summary court martial, it  
10 still is happening.

11           So, I changed the titling on the slide  
12 to be Penetrative Offense Preferred and Contact  
13 Offense Preferred, because that is the most  
14 accurate way. And, Dr. Spohn, that was based on  
15 your concern about how it was worded.

16           So, I think that clears it up because  
17 it does say that we're in the category. But we  
18 can show in the database also, just for  
19 information, there are 13 cases of a preferred  
20 sexual penetrative offense that went to the  
21 special court martial, and five of those were  
22 actually referred at a special court martial.

1           So, the most serious offense was  
2 penetrative in 13, and then five were referred  
3 still to a summary. So, it is still happening.  
4 It is a smaller number, but it's there.

5           So, that -- the changes on that  
6 reflect the concerns that were raised. The  
7 last -- next couple of pages I'm not going to go  
8 into detail on. Chair Bashford asked the  
9 question this morning of, again, well how did the  
10 numbers change from year to year.

11           And I'm going to provide a little bit  
12 more detail and will be able to show in the  
13 appendices -- because the appendix that applies  
14 to our report has all the data tables.

15           But you'll see if you look at last  
16 year's report, how some of the numbers have  
17 changed -- what the conviction rate was, what the  
18 acquittal rate was. And that's as we add in  
19 these 30-something cases and we're doing our  
20 quality control. We will see that as of the date  
21 today, you may have a different percentage.

22           The one thing you can feel confident

1 about is that Dr. Wells and I did these numbers  
2 separately and did them -- he's using his  
3 software, I'm using the Excel spreadsheet -- we  
4 came up with the same results.

5 So, we get there, but it does change  
6 from year to year as we're updating and adding  
7 more cases in that we did not have. Yes, ma'am.

8 CHAIR BASHFORD: I'm just going to  
9 say, I realize the conviction rates for the  
10 members panels have increased with the addition  
11 of new cases, but these are still god-awful  
12 conviction rates, and I think Judge Walton, Judge  
13 Grimm would agree with me.

14 So, these are the best of the best  
15 cases after the winnowing out period, and there's  
16 just something wrong, you know, and I think that  
17 that's part of what we're here to decide, you  
18 know.

19 And I don't know that we have the data  
20 yet to know, is it the wrong cases going forward,  
21 is it the prosecutors, is it the -- you know.  
22 But this is not in norm with any other data

1 outside of this area -- you know, the civilian  
2 area -- that I've ever seen.

3 MR. MASON: And I think you will see,  
4 as staff we're going to take some suggestions to  
5 the working group of maybe other ways we can look  
6 at this information, or other data we might want  
7 to try to pull, and see if we can inform it a  
8 little bit.

9 But I would hope that by the next full  
10 meeting we will have some more direction for you.

11 BGEN SCHWENK: Chair Bashford, I think  
12 in the case review working group, as we wrap up  
13 with the preferred or no-action cases, one of the  
14 discussion items has been whether we should then  
15 launch on, why is the acquittal rate so low. So,  
16 we would skip the process between preferred --

17 CHAIR BASHFORD: Acquittal rate so  
18 high.

19 BGEN SCHWENK: The acquittal rate so  
20 high. Sorry. Yeah, why is the acquittal rate so  
21 high. Thank you. Yes, and just skip into that  
22 and see what Chuck and the case review -- I mean,

1 the data working group has, and decide what we  
2 need.

3 But we're thinking that's going to be  
4 records at trial, and going through those. So,  
5 even though the numbers are smaller, the size of  
6 the file could be significantly larger.

7 But -- so, we're thinking about that  
8 and I guess maybe at our next meeting, when Chuck  
9 has more detailed things, we'll have a better  
10 idea of what to recommend to the full DAC IPAD  
11 that the case review working group take on for  
12 next year.

13 MR. MASON: One more? One more?  
14 Okay, and I'm -- so, the last four charts -- the  
15 last four slides, you have seen those, they were  
16 from yesterday, there aren't any major changes  
17 for today. If you would go to, I believe it's  
18 slide 26, it's Summary of Multivariate Results,  
19 I'm now going to turn things over to Dr. Wells,  
20 and he will talk to you about his analysis and  
21 his takeaways.

22 DR. WELLS: Thanks, Chuck. Thanks,

1 Members. So, we don't have for you today the  
2 detailed analytic results from the multivariate  
3 models. What we're prepared are the four summary  
4 slides. But just to reiterate, we analyzed the  
5 data for FY16 and FY17 and we estimated a series  
6 of multivariate models for both of those years.

7 And we had looked at a series of  
8 outcome variables for both of those years. So,  
9 the first four outcome variables for both years  
10 dealt with whether or not there was a conviction  
11 for a penetrative offense, whether or not there  
12 was a conviction for any offense, whether the  
13 case ended in acquittal, and whether the case  
14 ended in dismissal. So, those were the first  
15 four dependent variables.

16 Then, we took off the cases that ended  
17 in a conviction, and we looked at the sentencing  
18 results. So, the first outcome variable we  
19 examined was whether or not there was a period of  
20 confinement given, whether punitive separation  
21 occurred, and then the last dependent variable --  
22 so, dependent variable number seven -- was a

1 combined measure of the length of the sentence  
2 and the punitive separation. So, it was a  
3 sentencing severity scale.

4 Okay, so those were the seven  
5 dependent variables that we looked at in our  
6 multivariate models, and we did that for '16 and  
7 '17. And you'll have access to those full  
8 results in the appendix if you would like to see  
9 those, and we talked about those a little bit  
10 yesterday.

11 So, what we have here today is just  
12 the summary of patterns that we observed.  
13 Because certain patterns emerged when you look at  
14 the '16 data and the '17 data. And that's what I  
15 provided for you.

16 So, the four predictors -- so, the  
17 four variables that stood out included the  
18 Military Service Branch, the number of charges in  
19 the case, the type of charge or conviction  
20 offense, and then last, a handful of victim-  
21 related variables.

22 Those weren't as consistent, but



1 they're noteworthy. And that's what we're going  
2 to have up here for you on the last slide. So,  
3 the first slide summarizes -- oh, I'm sorry. Go  
4 back, Stacy -- service branch.

5 So, the general pattern that emerged  
6 is reflected here, that any chances of a  
7 conviction were lower in the Air Force than the  
8 other service branches across both years, and  
9 that was pretty clear when we looked at those  
10 multivariate models. There was something  
11 standing apart there.

12 The other pattern that emerged when we  
13 looked at the sentencing outcomes, is that in a  
14 general sense -- not always, not compared to --  
15 not all service branch comparison possibilities,  
16 but convicted Marine Corps members tended to be  
17 sentenced a little bit more severely than  
18 convicted members of the other branches of  
19 service.

20 BGEN SCHWENK: No.

21 (Laughter.)

22 DR. WELLS: Number of charges

1 consistently mattered across our model. So, the  
2 chances of conviction were greater when there  
3 were more charges filed in a case, and the  
4 chances of dismissal or acquittal were lower when  
5 there were greater numbers of charges.

6 And then, when there were greater  
7 numbers of charges, the severity of the sentences  
8 also increased.

9 CHAIR BASHFORD: And just to clarify,  
10 that's, again, any kind of charge -- adultery,  
11 dereliction of duty -- not just the sexual  
12 charges. Right?

13 DR. WELLS: Yes, ma'am. Yeah, we just  
14 summed up the total number of charges in the  
15 case. And you'll have access to the data that  
16 show the ranges. And it was a broad range of  
17 charges across the cases.

18 The charged offense or conviction  
19 offense, so the particular type of offense that  
20 we're talking about here, mattered. In FY16, if  
21 you were charged with a penetrative offense, you  
22 were less likely to be convicted than if you were

1 charged with a contact offense.

2 Also, regarding penetrative offenses,  
3 you were more likely to be acquitted and more  
4 likely to have the case fully dismissed. I mean,  
5 that was only for FY17.

6 Convictions for penetrative offenses  
7 lead to more serious sanctions, however, when we  
8 compare them to contact offenses or non-sexual  
9 assault conviction offenses.

10 Last, as I indicated, there were a  
11 handful of victim-related variables that weren't  
12 consistent across many models, but they emerged  
13 and worth noting here.

14 Dismissal was greater for intimate  
15 partner cases than other relationship cases. In  
16 FY16 and FY17, there was a relationship between  
17 numbers of victims, and an increased chance of  
18 conviction on a penetrative offense -- that was  
19 only for FY17 -- and then, military-only victim  
20 cases were linked to reduced chance of a  
21 confinement sentence, compared to civilian victim  
22 cases, and a mixture of victims military and

1 civilian. But again, that was only for FY17.

2 So, that's the summary of patterns  
3 that we see, and the full sets of model results  
4 are available for you.

5 The last thing I'll say is, the only  
6 thing we presented here were the patterns where  
7 there was a relationship. It's also important to  
8 know when the patterns show there is no  
9 relationship at all, because those findings can  
10 be just as revealing. Thank you.

11 MR. MASON: Unless you have any other  
12 questions for us, that is or data presentation  
13 for you.

14 CHAIR BASHFORD: I do have one  
15 question. Can you give us some examples of what  
16 you've seen where there was no relationship  
17 between different variates? You said sometimes  
18 the fact that there is no relationship is just as  
19 important. Can you give us a couple of examples?

20 DR. WELLS: Yeah, exactly. Rank or  
21 pay grade of the accused did not matter in any  
22 model. Gender of the victim was not important

1 across the models.

2 The intimate-partner variable was only  
3 important in that one. So, across the other  
4 models for FY16 and '17, that was generally  
5 unimportant.

6 BGEN SCHWENK: Do you want to discuss  
7 the racial issue? You know, whether there's  
8 any -- is there a problem with the race data that  
9 you're getting? You know.

10 MR. MASON: Well, with respect to the  
11 actual courts martial, we do not have that data.  
12 It is not a point that is captured in the record  
13 of trial that we have access to.

14 The -- I would suggest, sir, that you  
15 might want to ask with the Case Review, when they  
16 do their presentation this afternoon, they can  
17 tell you the issues that they have come across  
18 with respect to how the services are coding the  
19 races of the accused.

20 But it is not something that we can  
21 track in our database, and it's not even a field  
22 that we attempt to fill. The one thing that we

1 are doing that I can kind of piggyback on, we  
2 have been going back and adding the date of  
3 births to our data fields, so that we can, once  
4 the case review finishes with their 2000 files,  
5 we can try to mirror the investigation from the  
6 very beginning, to when it goes to trial, tie  
7 those two cases, and actually have, soup-to-nuts,  
8 the entire process.

9 So, we'll be able to see that when  
10 this investigation started and it actually went  
11 to conclusion, if there's any trends that  
12 might -- or common variables between the two  
13 sides, that lead us towards the court martial  
14 component.

15 BGEN SCHWENK: And what you said also  
16 true for victims? The difficulty in identifying  
17 the victims also depends on race?

18 MR. MASON: Yes, sir. So, with  
19 respect to court martial, we do not have that  
20 anywhere in our database at all.

21 BGEN SCHWENK: I just think that's  
22 something we may want to look into try -- that's

1 got to be somewhere. And -- because how else can  
2 you evaluate whether the system appears --  
3 numerically, at least -- to be even-handed or  
4 not. So, I think it's something we ought to  
5 think about making somebody go look, like the  
6 staff, see what they can find.

7 COLONEL WEIR: If I could add,  
8 General, the court martial documents that --

9 BGEN SCHWENK: No, you can't add,  
10 whoever you are.

11 (Laughter.)

12 COLONEL WEIR: The court martial  
13 documents that we upload into the database are  
14 all the court martial documents you would  
15 normally see. A charge sheet, Article 32,  
16 Preliminary Hearing Officer's Report, Staff Judge  
17 Advocate's recommendation to the convening  
18 authority, result of trial, and any other, you  
19 know, victim's wishes that we might be able to  
20 pull down and upload.

21 So, in none of those documents is  
22 there any place where race is a box that's filled

1 out in those documents. So, that's the reason  
2 why the court martial database folks don't have  
3 access to it, because the documents that they  
4 pull down as part of a court martial -- even the  
5 record of trial, it's nowhere mentioned, so that  
6 we wouldn't have access to that information from  
7 what they're pulling down.

8 But, I will hold the suspense until  
9 this afternoon and we'll talk about it again.

10 BGEN SCHWENK: I would also add for  
11 the Committee's information, that GAO was in the  
12 process of conducting a wide-scale analysis of  
13 racial disparities within the military justice  
14 system, or lack of racial disparities within the  
15 military justice system, in that report.

16 I believe it's expected out -- that  
17 February time frame? Then, I will say we should  
18 wait to see what they have to say. And Dwight,  
19 you'll send us a copy?

20 MR. SULLIVAN: Of course.

21 BGEN SCHWENK: Thank you.

22 CHAIR BASHFORD: Are we able to break



1 for lunch early and then start up again early?  
2 Are we waiting on delivery, or anything like  
3 that?

4 PARTICIPANT: I could check.

5 CHAIR BASHFORD: We don't need an hour  
6 to eat sandwiches, so why don't we break now and  
7 come back at quarter-to-one.

8 (Whereupon the above-entitled matter  
9 went off the record at 11:44 a.m. and  
10 12:45 p.m.)

11 CHAIR BASHFORD: Okay. Welcome back  
12 all. We're going to start our afternoon panel  
13 with the Case Review Working Group Presentation.

14 MS. TAGERT: Good afternoon. For  
15 those in the aud -- have we started?

16 Well, good afternoon. For those in  
17 the audience, the next presentation is going to  
18 be showing data that the Case Review Working  
19 Group has collected through reading sexual  
20 assault investigations closed in Fiscal Year 17,  
21 and reporting information based on those case  
22 files.

1           And the first section -- there's going  
2 to be two sets of results that are going to be  
3 presented today. The first are descriptive  
4 statistics, which are a result of the Staff using  
5 the database that we have to put together the  
6 numbers.

7           And the second set of data is going to  
8 be a more higher level analysis. And Dr. Wells  
9 is going to be going over with that with you.

10           For purposes of the DAC-IPAD Members,  
11 this is just a taste of the kind of data that  
12 we're able to extract from the database.  
13 However, anything that you may want to look at  
14 based on the numbers that we've provided, can  
15 also be discussed. And Dr. Wells and I could  
16 potentially put additional presentations  
17 together.

18           So the first set of data that --

19           BGEN SCHWENK: Can I interrupt for a  
20 minute, please?

21           MS. TAGERT: Yes, sir.

22           BGEN SCHWENK: Let me just say that a

1 lot of the data that's here comes from our group  
2 of 165 or whatever cases it was that the Staff  
3 and the Members all reviewed.

4 It doesn't come from the 2055 big pot  
5 of cases that is our mission to complete. We've  
6 done 1400. The Staff has done 1400 of those. So  
7 there's 600 to go.

8 So, don't be thinking too much about  
9 conclusions from the data based on 165. Because  
10 that may be a great random sample, but it's not  
11 2055.

12 So, it will be next fall when we have  
13 completed our work and turned it over to Dr.  
14 Wells. And he's done his analysis that will  
15 really have an in-depth review of all the data  
16 and what we can learn from it.

17 So this is sort of like a preview, a  
18 sneak preview of a small fraction. Thank you.

19 MS. TAGERT: Yes. I should have  
20 explained that. The first set of data that we're  
21 looking at are reporting parties.

22 And unlike in the civilian system,

1 victims are able to give obviously reports of  
2 sexual assault. But so are third parties.

3 And they have been broken down into  
4 victim authorized representatives, who can be  
5 people that are associated with the Family  
6 Advocacy Program, SARCs, Special Victims'  
7 Counsel, Victims' Legal Counsel, as well as the  
8 third group, which is the Command.

9 The Command does not have the -- the  
10 Command, if they are told of a sexual assault or  
11 learn of one, they by regulation have to report.  
12 It's a mandatory report.

13 However, as you can tell, the majority  
14 of cases that are reported to law enforcement,  
15 and we are not talking about restricted reports  
16 here. We're only talking about unrestricted, are  
17 not the victims themselves.

18 So, that was something that we found  
19 interesting thorough the case investigations.

20 DR. MARKOWITZ: Excuse me, Kate?  
21 Medical providers, do they fall under victim  
22 authorized representatives? Or other personnel?

1 MS. TAGERT: They do.

2 DR. MARKOWITZ: Victim  
3 representatives? Okay. Thank you.

4 MS. TAGERT: If -- of course if the  
5 victim has given that, yes. Exactly.

6 We've also broken down the other third  
7 party reports to kind of give you an idea of what  
8 those look like. And those were intimate  
9 partners, family, friends, neighbors, and then  
10 there was about ten cases where they didn't fit  
11 into any type of category.

12 The case review checklist also  
13 recorded the date of the sexual assault versus  
14 the date of the report. And we ran these numbers  
15 to show you incrementally how many reports were  
16 reported between certain days.

17 And so you -- reported within 48 hours  
18 is 33 percent. And the numbers go up to show you  
19 incrementally how many cases are reported within  
20 a certain amount of time.

21 For the report that will be issued in  
22 March based on Dr. Spohn's recommendation, we're

1 also going to do a median of these numbers to  
2 present for you next time.

3 There has been testimony provided to  
4 case review and the DAC-IPAD about the length of  
5 investigations. And potentially some negative  
6 side effects that maybe on the victim and the  
7 subject.

8 So we did an average duration of all  
9 the cases from the time that a case is opened.  
10 Not based on the reporting, just when the case  
11 was opened. To the time that the Command gets  
12 the report. All the time that the Commander can  
13 make a decision.

14 Next year we will also be providing  
15 the dates of how long it takes the Commander to  
16 come to a decision. I just want to be clear on  
17 this. This is just the length of investigation  
18 up until the time that the Commander can take  
19 action.

20 This is the victim demographic  
21 characteristics. I don't believe that there's  
22 any surprise here.

1           Overwhelmingly, victims are female and  
2           enlisted. The second largest demographic is the  
3           civilian spouse of a Service Member. There are  
4           40 there. However, only 20 of those cases  
5           involved the subject being married to that  
6           civilian spouse.

7           The age of victims on average are  
8           between 19 and 20. That's the largest percentage  
9           of ages that we saw in these particular case  
10          files.

11          And for the next report we will link  
12          the age and the rank together. So you can see  
13          where those fall. We can kind of compare those  
14          together.

15          We also did a victim/subject  
16          relationship. And this was based on a hierarchy  
17          model that Dr. Wells did for us. Which was  
18          combining the closest relationship.

19          There was disagreement between  
20          reviewers sometimes on these cases as to what the  
21          relationship was. Whether or not it was an  
22          acquaintance or a coworker.

1           So we didn't want to discount anyone's  
2 answers how they reviewed the relationship or how  
3 they felt the victim described the relationship.  
4 So these numbers represent the closest  
5 relationship that was reported.

6           And as you can see, the largest number  
7 here is friend. People -- the victim and the  
8 subject describe themselves as friends.

9           Here we have a declination to  
10 participate with the investigation. Overall out  
11 of 165 cases there were 56 cases that involved  
12 the victim's declination.

13           (Off mic comments.)

14           MS. TAGERT: These are the numbers  
15 that we were -- these are the cases that we were  
16 able to tell that there was a victim declination.  
17 However, not in every case did we see an official  
18 declination memo either from an attorney or the  
19 victim.

20           Potentially we would see a note from  
21 an investigator that said victim declines to  
22 participate. In other cases we wouldn't see



1 anything.

2 So there's no sort of consistent way  
3 across the services that they're accounting for  
4 this. However the largest group of  
5 characteristics or demographics that declined to  
6 participate were Service Members and civilians.

7 However, keep in mind that those were  
8 the largest demographic of victims in general,  
9 so.

10 BGEN SCHWENK: So, is that 56 out of  
11 the 65 cases?

12 MS. TAGERT: Yes, sir.

13 BGEN SCHWENK: There was a declination  
14 in 56 out of 65.

15 (Off mic comment.)

16 BGEN SCHWENK: One hundred and sixty-  
17 five.

18 MS. TAGERT: Yes. Not necessarily a  
19 formal declination. Although some of them were.  
20 But some mention of a victim not wanting to  
21 cooperate with the investigation or the  
22 prosecution.

1                   HON. WALTON: Do you know if there are  
2 domestic violence victims' advocates available?

3                   MS. TAGERT: Yes. There are. The  
4 Services, I believe it falls under the Family  
5 Advocacy Program. So, yes.

6                   SGT. MARKEY: And one more, for  
7 definition, which types of victims are not  
8 eligible for SVC?

9                   MS. TAGERT: So for purposes of our  
10 study, sir, the people that were eligible were  
11 Service Members, civilian spouses of Service  
12 Members. Some dependents basically depending on  
13 the relationship.

14                   However, the Service regulations that  
15 we looked at, there are always exceptions. So  
16 they could potentially give a Special Victims'  
17 Counsel to someone that is not within those  
18 dependent status or Service Member.

19                   So we can't tell you who is or isn't  
20 eligible when they have exceptions to people  
21 having Special Victims' Counsel. And I believe  
22 that DoD civilians are not eligible for Special

1 Victims' Counsel as well.

2 Next slide. We also ran the numbers  
3 to see whether or not having a Special Victims'  
4 Counsel potentially would have an impact on the  
5 victim declination.

6 Now as you heard from Dr. Wells  
7 yesterday when he did his presentation on  
8 statistics, this is a bivariate analysis. So  
9 there may be other reasons as to why people are  
10 declining if they have or have not had a Special  
11 Victims' Counsel.

12 And the eligible victims represented  
13 by an SVC versus eligible victims not represented  
14 by an SVC, that is not a statistically  
15 significant number. So there's not really a  
16 difference between those two parties or two  
17 groupings.

18 However, victims not eligible for an  
19 SVC and the percentage that participated in the  
20 investigation, is significantly to -- significant  
21 between those parties.

22 So, --

1 CHAIR BASHFORD: So it will be very  
2 interesting when we get the full cohort of cases  
3 to see if the numbers and percentages still track  
4 past the random sample.

5 MS. TAGERT: Yes, ma'am. And Dr.  
6 Wells, tell me if they don't track, then there's  
7 a problem with the reviewers.

8 (Laughter.)

9 MS. TAGERT: So let's hope they do.  
10 Next slide.

11 All right. So, as I mentioned before,  
12 the fact that a third party can make a report of  
13 sexual assault is unique to the military.

14 And so we also took a look at whether  
15 or not that was -- what effect of having a third  
16 party report would have on the participation  
17 level.

18 And here as you can see, if the  
19 Command is the party making the report, they have  
20 the largest percentage of participating victims.  
21 And the Case Review Working Group found that  
22 interesting.

1                   Potentially there is a bias against  
2 Commanders. And maybe people believe that if the  
3 Com -- you know, the Commands -- there's maybe an  
4 effect on prosecution with the Command.

5                   But here we found that if they were  
6 the reporting party, there seemed to be more  
7 participation than if other people reported.  
8 Including the victim him or herself.

9                   Again, this is the demographic  
10 characteristics. It's very similar to what SAPRO  
11 puts out. The majority of subjects are male and  
12 enlisted.

13                   And as you can see here, the ages of  
14 the subjects are -- it's a little older than  
15 victims. But not by much.

16                   The Case Review Working Group also  
17 recorded every time a subject gave a statement to  
18 law enforcement. And as you can see, in the  
19 majority of cases, up to 74 percent, the subject  
20 does indeed give a statement to either a military  
21 investigator or a civilian law enforcement  
22 agency.

1                   And we also then broke it down for  
2 those that did choose to give a statement, we  
3 thought well maybe an attorney is telling them  
4 that it would be wise to give a statement.

5                   But here, as you can tell, there were  
6 very little -- there was very little legal  
7 representation at an initial interview for any of  
8 the people, whether or not they gave a statement  
9 or did not.

10                  SGT. MARKEY: But you weren't able to  
11 determine whether those were exculpatory or  
12 inculpatory?

13                  MS. TAGERT: No, sir.

14                  CHAIR BASHFORD: Well, ultimately we  
15 did. But I don't think for purposes of this.  
16 But didn't we check if it was an admission or a  
17 denial confession?

18                  MS. TAGERT: Oh, yes. I'm sorry, sir.  
19 We were -- we did record whether or not there was  
20 a confession. So we will be able to see the  
21 results of that.

22                  And I think Dr. Wells in his

1 presentation shows the percentage of cases that a  
2 Command takes action when there's been an  
3 admission or a confession.

4 DR. WELLS: Right. So in addition to  
5 the results that Kate discussed, we did a little  
6 bit more sophisticated analysis based on some of  
7 the things that the case file reviewers noted  
8 when they were recording the data.

9 And some of their observations. And  
10 then some of the things that the Staff and the  
11 Committee had indicated as well.

12 So that's what we're going to talk  
13 about now. I'm going to talk about four sets of  
14 a little bit more in-depth analysis that we  
15 performed.

16 So the first thing we're going to talk  
17 about is the consistency of case closure status  
18 across four different decision points. So we're  
19 going to talk about Command decision, probable  
20 cause determination, DIBRS classification, and  
21 MCIO classification.

22 And one of the things that we did was

1 determined what closure classifications were used  
2 in two or more of those decision points.

3 And then we could compare how often  
4 those things intersect. In other words, how  
5 consistently these particular closure  
6 classifications are used across those decision  
7 points.

8 So in the chart you're going to see,  
9 it doesn't track a particular case to see how  
10 consistent a closure classification is used  
11 within that case. It's just aggregate counts  
12 within those cells. And then that will give us a  
13 picture of consistency.

14 So here are the results that you can  
15 see. So across the top row are the four decision  
16 points, Command, probable cause, DIBRS and MCIO.

17 And then in the first column you can  
18 see the five different closure classifications.  
19 So I'll draw your attention too just a few of the  
20 highlights here.

21 If you look at the unfounded row, you  
22 see that DIBRS uses the unfounded classification



1 most often. Nearly a third of the cases that had  
2 a DIBRS classification were listed as unfounded.

3 DIBRS also uses prosecution declined  
4 most frequently. Over a third of the time that  
5 they make a closure classification they list it  
6 as prosecution declined.

7 And that's quite a bit more than MCIOs  
8 and Command. Command uses that category less  
9 than 10 percent of the time.

10 Victim declinations, lack of  
11 participation. Commanders use this classification  
12 most frequently. Over one fifth of the time.

13 And then it's used least frequently by  
14 the MCIOs. You see a pretty big difference there  
15 in those percentages.

16 And then last, Commanders almost  
17 exclusively use the insufficient evidence  
18 classification. So we can see some patterns of  
19 inconsistency and how these different decision  
20 points close out their cases.

21 And again, we did take a look at some  
22 of the individual cases. And I can report those

1 particular numbers to you. And they can be  
2 listed in the appendix if you would like. Next  
3 slide.

4 So the next issue we wanted to take a  
5 look at was the nature of victim impairment. And  
6 we felt like this variable was pretty important,  
7 because it can have an impact on case progression  
8 for a couple of different reasons, including  
9 potential issues of victim credibility.

10 And then also issues related to the  
11 quality of evidence in a particular  
12 investigation. So, we wanted to know how often  
13 these cases entailed victim impairment and then  
14 what the impairment looked like in these cases.

15 So, in the next table here you can see  
16 that a victim was impaired in over half of the  
17 cases. And this indicates that we've got some  
18 investigative challenges with a pretty  
19 significant portion of cases in this sample.

20 Then the next step was to look at the  
21 nature of victim impairment. And what you see  
22 there with those rows under the nature of

1 impairment is sort of a hierarchical  
2 classification of victim impairment.

3 With the top row being the highest  
4 degree of impairment. The person was passed out  
5 or unconscious. Versus blacked out at least some  
6 memory loss. And then asleep.

7 And then you can see how those are  
8 broken down. And you can see that being passed  
9 out and unconscious represented about 43 percent  
10 of all of the impairment cases.

11 So when we talk about impaired  
12 victims, we're talking about something that is  
13 fairly substantial.

14 MS. TAGERT: And just for purposes of  
15 when we're discussing what those definitions are,  
16 this was as described by the victim in her  
17 statement. It's not the reviewer's opinion as to  
18 what her state of mind was. Or his.

19 DR. WELLS: And sometimes within the  
20 data we will see things in a single case where it  
21 will list the victim as either being passed out  
22 with partial memory.

1                   And what we did in those kinds of  
2 cases was code the most severe form of  
3 impairment. So we would code that as being  
4 blacked out as opposed to just partial memory.

5                   We'll take a closer look at this  
6 variable to see how it was related to victim  
7 reported drug and/or alcohol use. And this was  
8 primarily a check on the quality of the victim  
9 impairment variable.

10                  But it was also to allow us to get a  
11 better idea of what victim impairment looked  
12 like. And I think the takeaway conclusion from  
13 this is, that victim impairment variable does a  
14 pretty good job of measuring this, at least when  
15 we compare it to drug and alcohol use.

16                  So I'll just walk you through a couple  
17 of the cells. So if you look at the lower left  
18 cell there, under victim impairment, where the  
19 number is 73. And what that means is, 80 percent  
20 of the cases, actually 80.2 percent of the victim  
21 impairment cases involved a victim who said he or  
22 she used alcohol, but did not use drugs.

1           And if you go one cell up and you see  
2           that number 11, that's 12.1 percent of the victim  
3           impairment cases. And in those cases the victim  
4           said that he or she had used drugs and/or  
5           alcohol.

6           We can't talk about the extent of drug  
7           or alcohol use. We can't talk about the type of  
8           drugs that were used.

9           But we do know that if we add up those  
10          two cells, it comes out to a little bit more than  
11          92 percent of the victim impairment cases  
12          involved drug and/or alcohol use.

13          DR. MARKOWITZ: So, is there any  
14          consideration given to surreptitious provision or  
15          surreptitious use of drugs in any of these cases?

16          So the possibility of someone being  
17          given something against their will like in those  
18          particular cases or against their knowledge. Did  
19          that come up in any of these cases, where  
20          somebody is not sure whether or not they were  
21          given something in the course of an incident?

22          DR. WELLS: Right. So some of those

1 indications are in the data, as we were reviewing  
2 the data file.

3 DR. MARKOWITZ: Right.

4 DR. WELL: I can't speak to how  
5 systematically that was recorded and written  
6 down. But maybe Kate can talk about that a  
7 little bit.

8 MS. TAGERT: So, on the checklist Dr.  
9 Markowitz, it set. There was an option for  
10 drugged.

11 So there were victims that reported  
12 that they were impaired but they don't know how  
13 they got impaired. And sometimes reviewers would  
14 hit drugged.

15 Or if someone reported that they felt  
16 like they were drugged, yes. That would -- those  
17 numbers would account for those.

18 DR. MARKOWITZ: Okay.

19 MS. TAGERT: And just to be clear,  
20 drugs is not just -- there was confusion  
21 yesterday. So it's not street drugs necessarily.  
22 It could be Ambien, or any kind of prescription

1 drug that is used with alcohol or anything like  
2 that.

3 DR. MARKOWITZ: And just so to make  
4 sure I understand. So we're not talking -- so a  
5 patient's -- or I'm sorry, a victim's account of  
6 believing they were drugged would be enough to  
7 put them in this category?

8 You weren't verifying with like tox  
9 screens or what have you in the case reports like  
10 this was.

11 MS. TAGERT: So we do have -- there's  
12 another section in the minority of cases there is  
13 a tox exam. But if there was one on the victim,  
14 and the subject, that is recorded.

15 DR. MARKOWITZ: Okay.

16 MS. TARGET: And that will be provided  
17 in the big report next year.

18 DR. MARKOWITZ: Right. Thank you.

19 SGT. MARKEY: And I think if you  
20 remember going back to the time line of when most  
21 or a majority, 51 percent or more were reported  
22 after 48 hours, that became problematic

1       investigatively to try to corroborate, you know,  
2       alcohol content or any type of drugs. So.

3               DR. MARKOWITZ: Sure. I was more  
4       interested in whether just a simple report of  
5       belief of being drugged --

6               SGT. MARKEY: Right.

7               DR. MARKOWITZ: Put that individual  
8       within that category. So that was really my --  
9       my big question was how we were categorizing  
10      those individuals.

11              So, thank you.

12              DR. WELLS: So overall the patterns  
13      here support that victim impairment variable  
14      seems to be capturing what's going on here fairly  
15      well.

16              We looked at those three cases where  
17      the victim said they were impaired, but they  
18      didn't use drugs and they didn't use alcohol.  
19      And there were indications in the data that they  
20      were impaired in some way.

21              And then -- and the victim was not  
22      impaired, the 51 in the lower right cell is what



1 we would expect to see if they weren't impaired.  
2 They also reported that they didn't use drugs.  
3 They didn't use alcohol.

4 And then 22, they reported that they  
5 used alcohol but they were not impaired.

6 DR. MARKOWITZ: Just as a -- just as  
7 a general consideration going forward. From my  
8 own clinical perspective, there may be some  
9 utility in a category of unclear what the nature  
10 of the impairment is.

11 I think that information is as  
12 important as anything else. The fact that there  
13 are times in which we do not know why a patient  
14 comes to us impaired.

15 So, it's something to consider as we  
16 are having these conversations.

17 DR. WELLS: Next, so the third  
18 analysis that we did, to take a closer look at  
19 some of these data, were to figure out what  
20 happened in some of these cases in which a  
21 civilian agency was involved, a civilian agency  
22 was the lead, and then the question is, what

1 happened in the military criminal justice system  
2 within these cases?

3 So, I'm going to go through a couple  
4 of tables here. A lot of numbers. A lot of  
5 different categories. But they'll lead us to a  
6 conclusion about what happened here in just a  
7 second.

8 So, what we see is that in -- how does  
9 that add up? Fifty cases -- 49 cases. Sorry.  
10 Forty-nine cases involved in off installation  
11 incident and a civilian agency was involved.

12 The top three rows add up to 50  
13 because two agencies were involved in one of  
14 those cases. That's why it doesn't add up to 49.

15 So we had 49 cases off installation in  
16 which a civilian agency was involved. We see  
17 that in 34 of those, the civilian agency took the  
18 lead.

19 The next row of data show that a  
20 civilian prosecutor prosecuted the case one of  
21 those times. So one out of the 49 cases with a  
22 civilian agency involvement led to civilian

1 prosecution.

2 And then the last row of data allows  
3 us to understand why was that the case. Why were  
4 48 cases not prosecuted?

5 And the top row there captures 45.8  
6 percent of those cases. That combines two  
7 categories. One of two things happened there  
8 within that row.

9 Either the law enforcement agency  
10 never took it to the prosecutor's office. And  
11 that was indicated in the case file notes. Or,  
12 the case was taken to a civilian prosecutor --  
13 prosecuting agency, and they declined to move  
14 forward with the case. So that was 22 of those  
15 cases.

16 So the next step in our analysis, and  
17 Kate -- the discussion that Kate and I had was,  
18 so let's take those 22 cases and see if anything  
19 happened in the military justice system after  
20 they were declined at the civilian side.

21 So the next slide you're going to see  
22 --

1                   BGEN SCHWENK: Can I make one comment  
2 on this slide before you review it?

3                   DR. WELLS: Yeah. Yeah, yeah.

4                   BGEN SCHWENK: So the first category  
5 is what agency was involved. And then we say  
6 civilian investigative agency took the lead in 34  
7 cases.

8                   So then the next one is civilian  
9 prosecutor prosecuted the case. And we have one  
10 in yes. And 48 no.

11                  DR. WELLS: Um-hum.

12                  BGEN SCHWENK: I wonder if it would be  
13 more helpful if we said one yes, and 33 no.  
14 Because to me it goes like, you know, a tiered  
15 system.

16                  They took the lead in 34 cases.

17                  DR. WELLS: Um-hum.

18                  BGEN SCHWENK: That means they get the  
19 first call on whether to prosecute. On the ones  
20 we took the lead on, probably we were making the  
21 decision on whether to prosecute.

22                  So, when we say that in 48 times they

1 didn't prosecute, well 15 of them is probably  
2 because we were the lead. We took it. It was  
3 us.

4 So I'm -- so that's something to think  
5 about. I don't know what the answer is. But,  
6 that's my thought looking at it.

7 DR. WELL: We can do that.

8 BGEN SCHWENK: Thank you.

9 DR. WELLS: Okay. So then what we did  
10 with the next slide and the next layer of this  
11 analysis was to pick off those 22 cases.

12 Would you go back one Stayce, just  
13 real quick before we get to that?

14 So we picked off those 22 cases where  
15 the prosecution was declined or the case was  
16 never presented to the prosecutor. And these are  
17 off-installation cases. So these are all off-  
18 installation.

19 Okay, so the next slide presents those  
20 22 cases. And what we wanted to know is, what  
21 happened, if anything, with the military criminal  
22 justice processing.

1           In 11 of those 22, so half of those  
2 cases, a Judge Advocate determined that probable  
3 cause did not exist. Five, probable cause was  
4 determined to exist. And it wasn't determined to  
5 exist in six of those cases. So no probable  
6 cause.

7           Then we can see that the case was  
8 acted upon in five of those cases. And then in  
9 all five of those cases it resulted in a  
10 conviction for a sex assault. Or a conviction  
11 for multiple charges, conviction for a sex  
12 assault and for a non-sexual assault crime.

13           And so five out of the 22 went forward  
14 and resulted in some conviction within the  
15 military system. Okay.

16           Last --

17           CHAIR BASHFORD: Just before you go to  
18 the last one.

19           DR. WELLS: Yes.

20           CHAIR BASHFORD: You know, during our  
21 first Panel this morning, I know several of the  
22 Panel Members were asked did they think that

1 handing this section off to a different form of  
2 prosecution would be beneficial?

3 And this preliminary data suggests  
4 there might not be any difference. I think.  
5 Because they're just not -- they're not going  
6 forward on very many of these cases.

7 At least the ones that we saw that  
8 happened off base. I guess that was more of a  
9 comment than a question.

10 (Laughter.)

11 DR. WELLS: The last analysis then is  
12 again, with these 165 case files that were  
13 reviewed and we recorded data for, we looked at a  
14 series of bivariate analysis.

15 So we looked at a series of case  
16 characteristics to see how they were related to  
17 whether or not a Commander took action on a  
18 penetrated sexual assault complaint. So they  
19 either took action or they did not.

20 And then we wanted to look at those  
21 categories according to a host of other case  
22 characteristics. And what you have in front of

1 you there are some of the relationships that  
2 emerged from that analysis.

3 The full table of results will be made  
4 available to you if you want. It has a data  
5 appendix. And the full table is there for you to  
6 review in the future.

7 So what I've done here is just offered  
8 some examples to illustrate some of the points  
9 where we do find a relationship. So, I'm going  
10 to walk you through just a couple of these to  
11 illustrate the point. And several of these make  
12 perfect sense.

13 When a Judge Advocate determines there  
14 was probably cause, the case was more likely to  
15 result in some action on the penetrative sexual  
16 assault complaint. When the victim participated  
17 in the investigation, there was also a greater  
18 chance that there was some action on the  
19 penetrative assault sexual complaint --  
20 penetrative sexual assault complaint.

21 If the victim received a forensic  
22 sexual assault medical examination, it was more



1 likely to move forward with some action. When  
2 the victim and the subject were not intimate  
3 partners, when there was some other relationship,  
4 all those relationships combined together, there  
5 was more likely to be some action.

6 When the subject confessed, there was  
7 a much greater chance that some action was taken  
8 in the case. And then you can see the other  
9 characteristics that are there.

10 And that was the last set of analysis  
11 that we performed to take a closer look at some  
12 of the case file data.

13 BGEN SCHWENK: The Case Review Working  
14 Group will, like I said earlier, be in the  
15 business of reviewing at least 60 cases in the  
16 next couple of months so we can wrap it up in  
17 time to turn it over to Dr. Wells.

18 Anybody that's not on the Case Review  
19 Working Group and can't wait to have an  
20 opportunity to review a military criminal  
21 investigative organization investigative file,  
22 say that three times fast, is welcome to contact

1 Kate.

2 And Kate will be happy to hook you up  
3 with a case, an investigative file, and a sheet  
4 with whatever number of variables we have. So  
5 that you'll get a real chance to put your hands  
6 on it and see what it's like and do it.

7 And so let her know. But you're all  
8 welcome. Thank you.

9 MS. TAGERT: Those furloughed are  
10 welcome.

11 (Laughter.)

12 MS. TAGERT: Pizza.

13 CHAIR BASHFORD: Are there any  
14 questions from the Committee or anyone?

15 DR. SPOHN: Perhaps we could return to  
16 the question that General Schwenk asked about  
17 race and ethnicity.

18 MS. TAGERT: Yes. At this time the  
19 case review is concerned about the data that we  
20 have on race and ethnicity. Because as we found,  
21 and we've heard some testimony from Judge  
22 Advocates, race is not recorded on criminal

1 documents.

2           Although we have seen race on the  
3 MCIOs documents. They're basic -- it's broken  
4 down into white or black. And I think that the  
5 reviewers looked at other documents.

6           So, we were more granular on what  
7 someone was described as. So, if someone was --  
8 we would say Hispanic as opposed to white. Which  
9 is what the MCIOs would classify someone as.

10           So we need to figure out whether or  
11 not we need to look at the investigations to look  
12 only at race. Or whether or not we're going to  
13 rely on other documents.

14           And some of the cases which I found  
15 most helpful, the investigator asked the subject  
16 or the victim to describe what they are. Or  
17 what, you know, what they identify as.

18           And so, those cases I feel like we can  
19 rely on more. But, with the reviewers getting  
20 information on race and ethnicity from different  
21 documents, whether or not that be a DEERS  
22 application for insurance, or another criminal

1 investigation in the civilian side of the house,  
2 I just don't trust the data that we have.

3 And I don't know how to fix it yet.

4 And I hope that I have an answer for you the next  
5 time we meet.

6 CHAIR BASHFORD: We can review those  
7 cases again.

8 (Laughter.)

9 CHAIR BASHFORD: I mean, there were  
10 cases that were reviewed where just based on  
11 names alone, somebody was -- it happened in a  
12 Pacific base, and the person was clearly  
13 Polynesian descent.

14 Or American Indian descent based on  
15 surname alone. But I don't know how much you can  
16 then say, oh, this person has a Hispanic surname,  
17 let me check Hispanic box if it's not checked at  
18 the outset.

19 So, we trust Ms. Tagert will come up  
20 with a solution.

21 SGT. MARKEY: Well, and I think that  
22 kind of reflects on we've had this discussion

1 about some of the problematic issues we came  
2 across with the documentation. And the varied  
3 ways that information was documented across the  
4 services.

5 I commend the Staff for all the work  
6 they did on the case review. And we commented  
7 that they still have their hair on their heads,  
8 because this -- the way information was being  
9 documented was not consistent.

10 There were not standards. In  
11 something as simple as race, you would think we  
12 would be able to come up with a standard way of  
13 documenting that.

14 And that even became problematic. So,  
15 a lot of the data that we collected, or didn't --  
16 wasn't able to collect, it was because it just  
17 wasn't there. It was inconsistent.

18 And I think you will probably hear me  
19 repeatedly say that inconsistency creates  
20 problems with being accurate and transparent with  
21 how you report. And what is actually going on  
22 within the military.

1                   And so I think that's one of the  
2                   issues that we can glean out of this case review.  
3                   Is how that needs to be addressed.

4                   CHAIR BASHFORD:   And Ms. Carson, I  
5                   believe, we had -- there was an appendix to  
6                   something that we had gotten about going forward.  
7                   What they're going to be collecting.

8                   Which had much more significant  
9                   breakdowns.   Pacific Islander, Native American, -  
10                  -

11                  MS. CARSON:   We certainly can address  
12                  that issue for their systems going forward.

13                  CHAIR BASHFORD:   Going forward.   Yeah.

14                  MS. CARSON:   Have an Article 140A  
15                  requirement.   We just have to figure out how to  
16                  apply it and that's --

17                  CHAIR BASHFORD:   Any other questions?  
18                  Okay.   We're scheduled for a break, but I think  
19                  since we just got back, we can forge ahead.

20                  COLONEL WEIR:   I think I'll move to  
21                  the big table so it's easier for you all to hear  
22                  me.   And have this discussion on the proposed

1 Findings and recommendations.

2 Okay. What I'd like to do is start  
3 with Chapter 1, which we went through yesterday  
4 at an administrative session.

5 And basically that session was to make  
6 changes in the way stuff was drafted. There was  
7 no discussion on the Findings or discussion on  
8 proposals or recommendations, because that  
9 requires a public hearing.

10 So what we did yesterday was go  
11 through the Chapter. And make sure it was clear  
12 to the Committee Members what we were trying to  
13 say as a Staff when we draft that.

14 So what we're going to do today is  
15 there were points where you all have to make  
16 decisions and deliberate on the language you want  
17 to incorporate into the report. And then we will  
18 vote when appropriate and tackle it that way.

19 So, the first issue that we saw was in  
20 Page 8, if you can flip to -- and Ms. Tokash  
21 yesterday mentioned that the sentence reads, over  
22 the past decade media -- it's the first sentence

1 in that -- on that page.

2 For the past decade, media reports  
3 have criticized the Military and Commanders for  
4 insufficient action against alleged offenders in  
5 sexual assault cases. The Staff had decided that  
6 we were going to take out Commanders and just  
7 leave it the Military for insufficient action  
8 against alleged offenders in sexual assault  
9 cases.

10 She made a point, a valid point that  
11 we speak about Commanders. And that Commanders  
12 have been the focus and Commander's decisions.

13 So what I need you as a Committee to  
14 do, is to determine whether that sentence should  
15 remain the way it was originally drafted. Or  
16 take out the word Commanders.

17 And that's open for discussion.

18 CHAIR BASHFORD: I just would take out  
19 the media reports have criticized. And start  
20 with the Military. And if we decided Commanders,  
21 has been criticized.

22 I really don't think the fact that the



1 media has done it. They've been criticized by  
2 more than just the media.

3 COLONEL WEIR: Okay.

4 BGEN SCHWENK: I would note that on  
5 the Military and Commanders issue, Commanders are  
6 part of the Military. So, it's not really  
7 Military and Commanders. It's Military including  
8 Commanders.

9 And the criticism, although I think  
10 Meghan's point was that the sentences that follow  
11 that are particularly focused on decisions by  
12 Commanders.

13 I think the criticism in the first  
14 sentence is broader than just Commanders. It's  
15 Military-wide.

16 So, I would either go the Military or  
17 go the Military including Commanders. But, I  
18 wouldn't do Military and Commanders.

19 CHAIR BASHFORD: Including sounds  
20 good.

21 COLONEL WEIR: So, General Schwenk has  
22 made a suggestion. Over the past decade the

1 Military has been criticized for taking  
2 insufficient action.

3 So, it would say, Military and --  
4 Military including Commanders in that sentence.

5 CHAIR BASHFORD: So if we pass that.

6 BGEN SCHWENK: Right.

7 SGT. MARKEY: And continue with the  
8 rest of that paragraph.

9 COLONEL WEIR: Yes.

10 SGT. MARKEY: Without -- okay.

11 COLONEL WEIR: Anyone opposed to that  
12 correction?

13 (No response.)

14 COLONEL WEIR: Seeing or hearing no  
15 opposition, we'll move onto the next one.

16 If we turn to Page Ten. And this is  
17 --

18 MS. GENTILE LONG: Steve, this is Jen  
19 Long from the Train. Can you hear me?

20 COLONEL WEIR: Yes.

21 MS. GENTILE LONG: Sorry. I joined --  
22 I just wanted to go back too alleged. I thought

1 there was a discussion to revisit wording.

2 It occurs in that first sentence.

3 Which is why I wanted to get to it.

4 COLONEL WEIR: Yes. We're going to  
5 remove the word alleged. I think we had it in  
6 there, I think, 70 times.

7 So we're going to remove alleged.

8 MS. GENTILE LONG: Thanks so much.

9 COLONEL WEIR: Okay. The next issue  
10 that we discussed yesterday or we talked about  
11 and needed some decision by the Committee today,  
12 was Page 10 through 13.

13 The common fact patterns in which  
14 reasonable -- which it was reasonable that  
15 charges were not preferred for the penetrative  
16 sexual assault offense.

17 Did -- the issue became that maybe it  
18 was focused too much on the victim. And was  
19 there a way to either -- to shorten the  
20 paragraphs and just do a list of items that were  
21 found that were consistent throughout?

22 Or did we need to have this section at

1 all in the report? And so that's where we're at  
2 for this decision point.

3 SGT. MARKEY: And I had raised that  
4 point. It's almost two pages. And in each one  
5 of those paragraphs, I'm not disputing that that  
6 was the information and facts that we, during the  
7 case file review, saw and documented.

8 But, each paragraph has the optics of  
9 starting out with the victim x, y, and z. The  
10 victim x, y, and z.

11 I think it may be more appropriate to  
12 maybe take those five or six paragraphs and  
13 create a shorter synopsis of the data that we  
14 actually pulled from that. Which we can  
15 attribute to some of the factors that we saw in  
16 the review pertaining to victims of these crimes.

17 I just -- I just think the length to  
18 which it went to, was greater then I think was  
19 necessary.

20 DR. MARKOWITZ: I would absolutely Mr.  
21 Markey on that. I agree 100 percent on that.

22 CHAIR BASHFORD: I took a look at how

1 you would do it. Frankly, I couldn't come up  
2 with any way of just sort of compressing it other  
3 than the nearly half of the cases were  
4 declinations.

5 I think even saying some of the data  
6 we've already seen about the numbers or the  
7 percentages of people that reported being  
8 impaired, again looks as though you're pointing  
9 the finger. Unless you can tie it into an --  
10 which often results in the ability to provide  
11 detail or provide information to the  
12 investigators.

13 But, I -- it's hard to -- I would  
14 either take it out. Or just really, really leave  
15 it to the declination and maybe -- maybe  
16 impaired.

17 DR. MARKOWITZ: Yeah. I agree. So,  
18 I -- I don't know why I'm holding this down. I  
19 would actually be in favor of removing it all  
20 together.

21 If we are going to keep it in, I think  
22 a very -- the brief synopsis that you're talking

1 about would be appropriate.

2 It does feel -- it does feel like this  
3 is a lot.

4 COLONEL WEIR: The information about  
5 declination and impairment is covered in other  
6 sections of the data. So, to me it wouldn't make  
7 sense just to have a paragraph about declination  
8 and impairment in this section when it's already  
9 covered, if that's all that's going to be in it.

10 It would make sense to remove it  
11 completely. And then that information would be  
12 covered later on in other parts of the -- of  
13 this.

14 Because -- you know, as the Staff  
15 reviewed the cases, we tried to come up with a  
16 written picture of how these cases, the facts and  
17 situations behind the cases that led to some of  
18 the results that happened.

19 And to give you guys -- to give the  
20 Committee a better site picture of what was going  
21 on. But I completely understand if.

22 You know, that was our attempt to make

1       sure that once reading this, you would  
2       understand. Okay, I understand how we got to a  
3       no action taken on this case.

4               DR. SPOHN: Except this is on -- this  
5       section refers specifically to the cases in which  
6       the Case Review Working Group deemed the action  
7       in the case reasonable.

8               Which is not covered in any other --  
9       was not covered in the data that was looked at  
10      thus far.

11              And so it seems to me that these  
12      conclusions need to be included. But perhaps all  
13      of the explanatory material, which is really sort  
14      of pointing a finger at the victim, can be  
15      removed.

16              And we can just state, 45 percent  
17      involved cases where the victim declined to  
18      participate. Whatever the percentage is where  
19      the victim was impaired as a result of drinking  
20      excessive amounts of alcohol.

21              And, you know, remove some of the  
22      editorializing.

1                   CHAIR BASHFORD:  If the Committee  
2                   found it reasonable that charges were not  
3                   preferred in the -- nearly half of the cases  
4                   where the victim -- where the victim declined to  
5                   go forward.  Something like that?

6                   But I think Dr. Spohn's right.  That  
7                   we are re -- we'll be doing something slightly  
8                   different.  We're explaining why we felt it was  
9                   reasonably to work with this.

10                  BGEN SCHWENK:  I mean, the way I look  
11                  at it when I reviewed them is, every case was  
12                  different.  You know, and so whether the  
13                  Commander's decision, the initial disposition  
14                  decision was reasonable or not, depended on  
15                  whatever was in that case file.

16                  And I either felt it was reasonable or  
17                  unreasonable.  So, then to me if we're going to  
18                  say well, these are the kinds of cases that were  
19                  reasonable when it's 90 something percent that we  
20                  determined were reasonable.  And this small  
21                  percentage over there becomes all but impossible.

22                  And it -- it's almost like we're



1       trying to take what factors correlate to a  
2       preferral decision or a no action decision, and  
3       put it into our analysis of reasonableness.

4               The reasonableness one, like the first  
5       Panel told us this morning, every case is  
6       different. And that's how I looked at it. I  
7       think it's all --it's really hard to say to the  
8       Staff, try to figure out 45 percent of the cases  
9       that were, you know, impaired.

10              I don't know what that means,  
11       unreasonableness. Because I'm sure in the  
12       unreasonableness there were impaired cases also.

13              You know, so I would just take it out.  
14       And just talk about the reasonableness decision  
15       itself. And what we did. How we did it. Here's  
16       what we came up with.

17              And people are entitled to take it for  
18       whatever they want to take it for. And then I  
19       would save the -- trying to figure out what  
20       factors in a given case might predict a given  
21       outcome, preferral or no action or whatever.

22              Save that for when we've done 2055

1 cases and we have a bigger database to look at.  
2 Those are my thoughts.

3 DR. SPOHN: That's a really good  
4 point. And something I hadn't thought about. Is  
5 that, I mean, 93 percent of these cases, we said  
6 that they were reasonable.

7 So really you're talking about the  
8 fact patterns in all of the cases.

9 CHAIR BASHFORD: So, if you were to  
10 remove -- if you were to remove number one, both  
11 one and bullet two. And then jump to the  
12 discussion on 14.

13 COLONEL WEIR: Um-hum. So what --  
14 what we'll -- I think what we would do is remove  
15 one, two, three, four, --

16 CHAIR BASHFORD: The start.

17 COLONEL WEIR: Around start.

18 CHAIR BASHFORD: The bold one on ten.  
19 And move everything --

20 COLONEL WEIR: Yeah. There were five.  
21 So it would be number one on Page 11. Number two  
22 on Page 11, because that once again talks about.

1 And then we go to Page 12, that talks about  
2 number three.

3 Another fact pattern in common, when  
4 the victim's description of the sexual encounter  
5 does not meet the elements of penetrative sexual  
6 -- so once again, that would be --

7 BGEN SCHWENK: Yeah. We're talking  
8 about -- go back to Page Ten.

9 CHAIR BASHFORD: Cross everything out  
10 underneath the charts.

11 BGEN SCHWENK: And then we have right  
12 under the chart, bold number one.

13 COLONEL WEIR: Um-hum.

14 BGEN SCHWENK: Kill all of bold number  
15 one and bold number two. And that leaves us --  
16 that takes us to Page 14. That's D, discussion  
17 which we'll agree to re-label as something else.

18 CHAIR BASHFORD: Yeah.

19 BGEN SCHWENK: And then do a  
20 discussion of how we did reasonableness.

21 CHAIR BASHFORD: Yeah.

22 COLONEL WEIR: Okay. That's the --

1                   BGEN SCHWENK: That was, I think, what  
2 you were saying, right Martha?

3                   DR. SPOHN: Agreed.

4                   COLONEL WEIR: Is everyone in favor of  
5 making that change?

6                   ALL: Yes.

7                   COLONEL WEIR: Hearing no noes, okay.  
8 So that's what we'll do.

9                   CHAIR BASHFORD: Great. As far as I'm  
10 concerned, you can still call it -- you can still  
11 call it discussion.

12                   BGEN SCHWENK: And if it doesn't turn  
13 out right, it's Meghan's fault.

14                   (Laughter.)

15                   SGT. MARKEY: Well, and Colonel, I  
16 under -- I completely understand the principal.  
17 This -- these are the fact patterns in the case  
18 we saw that the Command also had to -- had looked  
19 at to make those decisions.

20                   And I think part of the Committee is  
21 looking at what information did they have to make  
22 those decisions? And with our professional

1 backgrounds, we looked at that same information.

2 And so we were able to compare their  
3 decision with the same information. And what --  
4 so the question I would ask is, well, what  
5 information was there that supported that  
6 decision to prefer or not prefer.

7 And so, I agree with taking it out.  
8 But I do think it's important information to  
9 support the Committee and the Subcommittee's  
10 working team about how they were able to come to  
11 those percentage of agreements with what the  
12 Commander decided to do.

13 So, I don't know if that would be in  
14 an appendix. Or how that might be described.

15 COLONEL WEIR: I think that if we  
16 looked at the -- and we discuss it a little bit  
17 in the methodology and when we discuss the 21  
18 page data information checklist, and the 255 data  
19 points that, you know, we could say something  
20 about it.

21 And that's what we base -- that's what  
22 the Committee and the Staff based their

1 reasonable decision on, were those data points.  
2 I'm not sure if that gets you to where you.

3 CHAIR BASHFORD: And I'm not sure we  
4 based on our decision though on the data points.  
5 Because we collected a lot of data points. Age,  
6 --

7 BGEN SCHWENK: That aren't really  
8 relevant.

9 CHAIR BASHFORD: That aren't really  
10 relevant to the overall. I think it's really we  
11 looked at the overall investigative file only if  
12 it was available to us.

13 And just used our judgement to come  
14 down as a reasonable or unreasonable, no matter  
15 what the underlying decision -- Command decision  
16 had been.

17 But, I think if you link it to the  
18 data points, you're in a morass.

19 SGT. MARKEY: And I think that the --  
20 I think the idea that the Commander looked at  
21 those same investigative files to make the same  
22 decision.

1           So we were, in theory, we were looking  
2 at all the entire case file with the same  
3 information. And so our conclusions in the  
4 majority of the cases agreed with the Commander's  
5 conclusion, based on some commonality factors.

6           So the question is, whether we want to  
7 include those types of commonalities of how these  
8 cases were presented and the information in the  
9 files.

10           And so I just think if the question  
11 would come up, well, what did you base your  
12 decision to agree with the Commander on? And  
13 what were some of the things that were common  
14 between the Commander's decision and your  
15 decision?

16           I think that would be the only -- the  
17 only issue that might come up questioning the  
18 Committee's conclusions as well.

19           But, I just think the way it's  
20 documented now, is something that we all agree  
21 probably should not be at this section. So,  
22 maybe table and think about how we might else --

1 if that -- if that seems to be an issue of  
2 concern.

3 BGEN SCHWENK: I mean, it seems to me  
4 that's worth talking about in the CRWG when we  
5 get together the next time. Because we're --  
6 that issue's going to come up bigger when we do  
7 next year's report and we have all 2055 cases  
8 that we're talking about.

9 So, why don't we take a shot at the  
10 CRWG of talking about it. And see how we might  
11 describe it in the interim period.

12 So that when we come back in October  
13 and get the briefing from Dr. Wells on all the  
14 numbers, the CRWG can also say, and we've been  
15 thinking about how to -- how to address this.  
16 And here are our thoughts. Whatever they maybe  
17 at that point.

18 Is that okay?

19 SGT. MARKEY: Yeah. That's fine with  
20 me.

21 BGEN SCHWENK: Okay.

22 COLONEL WEIR: So as it stands right



1 now, we're deleting and we're picking up with  
2 discussion.

3 CHAIR BASHFORD: Correct.

4 COLONEL WEIR: Okay. In the  
5 discussion section, does the Committee want to  
6 discuss civilian no prosecution rates? Or make  
7 any comments in the report on the 80 percent of  
8 cases in which no charges were preferred for the  
9 penetrative sexual assault offense?

10 CHAIR BASHFORD: I'm not -- I'm not  
11 sure we have enough civilian data to make that --  
12 to make that determination.

13 I know what I suspect. But that's not  
14 -- shouldn't go into a report.

15 COLONEL WEIR: And I would say that  
16 making it, like Dr. -- or is that Doctor/General,  
17 General Schwenk mentioned --

18 BGEN SCHWENK: I'm not smart enough to  
19 be both.

20 COLONEL WEIR: That might be a better  
21 -- the better opportunity to make comments on  
22 that 80 percent would be after we've done the

1 2000 cases. And we've got more data.

2 And so it might be premature to add  
3 anything into the report at this point based upon  
4 the size.

5 DR. SPOHN: I also don't think that we  
6 know what decision in the civilian world to  
7 compare it to.

8 CHAIR BASHFORD: Right.

9 COLONEL WEIR: Right.

10 DR. SPOHN: I mean, is it arrest?  
11 It's probably not presentation to the prosecutor  
12 for a filing decision.

13 So, what would be the comparable point  
14 of comparison? I don't think there --

15 COLONEL WEIR: I think yesterday we  
16 discussed it's tough to compare the Military  
17 system to the civilian system. Because we  
18 investigate every single allegation of sexual  
19 assault.

20 And it goes up for a Command decision.  
21 We don't necessarily know how all those civilian  
22 jurisdictions work.

1                   And so trying -- someone could say oh,  
2 well they don't do 80 percent either. So you're  
3 just as bad as the civilians.

4                   And so, that's not our intent.  
5 Because I think we do a much better job since  
6 every single sexual assault case gets  
7 investigated and it goes to a lawyer for review.  
8 And then to a Commander for final decision.

9                   And that it's not the same correlation  
10 in the civilian world. A detective can't stop an  
11 investigation and it never makes its way to a  
12 District Attorney for a decision.

13                   And so --

14                   BGEN SCHWENK: But we haven't looked  
15 at the issue. We haven't done any research. We  
16 just shouldn't address it.

17                   COLONEL WEIR: Okay.

18                   CHAIR BASHFORD: So we should delete  
19 that it -- we should delete the bolded, the  
20 yellowed paragraph. I believe the paragraph  
21 right above it as well.

22                   COLONEL WEIR: Yes. On page 15, the

1 Staff suggested revising Finding onto state, on  
2 the basis of its review of 165 Military  
3 investigative cases, the DAC-IPAD finds that  
4 Commander's disposition of penetrative sexual  
5 assault complaints are reasonable in a percentage  
6 of cases.

7 And if we can -- the proposed Finding  
8 is on the screen.

9 CHAIR BASHFORD: Just remind me why  
10 it's still XX?

11 BGEN SCHWENK: Well, it was 93. But  
12 there were five cases that might have flipped.  
13 Or two cases that might have flipped.

14 COLONEL WEIR: It was 90 -- it was the  
15 90 -- it was 93 percent of cases. And then we  
16 discovered because of due diligence of this great  
17 Staff I have, that one of those cases was mis-  
18 binned as a penetrative sexual assault case. And  
19 it wasn't.

20 And the other case is we discovered,  
21 is pending court martial. So, that --

22 BGEN SCHWENK: It was down as a no

1 action.

2 COLONEL WEIR: Right. And so they've  
3 taken action on that case. So the percentage is  
4 going to be somewhere in the neighborhood of 94.

5 So the percent's not really changing.  
6 But those cases aren't cases that should be  
7 looked at as part of the sample.

8 CHAIR BASHFORD: Got it.

9 BGEN SCHWENK: I would say what the --  
10 what the CRWG is consistently, we've tried  
11 consistently to say is, for the preamble  
12 beginning clause there, based solely on its  
13 review of Military Law Enforcement and  
14 investigative case files.

15 Because that's all we had is the Mil  
16 -- the criminal investigative case file. The  
17 Commander had that. But the Commander might have  
18 had other stuff we don't have, because it's not  
19 in the file.

20 So we've always said based solely on  
21 its review of. So, I would recommend we change  
22 that. So it tries to make that clear.

1                   CHAIR BASHFORD: The other thing, and  
2                   it may be nitpicking, but the DAC-IPAD didn't do  
3                   the review. The Case Review Working Group is an  
4                   arm of the DAC-IPAD.

5                   I don't know if you want -- if it's  
6                   too wordy to say the DAC-IPAD working through the  
7                   Case Review Working Group found.

8                   BGEN SCHWENK: Congress did that on  
9                   the collateral misconduct. The Secretary of  
10                  Defense acting through the DAC-IPAD. We can do  
11                  the same thing here.

12                  CHAIR BASHFORD: I just -- I want --  
13                  I don't want it to get so wordy that it loses its  
14                  -- loses its meaning.

15                  DR. SPOHN: Well, could we say based  
16                  solely on the case review, Working Group's review  
17                  of Military Law Enforcement investigative files,  
18                  the DAC-IPAD finds?

19                  HON. GRIMM: It's the finding of the  
20                  whole Committee.

21                  DR. SPOHN: Right. So you will  
22                  recalculate that figure?

1 COLONEL WEIR: Right.

2 DR. SPOHN: And include the  
3 appropriate figure in the final report.

4 MS. CARSON: Can I ask a question of  
5 clarification? Could you take out solely? Or is  
6 that still in?

7 BGEN SCHWENK: It's got to be in, I  
8 think. I think it's got to be -- my vote is,  
9 keep it in.

10 MS. CARSON: Do you want to add --

11 BGEN SCHWENK: Because that's all we  
12 had.

13 MS. CARSON: That other documents  
14 reviewed from the DAC-IPAD court-martial database  
15 and individual documents requested from the MCIO?

16 BGEN SCHWENK: What was that?

17 MS. CARSON: Those were documents that  
18 were not in the case file as provided to us.

19 MS. TAGERT: So are these for the  
20 preferred cases where we --

21 BGEN SCHWENK: Oh, where you found  
22 other stuff later on. Yeah.

1 MS. TAGERT: And that's an addition  
2 for accuracy purposes. We reached back to the  
3 Services to provide us with command disposition  
4 reports that were not necessarily in the  
5 investigative case file.

6 BGEN SCHWENK: I mean, clearly  
7 anything that came in time after the initial  
8 disposition decision didn't factor into a  
9 reasonableness determination of that decision.

10 So, it would have to be -- the only  
11 thing that we would have had extraneous would be  
12 a document that said the Commander made this  
13 initial disposition decision, and here's why.  
14 Right?

15 Is that the only document we're really  
16 talking about? That wasn't in the criminal  
17 investigative case file that would have been  
18 relevant.

19 MS. TAGERT: As well as any preferred  
20 document that the Data Group uses. So, as the  
21 SJA assigns the charge sheet --

22 BGEN SCHWENK: But see the SJA device



1 comes way down the path. If you start -- if any  
2 of us use that as a basis for whether something  
3 was reasonable or not, then we're not -- then  
4 we're talking about something that happened later  
5 on.

6 MS. TAGERT: Um-hum.

7 BGEN SCHWENK: Why would we be looking  
8 at something that happened months after the  
9 preferral decision that we're supposed to be  
10 reviewing?

11 MS. TAGERT: We looked at -- people  
12 took it into account when making a decision of  
13 whether or not to -- those -- there were  
14 additional doc -- there were additional questions  
15 that relate to cases that actually were  
16 preferred.

17 BGEN SCHWENK: Right. That has to do  
18 with the data stuff that, you know, the data  
19 points that we had. But it doesn't have to do  
20 with the reasonableness decision, because that  
21 was based on at the time the Commander made the  
22 decision for preferral or no action.

1 Documents relevant to that are those  
2 that date that date or before. Afterwards, I  
3 don't know.

4 I guess we'll need -- I don't know.

5 COLONEL WEIR: So the wording -- help  
6 me out here. Based solely on its review of  
7 Military Law Enforcement investigative case  
8 files, the DAC-IPAD finds the Commander's  
9 dispositions of penetrative sexual assault  
10 allegations are reasonable in a percentage of the  
11 cases, which will somewhere be 94 percent.

12 Now, that language was -- now did we  
13 want to incorporate or did you want to  
14 incorporate the Case Review Working Group or the  
15 DAC-IPAD and then somehow get Case Review?

16 I mean, it's not going to be too  
17 wordy. And it's not going to lose its -- do we  
18 want to signify that it was the Case Review  
19 Working Group that reviewed those cases?

20 DR. SPOHN: And the Staff.

21 COLONEL WEIR: Yeah. And the Staff  
22 and --

1 CHAIR BASHFORD: Why don't we just say  
2 based on the review? I think if we say based  
3 solely on this, it sounds weaselly.

4 HON. GRIMM: So, if we're saying it's  
5 based upon that review, then it's pretty clear  
6 what it's based on.

7 COLONEL WEIR: Right.

8 HON. GRIMM: So, that probably  
9 communicates the message.

10 COLONEL WEIR: Yeah. That's fine with  
11 me.

12 HON. GRIMM: Because clearly he has  
13 the means to lobby this.

14 COLONEL WEIR: Okay. So, based on the  
15 review of Military Law Enforcement to investigate  
16 the case files, the DAC-IPAD finds that  
17 Commander's dispositions of penetrative sexual  
18 assault allegations are reasonable in a  
19 percentage of the cases.

20 CHAIR BASHFORD: Complaints.

21 DR. SPOHN: Complaints, um-hum.

22 BGEN SCHWENK: Allegations goes to

1 complaints.

2 COLONEL WEIR: Oh, yes. Yes, I'm  
3 sorry.

4 BGEN SCHWENK: And dispensed with.  
5 You see you're too old, you're back to  
6 allegations and then print. We've gone to a new  
7 world on that.

8 COLONEL WEIR: Is there --

9 CHAIR BASHFORD: Any further -- any  
10 further discussion?

11 (No response.)

12 CHAIR BASHFORD: I would ask the  
13 Committee to vote Finding One as amended.

14 BGEN SCHWENK: Second.

15 COLONEL WEIR: Yeah. And does anyone  
16 need me to read it as I think I understand it  
17 now?

18 CHAIR BASHFORD: We can vote.

19 COLONEL WEIR: Are we good?

20 CHAIR BASHFORD: Okay. It's been  
21 moved and seconded. All in favor?

22 (Chorus of ayes.)

1 CHAIR BASHFORD: Any opposed?

2 (No response.)

3 CHAIR BASHFORD: It passes. There was  
4 one other thing that I just wanted to draw to  
5 your attention to that we changed yesterday,  
6 footnote 144 on 15.

7 Where it says, this report will not  
8 address the race or ethnicity. We're going to  
9 change that to cannot.

10 Because we simply don't have the data.  
11 Will not sound like it's voluntary.

12 BGEN SCHWENK: Right. Um-hum.

13 COLONEL WEIR: The Staff had a -- this  
14 is on Page 15 as well. It was a Finding Number  
15 Two.

16 And this is just a recommendation.  
17 Staff suggests adding Finding Two, which would  
18 state on the basis of its review of 165 Military  
19 investigative cases, the Committee did not  
20 identify any systematic concerns with the  
21 Commanders exercising their discretion when  
22 disposing of penetrative sexual assault cases.

1                   Now what we mean by that is at this  
2                   juncture, looking at 165 --

3                   BGEN SCHWENK: It's on the board up  
4                   there if you want to look at it.

5                   DR. SPOHN: That's not it.

6                   COLONEL WEIR: No.

7                   BGEN SCHWENK: Oh, that's not it? Oh,  
8                   okay. It's not on the board up there.

9                   DR. SPOHN: Could you read it again?

10                  COLONEL WEIR: On the basis of its  
11                  review or based on the review of 165 Military  
12                  investigative cases, the Committee did not  
13                  identify any systematic concerns with Commanders  
14                  exercise of their discretion when disposing of  
15                  penetrative sexual assault cases.

16                  So the thought process behind that is,  
17                  we've looked at 165 cases, and so far, based upon  
18                  that sample, the Committee has not -- has not  
19                  looked, or have not seen any problems with  
20                  Commanders making these decisions.

21                  DR. SPOHN: How is that different from  
22                  the Finding One?

1                   BGEN SCHWENK: Yeah. It's like  
2 written for Marines, you know.

3                   (Laughter.)

4                   BGEN SCHWENK: It's obvious in Number  
5 One. But just to be sure you didn't miss it, you  
6 picked it up in this one.

7                   COLONEL WEIR: I mean, it's very  
8 similar.

9                   BGEN SCHWENK: Yeah. I don't think  
10 it's needed.

11                  DR. SPOHN: I don't think it's needed.

12                  COLONEL WEIR: Okay.

13                  DR. SPOHN: Yes.

14                  COLONEL WEIR: Great. Finding Two.

15                  BGEN SCHWENK: Page? Page 25. If  
16 that's the right Finding Two.

17                  COLONEL WEIR: Yes.

18                  BGEN SCHWENK: Oh, okay.

19                  COLONEL WEIR: Military Investigators  
20 testify that they are required to follow a  
21 checklist of investigative actions regardless of  
22 the facts of a particular case. And that they

1 have little discretion to determine which  
2 investigative actions provide value in a case.

3 That was some of the testimony that  
4 ties their investigation to a checklist. I think  
5 that we have noted in the review of cases that  
6 you will see where an Investigator has gone out  
7 to a hotel where an alleged sexual assault  
8 occurred, or a compliant of a sexual assault  
9 occurred five years ago.

10 And they go out to the hotel that's  
11 been renovated, remodeled, the name has changed,  
12 and they take pictures of the room. That's kind  
13 of one of the, you know, that's a hypothetical of  
14 some of the stuff that's -- that kind of goes to  
15 this finding.

16 And this Investigator discretion, I  
17 think from the testimony that we've heard from  
18 investigators that the Committee feels that they  
19 ought to have, I think Chair Bashford, you  
20 mentioned, you know, in one of your comments  
21 that, you know, they're trained Investigators.

22 Just turn them loose and let them



1 investigate a case. And not be beholden to a  
2 checklist that makes little or no sense.

3 And a lot of it's not even relevant or  
4 admissible in a court martial.

5 CHAIR BASHFORD: Not every step of  
6 that checklist needs to be followed in every  
7 particular case, I think is what we're getting at  
8 here.

9 HON. GRIMM: Right.

10 CHAIR BASHFORD: And that they should  
11 be able to determine which of these investigative  
12 steps are appropriate under this particular case.

13 HON. GRIMM: Yes. A checklist may be  
14 very helpful. But, in a certain -- it may  
15 suggest certain things that could be done that  
16 make sense in one case but not another.

17 But to suggest that they don't need a  
18 checklist and every Investigator should sort of  
19 just let their own investigative GPS tell them  
20 how to go, doesn't seem like a wise thing to do.

21 HON. WALTON: And the concern with a  
22 checklist also is you don't want to give the

1 impression that all you need to do is what's on  
2 the checklist.

3 HON. GRIMM: Right. So it can be  
4 useful. But it should not be either considered  
5 all that should be done, or everything on it  
6 should be done in every case.

7 I think that's the point that we were  
8 getting.

9 CHAIR BASHFORD: Well, what if we  
10 added in Finding Two, they have little discretion  
11 to determine which investigative actions in the  
12 checklist. So it's clear we're not saying  
13 jettison the checklist.

14 HON. GRIMM: Or actions not on the  
15 checklist. Which is lots of stuff.

16 CHAIR BASHFORD: Any further  
17 discussion of Finding Two?

18 (No response.)

19 CHAIR BASHFORD: As amended then I  
20 propose -- put it to a vote. Second?

21 BGEN SCHWENK: Second.

22 CHAIR BASHFORD: All in favor?

1 (Chorus of ayes.)

2 CHAIR BASHFORD: Opposed?

3 (No response.)

4 CHAIR BASHFORD: Okay. That passes.

5 COLONEL WEIR: Finding Three, in the  
6 course of conducting case reviews, the Committee  
7 found that nearly all case files include the same  
8 series of investigative actions, including  
9 photographs of the incident locations and  
10 extensive interviews of coworkers and other  
11 character witnesses, whether relevant to the  
12 specific case or not.

13 CHAIR BASHFORD: That's kind of just  
14 expanding on Finding Two.

15 DR. MARKOWITZ: Exactly right.

16 CHAIR BASHFORD: Do we -- is it  
17 worthwhile to have a separate Finding on that?

18 DR. MARKOWITZ: I mean, do we have a  
19 feeling about it? Do we feel some way about  
20 that?

21 BGEN SCHWENK: What two said.

22 DR. MARKOWITZ: Right.

1           BGEN SCHWENK: You know, if it doesn't  
2 add any value to the investigation, don't spend  
3 the time. So I'd say Three's redundant with Two.

4           DR. MARKOWITZ: Right. Because Three  
5 does just seem to restate without any --

6           CHAIR BASHFORD: I think the addition,  
7 but I don't know if it needs it, is --

8           DR. MARKOWITZ: -- without any  
9 qualification.

10          CHAIR BASHFORD: Is the coworkers and  
11 the characters --

12          DR. MARKOWITZ: Right.

13          CHAIR BASHFORD: And the family and  
14 all of that. But, I think it's -- I agree, I  
15 think it's stated in Finding Two.

16          DR. MARKOWITZ: Yeah.

17          MS. GENTILE LONG: Chair Bashford,  
18 this is Jennifer Long. Do you think though,  
19 because I remember the things directly related to  
20 those pages of interviews basically getting at  
21 the character of the victim in many cases.

22          CHAIR BASHFORD: Uh-huh.

1 MS. GENTILE LONG: Or versus the  
2 accused. And I'm wondering if the basis to  
3 amend, to bring that up. So that it is  
4 represented or reflected.

5 If you're going to remove Finding  
6 Three.

7 COLONEL WEIR: I -- what Ms. Long is  
8 talking about, is if you remember in some of  
9 these investigations that the Investigat -- the  
10 suspect or subject of the investigation is 20  
11 years old.

12 The Investigator goes back and finds  
13 his high school girlfriend that he took to the  
14 prom, and asked the question, is he a good guy?  
15 Is he a bad guy? Did you -- did he ever sexually  
16 assault you?

17 And you see that going through. Or  
18 the question is to a fellow Airmen or Soldiers,  
19 how is so and so when she's drinking? How is he  
20 when he's drinking?

21 More character issue questions that  
22 aren't relevant. You're not going to be able to

1 get that in most cases, admitted into court  
2 during the trial.

3 And what it seems to do is it -- you  
4 have a victim set of friends and then you have  
5 the accused or the suspect set of friends that  
6 are now giving opposite opinions on what kind of  
7 individual this person is.

8 HON. GRIMM: Well, wait a minute.  
9 That's just not accurate. Because there are  
10 instances when the general prohibition against  
11 character evidence does not apply.

12 And so I think it -- it is -- we  
13 should be concerned about trying to zero in, in a  
14 very narrow sense on some aspect of an  
15 investigation.

16 It's up to the po -- it's up to JAG to  
17 decide whether it's relevant and whether it's  
18 going to be admitted or not.

19 While in general character evidence is  
20 not allowed in, you have a significant number of  
21 exceptions. And they include, in a criminal  
22 case, defendant is allowed to introduce pertinent

1 character evidence of the defendant and in some  
2 instances, with certain restrictions under the  
3 Rape Shield Rule, the victim.

4 So to suggest that it's improper for  
5 them to try to find out through investigation  
6 that maybe relevant for example, to consent, I  
7 think is a dangerous thing to suggest.

8 COLONEL WEIR: So I think what the  
9 discussion is, do we need Finding Three?

10 CHAIR BASHFORD: I would say we don't.

11 HON. GRIMM: I think we covered it in  
12 the first one about the checklist is helpful, but  
13 not wholly written. And there are some things  
14 that are not on the checklist you might want to  
15 do.

16 CHAIR BASHFORD: So, is everybody in  
17 agreement that we'll ditch Finding Number Three?

18 (Chorus of yeses.)

19 CHAIR BASHFORD: Yes. Okay. It's  
20 gone.

21 COLONEL WEIR: All right. Finding  
22 Four.

1 DR. SPOHN: Would it be possible to  
2 remove the word appropriately?

3 DR. MARKOWITZ: Which word?

4 DR. SPOHN: Appropriately.

5 HON. GRIMM: Under Four, the first  
6 line.

7 DR. MARKOWITZ: Appropriately.

8 COLONEL WEIR: Anyone object to the  
9 removal of the word appropriately?

10 CHAIR BASHFORD: I understand what  
11 you're saying, because we found that the vast  
12 majority of the decisions were appropriate. But  
13 it just -- it does sort of jump out there a  
14 little bit.

15 DR. SPOHN: Like a value judgement,  
16 so.

17 HON. GRIMM: Right. A  
18 characterization.

19 DR. SPOHN: Um-hum.

20 COLONEL WEIR: No objection to  
21 appropriately being removed.

22 CHAIR BASHFORD: With that removal



1 then, I move to find Finding Four, as revised,  
2 adopted.

3 HON. GRIMM: Second.

4 CHAIR BASHFORD: All in favor?

5 (Chorus of ayes.)

6 CHAIR BASHFORD: Anyone opposed?

7 (No response.)

8 CHAIR BASHFORD: Next.

9 COLONEL WEIR: The assessment that the  
10 Staff has, with your concurrence, the Committee  
11 will continue to monitor the important and  
12 problematic issues identified with Investigator  
13 discretion.

14 I think that goes to the point that  
15 we're going to be looking at a lot more cases.  
16 And we'll be able to come back at the end of  
17 those cases with a better overall understanding  
18 with two thousand cases.

19 MS. GALLAGHER: And, if I may add, one  
20 of the things that we were talking about with  
21 regards to the assessment, was whether or not to  
22 add in the lengthy investigation as something

1 that we could continue to monitor.

2 Because it's not -- the findings that  
3 it's not otherwise addressed as an assessment.

4 CHAIR BASHFORD: Yeah. I think if we  
5 added and the continued -- after discretion say,  
6 and the length of investigations.

7 HON. GRIMM: Do we need important and  
8 problematic? I mean, we're just saying that  
9 we're going to continue --

10 MS. GALLAGHER: Yeah.

11 HON. GRIMM: We're going to continue  
12 to monitor these issues.

13 COLONEL WEIR: Okay. Any disagreement  
14 on with removing or any -- removing the word  
15 problematic?

16 BGEN SCHWENK: And important. We  
17 could just say, the Committee will continue to  
18 monitor these issues. You know, if that's what  
19 we're going to do.

20 DR. MARKOWITZ: Yep.

21 BGEN SCHWENK: And it's for all  
22 conditions.

1 DR. MARKOWITZ: Yes.

2 BGEN SCHWENK: All the issues and the  
3 findings.

4 COLONEL WEIR: So, I -- what I have  
5 now is, the Committee will continue to monitor  
6 the issues identified --

7 CHAIR BASHFORD: These issues.

8 COLONEL WEIR: These issues?

9 DR. MARKOWITZ: These issues, period.

10 COLONEL WEIR: These issues. Okay.

11 CHAIR BASHFORD: Period. Moving on.

12 COLONEL WEIR: And with that, revised  
13 Finding Five --

14 BGEN SCHWENK: Page 30. Page 30.

15 COLONEL WEIR: It is revised, accurate  
16 and uniform documentation of a Commander's  
17 disposition decision -- of a Commander's  
18 disposition decision, the reasons for the  
19 decision, and any disciplinary action taken for  
20 alleged violations of the Uniform Code of  
21 Military Justice, is essential to ensure that  
22 Military criminal investigative agencies provide

1 accurate and timely reports of crime data to  
2 federal law enforcement agencies and databases.

3 CHAIR BASHFORD: Any discussion?

4 (No response.)

5 CHAIR BASHFORD: If there's nothing to  
6 discuss on this, then I would move that Finding  
7 Five as revised, be adopted by the DAC-IPAD.

8 HON. GRIMM: Second.

9 CHAIR BASHFORD: All in favor?

10 (Chorus of ayes.)

11 CHAIR BASHFORD: Any opposed?

12 (No response.)

13 CHAIR BASHFORD: Moving on.

14 COLONEL WEIR: Finding Six. Section  
15 535 of the Fiscal Year 19 National Defense  
16 Authorization Act requires the Secretary of  
17 Defense to establish a Uniform Command Action  
18 Form applicable across the Armed Forces for  
19 reporting the final disposition of cases of  
20 sexual assault in which one, the alleged offender  
21 is a member of the Armed Forces, and two, the  
22 victim files an unrestricted report of the

1 alleged assault.

2 CHAIR BASHFORD: I'm not sure what the  
3 purpose of that is. That's just --

4 COLONEL WEIR: That's just a reading  
5 --

6 CHAIR BASHFORD: That's just saying  
7 what the law is. Are we teeing up for something  
8 else? Or --

9 HON. GRIMM: That's a good question.

10 COLONEL WEIR: No. That's just a  
11 restatement of the law and the requirement.

12 HON. GRIMM: But what if you intend --  
13 (Simultaneous speaking.)

14 HON. GRIMM: Definitely could find  
15 something if the law were reported. Now, it  
16 could be found that the law requires that if it's  
17 not being done, then that's fine.

18 BGEN SCHWENK: I think it's a setup  
19 for Recommendation One. Because Recommendation  
20 One talks about Section 535 of the FY19 NDAA.

21 So the Finding sort of says what that  
22 is. And you could just make it a footnote to

1 Recommendation One I suppose.

2 But I think that must be the  
3 connection of why it's there.

4 DR. SPOHN: Or is that a finding that  
5 there is no --

6 HON. GRIMM: Right.

7 DR. SPOHN: At the current time there  
8 is no uniform --

9 HON. GRIMM: Right. It's required,  
10 but it's not yet in existence.

11 DR. MARKOWITZ: Right. I think that's  
12 our -- I think that's our finding.

13 HON. GRIMM: That is a relevant  
14 finding.

15 CHAIR BASHFORD: So is our Finding  
16 despite this section, which requires this. It's  
17 not being carried on in practice?

18 DR. SPOHN: That the form does not  
19 exist.

20 HON. GRIMM: But we could just start  
21 off with although. And then, you know, this is  
22 not being done. Or this currently is not being

1 done.

2 DR. SPOHN: I mean, we're just  
3 beginning. We just started really.

4 BGEN SCHWENK: Yeah. So, I mean, this  
5 thing's been in the law for a couple of months.

6 DR. MARKOWITZ: Right. We're only  
7 just starting, FY19 with it.

8 BGEN SCHWENK: Yeah. I mean --

9 CHAIR BASHFORD: That seems a little  
10 unfair.

11 BGEN SCHWENK: That's piling on.

12 DR. MARKOWITZ: Yes. So that might be  
13 mean.

14 BGEN SCHWENK: So that's why -- that's  
15 why I think it just goes to Recommendation One  
16 explaining it.

17 DR. MARKOWITZ: Yeah.

18 CHAIR BASHFORD: So no Finding Six?

19 DR. MARKOWITZ: No.

20 BGEN SCHWENK: You can make it a  
21 footnote to Recommendation One so people know  
22 what we're talking about in Recommendation One.

1 HON. GRIMM: Right.

2 CHAIR BASHFORD: Finding Seven.

3 COLONEL WEIR: The Command Disposition  
4 Action Reports that are found in investigative  
5 files are often unclear, incomplete, inaccurate,  
6 and inconsistent within and across the Services.

7 BGEN SCHWENK: But how do we really  
8 feel about them?

9 (Laughter.)

10 BGEN SCHWENK: Can we add one more in  
11 there?

12 CHIEF McKINLEY: Can we add that we  
13 gave you a recommendation of 140A?

14 DR. MARKOWITZ: Yeah.

15 CHAIR BASHFORD: Oh, we're going to  
16 get to that. Any discussion on Finding Seven?

17 (No response.)

18 CHAIR BASHFORD: I would move that it  
19 be adopted by the Committee.

20 DR. MARKOWITZ: Second.

21 CHAIR BASHFORD: All in favor?

22 (Chorus of ayes.)



1 CHAIR BASHFORD: Opposed?

2 (No response.)

3 CHAIR BASHFORD: It's adopted. Moving  
4 on.

5 COLONEL WEIR: Finding Eight, Command  
6 Disposition Action Reports that are found in  
7 investigative files include terminology  
8 inconsistent with MCIO federal database reporting  
9 requirements. To meet these requirements  
10 Investigators must therefore interpret the terms  
11 used leading to inconsistent results.

12 And I think what this Finding goes  
13 too, is that the Disposition Form is either not  
14 provided, or it's inconsistent with the  
15 terminology. So, the MCIOs are led to have to  
16 come up with their own interpretation of that and  
17 enter it into the databases.

18 CHAIR BASHFORD: Just remind me, is  
19 MCIO a generic term for pros all Services?

20 COLONEL WEIR: Yes. It's Military  
21 Criminal Investigation Organization.

22 CHAIR BASHFORD: Okay.

1                   HON. GRIMM:  So, when we say to meet  
2                   these requirements, are we talking about the  
3                   reporting requirements for the MCIO?

4                   COLONEL WEIR:  Yes.

5                   SGT. MARKEY:  So, it's leading to  
6                   inconsistent reporting as opposed to inconsistent  
7                   results?  Or both?

8                   Because really what we're talking  
9                   about is the data that's being input into MCIO as  
10                  a part of the requirement, is being -- is  
11                  difficult because of the terminology that's being  
12                  provided to them.

13                  COLONEL WEIR:  And I think if you  
14                  recall back to Dr. Wells' slide where it talked  
15                  about the different case closed unfounded, --

16                  SGT. MARKEY:  Um-hum.

17                  COLONEL WEIR:  And you'll see what a  
18                  Commander says.  And then you go across what the  
19                  MCIO, why are those two different?

20                  If it's victim declined, it should be  
21                  victim declined, not unfounded.  So that's kind  
22                  of what that finding is looking at.

1           BGEN SCHWENK: Yeah. So I would say  
2 that instead of inconsistent, inaccurate. I  
3 mean, isn't that the problem?

4           Because they're interpreting and they  
5 do it inaccurately. And it's -- and I agree with  
6 you, it's not the results. It's the database  
7 reporting requi -- reporting that's inaccurate  
8 with what the MCIO has.

9           CHAIR BASHFORD: Inconsistent and  
10 inaccurate.

11          BGEN SCHWENK: Uh, it's just  
12 inaccurate. And then we could say database  
13 reporting to refer back to it.

14          SGT. MARKEY: Why don't we also use  
15 unclear, incomplete -- just like we did --

16                   (Laughter.)

17          BGEN SCHWENK: Lions and tigers and  
18 bears.

19          HON. GRIMM: Would it be possible to  
20 add the word reporting before the word  
21 requirement in the next -- third to the last?  
22 These reporting requirements.

1                   Because if you're not really familiar  
2 with what MCIO terms, it's the reporting  
3 requirements that are -- in order to meet the  
4 reporting requirements they're having to  
5 interpolate these things. And then that's what's  
6 being the problem.

7                   COLONEL WEIR: So, the way I think you  
8 are probably going to have me to read this,  
9 Command Disposition Action Form reports that are  
10 found in the investigative files include  
11 terminology inconsistent with Military Criminal  
12 Investigation Organization federal database  
13 reporting requirements. To meet these reporting  
14 requirements, Investigators must therefore  
15 interpret the terms used leading to inconsistent  
16 and inaccurate results.

17                   CHAIR BASHFORD: Um-hum.

18                   BGEN SCHWENK: I'd say database  
19 reporting instead of results.

20                   COLONEL WEIR: Inaccurate database  
21 reporting. Got it.

22                   BGEN SCHWENK: It's their database

1 reporting that gets screwed up.

2 CHAIR BASHFORD: Yeah. Any further  
3 discussion on Finding Eight as revised?

4 (No response.)

5 CHAIR BASHFORD: Then I move that the  
6 DAC-IPAD adopt.

7 DR. MARKOWITZ: Second.

8 CHAIR BASHFORD: All in favor?

9 (Chorus of ayes.)

10 CHAIR BASHFORD: Opposed?

11 (No response.)

12 CHAIR BASHFORD: All right.

13 COLONEL WEIR: Finding Nine, for  
14 MCIOs, the primary purpose of the Command  
15 Disposition Action Report is to enable them to  
16 officially close their cases and make required  
17 federal reports to DIBRS and NCIC.

18 BGEN SCHWENK: I don't know why that's  
19 needed. But I don't have any objection either.

20 CHAIR BASHFORD: Well, I think it's  
21 accurate. I don't think they can close their  
22 investigation until they get the report back.

1 Right?

2 COLONEL WEIR: That's right.

3 CHAIR BASHFORD: Hence all these still  
4 waiting, still waiting, still waiting. Any  
5 discussion on Finding Nine?

6 (No response.)

7 CHAIR BASHFORD: I move that it be  
8 adopted by the DAC-IPAD.

9 COLONEL WEIR: Mr. Markey I think --

10 CHAIR BASHFORD: Oh, sorry.

11 SGT. MARKEY: So the finding would be  
12 that MCIOs are not -- the finding is the primary  
13 purpose at this point. The finding of the MCIOs  
14 are unable to close their cases.

15 I'm trying to figure out if that's the  
16 actual finding of the primary purpose.

17 BGEN SCHWENK: The MCIOs need the  
18 Command Disposition Action Report to officially  
19 close their cases and make required federal  
20 reporting to DIBRS. Is that what you're --

21 SGT. MARKEY: Yes. That would be it.  
22 Appreciate it sir.

1 BGEN SCHWENK: Okay.

2 SGT. MARKEY: Thank you sir.

3 BGEN SCHWENK: You might let that --

4 COLONEL WEIR: Could you say that one  
5 more time.

6 BGEN SCHWENK: I don't know what I  
7 just said.

8 CHAIR BASHFORD: MCIOs need the  
9 Command Disposition Action Reports to close their  
10 cases and make required federal report, et  
11 cetera. That's what you said.

12 BGEN SCHWENK: Yes. Thank you.

13 DR. MARKOWITZ: Yeah.

14 BGEN SCHWENK: If everybody likes it,  
15 I did say that. If not, you've misinterpreted  
16 it.

17 CHIEF MCKINLEY: Would it be wrong to  
18 also add in there to do it in a timely manner?  
19 Because one of the problems is, Commanders are  
20 filling it out much later.

21 MS. TAGERT: You have that in there.  
22 I think it's Finding Twelve.

1 CHIEF MCKINLEY: Okay. So that's  
2 actually in there?

3 CHAIR BASHFORD: Um-hum.

4 BGEN SCHWENK: Right. Yes.

5 COLONEL WEIR: So you were ahead of  
6 the game, Chief. So this Finding Nine reads, as  
7 I believe, MCIOs need the Command Disposition  
8 Action Reports to enable them to officially close  
9 their cases and make required federal reports to  
10 DIBRS and NCIC.

11 BGEN SCHWENK: I think Martha edited  
12 out this would be better.

13 CHAIR BASHFORD: As amended, does the  
14 DAC-IPAD adopt -- adopt it, I move to.

15 BGEN SCHWENK: Second.

16 CHAIR BASHFORD: In favor?

17 (Chorus of ayes.)

18 CHAIR BASHFORD: Opposed?

19 (No response.)

20 CHAIR BASHFORD: It's adopted. Moving  
21 on.

22 COLONEL WEIR: Finding Ten, Command



1 Disposition Action documentation found in the  
2 investigative case files sometimes conflict with  
3 the actual action taken by the command.

4 BGEN SCHWENK: Well, I think that's  
5 fine with me. But it doesn't hook more with  
6 Seven?

7 What we're talking -- and I think we  
8 ought to group the findings together. So, if  
9 we're talking about Command Disposition Action  
10 Reports, in Seven, you know, then maybe the Ten  
11 would go right after that to give an example.

12 COLONEL WEIR: So your recommendation  
13 is to move Finding Ten under Finding Seven and  
14 then it would be Finding Eight?

15 BGEN SCHWENK: Yeah. Or whatever it  
16 would be, yes. So that Seven says, Command  
17 Discipline Action Reports that are found in  
18 investigative files are often unfair, incomplete,  
19 inaccurate, and inconsistent.

20 And then the next one would say,  
21 Command Discipline Action Reports found in  
22 investigative files sometimes conflict with the

1 actual command action taken. Because it seems  
2 like they flow from one to the other.

3 CHAIR BASHFORD: Um-hum.

4 SGT. MARKEY: Be sure to put conflicts  
5 with an S.

6 BGEN SCHWENK: Documentation sometimes  
7 conflicts rather than conflict.

8 COLONEL WEIR: So adding to ensure the  
9 wording would be conflicts with the actual action  
10 taken by the command?

11 CHAIR BASHFORD: So it would be  
12 Finding Eight.

13 COLONEL WEIR: And that would be  
14 Finding Eight instead of ten.

15 CHAIR BASHFORD: Right.

16 COLONEL WEIR: And that would just  
17 move everyone down one.

18 BGEN SCHWENK: Yeah.

19 CHAIR BASHFORD: Any further  
20 discussion? If not, I move we adopt the Finding  
21 Eight to replace the old Finding Eight.

22 HON. GRIMM: Second.

1 CHAIR BASHFORD: All in favor, aye.

2 (Chorus of ayes.)

3 CHAIR BASHFORD: Opposed?

4 (No response.)

5 CHAIR BASHFORD: That's the new  
6 Finding Eight. And you then renumber Nine and  
7 Ten.

8 COLONEL WEIR: Yes, ma'am.

9 CHAIR BASHFORD: And now onto Eleven.

10 COLONEL WEIR: Judge Advocates testify  
11 that they do not routinely assist Commanders in  
12 completing Command Disposition Action Reports.  
13 And this Finding is tied into Recommendation Two.

14 BGEN SCHWENK: Fine with me.

15 CHAIR BASHFORD: Um-hum. Any  
16 discussion?

17 (No response)

18 CHAIR BASHFORD: If none, then I move  
19 we adopt Finding Eleven. All in favor?

20 COLONEL WEIR: Ma'am, we need a  
21 second, don't we?

22 HON. GRIMM: Second.

1 CHAIR BASHFORD: Okay, with second.

2 (Chorus of ayes.)

3 CHAIR BASHFORD: Opposed?

4 (No response.)

5 CHAIR BASHFORD: Finding Eleven is  
6 done. Finding Twelve.

7 COLONEL WEIR: Command Disposition  
8 Action Reports are often not submitted to the  
9 MCIOs within five days of command action as  
10 required by DoD policy.

11 CHIEF MCKINLEY: Often are instead of  
12 are often.

13 CHAIR BASHFORD: It should be often  
14 are not.

15 COLONEL WEIR: Command Disposition  
16 Action Reports often are not submitted to the  
17 MCIOs within five days of command action as  
18 required by DoD policy.

19 CHAIR BASHFORD: Okay. Any further  
20 discussion?

21 (No response.)

22 CHAIR BASHFORD: I move we adopt

1 Finding Twelve.

2 HON. GRIMM: Second.

3 CHAIR BASHFORD: All in favor?

4 (Chorus of ayes.)

5 CHAIR BASHFORD: Opposed?

6 (No response.)

7 CHAIR BASHFORD: Okay. Findings are  
8 done. Recommendations.

9 COLONEL WEIR: Recommendation One as  
10 revised. In developing a uniform Command Action  
11 Form in accordance with Section 535 of the Fiscal  
12 Year 19 National Defense Authorization Act, the  
13 Secretary of Defense should establish a standard  
14 set of options for documenting command  
15 disposition decisions. And require inclusion of  
16 the rationale for those decisions, including  
17 declinations to take action.

18 The Secretary of Defense should ensure  
19 that the standard set of options for documenting  
20 command dispositions decisions are based on  
21 recognized legal investigatory terminology, and  
22 standards that are uniform across the Services

1 and accurately reflect command action source  
2 documents.

3 CHAIR BASHFORD: Discussion?

4 HON. GRIMM: Can we say command  
5 disposition decisions and require the rationale  
6 for those decisions, instead of require inclusion  
7 of the?

8 And require the rationale for those  
9 decisions including declinations taken.

10 CHAIR BASHFORD: Any further?

11 (No response.)

12 CHAIR BASHFORD: Then as amended, I  
13 move we adopt Recommendation Number One.

14 HON. GRIMM: Second.

15 CHAIR BASHFORD: All in favor?

16 (Chorus of ayes.)

17 CHAIR BASHFORD: Opposed?

18 (No response.)

19 CHAIR BASHFORD: As amended then,  
20 that's adopted.

21 COLONEL WEIR: Okay. Moving to  
22 Recommendation Two. The Secretary of Defense

1 should ensure that Judge Advocates or equivalent  
2 civilian attorneys review and provide advice to  
3 Commanders in completing Command Disposition  
4 Action Reports in order to make certain that the  
5 documentation is accurate and complete.

6 DR. SPOHN: Review what?

7 BGEN SCHWENK: Yeah. I'd delete  
8 review and. The recommendation is they provide  
9 advice in completing the form, the report.

10 And they have to review whatever they  
11 have to review to be able to do that.

12 DR. MARKOWITZ: To provide advice.

13 BGEN SCHWENK: I think that's inherent  
14 when you provide the advice.

15 COLONEL WEIR: So, the Secretary of  
16 Defense should ensure that Judge Advocates or  
17 equivalent civilian attorneys provide advice to  
18 Commanders in completing?

19 CHAIR BASHFORD: Yeah. Um-hum.

20 COLONEL WEIR: So, we're removing  
21 review?

22 BGEN SCHWENK: Review and.

1 COLONEL WEIR: Review and. Provide  
2 advice to Commanders in completing Command  
3 Disposition Action Reports in order to make  
4 certain that the documentation is accurate and  
5 complete.

6 CHAIR BASHFORD: Colonel just -- just  
7 remind me how a civ -- an equivalent civilian  
8 attorney would be in the role?

9 COLONEL WEIR: It could be in some  
10 instances we have civilians who are Deputy Staff  
11 Judge Advocates that could be doing the role of  
12 the --

13 CHAIR BASHFORD: Not somebody  
14 wandering in from Main Street?

15 COLONEL WEIR: No, no, no. This would  
16 be someone in the JAG Office whose job it is to -  
17 - or a DoD government lawyer.

18 And that just covers those situations  
19 where some organizations have civilian lawyers  
20 providing advice.

21 HON. GRIMM: Or test and evaluation  
22 command.



1           BGEN SCHWENK: You could put DoD in  
2 before civilian.

3           CHAIR BASHFORD: So as amended, --

4           SGT. MARKEY: I just -- I'm sorry,  
5 Chair. I just have one question.

6           So, is the intent of this  
7 recommendation to have the JAG show the Commander  
8 how to fill the report out? Or are we trying to  
9 send the message that the -- there should be a  
10 discussion as to the findings of the Commander?

11          COLONEL WEIR: Yes. The  
12 recommendation goes to the fact that there should  
13 be a lawyer involved who has looked at the case.

14          And so when this form goes from the  
15 Commander to the MCIO, the accurate reason or  
16 accurate disposition of that case is given to the  
17 MCIO.

18          So, there should not be, if there was  
19 a Judge Advocate reviewing the case, and the  
20 Commander -- the reason that the Commander is not  
21 taking action is because the victim has declined  
22 to participate, then the lawyer and him would

1 discuss that, or her. And that would be the  
2 reason.

3 That would go over to the MCIO and  
4 there should not be, if there's a JAG, a  
5 misinterpretation of that. And so when it gets  
6 to the MCIO, on the Case Disposition form, it  
7 would say, victim declined to participate.

8 So there would not be -- it's just  
9 another check on the system so when it gets to  
10 the investigators, they know what the accurate  
11 reason is why this no action was taken.

12 Because then they have to enter that  
13 into their systems.

14 SGT. MARKEY: I was looking at some of  
15 the wording. It's right there. Okay, so you put  
16 the date on here. And then you put, you know,  
17 after the technical part of filling the form out  
18 as opposed to more of the investigative side,  
19 decision making process, so.

20 I think a little -- well, the intent  
21 is both. To ensure that the decision made is a  
22 sound command decision, and the form is filled

1 out as required.

2 Does that sound --

3 COLONEL WEIR: Okay. Yeah. That's  
4 fine like that.

5 CHAIR BASHFORD: Maybe if we said so  
6 that the documentation of that decision is  
7 accurate and complete?

8 And you may remember, we saw cases  
9 where it said command action precluded. And then  
10 the reasons, there were only two ways command  
11 action is precluded, but there were four or five  
12 or six different things that would be lumped  
13 under there.

14 DR. SPOHN: Should the recommendation  
15 say the Secretary of Defense should require? Or  
16 is it ensure?

17 I mean, do we want them to promulgate  
18 a rule?

19 BGEN SCHWENK: Yes. There is no rule.  
20 So, I mean, if we wrote ensure, he'd have to do  
21 it by the regulations somehow.

22 DR. SPOHN: Oh, okay.

1 HON. GRIMM: So again, we want it to  
2 be referred.

3 BGEN SCHWENK: Right. Require is  
4 probably, you know, better.

5 HON. GRIMM: Yeah.

6 BGEN SCHWENK: I mean, I think what  
7 Mr. Markey is saying is, he would prefer if it  
8 read, the Secretary of Defense should ensure --  
9 thank you.

10 The Secretary of Defense should ensure  
11 that Judge Advocates or equivalent civilian  
12 attorneys review and provide advice to Commanders  
13 in making initial disposition decisions and in  
14 completing Command Disposition Action Reports in  
15 order to make certain that the documentation is  
16 accurate and complete. Right? Both?

17 SGT. MARKEY: I'm trying to catch both  
18 of those. Yes.

19 BGEN SCHWENK: Okay, so.

20 CHAIR BASHFORD: Except for a Command  
21 Disposition Form.

22 BGEN SCHWENK: Oh, okay.

1 CHAIR BASHFORD: No decision.

2 BGEN SCHWENK: No. I think he wants  
3 them to do the decision and then the form, the  
4 report so that the Judge Advocate knows what the  
5 decision was and why, and was involved in it.

6 And now he can check the report to  
7 make sure it accurately reflects what he knows  
8 the Commander reasoned this.

9 SGT. MARKEY: And is that appropriate  
10 at this -- in this Recommendation? But yeah. I  
11 think that's the best process.

12 BGEN SCHWENK: I don't think that's  
13 what we had in mind initially, because we were  
14 just focused on doing the report.

15 SGT. MARKEY: Get the report then.

16 BGEN SCHWENK: The form, the report  
17 itself.

18 SGT. MARKEY: Yeah.

19 BGEN SCHWENK: He's brought out  
20 broadening it. Which somebody should be doing  
21 anyhow.

22 CHAIR BASHFORD: I don't know if it

1 would go there though. Because everything  
2 leading up to that --

3 BGEN SCHWENK: It's all about the  
4 report.

5 CHAIR BASHFORD: Right. It's all  
6 about the report. The documentation of the  
7 decision, not the decision itself.

8 BGEN SCHWENK: Right.

9 COLONEL WEIR: So what I've got right  
10 now is that the Secretary of Defense should  
11 require that Judge Advocates, and we've had --  
12 General Schwenk said, or DoD civilian attorneys  
13 provide advice to Commanders in completing  
14 Command Disposition Action Reports in order to  
15 make certain that the documentation is accurate  
16 and complete.

17 BGEN SCHWENK: Right. And then we  
18 would save Mr. Markey's for another day. And  
19 another issue.

20 SGT. MARKEY: But I will say advice.  
21 I think that word indicates to me that they're  
22 advising him on the decision, not just how to

1 fill the form out.

2 But maybe I'm reading too much into  
3 the word advice. They're advising him.

4 COLONEL WEIR: Well, I think that --  
5 I don't think you're -- I think that would --  
6 that's envisioned by the trial counsel in  
7 advising the Commander.

8 Based upon the facts of this case, my  
9 recommendation to you is that you --

10 SGT. MARKEY: Complete the form.

11 COLONEL WEIR: Clip the -- or check  
12 the box insufficient evidence.

13 SGT. MARKEY: Okay. I see that.

14 COLONEL WEIR: And that's the advice  
15 on the legal portion of the case, not -- does  
16 that make sense?

17 CHAIR BASHFORD: This follows up on  
18 our Finding Number Eleven. That they're not  
19 routinely assisting Commanders in completing the  
20 forms. And we want them to.

21 MS. GALLAGHER: And you haven't yet  
22 made any finding or taken the testimony to

1 determine that the lawyers are not providing the  
2 advice on the disposition itself.

3 So this was focused just on the  
4 completion of the form.

5 SGT. MARKEY: Okay.

6 CHAIR BASHFORD: Any further  
7 discussion?

8 (No response.)

9 CHAIR BASHFORD: So, as amended, I  
10 move we adopt Recommendation Number Two.

11 HON. GRIMM: Second.

12 CHAIR BASHFORD: All in favor?

13 (Chorus of ayes.)

14 CHAIR BASHFORD: Oppose?

15 (No response.)

16 CHAIR BASHFORD: That's adopted.

17 COLONEL WEIR: Finding Thirteen.

18 There's significant confusion among  
19 Investigators, Judge Advocates, and Commanders as  
20 to what the terms probable cause, reasonable  
21 grounds to believe, and unfounded, false or  
22 baseless, mean, when and by whom probable cause



1 and unfounded determinations are made and how  
2 they are documented throughout the investigative  
3 process.

4 MG ANDERSON: Can I -- could somebody  
5 explain -- can you explain what how they are  
6 documented and used throughout the process?

7 Is that how they're used on any  
8 reporting forms? How Investigators are using  
9 them in their reports?

10 I'm just a little unclear.

11 COLONEL WEIR: This goes to the idea  
12 of what -- how a case when it's closed, how it is  
13 classified.

14 In the Army you're not the -- the JAGs  
15 don't make an unbounding decision. And I believe  
16 all the Services it's the same way. A JAG does  
17 not say unfounded.

18 But that is a case closure  
19 classification under --

20 DR. MARKOWITZ: DIBRS.

21 COLONEL WEIR: DIBRS. So, there is  
22 some confusion as to how those terms crosswalk

1 with each other. So the Judge Advocate makes a  
2 probable cause determination, but that may end up  
3 being unfounded in another database.

4 MS. TAGERT: So ma'am, just to follow  
5 up on that, the DAC-IPAD has received testimony  
6 that only Commanders make probable cause  
7 determinations. Only Commanders make unfounded  
8 determinations.

9 But when we looked at the  
10 documentation that Commanders provide, and I  
11 think this goes to what Mr. Markey was previously  
12 talking about, there is no discussion on whether  
13 or not probably cause is met. Or whether or not  
14 a case is unfounded.

15 So there seems to be confusion as to  
16 what party makes those decisions. And of course  
17 there is a probable cause determination by a  
18 Judge Advocate as required by the reporting to  
19 the FBI database. Which is why you have that  
20 probable cause determination in the data.

21 But, you saw probable cause  
22 determinations in different places in the

1 investigation that were not necessarily across  
2 those three players.

3 MG ANDERSON: Okay. Thank you.

4 CHAIR BASHFORD: Any further  
5 discussion as to Finding Thirteen?

6 (No response.)

7 CHAIR BASHFORD: Okay. I move that it  
8 be adopted by the DAC-IPAD.

9 HON. GRIMM: Second.

10 CHAIR BASHFORD: All in favor?

11 (Chorus of ayes.)

12 CHAIR BASHFORD: Opposed?

13 (No response.)

14 DR. SPOHN: And we're making no  
15 recommendation based on this Finding.

16 HON. GRIMM: Not yet.

17 DR. SPOHN: Okay.

18 COLONEL WEIR: Finding Fourteen  
19 proposed the standards, timing and authorities  
20 for collecting and submitting fingerprints to the  
21 federal database, making probable cause  
22 determinations and submitting final disposition

1 information to the federal database are unclear  
2 and not uniform across the Services.

3 CHAIR BASHFORD: And when you say  
4 authorities, do you mean who's doing it? Or do  
5 you mean the authority to do it?

6 COLONEL WEIR: The authority to do it.

7 CHAIR BASHFORD: Then I would make  
8 that singular not plural.

9 COLONEL WEIR: And what this Finding  
10 goes to, is that across the Services it varies,  
11 when is a suspect or subject's fingerprinted?  
12 Most of the time it's taken when he's brought in  
13 for the first interview and they do the  
14 fingerprints.

15 You might see within a week a JAG  
16 makes the determination there's probable cause  
17 and off the fingerprints go. You might see six  
18 months later the JAG makes a determination that  
19 the fingerprints should be sent off.

20 There's no consistency across the  
21 Services as to when that determination is made.  
22 So should, you know, is there a point in time

1 where the investigation has gone far enough that  
2 you can say at a point this is when you should  
3 send off the fingerprints.

4 And then what we found in the files is  
5 that as you look at them, sometimes there is a  
6 very clear, Captain so and so reviewed this. And  
7 has determined that probable cause exists to  
8 believe that this offense was committed. And the  
9 fingerprints were sent off.

10 And in other files you never know if  
11 it happened or when it happened. And this goes  
12 too also in the report where it's talked about  
13 the Air Force experience with the fingerprint  
14 issue.

15 Because, you know, when was the right  
16 time to do it. And it was, you know, left. You  
17 know, there needs to be more guidance about that.

18 And right now the -- we've deleted the  
19 S off authority?

20 BGEN SCHWENK: Um-hum.

21 COLONEL WEIR: And that's the only  
22 change that's been made so far.

1 CHAIR BASHFORD: Any further  
2 discussion? Dr. Spohn, you look pensive.

3 DR. SPOHN: No.

4 CHAIR BASHFORD: Then as amended, --  
5 as amended I move that we adopt Finding Fourteen.

6 HON. GRIMM: Second.

7 CHAIR BASHFORD: All in favor?

8 (Chorus of ayes.)

9 CHAIR BASHFORD: Opposed?

10 (No response.)

11 CHAIR BASHFORD: Okay. So that's  
12 done.

13 COLONEL WEIR: Finding Fifteen.  
14 Coordination with Judge Advocates on a probable  
15 cause determination is often not documented in  
16 the investigative file.

17 And I just discussed that. It would  
18 make it -- it would make it much easier if there  
19 was uniform at where it must be in the file.

20 CID is right up front on their -- in  
21 their first two pages of the investigation when  
22 the probable cause determination was made. In

1 some other files, you can't find it.

2 And so there should be that  
3 coordination and it should be documented is what  
4 this finding is going to.

5 CHAIR BASHFORD: And this again is  
6 regarding the federal criminal history report?

7 COLONEL WEIR: Yes.

8 CHIEF MCKINLEY: I would also say  
9 often is instead of just often. Because often  
10 not isn't often.

11 SGT MARKEY: And Chair Bashford, I  
12 think you made a good point. At different  
13 locations in the investigative file there were  
14 different probable cause determinations.

15 And so the probable cause  
16 determination to collect fingerprints and  
17 photographs and perhaps DNA, it was sometimes in  
18 conflict later on when we would see a disposition  
19 that there was no probable cause.

20 CHAIR BASHFORD: Um-hum.

21 SGT. MARKEY: And so the confusion  
22 became as well, you had probable cause. Where

1 did that probable cause go?

2 So, do we need to articulate this is  
3 probable cause only for the collection of that  
4 information from the subject? As opposed to  
5 probable cause is determined whether a case is  
6 preferred or somebody is going to be arrested?

7 CHAIR BASHFORD: Colonel, this would  
8 still be under the federal criminal history  
9 reporting? The finding?

10 COLONEL WEIR: Yes.

11 CHAIR BASHFORD: Okay.

12 SGT. MARKEY: Okay. But --

13 CHAIR BASHFORD: Won't the Finding  
14 have that caption?

15 COLONEL WEIR: Yes.

16 CHAIR BASHFORD: Okay.

17 COLONEL WEIR: It's interesting Mr.  
18 Markey that because that was a point I was going  
19 to make, is there's three different probable  
20 cause determinations in one case file.

21 And if there's probable cause to send  
22 the fingerprints off, why isn't there probable



1 cause for the act? You know, so probable cause  
2 is probable cause.

3 So right now the proposed Finding  
4 Fifteen, coordinate -- coordination with Judge  
5 Advocates on a probable cause determination is --  
6 often is not documented in the investigative  
7 file.

8 CHAIR BASHFORD: Any further  
9 discussion?

10 (No response.)

11 CHAIR BASHFORD: I move we adopt  
12 Finding Fifteen as amended.

13 HON. GRIMM: Second.

14 CHAIR BASHFORD: In favor?

15 (Chorus of ayes.)

16 CHAIR BASHFORD: Opposed?

17 (No response.)

18 CHAIR BASHFORD: That's adopted.

19 COLONEL WEIR: Sixteen. Final  
20 dispositions being reported to the NCIC for  
21 sexual assault offenses are sometimes inaccurate  
22 or misleading.

1 DR. SPOHN: There was discussion  
2 yesterday about making that often instead of  
3 sometimes.

4 HON. GRIMM: So the data showed that  
5 it was not just occasional, it was very prominent  
6 then, right?

7 So often would be more accurate.

8 DR. SPOHN: Often would be accurate.

9 HON. GRIMM: Yes.

10 COLONEL WEIR: So it would be often  
11 are inaccurate or misleading.

12 CHAIR BASHFORD: Any further  
13 discussion on that?

14 (No response.)

15 CHAIR BASHFORD: Then I move that we  
16 adopt Finding Sixteen.

17 HON. GRIMM: Second.

18 CHAIR BASHFORD: All in favor?

19 (Chorus of ayes.)

20 CHAIR BASHFORD: Opposed?

21 (No response.)

22 CHAIR BASHFORD: Finding Sixteen is

1       adopted.

2                   COLONEL WEIR: All right, Finding 17.  
3       DoD policy does not provide direction to the  
4       Services for cases in which fingerprints are  
5       submitted to the Federal Criminal History  
6       Database and the command disposition action on  
7       the sexual assault is an election not to pursue  
8       criminal charges.

9                   MS. GALLAGHER: And on that one there  
10       was staff discussion that's not as clear as it  
11       could be. And the staff was recommending we  
12       change that to DoD policy does not provide  
13       guidance to the Services for sexual assault cases  
14       in which fingerprints are submitted to the  
15       Federal Criminal History Database, and the  
16       command takes no action on the sexual assault.

17                   BGEN SCHWENK: What kind of guidance  
18       are we talking about? Guidance about what?

19                   CHAIR BASHFORD: What to do with the  
20       fingerprints, I suppose.

21                   MS. GALLAGHER: All, yes, all of the  
22       Services are not necessarily doing the same

1 thing. I mean, it's not addressed in DoD policy  
2 as to how they are supposed to characterize a  
3 final disposition that involves no action on a  
4 criminal case.

5 BGEN SCHWENK: So are those two  
6 different issues?

7 HON. GRIMM: Yeah, that's what I'm  
8 wondering. It seems like just one issue, but it  
9 really sounds like it's two.

10 BGEN SCHWENK: These are two different  
11 issues, right, they're distinct. One is when to  
12 submit databases -- I mean fingerprints, or  
13 something about fingerprints. And another one is  
14 what we do and how to put a command disposition  
15 action when there's no pursuit of criminal  
16 charges.

17 CHAIR BASHFORD: It seems to me what  
18 you're trying to get at is that DoD policy does  
19 not provide guidance to the Services for cases  
20 where no criminal charges are pursued on the  
21 sexual assault, but fingerprints have already  
22 been submitted.

1 MS. GALLAGHER: That's correct. It's  
2 trying to articulate that clearly.

3 CHAIR BASHFORD: So it's, I think it's  
4 just if you reverse it a little bit. So start  
5 out with the ultimate decision was not to go  
6 forward, but you've already done this, yes. The  
7 guidance is being provided, that makes sense. So  
8 it'd be for cases in which --

9 HON. GRIMM: The command disposition  
10 is an election --

11 CHAIR BASHFORD: Not to pursue  
12 charges, but --

13 HON. GRIMM: Right, yes.

14 CHAIR BASHFORD: -- fingerprints have  
15 been.

16 HON. GRIMM: Right.

17 COLONEL WEIR: Okay, let me see if  
18 this is the way you would like it. For cases in  
19 which there is an election not to pursue criminal  
20 charges, DoD policy does not provide guidance to  
21 the Services for cases in which fingerprints are  
22 submitted to the Federal Criminal History

1 Database --

2 BGEN SCHWENK: Have been.

3 COLONEL WEIR: Have.

4 HON. GRIMM: Colonel, it would be all  
5 right to start off, DoD policy does not provide  
6 direction to the Services for cases where the  
7 command disposition action on sexual assault is  
8 an election not to pursue criminal charges, but  
9 fingerprints have been submitted to the Federal  
10 Criminal History Database.

11 So the introductory language is fine  
12 the way it starts.

13 COLONEL WEIR: Can you, sir, can you  
14 read that again?

15 HON. GRIMM: Sure. Can we make sure  
16 that the staff over there takes this down.

17 COLONEL WEIR: No, no, no, it's the  
18 Chair's suggestion is a good suggestion. DoD  
19 policy does not provide direction to the Services  
20 for cases where the command disposition action on  
21 the sexual assault is an election not to pursue  
22 criminal charges, but in which fingerprints have

1       been submitted to the Federal Criminal History  
2       Database.

3                   CHAIR BASHFORD: Any further  
4       discussion? Then as amended, I move that the  
5       DAC-IPAD adopt Finding 17.

6                   HON. GRIMM: Second.

7                   CHAIR BASHFORD: All in favor?

8                   (Chorus of ayes.)

9                   CHAIR BASHFORD: Opposed? And that's  
10      adopted.

11                   COLONEL WEIR: Okay, next is a  
12      proposed initial assessment. The Case Review  
13      Working Group will continue to monitor the  
14      important and problematic issues associated with  
15      collecting and submitting fingerprints and  
16      submitting final disposition information to the  
17      federal databases.

18                   And earlier we removed problematic,  
19      set --

20                   DR. SPOHN: Important and, yeah.

21                   COLONEL WEIR: Important and  
22      problematic. So if I'm assuming we want it to

1 read the same. Well, the CRWG will continue to  
2 monitor the issues associated with collecting and  
3 submitting fingerprints and submitting final  
4 disposition information to the federal databases.

5 DR. SPOHN: Right.

6 CHAIR BASHFORD: Do we want to say the  
7 CRWG or the Committee?

8 COLONEL WEIR: I think it's probably  
9 better to say the Committee.

10 CHAIR BASHFORD: That's what we said  
11 the last time.

12 BGEN SCHWENK: I agree.

13 COLONEL WEIR: So as amended, the DAC-  
14 IPAD will continue to monitor the issues  
15 associated with collecting and submitting  
16 fingerprints and submitting final disposition  
17 information to the federal databases.

18 CHAIR BASHFORD: I would just say  
19 Committee, because that's what we said on the  
20 last initial assessment. So can we say DAC-IPAD  
21 twice or we say Committee twice.

22 HON. GRIMM: Whatever you said.



1 CHAIR BASHFORD: You said Committee.

2 HON. GRIMM: Committee, the Committee.

3 CHAIR BASHFORD: I don't think that  
4 has to be adopted, right?

5 HON. GRIMM: That's just it.

6 COLONEL WEIR: Okay.

7 CHAIR BASHFORD: And then the last  
8 proposed recommendations, then I think probably a  
9 short break would be in order.

10 COLONEL WEIR: DoD policy should  
11 provide guidance on how the Services should  
12 address cases in which no criminal or  
13 administrative action was taken on the sexual  
14 assault offense, and cases in which  
15 administrative, judicial, or non-judicial action  
16 was taken for an offense other than sexual  
17 assault when they submit final disposition  
18 information to federal databases.

19 DR. SPOHN: Is address cases sort of  
20 vague?

21 MS. GALLAGHER: One of the --

22 DR. SPOHN: What do you mean by

1 address cases?

2 HON. GRIMM: Should, the Services  
3 should.

4 MS. GALLAGHER: One of the  
5 recommendations was, well, to change DoD policy  
6 to --

7 PARTICIPANT: Secretary of Defense.

8 MS. GALLAGHER: Send the recommendation  
9 to the Secretary of Defense. And then the two  
10 options there, should provide or should establish  
11 a working group to assess and recommend uniform  
12 guidance. Because there's issues involved with  
13 how to address it.

14 CHAIR BASHFORD: I'm not sure what  
15 we're trying to get at here, so.

16 BGEN SCHWENK: What, address what?

17 CHAIR BASHFORD: We have cases where  
18 no action's taken on the sexual, but there is  
19 action taken on other offenses.

20 MS. GALLAGHER: There's two issues  
21 involved there. The one is where no criminal  
22 action was taken on the event, where there's no

1 action. And then there's cases in which some  
2 action was taken, but not on that offense. So I  
3 guess you're right, they could be merged into the  
4 same thing.

5 BGEN SCHWENK: Well, isn't there  
6 action in their guidance on submitting, we're  
7 talking about --

8 DR. SPOHN: Fingerprints.

9 BGEN SCHWENK: -- final disposition  
10 information to federal databases. That kind of  
11 guidance?

12 MS. GALLAGHER: Correct.

13 BGEN SCHWENK: And isn't there already  
14 guidance on submitting final disposition  
15 information to federal databases?

16 MS. GALLAGHER: There is no DoD  
17 guidance on how to characterize command  
18 dispositions that involve taking no action on a  
19 criminal charge for which the fingerprints were  
20 submitted, such as the Article 120 sexual  
21 assault. The command election is to take no  
22 action.

1           There's no DoD policy guidance on how  
2           to characterize that in the final disposition  
3           report, and the Services are left to address it  
4           separately.

5           CHAIR BASHFORD: I'm still not seeing  
6           what the issue is. Is it that they've sent  
7           fingerprints in and now they've been convicted,  
8           or just on a much different type of offense?

9           MS. GALLAGHER: That is one of the  
10          things. For example, fingerprints are sent in  
11          for a sexual assault, Article 120. Command  
12          disposition comes back, and the election is  
13          they're going to take no action, there's no  
14          criminal, judicial, non-judicial action.

15          CHAIR BASHFORD: But they left their  
16          post.

17          BGEN SCHWENK: No, this is for no  
18          action.

19          MS. GALLAGHER: Or at all.

20          BGEN SCHWENK: The first example is no  
21          action.

22          MS. GALLAGHER: No action at all.

1 CHAIR BASHFORD: Okay.

2 BGEN SCHWENK: I think Terri's saying  
3 there's two categories. One is fingerprints for  
4 a sexual assault, no action on anything. One is  
5 fingerprints for a sexual assault that action on  
6 something other than a sexual assault.

7 MS. GALLAGHER: Yes.

8 BGEN SCHWENK: So what are they doing  
9 in those cases?

10 MS. GALLAGHER: Well, they are putting  
11 in --

12 BGEN SCHWENK: Whatever they're,  
13 they're doing what we said earlier.

14 MS. GALLAGHER: Sometimes they'll put  
15 in administrative actions taken, and the  
16 administrative action was for adultery, not a  
17 sexual assault. Which results in the implication  
18 that the administrative action was for a sexual  
19 assault, and that's what's in their criminal  
20 history.

21 CHAIR BASHFORD: I think this needs to  
22 be broken down, then, because one of the

1 recommendations should then deal with our Finding  
2 17, right. Where we say there was an election  
3 not to pursue criminal charges, because  
4 fingerprints had been taken.

5 And then a second one, which I don't  
6 think we've made a finding for yet, is they did  
7 something else administrative, judicial, or non-  
8 judicial, but for some other category of offense,  
9 right?

10 MS. GALLAGHER: Right, but it could  
11 also be consolidated into one in that there is no  
12 action taken on the sexual assault offense. So  
13 if there is an action taken on some other  
14 offense, that's something different.

15 CHAIR BASHFORD: But you're saying if  
16 somebody that is fingerprinted or stopped, it  
17 will show up as a sexual assault offense? I  
18 don't know that we've had testimony on that,  
19 though, I don't.

20 MS. GALLAGHER: It's in the R-84s that  
21 have been in the case -- we've seen it in the  
22 final dispositions.

1                   BGEN SCHWENK: What about if we looked  
2 at Finding 14, the one that is really broad and  
3 says the standards time -- I don't remember how  
4 we edited it there.

5                   CHAIR BASHFORD: Authority, that's the  
6 only change.

7                   BGEN SCHWENK: Pardon me?

8                   CHAIR BASHFORD: We only switched  
9 authorities to authority.

10                  BGEN SCHWENK: Okay, so the standards,  
11 the timing, the authority for collecting and  
12 submitting fingerprints, making probable cause  
13 determinations and submitting final disposition  
14 information to the federal database are unclear  
15 and not uniform.

16                  So why don't we just have a  
17 recommendation that says Secretary of Defense  
18 should clarify the guidance on exactly that, all  
19 that stuff. You just made a finding that it's  
20 not done well, but now tell them to do it. Now  
21 would that subsume both of those examples?  
22 Because it would relate to the last thing,

1 submitting final disposition information to the  
2 federal database.

3 HON. GRIMM: We want uniform guidance.

4 BGEN SCHWENK: Yes, uniform guidance.

5 HON. GRIMM: Across the Services.

6 BGEN SCHWENK: Right. I mean, maybe  
7 that would be a nice broad thing, goes off of 14  
8 and covers all the rest of the findings and what  
9 was done with them.

10 COLONEL WEIR: So let me see if I --  
11 Secretary of Defense should provide guidance --

12 BGEN SCHWENK: Uniform.

13 COLONEL WEIR: -- uniform guidance on  
14 the standards, timing, and authority for  
15 collecting and submitting fingerprints to the  
16 federal database, making probable cause  
17 determinations, and submitting final disposition  
18 information to the federal database.

19 BGEN SCHWENK: Period.

20 COLONEL WEIR: Period.

21 BGEN SCHWENK: Yes.

22 CHAIR BASHFORD: Does that cover what



1 you wanted to get at in here, or not?

2 MS. GALLAGHER: Yes. Bravo.

3 COLONEL WEIR: So let me see if I,  
4 we'll do it one more time. Secretary of Defense  
5 should provide uniform guidance on how the  
6 Services -- provide uniform guidance on the  
7 standards, timing, and authority for collecting  
8 and submitting fingerprints to the federal  
9 database, making probable cause determinations,  
10 and submitting final disposition information to  
11 the federal database.

12 CHAIR BASHFORD: Did you say uniform  
13 guidance twice?

14 HON. GRIMM: Yeah, I think he went  
15 back.

16 CHAIR BASHFORD: Oh, okay.

17 COLONEL WEIR: Yeah, I got tongue-tied  
18 there.

19 CHAIR BASHFORD: Okay.

20 PARTICIPANT: That was a reboot.

21 MS. GALLAGHER: But the issues there  
22 is there is some guidance that is uniform from

1 the DoD. It just doesn't address all of the  
2 topics, such as the cases in which no action is  
3 taken by the commander, or action is taken on  
4 some other offense. So maybe it's pointing  
5 attention and directing the areas that are  
6 missing specifically.

7 COLONEL WEIR: So would we, if after,  
8 to the federal database to include cases in which  
9 no criminal or administrative action was taken on  
10 the sexual assault offense and cases in which  
11 administrative, judicial, or non-judicial action  
12 was taken for an offense other than sexual  
13 assault? Period?

14 MG ANDERSON: Could I make a  
15 suggestion that potentially we wait until we've  
16 reviewed all the cases that involve an  
17 administrative action or have been binned by the  
18 Services? Because it will give us a little bit  
19 more insight into this particular issue.

20 MS. GALLAGHER: The other issue there  
21 is that they are currently revising the DoD  
22 policy applicable to this and will be issuing it

1 certainly well before we finish all these cases.  
2 So if there's a recommendation to be made, it  
3 should be made in time to be considered during  
4 the evaluation of the policy.

5 CHAIR BASHFORD: I guess what I'm  
6 having trouble with is what's the difference in  
7 the second thing between, so you say no criminal  
8 or administrative actions was taken on the sexual  
9 assault. And cases where administrative,  
10 judicial, or non-judicial action taken for  
11 different offenses, is judicial the same as  
12 criminal?

13 MS. GALLAGHER: Yeah, judicial is  
14 defined in the policy as a summary, special and  
15 general court martial. Non-judicial is defined  
16 as the article UCMJ Article 15 proceeding. And  
17 administrative is not defined. Although the DoD  
18 policy does address administrative action in lieu  
19 of a court martial, it does not address  
20 administrative actions generally.

21 BGEN SCHWENK: And this is really  
22 complicated. I know, Terri showed me yesterday

1 some clear examples, like five or six clear  
2 examples where the command came in and said here  
3 is our final action. And then you went and  
4 looked at the form that was submitted by the  
5 MCIO, and the final action on that one was not  
6 the same. So that I understand.

7 You know, there's a -- but we've  
8 already said that. This gets very nuanced and  
9 gets more complicated the more we look into it.  
10 I don't know that we have the time to look into  
11 it.

12 HON. GRIMM: So maybe it does suggest  
13 that we see what the data that is going to be  
14 produced in the completion of the case samples  
15 and then have some idea. Because however it  
16 needs to be drafted, it needs to be drafted to hit  
17 all of those concerns.

18 And right now, it's kind of hard to  
19 tease those concerns out the way it is now. So  
20 maybe it would be helpful to hold off on this one  
21 until we get a little bit more data.

22 CHAIR BASHFORD: What we're really

1 trying to say is that accurate final disposition  
2 information on all sorts of cases, where the  
3 initial charge was a sexual offense, should be  
4 submitted, right? Even where that's not the  
5 ultimate.

6 MS. GALLAGHER: Yes, we are not  
7 collecting a specific data point on the -- what  
8 is identified in the final disposition report.  
9 It's just one of the observations from reviewing  
10 the files. It's not unique to the administrative  
11 or non-judicial action file. It's in really all  
12 of no action files as well as the administrative  
13 and non-judicial files.

14 And the point is to try and avoid the  
15 situations where you have fingerprints submitted  
16 for a sexual assault offense, and then the final  
17 disposition is submitted to the Criminal History  
18 Database is misrepresentative of what occurred.  
19 In the sense that they'll have a verbal  
20 counseling and it'll be listed as counseling.

21 But it's a verbal counseling on being  
22 stupid or, you know, violating adultery. Or

1 something other than what those fingerprints are  
2 in the database for. And instead of listing a  
3 separate offense like adultery or violation of a  
4 regulation and putting the disposition related to  
5 that criminal offense, they just have on the  
6 form, sexual assault.

7 CHAIR BASHFORD: So what if it would  
8 be Secretary of Defense should provide uniform  
9 guidances -- uniform guidance to the Services to  
10 address cases where fingerprints have been  
11 submitted in connection with a sexual assault  
12 offense, but the final disposition is for  
13 something else. Just a little bit of something  
14 with the something else when they submit that  
15 information to the federal databases.

16 MS. GALLAGHER: Yes.

17 CHAIR BASHFORD: Would that -- so?

18 HON. GRIMM: Yes.

19 CHAIR BASHFORD: Okay.

20 All right, wordsmith that a little  
21 bit. So it'd be Secretary of Defense should  
22 provide uniform guidance to the Services in cases

1 where fingerprints have been submitted in  
2 connection with the accusation of a sexual  
3 offense, but the final disposition was for an  
4 offense other than a sexual assault offense.

5 HON. GRIMM: That's right.

6 CHAIR BASHFORD: And then you got get

7 --

8 BGEN SCHWENK: Or was either no action  
9 or action on an offense other than a sexual  
10 assault offense.

11 Right, Terri, no action and action on  
12 an offense other than a sexual assault?

13 CHAIR BASHFORD: Final disposition is  
14 either no action or action on something else?

15 HON. GRIMM: Other than -- yes.

16 CHAIR BASHFORD: On something,  
17 something other.

18 BGEN SCHWENK: On an offense other  
19 than sexual assault.

20 HON. GRIMM: Offense other than sexual  
21 assault.

22 CHAIR BASHFORD: And then I think you

1 have to still put in when they submit their  
2 disposition information to the federal databases.

3 BGEN SCHWENK: So I'm really looking  
4 forward to Colonel Weir, you reading this back to  
5 us.

6 COLONEL WEIR: You got it, sir. All  
7 right, Secretary of Defense should provide  
8 uniform guidance to the Services in cases where  
9 fingerprints have been submitted for an  
10 allegation of sexual assault when there was no  
11 action taken, or action on an offense other than  
12 sexual assault, when they submit final  
13 disposition information to federal databases.

14 CHAIR BASHFORD: I suggest we take our  
15 ten minute break now, and we'll just look at the  
16 final version of that.

17 (Whereupon, the above-entitled matter  
18 went off the record at 3:07 p.m. and resumed at  
19 3:23 p.m.)

20 COLONEL WEIR: All right. All right,  
21 we've got a draft proposed recommendation that  
22 hopefully we've worded this to everyone's



1 satisfaction.

2 The Secretary of Defense should  
3 provide uniform guidance to the Services on  
4 submitting final disposition information to  
5 federal databases for those cases in which, after  
6 fingerprints have been submitted, either the  
7 command took no action, or took action only for  
8 an offense other than sexual assault.

9 BGEN SCHWENK: Read it again, sorry.

10 COLONEL WEIR: Okay. The Secretary of  
11 Defense should provide uniform guidance to the  
12 Services on submitting final disposition  
13 information to federal databases for those cases  
14 in which, after fingerprints have been submitted,  
15 either the command took no action, or took action  
16 only for an offense other than sexual assault.

17 BGEN SCHWENK: Thank you.

18 CHAIR BASHFORD: So any further  
19 comment on the proposed recommendation as  
20 revised? Then I propose that the DAC-IPAD adopt  
21 that as it applies to the Federal Criminal  
22 History Reporting.

1 HON. GRIMM: Second.

2 CHAIR BASHFORD: In favor?

3 (Chorus of ayes.)

4 CHAIR BASHFORD: Any opposed? That's  
5 adopted.

6 COLONEL WEIR: Okay, what I'd like to  
7 do now is jump into the rest of the report.  
8 We've got six more hours, so I'm glad Delta's  
9 delayed the flights.

10 CHAIR BASHFORD: We've just finished  
11 Chapter 1.

12 BGEN SCHWENK: You may have six more  
13 hours.

14 COLONEL WEIR: So Chapter 2, the  
15 sexual assault court martial case adjudication  
16 trends and analysis, we've had, yesterday we went  
17 through this chapter. And we've also talked  
18 about the data that's going to be in the chapter.

19 So the, if you go to page 47, we know  
20 we're going to add a graph there that talks about  
21 the percentage of each service.

22 CHAIR BASHFORD: I only have 20 pages

1 in mine.

2 COLONEL WEIR: It should be in your  
3 folder with, in your read-ahead folder, you  
4 should have the remaining.

5 BGEN SCHWENK: You know, each chapter  
6 starts with one.

7 COLONEL WEIR: Oh, okay, never mind.

8 BGEN SCHWENK: So what page did we end  
9 up on?

10 COLONEL WEIR: So I'm on page 47 of --

11 BGEN SCHWENK: Chapter 1 ended on 44.  
12 So maybe page 3 of this thing. You got one of  
13 these?

14 COLONEL WEIR: Yes, yes. Okay, now --

15 BGEN SCHWENK: Is that your 47?

16 COLONEL WEIR: Yes. Sorry about that.

17 BGEN SCHWENK: Page 3 is his 47.

18 COLONEL WEIR: So we discussed that,  
19 I believe it was Chair Bashford thought it would  
20 be informative to have a percentage of the  
21 Services of those percentages make more sense.  
22 So it's 42% for FY17. The Army's 42%, but how

1 much of the total force does the Army make up?

2 So we'll add that slide in there.

3 So that was page 3 of yours.

4 BGEN SCHWENK: Yeah, just subtract 44  
5 off of yours.

6 COLONEL WEIR: And on page 7 -- 6, we  
7 we're going to change grade -- rank, to grade.  
8 On the next slides. On page, the graph that  
9 talks about male accused sex of victims, we're  
10 putting in actual numbers on the female accused  
11 for those graphs, so that gives you a better idea  
12 of how many we're actually talking about.

13 So instead of 60 it might be, you  
14 know, 6. So then, I forget who on the Committee  
15 wanted that information, but that's going to be  
16 done.

17 We were going to break out, on the  
18 graph that talks about case disposition by  
19 military service of the accused, break out  
20 penetrative and contact. We talked about that  
21 earlier today when Chuck was doing the briefing.

22 We've had the briefing from Dr. Wells

1 on the multivariate. It's fiscal years 2016,  
2 2017, we got a briefing on that today. And the  
3 data project way forward, which should be your  
4 last page or thereabout your last page, and  
5 basically that says that the Data Working Group  
6 will continue the collection and analysis.

7 Future analysis will include  
8 descriptive statistics concerning court martial  
9 case characteristics, case disposition, and case  
10 outcomes. In addition, the DWG anticipates  
11 further examination into the data points  
12 concerning adjudged versus approved sentences,  
13 the relationship between the victim and the  
14 accused, and the resulting outcomes of the case,  
15 and timeliness of the court martial process  
16 through the Services.

17 Is there any other items that you as  
18 Committee members would like the Data Working  
19 Group to look into?

20 SGT MARKEY: Colonel, I know we had  
21 had a little bit of discussion on victims  
22 dragging out of the process, not wanting to move

1 forward. And we talked about, are there any  
2 types of characteristics that would indicate any  
3 sort of pattern of when they drop out of the  
4 system. And then of course why they might be  
5 dropping out.

6 And I know that might be more in the  
7 future to do onsite visits with, you know, and  
8 gathering maybe survey information about that.  
9 But I think since we see a lot of reports where  
10 victims did not want to participate, I think it  
11 might be important to determine if there's  
12 something to that that creates, that's creating  
13 that atmosphere of nonparticipation.

14 COLONEL WEIR: We've discussed that  
15 and I think that's probably a working group or a  
16 site visit process that will probably result in  
17 something in next year's report. There's --  
18 based upon what the court -- the Data Working  
19 Group can do with court martial statistics, and  
20 we've had meetings with people who are interested  
21 in figuring out that very question.

22 And it's or -- and it goes kind of

1 hand in hand with the acquittal rate question,  
2 how, why is the acquittal rate so high, the  
3 conviction rate conversely so low.

4 And so that's one of the things that  
5 we're also going to be looking at as the Case  
6 Review Working Group, as we get through with the  
7 review of the cases.

8 And we're actually going to have a  
9 meeting with some folks to try to figure out a  
10 way ahead to be able to do that, to figure out  
11 can you, is it, you know, is it going to require  
12 records of trial, is it going to require  
13 transcripts, you know, records of trial, tapes  
14 being transcribed into records of trial for the  
15 evaluation of that. So that's probably in the  
16 way ahead for future work.

17 But that's the Data Working Group way  
18 ahead. Is there anything that you wanted them to  
19 do?

20 CHAIR BASHFORD: One thing I know Dean  
21 Harrison was very interested in is retention  
22 rates after a sexual case, both, on behalf of

1 both sides. What happens to the largely women  
2 victims, do they stay in and continue a career?  
3 What happens to the accused?

4 We got a glimpse of that, but you  
5 know, what happens to them if the charges do not  
6 go forward. And he saw that as a potential huge  
7 loss to the Services of really talented people.  
8 If there's a way we could look at that, I would  
9 like to do that.

10 COLONEL WEIR: What we'll do is talk  
11 to Service reps and figure out if there's a way  
12 to go through each of their human resources  
13 offices to kind of determine if we had, and I'm  
14 not sure how we'd be able to do this with Privacy  
15 Act information stuff, but a name of a victim and  
16 did he or she get out information.

17 So we'll get back to you with more  
18 information on it, if that's even possible for  
19 this committee to do based upon, you know, not  
20 wanting to release names of individual soldiers.  
21 Maybe we just do it by, you know, numbers, not by  
22 name. And try to have them sorted out, but we'll



1 look into that. That's probably in our request  
2 for information.

3 We can jump into Chapter 3, which  
4 talks to changes in military sexual assault data  
5 collection and case management in the new Article  
6 140. Chair Bashford mentioned that this morning.  
7 She received a letter addressed to her on behalf  
8 of the DoD General Counsel that they got the  
9 recommendation from the DAC-IPAD, and you've been  
10 provided copies of that letter.

11 So they're moving towards some of the  
12 things that you identified even today about the  
13 race of the individual involved, that's one of  
14 the things that was brought out in that, is to  
15 capture more of that information.

16 My recommendation for Chapter 3 is  
17 it's all good information. We can just attach  
18 that memorandum, or excuse me, letter, as an  
19 attachment in an appendix. And we can footnote  
20 that that recommendation was received and the  
21 response is attached in Appendix whatever. That  
22 would be my recommendation.

1 CHAIR BASHFORD: There were two  
2 appendices. There was the letter attached to his  
3 letter attached to his letter and then there was  
4 an appendix.

5 COLONEL WEIR: Right.

6 CHAIR BASHFORD: And I don't think  
7 everybody got the appendix.

8 COLONEL WEIR: Yes, we will -- we  
9 ended up getting that. But we will definitely  
10 send that out to you. We'll hang it on our  
11 website, so you guys can access that, and we'll  
12 send it out to your email -- clog up more of your  
13 email.

14 But that would be my recommendation,  
15 is just to add that, the letter and its  
16 attachments as an appendix to the report. And  
17 we'll footnote that, see letter based upon the  
18 recommendations.

19 BGEN SCHWENK: Sounds good to me.

20 CHAIR BASHFORD: Does that need a  
21 vote?

22 COLONEL WEIR: Yes please.

1 CHAIR BASHFORD: Any further  
2 discussion putting Chapter 3 and the letter? I  
3 move that move that we include Chapter 3 and the  
4 letter in the appendices.

5 HON. GRIMM: Second.

6 CHAIR BASHFORD: All in favor?

7 (Chorus of ayes.)

8 CHAIR BASHFORD: Opposed?

9 COLONEL WEIR: Chapter 4, the  
10 Department of Defense expedited transfer policy  
11 and related issues. We've discussed the  
12 expedited transfer. I believe that we have, or  
13 the Committee has looked at that. And I want to  
14 say that they voted on the findings and  
15 recommendations in October.

16 BGEN SCHWENK: Yes, so they're all  
17 voted on?

18 COLONEL WEIR: So they're all voted  
19 on, and this is just putting the expedited  
20 transfer chapter in the annual report. And the  
21 only thing that we will do, as you notice in that  
22 chapter, Finding, it's XX, we just didn't want to

1 put a number in there and have to change it. But  
2 the DAC-IPAD has voted on the findings and  
3 recommendations for the expedited transfer  
4 portion of this.

5 CHAIR BASHFORD: My only comment is on  
6 page 5, and that in the footnote 134 about  
7 testimony in front of the PWG. Is that going to  
8 be sufficiently anonymized, given the small size  
9 of that?

10 COLONEL WEIR: And that's in which  
11 footnote, ma'am?

12 CHAIR BASHFORD: It's footnote 134,  
13 and it's the second paragraph, second sentence of  
14 the first full paragraph on page 5.

15 MS. SAUNDERS: Ma'am, I think we had  
16 talked about that and we had agreed to take that  
17 part of it out.

18 CHAIR BASHFORD: That was a different  
19 one we talked about.

20 MS. SAUNDERS: Right.

21 CHAIR BASHFORD: So is this one  
22 sufficiently anonymized as well?

1 MS. SAUNDERS: I think we're going to  
2 take out the testimony of --

3 CHAIR BASHFORD: Okay.

4 MS. SAUNDERS: --- a portion.

5 MS. CARSON: We'll put that on all of  
6 them for the ones that --

7 CHAIR BASHFORD: Okay.

8 MS. CARSON: -- involved something  
9 with the testimony we want to anonymize.

10 CHAIR BASHFORD: Okay.

11 COLONEL WEIR: So that moves us to  
12 Chapter 5, the discussion of required study on  
13 collateral misconduct.

14 CHAIR BASHFORD: Do we have to approve  
15 Chapter 4?

16 COLONEL WEIR: Yes, I'm sorry.

17 CHAIR BASHFORD: Any further  
18 discussion on Chapter 4? Then I move we adopt it  
19 as part of our annual report.

20 HON. GRIMM: Second.

21 CHAIR BASHFORD: All in favor?

22 (Chorus of ayes.)

1 CHAIR BASHFORD: Opposed? Chapter 4  
2 it is.

3 COLONEL WEIR: Chapter 5 talks about  
4 discussion of a required study on collateral  
5 misconduct.

6 This was briefed to the Committee at  
7 the October meeting where you all were informed  
8 concerning the National Defense Authorization  
9 Act, where there was a -- it includes a revision  
10 requiring the Secretary of Defense, acting  
11 through the Defense Advisory Committee on  
12 Investigation and Prosecution of Sexual Assault  
13 in the Armed Forces, to prepare and submit  
14 biannual reports to Congress detailing the number  
15 of instances in which an individual who reports  
16 an incident of sexual assault is either  
17 investigated for or receives adverse action as a  
18 result of the misconduct engaged in. But that  
19 individual is collateral to the investigation of  
20 the sexual offense.

21 There's the initial observations that  
22 we discussed. And basically what this is, this

1 chapter is a review of the discussions that you  
2 had in October concerning the collateral  
3 misconduct issue.

4 So this is what we as the staff  
5 captured and placed in this chapter, just to  
6 alert those who will receive this annual report  
7 that we're aware of that and we're waiting for  
8 further guidance and 50 more people.

9 Any comments or questions?

10 CHAIR BASHFORD: I just want to point  
11 out that the cases I think the Working Group has  
12 reviewed, whether there's collateral misconduct,  
13 sometimes it's apparent in the file underage  
14 drinking, whether there has been any action taken  
15 on any collateral misconduct is I would say more  
16 often than not not apparent.

17 So to actually find that out, I think  
18 you'd have to do the same thing with an RFI for  
19 the person's records to see what had happened.  
20 And I think that would be a massive task.

21 HON. GRIMM: We have a great working  
22 relationship with the Service representatives,

1 no, we used to.

2 (Laughter.)

3 HON. GRIMM: And we will get with them  
4 and theirs to try to help us figure out a way to  
5 solve this problem. I heard that perhaps if we  
6 had a Social Security number of someone in a  
7 report, they could run a query and maybe find out  
8 if anything was done. But we'll delve further  
9 into that and see if there was any non-judicial  
10 action taken.

11 But it's just not the 165 files that  
12 have been reviewed that were part of this sample  
13 that's part of this report. We've looked, I  
14 think that what's known as 1400.

15 And you will obviously glean from that  
16 investigation that there was some misconduct that  
17 went on, but most of the investigation -- the  
18 agencies that are investigating an allegation of  
19 rape or sexual assault are not investigating  
20 underage drinking.

21 That's a refer back to the command,  
22 hey, by the way, we found that this out, you



1 know, it's out of our, it's not within our  
2 purview to investigate this. So it's not clear,  
3 it's not at all clear from the files.

4 Now, sometimes you will find that a  
5 subject gets punished for collateral misconduct  
6 even if he wasn't punished for the sexual assault  
7 in a no-action taken case. But that's not really  
8 what I believe the focus of this requirement is  
9 from Congress. So, more information to follow on  
10 that.

11 And Chapter 6, additional issues for  
12 the DAC-IPAD's review identified by the JPP.  
13 This is just an update to let the folks know. If  
14 you'll recall, the DoD General Counsel sent a  
15 letter, a memorandum to the DAC-IPAD requesting  
16 that the DAC-IPAD look into Article 32, 33, and  
17 34, which were JPP recommendations.

18 And he requested that there be  
19 something in the annual report concerning that.  
20 So -- I'm sorry, 5 is attached to 6.

21 Part of the problem with doing this or  
22 the request, some of law just came into effect on

1 January. So it was -- we were unable to do  
2 anything with that because the law hadn't taken  
3 effect yet. And the Article 32 new provision had  
4 taken effect, but it's still too new.

5 As you saw from the data  
6 presentations, we know that how many Article 32s  
7 are waived, and we've got analysis of how many  
8 32s were waived and how did it result in the  
9 finding of not guilty. We were able to do some  
10 of that stuff.

11 But I think it's still too early until  
12 we get three or four or five years of data to try  
13 to figure out whether those changes. You know,  
14 anecdotally when you read a preferred case that's  
15 been referred to a court martial and you see the  
16 start time of the 32 was at 10:03, finish time  
17 10:22, I'm not sure, you know, how valuable that  
18 exercise was.

19 And when you read the actual report,  
20 the evidence submitted is a CID report, the CID -  
21 -- or, I'll use CID since I'm a Army dude -- CID  
22 agent was there to testify, and really there's no

1 testimony, they just didn't submit the report.  
2 The victim doesn't testify and the defendant --  
3 the suspect. And no other witness.

4 And then the 32 officer -- preliminary  
5 hearing officer makes his determination based  
6 upon that.

7 So that will be of interest when you  
8 see the length of these things. And we're where  
9 we're at because 132, and I won't mention the  
10 Navy, I mean, the Service, was the eight-hour,  
11 you know, on the witness, two-day 32. Which  
12 ended up causing the problem here.

13 But that's Chapter 6, it's just to  
14 capture what we know and kind of lay it all out  
15 for the final report. There's no findings or  
16 recommendations to make of that, other than to  
17 approve the chapter.

18 CHAIR BASHFORD: Any discussion on  
19 Chapter 6?

20 BGEN SCHWENK: What's our way ahead on  
21 Chapter 6?

22 CHAIR BASHFORD: Wait and see.

1                   BGEN SCHWENK: Wait and see? Okay.

2                   COLONEL WEIR: There's, what we've,  
3 what the staff is, we're talking about, we're  
4 still in discussion. But it may be a good place,  
5 and it's no decision, obviously you're the Chair  
6 and you get to make the decisions. But the  
7 Policy Working Group might be a good place to  
8 place that and see where it goes.

9                   But right now I think until we see a  
10 year's worth of information coming out of that  
11 data, you know, data collected for that, it  
12 probably might be too tough to even figure it  
13 out. I mean, part of the problems that we've  
14 had, we've got the information from 2012 court  
15 martials, '13, '14.

16                   But the law changed in there. So you  
17 know, how accurate. You can't compare '16 to '14  
18 to '12 because everything's got changed around.  
19 So if we could maybe have a pause in new laws and  
20 changes for you know, five years.

21                   PARTICIPANT: Face over there when you  
22 say that.

1 COLONEL WEIR: Some of that. So we  
2 might able to really come up with some valuable  
3 data.

4 CHAIR BASHFORD: I think that should  
5 be one of our recommendations.

6 (Laughter.)

7 COLONEL WEIR: But we, our next, what  
8 we'll do is we'll make all the revisions and the  
9 changes that we, you know, take law enforcement  
10 out and keep some of those, the words that we  
11 found. And then we'll send you out a clean copy  
12 of that.

13 And if there's something that we  
14 missed where we didn't take out law enforcement  
15 or something, if you'd just please get that back  
16 to us, we'll make those changes.

17 And that will be, we've already  
18 discussed and voted on the new, the draft stuff.  
19 So there's no -- been no new findings or  
20 recommendations that have been brought up that we  
21 have to think about voting on in the future. So  
22 I'm not sure -- I'll talk to you, Chair Bashford,

1 if we need the telephonic February meeting.

2 And it might be just a good idea to  
3 get everyone in, everyone happy and give us the  
4 yeah, yeah, yeah. And it'll be a short, 15, 20  
5 minute meeting just to make sure. I want to make  
6 sure before we go final and it gets submitted to  
7 the Secretary of Defense that everyone is happy.

8 CHAIR BASHFORD: Since General Schwenk  
9 weighed in, I don't think we've actually formally  
10 adopted Chapter 6. You asked what was the way  
11 ahead.

12 BGEN SCHWENK: Sorry. I think that an  
13 idle mind is the Devil's workshop. And seated  
14 next to you on your right is the Devil's  
15 workshop. So for those of you who can't see,  
16 that would be Chief McKinley. So I think it  
17 makes a lot of sense to get them started on  
18 thinking about 32, 34, whatever. Without any  
19 staff support, just let it on.

20 Let the staff provide the documents  
21 and let them sit down when we come for the next  
22 meeting in three months and at least get started

1 thinking about it. Because otherwise, you know,  
2 time will go by and three months after that and  
3 three months after that. And also, idle, we'll  
4 be idle.

5 CHAIR BASHFORD: Other than the ad  
6 hominem comments.

7 (Laughter.)

8 CHAIR BASHFORD: Any further  
9 discussion on Chapter 6? Then I move we adopt it  
10 as part of our annual report.

11 HON. GRIMM: Second.

12 CHAIR BASHFORD: All in favor?

13 (Chorus of ayes.)

14 CHAIR BASHFORD: Opposed? We're done.

15 COLONEL WEIR: Well, I think we have  
16 some cases. Now, the Case Review Working Group  
17 has reviewed these cases, but if any other folks  
18 that want to pop over and take a look at these  
19 investigations, you're more than welcome to.

20 I know, Chief, you're moving closer, so you  
21 could drive here and we'd pay for your mileage  
22 and a room, and you can bring a cot and sleep in

1 our office and just do nothing but review cases.

2 CHIEF MCKINLEY: I would like to say  
3 also that we probably need to real soon start  
4 thinking about site visits if we're going to do  
5 them at all. Because only having two years left.

6 BGEN SCHWENK: Yes, that's what the  
7 General was saying earlier.

8 CHIEF MCKINLEY: And we've got to get  
9 on the move if we're going to do it. And really  
10 have a course of direction on, you know, what are  
11 we going to try to accomplish on the site visits.

12 CHAIR BASHFORD: So that we're putting  
13 that on the staff to start thinking about, I know  
14 you already have been. Before I call Mr.  
15 Sullivan into, leaping into service again, I  
16 really want to take a moment to thank the staff  
17 on the work they've done in putting this  
18 together.

19 Even though we have nitpicked you a  
20 little bit, I mean it's a truly an awesome amount  
21 of work, and you've done, just really.

22 (Applause.)



1                   BGEN SCHWENK: And that's overcoming  
2 the Staff Director. I mean that's --

3                   CHAIR BASHFORD: Mr. Sullivan.

4                   MR. SULLIVAN: This meeting of the  
5 DAC-IPAD is officially closed.

6                   (Whereupon, the above-entitled matter  
7 went off the record at 3:52 p.m.)

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