UNITED STATES DEPARTMENT OF DEFENSE

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

PUBLIC MEETING

FRIDAY
FEBRUARY 22, 2019

The Committee met at One Liberty Center, Suite 1432, 875 North Randolph Street, Arlington, Virginia, at 11:00 a.m., Ms. Martha Bashford, Chair, presiding.
PRESENT:

Ms. Martha S. Bashford, Chair*
Major General Marcia M. Anderson, USA (Ret.)*
Hon. Leo I. Brisbois*
Mr. A.J. Kramer*
Ms. Jennifer Gentile Long*
Mr. James P. Markey*
Dr. Jenifer Markowitz*
Brig. Gen. James R. Schwenk, USMC (Ret.)*
Ms. Meghan A. Tokash*

STAFF:

Col. Steven Weir, USA, Staff Director
Ms. Julie Carson, Deputy Staff Director
Maj. Israel King, USAF, Alternate Designated Federal Officer (ADFO)
Dr. Janice Chayt, Investigator
Dr. Alice Falk, Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor*
Mr. Chuck Mason, Attorney-Advisor*
Ms. Marguerite McKinley, Analyst
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Attorney-Advisor
Ms. Stayce Rozell, Senior Paralegal
Dr. William Wells, Criminologist*

SERVICE REPRESENTATIVES:

Major Jane Male, U.S. Air Force*
Ms. Janet Mansfield, U.S. Army*
Mr. Stephen McCleary, U.S. Coast Guard*
Major Blake Peltz, U.S. Marine Corps*

*Present via teleconference
11:05 a.m.

MR. SULLIVAN: All right. This meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces is opened.

I'm Dwight Sullivan, the Designated Federal Officer for the Committee.

Ms. Bashford, you have the time.

CHAIR BASHFORD: Thank you, Mr. Sullivan.

Good morning to everybody. I'd like to welcome the members and everyone in attendance to the 12th meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, or the DAC-IPAD.

Of the 15 Committee members, eight are presently participating this morning and a ninth should be joining us. Since we're all participating by phone, when I say your name, please identify that you're here.
Major General Marcia Anderson?

MG ANDERSON: Here.

CHAIR BASHFORD: Judge Leo Brisbois?

JUDGE BRISBOIS: Here.

CHAIR BASHFORD: Mr. A.J. Kramer?

MR. KRAMER: Here.

CHAIR BASHFORD: I think we're missing Chief McKinley at the moment.

Mr. Jim Markey?

SGT MARKEY: Here.

CHAIR BASHFORD: Dr. Jen Markowitz?

DR. MARKOWITZ: Here.

CHAIR BASHFORD: Brigadier General James Schwenk?

BGEN SCHWENK: Here.

CHAIR BASHFORD: Ms. Meghan Tokash?

MS. TOKASH: Here.

CHAIR BASHFORD: And I'm Martha Bashford, and I'm here.

Did somebody just join us?

(No response.)

Did I miss anyone?
Okay. The DAC-IPAD was created by the Secretary of Defense in accordance with the National Defense Authorization Act for Fiscal Year 2015, as amended. Our mandate is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of sexual assault and other sexual misconduct involving members of the Armed Forces.

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

The purpose of today's meeting is to conduct final deliberations and vote to approve the 2019 DAC-IPAD Annual Report. We will also discuss our next steps as a Committee.

Each public meeting of the DAC-IPAD includes a period of time for public comment. We've received no such request for today's meeting.

With that, we'll begin our deliberations on the 2019 report. I will hand it
over to our Director, Colonel Steve Weir, to
start us on the deliberations review of all the
updates to the report or any that people have.

Thank you, Steve. Take it away.

COL WEIR: Good morning, everyone.

Thank you for participating this morning.

As you recall, in the January 19th
public meeting we did most of the heavy lifting
for the report where we voted on the findings and
recommendations and went over that report in
great detail.

What I'm going to do right now is turn
it over to Julie, who's been tracking the latest
changes, and she will go over that with you and
we'll have further discussion, if needed.

Thank you.

Julie?

MS. CARSON: Okay. So, after the
January 25th public meeting deliberations, we
incorporated the revisions to the report and sent
out a Draft Version 2.0 on February 8th and asked
members to submit any edits to us, which we have
incorporated and sent back out Version 3.0, which we are deliberating on today.

So, I am just going to walk you through the things substantively that changed in the report. And it starts with page 24 of Version 3.0, which has at the top two charts, "Status of Case Reviews as of February 5, 2019". Just the note is: that has been added. That information was not in Version 2.0, and it shows how many of the total amount of investigative cases there are to review, how many have been reviewed, and how many are left as of, I believe, February 5th.

CHAIR BASHFORD: Okay.

MS. CARSON: Next is page 28. You were provided in Version 2.0 with two different charts on the Command decision, making one that identified all of the results by unanimous decisions versus majority decisions and one chart that consolidated everything together with the majority reasonable/the majority unreasonable. Based on the input, we've put in, I believe it
was option 2, and footnoted in footnote 33 the
information that breaks it down by unanimous
versus majority of reviewers.

MS. PETERS: Footnote 43.

MS. CARSON: Forty-three. Whatever I
said, I don't --

Does anybody have any questions or
comments on that edit?

(No response.)

If not, we'll move on to page 32. And
based on the deliberations on the 25th, there
were two columns added for the cases in which no
penetrative charge was preferred and cases in
which penetrative charge was preferred. And
then, another chart was added on page 33, which
is the duration of investigations.

Are there any comments or issues with
those?

(No response.)

Okay. The next change is page 34.

That's one more chart that was added. No, a
footnote was added to that chart. Because the
numbers -- as you'll see, the N equals 97 and N equals 37 -- are not totaling the 164 cases, a Committee member noted that and asked why. So, we've added footnote 50 which explains that, in the case files, only 97 out of 122 no action cases had documentation sufficient to identify the time elapsed, and only 37 out of the 42 preferred cases had sufficient documentation. That's why they don't total 164.

Are there any questions on that?

(No response.)

Okay. The next change is on page 36. And this section and the charts have been added following the presentation by Dr. Bill Wells. So, this data is information that he presented at the January 25th meeting. That is Section D on page 36, "The Victim-Subject Relationship". And the charts on page 36 and 37 were added.

CHAIR BASHFORD: This is not tracking with yours. I'm showing that as on page 35 and continuing to 36.

MS. CARSON: Yours might have printed
off differently.

CHAIR BASHFORD: Okay. It's pretty close.

MS. CARSON: But it's Section D, "Victim-Subject Relationship".

CHAIR BASHFORD: Yes.

MS. CARSON: And one thing I noted, looking over it this morning, the first chart, "Relationship of Victim to Subject," doesn't have an N equals 164. So, I noted that on there. We'll add that in.

CHAIR BASHFORD: Okay.

MS. CARSON: Well, there was one internal issue we mentioned as a staff. There's not a spouse category. But we don't have Kate Tagert here or Bill on the line.

MS. POWELL: Dr. Wells may be on the line.

Dr. Wells, are you on?

MS. CARSON: I don't think we could join until one o'clock.

MS. POWELL: No, he said he could join
prior to that.

        MS. CARSON: Oh, okay.

        MS. POWELL: But I can't speak to Dr. Wells' charts, unfortunately.

        MS. CARSON: Okay, okay. Well, we'll leave it as it is and send out any information that we can get from Kate or Dr. Wells after the fact.

        But there was a question raised about why spouse isn't on there; it's just an intimate partner.

        Hi. Did someone just join?

        MS. GENTILE LONG: Hi. It's Jen Long. I just got out of class.


        CHAIR BASHFORD: Welcome.

        MS. GENTILE LONG: Thank you.

        MS. CARSON: We are reviewing the report. We're currently on page 36.

        MS. GENTILE LONG: I'm walking. So, I'll just listen.

        (Laughter.)
MS. CARSON: Okay. You'll just
listen? Okay. Excellent.

The next change is on page 41, on
Section 5, that says "Investigator Discretion".

In Version 2.0, when it was presented on the 25th
of January, it also had a section on the length
of investigations. Because that wasn't really an
issue that was developed with substantive
information yet, it was decided to hold that
until the 2020 report. So, that language was
deleted from the title of Section 5. A paragraph
on the discussion was deleted.

And also, what used to be Finding No.
3 was deleted. I can read the Finding No. 3 if
anybody wants me to, but it essentially didn't
make a complete finding on the length of -- okay,
the finding said:

"In some cases in which the accused is
not prosecuted for the penetrative sexual
offense, investigations are taking about six
months to complete. Lengthy investigations often
have significant negative consequences for
accused Service members as well as victims."

The issue with that finding is it doesn't connect six months to lengthy investigations. The statement should be made, if it's going to be a finding, that six months is a lengthy investigation or too long for an investigation, and that connection wasn't made. So, from the input that we received, we considered it a better idea to just remove the finding all together, when more analysis might be made at the 2020 report.

Is there any comment or concern with that removal?

(No response.)

Okay. Hearing none, we will accept that and move to the next change, which is on page 45.

This is the addition of the chart that was presented by Dr. Wells on January the 25th, the case disposition terms most commonly utilized across organizations for cases in which no action was taken. We did change -- there were longer
terms, I believe, and we changed it to just other
terms because they were terms that hadn't been
discussed by the Committee before. So, that's
the only change that was made to that chart.

Are there any questions about adding
that chart? Is everyone satisfied that it should
be added? Or are there any questions?

(No response.)

Okay. Hearing none, we'll move on and
we will continue to include the chart.

The next is on page 47-48. The first
point is on page 47, Section D, "Findings and
Recommendations". This is, it starts with
Finding 4, but because we've deleted Finding 3,
that will actually have to be renumbered now as
Finding 3. So, we'll follow through the rest of
the report with that numbering change. I just
wanted to point that out.

And then, to Recommendation 1. We've
added in each recommendation that it's to the
Secretary of Defense. We've also added the
language that will include the Coast Guard. The
Coast Guard's preferred language for that is "the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy". So, we added that as a parenthetical where we have a recommendation made to the Secretary of Defense.

Are there any questions about doing that or any disagreement with adding that in?

(No response.)

Okay. Hearing none, we will move on.

CHAIR BASHFORD: They're very touchy, aren't they?

(Laughter.)

MS. CARSON: The last is, let's see, page 63. We just did very slight wording tweaks. None of it changed the substantive meanings. I can read the tweaks, but they're very minimal for Findings 13, 14 -- no, 13 and 15, and the recommendation.

One thing I did note in Recommendation 3 we say "Military Services" where elsewhere we say "Services". So, I'll go ahead and change,
take out the "Military" there, unless anyone has a preference to keep it in.

(No response.)

If no one has any questions about that, I will move. There's one other part I would like to note, and that is in Chapter 3 regarding Article 140A. At the time of the meeting on January 25th, you had just received a response from the Department of Defense, Office of General Counsel, Mr. Paul Koffsky, to this recommendation letter that was provided to the Office of General Counsel in September of 2018. So, we added Section 5 on page 93 titled, "DoD Response to DAC-IPAD Recommendations Regarding Article 140A UCMJ," where we summarized the contents of that letter, and the letter is also added as an appendix to the report.

Then, added a Section 6 on page 94, Article 140A, "Standards and Criteria Issued by the General Counsel of the Department of Defense on December 17, 2018". This is the "Standards and Criteria" that was required by January of
2019. When Mr. Koffsky sent the DAC-IPAD the response, he attached this memo and the "Standards and Criteria". So, we have attached those as well as an appendix.

And Section 7, "Discussion and Assessment of Article 140A Standards and Criteria Prescribed by the Department of Defense," we added the following assessment:

"The Committee is very pleased that DoD is open in the future to further evaluation and consideration of its recommendation of a centralized, document-based, military justice data collection system. The Committee will continue to collect and analyze sexual assault case adjudication data until its term ends, and is hopeful that the Military Justice Review Panel will continue and expand the Sexual Assault Case Adjudication Project."

Are there any comments or issues with that assessment?

MR. SULLIVAN: Ms. Carson, if I could just note there's a small issue with regard to
Mr. Koffsky's title. It should be "Senior Deputy General Counsel and/or Deputy General Counsel for Personnel and Health Policy".

MS. CARSON: Okay. Thank you.

MR. SULLIVAN: All right.

MS. CARSON: That just adds a little bit more.

(Laughter.)

Okay. That is the last of the substantive changes to the report.

CHAIR BASHFORD: I think we need to, then, take a vote.

MS. CARSON: Let me add one more thing, if I could.

CHAIR BASHFORD: Yes.

MS. CARSON: If you will look at the Table of Contents on page 4, the last part is appendixes. There are 19 of them, most of which -- you have seen everything before. It's the letters; it's the statutes, the Charter, the list of members. The two I want to point out are Appendix G, which is Dr. Wells' report, the
"Statistical Report on Sexual Assault Investigations: Results from a Sample of 164 Cases Closed in Fiscal Year 2017," and Appendix I, which is the case adjudication database which is discussed in Chapter 2, the data in Chapter 2. This is the appendix with the detailed charts called "Demographic and Adjudication Data of Sexual Offenses Recorded in the DAC-IPAD Case Adjudication Database".

So, we'll be sending today all of those appendixes to you to review, but I wanted to note those are the ones you've not seen before. If you could respond when you receive that, just that you've received it and you have no -- if you have any issues with it, let us know. If you're fine with the appendixes, let us know.

CHAIR BASHFORD: Great. Then, I think we need a motion to approve the 2019 Annual Report, subject to a couple of revisions we mentioned about renumbering the findings.

MS. MANSFIELD: Ma'am, this is Janet
Mansfield from the Army. I apologize for
interrupting, but could I ask two questions about
two of the new charts?

CHAIR BASHFORD: Sure.

MS. MANSFIELD: Thanks. Thanks for
that.

So, on page 19, when, essentially,
we're looking at a prosecution rate for the
penetrative sexual assault cases, Julie, does
that include no probable cause cases in your
denominator, where an attorney said there was not
probable cause?

MS. PETERS: No. It's just the --

MS. CARSON: No, this is cases --

MS. MANSFIELD: This is
investigations, correct?

MS. CARSON: This is investigations.

So, this is whether or not there were charges
preferred --

MS. MANSFIELD: But this is a result
of no probable cause opined, investigations that
resulted in a probable cause opined or
investigations that just were completed?

MS. CARSON: Oh, are you talking about on page 19?

MS. MANSFIELD: Uh-hum.

MS. CARSON: The 2,055?

MS. MANSFIELD: Yes.

MS. PETERS: It does include --

MS. CARSON: That includes every completed investigation of a penetrative sexual assault allegation or complaint.

MS. MANSFIELD: Is there any way for you to clarify, somewhere in a footnote or something, that this would have included cases in which there was a no probable cause opined from the attorney --

MS. CARSON: Okay. If you want to look, also, in the appendix, it's RFI 5 that has the detailed request that was made to the MCIOs. So, you can see exactly what was asked for from them.

MS. MANSFIELD: Okay. I'm just concerned that in the report we're not clarifying
upfront, when we're calculating what's essentially a prosecution rate, we are considering cases that have no probable cause opined report on to the commander.

MS. CARSON: Okay. Okay. So, a footnote to this chart that indicates that?

MS. MANSFIELD: Perfect. Thank you.

MS. PETERS: And, Janet, this is Meghan Peters. Yes, this definitely includes cases in which a prosecutor opined there was no probable cause.

MS. MANSFIELD: Okay. Thank you for that, Meghan.

Then, the second question I have is page 24 of that chart. So, when we're talking about the non-judicial punishment for penetrative sexual assault, Steve, I think these are the ones we've been clarifying for you that there was not actually a penetrative charge on the non-judicial punishment; that because there was insufficient evidence to go forward with the penetrative sexual assault, the underlying misconduct was on
the NJP. Is it possible to clarify that in some way?

MS. CARSON: That's in the substance of the chapter.

MS. MANSFIELD: Okay.

MS. CARSON: Let's see, if you look at --

MS. MANSFIELD: Just the way the chart reads, it looks like the Army has 17 Article 15s for rape.

MS. CARSON: Well that is what the MCIOs provided. But they provided their -- yes, they provided their information to us by what they reported as the case disposition.

MS. MANSFIELD: Okay.

MS. CARSON: And that's something that we've identified now in the larger pool of cases, that that case disposition is not necessarily the penetrative sexual assault case disposition.

MS. MANSFIELD: Right.

MS. CARSON: So, it is discussed in the report itself. If you think it's not clear
enough -- it's in the methodology. Let's see.

MS. MANSFIELD: I'm just looking for another place to throw it in that's closer to the chart.

BGEN SCHWENK: Yes, this is Jim Schwenk. I think that's a good point. If the Army, through the MCIO CID, gave us 17, and then later, the Army, through the TJAG, told us, no, 17 is too high, it's some lesser number, then it seems to me we ought to put an asterisk right there in the chart and drop a footnote that says exactly that: we got 17 from the MCIOs. Later, the Army told us it was -- whatever number it was, or put the right number up there. And then, down in the footnote say, we initially got 17, but the Army told us that was wrong. We've now corrected it to the correct number.

This points out the problem that that highlights about the inaccuracy of case disposition information in the investigative files.

MS. MANSFIELD: Yes. Thank you.
BGEN SCHWENK: It seems to me we ought to do something like that.

MS. CARSON: Okay. And let me just point you to where it is in the methodology, just so you'll know. On page 19, if you look at the first full paragraph that explains what the DAC-IPAD did when it received the RFI responses --

MS. MANSFIELD: Got it.

MS. CARSON: So, "The cases were sorted by the Service of the subject and whether or not the disposition of the case involved preferral of charges. The Committee notes that, in cases in which no charges were preferred for the penetrative sexual assault, some other adverse actions, such as non-judicial punishment or admin action, may have been taken against the subject."

MS. MANSFIELD: Okay. Thanks, Julie. I see it.

MS. CARSON: Okay.

MS. MANSFIELD: Thanks very much,
ma'am, for letting me interrupt there.

CHAIR BASHFORD: Of course.

COL WEIR: Did someone just join?

BGEN SCHWENK: But, Julie, I still think we ought to do that with the chart, that the chart ought to have the right number, whatever it is, if we have the right number. And then, we can have a footnote that explains how it was hosed-up.

MS. CARSON: Sure. Absolutely. If all of the cases had been reviewed -- we also say in the methodology the NJP and admin action cases were set aside and not reviewed. So, that analysis hasn't been done yet. That's why this isn't more clear in this report, but I understand the concern. We'll note that in there, but that's why. Those cases specifically weren't reviewed by the members in order to be able to say those aren't correct.

DR. CHAYT: Julie, I think construct a footnote annotating that this was action taken based on the investigation --
MS. CARSON: Yes, and we'll definitely do that.

DR. CHAYT: -- and not necessarily the penetrative offense.

MS. CARSON: Yes.

DR. CHAYT: I'll craft that and provide that.

MS. CARSON: Yes.

DR. CHAYT: Okay.

MS. CARSON: Did someone else join?

DR. WELLS: Yes, this is Bill.

MS. CARSON: Oh, hi. Okay, great.

COL WEIR: I think we left off with the Chair. Ma'am, if you want to continue?

CHAIR BASHFORD: Yes, I'm losing track of what little -- there's going to be a couple of changes, one to the numbering of the findings. There will be an extra footnote with respect to one of the charts, and we will be getting the appendices that we have not yet seen to review and get back to you.

But, subject to that, does anybody
move to adopt the DAC-IPAD 2019?

   MS. CARSON: But there's one more

thing, Chair Bashford.

   CHAIR BASHFORD: What's that?

   MS. CARSON: If I may, this will now,

once it's substantively approved, will be sent to
our editor, who will make any editing changes
that are not substance-related, just editing for
purposes of improving the written quality of the
report.

   CHAIR BASHFORD: Which we welcome.

   (Laughter.)

   MS. CARSON: She's done a cursory

review of each section as we've gone. But, now
that it's finished, she's going to do the really
deep editing.

   CHAIR BASHFORD: So, this would be our

final pre-edited draft --

   MS. CARSON: Correct.

   CHAIR BASHFORD: -- that we'll be

approving?

   MS. CARSON: So, it will be subject to
the changes we've discussed today and the editing
that will be done by the professional editor.

CHAIR BASHFORD: Okay. Is there a
motion?

BGEN SCHWENK: Moved.

CHAIR BASHFORD: Second?

DR. MARKOWITZ: I second.

CHAIR BASHFORD: Okay. And since
we're on the phone, I'm going to ask if there's a
vote to approve. If people could just say by
name?

So, Bashford, I approve.

MG ANDERSON: Anderson, I approve.

JUDGE BRISBOIS: Brisbois, aye.

MR. KRAMER: Kramer, I approve.

DR. MARKOWITZ: Markowitz --

SGT MARKEY: Markey, I approve.

MS. GENTILE LONG: Jen Long. I
approve.

MS. TOKASH: Tokash, I approve.

BGEN SCHWENK: Schwenk, approve.

CHAIR BASHFORD: Did we miss anybody?
MS. CARSON: Dr. Markowitz? Maybe she had to go --

DR. MARKOWITZ: Sorry, I think I got lost in the process.

MS. CARSON: Oh, okay.

DR. MARKOWITZ: I approve also.

MS. CARSON: Thank you.

COL WEIR: Did Ms. Long --

CHAIR BASHFORD: Okay. So, it's unanimously approved.

COL WEIR: Did she --

MS. CARSON: Yes.

COL WEIR: Okay.

CHAIR BASHFORD: Anything further?

BGEN SCHWENK: And I think we ought to say, once again, what a great job the staff did in putting this thing together. I thought it read real well, and people can draw from it what they want, but I thought it was quite well done. So, congratulations to everybody.

CHAIR BASHFORD: Absolutely, yes.

MG ANDERSON: Great job.
DR. MARKOWITZ: Very well done.

MS. CARSON: Thank you.

COL WEIR: What we wanted to discuss now is, since we're finished with the report, talk about what we're going to do in the future. I had a conversation with the Chair about the way ahead.

As you all know, we've been working hard to do these case reviews, and now that we're finalizing the report, the staff's major role will be to finalize and review those investigations.

The decision was made to cancel the May 17th public meeting. In order to plan a public meeting, it takes a lot of background work to get that off the ground and to hold the meeting, which takes a lot of staff effort. And so, it was determined that the staff's effort could best be utilized in reviewing cases and get those knocked out, those 2,055.

So, the next public meeting will be on August 23rd. That allows the staff to finish the
case reviews, and it also allows the Case Review Working Group to come here to our offices and review those cases, instead of coming to a public meeting.

So, you're welcome to come here anytime, as much as you would like. Get with Amanda and she will set up your travel and lodging.

And I know that General Schwenk has been in contact with Kate Tagert about the Case Review Committee's need to review some of those cases.

What's come to our attention as the staff -- and I mentioned this briefly, I think, at the public meeting -- was either how you look at the acquittal rate or the conviction rate. The conviction rate has been determined to be low based upon what is normal, and how we define "normal" is something we can look into, but the acquittal rate is something that the staff has determined that it would be something that the Committee would want to look into.
There's been interest on Capitol Hill about the acquittal rate and why it's so high. And so, one of the things that we would like to do, as the staff, and propose to the Committee, as we start looking into those, the acquittal rates, one of the things or several of the things that we could do, as a staff, is pull the data that we already have in both the Case Review Working Group database and the court martial database, and try to determine if we can bin those cases factually and maybe make a determination of the likelihood of acquittal based upon the factual scenario.

If we can have Dr. Wells pull a bivariate or multivariate analysis that will say, in cases where there's alcohol involved, it's in a barracks, a dormitory setting, and both participants have been consuming alcohol, what's the likelihood of acquittal in that case? So, we could do that based upon the databases that we have in-house.

The other thing we can do is we've
discussed looking at records of trial, and we've been in discussions with how we can get those and how it best serves us to look at those. A record of trial may or may not indicate what happened at the court martial.

Another idea or possibility to look at is victim declination. We can send out a Request for Information to the Services, to their Special Victim Counsels' offices, and try to get back -- I know there's no mechanism right now that I'm aware of that the Services have, an outbriefing, so to speak, of when the victim leaves or the attorney-client relationship is severed with the Special Victim Special, the reasons why that victim did not want to participate. I think this will be more anecdotal information that would be beneficial to the Committee to determine, once we get that information in, where you guys go with that information.

Are they declining to participate because of the length of the investigation? And maybe that goes to further focus or study on the
length of these investigations.

How relevant or how important is the Special Victim Counsel's advice concerning the acquittal rate? Is that something that they're looking at? When they say to their counsel, "I see where it's 25 percent conviction rate. I don't want to go through this when the odds are stacked against me like that."

So, those are some of the things that we can do through an RFI, just get anecdotal information. And that also lends itself to going to a site, an onsite visit, to ask the SVCs and get some on-the-road, where-the-rubber-meets-the-road information from those SVCs.

And the overall acquittal topic also goes into Article 32, which the General Counsel's Office has asked us to look into, as well as the Staff Judge Advocate's advice. So, wrapped up in that overarching acquittal, there's a lot of small pieces to that.

And we've been involved and talked about the training piece and what training is
going on in the field out there. But we've requested and received what the Services are doing as far as training to incoming Service members in their basic training, whatever Service that may be, as well as their annual training, quarterly training. So, we have that.

That may be something that we want to ask because we've looked at -- one of our staff members has reviewed some of the voir dire questions that are being answered, or asked, by defense counsel. There may be a disconnect between the actual what's in the program of instruction for the training versus what the member is actually receiving or hearing.

And it sort of reminds me of the expedited transfer. Remember the anecdotal, this is being, this expedited transfer process or policy is being used by Service members to get better duty assignments. And I think you all found that that's not the case at all.

So, maybe part of the training is that, what we believe, you know, one drink and
you can't consent to sex, may be a myth that
needs to be dispelled more than additional
training. But that's something on a site visit
we could also look into.

But these are just some of the ideas
that the staff have kicked around, based upon
input we have received from the Senate Armed
Services Committee and Senators and
Representatives on the Hill.

CHAIR BASHFORD: This is Martha.

I'm not sure, Steve, that counsels
will be able to tell you why somebody declined.
That might be on an individual basis -- I would
think that would be privileged.

COL WEIR: Yes, what we were looking
at more is general comments from them, like not
saying that Specialist Susie Smith said this,
where obviously that would be a privileged
communication, but more of these are the five
things that we've been told why victims decline
to participate, and group them like that versus
individuals, just to try to get some handle on
why --

CHAIR BASHFORD: Sure.

COL WEIR: -- victims are declining.

Because, obviously, I think -- and we have the stat -- I want to say 40 percent are declining to participate. So, that's a big number. And so, trying to figure out why that number is that large may be beneficial to the Secretary of Defense and those on the Hill.

And how we go about that, obviously, is open for discussion.

CHAIR BASHFORD: Okay.

COL WEIR: But that would be the staff's --

CHAIR BASHFORD: So, are you sending out an RFI?

COL WEIR: We can do that. That would be the staff's recommendation to the Committee and the Chair, is that we look at the acquittals as our next way ahead; after the case review is completed, we look at the acquittals.

And then, for the August 20 meeting,
we will have -- or excuse me -- the August
-- what did I say? -- the 23rd meeting, that we
will be more in tune to looking at the acquittal
piece of this.

CHAIR BASHFORD: Anybody have any
comment on the Director's proposal?

BGEN SCHWENK: Yes. This is Jim
Schwenk.

I think that the Case Review Working
Group had pretty much decided that, once we got
finished with the work we're doing right now,
that we would move on to looking at acquittals
and figure out how to do that. So, what Steve
said dovetails with our discussions within the
Case Review Working Group.

I will note that Steve points out two
issues that are related, but separate. One is,
why do people decline; why do victims decline to
participate? Which probably in most cases
doesn't have anything to do with the acquittal
rate, because they probably declined before we're
in the middle of a court. So, it's probably two
related, but separate issues that we would end up looking at.

SGT MARKEY: And this is Jim Markey.

I think that you make a good point, General. Why they may have dropped out, and then, is there a timeline of when they appear to be dropping out of the process? I think that would be valuable to see, too, because there may be something tied into the timing of that.

MS. GENTILE LONG: The only thing I would say is I think this is a great place where the research is very helpful on downstream orientation. Because this is where -- I don't know if it was Colonel Weir or Chair Bashford who talked about maybe decisions made based on acquittals. It sometimes happens that the panels don't like this or someone makes a decision or recommendation based on the next one down the chain. So, it might be a good time to pull that and just be mindful of what you might be reading to see if there is any indication of that, which I don't know how you're going to find in the
documents that you have, but --

COL WEIR: Right now, the checklist that we are working off of, the question of victim participation, yes, no, and then, at what point in the process. So, I would say, just off the top of my head, 95 percent are in the investigation phase. We've got a couple that we've determined, once the case has been handed off, that we'll get a note in the investigation file that says, and this could be even after charges were preferred, that the victim is declining to participate. But that's a smaller number, a much, much smaller number than what we have right now at the investigation stage.

I'll toot the Army's horn. They've got a CID Form 570E that the victim fills out that we see in most all of the Army CID files where the victim declines to participate. And that form is signed by the victim, and there's a date certain when that individual has signed that form. So, that's what we found in the investigations so far.
But if we could get some anecdotal information from the SVCs that say that these are the top five reasons, and then, that would give us, from that RFI, that would give us an opportunity to dive deeper into what that reason may be.

And so, for example, I mentioned earlier, one of the top five reasons or top three is length of the investigation. "I just don't want to put myself through this because the SVC has told me it might take 18 months." Then, maybe that's something that the Committee can do a deeper dive into, as to how you shorten the process, if it's possible.

But that's all I have, unless you have anything further.

CHAIR BASHFORD: Well, it would also be interesting, if we could, if it's possible to find, were the declinations during the investigatory stage, how early they come in the investigatory stage. Because that would relate back to our discussion of should somebody be
allowed to re-restrict their report, sort of an inadvertent disclosure. If they're deciding on like day three that they don't want to participate, but the investigation kind of continues along, it would just be interesting data.

COL WEIR: Yes, ma'am, we'll see what we can pull.

But I think what you'll find is, if the victim declines on day three, the investigation does not stop, which I think in most civilian -- and, Mr. Markey, please comment. In most civilian jurisdictions, if the victim comes in and says, "I don't want to file a complaint," then that pretty much stops the investigation, which seems not to be the case in the military.

SGT MARKEY: Yes. This is Jim.

True. But also, one of the things that we have been looking at is the use of the declination form and how those are presented to victims and the timing of those forms. And
sometimes we have, only anecdotal, that those
forms are being used to influence the victim, not
-- how they're presented not to perhaps pursue
the case. So, I think that would be interesting
to look at that practice.

And the other question I had is, when
you talked about training, are you talking about
the individuals involved in the investigation and
prosecution, process training, or are you talking
about enlisted training for the general
population of the military about sexual violence?

COL WEIR: The latter there, the
general training they receive and what the
understanding of that training is.

SGT MARKEY: Okay. Because I'm
curious about training retention of MCIOs, JAGs,
of SVCs, and kind of experience level of that. I
know we've kind of talked about that a few times
at some of the meetings as well, and the turnover
rate, and how that might impact acquittal or
prosecution rates.

COL WEIR: Okay. I mean, one of the
things that we've discussed with the acquittal
rate, and trying to figure out how to get a
handle on that, is in our discussions with the
staff, there was some thought at one point it's
because the prosecutors don't have the experience
to prosecute these crimes. And then, the
Services have assigned special prosecutors to
these cases. You have senior trial counsels who
are trying these cases. You've got Deputy Staff
Judge Advocates involved.

And from my past experience, I can
tell you, when I was the Staff Judge Advocate and
had a sexual assault case, believe me, that was a
high priority for me, and I made sure that the
lawyers who were going to be bringing that case
to trial were prepared and ready to try the case.

So, I think we can get away from
looking at, well, this prosecutor only had two
years' experience and this was, you know -- but
we don't back it up with the senior trial counsel
who tried the case, he was a major, she was a
major. And so, the level of experience of the
prosecutor I think is not the issue.

If you look across the courtroom and
sitting next to the trial counsel's table is
defense counsel who is a young captain, what do
you make of that? These young, you know, the
defense counsels are that much better when
they're peers of the trial counsel? So, I think
that the issue becomes evidence. It becomes the
standard of beyond a reasonable doubt versus how
you got into the courtroom, which is probable
cause, and the mindset of, you know, when we go
back and try to bin these cases, what's the
corroborating evidence, if any? Is it the
classic "he said/she said," both drinking?

So, I think that's probably the focus
versus looking at the training or the experience
level of the prosecutor, because they've got
levels and layers above them who are exerting
-- I hate to use the word "pressure" -- but
exerting, you know, that they need to be well-
prepared to try the case.

And I'm sure we could go out, and that
could be another site visit, and talk to the
Special Victim Counsel -- or excuse me -- the
Special Victim Prosecutors, talk to staff Judge
Advocates and get what their focus is on these
sexual assault cases. Because you have those
cases come across your desk as the Staff Judge
Advocate. Regardless of the Service you're in,
you understand the importance of making sure that
this is a well-tried case. And so, you put in
focus your effort there.

I don't believe, based upon my
experience of that, it's the experience level of
the prosecutors. There is something else at play
here. Because, like I said before, you have
defense counsel who are peers of those trying the
case and they're defending it. And so, it's not
the skill or the experience level.

Chair?

CHAIR BASHFORD: I think that sounds
all fine. And we've been collecting all these
different data points originally in the Case
Review Working Group to see if there was
something predictive about what cases would get
preferred or not. I think those same points will
be useful when we extend it on further to see if
those data points, if there's something there
that Dr. Wells can use to predict which cases
will result in acquittals or which cases will
result in convictions.

COL WEIR: Based on what I've just
described as the way ahead, do we get the thumbs-
up to go ahead and pursue that way ahead from the
staff?

CHAIR BASHFORD: Anybody have any
comments?

(No response.)

I'm going to take lack of comment as
approval.

(Laughter.)

COL WEIR: All right. Well, I don't
have anything further here from the staff.

MS. TOKASH: Sorry, this is Meghan
Tokash.

I agree, Colonel Weir. I think
looking at the high acquittal rate is very
important, especially as a member of this
Committee, now that I have a comparative view as
a federal civilian prosecutor. So, I think that
that is a very good direction.

I would just ask that maybe we can
keep prosecutor training, or maybe not even
training, but the prosecutor track idea open as a
possible reason for the high acquittal rate. I
don't think that it is personally, from my
personal experience, but I just wouldn't want to
preclude, just shut down that avenue. I mean, if
that crops up, then maybe that's a road that we
go down and explore. But I just would hope that
we wouldn't completely preclude it.

COL WEIR: Meghan, let me make sure I
understand what you're saying. So, you're
talking about when the Services decided that they
were going to -- and I think it's the Navy, where
they were going to say you're going to be a
prosecutor for -- that's basically your job.
You're talking about that prosecution track, when
you say that?

    MS. TOKASH: Right.

    COL WEIR: Okay.

    MS. TOKASH: So, for example, just based on personal experience, I know when the Army's SVP program was initiated, one of the initiating ideas was that those SVPs would come around and serve SVP tours again. I'm not sure that that's ever happened to date. Maybe it has. Maybe I'm four years removed now and I just don't have --

    DR. MARKOWITZ: It has, Meghan. It has.

    MS. TOKASH: Yes. So, I think that that would be something interesting, then, to get perspectives from SVPs who are serving a second tour, and that sort of thing.

    COL WEIR: Okay. Definitely something we can look into.

    MS. TOKASH: Thank you.

    JUDGE BRISBOIS: Chairwoman Bashford?

    CHAIR BASHFORD: Yes?
JUDGE BRISBOIS: This is Judge Brisbois. I'm sorry, I have to take the Bench for a hearing in five minutes. So, I need to drop off the call.

CHAIR BASHFORD: Okay. Thank you for staying on this long.

JUDGE BRISBOIS: All right. Thank you.

COL WEIR: Ma'am, that's all I have. If there's no further comments, I think Mr. Dwight Sullivan can close us down.

CHAIR BASHFORD: Mr. Sullivan, you have the gavel.

(Laughter.)

MR. SULLIVAN: Very well.

This meeting of the DAC-IPAD is officially closed.

(Whereupon, at 11:56 a.m., the Committee was adjourned.)
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