UNITED STATES DEPARTMENT OF DEFENSE

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

PUBLIC MEETING

SATURDAY
SEPTEMBER 14, 2019

The Committee convened via teleconference at 11:00 a.m., Ms. Martha Bashford, Chair, presiding.

PRESENT:

Ms. Martha S. Bashford, Chair
MG Marcia M. Anderson, USA (Ret.)
Ms. Kathleen B. Cannon
Ms. Margaret Garvin
Hon. Paul W. Grimm
Ms. Jennifer G. Long
Mr. James P. Markey
CMSAF Rodney J. McKinley, USAF (Ret.)
Brig. Gen. James R. Schwenk, USMC (Ret.)
Ms. Meghan A. Tokash
Hon. Reggie B. Walton

STAFF:

COL Steven Weir, USA, Staff Director
Ms. Julie Carson, Deputy Staff Director
Ms. Patricia Ham, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Mr. Dwight Sullivan, Designated Federal Officer
ALSO PRESENT:

Captain Josephine VanDriel, U.S. Air Force
Major Paul Ervasti, U.S. Marine Corps
Lieutenant Adam Miller, U.S. Coast Guard
Mr. Jim Martinson, U.S. Navy
Lieutenant Colonel Adam Kazin, U.S. Army
MR. SULLIVAN: Good morning. I'm Dwight Sullivan, the Designated Federal Officer of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces or DAC-IPAD. This meeting is open.

For the benefit of the court reporter, I request that everyone identify yourself before speaking. The Director of the DAC-IPAD will be serving as the moderator for today's meeting.

COL. WEIR: Thank you, Mr. Sullivan, and good morning. I'd like to welcome the members and everyone in attendance today to the 14th public meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces.

This unusual Saturday meeting was scheduled for today in order for the committee to meet its deadline of September 16 for providing
input to the Department of Defense General Counsel concerning collateral misconduct.

Because the participation of members today is by teleconference, I am going to read the names of the members expected this morning, and I would like each of you to acknowledge your presence when I read your name. Thank you.

General Anderson?

MG ANDERSON: Present.

COL. WEIR: Kathleen Cannon?

MS. CANNON: Present.

COL. WEIR: Margaret Garvin? Margaret Garvin?

MS. GARVIN: Present. Sorry, I couldn't get off of mute. I apologize.

COL. WEIR: Judge Grimm?

HON. GRIMM: I am present. Good morning.

COL. WEIR: Jennifer Long?

MS. LONG: Present. Good morning.

COL. WEIR: James Markey?

MR. MARKEY: Present.
COL. WEIR: Chief Master Sergeant Air Force Rod McKinley?

CMSAF McKINLEY: Present.

COL. WEIR: Brigadier General Schwenk?

BRIG. GEN. SCHWENK: Present.

COL. WEIR: Megan Tokash?

MS. TOKASH: Present.

COL. WEIR: Reggie Walton?

HON. WALTON: Present.

COL. WEIR: Thank you. Five members currently are unable to participate in today's meeting, and that's Judge Brisbois, Mr. Kramer, Jenifer Markowitz, and Dr. Spohn, and Ms. Bashford.

The DAC-IPAD was created by the Secretary of Defense in 2016 in accordance with the National Defense Authorization Act for fiscal year 2015 as amended.

The 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.

Please note that today's meeting is being transcribed and the complete written transcript will be posted on the DAC-IPAD website.

Today the committee will conduct final deliberations on and vote whether to approve a letter from the committee chair on behalf of the committee to the Secretary of Defense.

This letter contains the DAC-IPAD analysis of and recommendations regarding the Department of Defense's 2019 sexual assault-related collateral misconduct report and future report requirements.

Each public meeting of the DAC-IPAD includes a period of time for public comments. We have received no requests for public comment at today's meeting.

Thank you all for participating today, and at this time, I am ready to begin the discussion of the collateral misconduct, the draft letter back to the Secretary of Defense.
If you'll take a look at the draft that was sent to the members, what we'll do is just go through this, and there are comments on your copy of the draft by various members of the committee, and so we'd like an opportunity to discuss those, and deliberate, and then after we're done with all of the discussions, we'll vote on whether or not to accept the report as drafted with those changes or additions that the committee has made.

If you look at page one of the draft, there were no comments by any of the committee members to anything that's contained on page one, and also if you look at page two, there are no comments from any members of the committee.

If we look at page three, there was a comment submitted by General Schwenk, and he suggested adding a footnote containing the number of false reports that were submitted.

So the staff drafted a footnote, which is footnote four, which says, "The Army reported eight cases involving false allegations of sexual
assault. The Navy, Marine Corps, and the Air
Force each reported five cases involving false
allegations of sexual assault, and the Coast
Guard reported no cases involving false
allegations of sexual assault."

Would anyone like to comment or
discuss the recommendation or suggestion by
General Schwenk to add that footnote?

MS. LONG: This is Jennifer Long, and
I apologize for not putting my comment in. I
think that it's very important to describe or
explain that the Services define false allegation
of sexual assault broadly, and that that
definition also included third parties making a
report of a sexual assault that then a victim
clarified was consensual.

Because under no common understanding
or even understanding in the research is false
allegation understood to include that, and so
what you will do is sort of create a record of
true false reports that we don't know how many of
these actually were those versus the others, and
that came out during the hearing, so I would just like that explanation in.

COL. WEIR: Okay, in anticipation of Ms. Long's comment, the staff drafted, if you'll look at the paragraph on page three that begins, "The Services were also inconsistent." So I will read the suggested language that you don't have and then we can discuss further the language that we've drafted.

"The Services were also inconsistent in how they treated what they considered to be false allegations of sexual assault. Some Services included false allegations in their data as collateral misconduct, while others did not.

"To clarify whether a Service included false allegations in the reported number of cases involving collateral misconduct, the DAC-IPAD asked all of the Services to separately provide data concerning false allegations and adverse actions taken.

"None of the Services provided a written definition of what they classify as a
false allegation of sexual assault or specified
the evidentiary threshold necessary to classify
an allegation as false.

"During the August 23, 2019 public
meeting, the committee members questioned the
Service representatives on this issue and learned
that at least one Service classified cases in
which a mistaken report was made by a third party
as a false report.

"The Service representatives also
mentioned instances in which a suspect makes a
cross claim of sexual assault, meaning that one
person reported the sexual assault and the
suspect in that case then countered by accusing
the reporter of sexual assault.

"Several Service representatives noted
that they had difficulty determining how to
classify these reports," and then that would be
footnoted to the transcript of the August 23
public meeting.

So I think, Ms. Long, we added in that
language. Did that, the language that I read,
did that satisfy what your concern was?

MS. LONG: It does. Thank you very much.

COL. WEIR: Does anyone have any questions about that, the drafted language that was suggested be put in based upon Ms. Long's comments?

MS. GARVIN: This is Meg Garvin, just that it answers my concern as well about the paragraph, so I'm pleased that it's already been drafted. Thank you for that.

COL. WEIR: And I think what the draft language does is it just clarifies in more detail what you all learned at the August 23 meeting about the false allegation claim. Does anyone --

BRIG. GEN. SCHWENK: This is Jim Schwenk. Thank you for doing that footnote. I was trying to get something in the report about how few cases there were regardless of all of the problems on how to count them, that there aren't that many.

Is there any way to take that big
number from our enclosure three of the total
number of Service member victims, I think it was
5,733, and maybe start the footnote by saying, Of
the 5,733, you know, Service member victim cases
during that period, eight were this and five were
that, which would maybe make my point even
better? I don't know.

MS. CARSON: We could combine all of
the Services, General Schwenk, this is Julie
Carson, and give the total number of military
sexual assault victims, and then the total number
of military determined false allegations by
whatever method, and then whatever very low
percentage that is.

BRIG. GEN. SCHWENK: Yeah, because
it's so small and we had a 5,000 and something
number in our enclosure three, I thought if we
reflected that, it would help in that sense to
give a perspective to the reader.

COL. WEIR: So the footnote will say,
There were a total of 5,733 Service member
victims, and of that number, the Army reported
eight cases, and then it would just go with the footnote we already have in the draft.

BRIG. GEN. SCHWENK: Yeah.

COL. WEIR: Does that make sense?

BRIG. GEN. SCHWENK: Yeah, that's all I'm suggesting. That's exactly right.

MR. SULLIVAN: Steve, this is Dwight Sullivan. Could you read that again, the beginning of that again, please?

COL. WEIR: Yes, so footnote four would say, "There were a total of 5,733 Service member victims."

MR. SULLIVAN: Rather than "victims," should that word be "reports?"

MS. CARSON: Well, the question is victims. That's the number that was provided by the Services.

MR. SULLIVAN: It would seem a bit odd to say that there were this number of victims, and of this number of victims, blank were a number of false reports.

MS. CARSON: But there could be
multiple victims in a case, so I don't know.

MR. SULLIVAN: My point is if we're saying, you know, the number of victims is ten and two of the victims were false reports, that would suggest that they weren't actually victims.

MS. CARSON: Right.

BRIG. GEN. SCHWENK: So should you say, "reported victims" or --

MR. SULLIVAN: That would address it.

COL. WEIR: So, There were a total of 5,733 reported Service member victims, and of that number, the Army, and then just finish the footnote?

MR. SULLIVAN: Right.

BRIG. GEN. SCHWENK: That works for me. This is Jim Schwenk. That's good.

MR. SULLIVAN: Does anyone have any further discussion on the footnote or the language that the staff drafted to answer Ms. Long's concerns?

MS. LONG: Just, it's Jennifer Long again, "involved reported false allegations,"
because again -- I'm sorry if I missed that. I was trying to listen carefully. If you're going to talk about the total number of reported victims, then I would equal it with "reported false reports" or something since we have already said we don't know what standard they're using, so I just don't want it to be a conclusion that they are false until we know more. I'm not saying we can't do that at some point.

PARTICIPANT: So, Ms. Long, where would --

MS. LONG: I know it's hard. I'm looking at the old footnote. I tried to write down what you were all saying. I don't know that this grammatically is correct in the original footnote where it said --

I just, now that you've added of the 5,000 or whatever reported victims, I think just where you're talking about the false allegations, that it's very clear that those are also reported or that they found false allegations, but I want us to be careful we are not concluding that they
were false because we don't know what their
determination was. Does that make sense?

MS. CARSON: This is Julie Carson
again. I think I see what you're trying to say.
It's these that were reported by the Services as
false allegations.

MS. LONG: Right, exactly.

MS. CARSON: I think we can make that
change.

MS. LONG: Thank you.

COL. WEIR: Okay, moving on to page
four, I don't see any comments on page four from
any of the committee members. If we look to page
five in the recommendations, there's a suggested
edit by General Schwenk.

It's at recommendation one and it
added language, "or where appropriate, the
Department should submit a legislative proposal
to Congress to amend Section 547 by clarifying
certain methods, definition, and timelines."

Does anyone have any concerns about that
additional language?
BRIG. GEN. SCHWENK: Yeah, this is Jim Schwenk. I just want to explain the reason I said that is it seems to me that arguably some of our recommendations would require an amendment to the statute.

The Secretary couldn't do it alone, and the recommendation goes to the Secretary, so we needed something to cover the recognition that some of this will require amending Section 547, and this language is fine with me, Steve.

COL. WEIR: Any other comments on the proposed language? Okay, and that was at the bottom of page four. I'm sorry if I said page five.

And I want to preface the discussion on the definitions by stating that we met with the Service reps in July, and also with the Service reps were those individuals who participated in gathering the information for each Service's report, the draft report that came to the DAC-IPAD committee.

And so we further followed up after
that meeting with the Services because it became
very clear that there was different methodologies
employed across the Services and the Services
used different definitions to define what they
were looking at.

So they stated to us, the staff, that
it would be very helpful if the committee drafted
definitions across the Services that all of the
Services could follow.

So we had a back and forth with the
Services because obviously they're the ones that
are required to get the information and data from
each Service's, you know, collection of the
information.

So we went back and forth and the
definitions that we drafted for the committee are
those that we ran by or were suggested by the
Services themselves, and so there was close work
done with the Service reps to ensure that the
definitions that the committee submitted made
sense to the Services and allowed them to do a
comprehensive review for the next report.
CHAIR BASHFORD: Colonel Weir, it's Martha Bashford. I totally apologize. I'm sorry I'm so late to the call.

COL. WEIR: No problem, ma'am. We have picked up on what's page five of the draft.

CHAIR BASHFORD: Okay.

COL. WEIR: And we're just going through the committee members' comments. So we defined the committee's definition of sexual assault. There were no comments based upon that definition.

HON. WALTON: This is Reggie Walton. Sorry I didn't weigh in earlier, but I've been in trial. I would just recommend that in addition to attempt conspiracy and solicitation, that we include aiding and abetting.

COL. WEIR: Anyone have any comments or questions about Judge Walton's proposed addition to the definition of sexual assault?

CHAIR BASHFORD: I'm not familiar enough with what it would be under the UCMJ, but it seems to me if we're including conspiracy,
then aiding and abetting would be appropriate.

COL. WEIR: Okay, well, we will make that addition. Now, the definition of collateral misconduct, this is directly from the Air Force submission because it was clear that there was different definitions of collateral misconduct used by the Services, so all of the Services have reviewed this definition that is currently part of the draft.

HON. GRIMM: This is Paul Grimm. Can we conclude from that comment that they've reviewed it that that language that the Air Force is using is acceptable to all of the Services?

COL. WEIR: Yes, based upon the emails that went back and forth, Judge.

HON. GRIMM: Okay, I just want to make sure that if we're picking one definition, it was completely appropriate to run that by the other Services as well, but I just wanted to make sure that they were on board with that.

COL. WEIR: Yes, sir. The way it transpired is that the Air Force Service reps
submitted definitions and all of the other
Service reps and others were cc'ed on the email,
and then we reached out to ensure that there were
no concerns by the other Services based upon that
definition, and all of the Services received a
draft copy of what you all are reviewing for
their review prior to ensure that they were happy
with the way that we had drafted the definitions.

HON. GRIMM: That sounds great.

MR. SULLIVAN: And Colonel Weir,
Dwight Sullivan here. When you have an
opportunity, could you give me a moment to
address the aiding and abetting point?

HON. GRIMM: Sure, go ahead, Dwight.

BRIG. GEN. SCHWENK: This is Jim
Schwenk. You're not allowed to say anything
about the law of principals in doing so.

MR. SULLIVAN: So, General Schwenk
anticipated exactly where I was going, and this
is not inconsistent with the proposition. I just
wanted to familiarize everyone with how military
justice treats this point.
So in Article 77 of the UCMJ, 10 USC Section 877, Congress defined principals as one who commits an offense or aids, abets, counsels, commands, or procures its commission.

So under military law, we treat aiding and abetting not as a standalone offense, but if someone is an aider or abettor, they have committed a 120, or, you know, if it's for larceny, they have committed a 121.

So again, that's not at all inconsistent with Judge Walton's point. I just wanted to familiarize everyone with that aspect of military law, which I was not familiarizing General Schwenk with because he anticipated exactly where I was going.

CHAIR BASHFORD: So it seems as though it's already included in the basic definition.

MR. SULLIVAN: It is already baked in.

COL. WEIR: Judge Walton, does that satisfy your concern that it's already --

HON. WALTON: Yes, it does.

COL. WEIR: Okay.
HON. WALTON: It does.

COL. WEIR: Okay, then we will not add

aiding and abetting based upon the discussion

that was just had. Do any of the members want to

talk about the definition of collateral

misconduct?

BRIG. GEN. SCHWENK: Yeah, this is Jim

Schwenk. So I guess the way I look at collateral

misconduct is why do we care? We care about

collateral misconduct only from the sense that it

might deter the reporting of the sexual assault.

So what might deter the reporting of the sexual

assault? Well, if the misconduct might come to

light in an investigation, that deters, that

could deter the reporting.

So any misconduct that might come to

light during the course of the investigation to

me is collateral misconduct, so if I were writing

the definition just out of the blue, that's what

I'd write. Our definition is a lot narrower. So

why have we decided to narrow it as much as we

have?
COL. WEIR: I think the discussion, sir, that was had was under your definition, if during the course of the investigation, it was found that the victim smoked marijuana two months before, under your definition, that would be considered collateral misconduct, correct?

BRIG. GEN. SCHWENK: If it was reasonable, you know, to think that the investigation would reveal that, yes.

COL. WEIR: And that was the issue that the Services had, was when someone would be, you know, down the road, Why did you smoke marijuana? It was because I was sexually assaulted. And so they wanted to make it as a result of or close in time to the actual sexual assault, not something that happened, you know, months before or months after under the definition. That's why the definition was narrowed to close in time of the sexual assault.

BRIG. GEN. SCHWENK: Yeah, I guess my concern with that is -- I mean, I understand why they want to do that, but my concern is now we're
narrowing what would deter a victim from making a report, because a victim is deterred by the knowledge that any kind of prior misconduct is going to come out as part of the investigation.

And now we've said, "Well, we're only going to count collateral misconduct if that misconduct occurred, you know, around the time of or during the sexual assault itself." So we've taken a subset of what our big concern is, which is misconduct by the accused that might come out in the investigation.

So that sort of bothers me, and if we had time, I would recommend that we, you know, run this back and ask the Services directly that through a working group and try to work out wherever we're going, but we don't have time, so, you know, I'll just point that out and say I've got misgivings about that, and so let everybody know that's how I feel.

I also, you'll see in my note that they put on the side over there, we incorporate a lot of terms that we don't define in that, and,
you know, my experience in the past is as soon as you write "directly related," you know, "committed close in time," you know, then how close? How directly?

How always comes up in the months and the years afterwards. And so if we had time, I would recommend we define those, but we don't, so that leads me to say from my standpoint, you know, I'm not going to vote in favor of B for those reasons.

And, you know, I could vote in favor of something that said, There needs to be a definition of collateral misconduct that everybody agrees and, you know, one that you might consider is this one, as long as, you know, I'm not signing up to say I think this is a good definition because I can't do that. Thank you.

CHAIR BASHFORD: It's Martha Bashford. General Schwenk, when you start talking about what might reasonably deter somebody from reporting, I just think you open up, like, a person's entire life.
I can think of lots of things completely unrelated to an incident that might deter somebody from reporting, something that happened before they joined the military, and I don't know to what extent, if something is remote, how anybody is going to understand whether they think that would be uncovered by the investigation or not. I think it gets just too far afield.

HON. GRIMM: This is Paul Grimm. You know, Judge Walton might have similar thoughts along this same line.

We run into the same kind of difficulties in federal court when we have civil cases involving sexual discrimination or age, gender, national origin discrimination, and the notion of retaliation, when someone has been retaliated against.

And the court does struggle with trying to figure out what's the temporal nexus required for some sort of adverse action taken against the person who reports this
discrimination.

    And they have developed on a case by case basis sort of presumptive periods of time that may vary from circuit to circuit, but it's impossible to have it absolutely granular, but they do say things such as, if you get beyond two or three months, then it's too remote in time.

    And I think General Schwenk's comment is well taken, but as Chair Bashford said, this is one of those things like pulling a thread on a sweater. The more you pull on it, the more it unravels.

    I don't know whether or not, in the decisions of the appellate courts within the military, they further refine conflicts like this, but it's hard to get a specific period of time that we would identify, and without having some limitation on it, it does open the door for a lot of subjective analysis.

    And if we're going to have -- I mean, I think maybe if the notion of it is an objective test, in other words, what a reasonable person
would find as opposed to a subjective test, what
an individual might think themselves regardless
of whether others might reasonably think that,
then that might get at that same issue, but it's
a legitimate concern, but I'm not sure it's one
that can be more specifically identified.

MS. GARVIN: This is Meg Garvin. I
too have concerns about this definition. And
mine stem from some of what has already been said
by General Schwenk, but also there has been so
much conversation at the policy level from, you
know, the prior committees like ourselves as well
as from Congress about in trying to ensure that
victims are not inappropriately punished for
collateral misconduct if we are going to
encourage reporting.

And I feel like for me to vote on a
definition right now, I want to put that
definition in context of all of those other
policy conversations to make sure that those
policy discussions that have already been about
collateral misconduct fit with what we're asking
them to collect in data, and I just don't feel
comfortable doing that.

And I didn't have time this week to do
that, and I apologize for that, but that's my
hesitation to vote for something right now
because I can't put it in context with everything
else that has come before that is driving this
data collection, so I'm not comfortable voting
for a specific definition.

CHAIR BASHFORD: It's Martha Bashford
again. Under bullet point one, there is a
definition, right? You said it's the current DoD
definition, is that correct?

COL. WEIR: Yes, the first bullet
under B, "Current DoD policy defines collateral
misconduct as victim misconduct that might be in
time, place, or circumstance associated with the
victim's sexual assault incident," and that's
footnoted to Department of Defense instruction
6495.02.

CHAIR BASHFORD: So it seems to me
we're sort of reiterating that with a little bit
more language, so, you know, they say "might be
associated in time, place, or circumstances," and
we say "potentially punishable under the UCMJ,"
which I think is a good distinction, and that
it's discovered as a result of the report of a
sexual assault. I don't have a problem with that
definition. Are there any other comments?

MS. CANNON: Kathleen Cannon here. I
agree with Martha.

CHAIR BASHFORD: Colonel Weir, should
we put that, the definition to a vote by the
committee then?

COL. WEIR: Yes, ma'am.

CHAIR BASHFORD: Then I would ask
that, I propose that we adopt bullet point two as
the definition for this data collection purposes
of collateral misconduct.

COL. WEIR: And ma'am, I will just go
down the role and ask each individual to vote.

General Anderson?

MG ANDERSON: I vote yes.

COL. WEIR: Ms. Cannon?
MS. CANNON: Yes.

COL. WEIR: Ms. Garvin?

MS. GARVIN: No.

COL. WEIR: Judge Grimm?

HON. GRIMM: Yes.

COL. WEIR: Ms. Long?

MS. LONG: I'll vote yes. I don't like "directly," but, I don't like the word "directly" in there, but I'll vote yes for this purpose.

COL. WEIR: Mr. Markey?

MR. MARKEY: Yes.

COL. WEIR: Chief McKinley?

CMSAF MCKINLEY: Yes.

COL. WEIR: General Schwenk?

BRIG. GEN. SCHWENK: No.

COL. WEIR: Ms. Tokash?

MS. TOKASH: Yes.

COL. WEIR: Judge Walton?

HON. WALTON: No.

COL. WEIR: Chair Bashford?

CHAIR BASHFORD: Yes.
COL. WEIR: That was eight in favor and three opposed.

CHAIR BASHFORD: So the definition is adopted.

COL. WEIR: Yes, ma'am. The next, on page six, does anyone have any comments on page six?

Hearing none, I'll move to page seven. General Schwenk had a comment that we did not offer a definition of suspected, but we come very close, and so based upon General Schwenk's comment, the staff added footnote number nine which is case law, United States v. Cohen, which defines suspect as -- and also that definition covers Article 31b right. So General Schwenk, with that footnote, does that alleviate your concern?

BRIG. GEN. SCHWENK: Well, it wasn't really a concern. This is Jim Schwenk. It wasn't as much a concern as a consistency thing. Since we had a lot of other recommended solutions, I figured we ought to have a
recommended solution here, so that's great. That
does take care of that concern.

On the substance of the
recommendation, "a reasonable person to believe,"
that seems to me to ring like preferral, you
know, a reasonable belief that a crime was
committed and the individual committed it, and
yet later on we say under that third bullet under
there, "The definition of suspected does not
require a preferral."

But if reasonable belief is preferral
or probable cause, then, you know, I'm not sure
how we answer that question, and I'm not smart
enough to know the answer, so I raise the issue
and let somebody smarter figure it out.

COL. WEIR: I think, sir, what we did
was we deleted the third bullet based upon the
footnote.

BRIG. GEN. SCHWENK: Oh, the one that
says, "The definition of suspected does not
require"?

COL. WEIR: Yes, we lined that out.
So what we did was, based upon your comment, we added --

BRIG. GEN. SCHWENK: Oh, great, okay, then never mind.

COL. WEIR: And deleted three. I'm sorry. I should have made that clear.

BRIG. GEN. SCHWENK: No, that's fine. Mine came out with, I don't understand this, but mine came out with dotted lines around it and then it went over, and of course it blamed Julie Carson for it, whoever she is, and it said "deleted," so if I read, I'd figure that out. Okay, there is no inconsistency.

COL. WEIR: Does anyone else have any comment on that definition? And once again, this was to clarify what the Services, you know, for the Uniform Code of Military Justice purposes, accused means something very different than suspect, so we wanted to make sure that was clear, and I think the definition, I think, does that for the Services as well as when this report goes to Congress.
HON. WALTON: This is Judge Walton. My only concern is the use of the term "believe." That just seems so vague. I understand you're saying, "a reasonable person to believe," but the term "believe" is so broad, I just don't know if it's sufficiently succinct that it's really understandable as to what's being conveyed.

MS. CARSON: This is Julie Carson. The "believed" was taken straight from the case law definition that determined whether the military questioner believed or reasonably should have believed that the Service member committed the offense.

BRIG. GEN. SCHWENK: Yeah, this is Jim Schwenk. You know, Judge Walton, I think you're right. Other than what Julie says, "believe" is a term that the military has used for a long time in the military justice world, both to prefer charges, and as the footnote points out, to determine whether Article 31b warnings are triggered.

It may be used elsewhere. I just
can't think of another example, so it has been
used a lot, so I don't have any problem with us
using it.

HON. WALTON: I mean, if there is a
common understanding within military law as to
what that term means, then I guess I'm
comfortable with it.

MS. CARSON: We actually started with
the word "concludes" and we changed it to
reconcile it with the case law, so.

HON. WALTON: Right.

COL. WEIR: Any other comments on the
definition of accused?

CHAIR BASHFORD: "Suspected of," you
mean, right?

COL. WEIR: Yes. I don't think a vote
is in order because we didn't have any dissension
on that definition.

The definition of adverse action, this
was one that we coordinated heavily with the
Services to narrow it down to those adverse
actions that the Services contract.
And we know that there are other adverse actions that are not in the four main ones, the letter of reprimand, imposition of a non-judicial punishment, preferral of charges, and initiation of involuntary administrative separation proceedings.

Those were the ones that the Services all came back and agreed that they would be able to pull data on those, accurate data, because those are tracked through the Services in different databases.

The problem becomes when you ask them about an adverse letter of counseling that a military member received. They would have no way to track that, and so it made sense to have the definition of an adverse action be narrowly tailored in order for the Services to provide accurate information.

And when you look at what the Services provided us after the July meeting on what type of misconduct it was, or the type of adverse action, it was these types of adverse actions
that they were able to track.

They're never going to be able to go
down and get a local letter or an adverse
counseling statement that some commander has in
their desk, so that's how we came to this
definition in coordination with the Services.

And then if you look underneath those
four, the committee recommends limiting the
definition for the purpose of reporting to ensure
consistency and accuracy across the Services.

One of the things that we found during
our meeting with the Service reps and the
individuals who are responsible for gathering the
information was that it wasn't consistent across
the Services. So in order to help the Services
provide accurate data, it made sense to be
consistent across with what they were gathering.

So limiting or narrowing the
definition of adverse action does that and it
helps the Services provide that consistent
information across the Services to the Sec Def as
well as the congressional committees, so that's
kind of the background on how we got to adverse action.

CHAIR BASHFORD: This is Martha Bashford. What kind of an adverse proceeding could lead to discharge that can't be tracked?

COL. WEIR: Well, that goes under the initiation of an involuntary admin separation proceeding. So if someone is going to be separated for collateral misconduct, there is a paper trail where the commander initiates the separation procedures.

The Service member is notified in writing that they are subject or going to be involuntarily separated. That triggers a right to see a defense counsel to discuss the separation, and then based upon the longevity of the Service member's career in the military, they are entitled to a separation board.

So for the Army, if you have over six years of service, regardless of your rank, you are entitled to a separation board, but there is a notification procedure throughout. The Service
member is notified and that's tracked.

And then the individual's DD-214, the separation document you get when you leave the Service, there's a code on that document that also would tell you why the Service member or how the Service member was separated, and that's tracked through the human resources offices across the Services.

CHAIR BASHFORD: But in our last bullet point in that section, we say, "The committee recognizes the existence of other adverse proceedings or actions that could lead to discharge." That seems like a fairly severe thing that we would not be tracking, that the Services would not be tracking. I don't know what other than the involuntary admin separation proceeding would lead to discharge.

COL. WEIR: Yeah, that sentence doesn't make sense since we are tracking initiation of involuntary admin separation proceedings.

BRIG. GEN. SCHWENK: This is Jim
Schwenk. Why don't we just delete -- why don't we have it read, "The committee recognizes the existence of other adverse administrative proceedings or actions such as loss of special or incentive pay, administrative reduction of grade," you know, et cetera? Just take out "that could lead to discharge" and substitute "such as."

COL. WEIR: Okay, sir, so the sentence would read, "The committee recognizes the existence of other adverse administrative proceedings or actions such as loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to re-enlistment or reclassification." Does anyone have any comment about that change to "such as?"

MG ANDERSON: This is General Anderson. I don't have a comment to that, but I do have another question, so I'll just wait.

CHAIR BASHFORD: This is Martha Bashford again. I still think it says, "that could lead to loss of special," because I don't
think the administrative proceedings or actions are "such as." They're actions and what happens during these proceedings could lead to these consequences, right?

BRIG. GEN. SCHWENK: Yes, this is Jim Schwenk. I agree with Martha.

COL. WEIR: Okay, so the sentence would say, "other adverse administrative proceedings that could," or, "actions that could lead to"?

CHAIR BASHFORD: Yes.

BRIG. GEN. SCHWENK: Right.

CHAIR BASHFORD: "Loss," and then just leave "discharge."

COL. WEIR: Okay, any other comment or concern about that sentence?

LT MILLER: This is Lieutenant Miller, excuse me. The one thing that I know that we can't track for the Coast Guard would be achievement of marks.

So if somebody's marks went from a five in a category of judgment to a four, there's
no way to determine how that, why that happened
because there is no policy requirement to
document that, so perhaps adding just something
in there for evaluation, or I don't know if
that's something, a road we want to go down, but
I think that might be something a victim might
later say or point to as collateral misconduct.

So I guess I'm proposing "actions that
could lead to," keep everything there, and then
at the very, before reclassification or after
reclassification, "reduction in marks, reduction
in evaluation."

COL. WEIR: Well, we have to use
something that's consistent across the Services,
so "adverse evaluation reports"? I mean, I don't
know how -- and we don't -- if there is no way to
track why the person got downgraded in their
evaluation, how would we know it was because of
collateral misconduct?

LT MILLER: I guess all I'm saying is
that if we're looking at this from one side of
what the Services can track versus the other side
would be what a victim is reporting, that a victim could report, "My marks went down because I said I was sexually assaulted." The Services have no way of correlating that allegation of retaliation from their own data.

COL. WEIR: So we could put in as another thing we can't track, "adverse evaluations," because if you say, "downgrade marks," the Army is going to go, "What are we talking about?"

LT MILLER: Right.

COL. WEIR: But I think an adverse evaluation across the Services would make sense.

HON. GRIMM: Should it be performance evaluations, because that's what we're talking about, right?

COL. WEIR: So the proposal would be to add performance evaluations in that list of stuff that they can't track. Do any of the committee members disagree with adding that?

BRIG. GEN. SCHWENK: Adverse performance evaluations? This is Jim Schwenk and
that's fine. Those three words are fine.

MG ANDERSON: This is General Anderson. "Adverse performance evaluations or the Service equivalent" because I think we all use different terms to describe those.

COL. WEIR: "Adverse performance evaluations," and with --

MS. CARSON: "Or Service equivalent."

COL. WEIR: "Or Service equivalent," is how that -- those words would be added. Does anyone disagree with adding "Adverse performance evaluations or Service equivalent"?

MR. MARKEY: This is Jim Markey. I do not, but my thought is this is not an exhaustive list of every adverse action, is it? This is just some general most likely? I guess what's the purpose of -- we're trying to say there's other actions that could be taken, but this is not an exhaustive list of those, I presume.

COL. WEIR: That is correct, sir.

HON. GRIMM: This is Paul Grimm. I think that adverse performance evaluations are
pretty significant in terms of what their
ultimate impact may be on a person's career, and
so they're of a type that are highly significant,
but it's impossible to track.

And while there are many other things
such as, you know, what particular room in a
barracks you are assigned and whether it's a
preferable view or something like that that could
have an impact on it, this is something that has
a major impact because if those evaluations drop
and you're up for review for a promotion or some
sort of reassignment, then everyone who is in the
Service knows how important it is to keep your
evaluations positive.

That has a significance, I think, that
is important enough that mentioning it in that
fashion is helpful.

CMSAF McKINLEY: This is Chief
McKinley. I really think this is kind of a
slippery slope because when you talk about
adverse performance reports, you know, is that
due to the person being sexually assaulted?
Are they in a state of depression or
PTSD because of the sexual assault or is it
because of lack of duty performance, failing
their PT test, or many other things that would
require the performance report to be marked down
to, say, from a five to a three?

So it's just a slippery slope on where
you go here to tie an adverse performance report
directly to the sexual assault.

LT MILLER: Chief, this is Lieutenant
Miller. That's exactly what the point that I was
getting at was, that there's just no way to tie
that, but that could be something that a victim
or an alleged victim down the road said, "You
know, I didn't go to MJP. I didn't go to court
martial. I didn't have administrative action,
but my marks went down."

So I guess I'm looking more at it's
more covering ourselves or at least really
showing kind of the bounds of what we can track
and what we can't track.

CHAIR BASHFORD: This is Martha
Bashford again. It seems to me when we're talk --
-- that's kind of straying from collateral
misconduct. I don't think somebody will say,
"I'm not going to report a sexual assault because
my marks may go down in a future evaluation."

That would strike me more under the
category of retaliation as opposed to any
misconduct that's being -- you know, an adverse
evaluation would be, I think would be pure
retaliation, not because of something collateral
to a sexual assault.

COL. WEIR: Where we left it was that
adding "adverse performance evaluations or
Service equivalent." Chair, do you want to take
a vote on whether to add that language or not?

CHAIR BASHFORD: Sure, all in favor of
adding the language? Do you want to go down?

COL. WEIR: Yeah, I'll start. General
Anderson -- the question is to add "adverse
performance evaluations or Service equivalent" to
that list of stuff.

MS. CARSON: Can I make one comment?
This is Julie Carson. We're making this list of things that cannot be tracked, correct?

CHAIR BASHFORD: Yes.

MS. CARSON: Okay.

COL. WEIR: Okay, so, General Anderson, we'll start with you, and the question is are you in favor of adding "adverse performance evaluations or Service equivalent" to that list, General Anderson?

MG ANDERSON: No.

COL. WEIR: Ms. Cannon?

MS. CANNON: Yes.

COL. WEIR: Ms. Garvin?

MS. GARVIN: Yes.

COL. WEIR: Judge Grimm? Judge Grimm?

HON. GRIMM: Yes.

COL. WEIR: Ms. Long?

MS. LONG: Yes.

COL. WEIR: Mr. Markey?

MR. MARKEY: No.

COL. WEIR: Chief McKinley?

CMSAF MCKINLEY: Kind of a yes, but
I'll say yes.

COL. WEIR: General Schwenk?

BRIG. GEN. SCHWENK: Yes.

COL. WEIR: Ms. Tokash?

MS. TOKASH: Yes.

COL. WEIR: Judge Walton?

HON. WALTON: Yes.

COL. WEIR: Chair Bashford?

CHAIR BASHFORD: No.

COL. WEIR: We have eight yeses to adding the additional language.

CHAIR BASHFORD: So the language will be added.

COL. WEIR: Are there any more comments? Let's look at recommendations two, three, four, and five. Are there any comments from the members on those recommendations?

General Schwenk, on recommendation four, the suggested edit was, "The Department should include in its report data on the number of collateral offenses the victims were suspected of by type of offense, and the number, and type
of adverse actions taken for each of the offenses, if any." Does anyone have any concern with that suggested edit?

(No response)

COL. WEIR: All right, hearing none, we'll -- so that --

CHAIR BASHFORD: Just let me -- I'm sorry. It's Martha Bashford. Is number four, does that now contradict number three since we've said that -- I'm sorry, it's number H, methodology letter H, "Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once."

But in recommendation four, if I'm reading it correctly, doesn't it seem "collateral offenses that victims were suspected of by type of offense and number of types of adverse actions," so if they were underage drinking in a barracks and, you know, something else, are we now telling them in recommendation four you have to count it all and all of the adverse actions, or are we going back to the methodology for
counting numbers of instances, or does it comport
and I'm just misreading it?

MS. CARSON: Ms. Bashford, the
intention was that it's the same as Section H,
only for the most serious collateral misconduct,
but we need to reference that in there, so it
won't be a list that includes every single type
of misconduct, but the most serious for each
victim.

CHAIR BASHFORD: If we could do that,
because the way it reads now, it seems to me
you're contradicting H.

MS. CARSON: Unless the committee
wants to have every single kind of misconduct,
but it seems to me it's a little harder to track,
so to keep it consistent, we'll note that this
includes only the most serious form of collateral
misconduct for each victim.

COL. WEIR: That's going to be in
recommendation four.

BRIG. GEN. SCHWENK: Yeah, this is Jim
Schwenk. I thought four was just a
recommendation that said all of the work that the
staff did to collect that information, the
Department ought to do in the future.

MS. CARSON: Correct, it's what the
Services already did for us and it is in
enclosure three.

BRIG. GEN. SCHWENK: So to Martha's
point, if we want to clarify that, that's fine
with me.

COL. WEIR: So we'll clarify that in
recommendation four and that concludes the
recommendation review. Now if you look at
enclosure two and three -- enclosure one, you
have, which is the Services' draft report, so
that's what they've provided, so there's no need
to comment about what they're provided.

Enclosure two is just the DAC-IPAD
analysis of the draft DoD collateral misconduct
report, and basically what this does is point out
the inconsistencies with the Services'
methodologies.

So basically it just backs up what the
committee is saying about "These recommendations are being made to help with the inconsistencies and here they are," and they're pointed out in enclosure two.

Is there any discussion on enclosure two?

And this was the same enclosure that you previously received at the 23rd.

MS. CARSON: We added the Coast Guard.

COL. WEIR: And added the Coast Guard, right.

BRIG. GEN. SCHWENK: Yeah, this is Jim Schwenk. I thought that was an interesting work product that I benefitted from having.

MS. CARSON: Thank you.

COL. WEIR: And if we turn our attention to enclosure three, that breaks down the Service-provided collateral misconduct information, and then also this enclosure points out the alleged collateral misconduct. All of this information was received from the Services. We just put it into a graph type format.

I think what -- I mean, from a staff
perspective and from my perspective, I think that
the good news that this graph points out under
the Service member collateral misconduct is that
less than, or one percent across the Services are
committing collateral misconduct.

So this chart points that out, I
think, well, that there's not a lot of collateral
misconduct occurring in those victims who are
reporting. So are there any comments or
questions about enclosures two or three?

MS. LONG: Sorry, it's Jen Long. Just
in this enclosure three, do we need to -- I know
that -- okay, it's our analysis, sorry.

Do we need to put the same sort of
explanation around false report as it's included
in these charts as we did in the actual document
so that it's not picked up and misunderstood, or
I guess I don't want to ask that as a question.

I think there needs to be a footnote
around false report that explains that that is a
very broad category that in some cases includes --
- basically I would just map whatever footnote
you put above in the actual report.

COL. WEIR: Okay, does anyone have any comments or concerns about adding a footnote to further explain the false report issue that we discussed earlier?

(No response)

COL. WEIR: Hearing no disagreement, I don't think we need to vote on that because everyone is in concurrence, so we will add a footnote to the false report tying it back to earlier comments in the draft, or in the letter to the Secretary of Defense.

I think, Chair, that we've covered the entire document. I would recommend that -- we've taken two votes on the issue, but I think at this point, we need to take a vote on the overall report.

MR. SULLIVAN: Hey, Colonel Weir, Dwight Sullivan here. Before you do that, I thought that General Anderson had another point she wanted to raise.

COL. WEIR: I'm sorry, ma'am.
MG ANDERSON: Well, I'm not sure now if it's even -- I just wanted to make sure, and this is my understanding, is that all of this data includes data obtained in sexual assaults that occur at the Service academies, as well?

COL. WEIR: Yeah, well, ma'am, the data that we received is the data that the Services provided to us and --

MS. CARSON: And the Air Force is nodding that theirs included the academies. The Army, Marine Corps, and Navy are online.

COL. WEIR: The Army Service rep, did you include Service academy sexual assault information?

LTC KAZIN: This is Lieutenant Colonel Kazin. Yeah, we included the academies.

COL. WEIR: And Jim Martinson, are you there?

MR. MARTINSON: Yes, so we got -- the subset of victims was given to us by NCIS and they would have investigated all offenses in the Navy, so that would have included academy cases.
COL. WEIR: Okay, thank you. Marine Corps rep?

(Simultaneous speaking.)

MAJ. ERVASTI: Yes, Dwight, this is Major Ervasti, the Marine Corps Service rep, and again, since NCIS pulled out the numbers based on identifying Marine victims, there would be no Marine victims at the Service academies.

BRIG. GEN. SCHWENK: I think just wanna-bes.

PARTICIPANT: Was that General Schwenk?

MAJ. ERVASTI: Yeah, thank you very much, appreciate that.

COL. WEIR: Okay.

MG ANDERSON: Thank you very much.

This is General Anderson. Thank you.

CHAIR BASHFORD: Before we go, this is Martha Bashford, I really want to thank the Services. I know was a heavy lift pulling all of this together and then we kind of sent you back and said, "Do it again," and I really want to
thank the staff for pulling this together.

Nobody was given much guidance from Congress, so I really think everybody has done a tremendous job here.

BRIG. GEN. SCHWENK: Agreed.

COL. WEIR: Ma'am, with that, I would recommend that we take a vote of the committee members to approve the overall draft, and we've already voted twice on some of the recommendations, so if we could just go down the roll again and vote on the entire document, understanding some of you have voted no on a couple of the recommendations, but they did pass with a majority of the vote, so --

BRIG. GEN. SCHWENK: So we're voting on the entire -- this is Jim Schwenk. We're voting on the entire document as amended by previous votes?

COL. WEIR: Yes, sir.

BRIG. GEN. SCHWENK: Okay.

COL. WEIR: General Anderson --

CHAIR BASHFORD: All right, I move
that --

COL. WEIR: Go ahead, ma'am.

CHAIR BASHFORD: I said I move that to a vote. Go ahead.

COL. WEIR: General Anderson?

MG ANDERSON: Yes.

COL. WEIR: Ms. Cannon?

MS. CANNON: Yes.

COL. WEIR: Ms. Garvin?

MS. GARVIN: Yes, noting my prior dissent on a piece.

COL. WEIR: Yes. Judge Grimm?

HON. GRIMM: Yes.

COL. WEIR: Ms. Long?

MS. LONG: Yes.

COL. WEIR: Mr. Markey?

MR. MARKEY: Yes.

COL. WEIR: Chief McKinley?

CMSAF McKINLEY: Yes.

COL. WEIR: General Schwenk?

BRIG. GEN. SCHWENK: Yes.

COL. WEIR: Ms. Tokash?
MS. TOKASH: Yes.

COL. WEIR: Judge Walton?

HON. WALTON: Yes.

COL. WEIR: Chair Bashford?

CHAIR BASHFORD: Yes.

COL. WEIR: Okay, ma'am, I don't believe the staff has anything else today, so are there any questions you or any of the committee members may have of us?

CHAIR BASHFORD: I just want you to enjoy the rest of your day. It's gorgeous here in New York.

COL. WEIR: Mr. Sullivan, I think that based upon we've conducted the business today, that you can do your thing.

MR. SULLIVAN: Roger that. This is Dwight Sullivan, the DFO. This meeting is closed.

(Whereupon, the above-entitled matter went off the record at 12:18 p.m.)
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