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
NOVEMBER 15, 2019

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

PRESENT:

Ms. Martha S. Bashford, Chair
MG Marcia M. Anderson, U.S. Army (Ret.)
Hon. Leo I. Brisbois
Ms. Kathleen Cannon
Hon. Paul W. Grimm
Sgt. James "Jim" Markey (Ret.)
Dr. Jenifer Markowitz
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
Mr. Dale Trexler, Chief of Staff
Mr. Dwight Sullivan, Designated Federal Official (DFO)
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Patricia Ham, Attorney-Advisor
Mr. Glen Hines, Attorney-Advisor
Mr. Chuck Mason, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor

ALSO PRESENT:

Mr. Don Christensen, President, Protect Our Defenders

*Present via teleconference
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MR. SULLIVAN: Good morning. I'm Dwight Sullivan. I'm the Designated Federal Officer for the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. This meeting is open.

CHAIR BASHFORD: Thank you, Mr. Sullivan.

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

We're going start by taking attendance.

General Anderson?

MG ANDERSON: Present.

CHAIR BASHFORD: Judge Brisbois?

HON. BRISBOIS: Here.
CHAIR BASHFORD:  Ms. Cannon?

MS. CANNON:  Here.

CHAIR BASHFORD:  Ms. Garvin is going to be joining us on the telephone.  She'll be joining us later.

Judge Grimm?

PARTICIPANT:  His backpack is present.

(Laughter.)

CHAIR BASHFORD:  I think Mr. Kramer and Ms. Long are not here.

Mr. Markey?

SGT. MARKEY:  Present.

CHAIR BASHFORD:  Dr. Markowitz?

DR. MARKOWITZ:  Present.

CHAIR BASHFORD:  Chief of McKinley?

CSMAF MCKINLEY:  Here.

CHAIR BASHFORD:  General Schwenk?

BGEN SCHWENK:  Here.

CHAIR BASHFORD:  Dr. Spohn is not able to join us.

Ms. Tokash?

MS. TOKASH:  Here.
CHAIR BASHFORD: And Judge Walton?

HON. WALTON: Here.

CHAIR BASHFORD: So, we have 12 members present today. We have a quorum.

The DAC-IPAD was created by the Secretary of Defense in 2016, in accordance with the NDAA 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, and the complete written transcript will be posted on the DAC-IPAD website.

I see Judge Grimm has joined us. I think your backpack was here before.

We will begin today's meeting with comments from Mr. Don Christensen, President of Protect Our Defenders, regarding his organization's perspective on military sexual assault convictions, sentencing, and victim access to materials relating to a court-martial.
Following Mr. Christensen's remarks, the Committee will vote whether to approve the DAC-IPAD standalone court-martial adjudication data report covering fiscal years 2015 through 2018. The information contained in the report was presented to the Committee by the DAC-IPAD's Data Working Group and deliberated upon at its August 23rd, 2019 public meeting.

Next, the Committee will receive a presentation from its Case Review Working Group and conduct deliberations regarding the observations and findings of the Working Group after having reviewed over 2,000 investigative case files for penetrative sexual assault investigations completed in fiscal year 2017. The Committee's deliberations on the case review project will be reported to Congress and the Secretary of Defense in the DAC-IPAD's March 2020 Annual Report.

After a break for lunch, the Committee will receive a presentation from the DAC-IPAD's staff regarding issues related to Articles 32,
33, and 34 of the Uniform Code of Military Justice. These issues were recommended to the Committee for review by its predecessor, the Judicial Proceedings Panel, but also by the Department of Defense General Counsel in a June 2019 letter addressed to me as the DAC-IPAD Chair.

At the October 19, 2018 public meeting, the DAC-IPAD unanimously agreed to have a working group look at these issues. At the August 23rd, 2019 public meeting, I requested that members of the Committee who wished to examine these issues in depth notify the staff of their interest. On November 1, 2019, I assigned the Article 32, 33, and 34-related issues to the existing DAC-IPAD Policy Working Group in a memorandum to the Committee and advised that the members who volunteered to examine these issues would become Policy Working Group members. This was done in accordance with the Working Group's terms of reference. The seven DAC-IPAD members who will be serving on the Policy Working Group
and undertaking the study are General Schwenk, Judge Grimm, Ms. Cannon, Ms. Garvin, Dr. Markowitz, Ms. Long, and Mr. Kramer.

Following the Policy Working Group's 2020 overview, the Committee will deliberate on the military Services' written responses and testimony on sexual assault conviction and acquittal rates, sexual assault victim participation in the military justice process, and the court-martial referral process for sexual assault allegations. The results of these deliberations will be presented in the DAC-IPAD's March 2020 report to Congress and the Secretary of Defense.

The DAC-IPAD Staff Director will then provide an update on the Department of Defense response to the Committee's letter providing our analysis and recommendations regarding the Department's September 2019 report to Congress on sexual assault victim collateral misconduct.

Finally, the DAC-IPAD staff will provide updates on the Committee's 2020 military
installation site visit plans and member
observations of sexual assault courts martial.

Each public meeting of the DAC-IPAD
includes a period of time for public comment. We
have received no additional requests for such
comment for today's meeting. During the meeting,
if a member of the audience would like to make a
public comment on an issue before the Committee,
please direct your request to the DAC-IPAD Staff
Director, Colonel Steven Weir. All public
comments will be heard at the end of the meeting
and at the discretion of the Chair. Written
public comments may be submitted at any time for
Committee consideration.

So, that's an ambitious agenda, and
we're scheduled to end at 3:30.

I thank everybody for being here.

And, Mr. Christensen, we are ready for
your remarks. Thank you for coming.

MR. CHRISTENSEN: Chair, thank you so
much for allowing me to come and talk to this
great group about a couple of issues I think that
you've been wrestling with and that I think have been a weakness in the military justice system; specifically, in sentencing reform, the prosecution/conviction rates, and access to discovery materials for victims and their counsel.

Sentencing reform, I think it's time for us to have bold solutions in 2019. We have a sentencing process that is virtually unchanged since George Washington headed the Continental Army. We've gotten rid of flogging and we've gotten rid of branding, but most of the other punishments are the exact same.

In my written remarks, I point out I looked at six months of court-martial results that the Air Force used to put out. I guess they're no longer putting them out as of June of this year; at least there's nothing new.

Just looking at the convictions and the results, there were 33 cases where somebody was convicted of a non-consensual sex assault. Ten of those cases, that offender found guilty,
walked out without any time in confinement, not one single day. That tells me that there's something wrong there. I'm not saying confinement is necessarily the answer to everything, but, as a society, we recognize confinement as one of the most critical steps in punishment for those who commit sex offenses and violent offenders.

When I was a prosecutor, in Europe I prosecuted a man who was convicted of rape. And this was under Article 120, which at that time was sexual intercourse by force and without consent. He was facing life in prison. We argued for confinement. The defense conceded confinement was appropriate. It was a question of how much. The members came back with 30 days restriction. How do you explain to a rape victim that those court members did not believe that the sanctity of her body was worth that man spending a single day in jail?

I think that this is really a question of the process versus arrogance or ignorance of
the court members. The process is unlike any other process in this country. And I think the federal model is the model we should be looking at, that the military should be adopting. It's been around since the '80s.

If you look at it before that, we've had all this judge-alone sentencing for many years. But Congress said, because of the problems of sentencing without any kind of guidelines, we have a wide disparity in sentencing. And that occurs, too, in the military. And that disparity may inure to the benefit of the accused, but often it also is a detriment to them. So, you will see similarly-situated people, people who have committed the same exact crime, and one gets 10 days restriction and a reduction and the other goes to jail for three years and gets a dishonorable discharge. That's not justice.

And for sex assault offenders and violent offenders, there's absolutely no way to ensure that they get treatment before they're
released back into society. In my written
statements, I talk about the Devin Kelley case.
And for those who aren't familiar, he is the
individual who had been court-martialed for
abusing his child and his wife and holding a
loaded gun to her head on multiple occasions,
threatening his commander. He was sentenced to a
year in confinement. He had already served about
five months in pretrial confinement. So, he was
out of jail about five months later.

The day he walked out of confinement
there were no restrictions on him. He did not
have to attend any kind of violent offender
treatment. There were no restrictions on his
movements, no ability to monitor him. And we
know that he purchased a weapon illegally and
slaughtered 26 people.

There are real consequences to our
sentencing process, and it's time for the
leadership of the military to recognize there are
real consequences to the punishment process. I
would suggest that this Committee look at
potentially adopting what the federal system
does: judge-alone sentencing that has a wide
range of tools for a judge to put restrictions on
supervised release.

When a military member serves their
sentence, they are just done; in the federal
system that is not the case. If you have
committed an offense -- let's say child
pornography -- that judge has an ability to say
you will not access the internet; you will not
have any pornography in your possession; you will
not own a computer. And, oh, by the way, I can
also say you're subject to search at any time we
want for a supervised period of time, and you're
going to get treatment. That is something that
protects society from them. The military simply
does not have that. It's really, really time for
bold solutions.

As far as prosecution and conviction
rates, I'm not saying that there's an ideal
conviction rate. Who knows what that is? But I
can say, as you have had testimony before you,
that a conviction rate of penetrative offenses of less than 30 percent and of contact offenses of around 14 percent, I can say something's wrong there.

As I said in my written statement, if anything else that the military did had an 80 percent failure rate, it would be unacceptable. Heads would roll. People would be held accountable. We would be looking to change how we do things.

But, for whatever reason, an 80 percent failure rate appears to be fine with the military. Their only response, if they're even pressed on it, is, well, we take tough cases to trial. Lots of civilian jurisdictions take tough cases to trial. And as we all know from looking at the data, when 95 percent of the cases aren't going to trial, I don't know how well that argument really stands, because they've weeded out all those alleged weak cases and this is all we're left with.

So, why are we failing so much? Well,
when you look at just a three- or four-year look
at the data, in 2015, when there were fewer
cases, fewer allegations, the military got 255
convictions. This is from the SAPR report.
Fiscal year 2018, it was down to 108. That
should be setting off alarm bells among people,
why are we failing?

I think there's a number of things.
I practiced for 23 years in the Air Force. I had
the unique opportunity to do almost all of that
in military justice and maintain my litigation
abilities throughout my career. The way the
military treats military justice -- if you are a
sports fan, I hope this analogy makes sense to
you -- if you think of Tom Brady as a military
litigator, somebody at the height of his career.
Obviously, Tom Brady has taken his Patriots to
nine Super Bowls and won six of them. If he were
an Air Force JAG, when he was getting ready while
warming up for his first Super Bowl in 2003, I
believe it was, or 2002, instead of playing in
that game, the coach would have come over, the
military could have come over and said, "Tom, you've done enough. Time for somebody else to take over. We've got this guy on the bench that needs some experience. We need to broaden your career. We need help on concessions. Why don't you put an apron on and go sell some nachos?"

It's absurd. Tom Brady wouldn't have won nine Super Bowls because his skill set was taken away too early. And that's what we do in the military. We take people out of the courtroom entirely too quickly.

My best appellant counsel, when I was the head of the Appellant Government Division, amazing litigator, was working on a capital appeal. He had been in the assignment for two years. He was supposed to have another year, which isn't enough. He was taken out of that assignment early, not to go to another litigation job, not to go fight in the deployed location. He was taken out early to become what we called the "Party JAG," the party planning JAG in the JAG corps, the guy who runs the social calendar
for the TJAG and sets up the Christmas party, right? He was on capital litigation, but for the Air Force it was more important that his skill set was used to make sure that the napkins were folded right at the TJAG's dinner. That is not a smart use of our resources. We have to have sustained experience.

I think it's obvious to everybody in this room who has great experience -- and we have judges; we have very experienced prosecutors -- there is a value to having experience. I was better at my job at year 23 than I was at any time before that. I was better because of the experience.

Sexual assault, as you have all heard and many of you know, is a very, very difficult case to prosecute. We need to have people who have the experience. And look at this, too. The accused can hire a civilian counsel, and they often do, especially for sexual assault. And so, if you take the Air Force typical Special Victims Prosecutor, they've been at a base level. Maybe
they got to do four or five trials. Maybe two of those were litigated. And then, maybe they got to be an ADC. Maybe they got to do 10 trials. Maybe a couple of those were litigated. Now they've become a Special Victims Prosecutor, and they're there for two years before they pull them out to do something else. And maybe they get to do 20 trials, 25 trials during that time. Maybe 10 of those are litigated.

He can go up or she can go up against a civilian counsel who's been doing this for 20, 30, 40 years, who has 500 cases under their belt. I'm not saying that the quality or the skill level of that military attorney isn't great. I've always been very impressed about the quality of the people we have. But the experience makes a difference. And that, I think, is part of the reason we have such an abysmal prosecution or conviction rate.

So, we have to value experience and it has to be done through legislation. We cannot leave it to the heads of the Judge Advocate Corps...
to do this because every time somebody new comes in, they can change whatever policy the last one had.

We've seen in the Air Force where at one time we had circuits. And then, suddenly, in 2006, I believe it was, circuits were bad and we broke up the circuits, and all our Special Victims' Counsel or our senior trial counsel were dispersed across the Air Force. And then, we get a new TJAG and circuits are good, and they're all brought back in.

The reason I say that is because we have to have legislation. We cannot rely on the goodwill of the current Judge Advocate General. We have to have legislation. And what's concerning is that Congress has twice passed legislation saying you must have career litigation tracks. And I have talked to the sponsors of this legislation and I know what they mean by that. They mean that someone like myself is not an anomaly. There's not been another colonel prosecute an Air Force case since I
They expect our most difficult cases to be handled by our most senior people with the most experience. I think that's what the expectation of Congress is. I think it's what the expectation of the American people would be.

And we cannot rely on the goodwill of Judge Advocate Generals to do that because they've shown they don't want to do that. And so, Congress needs to make it clear. I need, hopefully, you to advise Congress -- you need to make it 100 percent clear this isn't a joke; you need people to be able to prosecute and defend for a career.

What's the other thing that does for us? That sets up a better quality of judge, both at the trial judge and the appellate level. Our trial judges -- I was a trial judge -- our appellate judges -- I was selected to be an appellate judge -- are, by and far, very good people, very smart. But what they usually do not have is a lot of actual in-courtroom experience.
And again, they just rotate in and out of those positions. I was a trial judge for two years. That's it.

To put that in perspective, Judge Baker, who used to be the Chief Judge of the Court of Appeals for the Armed Forces, said it took him at least three years before he was comfortable doing what he was doing as a judge.

If you look at the Air Force Court of Criminal Appeals, which was created in 1969, if you look at it through today, the average judge on the Air Force Court of Criminal Appeals doesn't even make up to two years. If you look at 2016, when it got down to the summer assignment cycle, if you look at the makeup of the Air Force Court of Criminal Appeals, one judge had been on the Court one year. One judge had been on less than a year. Seven were brand-new judges. You would not find another appeal court anywhere in this country that has such limited experience, and it's important that they have experience. And so, if we have a cadre of
litigators that make a career out of this, that
is who you pick those judges from.

And then, again on judges, we can't
have judges rotating in and out. Congress has
tried to make that clear again to the Judge
Advocate Generals, but we still have judges on
the bench a year or two years and then, gone. I
would suggest that Congress should look at
requiring that the judge jobs at a trial level be
for at least for five years and for the appellate
level 10 years. That does only make sense. For
the Court of Appeals for the Armed Forces, that
is a 15-year service. And I just think we need
to do the same.

And then, finally, when it comes to
victim access to discovery, yes, I represent
victims in my current position. I'm denied
discovery because I was a civilian, not military.
The military SVC had the evidence, but was
specifically told she could not share it with me
because I was a civilian. That can't happen.

We would never accept that for our
accused, that their civilian defense counsel

didn't have the same access to documents that the

military defense counsel has. It has to be
equal. We have to get over this idea that the

Privacy Act is a bar to a victim to have access
to her own statements. FOIA is not a solution to
discovery. We've been in litigation with the

United States Department of Defense for two years
trying to get discovery, not on a sex assault
case. But you can't have that kind of delay if
you're trying to represent your client.

And the other area we have real
difficulty getting is the results of forensic
tests, DNA tests, SANE exams, digital analysis of
their cell phones. A victim needs to have that.

It's critically important for a Special Victims'
Counsel. How do we adequately and properly give
advice to our client whether they should go
forward with this, whether they should be pushing
if the government has shown hesitation or the
government has said, "We're not going to
prosecute."? How do we give them appropriate
advice if we don't know what the evidence is?
This is just ridiculous.

And I understand. I've been a prosecutor and a defense counsel and a judge. I understand that you don't just turn everything over to the victim. But, at a minimum, they need to have as routine complete access to anything that they have said and it has been recorded by the United States Government.

So, with that, I would be happy to take any questions.

CHAIR BASHFORD: We have about seven minutes for questions.

Judge Grimm?

HON. GRIMM: So, could you help me? You've commented upon the results of court-martial prosecutions in terms of whether or not the sentence of confinement is imposed or not. Sentencing can be done in the military by either a military judge alone or by a panel.

MR. CHRISTENSEN: Right.

HON. GRIMM: And there's some election
process going in there. Does the concern that
you have with regard to a failure to impose
confinement consistently upon conviction of
sexual assault offenses apply equally to
sentences imposed by military judges alone, or is
the problem, as you see it, when members who
might be swayed by the amount of time that
someone has served and concerns about what a
confinement sentence would be, that would not be
looking at the kind of factors that a judge would
be looking at in terms of sentencing?

MR. CHRISTENSEN: Yes. Well, if you
look at the numbers in where we have a protector
and a defender, doing a deeper dive with like a
longer period of time to look at this, but at the
sixth month numbers, of those 10 that resulted in
no confinement, eight were from court members;
two were from a judge. So, I have a concern with
both.

I have a greater concern with the
court members. I think making these judge-alone
sentencing, which was proposed legislation in
2015 and '16, is a better solution than having court members. I can tell you, as somebody who has argued in front of many court members about what an appropriate punishment is, and as a judge who has instructed them and watched the blank stares as you are giving them their sentencing instructions, and they're like, what are we supposed to be doing with this, that it's not fair to court members to try to have them come up with a sentence.

First, we're very limited in what we can tell them about the sentencing process. Second, they don't understand the consequences of what they're sentencing a person to. Third, it's very hard, as a judge, I think even as a judge sometimes, to sentence people. And what we're seeing is just, especially with member sentences, sentences all over the place.

But I would point out that the reason Congress created the reform in the federal process is because of the wide disparity that they were seeing even with judge sentencing. And
so, one of the things I really point to is that, if federal judges, who, as we all know, go through a much more rigorous process and most of them have much greater experience than what a military judge has, if they have to have guidance to get appropriate sentences, then why would we ever think that military members can come up with appropriate sentences without any guidance?

So, I hope that answered the question. I know it was a long answer, but it's concern with both, but a greater concern with court members.

HON. GRIMM: Thank you.

HON. WALTON: We were briefed on one of the panels that looked at this issue, and they concluded that one of the reasons sentencing guidelines could not be adopted is because there was no empirical proof that there is disparity in these type of offenses. You seem to take exception with that.

MR. CHRISTENSEN: Yes. Well, I think anybody who has done this and is being honest
with you will say, look, I've prosecuted people
or I defended people, and these are two Airmen,
the same background, been in a couple of years.
One goes to a jail a long time; one gets
restriction. Those things are happening.

We can look at just the results that
were in that six-month period of time. Ten
people didn't go to jail; one guy went to jail
for 30 years. Now it's difficult because we
don't know the details behind all those, but we
do know that 10 people didn't go to jail, despite
the fact they're going to have to register as a
sex offender, and other people are going to jail
for very lengthy periods of time.

And when we look at the ranks, we see
that the ranks are all over the place on the
people who were sentenced that didn't get jail,
and we also see the same for people who did go to
jail. But I don't think the American society, if
they understood that we have people convicted of
-- and two of those offenses were child sex
offenses -- these people aren't going to jail. I
just don't think they would believe that.

But if you look -- I mean, anybody can
go to the Air Force website and just start
looking through the results up until May of this
year, and again, I don't know why they're not any
more current than that, and look at the
sentences. Look at the convictions. Look at the
sentences. And you will see they're all over the
place. And you could see it with drug offenses.
You can see it with any other kind of offenses.

I have prosecuted and defended people
who were convicted of child abuse cases, shaken
baby cases, and the sentences go anywhere from
six months to 28 years. It's just all over the
place.

CHAIR BASHFORD: Time for one last
question. Ms. Tokash?

MS. TOKASH: So, from a comparative
perspective, the federal civilian system
sentencing heavily involves the United States
Probation Office.

MR. CHRISTENSEN: Yes.
MS. TOKASH: Including a comprehensive interview of the convicted defendant, including a complete and comprehensive presentencing report that's available to the parties and to the judges. Do you think that the military has the manpower and capability to stand up a U.S. military probation office of sorts to mimic the federal civilian system?

MR. CHRISTENSEN: I'm not going to speak for the federal system, whether or not they could take on this responsibility was well, but it seems to me they could. I mean, we're down to less than 2,000 courts a year. I don't think it's necessary for every offense that someone's convicted of. I'm looking at violent offenses and sex offenses. I think those are appropriate.

But, yes, I think that -- look, this is a priority issue. I've said this before at the JPP, I believe it was. There are 300 enlisted persons who work for general officers whose sole job is to cook their food and iron their uniforms and wash their clothes, right? I
think it's much more important that we do have
more Devin Kelleys -- because I believe that if
that process that you just talked about had been
in place, Devin Kelley wouldn't have had the
opportunity to murder 26 people -- than it is for
general officers not to have to cook their own
damn breakfast.

And so, I think it's a priority issue.
The military spends lots of money -- we have
bands all over the world, hundreds of bands. Is
that more important than making sure that we
don't have violent sex offenders released back
without any supervision?

CHAIR BASHFORD: Mr. Christensen,
thank you so much for coming and sharing your
thoughts with the Committee. We appreciate it.

MR. CHRISTENSEN: Thank you, Chair.

MR. MASON: Thank you, ma'am.

So, this morning we're going to be
going just quickly -- I'm looking for your
approval, please, of the data report that was
presented to you at the last meeting. You saw
all of the tables and charts at that point. We have printed out a copy. You received it two weeks ago, and then, an updated version this past week. We have printed out basically the body of the report for you. I have the full report with the 100 pages for the appendix, if you would like to see it.

But what we need from you, please, is a motion to accept the report and to publish it. And then, we will get it published and posted. And the 2018 fiscal year data will be, then, released to the public.

CHAIR BASHFORD: Is there a motion?

SGT. MARKEY: So, I'll make a motion.

DR. MARKOWITZ: I second.

CHAIR BASHFORD: The motion is made and seconded. Are there any people against publishing it?

Hearing none, you have permission.

MR. MASON: We will get it taken care of and published and get copies out to everybody.

The second thing that I would like
your support on this morning, please, is we would like to send out a Request for Information for the fiscal year '19 cases. We have not done that yet.

Sort of how in the past we modified our RFI and we were getting information, we're going to modify it one more time this time in an attempt to assist the Services. We're asking for all cases with a preferred charge under the Uniform Code of Military Justice, not limited to just sexual assault. And once we receive that list, and then, request the charge sheet that goes with that, we will be able to determine what are the responsive cases and then, ask for the documents related to sexual assault, rather than the Services trying to report to us, and then, having a response rate like we had with the Army at 60 percent. We think we can help them by asking for the right cases rather than them trying to figure out what we're looking for.

So, I would just ask if you would endorse that proposal going forward, so that we
can send the RFI out.

  SGT. MARKEY: So moved.

  HON. BRISBOIS: Second.

  CHAIR BASHFORD: Any opposition?

  Seeing none, you have your permission for the RFI.

  MR. MASON: We will get both of those done. Thank you very much, ma'am.

  CHAIR BASHFORD: We're a little ahead of schedule, which is always good. The Case Review Working Group is next.

  BGEN SCHWENK: We will take that being ahead of schedule as a challenge on the Case Review Working Group and try to make sure we get behind schedule.

  (Laughter.)

  Okay. Good morning, everybody.

  The staff is going to be coming up, so they can answer all your hard questions. The members will take all the easy questions.

  Okay. Good morning, everybody.

  The Case Review Working Group has
completed its review of adult penetrative sexual assault investigative case files resulting in initial disposition decisions and the subsequent case actions, if any, for cases that were closed in FY17. It has also inputted about two-thirds of the resulting data into a database for analysis by our criminologist, Dr. Wells.

The Committee members and staff reviewed a total of 321 out of approximately 2,000 cases. The staff alone reviewed the remaining cases. The reviewed documents included the entire investigative case file provided by the Services and in preferred cases the charge sheet, the preliminary hearing report, the result of trial, and any victim input that was available.

The commanders and staff analyzed detailed case records in order to better understand judicial command decisions, characteristics of both the victim and subject, and other case characteristics. One objective of the CRWG is to provide a standalone report to the
DAC-IPAD sometime in 2020 which will provide the following:

It will provide descriptive data by Service from penetrative sexual assault investigations from 2017.

It will provide bivariate and multivariate analyses of case factors that may be predictive of whether charges would be preferred or no action would be taken in a given case.

Additionally, the criminologist will be analyzing whether there are any similar characteristics in cases that result in no action and acquittals.

And finally, it will provide subjective determinations on command decisions based on the Committee members' expertise.

For purposes of the CRWG's objectives, subjective assessments, as well as the reported dispositions, they were made only in relation to penetrative sexual assault. For example, if a report of penetrative sexual assault was investigated, but the accused was court-martialed
for a sexual contact offense, the case was
reviewed as no action, in our perspective,
because no action was taken on the penetrative
sexual assault. Initial dispositions of the
cases were categorized as follows: no action;
charges preferred, or administrative action was
taken.

Although the DAC-IPAD will later be
given an opportunity to deliberate on the
completed data and make future findings and
recommendations based on the CRWG's completion of
the project, the CRWG -- easy to say for me --
wants to brief you today on its initial
impressions based not on the data collected, but
on the members' impressions from reading so many
investigative case files and related case
documents. The CRWG hopes this briefing will
help the DAC-IPAD prepare for site visits in 2020
by developing questions based on these findings
and observations.

Okay. Now we're going to hear three
findings and nine observations. For the three
findings, we recommend that the DAC-IPAD approve the CRWG continuing to explore each of those three findings. For the nine observations, we're going to recommend that the DAC-IPAD Chair approve the CRWG forwarding the nine observations to the Policy Working Group for their consideration and action they deem appropriate. And we've made the division because the three findings were in areas we thought clearly fell within the cognizance of the CRWG, but the nine observations, we're talking about Article 32, Article 33, Article 34, which now is under the province of the Policy Working Group.

For each observation and finding, a CRWG -- this is a real treat for you guys -- a CRWG member will explain the issue. Other CRWG members will comment, and then, the entire DAC-IPAD will have an opportunity to ask questions and raise their own comments for the CRWG or the Policy Working Group to consider in the future.

We will proceed one at a time. To
brief you on Finding No. 1, Mr. Markey.

MS. GALLAGHER: Before you start, if
I may, if the members -- it is at tab 4.

BGEN SCHWENK: As I said -- yes.

MS. GALLAGHER: Sorry. It is at tab
4. In tab 4, you also have your individual
copies of the slides that are up there, but you
also have another document that has relevant
bullets containing observations in support of the
findings.

Sorry. Please, Mr. Markey.

SGT. MARKEY: Well, thank you. Thank
you, General Schwenk, Chair Bashford, and the
DAC-IPAD.

First of all, I want to kind of
express our gratitude for staff and for the Case
Review Working Group. This is not an easy lift.
If anybody has ever done investigative case
review or any type of review of files, you
realize that coding data and reading through
reports is very time-consuming and tedious. And
I think the Case Review Working Group did an
outstanding job in going through this information and trying to identify trends/patterns within these case files as best as we could.

I don't know if everybody has access or can see Proposed Finding No. 1. I will briefly read it, so everybody is aware.

"Statements of sexual assault victims taken by military criminal investigators often lack sufficient detail and appropriate follow-up questioning by the investigator. The lack of detail and follow-up questioning in these statements made it difficult to properly assess an appropriate disposition for the case." And that was from the Case Review Working Group's observations and findings. It kind of has two ramifications.

One is, if we're finding it difficult through the lack of clarity or the lack of follow-up with statements -- or in some instances there was no statement that we could find within the case file, and yet, a decision authority is trying to determine whether they should take
action or no action in a case -- we found that very difficult for somebody without appropriate documentation information to actually make a sound decision about the case and whether it would move forward or not.

The other side, which I noted in Mr. Christensen's written statement, is about the investigation. And that is these investigations are not stagnant. So, there is not a statement and the investigation is over. There's continuing to be investigative follow-up, questioning of witnesses, identification of evidence and information that comes into the investigation.

When a statement is taken originally, sometimes there's information that's developed through the investigation that requires clarification or have the victim an opportunity to respond to some of the information that's developed in this case file. We did not see that occurring. It seemed like the initial interview with the victim was a one-time investigative
questioning, and there appeared to be little, if any, follow-up.

There also appears to be perhaps in some of the cases additional documentation that may be important in making a decision on these cases, whether they move forward or not, and that's through the availability of potential recordings of these interviews. And so, one of the questions would be, does the decision authority have access to those recordings to maybe clarify some questions? Or maybe some information was not documented in the report that might be in the recorded interview that would be important for them to try to make a more decisive or a better decision in the process.

And so, those are some of the observations and the findings that we had in relation to Finding 1.

BGEN SCHWENK: Others here, CRWG members or staff?

CHAIR BASHFORD: One of the things we noted, there were occasionally more than one
interview. But, by that time, there was almost always a victim legal counsel. Some made the victim available for the interview. Others said, send me written questions and I will pose them to my client and send you back. That's just not a very good method of developing information.

And I noted in one of our comments here there was rarely an attempt, once the suspect had been interviewed and gave usually a different version, there's was never an attempt to try to go back and see what the response was. And it's hard to know whether there simply wasn't an attempt to do it or whether the attempt was rebuffed under the theory that we don't want, they don't want the client to have to answer questions over and over again.

HON. WALTON: Are these interviews being conducted by trained, experienced sex offense investigations, as is the case in most well-developed police departments? I mean, it takes special skills in order to appropriately question individuals who have been subject to
sexual assault. So, if that's not happening, then I would suspect that that may be contributing to the problem.

SGT. MARKEY: I would answer that in two ways. One, yes, MCIOs are conducting these interviews. Two, we don't know the experience, training, skill set that those investigators might have when they're conducting the interviews. Three -- I said two; I'm going to go to three -- we don't know the directives that these investigators are given as far as what sort of interview process they're being asked to complete. So, there's a lot of unanswered questions that we would like to, obviously, look at further. But we believe that MCIOs are conducting these interviews. We just don't know to the degree of experience or skills that they may have.

If anybody else has --

BGEN SCHWENK: I know that previous advisory committees have looked into the skill level, and MCIOs say they have clear policies
that in a sex assault case it has to be a sex
assault-trained investigator that's doing the
investigation under supervision of the local
office. But we will follow up on that when we do
the interviews with people out in the field and
we do the panels in the future with the MCIOs,
and be able to have in our report back detailed
information on exactly that issue of the training
and experience.

I know Colonel Christensen, one of his
written comments on experience being a problem
didn't just talk about prosecutors and defense
counsel, but also talked about investigators.
So, we'll definitely look at that.

One thing, when you look at these
findings, the findings were, as careful as the
CRWG can be, carefully crafted to only talk about
our perception, our observation, that we felt
strongly enough to say, to recommend the finding
without going into what questions we should ask
as a result, what issues we should look at, and
where we might come up with possible
recommendations to answer the finding.

So, today, if you have thoughts, just like Judge Walton did, of things we should talk about, this is a great place to say, look into this; look into that; this might be a reason, or this might be something worth looking at.

CHAIR BASHFORD: General Schwenk, are you asking the Committee's approval for the Case Review Working Group to continue looking at this finding?

BGEN SCHWENK: Yes, I am.

HON. GRIMM: I move that.

DR. MARKOWITZ: Second.

CHAIR BASHFORD: Any opposed?

(No response.)

CHAIR BASHFORD: It's back to you.

BGEN SCHWENK: Okay. Finding No. 2, and Ms. Tokash?

MS. TOKASH: Proposed Finding No. 2 was that investigators need more direction -- excuse me -- discretion to tailor the investigation to the specific facts of the
complaint. There needs to be a mechanism early in the investigation for assessing complaints for closure, where appropriate.

And then, we had four subcategories to this proposed finding, and those were:

That the investigation and resolution of sex assault complaints frequently take longer than the facts necessitate;

(b) All complaints receive the same level of investigation without the investigation being tailored to the allegation;

(c) In some cases, investigations continue, irrespective of the victim's preference, even when the victim asserts there was no sex assault or where the elements of a sex assault were not established.

And then, finally, (d) our review of investigative case files leads us to conclude this practice of untailored investigations is not an effective use of time and resources, and it confirms our previous finding from March 2019, which is listed below, which was based on
testimony from military investigators.

So, this proposed finding really was borne out of our deep dive into these cases. And I have experienced as recently as yesterday, it was a delayed report case that I reviewed, and half of the NCIS investigative file included a photo packet, a very detailed photo packet of the crime scene that at this juncture was three and a half years old. And there were new residents living in the facility. So, perhaps there could have been a better use of time for the investigators rather than go out and take pictures that, according to their documentation, took over seven and a half hours with probably little to no evidentiary value, at least from what I could see, based on my review. And that's not a standalone case.

We were finding that in many of the cases that we reviewed that, if a victim said, "I was not sexually assaulted," from a prosecutor's perspective, that's a probable cause threshold. If a victim is saying, "I was not sexually
assaulted," an element of the crime is not being met. And so, one would think that the investigation could be wrapped up and closed. However, what our review has seen is that the investigation continues, irrespective of the victim's preference and irrespective really of the needs of that particular investigation.

I almost liken it to -- and maybe Dr. Markowitz would appreciate this -- but if you go to a doctor and say, "My head hurts," but, then, the doctor completes a full body examination and is focusing on tendinitis in another part of your body, while that may be troublesome, you're really there because your head hurts.

We're finding that these investigations are not being tailored to the particular crime, and it's this broad brush stroke, and we're finding that resources are not really being adequately put where they should be. And we were really backed up by the panel of military investigators that we heard from who said, "I've been doing this for decades,
and yet, I don't have the discretion from my headquarters to say this is a wrap; I can close this case." They're being made or forced to continue down the road of continuing fruitless investigations just to check blocks that their commands are requiring them to check.

BGEN SCHWENK: This is sort of like "Back to the Future," as Ms. Tokash said. The investigators told us that. They told previous panels that. Nothing seems to be done, has been done thus far -- well, I guess some minor things have been done. But we want the opportunity to take a deeper look at it and go out and ask some specific questions on solutions, not just understanding the scope of the problem, but figuring out, is there something we can propose that might help alleviate the concern that the investigators have and the resulting adverse effect on the entire rest of the process by dragging things on so long? And so, that's why we're asking the panel's approval to continue to work on this.
CHAIR BASHFORD: Another thing we saw is, because it seems to be checklist-driven, that one of the early stages is sort of canvassing fellow soldiers about both the victim's and the suspect's behavior/character, which would never -- it's not going to lead to admissible evidence. And what it really has the tendency to do is that, if there were people who are unaware of the allegation, they're now aware of the allegation because they've been asked, "What do you know about this one" or "What do you know about that person?"; things I never see in the civilian world, going to ex-girlfriends, ex-wives, ex-boyfriends and asking about, "What was your relationship like with this person?" It's very, very common in these investigations and it is very time-consuming, and it doesn't advance the investigation at all.

HON. GRIMM: Just a question to Ms. Tokash and for our Chair. And the reason for that, as supplemented by the testimony of the investigators themselves, is that this checklist
system, this do all these things in all cases, no
matter whether they seem to make sense or will
provide evidentiary value at all, is because
there are directives from the top-down saying, in
each case you have to do this?

       MS. TOKASH: Yes.
       HON. GRIMM: And that, then, supplants
the individual judgment of an experienced
investigator as to what is required in this
particular case?

       MS. TOKASH: That's what their
testimony was, yes.
       HON. GRIMM: And that seems to be
borne out by what you were seeing?

       MS. TOKASH: Yes.
       CHAIR BASHFORD: We did not ever have
the impression that the investigators thought --

       HON. GRIMM: That was the way to
really do it?

       (Laughter.)
       CHAIR BASHFORD: Or taking pictures of
a --
HON. GRIMM: A few years later?

CHAIR BASHFORD: -- of a house

sometimes seven, eight, nine years later was very
terribly value. And we saw many cases where the
current occupants wouldn't let them in. And so,
there's pictures of the front door of the house
and the outside of the house.

(Laughter.)

CHAIR BASHFORD: And it's well

meaning, but they're doing it because they have
to do it.

MS. TOKASH: Right.

MS. TAGERT: Just for clarification,
the direction of the checklist, or where that
comes down from, it's not at the top levels of
the MCIOs. They clarified that with us after a
previous meeting. However, we see checklists in
the majority of the case files. So, we're not
sure where the direction to have the checklists
comes from.

CHAIR BASHFORD: And just in contrast,
civilian investigators often have checklists, but
they use the portions of the checklist that apply to the particular facts or incident at issue. So, just because it's a checklist, you don't have to check everything off. You check off the relevant things.

SGT. MARKEY: Chair Bashford, just one comment. I understand the principle behind contacting ex-girlfriends, ex-wives, if you go with the premise or the principle that a lot of these offenders are serial offenders and you may get other disclosures from those folks. So, I do see the value on a limited basis of identifying potentially other victims that may not have come forward, but have information.

But we also saw previous commanding officers, previous platoon, military folks that they worked for asking about, "Was this person a nice person?", "Was this person well-behaved?", "Did you see other attributes that were concerning about their behavior towards other people?" in even years previously.

And so, I think there has to be a
balance, and I think that comes with maybe training and experience and knowledge and skill sets and direction for the investigators.

CHAIR BASHFORD: So, General Schwenk, are you asking for the Committee's permission for the CRWG to continue investigating this finding?

BGEN SCHWENK: I am.

HON. GRIMM: So moved.

SGT. MARKEY: Second.

CHAIR BASHFORD: Any opposed?

(No response.)

CHAIR BASHFORD: It's back to you General Schwenk.


MS. CANNON: Thank you.

With regard to Proposed Finding 3, we found that, immediately following an allegation of sexual assault, the subject's command routinely imposes some form of administrative action, including, but not limited to, suspension of security clearances, administrative holds
prohibiting favorable personnel actions such as promotions, educational opportunities, moves, and awards. These actions have negative personal and professional impact on the subject.

And when you look at the relevant data regarding this finding, you see that a significant percentage of the cases result in no action taken. And yet, action has been taken against the suspect. In an average of 180 days before the no action is taken, that suspect is going through these problems that arise on the initial accusation being filed.

So, some of this occurs, and a lot of it, before the process, which would be comparable to due process. I come from state. And in the State practice in California, if an investigation is going on and there's no formal complaint and process beginning, a person's life isn't derailed. When they're arrested, they could post bail, but it's still not necessarily derailed. Whereas, in the military, it can truly have deep effects on the accused.
And not only the freezing in place or
the flagging that's referred to, the fingerprints
and DNA being submitted, what happens is, let's
say no action is taken, which is what we're
concerned about here. No action is taken in a
significant number of these cases. Now that
Serviceperson is supposed to go back to their
life, but their life has been put on hold or
negatively impacted. So, they're no longer
really promotable in comparison to their peers.
They no longer have the ability to increase their
earnings, retirement. All kinds of things are
impacted. And what often happens is they leave,
and you lose valuable members of the Service
because of a process that doesn't really protect
them in the beginning.

There are some suggested areas to look
into. Can we distinguish more serious cases from
less serious, so that these kinds of early
actions against a suspect could be avoided in the
less serious? Would that be something to look
at? And maybe waiting until probable cause
determinations are actually imposed. So, those were some of the ideas that we were proposing as areas to look into.

        CHAIR BASHFORD: One of the things, there's simply absolutely nothing analogous in the civilian world that, before an arrest is made, so before somebody decides there's probable cause and an arrest is made, there's nothing that happens to somebody's who's being investigated. And a lot of times somebody investigated has no idea they've ever been investigated if no charges are going to be brought.

        The other thing we saw is that the fingerprints and DNA are often taken and sent out, DNA to CODIS, fingerprints to the FBI, before any decision has been made to bring charges. Again, there's nothing analogous to that in the civilian world. If you want DNA from an uncharged person you're investigating, you have to get judicial approval. Sometimes you have to get counsel assigned. But it's not just somebody says, "Okay, I think we have probable
cause," and off it goes.

And again, coming from the civilian world, I don't think -- certainly I did not have any understanding of how serious and sometimes permanent missing promotion opportunities while the investigations go on, missing chances to go to certain schools, and the fact that your career can be on hold for that period of time -- and again, the six months was an average; some are longer -- can completely derail a career. And that was something that certainly is not immediately obvious to me, but we heard a lot of testimony about that.

CSMAF McKINLEY: One of the things I'm concerned about is the impact on the accused and also, the victim, is retainability in the military. When we go out and we recruit members to our military, by the recruiting process until the time we get them to the basic training or officer training, and then, we get them to their first day of duty, actual duty, we've probably spent hundreds of thousands of dollars on that
person. Who haven't gained a day of work from that person yet, other than the training, and so forth, they went through.

And we've asked this before from each one of the Services in these meetings. When we have a victim, once the victim goes through trial, whether or not the accused is convicted or not, what is the retainability of the victim? And no Service tracks that. And also, for the suspect.

The Chair says that many things impact that person's career from minute one. You can't go to professional military education. You can't carry a weapon. Can't do a permanent change of station. All these things, and this could go on for a couple of years. And we do not track the retainability of those suspects.

So, each member of our military from the time we go out and recruit them and train them, they're a valuable, valuable member to our military. But, yet, for these cases, we don't track the retainability of how many people just
choose to get out because they don't like the system; they don't like how they were treated. So, I think it's really important that each Service come up with a way to track the retainability of our victims and, also, the suspects who have been found innocent.

CHAIR BASHFORD: And I think the restrictions and flagging have to be looked at in connection with the fact of -- it's in the data -- how many of the sexual assault complaints resulted in no action being taken, not an acquittal at a court-martial. I mean, that can happen, but no charges were ever preferred. And we've got to look at it in that context, too, I think.

BGEN SCHWENK: And just for the public, because I don't think they have -- do they have these, the numbers? No? Their honor sheets? No? The numbers range from the 60s to the 70 percent that result in no action cases. So, we're not talking about a small, you know, 5 percent, which we would still worry about. But
when you're talking about 60 to 70 percent of all the people that are, suspects that are placed in this situation, end up with no action at the other end, it definitely got my attention.

And so, yes?

MS. TAGERT: I would just add that it's not just no action. These are cases where a judge advocate has found that there's no probable cause for indexing. So, there has been an attorney weighing-in on the probable cause for the penetrative sexual assault.

BGEN SCHWENK: So, Ms. Bashford, we recommend --

CHAIR BASHFORD: Are you asking the Committee's approval for the Case Review Working Group to continue to explore this issue?

BGEN SCHWENK: Yes, I am.

HON. WALTON: So moved.

MS. TOKASH: Second.

CHAIR BASHFORD: Any opposed?

(No response.)

BGEN SCHWENK: Okay. Now things are
going downhill on the quality of our briefers.

(Laughter.)

BGEN SCHWENK: Ms. Bashford?

(Laughter.)

CHAIR BASHFORD: Okay. Now we were starting out with observations. So, Article 30 of the UCMJ directs that commanders and convening authorities determine what disposition should be made of charges in the interest of justice and discipline.

Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found, in cases where there was an indication of the rationale for the disposition decision, consideration primarily of the following factors:

We saw consideration of probable cause, sufficiency of the evidence, multiple victims, victim preference, and the declination of other jurisdictions to prosecute. These factors seemed to be considerations concerning
the interest of justice, but we didn't see
considerations, at least articulated, concerning
the interest of discipline.

So, people had very different views of this. Some thought that it was a subjective and
vague standard that should not be used, and 180-degree different, that it sounded right, and what
other standard would you use?

So, I think we want to refer this to -- and we'll do this at the end -- to the Policy
Working Group to see what should this mean. Does it mean that there's probable cause? Does it
mean that there's sufficient admissible evidence? Really, what does the best interest of justice
and discipline entail?

BGEN SCHWENK: Yes, we understood that the purpose of military justice is not solely
justice, but it is also good order and discipline. And so, it's pretty apparent that in
the interest of justice and discipline means in the interest of justice and good order and
discipline.
But what was I guess perplexing to me, in particular, was, when we saw the case disposition reports and they wrote down, as Chair Bashford said, the reasons for the disposition, they all went to the justice side. They were all legal considerations. And rarely -- I mean I never saw one, so I'll say rarely; maybe somebody wrote it down -- that adverse effect on the command of some specific was never written down.

So, I'm not sure what exactly it means. And so, even though I'm the one that said, because the purpose is justice and discipline and military justice, it sounds like a good standard to me, I don't know what the standard really means. And so, I thought since I didn't have to do it CRWG, it was worth having the Policy Working Group put it on their list of issues to look at.

CHAIR BASHFORD: Judge Grimm?

HON. GRIMM: It seems to me that this is a fundamental issue. Because this whole process of these committees has come in when
criticisms were rendered five-ten years ago about the way in which the military was handling these. The suggestion was, well, let's remove sexual offense from the jurisdiction of the military court-martial system; let's give it to civilians who have the investigators who have the discretion to do more than check the box. Let's give it to prosecutors who have spent a whole career prosecuting this. Let's give it to defense attorneys who know how to defend. Let's have the protections of due process. Let's get people who can provide therapy and treatment for the victim. Let's just take it away.

And the response from the military was, oh, no, we need this; we can do it; we can do better. And when you look at the dedication, the development of all of these systems, the special victims' system, extraordinary effort put on there. When you look at the sincerity of the people who have testified before us who have been trained and are committed to doing the right job, but, then, when you look at it in the notion of a
year and a half as a prosecutor, a judge for 12 months, you look at investigators who have to check the box, and you ask yourself, why is it that if you're going to have three or four of these advisory committees recommend that things be done, and they are not done, then why is it that the military should be allowed to continue to prosecute this tranche?

And it's particularly important, it seems to me, if they can't articulate why the good order and discipline, which is the justification -- the military justice system not only prosecutes things that are offenses in the civilian community, such as assault or theft or sexual assault, but it also prosecutes for disrespect or disobedience of an order or AWOL or failure to repair, things that are unique to maintaining discipline.

And if there is no ability to be able to articulate how it is that the prosecution of these cases contributes to good order and discipline, as opposed to justice, then why is it
that the military should continue to have these
cases? That's existential as far as I am
concerned. It seems a fundamental question to
me.

CHAIR BASHFORD: But one thing we also
observed is there were a number of cases we saw
where there was dual jurisdiction between the
civilian authorities and the military. And at
least of the ones that I saw, sometimes the
civilian authorities would take it for a couple
of days, and then, say, "Back to you." And
sometimes the civilian authorities would say,
"It's yours" from day one. I certainly didn't
see a great appetite from civilian prosecutors
for taking these cases.

BGEN SCHWENK: Any other comments from
anybody on Observation 1? And we'll hold the
recommendation on the observations until we get
to Observation 9.

(No response.)

BGEN SCHWENK: Okay. Observation 2,
and if experience makes people better, then
here's another chance to excel for Ms. Bashford.

(Laughter.)

CHAIR BASHFORD: That was a very amorphous one.

Our second observation is that, "In many cases the victim's preference as to disposition seems to receive more weight by convening authorities than the consideration of whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial. The Article 33 non-binding disposition guidance may not give appropriate weight to the sufficiency of the evidence factor."

What we saw was that the complainant's preference seemed to be binding on the authorities. And that's certainly appropriate in most cases. When there is a declination to go forward, I could envision some horrific case where you would want to spend a lot of time trying to change that declination for safety purposes to the general community. But wanting
to have a trial shouldn't be the only thing
that's being looked at.

So, we thought that, if you don't have
enough evidence to obtain and sustain a
conviction, you shouldn't pass go. But, since
these are just sort of a lumped menu of factors
that can be considered, it's very hard to know
which factors were considered. Sometimes the
convening authority did say which ones were
considered, but there was never any weighting of
them. And what we saw was that the victim
preference seemed to be the most heavily weighted
of any of them. And we heard that certainly from
the Air Force testimony last time, that if the
victim wanted to go forward and they had probable
cause, then off they went.

We just think that saying that you
have admissible evidence to sustain a conviction
should be given equal weight. Because if you
don't, then what are you doing?

DR. MARKOWITZ: Chair Bashford, are
you saying that in your review you saw that
across all of the Services? Or are you saying that, in response to what we heard from testimony last time, this is your recommendation, that none of the Services -- that all of the Services should be considering this as the standard?

CHAIR BASHFORD: We saw most of it as declinations, I think.

DR. MARKOWITZ: Okay.

CHAIR BASHFORD: But I think you absolutely have to look at what evidence you have available to you in weighing these, as opposed to this being given the most weight.

DR. MARKOWITZ: Got it. Thank you.

BGEN SCHWENK: From my perspective, I mean, when I started looking at the low acquittal rate and wondering why is there a low acquittal rate, there obviously can be many --

CHAIR BASHFORD: High acquittal. High acquittal.

BGEN SCHWENK: Oh, high acquittal rate. Sorry. Thank you.

High acquittal rate, there are
obviously many reasons, but one of the reasons I thought was, how important is considering the likelihood of success of conviction at trial? And in looking at that, boy, you would see the Article 34 advice letter where you think it might be raised, and it's a checklist letter. It's just not even discussed.

And the answer, of course, from the panels we had is it's discussed in private with the convening authority, but it's not written down. And that made me think I'm not sure what they're considering, and I'm not sure that the current system of having likelihood of conviction given the same weight as all the others and not pulled out, when you're talking about a court-martial, makes sense. Maybe it does, but I wasn't sure it did. And so, I thought that was a good observation and one that we ought to forward to the Policy Working Group.

MS. TOKASH: And I think we have to also think about -- this is Meghan Tokash -- the message that it sends to victims. From being a
former Army Special Victim Prosecutor, when
something was referred to court-martial, the
victims that I interfaced with as the prosecutor
felt confident in my ability, that they were
going to seek justice via a conviction.

And I think we have to be cognizant of
the fact that we might be setting victims up for
failure or creating this great expectation that
just might not come to fruition because we just
don't know how a panel is going to receive the
evidence and deliberate on it, and ultimately,
vote.

So, it's something that certainly I,
as a case reviewer, had in the front of my mind
while reviewing these cases, you know, that that
should be something -- the ability to obtain and
sustain a conviction has a direct correlation to
how we treat victims really and how we service
them.

HON. GRIMM: The distinction being,
from your point of view, that probable cause
being a much lower threshold than beyond a
reasonable doubt, which is what you need for conviction? That somehow the difference between those two standards is lost in the value to process it?

MS. TOKASH: Right, and especially, I mean, the Air Force was very overt about it. They said, "We just need probable cause and a victim preference, and then, we're a go." It seems problematic, not only from the case files that we reviewed, but also from victims that we've heard testify before us, and then, also, from my comparative experience now. It could be harmful.

CHAIR BASHFORD: And just to be clear, we're not suggesting in any way that only cases you think you're going to win should go forward, because there are many cases where you have sufficient evidence to sustain a conviction and you think, boy, this one is going to be really, really tough and I very well may not prevail, but it should go forward. But that's because you believe you have the evidence to meet that
burden.

MS. TOKASH: Uh-hum, uh-hum.

MS. GALLAGHER: If I may interject, with regards to the Article 33 non-binding guidance, the Case Review Working Group was certainly aware that that was not in effect until January of this year. However, the observation itself is irrespective of the non-binding guidance. It deals with the sufficiency of the evidence and the victim's preference, which came across clear through the materials that they did review.

And the observation is that, going forward, the Policy Working Group should look at how Article 33 is factoring that in, now that it is in effect. And many of the Services did respond in the RFIs that practice is not necessarily going to change, based on the Article 33 non-binding guidance factors because they were already observing those in practice.

BGEN SCHWENK: Okay. Well, since Ms. Tokash has got her voice warmed up, we'll let her
do Observation 3.

MS. TOKASH: Observation 3, "While judge advocates often provided investigators advice on probable cause for submission of fingerprints" --

BGEN SCHWENK: Could we get the slide --

MS. TOKASH: Oh, sorry.

BGEN SCHWENK: -- for Observation 3, please?

MS. TOKASH: Sorry about that.

"Probable cause for submission of fingerprints and DNA to federal databases. It is unclear what, if any, advice on appropriate disposition factors, including advice on probable cause, judge advocates provided to the initial disposition authority."

So, from our review of the case files, it was unclear in the materials that we reviewed when and how initial disposition decisions were made, whether commanders received advice, whether there was any discussion of probable cause, and
if probable cause was met. It was very hard to understand whether there was a system for initiating and/or declining prosecution. It seemed that the PC requirement comes a lot farther down the road instead of at the initial disposition.

Some of the members of our subcommittee found that or believed that judge advocates should make written probable cause determinations, and that if there is no probable cause, the investigation should be closed.

From a comparative perspective, as I was reviewing these, I considered the initiation and declination of cases requiring a probable cause requirement with the U.S. Attorney's manual; and that, if there is a failure to establish probable cause, that is an absolute bar to prosecution. And based on the review of our cases, we were seeing some preliminary hearing officers saying there's no probable cause, and then, a staff judge advocate recommending that a case going forward, and the convening authority
accept that. And that seems to be problematic from where I sit as a practitioner, if you have a judge advocate saying that probable cause was not established.

CHAIR BASHFORD: One other thing, again, there's just nothing analogous in the civilian world to this determination, the decision to go forward pre-preferral, of taking fingerprints and DNA. And we've seen cases where the complainant's statement simply didn't articulate a crime. And yet, there's a PC determination made a week later for the DNA and the fingerprints, and then, ultimately, the decision is there's no PC even for a case. So, there seems to be multiple standards of probable cause floating around. We're not really sure who's making them. You have some of the findings and recommendations from 2019 here. So, certainly we saw a lack of clarity in how that was made. I saw one where there's a PC for fingerprints, but no PC for DNA from the same
case.

So, I think everybody was a little bit confused about what that means, the practitioners as well.

Are there any questions of Ms. Tokash?

(No response.)

BGEN SCHWENK: Okay. On to Observation No. 4, and this one is back to Mr. Markey.

SGT. MARKEY: Thank you, General Schwenk.

You know, I just realized that case progression, we're working downstream farther and farther with each one of these observations and findings, which is interesting, like you would work through a case.

So, No. 4 Observation, "The initial disposition authority often did not identify which factors were considered significant in the disposition decision and currently is not required to do so. This created, or appeared to create, some impact or effect on the credibility,
consistency, and transparency of how these
decisions are being made, which lends itself to
the fact of questioning how the process is
working or not working when decisions, hopefully,
we believe, are being made on sound legal
principles."

But we don't know because those
decisions being made are not documented in a
majority of the cases. And so, there is a
presumption on the part of the review team that
-- our presumption is, you know, experience and
experts in the various fields -- was that these
decisions were being made based on sound legal
principles.

But I think the observation is that we
need to bring that out, so that credibility, so
that transparency, so the rationale behind these
decisions is visible to everybody. And that
would kind of take that cloak of unsure on how or
why these decisions are being made, and is there
bias being applied to how these decisions are
occurring? And I think it would be helpful for
the military, the general public, and those questioning the process if that would occur.

One of the recommendations from 2019 as well was to establish a set of standard options, whether that's something to consider or not, but that's at this point one of the recommendations for commands' disposition and how they document.

So, I know we've talked a lot about checklists, on considering would we create another checklist, right? I don't know if that's exactly what we would like to do, but it's a consideration. Because do some of the disposition authorities, are they unsure on how to describe how they made the decision or what factors that they should be considering? And so, that was part of the questioning and the observation that we had.

BGEN SCHWENK: Yes, from my perspective, we're sitting there; we're looking at the case investigative file, and now we're looking at the initial disposition decision. And
I'm asked the question on the form, was the initial disposition decision reasonable? And so, I make my own assessment, but, then, I'd like to know why they did whatever they did. And sometimes there's a report. In some of the reports you get a pretty good answer and you can say, oh, okay, I understand why and I still agree or disagree, or it might cause me to reconsider how I evaluated it when I see how they evaluated it. But sometimes you just don't have a clue and you're left with, well, I know what they did, but I don't know why and I'm not sure now what they did was reasonable. I sure wish I knew why, and you ring it up as unreasonable.

Now I don't want to give the impression that I or any of the other members or the staff found initial disposition decisions were unreasonable in any large number because we actually didn't. We overwhelmingly found they were reasonable. But the fact that you can't get the why answer was a problem.

CHAIR BASHFORD: I really want to
stress that we -- overwhelmingly is almost an understatement -- found these decisions to be reasonable. We spent hours looking through every investigative file to come to that conclusion.

Certainly, in transparency, if there was a little bit more of an explanation for why the commander made that decision, because not everybody's going to have access to go through the whole file, it would be helpful just for transparency.

BGEN SCHWENK: Okay. Anything else on that one?

(No response.)

BGEN SCHWENK: All right. Moving on, as Mr. Markey said, as we move to Observation 5, we've moved to the Article 32 world. Observation 5 says, "Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's analysis and conclusions are useful to SVCs, VLCs, and defense counsel in advising their clients and SJAs and convening
authorities in rendering advice and making
decisions on the charges, probable cause,
jurisdiction, and dispositions."

Okay. We were mindful that, although
we were looking at 2017 cases, and these were our
impressions coming out, that the requirements now
under Article 32 say that the preliminary hearing
officer is supposed to do a more detailed
analysis. And so, obviously, based on our
observation, we think that's wonderful.

The question that I think this raises
is, is the details that are now going to be in
the Article 32 preliminary hearing reports
sufficient for the purpose? From my perspective,
one of the issues is likelihood of success on the
merits. The preliminary hearing officer is going
to have to make a recommendation of disposition.
Hopefully, the preliminary hearing officer
considers all the non-binding factors, even
though it only says "should consider," instead of
"shall consider". But, nonetheless, hopefully
they do. And if they do, I hope they give what I
consider to be appropriate weight. But I think the Policy Working Group should look at it and see whether all that's true.

But there was no doubt that, when you saw the old check-the-box Article 32 report, you had a sinking feeling of not knowing why any of those boxes were checked, especially the ones on probable cause and disposition decision. And now, when you picked up your next case and you went through it, in there was somebody who actually did what we called detailed, which we really mean a careful, analytical explanation of the reasoning. It was wonderful. I mean, you could agree or disagree, but at least you understood. And so, that's what we're thinking of and that's why we made the observation.

CHAIR BASHFORD: Certainly, when we saw the detailed reports, they were very thoughtful and clearly took a lot of time to prepare. They were very, very helpful.

One of the things -- and this is no reflection on the PHOs themselves -- but you
would sometimes see almost a "Well, good luck with this."

(Laughter.)

CHAIR BASHFORD: Yes, there's PC, but there are serious credibility issues, again, evident just from the paperwork itself. But the PHO is like, but that I have to push down. Even though I think there are serious credibility issues, that's really not my job. And so, the thing goes downstream again, which also seemed to be -- which we'll get to in some of the later observations.

Any other comments?

CHAIR BASHFORD: Any other comments on that?

(No response.)

CHAIR BASHFORD: All right. On to Observation No. 6, and that is Ms. Cannon.

MS. CANNON: Yes, tailing into or off of the last, we're now in the deep dive of the Article 32 hearings. Observation 6, we found that, "Based on reviews of the investigative
files and Article 32 reports, the CRWG noted that sufficient evidence for a probable cause determination is not always presented at the Article 32 hearing. The Article 32 preliminary hearing officer should be presented with sufficient evidence to support a probable cause determination at the Article 32 hearing where it is subject to be challenged by the defense."

And by that, what we're talking about is make it a real hearing, not a paper depository of some of the investigation and holding back on others, but a true hearing that has heft and weight, where there's testimony, live testimony, of victims and there's true challenge to the evidence, and it's a vetting process, an adversarial process of determining whether there is sufficient probable cause, and giving the hearing officer the discretion and the power to make a binding decision.

And where it's just a somewhat limited to almost empty process, kind of an administrative process, as opposed to having any
kind of constitutional due process, it doesn't
have the effectiveness that we could see it
having. What we saw with some of the cases, and
the data bears it out, is where hearing officers
made a finding that there was not sufficiency to
go forward, the SJA would make a decision
overriding that and based on information that
wasn't presented, or information that was
obtained later.

And subsequently, the case was found
to not be viable and the action was no longer
taken, which kind of reinforced the finding of
the preliminary hearing officer. And all of that
could have been avoided, had the preliminary
hearing or the Article 32 had the sufficient
weight to carry the day.

In the comparable civilian world that
I'm in, a preliminary hearing is a critical stage
of the proceedings. That's a term of art that
basically gives all the constitutional weight and
power to all those involved, including the
defense, and all the rights are there.
And the power of a preliminary hearing officer to look at all of the evidence, and then, say either it's not good enough or, as indicated, it may meet these very low threshold, but "Good luck, counsel, and here are the areas you're going to have a problem with." That will help in determining whether the prosecution really wants to go forward.

So, the question we have is, should we look at the binding ability of preliminary hearing officers? Will it affect the proper disclosure of discovery and the fairness and due process of the entire process? And should it be comparable to the civilian world where the binding authority is still subject to -- it's not without prejudice. If there's new evidence, it can be another hearing or it's subject to appeal. So, it's not the end of the story if there's other things to look at.

So, that's kind of the basis.

HON. BRISBOIS: So, this strikes me as, should we go back to the way we were doing
things in the '80s? Because, anecdotally, Judge Grimm and I, we were prosecutors/trial counsel in the late '80s. And the Article 32s at that time were adversarial hearings, and there were detailed recommendations and findings based on the evidence that the government had a burden of putting on, and the defense had the opportunity to impeach.

Somewhere we've had testimony that along the way there were changes to the rules of court-martial, and that, basically, eliminated the role and the purpose of Article 32, as we knew it as judge advocates. And it has created problems which the Case Review Working Group has now identified. Those changes appear not to be doing anything to help the process, but they're creating new problems in the process. And so, maybe an observation isn't even necessary.

I think we've had enough testimony. We've got enough experience with prior systems, current systems. I mean, we could almost ask the Case Review Working Group and the Policy Working
Group whether or not it should be a 
recommendation to put the substance back into
Article 32. I don't know how much more work we
need to do. We know it's not working.

HON. GRIMM: It's an interesting issue
because, if you analyze it in the civilian
context, which is where our experience and advice
is supposed to be brought in to try to make
intelligent recommendations, in the federal
system the indictment process, there is no
preliminary hearing. There is no evidentiary
presentation at the point to decide whether
there's probable cause, and that's all done
before a grand jury in secrecy with the
prosecution there and not the defense. So, it's
non-adversarial. Once that charge is made, if
additional evidence is developed, they'll go back
in to the grand jury and either supersede to add
charges or remove charges.

In the civilian community, in some
case there are preliminary hearings unless
there is an indictment. If you talk to any
prosecutor who is given their druthers, they will
indict before there's a preliminary hearing
because they don't want to have to go in at a
stage when their preparation is far less complete
than it would be a week before trial and roll the
dice on having testimony from witnesses who they
may not give -- and the timing the way this is,
to be able to have the opportunity to prepare the
way they would prepare before trial.

And if that circumstance occurs, you
can understand why a prosecutor would say, "Well,
I'm not ready. I haven't had the opportunity to
be with my witness. I haven't prepared my
investigator," who may be over here and I don't
have access to him. So, let's just go with a
paper file and put it all in there and let it go.
But it's undermining what it is that the purpose
of this investigation is supposed to be doing.

And that's a tricky thing because I
think we get that in the federal system as well
when we're trying to enforce discovery
obligations of the federal government and saying,
under the Rules of Criminal Procedure, the
defense has a right to have knowledge of tangible
documents and things that are going to be
introduced in the case-in-chief. And you know
that when you've indicted. And the prosecutors
will say, well, yeah, but we don't really tighten
that up until a week, two weeks, three weeks
before trial because of all the other cases that
we have.

So, there's this dynamic there about
whether or not there is an incentive at that time
to have the best information available, whether
it is available, whether there's been the
preparation necessary to be able to provide to
the Article 32 officer the information to be able
to make not just simply probable cause, but that
forecasting as to whether you should take it
forward. They seem that they could be working at
cross-purposes.

CHAIR BASHFORD: I just want to
clarify one thing. Our observation is that the
preliminary hearing officer should have
sufficient evidence presented to him or her to support a probable cause determination. Our observation doesn't include what form that evidence should take.

HON. GRIMM: Right.

CHAIR BASHFORD: And in the civilian world, again, I believe at least for federal grand juries the agent testifies as to what they learn. So, it's hearsay. In my jurisdiction, it's an indictment has to be based on non-hearsay evidence. So, you have to call the witnesses.

So, right now, it doesn't seem to be working. I think we've heard a lot of testimony about that. But how it can be improved I think still needs to be looked at, you know, mindful of having a victim testify more than once is to increase the trauma and, also, depending -- although I don't think this is really an issue -- the Article 32 does not seem to come right on the heels of the actual incident. In the old days, at least in New York State, you had six days. So, for a preliminary hearing, you would have to
have your victim testify within six days of being assaulted. These seem to be happening months and months and months later, but still we're mindful of the trauma that could be involved.

BGEN SCHWENK: I looked at this observation from a narrower standpoint, I guess. It says exactly what the previous speakers have said. There ought to be sufficient evidence for probable cause if you're going to bother having an Article 32.

And yet, in case after case, the PHO says no probable cause, and you sit there and think, how can that -- I sit there and think from my warped perspective, how is that possible? Why do you have the 32? You have the 32 because you're thinking of going to a court-martial, where, as Judge Grimm said, the standard is beyond a reasonable doubt. How can you be at the 32 and not at least have probable cause?

So, then, I think, well, nowadays, since the -- in the old days, the Article 32 investigating officer got to call for evidence.
And if the Article 32 investigating officer didn't get the evidence that the person wanted, the evaded the proceedings, you know, and the government had two choices: get another Article 32 investigating officer or cough up the evidence.

But now they can't. The preliminary hearing officer is stuck with what's given. So, I have no idea whether trial counsel are playing some kind of game and saying, "Well, okay, I've got this pile of stuff. How little can I give in order to get probable cause without the rest of the stuff?" I have no idea what they're doing. But it's beyond my imagining that I could ever, as a trial counsel, walk in there and not be absolutely sure I have probable cause. What am I even doing there?

So, I looked at this observation from that narrow perspective: what is going on? And I'm going to submit questions to that effect to hear what the people in the field have to say when we go out this summer.
Any other comments on Observation 6?

(No response.)

BGEN SCHWENK: I see we're being prompted to move on to Observation 7.

MS. TAGERT: Well, I think 6 and 7 were covered together, but if you want to put Observation 7 formally on the record --

BGEN SCHWENK: Okay. Well, we'll see what Ms. Tokash says about that.

(Laughter.)

BGEN SCHWENK: Observation 7.

MS. TOKASH: I actually have a lot to say about Observation 7.

So, that is "The lack of a binding probable cause determination by the preliminary hearing officer, allowing the staff judge advocate to come to a different conclusion on probable cause without explanation, reduces the usefulness of the Article 32."

We also had some relevant data to look at, including from fiscal year 2018 and fiscal year 2017. And in fiscal year 2018, 20 cases --
so, the convening authority still sent 20 cases
where the preliminary hearing officer said no
probable cause forward to a court-martial. In
fiscal year 2017, convening authorities sent 32
cases forward where a preliminary hearing officer
said no probable cause.

    And I think that if there's anyplace
for a checklist -- I know we were joking about it
-- but this would be the place for a checklist.
And again, sitting where I am, now having
comparative experience as both a former Army
Special Victim Prosecutor and now a federal
prosecutor and a United States Attorney, the
Justice Manual I think provides the best
guidance. And it's really, I think, the easiest
guidance to look at to really determine whether
you should initiate or decline prosecution. And
that's 9-27.200. So, this is the initiating and
declining prosecution. That's the probable cause
requirement.

    And this is made at the stage where I
have an FBI agent or a Homeland Security agent
come to me, brief the case. We might want to throw up a wire. We might want to get a couple of search warrants out, sealed search warrants. But that case agent is going to brief me on the facts.

And based on that, if I determine there's probable cause -- and the comments in the Justice Manual make it clear that the judgment is left up to the attorney for the government. Now I might consult with a supervisor or my criminal chief, but, in large part, probable cause is a determination that, hopefully, every lawyer should be able to make. If I determine there's probable cause to initiate a prosecution, I should task my agent with either further investigation or I should start or recommend prosecution by opening a case jacket, or decline prosecution, refer it to another jurisdiction, or decline prosecution and recommend pretrial diversion or some form of non-criminal action, or decline it without action. And if I decline it, I'm required, also by the Justice Manual, in
writing to specify why I found there was no probable cause, why I believe that the case should be declined.

And the comment section of that portion of the Justice Manual says, "The probable cause standard is the same required for issuance of an arrest warrant," or anytime I go in front of a magistrate to get a criminal complaint signed or any type of a search warrant.

And again, as I said before, the Justice Manual states in the comments that, "Failure to establish probable cause is an absolute bar to prosecution." And I think that's what I find most troubling about the cases that we've reviewed and the testimony that we've heard, including from a sitting AUSA -- that was Kate Buzicky -- who follows this guidance in her day-to-day practice as well.

You know, the most troubling thing is we're seeing cases where you're at the Article 32. Charges have already been initiated. And there's no probable cause. And then, on top of
that, at least in fiscal year 2017, 32 of those
cases, and in 2018, 20 of them were sent forward
for referral.

SGT. MARKEY: Ms. Tokash, it's my
understanding -- correct me if I'm wrong -- that
now the Article 32 officers are judge advocates
and usually majors or lieutenant colonels? Is
that right?

MS. TOKASH: That's my understanding.

SGT. MARKEY: So, these are not
inexperienced people who are looking at that
evidence and making these determinations?

MS. TOKASH: That's my understanding
from what the staff has briefed us on. When I
was practicing, that was not the case.

And then, the second component of the
checklist is 27.220. That's grounds for
commencing or declining prosecution. And that's
the next step that says I have to make sure that
the conduct constitutes a federal offense and
that there is admissible evidence sufficient to
obtain and sustain a conviction. That comes in
very close proximity to my case agent briefing me and deciding are we going to charge by criminal complaint or am I going to go into the grand jury to start laying down my investigation.

But, again, like Ms. Bashford said, the military and civilian systems are so different, in that you don't see what's coming if you are target in a federal civilian prosecution. I mean, you know what's coming when your indictment is unsealed or you're being placed in handcuffs. But when those things are happening, you know that you have probable cause. And if it's an indictment, I am charged with making sure that I have evidence admissible that's sufficient to obtain and sustain a conviction, unless there's no federal interest or unless it could be prosecuted in another jurisdiction. And again, the comment to that portion of the Justice Manual is that the discretion, even for grounds for commencing or declining prosecution, is left to the attorney for the government.

So, it was very interesting in
reviewing these cases and seeing, thinking back.

Like I'm not sure how I did this when I was a judge advocate. I mean, I basically was following the NDAA's checklist of things to consider for a prosecution, and I would write this in a memo with my pros memo, and was told, "Stop writing those things. Just stop putting those things in writing."

But it helped me, as a prosecutor, to understand what my left and right guides are. And from the review of these case files, I saw nothing, nothing in the case file, where there was any evidence of any discussion of a probable cause determination at the initiation or declination phase. And that's troubling, in my opinion.

CHAIR BASHFORD: Just to put those numbers in some sort of statistical thing, it seems like, in fiscal year '18 and '17, 40 percent of the cases where the PHO said no PC were, then, overridden by the SJA and commander to send them on to court-martial. So, 40 percent
is a fairly high number.

SGT. MARKEY: We looked at those numbers yesterday in the Working Group, and I think that a significant number of those that went to trial over a finding of no probable cause resulted in acquittals.

CHAIR BASHFORD: Almost every single one, yes.

DR. MARKOWITZ: So, we do have outcomes on those cases?

SGT. MARKEY: Yes.

DR. MARKOWITZ: Okay. Interesting.

BGEN SCHWENK: Yes, I think we're going to hear about the review of the preliminary hearings this afternoon.

SGT. MARKEY: And then, just one more, and then, I apologize for interrupting.

BGEN SCHWENK: No.

SGT. MARKEY: And I guess it goes back to the documentation and rationale, sound legal rationale, why a decision would be made. And then, in cases where the decision of no probable
cause at the 32 was made by, what we presume, an
experienced, knowledgeable, and skilled advocate,
and an SJA overturned that, we almost never or
rarely saw the rationale as to why that was
overturned. Maybe there was additional
information that we were not privy to as to why
they decided not to follow that advice, but that
is never documented or is rarely ever documented,
as to why that decision was overturned and moved
forward anyway. And I think it would be helpful
in transparency and understanding how these
decisions are being made, that it's not being
made because of discipline, right, or order, but
it's legal foundation.

MS. TOKASH: The only staff judge
advocate recommendation that I saw in the cases
that I reviewed that was completely transparent
and actually a breath of fresh air was when the
victim's preference changed. So, it was an Air
Force case. It had been referred to court-
martial, and the victim decided that he or she
did not wish to participate.
At that point, the staff judge advocate in writing to the convening authority listed all of the problems with the case now, which were all of the problems with the case prior to the victim deciding that he or she no longer wanted to participate, but they only came to light when now the SJA had to advocate to the convening authority as to why a dismissal is appropriate in this case.

SGT. MARKEY: And I think consistency, right? You have one SJA that's doing that, and it's excellent, and others that are not. So, why are they not consistent? And that begs the question, is the system not consistent in how they're making these decisions? And I think it's a bigger picture of the results.

MS. TOKASH: Well, I think the bigger picture was, in seeing that written SJA advice, I don't know whether they didn't have the moral courage, or whatnot, to advise the convening authority of that prior to a referral decision. Because based on that very articulate, written
explanation, if I were the convening authority, I
would not have referred it to trial, of if I were
the staff judge advocate, I would have advised
the convening authority that we don't have the
evidence to obtain and sustain a conviction.

We could be harming victims by setting
up an unrealistic expectation of sending a case
that was that problematic, that I would never
have seen as a Case Review Working Group unless
and until the victim changed his or her
preference. And now, the SJA had to advocate in
writing to do a 180. It was a very interesting
case to review.

CHAIR BASHFORD: I think one of the
things we also heard from the panel of defense
attorneys was the idea that the SJA developing
further evidence, they certainly did not think
that actually happened, but if it did happen,
they weren't privy to it. They were privy to
what happens at the 32, but if there's a no PC
finding there and there is additional evidence
presented to the commander, they're not --
MR. HINES: I think where this really reveals, this issue really reveals itself, when we did the case reviews -- and I'll just speak for myself -- is when you get a case and you know beforehand this was a preferred case that went to a court-martial. And so, you began, from the beginning of the investigation, you start to go through it and you develop the impression this is a weak case. This doesn't look a lot different than a no action case. So, you start to formulate these questions: what were the reasons this went forward?

And then, if you have the Article 32 report and you see what we're talking about, a detailed analysis, this is a weak case, no probable cause, or probable cause, but this is a loser case, and then, you see what comes out the other end, it gets referred to general court-martial and it's a full acquittal.

And you start to ask, where is the disconnect? What happened here? Everyone is on the same track. I agree with the investigator.
I agree with the prosecutor maybe. I agree with the preliminary hearing officer. And then, there's this black hole at the Article 34 advice letter, which Ms. Bashford is going to get into here in a minute. Those are my terms. But there's not much there. The 34 advice letter just has to get three -- and then, you get the result on the end.

The question that you have is, what happened here? And what was the advice that was given to the convening authority? Why did he or she go ahead, despite all of this, and send this to a panel of members? We're not surprised by the result.

So, it just raises the question, where is the breakdown? Or why did the SJA give advice that contradicted what everyone else is saying and what you saw, as the reviewer in the case? That's when it really revealed itself to me.

And so, why is that important? Well, we keep hearing that we have a very low conviction rate. And maybe that's one of the
reasons.

And that's just my impression. I don't know -- I'm not as familiar with the data as everyone else, but I saw that in quite a few cases.

BGEN SCHWENK: One of the things when we were looking at this that struck me was, when you look at Article 32, it gives the preliminary hearing officer two categories of jobs. One is make a determination, and one is make a recommendation.

So, the recommendation one is disposition because, obviously, the convening authority will make the decision on disposition. But, on the determinations, which would certainly give you the impression I'm making a determination for a reason, it's probable cause, you know, jurisdiction and proper form of the charges. But it's a determination, but a determination with no effect. So, why isn't it a recommendation like everything else?

I mean, if that's how the system wants
it to be, it would seem to me you make a recommendation on whether there's probable cause, on whether there's jurisdiction over the accused and the offense, whether the things are in the right order, and what you think ought to be done with the case.

And it's all recommendations. To make it really clear, the PHO has a limited advisory role. He's just another in a long list of advisors. And so, right away, the language itself can give you the impression that we're at a disconnect of making determinations with no effect, other than advisory.

But, anyway, my attitude on this is this raises an option of what might be done in tinkering with Article 32, and it's well worth something for the Policy Working Group to consider.

Anything else on 7?

If not, we have really enjoyed hearing from the Chair on our Working Group.

CHAIR BASHFORD: This is a long one.
BGEN SCHWENK: And so, since we have, we let her have the honor of having three of the observations, just to show we do not give preferential treatment based on position.

CHAIR BASHFORD: This is sort of an overlap, but our observation was that, "Many sexual assault cases are being referred to courts martial when there is insufficient evidence to support and sustain a conviction."

There's four subcategories there. (a) is "The Article 32 preliminary hearing officers do not consistently include in their reports an evaluation of whether there is sufficient admissible evidence to support a conviction. Such an evaluation would be helpful to subordinate commanders, convening authorities, and SJAs."

(b) "Article 34 requires SJAs to provide convening authorities a binding determination of probable cause as the standard for referring a case to trial. Probable cause may not be the appropriate standard for referring
a case to trial."

(c) "Staff judge advocates rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice, and they are not required to do so. Including such an analysis, as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in trial, the court-martial, would be helpful to convening authorities."

And finally, "Many cases did not seem to afford consideration of the sufficiency of evidence to obtain and sustain a conviction, the same deference accorded in the U.S. Attorneys' Manual."

So, the data in the case files that resulted in contested courts martial that we've analyzed, for cases that resulted in conviction, the members overwhelmingly found that the ability to obtain and sustain a conviction was possible based on the file analyzed. So, there was a great deal of concordance in our assessment of
the evidence, our assessment of the
investigation, and the actual result of the
court-martial.

For cases that resulted in acquittal,
the members found that there was evidence
sufficient to obtain and sustain a conviction in
approximately one-half of the files. So, you had
much less concordance there, which, again, leads
to what is happening there, since about half the
cases we thought there was sufficient evidence,
and nonetheless, there was an acquittal.

Some of the observations from the
Working Group members was that the referral
standard should not be probable cause, which is
the minimum, that that's too low of a standard of
proof for taking a case to trial; that we should
think of likelihood of conviction. And again,
that does not mean slam-dunk cases only. It's
that you have enough evidence that, if everything
falls as you hope it will, you can get a
conviction there, but it shouldn't just be, oh,
this is a winner or that's a loser in a sort of
subjective way.

One thing we saw, also, is that the Article 32 officers don't feel they can take credibility into account when making a PC determination. And so, they have made finding probable cause, even though they will say in the report, serious doubts as to credibility of some of the witnesses.

Another observation by a Working Group member was, given the large number of acquittals, you might conclude that the SJAs are not correctly advising the convening authorities because too many weak cases are going forward to court-martial. It's just hard to know, given the lack of transparency and the advice, what's happening.

And then, one thing was people were concerned that having the SJA really do a candid assessment of the evidence would somehow tip their hands for the defense. Prosecutors know the weaknesses in their cases, and defense attorneys know, hey, this is what the
prosecutor's case is, without having to have it
written out for them. We're well aware of that.

   Again, we just thought that the advice
was being based on probable cause and not looking
ahead to what the sufficiency of the evidence
would be. And that's very, very different, as
Ms. Tokash has said. And I know in my own
practice we bring cases forward where we believe
we have evidence sufficient to prove guilt beyond
a reasonable doubt. Sometimes we're disappointed
and a jury disagrees with that assessment. We
have made that assessment before we move a case
forward.

   MS. TOKASH: And the Justice Manual
addresses that also, the difficult cases. I
think it's in the comments section of 9-27.220
where they give an example, where in your
district if there is a very popular political
figure who is indicted and the prosecutor thinks
that he or she doesn't stand a chance because the
jury is going to have this love for that
particular defendant, nonetheless, the Justice
Manual says, if you have the evidence to obtain
and sustain a conviction, you should go to trial,
and that would be appropriate.

So, it's not that we don't take hard
cases in the federal system. I just prosecuted a
sex trafficking case in September where all my
victims were prostitutes, drug-addicted
prostitutes, and we got a conviction. And it was
a hard case to take to trial, and it's one that
needed to be taken to trial, but we knew that we
had evidence to obtain and sustain a conviction
before we really threw down and said, okay, we're
going to trial.

BGEN SCHWENK: I think we sort of got
this observation from looking at the acquittal
rate problem and the fact that, as we were
looking at these case files, and then, the
related documents, you would sort of make a
judgment on your own of is this a winner. You
know, what's the likelihood of success at the
trial? Because I think everyone in the Working
Group independently arrived at that's the
standard that I'm going to start with, and then, I'll go from there on what I think should be done.

Whether the convening authority's referral was reasonable or dismissal was reasonable, what's the likelihood of success? And as I looked at the likelihood of success, I found several times that this is not even close. There's no likelihood of success. There may be probable cause, but, as somebody said earlier, there's a chasm there between probable cause and beyond a reasonable doubt.

And then, I'd look and "referred". And then, I'd read the results of trial, acquittal. And after that happened several times, I started thinking maybe it's more than experience. Maybe it's more than, you know, whatever, you know, experienced investigators, experienced prosecutors. Maybe there's an insufficient consideration of likelihood of conviction.

And that's, previous comments, when
you start wondering whether it should be just one 
of the non-binding factors to consider or it 
ought to be elevated to some other level. And 
so, I think that's how we ended up saying that we 
need, well, the Policy Working Group needs to 
consider all the things that are in this 
observeration as they try to decide what's the 
solution to what I think most people recognize as 
a dilemma on how to make better use of that and 
of the investigative process.

CHAIR BASHFORD: It's like an 
upstream/downstream. Mr. Christensen's comments 
about the length of time prosecutors and judges, 
that would be a downstream problem, I would say. 
And cases that are being set for, pushed forward 
without sufficient evidence, is more of an 
upstream problem. And I really look forward to 
the Policy Working Group telling us about it and 
solving this problem.

(Laughter.)

BGEN SCHWENK: Get in the middle of 
the stream.
CHAIR BASHFORD: Yes.

BGEN SCHWENK: Okay. Moving on to Observation No. 9, which we'll refrain from showing my age by making any Beatles "No. 9".

(Laughter.)

BGEN SCHWENK: But, nonetheless, Observation No. 9, "Currently, Article 34 prohibits convening authorities from referring charges to a general court-martial unless the SJA provides written advice that the specification alleges an offense, that there is probable cause to believe the accused committed the offense, and that jurisdiction over both the person and the offense exists. Additionally, the SJA must provide a written recommendation as to the disposition to be made in the standard, in the interest of justice and discipline," as we've talked about previously.

"The SJA's Article 34 pretrial advice to the convening authority often consists of conclusions without explanation. These unexplained conclusions are not useful in
assessing factors relevant to a referral
determination. The Article 34 pretrial advice
would be more helpful to convening authorities if
they included detailed explanation for the SJA's
conclusions."

Okay, I think most people would go
along with everything except the last sentence
where I think the military justice people that
spoke to us would say, no, that's all taken care
of behind closed doors with the convening
authority, so it doesn't have to be in the 34
advice letter.

But our observation is it would be
more helpful if it were in the 34 advice letter.
And we thought that this observation should be
considered carefully by the Policy Working Group.

Contrasting a really detailed Article
32 report with a bare-bones, check-the-box
Article 34, the reaction has to be, who's helping
the convening authority there? One is checking
the box, so you can proceed. You know, I said
PC; you can go. And that's it. The other one
actually helps you understand and get into the case.

Clearly, those discussions are happening behind closed doors. The question for the Policy Working Group is, why in the world can't they be reduced to writing and made available?

I think the JPP recommendation was, well, it should be reduced to writing and be in there, but, then, it becomes some kind of work product and shouldn't be released until after the trial to the defense.

I'm mindful of something Chair Bashford said. You know, what do you think, the defense counsel are idiots; they can't figure this stuff out? I don't think she said it that way, but the intent was you're spilling the beans on what? These people are intelligent. They know what they're doing. They can figure out the case. And so the last sentence stands as part of our observation.

Some of the comments people made:
"The Article 34 advice seems to have evolved into a check-the-box form, not useful. If the SJA is going to provide a written conclusion about whether the case should or should not be referred, the SJA should provide an explanation for the decision, and the explanation should be substantive and detailed, not just insufficient evidence or victim problems."

Another one, "I don't like the 34 advice memo without explanations for its findings or recommendations. We can assume explanations are provided orally, but the better practice is to provide explanations in writing and further explain orally when/if necessary."

And the last one, "I hate the bare-bones, check-the-box Article 34 advice letter. It should explain why and include sufficiency of the evidence."

So, it's a unanimous verdict from the CRWG that there's a problem and it needs to be fixed.

MS. CANNON: You know, one of the
things that comes up is what Chair Bashford had said earlier as to another item. It's about transparency. Because it's not that there wasn't a discussion with the commander, that there weren't things said, but why does it have to be in darkness? What's going on behind the closed doors that they don't want to put in writing? I mean, sometimes it's we don't have to, but sometimes it's we don't want to. Why not? And it affects fairness, due process, as well as transparency, and I think that's what's important.

BGEN SCHWENK: Other comments from folks? If not --

CHAIR BASHFORD: Working Group Chair, are you asking me to --

BGEN SCHWENK: Take all these hard issues and send them to the Policy Working Group -- far away from the CRWG.

(Laughter.)

CHAIR BASHFORD: I'm asking the Policy Working Group to continue to explore the issues
associated with Observations 1 through 9. And I think all of these things we have a great opportunity in the site visits to further explore them in a less formal method. And I think we'll get some very good input from a variety of people at a variety of installations as to what they think.

BGEN SCHWENK: And I concede back the remainder of my time, 25 minutes or whatever it is.

(Laughter.)

CHAIR BASHFORD: We're actually ahead of time. We were scheduled to go to 11:45. It's 11:20. I'm going to ask, do we have something else we want to do right now?

COL. WEIR: I think we can do the briefing after lunch right now --

CHAIR BASHFORD: Okay. Great.

COL. WEIR: -- that was scheduled for 15 minutes.

CHAIR BASHFORD: Policy Working Group.

BGEN SCHWENK: Okay. Good afternoon.
Well, do you want to wait for Meghan to get back or do you want to roll on, Chair Bashford?

CHAIR BASHFORD: Well, you can start.

BGEN SCHWENK: Okay. Good afternoon. Or good morning.

I am the Interim -- that's a capital I, capital N, capital T -- Interim Chair of the Policy Working Group. Our purpose here today is to brief you briefly -- I like the way I did that, "brief you briefly" -- on the Policy Working Group mission, actions to date, and our plan for the future.

We're then going to discuss some of the Article 32 investigation data that the staff, Meghan and Terri, put together on FY17 and FY18 preliminary hearings, some of which we referred to earlier in the previous briefing.

And the good news is we have no findings; we have no observations, and we have no recommendations at this point because we haven't really gotten too far down the track.
CHAIR BASHFORD: Can you just hold up what we're supposed to be looking for? I've got so many papers here.

BGEN SCHWENK: Oh, we're at tab --

MS. SAUNDERS: Tab 5 is the Article 32 information, the Article 32 data.

BGEN SCHWENK: Five. Okay.

MS. SAUNDERS: I think you also had a copy of the slides in front of you, Policy Working Group updates.

SGT. MARKEY: And is the spreadsheet as well?

MS. SAUNDERS: That as well.

BGEN SCHWENK: It's one of these and the spreadsheet, right. It's this thing and the spreadsheet. And tab 5 has a more detailed --

MS. SAUNDERS: Does everybody have the Policy Working Group slides in front of them? Okay. I just see the little circle, spinning circle on the computer. So, I'm thinking maybe we're having a few computer issues. So, we can press ahead just with the slides that you have in
front of you.

But I'm sorry, go ahead, General.

BGEN SCHWENK: And so now, the staff
-- I've done the hard work, now they have to
explain the rest of it.

(Laughter.)

MS. SAUNDERS: Okay. First of all,
we'd just like to thank the Case Review Working
Group for sending us more work. So, thank you
very much for that.

(Laughter.)

BGEN SCHWENK: You're welcome. We're
happy to do so. And if we find more, we'll send
it your way.

MS. SAUNDERS: So, again, we're
looking at tab 5 of your material. It has the
Article 32 data that we'll be going through in
just a minute. But, then, the slides in front of
you, we'll just talk about the first slide, which
is on page 2. It's just some of the background,
and Chair Bashford actually went through this
pretty extensively this morning, about the
formation of the Working Group and the tasks that
we are undertaking.

So, moving on to page 3, the update,
we have our Working Group. We've already met.
We had one teleconference in October to discuss
the way ahead and how we're going to approach the
Article 32 issue, as well as the referral
process.

The Working Group elected to begin its
work by looking at Article 32, and then,
following that, conduct a review of the entire
referral pretrial process from preferral to
referral.

And then, the next slide on page 4 is
the ultimate goal of the Working Group is to
gather additional evidence on Article 32 as well
as the referral process, to include going out on
installation site visits next year and asking
questions of the appropriate parties about what
their sense of these issues is. And then,
gathering all this information up together and
reporting back out to the DAC-IPAD for inclusion
in the 2021 report.

CHAIR BASHFORD: Your pages aren't matching ours.

MS. SAUNDERS: Oh, I'm sorry.

CHAIR BASHFORD: We've got two slides per page. So, I think we were just --

MS. SAUNDERS: Oh, okay, I'm sorry about that. My bad.

CHAIR BASHFORD: That's okay.

BGEN SCHWENK: If you could just say what slide you have.

MS. SAUNDERS: Slide, okay. Oh, I'm good. I'll just go by the slide number. How about that?

So, going on to the Article 32 data, the data you have at tab 5 is what we're going to be going through, but I've actually prepared a summary of that data, which is in the slides here.

So, looking at tab 5, the Article 32 methodology, this came up at the August meeting.

One of the members had had a question about, how
often does it occur that the Article 32 preliminary hearing officer finds there's no probable cause for a sexual offense? And then, how often do those offenses, then, get referred to trial, and either result in acquittal or a conviction?

So, we decided to take a look at that. Using the DAC-IPAD database, we looked at all of the cases that had an Article 32 for fiscal years 2017 and 2018 in which the most serious offense charged was a penetrative offense, there was an Article 32 hearing, and the preliminary hearing officer found there was no probable cause for one or more penetrative offenses. And we, then, followed those offenses through to their conclusion.

I will note that, in some of these cases that we looked at, there may have been multiple penetrative offenses charged, some of which the preliminary hearing officer found probable cause for; others that they did not find probable cause for. We followed only the no
probable cause offenses. So, the ones for which they did find probable cause may have gone on to court, gotten a conviction or an acquittal, but we did not follow those particular offenses. We were only looking at the no probable cause offenses. So, we followed them through to their ultimate dispositions.

In those instances where we had a case, which is pretty frequent, where you would see an offense being charged in the alternative under different legal theories, in any case in which the preliminary hearing officer found probable cause under one legal theory, but not under another legal theory, we did not count those cases in our data.

So, looking at the actual data itself on slide 6, this, the way it's presented here, is the top two rows are the fiscal year 2018 data and the bottom two are the fiscal year 2017 data, so that you can compare. And what this shows, in the blue row, it's the total number of Article 32s held in penetrative cases. And then, on the
green row right below that, it's the total number
of those cases in which the Article 32
preliminary hearing officer found no probable
cause for at least one penetrative offense in
those cases.

So, you can see, in 2018, about 16
percent of cases where the preliminary hearing
officer found no probable cause for at least one
offense. And that was about 22 percent for 2017.

Slide 7. I don't know if mine just
don't have numbers or I'm not seeing them.

But, going on to slide 7, this shows,
the two columns on the right -- or excuse me --
on the left are 2018, and the two on the right
are 2017. This breaks it down, the number of
cases in which the preliminary hearing officer
found no probable cause, and then, how many of
those cases were dismissed prior to referral and
at what level.

So, when you see "GCMCA" and "SPCMCA,"
what that means is General Court-Martial
Convening Authority dismissed the charges or the
Special Court-Martial Convening Authority

dismissed the charges in that case.

    Just as a little bit of background,

the Special Court-Martial Convening Authority is
the individual who orders that the 32 hearing be
held. Once that 32 is complete and the report
actually goes back to the Special Court-Martial
Convening Authority, that person has the option
of either dismissing the charges or sending the
case forward to the General Court-Martial
Convening Authority for disposition.

    So, as you can see from these numbers,

for example, in 2018, in the majority of cases
overall, the charges for which the preliminary
hearing officer found no probable cause were
dismissed. And most of them were dismissed at
the Special Court-Martial Convening Authority
level. The exception to that is in the Army, in
which it's the opposite, where most cases were
actually referred to court rather than dismissed.

    So, going on to slide 8, this is the

flip side of the slide you just looked at. We
just looked at the cases that were dismissed.

Now we're looking at the cases that were actually referred to court-martial.

So, you can see, on the left, 2018, a total of 18 out of 52 cases were referred to court-martial, the offenses were referred to court-martial, despite the preliminary hearing officer finding no probable cause for them. And you can see the breakdown of what actually occurred.

Honing-in on that a little bit more, you can see, when you take the Army cases out of it, really only seven cases were referred to court-martial. And of those seven, three were actually dismissed after being referred. But when you add in the Army cases, it jumps to 18. And of those cases, 11 ultimately went to a trial and eight were found not guilty; two were found guilty of the probable cause offenses, and one was a mixed bag with some being found guilty and some not.

Looking at the FY17 cases, it's,
again, 32 out of 80 were referred to court-martial, despite the preliminary hearing officer's determination of no probable cause. When you take out the Army cases, it falls down to 16.

On slide 9, which is we just put some observations in here. I've talked about a few of these, but just the percentage of cases in which the preliminary hearing officer finds no probable cause. And you can look at those numbers and decide for yourselves whether that's high or not high.

And then, the staff judge advocates and convening authorities acted consistently with the probable cause hearings or probable cause determinations of the preliminary hearing officer in most cases, with the exception of the Army. And I say "acting consistent with" because we don't know by looking at the files in front of us that the convening authority made his or her decision based upon the probable cause determinations of the Article 32 preliminary
hearing officer. There are other factors at play there. The trial counsel may have weighed-in. The staff judge advocate may have weighed-in. So, we just said they "acted consistently with".

Looking at slide 10, this is, again, some of the numbers that you just saw, which is 34 out of 52 cases in fiscal '18 were dismissed, consistent with the no probable cause determinations by the preliminary hearing officer. When you take out the Army cases, that jumps to about 82 percent were dismissed and 70 percent in 2017.

Going on to slide 11, this just discusses the numbers of guilty versus not guilty verdicts for each of those cases. One thing we did know, we did want to look at the breakdown of the rank of the preliminary hearing officers and whether that had any effect on whether or not those cases were referred to court or dismissed, in accordance with the determinations of the hearing officer. And we determined that really had no effect. Most of them were O-4s and O-5s,
I think as has been mentioned already. A few 0-3s, some 0-6s, but most of them, the vast majority fell in the 0-4 and 0-5 range. And the rank did not seem to be a factor in whether or not the convening authority acted consistently with their determinations.

Looking at slide 12, this was our observation. So, it was actually three of us that looked at all of these 32 reports. Patty Ham did as well as Meghan and I looked at these 32 reports for these two years.

For most of the Services, almost without exception, they were really well-developed Article 32 reports with factual summaries and really great analysis. And you know how they came to their determinations.

The Army was a little bit more of a mixed bag. On one end of the spectrum, you had just the form, a one-page form -- I think it's a two-page form -- with a block checked for either probable cause or no probable cause with nothing else to guide you whatsoever. On the other end
of the spectrum, even within the Army, there were some Article 32 reports that were great that had really well-developed analysis and factual summaries. So, it kind of ran the gamut in the Army.

And I will note that, under amendments to the Article 32 process, beginning back in January of this year, the preliminary hearing officer is now required to provide analysis. So, we'll see when we get the 2019 data. Probably half will fall under the old system and half will fall under the new, but we would expect to see more well-developed analysis for all the reports that we see.

And then, just a side observation that really doesn't have a lot to do with the no probable cause piece is we were just struck by the fact that, despite the population, the active-duty population sizes of the Air Force and the Navy being very close, there were significantly more Article 32 cases, so presumably significantly more preferrals, in the
Air Force than the Navy, more than twice. So, we just found that interesting.

Are there any questions on the data?

Again, as soon as we are able to get some of the 2019 cases in, we can replicate this for that year as well.

Okay. Any questions?

Okay. Well, that concludes my briefing.

CHAIR BASHFORD: Are we going over this one as well?

MS. PETERS: No, ma'am. I think that was the Policy Review Group's data for the update presentation.

CHAIR BASHFORD: Uh-hum.

COL. WEIR: Madam Chair?

CHAIR BASHFORD: Yes?

COL. WEIR: I can do the Collateral Misconduct Report Status Update now --

CHAIR BASHFORD: Great.

COL. WEIR: -- which is for about five minutes. And then, that will bring us closer to
lunch and knock one more thing out of the
afternoon's agenda.

    CHAIR BASHFORD: Wonderful.

    COL. WEIR: So, I just wanted to give
you a quick update on what's going on with the
collateral report that you all worked on and
approved in September at the telephonic public
meeting we had.

    So, on September 16, 2019, I submitted
on behalf of the DAC-IPAD, the final misconduct
report. Along with the report was a request that
the Secretary of Defense provide the DAC-IPAD a
written response with his approval or disapproval
of the DAC-IPAD recommendations by November 1st,
2019.

    On October 2nd, 2019, the DoD General
Counsel, Mr. Paul Ney, responded in a letter to
the Chair explaining that the requested response
would not be able to be provided by November 1st,
2019. Mr. Ney forwarded the DAC-IPAD report to
the Joint Services Committee on Military Justice
for its analysis. And that's the Committee
that's made up of Service members that review
issues that have to do with military justice and
other issues. So, Mr. Ney has asked the Joint
Services Committee for their recommendations by

So, at that point, I expect it will go
back to Mr. Ney, and then, they'll go through the
Department. And then, we'll get some response
back sometime late March. But that's where it is
right now.

Also in Mr. Ney's letter, he was very
appreciative to the Committee. Clearly, he could
see the hard work that was done putting together
that report that went back to the Secretary of
Defense. So, he was appreciative that you
actually got involved and did the hard work and
provided a very thorough, complete report for the
Secretary and his Department to review and make
some policy determinations or recommendations
based on that.

As you will recall -- and this is an
ongoing requirement -- I think the next one is
due in 2020. So, more to follow on that. But Ijust wanted to give you a quick update on what'sgoing on. Sometimes we get a sense that youwould like to know what's happening with it.

So, that's where it is right now. And once we get a response back, I'll release that to you at the next public meeting after that.

Any questions?

BGEN SCHWENK: I have two comments. One is on the way the staff handled that. I thought that was exceptionally well done. I think I wrote you something on that.

But the way you worked with the Services, the way you got them to cooperate in explaining what they did and why they did it, and identified inconsistencies and issues within the documents that they had prepared that could mislead or misrepresent what they really meant, and then, tried to smooth it all out and come up with ideas for them to use in the future, I thought that was really terrific. And the more of that kind of relationship with the Services
you have, the easier it will be for the members
to get through. So, congratulations.

And the other thing I wanted to say is
Dwight would be disappointed if I did not say
that, in reading the letter -- I'm sure he wrote
this just so I could say this -- I noted that one
of the reasons they're just too darn busy over
there at the JSC is because they have their day
jobs keeping them busy. And so, I will say once
again that it astounds me to no end that here we
are 60 years past the UCMJ, or whatever it is,
and we still try to run a military justice system
with part-time people in the Joint Service
Committee. And I will once again recommend that
maybe they think about carving up a few billets
and putting them full-time on it, so that they
can do things without killing themselves working
all night and weekends because they've got their
day job, and then, they do the JSC, and there's
only so many hours in a day.

You're welcome, Dwight.

COL. WEIR: Would you like that to be
a finding and a recommendation?

(Laughter.)

BGEN SCHWENK: I told one of the
groups yesterday that, if I can find a way to get
that in there, I'm going to try.

HON. GRIMM: We're trying to get
General Schwenk to cook his own breakfast.

(Laughter.)

BGEN SCHWENK: Here's the story on
that. So, when I was a lieutenant, I came home,
and my dad was a general. And so, when I was a
lieutenant, I came home and I immediately went
out with friends, and it was -- I don't know --
3:00 in the morning when I got back. And I went
into my room in this new set of quarters that my
parents had, and I went into bed, and I put my
foot down and right through the sheet, because
the steward had decided to be, a gunnery
sergeant, had decided to be funny and welcome me
back by short-sheeting my bed.

So, the next morning I said, okay, and
I woke them all up early. There were three of
them. I mean, this was in the old days. But we
had three guys for my mother and my father, you
know. But, anyway, I woke them all up, put them
in formation, and took them for a run at 5:00 in
the morning or something.

And so, that night they had guests.

I don't even remember who it was, but they had
guests and I had to eat with them. So, I sat
there, and every time they served, as I went to
take whatever it was, they moved it. And I
dropped everything all over my side of the table.

And so, there's a good thing that they
don't cook my breakfast and I cook my own.

(Laughter.)

CHAIR BASHFORD: Okay. So, let's
adjourn until 12:45, when we will begin with the
deliberations regarding RFI Set 11. And then,
we'll move on to the military installation site
visit update, the court-martial observations
update, and then, public comment/meeting wrap-up.

(Whereupon, the above-entitled matter
went off the record at 11:42 a.m. and resumed at
12:47 p.m.)

CHAIR BASHFORD: So, written responses
to requests for information. Take it away.

MS. PETERS: This afternoon's session
is designed to gather your thoughts, your
impressions and your comments on information the
Committee has received to date.

Since the Committee has begun
receiving information around several topics --
the Article 32 preliminary hearing; Article 33,
non-binding disposition factors; Article 34,
advice required prior to referral; the DAC-IPAD's
conviction and acquittal rate data and victims'
decisions to decline participation in the
investigation and prosecution of sex assault
cases, we wanted to set aside some time to stop
and not necessarily make findings and
recommendations, but have a discussion to gather
the Committee members' impressions of the written
RFI responses that the Committee received this
summer and the testimony from the last meeting
from Military Justice Division chiefs, Special
Victims counsel, and Defense Organization chiefs, about these substantive topics.

To guide today's session, I'll direct you to Tab 6 of your folders. In Tab 6 is just a printout of the PowerPoint slides I'll be using to refer to periodically throughout the discussion.

And probably more importantly is a stapled document that says, overview of information received by the DAC-IPAD at the August 23rd meeting and the Service's written RFI responses.

What this does is try to in one page sort of distill the highlights from the testimony from the last meeting and the written RFI responses on those substantive topics. It's organized loosely by topic and by presenter, and it's really there to jog your memory about what you heard previously, and what the Committee received in writing from the Services. And so, I'll be referring to that from time to time as needed.
Lastly, I think at Tab 6 you should have a copy of Articles 32, 33 and 34 of the UCMJ as written, just for your reference.

And as a reminder, these topics came to us because the Judicial Proceedings panel had highlighted that the Committee should -- or it urged the Committee to consider whether preliminary hearing officer determinations should be given more weight.

And to further that we brought you the testimony, the written RFI responses, and in response to some questions by members of the last meeting, the staff has generated the Article 32 data regarding no-probable-cause case determinations that you just heard before lunch.

So, we ask that if you have any additional questions, or if you can find a way that that factors into your observations about what you've heard thus far, please go ahead. I think that's highly relevant to the discussion.

I think the topics that we're talking about there's obviously some overlap with the
morning session. This morning you heard a
different source of information, that being the
Case Review Working Group's observations from
their review of investigative files and
prosecution files for a large set of cases.

And this is now, again, a lot of
subject matter overlap, but it's a different
source. We received information directly from
the Services and we do want to know what you
think about it.

Because these topics are broad, you
can go in a lot of different directions. But one
thing that we hope to glean from this is to
identify some specific research questions.

What is it about -- what would help
you understand, let's say how to -- or whether to
suggest any reform to Article 32? Is there
something further that we can give you? Is there
somebody you want to hear from? Are there
specific questions that you want to know the
answer to?

Are there specific tasks that the
Policy Working Group can undertake, the understanding that they have?

    We have initiated that discussion within the working group and briefed that to you all earlier.

That said, the more discussion, the more thoughts we have, certainly the better. The more experience we can bring to bear on those issues, the better.

In addition, we want to leverage the military installation site visits in 2020 to answer the questions concerning these substantive topics.

So, if something from the last meeting or the RFIs brought up an issue that for you, you would like to see addressed with maybe certain roundtable discussions at the site visits, this is a good time to bring that up.

Staff can then take that feedback and appropriate it into the proposed questions for you all to take on the site visits.

And lastly, if there are any
observations that you already would like to
make -- at the last meeting, for example, there
was a remark about the sense that the Military
Justice Division and the Trial Defense Organiza-
tion chiefs had given testimony.

They said -- well, the impression was
from at least one or more members, that there was
a lack of trust between the two and it resulted
in both sides giving testimony to the effect that
they were holding their cards close to their
chest, relatively speaking, to use sort of a
summary term to describe what their testimony
was.

But that was a good observation, as
was the observation that certain Article 32 data
would be useful in understanding its
effectiveness in providing a procedural safeguard
or assisting in the referral decision. So then
the Staff went and undertook that research and
brought it back to you today.

So, we hope to glean some additional
observations along those lines from you today.
And then the Staff and the policy working group
can take that and understand how to move forward.

So, I will start with just, again,
some very broad highlights about what we have
heard on these topics. And that is that as --
generally speaking, as a result of Congress's
changes to Article 32, Article 32 hearings are no
longer a comprehensive review of available
evidence.

More preliminary hearings are waived
after the FY14 NDAA changes than beforehand. We
heard that victims rarely testify at the
Article 32 preliminary hearing.

More sometimes, I think, depending on
the Service, no witnesses are testifying at the
hearing. And that we heard -- and I think we've
seen in the rules -- the preliminary hearing
officer cannot compel evidence at the hearing.

So, the question from the Staff for
you all is, is any of this a problem to you and
why, or why not.

CHAIR BASHFORD: It's after lunch.
(Laughter.)

MS. PETERS: The testimony from the Defense counsel was that yes it is a problem, in that they don't feel it is a procedural safeguard for the accused, in that even though it's considered an adversarial process, they don't feel that there is -- several defense counsel, I think, testified that they didn't feel there was much purpose to putting on a case.

In addition, I think RCM-405, now in 2019, even limits the amount of evidence or the type of evidence that the defense could even bring out at the Article 32, so that there's less opportunity to even present defense and mitigation evidence, unless maybe it's relevant to the recommendation as to disposition.

CHAIR BASHFORD: Can you remind us of the percentage of the Article 32s that are being waived?

MS. PETERS: Yes. The figures from the court-martial adjudication report --

CHAIR BASHFORD: Again, at that
hearing?

MS. PETERS: All right, I have --

FY18, I have -- this is for all offenses, not --

CHAIR BASHFORD: All sexual?

MS. PETERS: All sexual assault

offenses, penetrative and contact. In FY18, out

of the cases eligible for an Article 32,

70 percent of the time an Article 32 hearing was

held. And 21 percent of the time -- or really

almost 22 percent of the time in FY18 -- an

Article 32 was waived.

And that is roughly the same as it was

statistically in 2017 and 2016. It's just that

overall numerically the number of Article 32s

have been steadily shrinking.

CHAIR BASHFORD: I would be interested

in understanding why -- so, if there's very

little utility to them anymore, why more of them

aren't being waived, or what considerations are

in play, the 20 percent where the counsel elects

to waive the Article 32 -- what do they think

they're gaining strategically by doing that?
MS. PETERS: And that's a question for the defense counsel, most appropriately. The testimony, interestingly, at the last meeting was also that the Article 32 still provides a forum for the defense to present available evidence.

It was just that I think the defense counsel had different testimony that it didn't seem like there was really an advantage or a point to doing so.

And it seemed to run into the issue of the PHO not being able to compel evidence, so if the defense wanted production of a witness, even if the PHO found the person was relevant and not cumulative, that person's production may just not happen. And nobody can make it happen.

CHAIR BASHFORD: The prosecutors thought it was a benefit to the defense. The defense did not think so.

(Laughter.)

MS. PETERS: I think one issue that the Staff had also identified is that because the 2019 changes will require a more robust analysis
in the field reports, there remains to be seen how helpful they will be to convening authorities.

And when we posed the question in the RFIs to the Services, how has that changed for the requirement for a more robust report?

It hasn't had an effect on things.

And everyone said at least because it was late summer 2019, that it was just too early to tell. So, maybe by 2020 we'll be able to ferret that out.

BGEN SCHWENK: I think one of the issues that we need to look at is what's the purpose of the Article 32 preliminary hearing. And the fundamental question of why do we have them, and what should be the -- if we're going to have one, what should its purpose be.

If you can answer the purpose question and how it fits in with what preceded it and then what comes after -- you know, the 34 advice and referral decision -- then I think you can go about trying to figure out who should do it, what
authority should they have, what is the due outs
from them, determinations, recommendations -- you
know, their determinations, are they binding or
are they just recommendations?

So, I think one place to start is
what's the purpose of the Article 32.

HON. GRIMM: And to that point, I'd
like to add that the current version of
Appendix 2 you gave us, that the four things that
the 32 officer is limited to determining,
alleging an offense, probable cause, not likely
to have success and sustained, and then finally
the recommendation.

But one of the things that presumably
this group could do if they believe that that was
not well-serving, the purposes for which these
cases should be prepared, prosecuted and defended
and investigated, a recommendation that
Article 32 be changed.

And so, I agree that the first thing
is, is what is its proper function. And then,
once its proper function is determined, what
would it do, and in light of what the data has suggested.

When you look at what these recommendations are and they're not followed and you see what the results of trial are, it suggests that there is a price that is paid for not following what the recommendation is.

So, it seems to me that identifying what the proper purpose is, even if it would requirement amendment of what Article 32 says, is a proper function of this Committee to evaluate.

MS. TOKASH: And along with that proper function, should the proper function be a more comprehensive analysis of evidence admissible to obtain and sustain a conviction?

Because I would hope, as General Schwenk noted, you're at a 32, you better have probable cause at that point. I mean, that's offensive from a constitutional standpoint if you've already preferred charges against somebody and you don't even have probable cause.

That should raise the hackles of every
citizen in the republic, not just defense bar in
the military justice system. So, perhaps it
needs to be viewed through those lenses.

Why are we even talking about whether
probable cause exists when the more proper
function might be, do we have evidence to obtain
and sustain a conviction. Because I hope to God
there's probable cause when you have preferred
charges against somebody and you're sitting at a
32.

MS. PETERS: What was your impression
of -- and this is to everybody -- of the data
that we presented earlier, that showed 16 to 20
percent of the Article 32's were finding no
probable cause in a penetrable sexual assault
offense?

This question may sound overly
simplistic. Is that low? Is that high? I don't
know how that strikes --

BGEN SCHWENK: That's about 20 percent
too high. There should be zero cases that don't
have probable cause. I mean, as Megan just said,
we're talking about whether to go to a court-martial -- beyond a reasonable doubt. Not whether we're going to put fingerprints in a database. It's probable cause.

HON. GRIMM: To Ms. Tokash's point, which I think is, again, a fundamental point, the probable cause standard is not a difficult standard, nor is it a standard that is typically hard to apply in an individual case.

You can ask what value an Article 32 has to the whole process of convening authority to a defense of prosecution if all they're allowed to do is say probable cause. Because probable cause does not speak to the likely outcome of the case.

If instead the factor was, what would be applicable to prosecutors certainly in the federal system, and also in the civilian system, of ability to obtain and sustain a conviction, then that would be a much more helpful recommendation.

Regardless of whether you're going to
say it's binding or not, that would be a much more useful recommendation, particularly given the fact of where it comes in the life cycle of an investigation leading to a charge.

When charges have been preferred, that's the responsibility of the military justice lawyers -- the SJA -- of the investigators.

And so, in terms of adding something to the process that is useful, and having sufficiently senior people doing it with experience and judgment, with legal training and knowledge, with the requirement of explaining, maybe with or without the ability to call witnesses and determine what evidence is presided so that it's a real inquiry, and what value does simply saying probable cause add to the system, as opposed to looking at what really is significant, which is obtaining and sustaining a conviction, particularly when that is viewed as sort of the bellwether test in the non-military aspects of the application of the criminal justice system.
CHAIR BASHFORD: In some ways though, that's -- and I agree, but it's imposing a different standard on the same source material if you're still just looking at an investigative file.

And the case review working group has noted some of the deficiencies -- I don't want to say deficiencies in the investigation, because they're very thorough, they're just not focused necessarily.

You're asking somebody again to read through these papers and now make that decision.

HON. GRIMM: You're exactly right.

But what I'm saying is, I think General Schwenk is exactly right. What should it do?

If you decide that that's what it should do, then you have to make a judgment about, well, can they do that on a paper file?

And certainly the experience was, as was pointed out back in the day when the Article 32 officer could call witnesses, bring them in there and put them on there.
Obviously, you can make a judgment
call you cannot compel the victim to -- that's
what Article 32 says now, if the victim doesn't
want to be heard, but have that opportunity, call
the witnesses, get them in there.

Then, if the determination is made
that it would be helpful to make a recommendation
as to whether you can obtain and sustain a
conviction, then you would want to make sure that
they had available the information that would
allow them to do that in the degree of
particularity that you want, in a way that would
be helpful.

And that might then say they should
have the ability to control what evidence is
heard.

If you make a decision that, well,
just simply saying probable cause on a record is
helpful, then you can say, well, that's what's
being done right now.

And if you look at the results in
terms of conviction rates and in terms of
outcomes when the convening authority doesn't agree, then you can ask yourself whether that's proving out by the numbers. And you can question whether that is.

MS. CANNON: In my world of California state court, a preliminary hearing is a probable cause hearing. And the idea is for it to be heard relatively early on.

It's within ten days by statute, but is usually for more serious cases like this continued. It could be up to a few months or longer.

But the idea is that it should be tested. It shouldn't just be up to the prosecution to set something to trial. There should be something before that. And the defendant should have whatever is necessary to provide a defense that meets constitutional muster in the right to cross-examine a witness and discovery, and things like that, in order to do it effectively through counsel.

And a lot of that is reflected in
here. That's a lot of what is reflected in the Article 32 as it's reflected in the latest appendix 2. And I think it's still valuable for that.

The other thing that it adds here is a recommendation as to disposition, which I think addresses -- you know, it may be good enough to get by me, sir, but it's weak. And that should be a directive, but -- or a recommendation.

But to say there's no probable cause shouldn't happen in most of the cases. So, Ms. Tokash is right. It shouldn't happen in most of the cases, but it's going to happen where cases are weak, and they're too weak and it needs to be called by somebody early on.

Or maybe some of the charges, some of the allegations, that cleans it up and make sure that -- I'm just worried, if we make the standard too high, then it's not going to happen.

HON. GRIMM: In California, what -- is the preliminary hearing done by a judicial officer?
MS. CANNON: Yes.

HON. GRIMM: And what happens if that judicial officer determines no probable cause. Do they dismiss the charge?

MS. CANNON: Dismissed. As to whatever charges are determined to lack probable cause, and as here stated under 832, if other charges are reflective that didn't get charged, the prosecutor can add those charges, for purposes of the information.

HON. GRIMM: But the distinction between what the current system is here and what you've described, is that if the Article 32 officer could do just that -- dismiss the ones for which there are no probable cause, say there is probable cause for these and make a recommendation, then you wouldn't have that situation that Ms. Tokash has talked about, where the ultimate decision is being made by a convening authority -- not an attorney -- on recommendation that is not explaining the justification or rationale for the
recommendation. And then, produces results with low conviction rates -- especially in those where they don't follow the recommendation.

I mean, one other alternative would be to say, all right, keep it with probable cause but give greater power to the Article 32 officer to get rid of those that they find is not, and to identify those that do.

BGEN SCHWENK: You think having --

Ms. Cannon, do you think having a time frame to get started and then having to ask for a continuance for delays, whatever you want to call them, helps move the process along? Because one of the other underlying concerns we have is, it takes forever to get wherever you're going.

So now, I'm thinking that maybe another issue the PWG ought to look at is, what's the efficacy of having some kind of an initial time frame, and then the PHO can grant delays or something, whatever the system is.

MS. CANNON: I think that's a good idea. Like I said, with us it's ten days. And
if you have -- it can be continued for good
cause.

    BGEN SCHWENK: You'd still be trying
to get the SVC to come in to -- so a ten days
before -- yeah.

    MS. CANNON: And it can be done by
hearsay of what a qualified investigator
testifying to what a complaining witness might
have said, or what another witness may have said.

    But you kind of get left with the
evidence you've presented if you're a prosecutor,
and if it's not compelling because they can't
assess credibility, and maybe the defense creates
enough of a question.

    But oftentimes the prosecutor wants to
present that evidence because they want to vet
it. They want to see how good is it.

    They see it as a tool in my
jurisdiction. They see it as a tool. They could
go by way of indictment with a grand jury and
everything in secret and defense not involved.

    They actually put it all out there.
Because they don't want to go the distance if they don't have to. And it's a good vetting process, I think.

CHAIR BASHFORD: In my jurisdiction, we do grand jury and it's non-hearsay. But if the grand jury no-true-bills the case, in order to go back in and present additional evidence, you have to get a judge's permission to do that.

You can't just ignore what the grand jury said and say, well, I'll have somebody else just say go ahead. So, I mean, to me that is the big difference is a PHO says, no PC, and there's no -- you're not going back to the same person who made that decision.

You're sort of -- I don't want to say an end run. I don't mean to be pejorative in that way. It's just somebody else is then vetoing that decision.

MS. PETERS: What we heard in the way of the Service's take on different potential reforms of Article 32 highlighting some of the -- in response to some of the -- I think the
problems, or potential problems, or complaints
that had been brought to them, in RFI questions
and testimony, was to either consider the
ramifications of making the Article 32 binding,
and the other was to potentially reform the
procedures themselves, give the hearing officer
more power.

And the RFIs also ask them to consider
creating an alternative where, when the PHO says
no probable cause and the SJA disagrees, the SJA
has to actually justify that independent
determination in writing, because they would have
to -- they would have to justify in writing that
independent determination.

The Services weighed in on that and I
have that -- I think some of the testimony in the
RFI responses highlighted on a few different
pages here, where topic 2 is the advisory nature
of Article 32.

You heard that the Military Justice
Division chiefs were not in favor of making it
binding. Some of the reasons given were the SJA
is well-positioned to make an independent probable cause determination, the convening authority is as well, and they should be imbued with the power to make their judgment in the case in the interests of good order and discipline and justice. And those are just some of the reasons.

And the other is, given the current format, they felt that the preliminary hearing, because it's not a sufficient vetting of the evidence, that's not where the dispositive decision on the case's sufficiency should be made.

HON. GRIMM: There should be no surprise if prosecutors don't think it should be changed, and like it that way that it is. I mean, that should surprise absolutely no one.

MS. PETERS: And likewise, that the defense favored making it binding.

HON. GRIMM: Absolutely. That's like the punchline of the joke about the advice from accounts, it's 100 percent correct and totally useless.
MS. PETERS: So, I guess the question is, what sort of changes -- how would you sort of categorize the types of changes that you think are worthy of consideration, in light of that testimony?

And is there more information that we can bring to bear on the potential ramifications of a binding 32, whether it becomes judicial in nature, or remains quasi-judicial. But I think there might be more information to gather there.

But is there something -- is that something that you want to consider, or is that too great a change and we should focus on more targeted, procedural changes to Article 32 and its implementing rule?

HON. WALTON: Is that determination binding, regardless of whether additional information comes forward that would provide a basis now for maybe a new followed upon determination?

MS. CANNON: That's probably a question.
HON. WALTON: Yeah, that's a question.

COL. WEIR: That may be a discussion, in that it would be similar to a search warrant. The affidavit comes in, it doesn't contain enough information for the magistrate to authorize a search authorization.

But the officer can go out and gather more evidence, and then come back to the magistrate with that additional information to get over that probable cause hurdle. And it wouldn't be binding and never return again with more evidence.

Which counters the argument that the SJA receives evidence after the 32 that forms his ability to make a better probable cause determination.

PARTICIPANT: Go back to the 32.

MS. TOKASH: So, I -- this is Meghan Tokash. I found this is interesting in looking on topic 2, the bullet point handout that we have, the overview of information received regarding the written RFIs.
When you look at RFI 11 responses, Military Justice Division chiefs, from a case review working group standpoint, bullet one is just what General Schwenk was talking about.

The convening authority needs adequate flexibility to make decisions regarding cases, in order to maintain good order and discipline.

Well, the cases that we reviewed didn't show that that was anywhere in any of the cases that we reviewed.

The second bullet point, the PHO determination should not be binding, because 32s are not a comprehensive review of available evidence.

Any of the cases I've reviewed, I even see some end-of-case file -- hold on, here's brand new evidence that just came to light -- or any evidence if the case was referred to trial, that there was new evidence that was brought before the convening authority.

And then, the third one, the binding PHO determinations are unnecessary, because the
data indicates commanders' disposition decisions are reasonable.

Those are no-action dispositions. Those are -- and I think that that's really important. We've found that a declination of prosecution was reasonable, not a commence prosecution decision was reasonable.

And then finally, their point about a binding Article 32 hearing could erode a victim's right to be heard.

A binding Article 32 hearing could erode a defendant's due process rights, especially in those 20 cases in fiscal year 2018 that were sent for referral, regardless of the fact that a lawyer said there was no probable cause. And that's a problem.

So, I just find that the sentiments from the Military Justice Division chiefs just do not comport with the actual case files that we had our hands on and were reading and absorbing, and looking at and listening and analyzing, and talking to each other about.
And so, I just find that their reasons are disingenuous regarding whether the Article 32 preliminary hearing officer's determination should be binding.

The probable cause determination I think should absolutely be binding. If the 32 changes in its shape or nature, where one of the things they have to come to a determination encompasses the ability to obtain and maintain a conviction, that I don't think should be binding at all.

That is something that's open for discussion. And I think an SJA and a convening authority could say, I hear you, PHO, but I disagree. This is a righteous prosecution and should be sent forward to a court-martial panel.

But for the probable cause determination, I think it should absolutely be binding. And I found that the testimony given by the Military Justice Division chiefs and some of the trial counsel just did not bear out in the actual cases, and what we saw them doing day in
and day out as military justice practitioners inside the case files.

COL. WEIR: To go to Ms. Tokash's fourth bullet, she mentions about it erodes the ability of the victim to participate or testify in the Article 32.

I believe you guys ran the stats on that. I think it was 314 Article 32s, and the victim testified in seven. So, when you're talking about eroding, I don't know what that percentage is; I'm a lawyer, not a doctor. But that's fairly low.

BGEN SCHWENK: Thank God.

(Laughter.)

CHAIR BASHFORD: Meghan, when you're saying that the PC determination should be binding, are you only talking about the negative PC, no PC, or positive, "yes, there's PC" as well?

MS. TOKASH: Yes to both. That once a lawyer has made a probable cause determination, that it should be a binding determination
regarding the commencement of a prosecution.

CHAIR BASHFORD: But binding on whom?

Yes, there's a PC. So, I get it with the
negative. There's not -- you know, a
determination's been made, there's no PC. But a
determination's been that there's a PC, does the
SJA have to --

MS. TOKASH: I see what you're saying.

CHAIR BASHFORD: -- you know? Okay,
now we're locked into going forward no matter
what? That doesn't seem right.

HON. BRISBOIS: But the analogy is, if
it's binding both negatively and positively, it
works. Because in my federal court, if the grand
jury says there's probable cause, the defense
can't come to me in pretrial motions and say, I
want to challenge the indictment on the basis of
probable cause. That's not something they're
allowed to do.

If the grand jury says there's no
probable cause, then it's binding on the
government as a not-a-true-bill, and they've got
to go through steps to get their evidence and
start over. So, it works both ways.

        And then, if it's binding both ways,
then the recommendation part of whether it has a
chance of success on the merits or not, this is
going to be a tough case, but then the convening
authority can make the decision of whether we're
going to go ahead with the politicians as a
defendant case, or as a convening authority.

        But to have a probable cause
determination prior to preferral, have a new
probable cause determination at an Article 32 or
34 probable cause and determination, none of
which gels in any sort of way, makes an
Article 32, as it currently sits, an entire waste
of time for everybody.

        CHAIR BASHFORD: But I just want to
make sure we're not saying that if a PHO says,
yes, there's PC, that the SJA and the convening
authority are now locked into, "we must go
forward" --

        HON. BRISBOIS: Well, that's just
probable cause.

CHAIR BASHFORD: Right.

HON. BRISBOIS: Because the U.S. Attorney can plead out to something less or dismiss entirely, even though the grand jury has said that there's probable cause.

But the defense can't come to me -- or to Judge Grimm or to Judge Walton -- and say we're going to challenge the indictment by re-litigating the probable cause determination.

Once it's done, it's done. And then, you move off to the next stages.

MS. CANNON: There are challenges that can be made legally, and sufficiency of the evidence. But those are going to be rare.

HON. BRISBOIS: But it's because of false evidence --

MS. CANNON: Right.

HON. BRISBOIS: -- or lying, or something like that. But just the nature of, I disagree with the probable cause determination, you can't do that. And that's what's in place
right now is, we've got three or four different places where somebody can say, I've got other reasons why I want to go forward, so I'm going to come up with a different probable cause determination.

BGEN SCHWENK: So, if the -- under this option, if the preliminary hearing officer said no probable cause, the case is done for the moment -- or maybe done forever, but done for the moment for sure -- and back in the ballpark of the investigator, the special court-martial, convening authority, the trial counsel, what are we going to do now, and they do whatever they do.

If the decision is, there is probable cause, then I suppose we would ask the PHO, if you find probable cause then, given the evaluation of likelihood of conviction, whatever the correct word is --

BGEN SCHWENK: That's the recommenda-
tion.

HON. BRISBOIS: And then the recommendation for disposition. So, that would
give them the option of saying, now these are
just recommendations -- an evaluation, and then a
recommendation. Low likelihood of conviction.
Recommendation, some lesser action of some kind,
or whatever it is.

MS. TOKASH: And that's where you
would want to be in discourse with your SJA and
you would want to say, is this the hard case that
is a righteous prosecution, and despite some of
its warts, should still go forward.

HON. BRISBOIS: Or do we look at a
title 10 in lieu of court-martial.

MS. TOKASH: Right. Or some other
disposition.

HON. BRISBOIS: Instead of discharge.

BGEN SCHWENK: So then, if you do
that, then you go back to who? And now, we would
ask the question, who is the person, what special
training, if any, does that person need? I don't
know whether you have --

MS. TOKASH: You're talking about the
PHO?
BGEN SCHWENK: Yeah, the PHO. You know, a three-day certification course to be a PHO, you know, that people go through, where they do scenarios and do whatever they do, or one day or online, or whatever it is, some kind of a program so that they have a certain amount of experience, a certain grade level, and they've done whatever this stuff is.

And so now, we're looking at the who, and then the authority. So now, we've decided what their mission is, and who they are and what authority. And I would assume you go back to the old days where they have the authority to compel evidence, and so that they know that they've thoroughly looked at it before they make their decision and the recommendations.

And if we go back to that, then that brings us up to the issue of, what about victims, and how do you handle compelling witnesses. But that's something that policy working group can look at in more detail. I'm not sure what I think at the moment and maybe somebody has the --
CHAIR BASHFORD: It would be interesting to see the data. Because in the last two years, when the PHO said no PC, about 60 percent of the time the SJA and the convening authority agreed and we did not refer it out to general court-martial.

But 40 percent of the time they didn't. And I just wonder if there's any -- why 40? Why 60? Like, what is the difference between those cases? So, they're not referring everything to court-martials.

So, they're not saying, I don't feel that I can accept a no-PC finding. But 40 percent is a big chunk to overturn, I think.

BGEN SCHWENK: Yeah. It will be interesting when we see the CRWG info, because a lot of that is captured, plus the reviewer's assessment of whether the referral made sense based what's in the investigative case file and if you happen to have the 32 PHO report in front of you or not.

A lot of the ones I reviewed, we
didn't have them, for some reason.

MS. PETERS: To that end, when the
Staff did the data project for the 32s, we noted
when we presented it, that the information we
don't have is, what was the victim's view as to
disposition at referral?

That could have changed after the 32,
and not all 32 documents noted their
willingness -- some commented on their
willingness to participate in the court-martial;
some didn't.

And some referral documents noted that
there was a change. If there was a no, it went
to a yes, or a yes went to a no. Or it stayed
the same. But in many cases we didn't have what
the victim's preference was. And we don't know,
I think, what the testimony of the August meeting
we were at was that sometimes the trial counsel,
they've done additional interviews.

They have additional insight into the
strengths and weaknesses in the case and we don't
have that information that they probably put into
a prosecution merits memo, or a case analysis memo. And then they made the SJA aware of that.

So, I think that some of the testimony, it was difficult to sort out in August. But in reviewing the transcript, trying to hone in on things that might take an Article 32, no probable cause, to an SJA, says yes, there is probable cause, and refer, or a PHO just recommended against referral, given the likelihood of success being low, and the SJA agreed even with that recommendation.

The testimony, again, was a little bit difficult to parse out, but I threw some of the reasons up on the slide and put them in topics 3 and 4, just as to what kind of information an SJA might be privy to, that the Article 32 hearing officer didn't have. And again, this is just based on their testimony. And we can always go back to the Services for more detail or information, or even comment today from the Service representatives.

But the things they tried to highlight
were any interviews, or the trial counsel has
done beyond the initial law enforcement
interview, that's all the PHO has in many cases.

We were told the results of digital
forensic examinations sometimes come in after the
32, and then the government has that information
to help them assess the meritoriousness of the
case or the merit of the case.

And then anything -- and so, another
prosecutor said that sometimes the defense raises
issues after the Article 32, or brings witnesses
to light, or evidence to light. And that changes
the calculation potentially, somehow, between the
32 and the referral decision.

So, that was an interesting issue to
parse out. And I wanted to take a point to
clarify that there were a couple of different
things going on in the last meeting.

There was a discussion of Article 32
post-hearing submissions. There's a discussion
of what is the SJA privy to that the hearing
officer might not be privy to?
And then, there was, what information could a victim or her counsel be providing to the referral, to the CG, to the convening authority, that is not being provided to the hearing officer?

When they went back into the testimony and the RFIs, it boiled down to those items on the part of the government that the SJA might be aware of.

But separately, we don't have a lot of information yet on the written procedure following an Article 32. It's new for the 2019 MCM, that the defense, the government and the victim have a day or two after the 32, to provide written materials on what they think the recommendation as to disposition should be. Whatever they think is relevant. That's a written submission.

The PHO is supposed to comment on that, wrap that up into the new report, and give it to the special court-martial convening authority, and then to the SJA.
So, we need to see what effect that has. But I think the testimony also bore out, and the RFIs also bore out, that any information from the victim post-32 largely regards their preference. It's not generally substantive ex parte information to the SJA and convening authority that's influencing the decision.

And I invite any commentary from the Services on that. But I think that's what the testimony of the folks in August ultimately came down to.

But sometimes we were talking about all those things at once and it was difficult to parse out. We as a Staff wanted to go back and kind of comb through the testimony piece by piece, just to make those three things clear -- a written submission after the 32, the SJA's consultation with his prosecution team, and what whatever fruit that bears towards the assessment of the case, and then the victim's right to express a preference as to disposition, which will come usually in writing to the prosecution
team, and then to the SJA prior to a referral decision.

Those are sort of the three things at work between the 32 and referral. So, I just wanted to add that clarification in there.

CHAIR BASHFORD: The one thing that struck me is on victim preference, particularly declination. I mean, the military has thousands of forms. And it was like pulling hens' teeth to try to find what the victim's preference was in these files.

There might be some reference to it in the investigator's notes, it might be something from the SVC/VLC. But it would be very easy for the staff --

BGEN SCHWENK: Not a form. It would just be a memo that they type --

CHAIR BASHFORD: Just a "I do not want to participate in this process." It would be nice and clean. You could know when it happens. Maybe post-32 it's in writing. But it was -- given the weight it has, it's so badly
documented.

COL. WEIR: CID has a Form 570-E, I believe is the name of it. In most of the Army files, in the declination, there was that form was signed, or it was done telephonically and the agent would say, look, I don't think the rest of the Services have an actual form they use. And so it was just, like you said, trying to figure out what happened along the way when the victim no longer participates.

MS. PETERS: There was testimony at the last meeting that something that also makes it more difficult to track is when -- and this is arguably the case, there isn't verification -- but arguably, when there's discussions between the victim's counsel and the defense counsel about an alternate resolution, whether that dovetails or overlaps with the decision not to participate in a court-martial.

But because the victim has to be heard on any proposed alternate resolutions, the defense and the victim are coordinating ahead of
time to sort of negotiate that and bring it forward to the government or to the CG.

So, that was one complicating factor.

And noting clearly of -- getting a victim declination read, a date, a reason, whatnot.

MS. CANNON: You know, when you were asking what kinds of information do we need to go forward, because we did already do a lot of hearing from different people on this question, but the issue of time limits is a good one, because as I said, if there's a statutory, or some kind of regulation, that sets a certain time limit that would require good cause or such in order to put it over, that might create more pressure to get things done in a more timely way.

And what effect would that have? I'd be curious what the --

CHAIR BASHFORD: How time looks on the investigation? Or time limits --

MS. CANNON: I'm sorry. For the setting of the Article 32. That you have to have an Article 32 hearing within -- maybe you could
set a range or some timetable, as is done in the
state, and if you're not ready, good cause must
be shown to justify putting it over, and how long
do you need and why.

So, it creates kind of an overview or
some oversight over letting these things just
kind of take a back burner too long and something
else is more important, and meanwhile people's
lives are being affected on both sides.

BGEN SCHWENK: What's the trigger for
the ten days in California?

MS. CANNON: What's the trigger? The
arraignment. I'm talking the old-fashioned
arraignment. You're arraigned within 48 hours
of -- or 72, depending on the charges -- and ten
days -- ten court days are essential bond time
for the investigation, before anything -- there's
no real trigger -- other than filing a complaint,
there's no real triggering mechanism.

HON. GRIMM: The charge, whatever form
the charge is, then triggers a period of time
before the arraignment. The arraignment is
before a judicial officer, who advises of rights and take a plea, and that's when the clock starts for the preliminary hearing, ten days from that. Yeah.

MS. CANNON: Correct. And it's not hard to get a continuance if you have X number of people to still interview and you're waiting for test results, and this, that and the other thing, and you can give a reasonable 45-, 60-day request.

But it requires you to address that and stay with it.

HON. GRIMM: So, one of the issues that comes up on my mind on this, is that when you compare it to the civilian analog, is that in the preliminary hearing, as done in the civilian community, you have a judicial officer who hears that.

That judicial officer is going to be in that jurisdiction then and, unless they retire or have an illness, or aren't elected, or whatever it is, they're going to be there for a
foreseeable period of time. And if they're not there, there will be some other judicial officer that will do it.

In the context of what we're talking about here where you have all these people rotated in and out of various schedules where you don't know, if you were going to re-imagine an Article 32 where a no-probable cause was binding -- unless you went back to an Article 32 officer with more evidence and they found it -- you would either be going back to a different Article 32 officer -- which then gets into the issue of who appoints the Article 32 officer -- if it's a special court-martial convening authority who does that, where are they taking them from?

Are they appointing somebody who's a prosecutor in the Justice Department? Are they appointing a defense attorney? Where are the qualifications?

And then, if that person is not there and you go before a new Article 32 officer, then
there's that whole forum shopping issue comes up as well.

So, part of the problem that we have in terms of imagining how this process works, happens within the context of a military where people are being transferred in and out all the time.

MS. CANNON: Well, that's true. And the courthouses too. Judges don't stick around in one particular -- we have a large county. So -- and people retire, or people visit and do a vacation for somebody.

HON. GRIMM: But they're judges doing it. So --

MS. CANNON: There are judges doing it.

HON. GRIMM: And then some of the data that we looked at, military judges were acting as Article 32s. I mean, if you wanted to say that only a military judge could do it, then you would have a barrier that would be a barrier between how you pick someone and what their
qualifications were in order to do it.

So, they're just -- there are complications in terms of how you take a system and manage it within the military system, where you have --

MS. CANNON: So, you're saying, who does it is one thing.

HON. GRIMM: Sure.

MS. CANNON: Who are you going to have do it? And then, the other issue is, if it's finding dismissal but you want to revisit it, there should be a transcript of the proceedings.

HON. GRIMM: Mm-hmm.

MS. CANNON: And anyone can pick it up and say, does this affect that? Sure, it does. That's how it would happen in my world. It's not really that difficult.

HON. GRIMM: So, I think -- go ahead.

HON. BRISBOIS: Well, I mean, for purposes of this discussion, we're trying to formulate what are we going to ask? What are we going to find out at our site visits?
And I think whether it should be binding or not is the threshold question. Because if it's not binding, then who does it really isn't quite as important as if it's going to be binding or not.

And the more I think about whether it's binding or not, it doesn't -- we've been talking about the federal system and the state system.

Probable cause determination is binding in both systems. We have a grand jury in the federal court system. California, the state of Minnesota, they don't use grand juries except for very limited circumstances.

So, the preliminary hearing is, in fact, the equivalent of the federal grand jury system. No probable cause, the case is dismissed unless you can meet the test to come back.

Our military justice system is completely removed from that. We have -- and so it is an existentially foundational question to the continued existence of Article 32 or not,
whether it's going to be binding or non-binding.

If it's not going to be binding, one of the other questions we should be asking then is, let's get rid of it.

SGT. MARKEY: Two ways to do it.

Yeah. And I don't disagree with that. I'm looking at three things. What's the utility of the Article 32?

So, decision would be, leave it as it is -- because I don't think any of us take this lightly, right? This is a huge part of the process. And there's already been some reform. So, do we leave Article -- do we ask the question do we leave Article 32 as it is?

Do we take Article 32 and try to look at areas that could improve the process? And I think part of the issue with that is, what I took away from the testimony from some of the panels was, quite frankly, the disrespect for the process.

I don't think anybody respected the Article 32 process because they were basically
playing games with it -- both sides.

And so, if there's no respect for the process and we don't ensure that that process is being done the way Article 32 is designed, then what would be the purpose of Article 32 is nobody really respects how it operates. We're just going to play games with it.

We're going to give this information, not information. And I don't know if that's a result of the previous reform, but that has happened, because we've seen the changes occur.

And the other part is, how do we ensure quality control and oversight that Article 32 is not being misused, abused, ignored, disrespected? That it is a meaningful part of the process in the military justice system?

So, keep it, throw it out, or look at it and identify those areas within the current Article 32 that we want to address to improve the process. And then, ensure that the users of that system respect that process.

HON. BRISBOIS: Which gets back to
what's its function and purpose, and then the
answer to that question, whether it's binding or
non-binding.

Grand juries, preliminary hearings,
the purpose of the that is not to help the
government perfect its case in the sense that
we've been hearing the testimony about.

It, at its core, is a check and
balance on prosecutorial overreach. I mean, the
purpose of the grand jury is, we're not going to
let you take a defendant to trial for political
reasons where there's no probable cause.

The reasons for preliminary hearing,
the county attorney or the city attorney prefers
a charge, and would I again let you take someone
to trial for non-meritorious reasons where
there's no probable cause. It's a check and
balance on excessive prosecutorial action.

Right now, that Article 32 is not
serving that function. And so, it doesn't do
anything in terms of its analog with the justice
systems, in the state and federal level,
everywhere else in the country.

So -- and maybe that's too much of a
deep dive for the site visits. I don't know,
because the people in the field are going to be
dealing with that case at that time on that --
that's right in front of them.

But I think for our group -- for the
policy working group for the larger DAC-IPAD, I
think ultimately we're going to come back to --
we need to come back to not just tinkering with
Article 32, we need to really decide what is it
going to be, or what are we going to recommend
it's going to be, going forward, from a
substantive, how-does-it-serve-an-analog func-
tion, and yet also provide a tool for good order
and discipline.

But right now, from everything I've
heard from all the testimony, all the questions
that we're raising among ourselves, it's kind
of -- we keep coming back to what are we doing?
Why are we doing it?

And if that's the recurring answer or
question to our questions, that raises a giant red flag about the continued utility of Article 32 in its current form.

HON. WALTON: Let me just ask, is Article 32 also designed to provide a process to assess whether someone should be detained pending trial?

HON. BRISBOIS: That's a separate process.

HON. WALTON: It's a separate process.

HON. BRISBOIS: Mm-hmm.

MS. PETERS: Which also requires finding probable cause to the way an offense was committed and the accused committed it. So --

HON. GRIMM: So, one thing -- and we're trying to design what questions we should be asking and decide that it's -- I think what we found is that when we heard from the participants -- from the criminal justice participants, the trial counsel, who expressed what their opinions were -- and everyone has opinions and they're based upon whatever they're
based upon -- but I suspect that none of them
have done anywhere near the kind of analytical
review that was done by what the case review
committee did, in terms of getting these things
and looking at them and mapping all the way
through.

I'm sure that in retrospect it would
have been good to hear from them after that to be
able to ask them, well, how many hundreds of
cases have you reviewed to support that
conclusion? What's that based upon?

I suspect it's based upon just
anecdote and experience and the position that
they hold. So, if we are informed by information
that we have received through the hard work of
our Staff being daunted and getting that
information, and the extremely hard work by the
people on that committee by looking at all that
and the time that the spent, then I think that
the kinds of things that we should want to try
and get from these field visits are data that can
help us make these decisions.
Certainly, attitudes are helpful on that, but attitudes informed by a lack of information are less helpful than those formed by having done the work that was done by the case review committee.

CHAIR BASHFORD: The one thing though is, if the 32s are as useless as the defense bar is essentially saying -- Meghan, you're saying they're only being waived about 20 percent of the time.

MS. TOKASH: Yeah.

CHAIR BASHFORD: So, it's either inertia -- it's easier to go ahead rather than to waive it -- or you would think there has to be some perceived benefit for people to go through with it eighty percent of the time.

MS. TOKASH: It will also be interesting I think to ask trial counsel in the field when they make their probable cause determination. Because I have a feeling it's a lot earlier than before the Article 32.

But if it is, it's not being
documented anywhere. And I think that would make
us as Committee members feel better. It would
certainly make me feel better knowing that that
analysis is being done at the front end, and if
it is, then why does it need to be done at the
Article 32?

If a lawyer has already made that
determination and advises a commander, I believe ther's probable cause that an offense was
committed, and that this particular soldier --
sailor, airman, or Marine -- committed the
offense.

So, commander, you have a green light
to go ahead and prefer charges. By the time you
get to a 32, that's one less thing that you have
to worry about.

HON. GRIMM: You know, the whole --
it's fine because we got copies of some law
review articles that talked about the historical
origin and development of the Article 32.

There was a time in the military
justice system when you could be a defense
attorney or a prosecutor without even being a
lawyer.

And they had law officers who would
advise the various people, who had to be a
lawyer. Then, the 1969 change, the Manual for
Courts-Martial came in. And that was the largest
change, the Manual for Court-Martial, just before
I came in, in the early '70s.

And that operated. And then you had
to be -- in order to be a defense attorney, you
had to be a lawyer. You didn't have to be a
lawyer to be a prosecutor. And I was a non-
lawyer prosecutor.

While I was going to law school and I
was on active duty, I tried 40 cases -- special
court-martial cases -- between my first and
second year of law school into the Excess Leave
Program, and wasn't even a lawyer.

But to be a defense attorney, you had
to be a lawyer. And they had the whole
certification process.

And so what's happened is, is that the
Article 32 existed at a time when you had a lot of non-lawyers involved in the process of bringing in prosecuting and defending courts-martial.

And so, as a result of that, that is what that function was. When you had that function, then there was some point to be made about having a lawyer advise someone to do an investigation, and then give advice to the convening authority.

As the system progressed where you had lawyers involved in all of these critical phases -- SJA being a lawyer, defense counsel being a lawyer, prosecutor being a lawyer -- then, there is this decision, well, we really don't need to have the preliminary hearing be a full evidentiary thing. They just can do a test.

So, it's almost as though the underlying need for what an Article 32 is to function as. There were tinkers with it as the system itself changed going forward, with increased professionalism, with lawyers involved
in all critical phases, and investigators being specially trained, but never this reexamination of, in this system the way it is now, what does this do and is it appropriate?

So again, it gets back to is it like your appendix? Is it something that's part of the body corporate but subject to it getting infected and having to be taken out, it doesn't really do all that much.

So, maybe we should try to get a sense of, in terms of how the process operates, when should the probable cause determination be made, who should make it, and that's the one that you stick with going forward one way or the other.

Because I wonder about whether or not you've had this thing that has a purpose that made a lot of sense at the time, that it was designed for what it did, that was outlived -- the need for that purpose as lawyers became more prevalent and involved in the process from there going forward.

MS. CANNON: But it reminds me of one
of the questions that was asked. We got a response to this question of due process was raised.

HON. BRISBOIS: There's a difference between --

(Simultaneous speaking.)

MS. CANNON: Military has a different due process than the United States -- the rest of the United States. And I don't think that's true.

And I think that's why if all the 32 is about is to be another set of eyes, then I agree its usefulness is nothing.

But if it is considered kind of a constitutionally charged oversight of the prosecution and a protection against the accused being wrongfully taken up into all of this way too long before an acquittal, then I think we should seriously consider strengthening it.

CSMAF McKINLEY: I personally would like to see the Article 32 strengthened and have a lot more teeth in it. When I think about good
order and discipline of the military, I think a lot of the military members out there -- officer and enlisted -- don't have a whole lot of faith in the system we currently have.

There's not a lot of confidence when they see cases that are carried on for two years and there's no teeth in it at the end and everything's dropped. But in the meantime, you've lost morale in your unit, you've lost personnel from the unit for work, you've wasted enormous amount of money, and at the same time you have to still complete the mission that your unit has to do.

But if we put more teeth in the Article 32 and we can determine then whether or not to dismiss the case or go on, it's better for the victim -- that victim will be able to decide where they want to go with their future -- and it's definitely better for the suspect, because they're going to find out whether or not they have to strengthen their case where all those flags that we talked about are going to be
dropped and they have a chance to go on with their military career.

But to carry these things out and just carry it out just for the sake of, well, we'll take it as far as we can, good order and discipline goes by the wayside.

We need to put more strength in the 32. And if there's not a case, then we need to drop it and get back to work.

BGEN SCHWENK: Judge Brisbois raised the issue of how we can get the most constructive comment in the time that we have with people in the field, rather than just off-the-cuff comments.

And one of the thoughts I had was, if the policy working group could come up with some strawmen options, and we could then send them out to whoever is being selected at all these places we're going, so they could look at it ahead of time and tell us, I like this about this because, I don't like this about this because, and I could care less about this because I think it's a waste
of time.

            Then, there'd be something they could prepare and something they could actually latch on that's sort of concrete. And we've already talked about a bunch of different options.

            We can come up with three different options or whatever. And then collect that data, come back and see if we can amalgam that into one thing that everybody things is a good idea.

            SGT. MARKEY: General, I think like minds think alike. I'd written notes about that. So, a research-based survey tool. And we have Bill Wells. I don't know if we could write something up where we would do a preliminary questionnaire or survey tool that we could validate with information. And then go into the field based on the responses.

            Because we really want to know what the end users, what they're doing with the Article 32, before we really can make a decision. We've heard panels testify about things. But again, I find when we do like type work, when I'm
in a group and somebody's telling me one thing, when they're driving to the airport they're telling me something else.

So, that's the reality is when I'm going to the airport, oh really? But in settings like this, right or wrong, you're going to get filtered information. And I think maybe a survey tool. But I don't know if we would need to do that anonymously, or we identify people and follow up with those people that would be willing to participate.

MS. CANNON: Or make it optional. Because I think you're going to have the car thing if you must put your make down. Nobody like to put anything in writing.

HON. GRIMM: Yeah, you're right. It's not for attribution anyway.

DR. MARKOWITZ: It would certainly be helpful, though, to have conversations with people where we're not talking to them in front of say their rater, or what have you. So if we can make sure we are having conversations with
folks in the field where we have set it up in a way that allows people to speak as freely as possible within a group setting, and certainly I think it will allow us to have the best information possible, understanding that it's still going to be filtered. But I think being mindful of how we structure those conversations will allow us to get better information if we're not having a conversation that has the SJA and the entire trial counsel sitting there at the same time. I mean, that's the kind of thing that would probably be best to avoid.

HON. GRIMM: And if that's so, we should probably be prepared to think about what we tell these folks about what we will do with their information. I mean, there's an understandable reluctance to say my name is Captain so and so and I'm a this or that, but it's helpful to know the perspective of the person who's on the trial counsel and the Defense Counsel. I've been a preliminary hearing officer. I can tell you right now I was a
special court-martial to be in authority, now I'm a general court-martial convening authority. When I was there, I wish I had known this, that and the other, so that we should be prepared to tell them up front what we think we can commit to, how we will use this information and I think we will get their information if we protect the identity of the people who are giving it.

CHAIR BASHFORD: JPP anonymized them.

GEN. SCHWENK: They did it by panels, so all of the trial counsel sat in the room with a couple of the members and some people to take notes, and all we put down is Captain, trial counsel, Camp Lejeune. That's all we know.

SGT. MARKEY: They're no longer in the military, but they served in those roles? So there is no longer that supervision. And I'm asking, clearly we want to know what worked, what didn't work, what would you suggest as far as improving the process?

MS. PETERS: We can certainly work with that thought, always keeping the goal of
anonymity in mind. And to that point, I think
I'm also hearing that while you don't want
necessarily the trial counsel and the SJA
together, those might be two separate groups that
you want to hear. And we can go back and have a
collection with you and maybe talk to the
Services about the best way to get those kinds of
perspectives, whether a site visit is that.
Because there's usually in a place there's one or
two SJA's, so as you get higher in rank there's
fewer and fewer of those folks that are easier to
identify. But because we've been talking about
the purposes of the 32 and the idea that -- in
some respects the 32 in its report is supposed to
assist the SJA, we can make a lot of tie-ins to
the SJA's interaction with the 32 information and
the referral process at site visits. We can
definitely work with that.

GEN. SCHWENK: The last time we had
panels, all Defense Counsel, all trial counsel,
and another panel would come in victim advocates,
and then another panel would come in and we'd
talk to SJA's, we met a couple convening
authorities individually in their offices. We
tried to talk to judges but they had Judge
Ephraim approach and they talked about it. And
so we talked about lots of other stuff, but not
what we were there for. So my concern was you
get all trial counsel, they're all young, they're
all aggressive, they're all going to be looking
at each other and they're only going to give you
the trial counsel view. Not so, they had no
trouble disagreeing with one another. When the
Defense Counsel came in, same thing. They were a
lot more candid than I had expected. Obviously,
when I grew up as a lieutenant and a captain, I
was a lot more mealy-mouth than these people
were. They were willing to speak their mind, so
it was interesting.

COL. WEIR: That's a great point,
General, which goes to the point about sending
out questions ahead of time.

GEN. SCHWENK: Somebody write that
down; that's the first time he's ever said that
COL. WEIR: Now once you've sent out questions ahead of time to people, somebody's boss gets it and show what the answer's going to be. So I would just be leery about sending out something to all the trial counsels are going to show because their SJA's will go what's these questions -- well, you know how to answer that. You know, so I think just getting the panel armed with the questions and just hit them with it at that time. It's the free flow and they don't say, oh shit, the SJA took the article --

GEN. SCHWENK: You said shoot, that's what I heard.

MG ANDERSON: That's right. Shoot.

GEN. SCHWENK: Well, it wouldn't be a question because more of opinions, attitudes and feelings, so more of a survey as opposed to they knew we're going to ask those same questions, but we're going to get a landscape view of what the end users are doing. That was my thought process on it. And keeping it as anonymous as you can, I
think that's key as well.

MG ANDERSON: I have a question. So

General Schwenk, maybe you know the answer to

this --

GEN. SCHWENK: No.

MG ANDERSON: Maybe it's an

opportunity when there's some professional
development conference for us to get a hold of a
critical mass of some of these folks to address
the issue of there being locations of where you
may have one or two and they could be easily
identifiable. That also might be an opportunity
to have a survey tool be distributed and have
people fill it out. Now, I don't know if the
Services would agree to that and I don't know how
the professional development training is done for
that, but it's just a thought.

GEN. SCHWENK: I mean, that's worth

looking to see when they have their conferences

and how many people show up. The JAG schools we

have people coming and going on a regular basis,

pretty large numbers. So it wouldn't be too hard
to get down to them, the Taj Mahal and the really
cool building in Charlottesville.

HON. GRIMM: They got a new building?

GEN. SCHWENK: And then the dump up in

Newport.

DR. MARKOWITZ: It's still a nice

place to go.

GEN. SCHWENK: Oh, okay. Thank you.

MS. PETERS: So a couple of the other
topics, I'm going to pivot from Article 32 -- we
can always come back to it -- but you heard in
the RFI's and the testimony about the Article 33
disposition guidance. Now, Case Review made some
observations about that. The guidance also we
should note effective 1, January 2019. That
doesn't mean that just because the Services know
it's out there and have already had similar
guidance, more informally in effect similar
considerations to go to in the rules for court-
martial for quite some time. But now they have
Article 33 disposition guidance and that was
discussed in the RFI's and testimony.
The kind of responses when we asked what weight is the ability to obtain a condition given, and this goes to the RFI's. We heard things like, it is a given, it is one factor to consider among many, it is one of the most important factors, certainly, but so is the victim's preference as to disposition. And there were a few comments I think I'm repeating; the Air Force had a specific standard that when there's probable cause and a credible, cooperating victim, they lean towards referring to court-martial. That was in the RFI responses and the testimony, and the testimony of the other Services really wasn't that far apart when they sort of spoke to it.

And in the RFIs we tried to drill down on that further by asking what are some reasons that you would refer a case to court-martial and if the chance of conviction appears low. And they talked about the interest of good order and discipline around having an accused who is in a certain position of seniority or special trust
where it's a difficult case but that case is high
visibility or there's a lot of potential
ramifications to the unit and to the military
community around the conduct at issue, and so
that might be a case where the interest of good
order and discipline weigh in favor of taking a
case. But you might win, you're not sure, but
you take that case to court.

They also mention the safety of the
community and then honoring the victim's
preference to have their day in court for the
reasons given; largely I think a RFI is discussed
a little bit, but why refer a case when the
chance of conviction is low. And I think while
the specific -- and we were asking people who've
been practicing in 2019, so I think given what we
heard and what you read, do you want to ask or
can you make any observations initially about
whether you think that disposition guidance is
clear and effective.

Based on that information I know Case
Review has already made some observations along
those lines. But are there issues that you see with the disposition guidance, what kind of questions do you have about its implementation going forward. We really don't have a lot of information still in 2019, but certainly by the time we get the site visits we'll have some more time and they'll be in effect for more than a year at that point, a little over a year.

So do you think it's clear and effective, do you think you want to explore ways that it should be tweaked based on what you heard, what are some issues, if any, that you noted with the disposition guidance. And that's -- you have Article 33 definitely as a reference in front of you. And I'm not sure that you'll have Appendix 2.1 from the manual in there as well. Can you check?

GEN. SCHWENK: Yes.

MS. PETERS: Okay, so Appendix 2.1 is where the actual guidance is in there.

And the considerations around disposition are actually in this section.
GEN. SCHWENK: So number one, I think it's important that they have Appendix 2.1 somewhere -- and right now it's in the appendix. Maybe that's the right place or not, but we should look into whether that is correct.

The other thing is I appreciate full well that one of the efforts by the department is to maintain the independence of judgement by the convening authority and not to try to appear in any way to be swaying the command authority one direction or the other. So with that said, I don't like the fact, and I think that we should look at why it says in the appendix "should consider" these factors. I think it should say "must consider" these factors. We're not telling them how much weight to give to the factor; some factors might not be in a given case. But why have it when it's a "should"?

Why not say, look these are factors you must consider, consider them. Give them whatever weight you want, but go down the list and make sure you consider them, and then you can
consider anything else you want. So the issue there for me is "should" or "must."

And then the question is what do you do with that, and I think that the -- I don't know about the 32, we'll see where we go on the 32, but for sure the 34 advice letter, if I'm the commanding general or the admiral -- the 34 advice that's the thing on top of the package that lands on my desk with whatever cover sheet they have on it, and I'd like to have something there that the relevant stuff I need to know, the explanation I need to know, it's all there. So on the relevant factors I'd like to see, my assessment of the why the SJA's assessment of likelihood of conviction is and an explanation. I'd like to know what the victim's preference is. I'd like to have that in there.

And I think the Policy Working Group and the DAC-IPAD at large should look at what things should be in there from that list that makes it easier on the convening authority to get a one-stop shopping feel of things before they
start -- if they do diving through Enclosure 1, the PHO Report, Enclosure 2, whatever it is, on down through the end. So those are my thoughts.

MS. PETERS: JPP's tasks also advise that Article 33's implementation be looked at to assess its affect, if any, on the referral of sexual assault cases in particular. I don't know if the testimony is helpful in that regard, maybe site visits would be, but to ask practitioners how this new guidance is affecting their calculation on the referral decision. But are there any other ways you would like to get at that issue or are they closely related enough to assess referral rate and disposition guidance.

Does anyone have any comments on sort of how we should look at that issue that was in the JPP task?

SGT. MARKEY: I think that's a great question to ask the practitioners in the field and end users. First of all, do you know about the non-binding guidance form? Have you seen any?
GEN. SCHWENK: Right, exactly.

MS. PETERS: Which is the first question.

SGT. MARKEY: Are you familiar with it, definitely. What training or information have your received about this document, and do you feel -- and again, it could be arbitrated, discretionary if you feel the guidance is clear and effective in allowing you to make decisions and do your job, right, complete the process. So I think this is really important. And that's going to lead to whether they feel like we wish it was more binding, we wish it was more shall as opposed to kind of this milquetoast goes to "Well, you can if you want," or, "If you don't want to, don't."

GEN. SCHWENK: We wish we knew about it.

SGT. MARKEY: Yes, this guidance.

GEN. SCHWENK: Yes.

CHAIR BASHFORD: I think still underlying all of this, the high acquittal rates,
the overriding of the PHO when they say no PC, it's still the perception that you're never going to get into trouble by sending a case to court-martial. You might get in trouble if you don't send it on, if you don't float it downstream further.

And I think underlying really kind of informs some of these decisions; why would you overturn a no PC, because you can send it down the way. Why aren't the acquittal rates troubling? It seems some of that is underlying a lot of this without being specifically said, and we've heard it some panels have mentioned that that's still a consideration for the convening authority. It'd be nice if we could see to what extent that perception is still held.

MS. PETERS: There was testimony at the last meeting by the higher echelon review by the Service secretary, if someone does not refer a case -- I think the statement was just the presence of that higher echelon review is in effect to check on the convening authority's
discretion, the statute that says if you do not refer contrary to -- well, given certain pre-
conditions it will be reviewed, essentially.

CHAIR BASHFORD: If you didn't refer contrary to your SJA's advice, you have to go the secretary of the -- and that zero cases have ever done that, so.

MS. PETERS: Right. Yes, ma'am. I think that was the testimony. That's exceedingly rare that no one was aware of any instance or that it happened. The JPP had looked at that a few years ago and there were maybe one or two where it just went up to the next level GCMCA, the three or four star, but not up to the Service secretary was the information that we had received.

CHAIR BASHFORD: Right.

MS. PETERS: So was there any sense that the Services or any concern that the Services we're applying Article 33 disposition guidance differently when you compared them next to one another that our Service, cultural
differences or attitudes okay? Is that a problem
or is that -- or could you even tell whether any
Service was really gelling around one perspective
or attitude about the disposition factors, or
another? One case is the Air Force, but there
were other Services that still used, seemed to
have the same rate of dismissal after the Article
32. There's arguments to be made on both sides
of that.

CHAIR BASHFORD: Since very few
documents said which of these factors they relied
on, it's hard to know.

MS. PETERS: Mm-hmm.

GEN. SCHWENK: A bridge too far.

MS. PETERS: Okay.

SGT. MARKEY: I think what we're
hearing testimony from practice, there's a large
disparity on how decisions were made and what
process they use to make those decisions. And I
think one of the things we tried to look at is
the consistency across the different Services, so
everybody using the same standard, go back to
we're all under UCMJ, right. Yet other
different, it appeared through testimony
different branches were considering different
things in their decision process. And maybe
that's a personal thing, individual, commander
SJA or something individually, but it didn't
reflect the entire Army or Navy. That's what I
had a tendency to see.

MS. PETERS: Do you want to get a
greater sense from convening authorities whether
the information and advice they've provided is
helpful? And is the current Article 32, or would
certain changes help them make the referral
decision? Because there was a lot of testimony
about what's available in writing, what's not
available in writing and why, what matters to --
or what is helpful to convening authorities. But
overall -- or can we bring in more testimony on I
guess on the information and advice that is
brought to convening authorities? Because
arguably that is one purpose of the Article 32 is
to help develop information for the referral
1 decision.

2 CHAIR BASHFORD: Really?

3 MS. PETERS: Right, okay.

4 GEN. SCHWENK: One of the problems with convening authorities is they have turnover also and we show up, and in the past there's been occasion to show up and talk to the new convening authority who never convened or dealt with a sexual assault case.

5 So you start talking to them and then the conversation is, "Well, I think in my training I got, or I remember talking to so and so, or --" they're just -- we may get lucky and we may find a convening authority at some place and, one, has time and is willing to talk to us; and two, has actually done a couple of cases, so they have some valuable perspective. But we'd have to check on that with the local SJA's to see if it's worth going to. I mean, a courtesy call to say hi is one thing, but to get into the substance other than, how are you doing in the sexual assault world and what you think is
important and what don't, that's always valuable, but kind of specific ones, they need to have handled some cases.

SGT. MARKEY: I personally don't know what information or advice they're getting based on most of the files that I review. I know we heard testimony from some of the CO's about they can handle it, we got it from here, so we don't know what that conversation is, it's not being documented, when they make a decision that's not being documented.

So I'd be curious to find out in reality what is that looking like and what are some gaps or challenges you're having as a convening authority to make those decisions and what would you like to see. Kind of approach it from, we're from the government, we're here to help.

GEN. SCHWENK: I'm sure that's the approach.

(Laughter.)

MS. PETERS: I think that JPP had
those similar considerations in mind when -- the recommendation that was forwarded said consider whether the Article 34 advice should be protected from disclosure to defense and also whether the case analysis or the Prosecution Merits Memo should be protected from disclosure with the view towards sharing that information with the convening authority to facilitate a frank and thorough discussion, that that was the issue before the JPP or the issue the JPP put forward.

When we send out RFIs and ask the Services what they thought about whether that would be helpful, I think that generally it was that any additional information and advice -- some said in theory that's helpful but it's not necessary because a lot of the advice goes on in person in an oral exchange of information. So there was some opposition to it, where as those who favored it favored the transparency in reflecting the true nature of the decision-making process and the decision.

So we did get a little bit of
information in the written RFI's about that, but
I don't think there's a whole lot of discussion
about it at the last meeting. And the site
visits might be a better way to continue the
dialogue about how the convening authorities
advised about the case and the decisions.

GEN. SCHWENK: It's pretty apparent to
me from looking at the 34 advice letters, it's
virtually all done orally. The 34 advice letter
was to check the box that we gave a 34 advice
letter and what 34 said, so it can't be
challenged. But you can challenge a 34 advice
letter for insufficiency. So therefore, write a
one-pager, check the boxes. I didn't see any
where it wasn't check the box, one page 34. I
never saw one that talked about the victim's
preference in the 34 advice letter.

MS. PETERS: There were some cases
that mentioned what the report of the 32 said and
there were some SJA advices that didn't mention
it, and it doesn't mean it wasn't communicated
because it has to accompany the referral. There
are definitely different practices in how thorough the SJA advice was.

Just due to time considerations, I can shift to Topic 7 which is Page 7 of the handout, which is the idea that the JPP put forward that conviction and acquittal rates that you all have been assessing the annual court-martial adjudication reports are potentially valuable for your assessments of reforms to military justice system. So the RFI's that we sent out, and some of the August testimony talked about what is the value of conviction and acquittal rate or the tasks that you have before you. Some of the things that you did hear in August were that -- and we asked folks to give the pro and con of each position; if you think that they're valuable, why are they, or could you see the argument on the opposite side. So we tried to have a thorough discussion of this, and just some take-aways from the comment in writing or the meeting were that conviction rates alone are not very useful to evaluating the health of the
I think other perspectives were that -- that said, I think especially the defense said the media could be useful for assessing something more specific, like high acquittal rates could be indicative of too many cases being referred or too many cases being preferred. That's not necessarily a comment on the overall health of the system, but it might be a sign or a symptom of some more specific issue.

Let's see -- when we were asking the Services again what is the value of conviction and acquittal rate, what is it theoretically useful for, I think we got comments that says that acquittals do not help or hinder the maintenance of good order and discipline.

The acquittals can demonstrate that the process is fair and just in certain cases, and that just the effect of acquittals or the acquittal rate, the effect of those statistics on good order and discipline, or the effect on acquittal and good order and discipline is
something that's very difficult to measure. And I think two of the Services suggested better measures of effectiveness of the system would focus on process rather than result, such as whether certain procedural rights, motions or findings related to whether the procedural rights of the defendant or victim were granted and there were violations found, those sort of procedural issues might be better data to collect. But that was all said in the discussion by the Services.

We asked what factors would contribute, what factors they thought contributed to the conviction and acquittal rates that you observed -- we fed them the DAC-IPAD data when we asked them that question -- some of the answers back were the use of alcohol and its effect on victims' and witnesses' memories, basically answers around the facts of these cases. Factors that contribute to the conviction rate for sexual assault include the alcohol factor, a prior relationship between the victim and the accused, delayed reporting, counterintuitive behavior and
the presence or absence of digital evidence, and
impeachment evidence or character or truthfulness
evidence.

The presence of these factors, or the
absence of these factors one Service said will be
more closely related to the likelihood of
conviction. And one Service --

CHAIR BASHFORD: Those factors are
just as prevalent in civilian world cases.
Alcohol is present in a huge number of cases as
with all the attendant things with memory, and a
prior relationship between 80 and 90 percent of
the cases we have are prior relationship or
intimate partner cases, counterintuitive
behavior, there's something else happening
because we see this exact same thing in the
civilian world and you do not have a 20 percent
trial conviction rate in the civilian world.

MS. PETERS: To that end, another
Service answered that the standard -- the reason
-- one explanation for the conviction rate is
that the standard of proof for conviction is
beyond a reasonable doubt, which is much higher than the standard required for preferral or referral. So that was actually brought out by one of the Military Justice Division offices. And just I think they also wanted to note that a relatively high percentage of sex assault cases involve contested trials rather than guilty pleas, obviously guilty pleas up the conviction rate.

We did not get a lot of feedback on whether the Services internally were able to readily assess the conviction rate for sex assault compared to the conviction rate for non-sex offenses. One or two Services commented they thought that non-sex offenses generally had a higher conviction rate, it wasn't remarkable, it wasn't too surprising.

Let's see -- answers from the defense regarding conviction and acquittal rates, they tended to be that -- that's where you got the answer, that conviction and acquittal rates could be a way to expose improper preferral and
referral of meritless cases. And that from the
defense perspective the factors that contribute
to the conviction rate were weak cases sent to
court-martials due to fears that doing otherwise
would result in criticism from the complainant,
Congress and the media. One defense answer was
that it's a feeling that victims must be
believed, if that prevails above the evidence you
can be seeing the conviction rates that you all
were seeing. And another defense note was that
sexual assault complaints are not thoroughly
investigated or vetted by law enforcement or
prosecutors. So those were the defense
explanations for the conviction rate.

And I think that calls for not just
maybe your reaction to the testimony, but also
does the committee feel that there is an
appropriate comment to make on the military's
conviction and acquittal rates? Not necessarily
in comparison to the civilian world, but just
internally is that something that the committee
would like to make an observation on moving
forward, whether you ascribe a descriptor to it like "high," "low," "indicative of a problem," or just "fine." Is there something, and I don't know what that is, but is there something the committee would, or any member would like to say about the data in the court-martial adjudication report? We now have four plus years of conviction rate data for sexual assault offenses in the military.

CSMAF MCKINLEY: Meghan, have you had info on some reasoning of why the enlisted court members, why the acquittal rates have skyrocketed with enlisted members?

MS. PETERS: I don't have a reason necessarily behind that, but I think the numbers that we can build into our relative numbers of the trends for how many people are choosing panel of members versus judge alone -- and we'll look at those acquittal rate trends. I can actually -- obviously it's right at my fingertips here, but it'll take me a moment to get back on it. But it won't explain the why.
CHAIR BASHFORD: The rates are fairly similar between member or judge; it's just if the judge doesn't convict you of the penetrative assault, he's going to convict you of something.

MS. PETERS: Yes, the non-sex offense.

CHAIR BASHFORD: Probably a non-sex offense. The member panels, if you don't convince them of the penetrative offense, they're not going to convict you of a non-sex offense. You're going to be done, kind of. The outright acquittal rate was substantially higher for the members, but the top count was very similar and about 20 percent.

MS. PETERS: Yes, so is it appropriate to make a comment on whether you think that is high or low, or problematic or not, or is there any better way or a better comment, if any, to make on these statistics?

SGT. MARKEY: Those numbers are out there, so I honestly think they're important to address one way or the other why those numbers -- the legitimacy behind the numbers or not. I
think the X factor, and you mentioned is we call it a community attitude towards sexual violence. What are your panel members who are representative of your community, what is their attitude towards sexual violence and how they view facts, information, judging victims' statements and suspect statements. The thing that struck me about the one, the recent observation we did in San Diego was there was a Marine as a defendant in uniform at the defense table, and when they were choosing the panel, in marched 20 Marines in uniform. Now, in the civilian world if you had a police officer that was charged with a crime, we would not march in 20 police officers as part of the panel.

And I realize that's the way the system is designed, but to me it just looked like, "Oh, wow. You have all these Marines in uniform with the same uniform this person has on right over here." I don't know; it's just a little sidebar thought in my head.

And so a couple things we did in
Maricopa County is we did community surveys because the prosecutor's office wanted to know who's going to be sitting on our panel, and what they think about if they were in a prior consensual sexual relation and this case involves interpersonal violence but now is a sexual assault, what do they think could somebody -- so questions like if the victim was involved in a consensual sexual relation with the person, could they be raped by that person.

And so they surveyed the community about what do you think, and then that's how they design, for prosecution of course, who do you want to sit on your panel. So the demographics of that person. And so I think -- I don't know if that's the X factor that we'll never be able to determine, but when the panel is making those decisions I find it rather odd when I'm watching a panel of uniformed Marines judge a Marine and they're sworn to follow evidence and the rules of law, of course, but no matter how you slice it there's always a bit of influence and bias in
everybody.

CHAIR BASHFORD: The victims are often in uniform too.

SGT. MARKEY: Well, yes.

CHAIR BASHFORD: There was one -- I can't find it right now -- but where it was a Servicemember victim, civilian victim, and wasn't the conviction rate slightly higher for the civilian victim?

MS. PETERS: In the past -- yes. Right. The data, I remember the JPP made that same observation and asked the DAC-IPAD to continue to look at that, so we do have that data.

CHAIR BASHFORD: Yes, that just seems somewhat anomalous.

I think that the -- again, it's upstream or a downstream problem when you have a top count trial conviction rate of only 20 percent, something is wrong. I mean, I don't think we can sit here and say, "Well, so be it. That's what it is." Something's wrong.
MS. TOKASH: And you've asked us twice for a word to describe it now; I like use Judge Grimm's word, abysmal. I actually noted that Don Christensen co-opted in his cover letter to us, too. That really does describe it and I respectfully disagree with some of the Military Justice chiefs and trial counsel who think that it's not a sign of poor health of the military justice system. There's something really wrong here, and as far as being a member of the Case Review Working Group we've identified what potentially could be a major problem, and that is that there's a finding of no probable cause, those cases are sent forward anyway, maybe because the victim wanted to -- well, we don't know -- that's the X factor, we're not sure why the probable cause, the no PC determination was overcome -- and then the court-martial panel comes up with the same determination as the PHO, but just a higher standard, we are not finding that you proved beyond a reasonable doubt.

CHAIR BASHFORD: That doesn't account
for all of them. That's a small segment of them.

MS. TOKASH: You know, that is -- I think the probable cause thing is the most troubling part of this, but definitely conviction and acquittal rates are important in a justice focused field.

HON. GRIMM: If you're running for election as a DA and you've got a 20 percent conviction rate, you got a problem, then you'll have a lot of time to do jobs to reflect about that because you won't be the DA.

MS. TOKASH: Right.

CHAIR BASHFORD: And I know the defense to that as well, then people are just cherry-picking cases and only doing stranger cases with DNA, but that's just simply not true.

DR. MARKOWITZ: Well, it seems to be not only the question of the Article 32, but the 33/34 process, that decision-making to me is where the lion's share of the problem is for that statistic. Because if it's a probable cause finding, that weeds out the really weak cases.
But if the finding after that should be the likelihood of success at trial and they're fudging on that one, that would account for that.

CHAIR BASHFORD: Going back to the data, again, we saw this morning, the Case Review Group thought that a conviction -- there's enough evidence to sustain a conviction in something like 40 to 50 percent, some place in there of cases that resulted in an acquittal. We thought there was enough evidence to sustain a conviction, almost 100 percent of the cases, 99/100 percent of the cases where there was a conviction, so that was a great deal of concordance. But that 40 to 50 percent where we thought there was enough, but there was still an acquittal, there's something going on in there and I don't really know what it is. It could be -- and I don't know whether that was members, judge or both, it could be something going on at the trial level, but that was a bit of a disconnect. We should probably look at it more.

DR. MARKOWITZ: I know it's difficult
to do this, and maybe there's no way to do this, but it seems to me that if rates are getting worse and we're trying to sort of figure out what is happening here, it would be really helpful to hear from the one group we have not heard from, which is judges.

And I know it's hard to hear from judges and I know that judges don't typically want to talk to us, but maybe if there's a way to talk to judges who are retired judges or if there's a way to craft questions that are narrow enough so that we are not specifically asking about things like deliberative process and what have you, we can get a sense because at least when I think about Army judges, I mean there are some judges who have been or were on the bench for a long time and may have some perspective in terms of how things have changed. And it would be potentially helpful to have a conversation.

HON. GRIMM: To that end, why are we giving the judges a pass? I mean, they can't talk about a case pending before them. That
doesn't mean that they don't have ideas about it, and for them to say, "No, we don't talk about that. How's the weather out there?" That's ridiculous.

CHAIR BASHFORD: Our judges are very vocal when they think we brought a case that should not have been brought or where they thought the performance of a prosecutor was sub-par, they have no problem sharing that information.

DR. MARKOWITZ: Yes, I think it would be great to be able to talk to them, and I specifically don't know what the parameters are on talking to judges who are active on the bench. But if we have the ability to talk to judges, it seems to me that is the one group we have not talked to, we have not heard from, and have a very specific perspective, not just in terms of what's happening now. But again, I know what Mr. Christensen said today about how people are moving off the bench rapidly, but it seems to me we also have some judges who have been on the
bench a while and may have a different
perspective in terms of how things have changed.
And it would be great to talk to some of those
judges about what they've seen in their career.

GEN. SCHWENK: Good point.

MS. CANNON: What about people who
have been on jury's in sexual penetration cases?
It sounds like that's where the acquittal is
from. Right, isn't it jurors who acquit them?

MS. PETERS: Yes.

MS. HAM: There are some strict limits
on getting opinions of jurors. They can
generally give you their impressions of the
advocacy, but they can never tell you their vote
or consideration or anything like that.

MS. CANNON: It would be more
generally the opinion, bottom line, why is it
hard to get a conviction, what do you think of
these cases, what kinds of issues come up.
Because I can see them saying, "They were both
drinking. It started out consensual." You know,
I mean, I don't know, I can guess at some things,
but the question is could we get to them.

CHAIR BASHFORD: One would be very case specific, unless they sit on lots and lots of cases, you would have the perspective on just one --

MS. PETERS: One issue that has come up before is how training all of these potential members are given sexual assault training and what that does to influence them going into the courtroom and then how that comports with the law and the instructions they get from the Judge. At trial might be another way to explore their attitudes about the cases generally. And then, see what we can do about people with that experience.

CHAIR BASHFORD: SARC has become a verb, right? I'm going to SARC you, gets lots of training.

MG. ANDERSON; The convening authority, though, also still has some role in who's -- who -- the people who are put on the roster for new panel members.
MS. PETERS: Yes.

MG ANDERSON: Maybe that's a question to ask convening authorities. What considerations go through your mind in selecting perhaps what the advice of your senior enlisted advisor, people who are going to be on these panels?

MS. PETERS: Okay. And when people see, if they panel cases as you go out and observe courts martial and see the different composition relatively, like, that can be -- that can happen in the Army versus the Marine Corps versus the Navy.

So, maybe get see one example of the panel brought together and voir dired and then separately maybe talk to convening authorities about how they go through the UCMJ criteria and go about selecting them. We can do that.

CHAIR BASHFORD: I just think it has a huge ripple effect, too. I mean, if the convening authority is aware of the rates, so knowing every case I send out, only about 20
percent of these guys are going to get convicted
of the top count. So, I'm sending out 80 percent
that aren't.

If you're thinking of whether to
report something, if I know that X number will
never be preferred and the ones that are
referred, here's the -- it just seems to me it's
beyond just, you know, the individual complainant
and the individual accused.

It has a much wider perception and it
could affect the convening authority's decisions.
Like, why should I send this forward if nothing's
going to happen really?

MS. PETERS: We had, at least have the
ability to ask the Special Victim Counsel program
managers, what are your -- what do the folks in
the field who are representing victims, what is
their sense about the effect of a conviction of
acquittal?

The information that brought back was
that, although an acquittal may be devastating,
in general, victims place greater value on how
they are treated to the process by investigators, the command, and prosecutors.

So, I just mention that to bring in that perspective as well.

BGEN SCHWENK: Those are not mutually exclusive, though. Those two points are not mutually exclusive, right? You know, they -- that sentence reads as though you can have one or you can have the other.

But you can treat somebody well and have a conviction. And you can treat somebody well and have an acquittal and vice versa. So, I'm not sure what it really means.

HON. GRIMM: Yes, it could be -- it was, I was devastated by the result, but I thought I was treated with respect. And that's not exactly a four-star review.

MS. PETERS: And I think if you had about whether anyone is surveying victims in the system for retention -- of their rates of retention and that is not known and not tracked.

But some folks think that maybe go
back and look for it, but even if you only looked
at population of represented victims, that would
not be the universe of all sex assault victims
whose case was handled in the military justice
system.

So, that was just -- I wanted to bring
out some of the information on the Special Victim
Counsel view of the conviction and acquittal
rate.

That is the bulk of the, I think, the
highlights wanted to bring out for discussion.
If we have missed anything or if there's anything
else, I don't want to cut it short, but I don't
have any particular questions what's been asked.
But there was a lot discussed and a lot of
questions we asked the Services about.

So, Chair Bashford, I leave it to you
to survey folks. That's it from the staff.

CHAIR BASHFORD: Is there anything
further for this other than that?

COL. WEIR; Just something for your
all's consideration is that when we talked to the
Special Victim's Counsel, and in conjunction with
the Case Review Working Group, we found that it,
roughly 30 percent of the victims declined to
participate in the process.

    Something you all may want to
investigate is why that happens. And none of the
Special Victims programs track those reasons why.

    You know, we've heard various -- it's
attorney/client -- well, it's not attorney/client
privilege. Establish a checklist, that's a
anonymous that says, wanted to get on with my
life. It took too long. I heard the acquittal
rate and it's 20 percent, you know.

    Those are questions that could help
policymakers determine the course of action to
take. If it takes too long and that's 75 percent
of the reason victims decline, then that would
inform the policymakers in the Department that
maybe we need to put some time limits, like a
ten-day. But that's something for you to
consider as part of this ongoing review you're
working on.
SGT. MARKEY: I agree. And, in the case files, you would find a victim uncooperative, victim did not want to move forward. There was never --

And I think there's a fear to ask, why don't you want to? You know, there -- that whole conversation which, you know, depending on how you ask it. But that goes back to them dropping out of the system back to that procedural justice heart of why we're here.

Were they treated fairly? Was it -- were the folks that prosecuted, investigated, seniors, were they professional? Were they qualified? Did they have experience, and knowledge, and skill? Did I feel like I got a fair shake?

Because this system was the best it could be.

COL. WEIR: And what we've heard from victims and Special Victims' Counsel is they develop, it is an attorney/client relationship, but they develop a close relationship based upon
the Services that are being rendered and helping that victim through this system.

And so, it doesn't seem to me to be beyond the realm of possibility to have that attorney, that Special Victims' Counsel ask his or her client or her client, okay, you decline. I need to know why so we can compile some information that may help down the road make the process better.

And if we knew that information, then it might help make some recommendations as to something to do.

CHAIR BASHFORD: And I think we did have some statistic, which is sort of surprising, that victim participation was slightly higher when they didn't have a VLC, not huge, but slightly higher. So, that was interesting, too.

And the other point I want to make, though, it's not just sexual assault cases. I mean, in the civilian world, you have a lot of victim declination and robberies and in burglaries. And, a lot of times, people just
don't want to be bothered after a while.

   In domestic violence cases, that's
   much more complicated. But stranger robberies
   and stranger burglaries, I mean, there's a big
   drop off, you know, after the report and
   cooperation on those as well.

   COL. WEIR: And just one more point on
   that. I think it's important, because what you
   hear, why all the victim -- why this percentage --
   higher percentage of victims are dropping out,
   it's because the way they're treated by the
   command, it's the way they don't get a fair
   shake.

   And so, this is an opportunity to
   actually put some data behind those reasons so
   we're not living on anecdotes of one or two folks
   who had a bad experience versus the 98 that had a
   good experience, but they didn't want to go
   forward for personal reasons that we can put down
   to say, okay, this makes sense.

   CHAIR BASHFORD: So, we have two more
   reports, the site visit report and the court-
martial report, is that correct?

    COL. WEIR: If you would like to,

Chair, we can just drive on. It looks like
people are taking breaks as they need and we can
just start with the site visit.

    CHAIR BASHFORD: I think that would be
better than -- if we take a break, we'll be 20
minutes getting back. So --

    BGEN SCHWENK: Could you get all those
issues put together by Monday and shoot me an
email?

    MR. HINES: Along with the questions
that we want to ask them.

    BGEN SCHWENK: That would be great.

    CHAIR BASHFORD: Mr. Hines, you have
the floor.

    MR. HINES: All right, good afternoon,
gentleman. I'm one of your attorney advisers,
Glen Hines.

    I'm sort of ponchoing, for lack of a
better term, the site visit effort last fall.

    Well, I say last fall, the September -- Chair
Bashford approved the site visit plan.

I pushed out sort of a courtesy

notification to the Service reps and indicated

that this is what we were planning to do starting

in April and going through next summer.

It's just a couple of slides up here

and it's a short period of time for me. So, I
don't plan on going off on any tangents, but I'm

happy to ask -- answer any questions. Because I

know the topic of site visits has come up

throughout the day.

General Schwenk, I'm looking around,

he may be the only person who was involved with

site visits that we did with the Judicial

Proceedings Panel three summers ago. So, I'll

let him pipe in if he wants to add anything.

But, essentially --

BGEN SCHWENK: Don't believe a word he

says. You're welcome.

MR. HINES: If I could just, on the

front end, you know, what's the purpose of the

site visits? And I'm not going to insult your
intelligence by, you know, reading everything on
the slide.

But I think the value of the site
visits are, and they were for the Judicial
Proceedings Panel, as you get the opportunity to
get out of the Beltway and go out to various
installations on the ground, into the Fleet, as
we say in the Navy and the Marine Corps, and talk
to the various stakeholders who are the policy
implementers on the ground, you're criminal
investigators on the ground, your NCIS/CID agents
at the various installations who are doing these
investigations, your prosecutors, your trail
counsel, senior trial counsel, Special Victims'
prosecutors, your defense counsel, senior defense
counsel, I believe we had a few regional defense
counsel in the Marine Corps, which is an O-5 a
couple of our site visits to North Carolina.

We had staff Judge Advocates come in
on a couple of those visits. I can think of
three or four battalion commanders that came in
at Fort Bragg to give us their impressions on
some of these topics.

The Sexual Assault Prevention people, the SARCS, and essentially any group that's a stakeholder. And I know, you know, they're not on some of my slides -- you can go ahead and go to the next one.

Judges has come up, you know, and we don't need to waste time on whether we can get Judges or not. But we were able to get, you know, three or four Air Force Judges, I think, from one of the site visits a few years ago.

Typically, the Circuit Military Judges do not like their sitting Judges to make policy comments. And, but that doesn't mean that we're -- we can't go out and request to have some of them who are still serving come in and give some of their impressions. And those might be limited impressions.

The Article 120 Subcommittee, for instance, for the JPP, we did have some retired Military Judges that came in and gave their sort of unbiased opinion on that version of Article
and how it might be improved.

So, that's how they're usually structured. The first day as a travel day out, the middle days are there at the installation. And the day essentially looks like, you know, you'll get an agenda and it's stacked by what General Schwenk called panels.

And so, they just -- they come in, prosecutors will come in for a panel. Defense counsel will come in for an individual panel. And so on and so forth.

And it's a very valuable tool to sort of get people's unvarnished -- I like the term unvarnished -- and honest opinions on what their lives are like as investigators or prosecutors, defense counsel, trying to work within our military justice system.

It's in a non-attributional format. So, unlike a public meeting where every presenter that have you have has a nameplate, we have a court reporter, you know, taking down everything anyone says. And that goes back into the public
record. That's not what happens on these site
visits.

And the reason for that is, we want
them to feel as comfortable as possible giving us
their honest opinions.

And so, I believe when that
information was reported back to the JPP, as
General Schwenk said, as far as we would go in
identifying a person was we would say a, you
know, a Captain trial counsel in the Army. Or,
you know, a Major who's a defense counsel in the
Air Force said this.

And so, that's the goal is to get them
to be able to feel free enough with you to answer
your questions honestly instead of just sort of
parrot back, to use my own words, what might be
the party line.

So, if we can -- well, go back please.
So, yes, I just -- we have this slide up, and
it's in your materials. These are the topics.
These are just examples of some of the topic
areas. And we've been hitting them all day,
Article 32, 33, 34, the conviction rates, the
victims' decisions to decline to participate.

And then, training is one that I think
arises from the Case Review Working Group. And a
lot of questions asked to, you know, how are
people being trained? What does the training
consist of with respect to sexual assault? What
is their concept of what a sexual assault or a
rape is?

And, again, that's training that DoD
works on annually, as time goes by, and it's
continuously being tweaked. And so, the idea, I
think, is, well, maybe we bring in some Soldiers
and some Marines, and even trainees this time
maybe at the training installations to find out,
were you trained in sexual assault? If so, what
was it? What's your take-away from that?

And just to find out what is an
individual Service member at, you know, the rank
of E-3 as opposed to E-7 or an officer understand
sexual assault to be?

It could be valuable in telling you or
explaining some of the things that might come up in some of these investigations that we've looked at.

And one of the things I can think of is, going back to, you know, one of the issues covered this morning is, when you read through it, especially in a situation where there might be a third-party complaint, sometimes the question arises, does the victim even think they were sexually assaulted here?

You know, their statement is not making out probable cause. And so, if you can't even determine that as an attorney looking at the investigation, well, how are they able to determine, you know, was I sexually assaulted? Should I report this?

And so, that's one reason we think going to some of the training commands and exploring some of that might be of value to you.

And, again, I've already covered this. These are some of what I call the stakeholders that might make up some of the panels. You know,
Mr. Markey this morning brought up when he was talking about, for instance, I'll just give you a perfect example.

Formulating questions, what we did the JPP was, and it was a fluid process that evolved over time, but we started off with what we called a packet of questions that we prepared -- the staff prepared for each of the members, suggested questions, and we forwarded that out to the Committee Members and let them sort of vet it and look at it.

And so, when you get there, you're going to have what we would suggest, with your input, to be some of the question areas that you might want to go into.

And what we found was, after the first couple of visits, based on the feedback we got, we would alter some of those question packets. We would take some of the questions out. We would add other questions that might come up based on some of the answers that we were getting.
And so, I just wanted to follow up on that point.

So, perfect example, Mr. Markey this morning was talking about the first finding of the Case Review Working Group, the notion of, investigators may or may not be asking important follow-up questions when they are taking the victim's statement.

And one of the, you know, that can raise a number of questions. Are you not asking these follow-up questions, for instance, because you were told in your training on to ask that question because it's too confrontational or it's deemed to be, you know, victim blaming or something?

Or, is it just the discretionary decision, you know, on the agent's part that, well, I didn't ask that follow-up question or I forgot to ask that follow-up question.

These are questions that you can, when we're bringing out a panel of say, NCIS agents, you know, you can ask those types of questions.
And so, that's what we see the process as. And we've already started to -- I've already started to prepare some of these question packets.

And I know the question was raised earlier, can we ask them this? Can we ask them that? Certainly, you know, forward me, forward any of the staff any, at any time, you know, topics that I don't have listed in the paperwork or on the slides or lines of questioning that are generated by your work here. And we are going to weave that in as we go.

It's not going to be a situation where you're just flying in and you walk into a room and you've got a stack of paper and you start and spend, you know, too much time trying to get up to speed. Our goal is, as soon as you go in there, you're ready and you're prepared. You know who you're going to speaking with during a certain period of time, how long they're going to be there, who that's going to be, and a list of the question areas that you want to cover with
that particular group.

And I just have this up, it's in your materials. I want to thank everyone. And I know Ms. Bashford has sent me occasional emails, you know, how are we doing on the site visits? Are people volunteering to go?

And the answer to that question is, yes. These are the trips as it stands right now and the Committee Members who've said they're available or want to go on those trips.

I know I've had a couple of Members come to me today. And I've noted, you know, Judge Brisbois did let me know which trips he was available to go to.

So, there's no staff on there because that could be a fluid process. But we have, you know, enough staff who put their hands in the air. And so, the word that I put out to everyone was that these were going to be worth the expense and the time, that we needed to have at least two Committee Members and at least two staff. And we've got more than enough Committee Members and
staff who are ready to go on each trip.

I would like to have one more Member on the Korea trip. We have three right now. So, if anyone wants to take the 16-hour flight over to Korea.

CHAIR BASHFORD: We're going to have a good time.

CSMAF MCKINLEY: Colonel, can I ask you a question? Colonel, can I ask you a question?

MR. HINES: Yes.

CSMAF MCKINLEY: Since the biggest proportion of our suspects and victims are E-2 through E-5, and the biggest proportion of them live in the dormitories or barracks, would it be beneficial for our Members who are on these trips to make a quick trip to see where they live and the conditions they are in?

Because some of our Members have never been, you know. So, I think that would be a good thing to possibly see where they live and the surroundings they're in.
MR. HINES: A great question, Chief.
And the answer is absolutely. We can try to do
that. I know, with the JPP and the RSP also did
site visits. I just wasn't part of the RSP. I
think Patty was, but I think that's called
colloquially a windshield tour, you know.

And I know when at Norfolk, the staff
there built in time to -- the Navy people on the
ground built in time to show everyone, you know,
the carriers. And we chose not to go over there
because it was going to take too long.

But the answer is, yes. And it
shouldn't be too difficult to setup something
like that.

And so, how that would happen, it
would usually probably happen after the meetings
are done, you know, in the afternoon we can make
time to do that.

CSMAF MCKINLEY: And, for me, I've
seen tons, so it would be only if the other
Members would find it --

CHAIR BASHFORD: He's looking at me.
CSMAF MCKINLEY: -- if they would find it beneficial, then I think it would be good.

MS. HAM: I think, Major, I recall with RSP, we'd seen Lackland and it was shortly after there was a big sexual assault issue there. And the Members did get a tour of the training area for the Airmen and Airmen lived and what changes had been made to that.

COL. WEIR: Chief, we're definitely going to do that. The Case Review Working Group probably, 75 percent of the incidents arose out of something that occurred in the common area of bridge, you know, where they're playing beer pong and then, who knows what happened.

We're also going to visit the smoke pit. That figures prominently into what goes on. And we're going to make sure we go to a smoke pit and check that out.

CSMAF MCKINLEY: I actually eliminated smoking in the dormitories in the Air Force when I was the Chief. And so, we moved them out to the smoke pits.
CHAIR BASHFORD: When we -- is there any limit on the number of Committee Members who can go on one trip? Do we want to file FACA at some point?

COL. WEIR: Yes, the limit is -- if we can have seven or less.

CHAIR BASHFORD: Okay.

COL. WEIR: Once we --

MR. HINES: If you have eight, you have a quorum and that signals a meeting.

COL. WEIR: And as this site survey or the site visits are fact gathering visits. So, you put together -- a report will be put together, you'll take notes. And then you come back with that information into the Committee and then deliberate and discuss what you found.

So, all that will be going on in a public meeting. But the purpose of the site visit is just to gather information, to formulate recommendations or findings and recommendations.

CHAIR BASHFORD: So, I would encourage the Committee Members, if you haven't yet signed
up for a visit, or if you have availability for
more visits than you've signed up for, as long as
we don't have, let's say it's seven or under,
please let Glen or any of the other staff know
your availability.

SGT. MARKEY: My agent will be in
touch with you.

CHAIR BASHFORD: I'm a Delta gal.

SGT. MARKEY: In my understanding,
when you discussed that we'd be meeting with
panels, that we'll be meeting with a group of
more than one person or we'll have individual
sessions with, you know, SJAs, or defense
counsel, or convening authorities?

MR. HINES: Right. So, panel is
probably not a good term. So, when I say panel,
it means, if it's trial counsel, those are the
only people in the room. So --

SGT. MARKEY: But there will be a
group of trial counsel.

MR. HINES: It will be a group. You
know, at least three was sort of the guidance we
put out last time. Because when you get less
than that, you're really not hearing from enough
people.

I think on average, when the JPP did
it, it was, you know, three to six. When we had
the victim -- the VWAP people or the SARC people,
you know, we got 8 to 10 to 12 that actually
would come in on that. And, sometimes, that's
too many.

But, no, that's the guidance that
we'll put out. If, you know, we're going to
bring in trial counsel for 90 minutes, we're
going to want four to six from -- which is --

SGT. MARKEY: But beyond that to meet
individually.

MS. HAM: You'll be surprised, sir,
how --

SGT. MARKEY: I will be, yes, I will
be.

MS. HAM: -- candid they are. It's
not a --

SGT. MARKEY: We do the same process
with civilian law enforcement. Part of the
strategy is, not just candid, but, you know,
common knowledge skills and abilities. And if
somebody starts BS then the other people will
just, yes, that's BS.

And you can't really -- I don't want
to saw QC, quality control, quality check the
information you're getting at times, but
individually, sometimes you get different
information that you know triggers in your head
that, okay, there's an issue with that or that's
a concern or that's something that this person
said this is happening and this person, this is
happening.

And so, it's kind of a --

MR. HINES: I'm not saying --

SGT. MARKEY: For me, that's just my
personal --

MR. HINES: There are no hard and fast
rules one way or the other. I mean, this is just
the way that we've done them to this point. And
I think it's mostly just based on time
constraints.

    And, sometimes, you're at one
installation and you're starting at, say, 8:30
and you're going to be done at 5:00. So, but we
can certainly explore that.

    CSMAF MCKINLEY: When we do
operational readiness inspections in the Air
Force, we have, you know, somewhere in there, we
have like an open IG time where if someone wants
to come in privately and speak to the IG, they
can.

    Are we going to have something like
that for half an hour, 45 minutes that if someone
wants to come in privately and speak to us, they
could possibly do that?

    MR. HINES: During the site visits?

    CSMAF MCKINLEY: Yes.

    MR. HINES: I'll throw that out to
Colonel Weir. I haven't really thought about
that.

    COL. WEIR: That's something that we
haven't contemplated, Chief. I don't know how
that, you know, it would almost have to be a base-wise announcement somehow that the DAC-IPAD is here. If you have something you want to talk to them about. I don't know if that would generate a 100 people coming in or --

CSMAF MCKINLEY: We might miss dinner.

COL. WEIR: -- you know to air their grievances against their chain of command or whatever. But that's not really the purpose of what we're doing.

SGT. MARKEY: I guess the question was, was there any issues with the previous? So, there's seven DAC-IPAD Members and two staff, so there's nine people sitting with these two trial counsels, whoever that might be.

I mean, just a visual of that would be intimidating, I think, to some degree.

MR. HINES: What we tried to do last time is, first of all, keep the staff members, you know, quiet unless we needed to -- and that wasn't a problem with, for instance, we had General Schwenk who is General Schwenk, you know,
and he can just kind of wind him up and he can
go. You know? And run the whole thing himself.
I mean, that in the kindest way, sir.

BGEN SCHWENK: Yes, thanks. I appreciate it, wind me up.

MR. HINES: But, you know, the staff wants to, you know, be quiet and sit in the background and take notes. So, how are we going to gather the information? Well, the staff should be gathering the information while you all are having the discussion and getting that.

But to get to your point, and someone mentioned this morning, what do we tell these people on the front end? As soon as -- and they were already told, you know, via email, but when they could come in the room, I or one of the other staff members or one of the Committee Members would say, okay, look, this is not for attribution. Have you been told that? Yes, sir or yes, ma'am, blah, blah, blah.

Which means, this is not being transcribed. This is not being tape recorded.
You know, we're just taking notes and you're not
going to be named and they're not going to see
your name in USA Today tomorrow.

So, trying to -- trying as much as you
can to put them at ease, to relax, and to sit
back and trust you to engage in a free flow of
information.

I don't think anyone was intimidated.
I don't know, I want to -- I don't think we had
anymore than maybe four Committee Members at any
of the site visits three years ago. So, it was
typically three to four Committee Members and,
you know, three or four staff in the back sort of
taking notes and, you know, being a gofer if
someone needed to go field a phone call or go out
and grab the next panel and that sort of thing.

MS. HAM: And they do not permit their

MR. HINES: Right, right. There was
no situation where you had -- the concern came up
earlier, there are three Army Captains in here
and their boss who's a Lieutenant Colonel sitting
in the same room, for obvious reasons. You know, that's going to have a chilling effect, you would think, on the junior officer's ability to be completely honest about their life and what they're doing.

CHAIR BASHFORD: But they're military personnel, too, so presumably not intimidated by seeing somebody sitting in the room.

SGT. MARKEY: Well, I don't mean intimidation in the fact that, you know, I guess I mean it in the fact that, you know, I just know our -- the strategy that has worked for us is more of a one on one right now. And, of course, it's going to be nonconfrontational.

MS. TOKASH: I plan on cross examining all of them.

SGT. MARKEY: I know that, you'll probably cross examine me and I'll start -- I'll admit to something.

BGEN SCHWENK: There was a good -- there's benefit to having one on ones. But there's a real benefit to have a group of them
because they interplay with one another. And you end up sitting back letting them disagree with each other, reinforce each other.

Somebody said something with -- who said, oh yes, this, dah, dah, dah. And that happened a lot that we would just sit there and I'd look at Glen and think, are we ever going to get to say anything? These guys -- they're on a roll.

And it was all interesting, you know, but so, I -- there's a real benefit to have a group of them in there.

MR. HINES: And they're going to know, they're going to know who you guys are. It's not like they're walking in like, is this the inquisition? Who are these people? You know, they're going to know that you're from the DAC IPAD and who you are and that you're not there to get anyone in trouble. You know, you're there to ask them questions and get their honest input on --

CHAIR BASHFORD: And, just to clarify,
day one on here is a travel day. Is the last day also a travel day?

MR. HINES: Yes, ma'am. So, if you notice, I mean, it doesn't marry up perfectly. And the Korea trip and the European trip, because of the long travel one way or the other probably has an extra day, maybe two built in there. Because, especially going to Korea, you'll lose an entire day going that way.

So, if you see something in boldface, that means there's going to be -- the plan is, there's going to be a day-long meeting at that installation.

And so, the other installations are on there because we're going to ask people from those installations to travel to the main installation.

So, if you look at, for instance, the Hawaii trip, that meeting would be at Pearl Harbor-Hickam, but we'd be inviting or asking people from the other, you know, Marine Corps Base Hawaii's up on the north side of the island.
We're asking them to travel down there for that.

MS. HAM: You'll hear themes develop.

I don't know if you -- it did for you, General Schwenk. I did all the site visits with Response Systems Panel. If you do more than a couple, you hear -- you'll hear the themes develop that give you information to develop recommendations and things and what you choose to do.

BGEN SCHWENK: I agree.

MR. HINES: And you'll find, you know, on these logistically, once we answer their questions and the Service reps are very good at speaking up when they're concerned about, you know, where you're going to be and who you want to meet with.

There'll be plenty of communication between all of us such that by the time we get there, it's a very fluid process. You know, getting on the installation, getting to where we need to go, having a room reserved, having the resources that we need.

Because, they want to assist as much
as they possibly can. And I know the RSP, all
the installations did a great job at
accommodating the RSP and they did it with JPP.
And I have no reason to doubt that the Services
will do the same thing for us this time around.

CHAIR BASHFORD: Okay, thank you.
We're going to be right on time, I
think.

COL. WEIR: Yes, we just have Theresa
to talk about the --

MS. GALLAGHER: Okay, wasting no time,
I think you all are aware of the ongoing project
that I'm going to talk about. It's the Court-
martial Observation Project.

And essentially, what we're trying to
do is to get all the DAC-IPAD Members to a court-
martial by December of 2020. And this is, we
want all Services to be observed. We don't want
to focus too heavily on one or the other, we want
everyone -- or each person to see a court-martial
and we want to spread the wealth out through all
Services.
And the criteria using to select courts martial are a penetrative sexual assault case that has a not guilty plea in place and a panel for the forum.

And the real purpose is to observe the court-martial. Many of you have not ever seen a court-martial. And those that have seen a court-martial, have not seen one recently.

And even if you have seen one recently, you may not have seen all the Services. So, there may be a different Service you can go observe.

The -- you'll have a chance to assess the current policies and practices in the courtroom. We have new rules being applied. Certainly, we noticed changes to the member selection.

You also have the chance to observe the state of training and experience of all the participants in the trial. And that is, of course, going to help assess where we go with site visits, different questions will come up.
It'll affect how you are able to kind of view the context of all the issues that you're grappling with now. So, there's a lot of value to it.

The process being used is, first of all, we're trying to look at the e-dockets. All the Services have, in name anyway, electronic dockets. And the Army and the Air Force docket is very useful for our purposes.

They -- you're able to go onto their trial judiciary docket and see that it's an Article 120, a sexual assault case. You can see what the plea is. You can see the forum. You can see the dates the trial is scheduled for, whether it's three days, five days. And you can see the location.

So, I'm able to go on there and I'm able to say, okay, well, this member lives in this area and I can look and say, all right, here's a court that might be accessible to them knowing that you are all on very busy schedules and volunteering and we have you going all kinds
of places with site visits and these things.

We're trying to get it -- you to
something as convenient to you as you can be.

And we understand that you may not be
able to take an entire week and sit through a
five-day trial or a three-day trial. But is
exceptionally valuable, even to be able to attend
one or two days of the court-martial. And so,
we're not expecting you to sign up for the entire
court. You take and attend whatever you can
because that's going to be value.

So, the Navy and Marine Corps e-
docket, electronic docket is a little different.
Their is pushed out just a week, maybe two in
advance. And they're not necessarily updated.

So, they have compensated by giving me
point of contacts and I tell them kind of areas
that I'm interesting in looking at courts martial
and they're able to feed me information on what
courts-martial that meet my criteria may be
pending in those locations.

And so, once I get the information
where the courts are, I shoot them out in an
e-mail to you. And next week, you should get your
next updated list of court-martials. I know I
have two members currently projected to be at a
court-martial. I can't even remember now whether
it's December or early January. But that'll come
out, a new selection of courts that are pending
next week.

Once I get word back from you guys
that, hey, this court-martial might fit into my
schedule in the second week of February. I have
some time open. Then, I take that court-martial,
I reach out to my point of contact to the
Services and say, hey, can you give me more
information on this particular court-martial?

And at that point, they normally
provide me more information and I'm able to
assess, is this going to be one that is worth the
time of -- does it meet our criteria?

Or, is it such a large, complex case
that your one or two days that you're there,
you're not going to be able to see all the
different pieces of the court-martial, so to speak.

So, we kind of screen it a little like that.

And then, it also alerts them to the fact that they may have visitors and so that they give me on the installation a point of contact. And that point of contact is exceptionally critical and valuable.

As we've seen now in two different cases, we'll have somebody locked into a case. They're ready to go, they've got the plane, the hotel, and the night before, there's a plea agreement or something happens in the trial, criteria disappear that we want to see.

And fortunately, the point of contacts have been so wonderful that we were able to stop Ms. Bashford from getting on a plane and she was able to keep working there and save her time for us for a different court-martial.

And so, and then, that happened again. And the fabulous Marine Corps JAGs reached out,
said, hey, there -- it's looking like this may go away. I'm able to then jump online and look for other possible forums and locations that maybe within that we can divert you to that might have a court-martial that meet the criteria going on at the same time.

And we were just able to re-shift Mr. Markey and Dr. Spohn to a different Marine Corps case and they were able to view a court-martial. But neither of them had observed a court-martial before and it was a valuable experience.

It was also very valuable, we send a staff member along for Colonel Weir who had not been in a court-martial under the new rules.

And so, it's really a very valuable procedure.

The other thing that we're doing is, of course, we're sending a checklist along with you. Because that's what we do. And you're able to, as the trial goes along, record your observations on the checklist. If you simply cannot do it because you just like to pay
attention, then, Colonel Weir or whatever staff member is there can certainly talk to you and get your reflections so that we have a record of them.

So, that when we are discussing different things, you can either refresh your memories or we can use that as a tool to say, hey, here's some things that are common that people are noticing that might need more attention.

It is a very fluid system for all people. That would be both the installations that may reach out and say, hey, you know, this trial may not happen as scheduled.

And I then immediately start reaching out to not just that Service, but maybe other Services as well and say, hey, can you kind of now immediately send me what kind of courts you have in this area that are going on to -- so I can try and redirect.

So, the Services have done a really great job working with us in those last minute
kind of requests to get the information.

And you all just have to stay flexible, knowing that it's trial work and it just may disappear at the last minute.

There's nothing saying that you cannot look at the list I sent you and say, hey, this fits into my schedule perhaps and this one and this one do. So, let me just project for all of them and maybe you get your first one, maybe it's the second one.

So, whatever works best with your schedule, we can accommodate.

And really, that's all I have. If there's no questions?

MS. TOKASH: I have a quick question. This is Meghan Tokash.

Do we get read ahead materials like the charge sheet, the 32 report?

MS. GALLAGHER: We have not been pushing. We do receive those kind of the same as we receive the documents or the investigative files. We receive them and we will provide you
some information from them. We don't want to
release any information electronically to you
unless you're here, you know, unless we're here.

But you will get the information that
you need and certainly, you can have free
discussion with the staff member that shows up
for your trial.

COL. WEIR: At Miramar, they provide
us the charge sheet. And when we were there, we
asked for it so we could have better
understanding.

MS. TOKASH: And could you ask some
things like, I know the trial you watched ended
in an acquittal, could you engage in discussion
about --

COL. WEIR: No, we were gone by that
time.

MS. GALLAGHER: Yes, I mean, given
that we had one Member stay for two days, we had
one Member stay for three days, you know, the
court-martial, I think, you know, it took almost
a full day to seat the jury.
Seeing the jury is very interesting for the people that have not observed a court-martial because it is kind of a little different selection of jury members. It's very detailed questioning of each member normally. And you also, throughout the trial, the members can ask questions via notes, of course, written ones that are submitted.

But no less, they are able to engage in that manner. So, it is a different process. And so, I would just encourage you, if you have not reached out yet to tell me, what is your best area to view a court-martial in. Please let me know.

If you are not limited and you just want to know where every court-martial is that I've -- that I'm sort of tracking, I will just include you on all of the emails out to whatever areas.

CHAIR BASHFORD: The colder it gets, the warmer we want.

MS. GALLAGHER: And then you --
(Simultaneous speaking.)

MS. GALLAGHER: Well, there happens to be --

DR. MARKOWITZ: Minot is a delightful place in February.

MS. GALLAGHER: Yes, so, and I definitely want to give kudos to the Services that have just really been very cooperative and it is a -- it is going to be a long process to get everybody in and linked up with a court-martial, but the payoff is really huge.

COL. WEIR: Okay, thanks Theresa.

CHAIR BASHFORD: Well, thanks once again to our magnificent staff. Oh, one more thing.

COL. WEIR: Yes, just to wrap up --

CHAIR BASHFORD: Okay.

COL. WEIR: -- it's going to be short and sweet here.

Just wanted to kind of put out some information to the total Committee so you're aware of what's going on with the staff and some
of the other moving pieces.

So, on December 17th, 2019 the Chair will have a meeting with the Secretary of Defense. And we just thought that was going to be an office call. I believe the Secretary of Defense has opened that up to the Service Secretaries as kind of what we're getting. So, that'll be a good meeting for the Chair and the Secretary of Defense.

We've talked about the database issue before. So, the staff is working diligently to find an answer to the database issue. We have had meetings with the Defense Digital Service, a civilian vendor, a Marine Corps organization that uses a database, and last, this week, we met with a member of the OGC, DoD OGC staff, who's in charge of coming up with a database for the Departments for the General Counsel's Office.

That seems to be, right now, based upon what we know, the best solution. So, we're going to work closely with him and what he's doing. And he believes there'll be a proposal
out after the first of the year on the street for
vendors to come back with some ideas so the
Department can make a decision on who to go with.

It will be a cloud-based system. It
would be a system that we could add to, and it
would also be a system that would work for both
the DAC IPAD and the Military Justice Review
Panel. So, that's where we are with the
database.

The next public meeting is scheduled
for February 14th, 2020. I did not schedule it
all so you guys can bring me flowers and candy.
It just so happened that was the date that it
came up. So, that's the next public meeting,
February 14th.

BGEN SCHWENK: And the 13th will be
like normal?

COL. WEIR: Yes, the 13th --

BGEN SCHWENK: The working group
meetings?

COL. WEIR: -- will be a working group
preparatory session. And then, the 14th will be
the --

CHAIR BASHFORD: We're all going to have the tissue the boxes wrapped in crepe paper, the whole Valentine's.

COL. WEIR: However, we may need to schedule a telephonic public meeting like we've done in the past to discuss the annual report that is due March 30th. So, that may happen, we'll just have to see how it shapes out.

Save the date, and I'll send out another email, but May 15th, August 21st, and November 6th of 2020, those are the next scheduled public meetings after the 14th.

BGEN SCHWENK: May 15th and then what?

COL. WEIR: May 15th, August 21st, and November 6th.

COL. WEIR: And that's all I have.

CHAIR BASHFORD: So, I think this was a very productive meeting. Thanks again to the staff for all the work that they did.

Mr. Sullivan, you want to bring us to court?
MR. SULLIVAN: I will, but before I close the meeting, I do want to note that this afternoon while we were meeting, the Supreme Court granted cert on a case involving three military rape convictions, United States v. Briggs and United States v. Collins which will be consolidated for oral argument.

And with that, the meeting is closed.

BGEN SCHWENK: Do you know the issue?

CHAIR BASHFORD: What's the issue?

MR. SULLIVAN: So, the issue -- it's a statute of limitations issue. The meeting is closed.

(Whereupon, the above-entitled matter went off the record at 3:30 p.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DAC IPAD

Date: 11-15-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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Court Reporter

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