

UNITED STATES DEPARTMENT OF DEFENSE

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

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PUBLIC MEETING

+ + + + +

FRIDAY
AUGUST 21, 2020

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

PRESENT:

Ms. Martha S. Bashford, Chair
Ms. Kathleen Cannon
Ms. Meg Garvin
Hon. Paul W. Grimm
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Sgt. James "Jim" Markey (Ret.)
CMSAF Rodney J. McKinley, USAF (Ret.)
Brig. Gen. James R. Schwenk, USMC (Ret.)
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash
Hon. Reggie B. Walton

STAFF:

Mr. Dwight Sullivan, Designated Federal Official
Col. Steven Weir, USA, Staff Director
Col. Laura Calese, USA, Staff Director
(incoming)
Ms. Julie Carson, Deputy Staff Director
Mr. Dale Trexler, Chief of Staff
Ms. Alice Falk, Technical Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Patricia Ham, Attorney-Advisor
Mr. Glen Hines, Attorney-Advisor
Mr. Chuck Mason, Attorney-Advisor
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
Ms. Eleanor Vuono, Attorney-Advisor

SERVICE REPRESENTATIVES:

Major Ryan C. Lipton, U.S. Marine Corps
Ms. Janet Mansfield, U.S. Army
Mr. James Martinson, U.S. Navy
Major Marquita Ricks, U.S. Air Force
Captain Vasilios Tasikas, U.S. Coast Guard
Ms. Vasha Vaghela, U.S. Air Force

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

2 11:00 a.m.

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

9 This public meeting of the DAC-IPAD is
10 open. Ms. Bashford, you have the conn.

11 CHAIR BASHFORD: Thank you, Mr.
12 Sullivan.

13 Good morning to everybody. I would
14 like to welcome the members and everyone in
15 virtual attendance today to the 18th public
16 meeting of the Defense Advisory Committee on
17 Investigation, Prosecution, and Defense of Sexual
18 Assault in the Armed Forces, or DAC-IPAD.

19 In accordance with the current
20 Department of Defense guidelines for operations
21 during the COVID-19 pandemic, today's meeting is
22 being held via teleconference. Please note that

1 non-DAC-IPAD attendees will be muted by our
2 teleconference administrator, in compliance with
3 DoD's legal guidance and to prevent background
4 noise or disruptions during the meeting. To the
5 many members of the staff, I ask you to please
6 keep your phones muted as well when you are not
7 speaking.

8 Additionally, in case the current
9 conference line fails, we will break for 15
10 minutes and move to an alternate conference line.
11 The alternate conference line dial-in information
12 will then be posted on the DAC-IPAD website with
13 instructions for rejoining the meeting.

14 With that, we'll begin by taking
15 attendance. We did so informally, but I'd like
16 to do it formally on the record.

17 CHAIR BASHFORD: General Anderson?
18 General Anderson?

19 Judge Brisbois?

20 Ms. Cannon?

21 MS. CANNON: Present.

22 CHAIR BASHFORD: Ms. Garvin?

1 MS. GARVIN: Present.

2 CHAIR BASHFORD: Judge Grimm.

3 Mr. Kramer?

4 MR. KRAMER: Yes, I'm here.

5 CHAIR BASHFORD: Ms. Long.

6 MS. LONG: I'm here. Present.

7 CHAIR BASHFORD: Mr. Markey?

8 MR. MARKEY: Present.

9 CHAIR BASHFORD: Dr. Markowitz?

10 Chief McKinley?

11 CMSAF MCKINLEY: Present.

12 CHAIR BASHFORD: General Schwenk?

13 BGEN SCHWENK: Present.

14 CHAIR BASHFORD: Dr. Spohn? Dr.

15 Spohn?

16 Ms. Tokash?

17 HON. GRIMM: Hello?

18 CHAIR BASHFORD: Yes?

19 HON. GRIMM: This is Paul Grimm.

20 CHAIR BASHFORD: Okay. Great.

21 Welcome, Judge Grimm.

22 HON. GRIMM: Thank you.

1 CHAIR BASHFORD: Ms. Tokash?
2 Judge Walton?

3 HON. WALTON: Here.

4 CHAIR BASHFORD: General Anderson?
5 Ms. Tokash?

6 MS. TOKASH: Yes. Here.

7 CHAIR BASHFORD: I thought General
8 Anderson was on the line before. If not, we
9 still have a quorum. We have 12 of our members
10 present.

11 The DAC-IPAD was created by the
12 Secretary of Defense in 2015, in accordance with
13 the National Defense Authorization Act for fiscal
14 year 2015, as amended. Our mandate is to advise
15 the Secretary of Defense on the investigation,
16 prosecution, and defense of allegations of sexual
17 assault and other sexual misconduct involving
18 members of the Armed Forces.

19 I will now move on to our agenda for
20 today. As part of the DAC-IPAD's mission,
21 Congress directed the Committee to review on an
22 ongoing basis cases involving allegations of

1 sexual misconduct. Complying with this
2 requirement, the DAC-IPAD formed a Case Review
3 Subcommittee composed of seven Committee members
4 and tasked it to review individual cases
5 involving sexual offenses.

6 As the culmination of the
7 Subcommittee's three-year project that involved
8 the in-depth examination of nearly 2,000
9 penetrative sexual offense cases by Subcommittee
10 members and staff, at today's meeting the full
11 Committee will deliberate and vote on the Draft
12 Report on Investigative Case File Reviews for
13 Military Adult Penetrative Sexual Offense Cases
14 Closed in Fiscal Year 2017.

15 Next, members of the DAC-IPAD staff
16 will provide an introductory briefing on the
17 congressionally-mandated requirement for the
18 Committee to review and assess the race and
19 ethnicity of members of the Armed Forces
20 investigative corps charged with and convicted of
21 sexual offenses under the Uniform Code of
22 Military Justice.

1 Finally, the Committee will receive an
2 update from its Policy Subcommittee.

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

6 If a meeting attendee would like to
7 make a public comment, please submit your name
8 and the phone number you are calling from to Mr.
9 Dale Trexler at dale.l.trexler.civ@mail.mil no
10 later than 1:00 p.m. Eastern Time. Comments will
11 be heard at the discretion of the Chair. Written
12 public comments may be submitted at any time for
13 the Committee's consideration.

14 This is a bittersweet meeting for me
15 and the Committee and staff. I would like to
16 take a moment to recognize and sincerely thank
17 the DAC-IPAD Staff Director, Colonel Steve Weir,
18 for his exemplary leadership and commitment to
19 our important mission over the past three years.
20 It saddens me today to announce that this will be
21 his last meeting as our outstanding Staff
22 Director. As is the military's way, Steve is

1 moving on to his last assignment before
2 retirement next year from the Army and a
3 distinguished 30-year career of service to the
4 JAG Corps.

5 I must say that when Captain
6 Tideswell, our first Director, announced her
7 retirement, I admit to having been somewhat
8 nervous about her replacement. And I quickly
9 learned, though, that those fears were completely
10 misplaced.

11 Steve, we will sincerely miss your
12 wisdom, your good humor, and your expertise in
13 issues of military justice, and we thank you so
14 much for leading us through these last three
15 years and the production of eight excellent
16 reports.

17 As we say farewell to Colonel Weir and
18 wish him well in his future endeavors, I am also
19 pleased to introduce and welcome our incoming
20 Staff Director, Army Colonel Laura Calese, who is
21 also joining us on today's teleconference.
22 Colonel Calese posts to the DAC-IPAD from the

1 field, where she just completed her previous
2 assignment as the Staff Judge Advocate for the
3 101st Airborne at Fort Campbell, Kentucky,
4 including a forward deployment to Afghanistan in
5 that capacity. She has now settled into the D.C.
6 area with her family and has finished all
7 quarantines. So she is up and running and ready
8 to pick up the baton.

9 I have had the opportunity to talk
10 with Colonel Calese over the phone already this
11 week, and I want to welcome her to the team and
12 assure the Committee that, sad as we are to say
13 farewell to Colonel Weir, Colonel Calese is a
14 worthy replacement.

15 We look forward to working with you in
16 the coming months and years, and I hope we're
17 actually able to meet with you in person before
18 too much longer.

19 Before I hand it over to Colonel Weir
20 to begin, I request that Committee members signal
21 when we have questions or wish to speak by just
22 stating your name and, then, waiting to be

1 acknowledged. This process will both help us
2 identify who is speaking when multiple people
3 speak at the same time, and it will also be very
4 helpful to the court reporter in identifying
5 speakers.

6 We will now begin our deliberations on
7 the Draft DAC-IPAD Report on Investigative Case
8 File Reviews for Military Adult Penetrative
9 Sexual Offense Cases Closed in Fiscal Year 2017.
10 We reviewed the report with the staff yesterday
11 at our preparatory session to make technical
12 edits and identify substantive questions for
13 today's deliberations.

14 Thank you again for your attendance
15 today.

16 And with that, I will hand it over for
17 the last time to Colonel Weir and the Case Review
18 Subcommittee staff to start us off.

19 Thank you.

20 COL WEIR: This is Colonel Weir. Good
21 morning and thank you, Committee Members, for
22 attending.

1 And Chair Bashford, thank you for the
2 kind words. I'm definitely going to miss working
3 with you all because I feel that what you do is
4 extremely important for the nation. And I am
5 proud to have been a part of that in the last
6 three years.

7 But, at this point, we're going to go
8 ahead and turn it over to the DAC-IPAD staff.
9 And I just want to say a few words about it,
10 before I turn it over to them, just to kind of
11 give you an overview of what has transpired over
12 the last three years with this Case Review
13 Subcommittee.

14 When we got the task, based upon some
15 information that had been received by the Chair
16 about some of the cases, the 80 percent of the
17 cases that didn't go to trial, that triggered the
18 Chair to look into what happens with those cases.
19 So as the staff, we developed a checklist of 231
20 data points, and along with the Committee or the
21 working group that was the Case Review Working
22 Group, we went through these investigations that

1 were provided to us, and we came up with a
2 database. We spent many, many hours, not
3 necessarily me, but the staff spent many, many
4 hours.

5 So I'd just like to give a shout-out
6 to Theresa Gallagher, Kate Tagert, Glen Hines,
7 and Stacy Powell for the hard work that they did
8 to get the information in front of you in a
9 report.

10 And no one knew at the time, and
11 certainly I didn't --

12 (Whereupon, the above-entitled matter
13 went off the record at 11:12 a.m. and resumed at
14 11:26 a.m.)

15 MS. GALLAGHER: Sir, were you ready
16 for me to begin? This is Terry.

17 COL WEIR: Yes.

18 MS. GALLAGHER: All right. This is
19 Terry. I'm going to go ahead and start.

20 If you would all turn to your slide
21 deck, we're going to start with going through
22 slides. What we're going to do is focus first on

1 the first half of the report that involves more
2 of the subjective findings, the reasonableness,
3 the probable cause, the sufficiency. And then,
4 we're going to take that lunch break. Then,
5 we'll come back and start focusing on more of the
6 data pieces, and Ms. Tagert will lead you through
7 that.

8 First of all, we're going to go
9 through the first half of the slides. And then,
10 we're going to turn to the Executive Summary.
11 And then, we'll turn to the report, all working
12 on the first pass. The voting will be done at
13 the very end of the presentations of all of the
14 report. As we go along, make sure that, if you
15 have issues, you voice them at that time, because
16 the intent is to do the voting more as a block at
17 the end. Given the volume of findings and pages,
18 we'll be doing more of a block.

19 Okay. So one thing to keep in mind as
20 you go through these slides -- well, actually,
21 there's three types of outcomes from this report.
22 We have database findings, non-database findings,

1 and directives to the Subcommittee. All of the
2 non-database findings and all of the directives
3 are contained within the slides that we'll be
4 going through. And those are not necessarily in
5 chronological order, but they do have page
6 numbers from the report. So many of the database
7 findings are contained in the slides, but not all
8 of them. Some of the data findings are not
9 complete on the slides. So for the complete
10 findings, because some of them are multiple
11 parts, refer to the report.

12 All right. Service-specific data is
13 found in the report. We will not be covering the
14 Service-specific data in the presentation. As
15 always, you are welcome to jump in and ask
16 questions.

17 If you turn to slide 2, what this is
18 is really just a recap of what we've been doing.
19 We have taken the 1904 cases, and when I say
20 "cases," that is not necessarily the number of
21 investigations we received from the MCIOS,
22 because we further broke those down. And if

1 there was a multiple victim or a multiple subject
2 investigation, we did a case for each
3 subject/victim combination. And so that's where
4 we get our total of 1904 cases. Remember, also,
5 that we are dealing only with the penetrative
6 sexual offenses defined there on slide 2.

7 Slide 3, we have our goals set forth.
8 The first one is to gather the objective
9 descriptive data, which we gathered multiple data
10 points on each investigation file.

11 Second was to perform the subjective
12 assessments. First, was the initial disposition
13 decision. Second, the qualitative evaluations of
14 the evidence, the evidentiary standards, the
15 probable cause standards, and the sufficiency of
16 the evidence to obtain and sustain a conviction.

17 Slide 3, this slide is a very
18 important limitation to what we were able to do.
19 So when you go through the findings and the
20 directives, bear in mind that we could only
21 assess what material we had. And so we had the
22 investigative file, documents, and material. We

1 did not for all cases have the recordings of
2 victim interviews and subject interviews. Those
3 were not reviewed. So we had written
4 documentation and photos. We did not listen to
5 audio tapes. So that's the material we had.

6 For all the preferred cases, we also
7 had some trial material. Those were from our
8 internal database, the DAC-IPAD database, as well
9 as, occasionally, we would send requests to the
10 Service Judge Advocates to help us get
11 disposition information that was missing from the
12 files.

13 We did not consider any additional
14 evidence or information from outside of these
15 materials. We don't know what input the defense
16 would have had on a case necessarily, unless it
17 was contained in the file. And we didn't go
18 through trial transcripts or any of that stuff.

19 So when we make an assessment that
20 there is sufficient evidence or there is probable
21 cause, we're doing that based on the material we
22 have. And we recognize fully that there could

1 have been some other information that changed the
2 course of things along the way. But this is a
3 really good insight into the strength of the
4 case, regardless.

5 All right. Turn to slide 5. Another
6 important caveat is our focus was on the
7 penetrative sexual offense only. If some action
8 was taken for an offense other than that, it is
9 not reflected in our data. So when we say that
10 there was no action taken on the case, that
11 doesn't mean that somebody didn't receive an
12 Article 15 for underage drinking or
13 fraternization or some other conduct, or even a
14 court-martial for sexual contact, in fact. All
15 that means is that there was an allegation being
16 investigated of a penetrative sexual offense and
17 that no action was taken on that offense, or that
18 a charge of a penetrative sexual offense was
19 charged.

20 All right. Slide 6. Another
21 important thing to remember is that this is not
22 the first time we have reported on issues found

1 during this case review project. This is the
2 first time we have the extensive data being
3 reported, but we have reported in several
4 different reports, the 2019 and 2020 Annual
5 Reports. We've made 34 findings, assessments,
6 observations, and recommendations already. And
7 some of those overlap a little bit. This also
8 won't be the last time that we use information
9 from this study because it's going to factor in
10 in other studies.

11 If you turn now to slide 7, this is
12 just the straight breakdown. Sometimes the MCIOs
13 would categorize cases differently than we do
14 because they had different definitions. What we
15 have done, because our focus was solely on the
16 penetration sexual offense, if a case was
17 reported as a non-judicial punishment case, we
18 may have reclassified it as a no-action case if the
19 non-judicial punishment was for something other
20 than the penetrative sexual offense. And so this
21 is the breakdown of our final numbers after we
22 recategorizing cases.

1 We have 70.2 percent of the cases were
2 no action; 27.2 were preferred, and 2.7 were
3 administrative actions. For the preferred cases,
4 there were 517 preferred cases, and we were able
5 to further break those down into cases that
6 resulted in a verdict, meaning those went to
7 trial and a verdict was rendered, either an
8 acquittal of the penetrative sexual offense or a
9 conviction of the penetrative sexual offense.
10 And that happened 45.5 percent of the cases
11 resulting in a verdict. 2.1 percent resulted in
12 some kind of an administrative declaration, and
13 16.1 percent resulted in a discharge in lieu of a
14 court-martial. There is more information on
15 those actions in the report.

16 And 36.4 percent of these preferred
17 cases resulted in a dismissal of the penetrative
18 offense, and that was either outright or pursuant
19 to a pretrial agreement, bearing in mind, of
20 course, that with the administrative separations
21 and discharges in lieu of courts-martial, those
22 would also result in a dismissal of the

1 penetrative sexual offense.

2 Page 9, we get to our first really,
3 our key finding. And that key finding is that
4 there is not a problem with the initial
5 disposition authority's decision either to prefer
6 an adult penetrative sexual offense or to take no
7 action against the subject for that offense.

8 If you turn to the next slide, you see
9 that in 98.5 percent of the cases in which no
10 action was taken by the initial disposition
11 authority, the reviewers found that this is a
12 reasonable action in light of what was contained
13 in the investigative file.

14 Likewise, in 94 percent of the
15 preferral actions, those were determined to be
16 reasonable. That does not necessarily mean that
17 we, as a reviewer, would have taken the exact
18 same action. It just means that it was
19 reasonable, based on the investigative file, for
20 the initial disposition authority to have taken
21 that action.

22 The second key finding is on page 11.

1 And that comes from proposed finding 24, page 65
2 of the report. And that is that there is a
3 systemic problem with the referral of penetrative
4 sexual offense charges to trial by general court-
5 martial when there is not sufficient admissible
6 evidence to obtain and sustain a conviction on
7 the charged offense.

8 With this, this is our first point of
9 deliberation. The language coming out of the
10 Subcommittee was that there may be a systemic
11 problem with the referral. And General Schwenk
12 has proposed an amendment to that to change the
13 "may be" to an "is," that the data shows that
14 there is a systemic problem with the referral of
15 penetrative sexual offense charges.

16 Sir, would you like to lead this
17 discussion? Sir, do you have anything to say
18 with regards to that?

19 BGEN SCHWENK: I've been told to move
20 my phone whenever I want to say something. So I
21 don't know if you can hear me.

22 But, anyway, no, so I think initially

1 in the Subcommittee we came up with this finding
2 partway through and we had "may be" because we
3 weren't sure. We were sure there was an issue.
4 We weren't sure whether we were hardover that it
5 was a problem or it might be a problem. So we
6 put "may be" in.

7 When the final report finally got
8 done, we have a direction which is somewhere in
9 here -- do you know where that direction is,
10 Terry, the one that says --

11 MS. GALLAGHER: Yes. That is on slide
12 -- well, it's a finding. And the first finding
13 is finding 15. It's on slide 19.

14 BGEN SCHWENK: Yes, which leads into
15 slide 20. So if you go to slide 20, we have a
16 proposed directive to the Policy Subcommittee.
17 The Policy Subcommittee previously has been
18 tasked by the full Committee with looking at
19 Articles 30, 32, 33, and 34.

20 So this proposed directive says,
21 "Require the Staff Judge Advocate to advise the
22 convening authority in writing that there is

1 sufficient evidence to obtain and sustain a
2 conviction on the charged offenses before a
3 convening authority may refer a charge and
4 specification to trial by general court-martial."

5 Right now, the law is that the Staff
6 Judge Advocate has to advise that there is
7 probable cause before a convening authority may
8 refer a charge. And this directive would be
9 telling the Policy Subcommittee, when they're
10 making their group of proposals on those four
11 Articles, to -- this is a specific tasking --
12 require the SJA not to say PC, but to say
13 sufficient evidence to obtain and sustain a
14 conviction before a convening authority may
15 refer.

16 We felt really strongly about that at
17 the very end of our deliberations as a
18 Subcommittee. Since we felt that strongly there
19 to make a requirement on the Policy Subcommittee,
20 I thought the "may be" is overcome by that
21 directive and that's a dissent. So if the full
22 Committee today votes in favor of this directive

1 on page 20 of the proposed directive 6, the
2 Committee has made the decision that the Policy
3 Subcommittee will change Article 34 to reflect
4 not probable cause by the SJA, but obtain and
5 sustain a conviction by the SJA.

6 And if that's the case, then when I
7 looked back at the finding, I said, well, now
8 we're inconsistent; we say "may be" on proposed
9 finding 24, which is slide 11, and we should say
10 "is" because our directive No. 6 is definitely an
11 "is". It's a tasking. So that's why I proposed
12 "is" instead of "may be".

13 And then, I told the staff that, since
14 I was mucking around with the language, that I
15 needed to alert the full Committee and let them
16 think about it, and then, discuss it, and
17 whatever. So that's my reasoning.

18 MS. GALLAGHER: Does any other member
19 want to be heard about changing the original
20 language as "may be" to "is" in proposed finding
21 24?

22 CHAIR BASHFORD: Yes. This is Martha

1 Bashford.

2 HON. WALTON: Yes. This is Judge
3 Walton. This is Judge Walton. I'm sorry, go
4 ahead.

5 CHAIR BASHFORD: Go ahead, Judge
6 Walton.

7 HON. WALTON: Yes, I would tend to
8 agree with General Schwenk's position. It seems
9 to me, with a large number of acquittals that are
10 occurring at court-martial after a case has been
11 referred for prosecution, and those acquittals,
12 as I understand, are based upon insufficient
13 evidence, it seems to me that there's a problem.
14 Because, obviously, just a referral in the
15 prosecution itself can have adverse implications
16 not only on the accused, but on the alleged
17 victim. So it seems to me that something more
18 than just a probable cause determination should
19 be made before the consequences of an ultimate
20 trial or court-martial occur.

21 HON. GRIMM: This is Judge Grimm.

22 CHAIR BASHFORD: This is Martha

1 Bashford.

2 I agree with General Schwenk. And if
3 you look at the very next slide, almost a third
4 of the cases tried to verdict in our assessments
5 did not have sufficient admissible evidence to
6 obtain and sustain a conviction. So I think that
7 means that there is a systemic problem, not that
8 there may be a systemic problem.

9 HON. GRIMM: This is Judge Grimm.

10 MS. GALLAGHER: Go ahead, Judge.

11 BGEN SCHWENK: I think Judge Grimm
12 wants to say something, Chair.

13 CHAIR BASHFORD: Okay. Yes, yes.
14 Okay.

15 HON. GRIMM: Yes, I agree that it
16 should be changed to "is" instead of "may be".
17 The results of the acquittals in as large of
18 number of cases as the data shows for lack of
19 sufficient evidence to sustain a conviction, and
20 given that with the low threshold for probable
21 cause, which is just a reasonable belief, I think
22 that it shows that there is a need for the

1 judicial input or the legal input to the
2 convening authority. Provide the convening
3 authority not simply with information that the
4 facts support probable cause, but forecast the
5 best judgment of the Staff Judge Advocate as to
6 whether or not it is sufficient to sustain a
7 conviction.

8 For the reasons that Judge Walton
9 added to the reasons that are sound that Judge
10 Walton or that General Schwenk identified, going
11 forward on a case that lacks sufficient factual
12 support to sustain a conviction has an impact not
13 only on the accused, but also on the victim. And
14 for that reason, I think that the proposed
15 modification is appropriate.

16 MS. LONG: This is Jen Long.

17 MS. GARVIN: This is Meg Garvin.

18 CHAIR BASHFORD: Go ahead, please.

19 MS. LONG: Me or Garvin?

20 CHAIR BASHFORD: Yes.

21 MS. LONG: Long or Garvin?

22 CHAIR BASHFORD: Ms. Garvin. Ms.

1 Garvin, go ahead.

2 MS. GARVIN: Okay. Sorry, Ms. Long,
3 I think you might have been first, but I'll go
4 ahead and take it and be brief.

5 I have a question before I can comment
6 on the "may be" versus "is". And my question is
7 a procedural question about what happens in post-
8 referral. I want to make sure I'm remembering
9 correctly, and I was doing some research. Post-
10 referral, is there any discovery or further
11 development of evidence that happens post-
12 referral, pre-actual-charge or pre-actual-trial?

13 COL WEIR: Ms. Garvin, this is Colonel
14 Weir.

15 There could always be evidence that's
16 discovered prior to the trial and even perhaps
17 during the trial. But what that would require
18 is, obviously, that evidence, if the Government
19 received the evidence, there would be a
20 requirement that it obviously be turned over to
21 the defense. And if it happens in close
22 proximity to the trial and it's adverse to the

1 defense, the defense could go to the military
2 judges and ask for a continuance to review the
3 evidence. So there is the possibility that
4 evidence could come in at the very last minute.

5 I believe that Mr. Markey --

6 MS. GARVIN: Hello?

7 COL WEIR: I believe that Mr. Markey
8 -- yes?

9 MS. GARVIN: Sorry. For
10 clarification, you don't have to explain those
11 pieces. I'm asking kind of more formal
12 procedural. Is there any pretrial motion
13 practice regarding the evidence or formal
14 discovery practices that happen post-
15 referral/pretrial, like any formal procedural
16 moments that are happening?

17 COL WEIR: As a defense counsel, my
18 discovery request to the Government was an
19 ongoing discovery request that didn't have a time
20 that it would stop. So the Government would be
21 required in my first discovery request that,
22 whenever they came into evidence that they should

1 turn over, I didn't have to submit an additional
2 request for discovery. And there can be motions
3 made post-referral if the defense doesn't believe
4 they've received evidence.

5 Mr. Markey will recall that the trial
6 that we observed at Fort Lewis, after the panel
7 was I believe empaneled, the Government received
8 information from a witness that the defense did
9 not receive. So the military judge at that point
10 halted the proceeding and allowed the defense to
11 explore this evidence. And there was actually
12 motions by the defense to suppress the
13 Government's, the evidence that the Government
14 received, basically, almost at midnight the day
15 the trial had started.

16 So I hope that answers your question.

17 MR. SULLIVAN: Hey, this is Dwight
18 Sullivan. If I could just add?

19 So when the rules for courts-martial
20 were changed after the Military Justice Act of
21 2016 was implemented -- so for the most part,
22 these are the rules that apply to cases tried on

1 or after January 1st, 2019 -- a separate rule for
2 court-martial, 404(a), was adopted for initial
3 disclosures, and then, you still have the 701
4 rule being the general discovery rule.

5 So, as a result, under current
6 practice, it is much more the case that there is
7 certain discovery that is viewed as being pre-
8 referral discovery and certain discovery
9 procedures that are in place for post-referral
10 discovery. And that's always been somewhat --
11 you know, it used to be that the 32 was used as
12 the discovery tool. That has largely changed.
13 So now, I would say there is a more formal
14 distinction between initial disclosures and
15 discovery, and certainly a great deal of that
16 discovery practice and almost all of the actual
17 litigation of discovery issues is post-referral.

18 Over.

19 MR. HINES: Ms. Garvin, this is Glen
20 Hines.

21 MS. GARVIN: Yes?

22 MR. HINES: In my time as a military

1 judge, I mean, every single case, when a judge --
2 and this is after the case is referred and given
3 to a military judge -- that judge sets the
4 pretrial scheduling order.

5 MS. GARVIN: Yes.

6 MR. HINES: And that will include a
7 motions deadline, that either side has to file by
8 a certain date. And then, there's a motion
9 litigation date that is actually set. And
10 oftentimes, a motion to compel discovery of
11 certain things is filed. That's a common motion
12 filed by an accused.

13 So hopefully that answers the
14 question, too.

15 MS. GARVIN: Ms. Garvin here again, if
16 I may, Chair?

17 CHAIR BASHFORD: Yes, please.

18 MS. GARVIN: And thank you, all three
19 of you. And, Mr. Sullivan, thank you because I
20 was also referencing or trying to concern my
21 recollections of the most recent changes.

22 And I'm making this notation for all

1 of us because, regardless of how this finding is
2 articulated, post-referral, there is, and always
3 has been, development of evidence, conversation
4 about evidence, and what is or is not admissible
5 at that time. And determinations are often made
6 post-referral, and that is clearer now with the
7 new rule.

8 So my concern about changing this to
9 an "is," and having it be a blanket statement
10 about the moment of referral, is I don't think it
11 necessarily reflects post-referral evidentiary
12 determinations that happen pre-actual-trial. So
13 I'm more inclined to concur with the
14 Subcommittee's idea of "may be" than "is," in
15 light of that.

16 MS. LONG: Jen Long.

17 CHAIR BASHFORD: Go ahead.

18 MS. LONG: So I object to changing the
19 language to "is". I don't think it's
20 inconsistent to have the directive in 6, which I
21 do agree with, about the SJA advising on evidence
22 having to be admissible. But I think it doesn't

1 necessarily follow that finding 24 has to be
2 changed to "is". My primary reason is that I am
3 extremely uncomfortable with making such a
4 definitive finding when we did not view any of
5 the video interviews or anything else that does
6 have an impact on sufficiency. And so for that
7 reason, I vote to keep it "may be".

8 MS. CANNON: Kathleen.

9 CHAIR BASHFORD: Go ahead, please.

10 MS. CANNON: I would agree with the
11 General on his reasoning. I feel like we've done
12 a lot of work and we've done a lot of deep diving
13 in this effort, and I don't think we should hedge
14 it. I think we should state what we found. So I
15 concur with his reasoning.

16 MR. MARKEY: This is Jim Markey.

17 CHAIR BASHFORD: Go ahead, Jim.

18 MR. MARKEY: So misdemeanor
19 compromise, could we say there "appears," based
20 on our observations, to be a systemic problem?
21 Does that kind of smooth in between those two?

22 MS. TOKASH: Meghan Tokash.

1 CHAIR BASHFORD: Go ahead, Meghan.

2 MS. TOKASH: I think the report does
3 a fine job of explaining that this is a
4 subjective analysis. So I don't agree with
5 having to change this to "appears". I also agree
6 with General Schwenk that, because this is a
7 subjective analysis, based on what the members of
8 the Committee reviewed and based on the
9 experience, training, and background of the
10 Subcommittee members in this field regarding the
11 investigation and prosecution and defense of
12 sexual assault, I think we can clearly say that
13 there is a systemic problem anytime a case of
14 penetrative sex offenses are referred when there
15 is not sufficient admissible evidence to obtain
16 and sustain a conviction.

17 I think, like Judge Walton and Judge
18 Grimm also mentioned, we are not only doing a
19 disservice to the accused, but we are potentially
20 harming the victim, even if the harm comes by way
21 of managing their expectations as to the gravity
22 of the moment of a judicial referral.

1 So for those reasons, I believe that
2 the word "is" should remain in the report.

3 CMSAF MCKINLEY: Chief McKinley.

4 CHAIR BASHFORD: Go ahead, Chief.

5 CMSAF MCKINLEY: Yes, I also believe
6 in the change to "is," because it affects the
7 victim and, also, the subject, but it also
8 affects the unit. When you have a case like this
9 that may go on for one to two years, and the
10 accused has lost the security clearance, job,
11 PCS, everything else, it ultimately may affect
12 mission capability of the unit. So taking cases
13 forward without evidence "just because" affects a
14 whole lot more than just the two people.

15 MS. LONG: Jen Long. I have a
16 question.

17 CHAIR BASHFORD: Go ahead.

18 MS. LONG: So I definitely agree with
19 what the Chief just said, and I want to make sure
20 I'm not misunderstanding. The way I read finding
21 24 is that we would be finding that there is a
22 systemic problem in the military with referring

1 cases where there is not sufficient admissible
2 evidence, as in we think they do this. Is that
3 how that finding is supposed to read? Should
4 they there? I mean, I don't agree that they
5 should be referring cases without sufficient
6 admissible evidence. That would certainly be, to
7 me and I think to everyone else, that's not a
8 good thing. But, as I read the finding, what it
9 reads to me is that we're saying we've looked at
10 this and you do this. So can someone just make
11 sure I'm reading it right?

12 CHAIR BASHFORD: May I respond?

13 MS. LONG: Yes. Thank you.

14 CHAIR BASHFORD: Yes. This is Martha
15 Bashford.

16 You're reading it correctly, and as I
17 said before, not just of the referred cases, but
18 if you look at the next slide, also ones that
19 actually were tried and went to verdict, we found
20 that almost a third, 31.1 percent, of those did
21 not have sufficient admissible evidence.

22 MS. LONG: Right.

1 CHAIR BASHFORD: So that's what we
2 based the finding on, that data.

3 MS. LONG: Right. Okay. And, I mean,
4 my concern, it remains the same, that I don't
5 think we've seen enough. We haven't seen enough
6 evidence, and the fact that 50 percent of the
7 cases where we think there was sufficient
8 evidence are also ending up in acquittal, that's
9 why I'm hedging.

10 But thank you for clarification. I
11 mean, I don't think it holds anything up. I have
12 no problem just saying I object and it goes
13 forward without me because it looks like I'm the
14 lone person here.

15 CHAIR BASHFORD: This is Martha
16 Bashford.

17 Does any other Committee member have
18 a comment?

19 HON. WALTON: This is Reggie Walton.
20 Can I ask a question?

21 CHAIR BASHFORD: Of course.

22 HON. WALTON: After a case is

1 referred, is there any further determination made
2 as to whether, not based upon probable cause,
3 whether there is sufficient evidence to justify a
4 conviction beyond a reasonable doubt?

5 And I ask that question because, in
6 the civilian world, there would be an arrest
7 based upon probable cause. And although,
8 theoretically, an indictment can be obtained
9 based upon probable cause, having been a
10 prosecutor for a long time, the reality is that
11 an assessment is made not based upon probable
12 cause when you're going to take a case to trial,
13 but whether there is sufficient evidence to
14 warrant a conviction based upon beyond a
15 reasonable doubt standard.

16 MS. GALLAGHER: Sir --

17 HON. WALTON: And it just seems to me
18 a case should not be preferred for prosecution
19 just based upon probable cause. It should be a
20 belief in the charging authority that there is
21 sufficient evidence to get a conviction based
22 upon the beyond a reasonable doubt standard, and

1 not subject somebody just based upon a probable
2 cause determination to the consequences of a
3 trial.

4 MS. GALLAGHER: Sir, if you turn to
5 slide 13, with a proposed finding 13, it
6 specifically states there is no policy
7 requirement for consideration or factoring in
8 either preferral or referral for sufficiency. So
9 there is no requirement that somebody do that
10 analysis before referring a case.

11 Does that answer your question?

12 HON. WALTON: Yes, it does.

13 MS. GALLAGHER: Yes, no policy or
14 statutory requirement. And there is a
15 distinction being made between preferral and
16 referral with these findings. The focus is on
17 referral. The finding says only with regards to
18 referral.

19 CHAIR BASHFORD: This is Martha
20 Bashford. Are there any other questions or
21 comments from the members?

22 Then I would propose that we vote on

1 General Schwenk's proposed amendment to finding
2 24, that there is a systemic problem.

3 It's so hard without raising hands.
4 But if you're in favor, please state your name.

5 I'm in favor.

6 MS. CANNON: Cannon, in favor.

7 MS. TOKASH: Tokash, in favor.

8 HON. WALTON: Walton, in favor.

9 MR. KRAMER: A.J. Kramer, in favor.

10 CMSAF MCKINLEY: McKinley, in favor.

11 BGEN SCHWENK: Schwenk, in favor.

12 HON. GRIMM: Grimm, in favor.

13 MR. MARKEY: Markey, in favor.

14 CHAIR BASHFORD: Opposed? Who wants
15 to continue the "there may be" language?

16 MS. GARVIN: Garvin.

17 COL WEIR: The transmission was a
18 little bit --

19 CHAIR BASHFORD: I'm sorry, go ahead.

20 COL WEIR: This is Colonel Weir.

21 Judge Grimm, I don't believe we heard
22 how you would like to come down on this issue.

1 HON. GRIMM: Yes, I actually did.
2 This is Paul Grimm. I actually did vote, but I'm
3 in favor of it.

4 May I make a suggestion that, if a
5 discussion on a point where the Committee needs
6 to make a vote has concluded, and it doesn't look
7 as though there are -- can you hear me? I hear
8 someone else talking in the background?

9 CHAIR BASHFORD: I can hear you, sir.

10 COL WEIR: We can hear you.

11 HON. GRIMM: Okay. That if it appears
12 as though the weight of the decisions of the
13 Committee favor passage, and that there were
14 other individuals who properly expressed their
15 disagreement with that, that we start with the
16 number of those who -- we simply say, identify
17 the people who have an objection and say that, if
18 you do not state you have an objection, then the
19 record will reflect that you are in favor of it.
20 And then, if there are not enough objections to
21 show that there was not a quorum of the Committee
22 to vote in favor of it, it would avoid the

1 problems of missing someone who has voted or not
2 understanding what they said when they tried to
3 speak because we have some transmission problems.

4 COL WEIR: Okay, sir. By my count,
5 then, we have a majority of the Committee voted
6 to include "is" in that finding. Is that your
7 understanding, Chair?

8 CHAIR BASHFORD: Yes.

9 And we're also getting a lot of
10 background noise. If you're not speaking, could
11 you mute your phone, please?

12 Terry, do you want to continue?

13 MS. GALLAGHER: Yes, ma'am. All
14 right.

15 So that change will be made in the
16 report to proposed finding 24. There is a
17 systemic problem.

18 If you move to slide 12, we have
19 talked a little bit about proposed finding 11,
20 which is the finding that says 31.1 percent of
21 the cases tried to verdict on a penetrative
22 sexual offense, the review did not contain

1 sufficient admissible evidence to obtain and
2 sustain a conviction. In those cases, the
3 Government only obtained a conviction on the
4 penetrative sexual offense in two of these cases,
5 and in one of those cases the conviction was
6 overturned on appeal. They were not able to
7 sustain the conviction, based on factual
8 insufficiency.

9 Proposed finding 13 is on page 13.
10 And it just reiterates what we've talked about a
11 little bit before, that there is no policy
12 requirement, either before preferral or referral,
13 for the Services to consider whether there is
14 admissible evidence to obtain and sustain a
15 conviction.

16 There is a proposed edit to that
17 finding. General Schwenk -- it's more of a
18 housekeeping finding -- recommended that we drop
19 off those last several words, "of those charges
20 to trial by general court-martial," as being
21 unnecessary.

22 Are there any objections to that

1 really kind of editorial change?

2 I'll take that as a no. So we'll go
3 ahead and make that change to the finding.

4 And when we go to do the final vote,
5 if we have changed something, it is the amended
6 language that will be voted on.

7 So slide 14. That kind of speaks for
8 itself. It is language pulled from the Executive
9 Summary. And really, it is a criticism of the
10 military justice system that they are allowed to
11 refer charges that are not supported by
12 sufficient admissible evidence to obtain and
13 sustain a conviction, and that the convening
14 authorities are doing what the system allows them
15 to do, although they're allowed to consider it,
16 if they want; they're just not required to.

17 Turning to slide 15, this is also
18 language pulled out of the Executive Summary,
19 where we point out some of the issues that you
20 all have voiced, in that referring these cases
21 without sufficient admissible evidence to trial,
22 it amounts to an injustice to the accused and the

1 victim, and it has significant negative
2 implications for the military justice process as
3 a whole.

4 If you go on to slide 16, this is just
5 a reminder that --

6 MS. LONG: This is Jennifer Long.

7 MS. GALLAGHER: Yes, Ms. Long?

8 CHAIR BASHFORD: Go ahead, Jennifer.

9 MS. LONG: On slide 15, and again, I
10 don't know that; it's simply something, it's the
11 same thing about present in the investigative
12 files. I just want to make sure that when we are
13 writing this in a report it is clear that it is
14 not present in the hard document, in the written
15 documents reviewed. It could be present in other
16 parts of that file that were in there, but that
17 we didn't view. I just think it's important to
18 be careful.

19 MS. GALLAGHER: Yes, I believe it is
20 caveated in the report, and we will ensure that
21 it is, that it was the written documentation and
22 we did not factor in the video.

1 MS. LONG: Thank you.

2 BGEN SCHWENK: Jim Schwenk.

3 CHAIR BASHFORD: Go ahead, Jim.

4 BGEN SCHWENK: Yes. Jennifer, I think
5 I read this sentence as being a general statement
6 about the law, and not a statement of what our
7 findings and all that were regarding whether
8 there was sufficient evidence to obtain and
9 sustain a conviction. This is just a general
10 statement that says, if you're going to send a
11 charge to a court-martial and in that case there
12 isn't sufficient evidence to obtain and sustain a
13 conviction, there is an injustice. So it's sort
14 of a summary, to me, it's a summary statement of
15 the Committee's view that we shouldn't be sending
16 cases to trial unless somebody has assessed that
17 there is enough evidence to obtain and sustain a
18 conviction.

19 And it's not directly tied to I think
20 your well-stated concerns that I think Terry has
21 done a good job of explaining in the report
22 itself, that we only reviewed what we reviewed,

1 and we don't know what else is there.

2 Thank you.

3 MS. GALLAGHER: Thank you, sir.

4 MS. GARVIN: Meg Garvin,

5 CHAIR BASHFORD: Go ahead, Ms. Garvin.

6 MS. GARVIN: Yes, I'm not going to
7 object to this. I'm just noting a language
8 moment that raises concerns for me, which is
9 anytime you use broad terms like "injustice," it
10 ignores kind of a subjective reality of what
11 justice is, either for the accused or the victim.
12 The significant negative implications -- I know
13 this is a subjective report; I know we're in the
14 subjective section of it -- but it seems that
15 "significant negative implications" is a more
16 objective assessment of what is happening, rather
17 than the term "injustice," which in victimology
18 and criminology it's been demonstrated to have
19 such vague understandings and definitions for the
20 actual participants, the accused and the victim.

21 I'm not objecting to it. I'm noting
22 that it is a subjective term being used in this

1 sentence right here and my preference would be
2 not to have it, but I'm not objecting.

3 BGEN SCHWENK: This is Jim Schwenk.

4 CHAIR BASHFORD: Go ahead, Jim.

5 BGEN SCHWENK: Yes, you know, Meg,
6 that's a point that we discussed. Because I
7 think, originally, this sentence didn't have
8 "injustice" and we had the conviction has
9 "significant negative implications for the
10 accused, the victim, and the military justice
11 process." And then, we worried about, maybe
12 unnecessarily, but we worried about "significant
13 negative implications for the accused and
14 victim," and maybe we should say "injustice"
15 instead. And so it ended up the way it is.

16 I have no objection from my standpoint
17 if we want to get rid of "injustice" because I'm
18 not an expert like you are, but I am aware that
19 it is pretty vague and subject to a lot of
20 misunderstanding or disagreement in what that
21 word exactly means. So I'm not against just
22 taking it out and going back to what I think we

1 sort of had originally. And I can't recall why
2 we made the change. Maybe somebody else can and
3 they can let us know.

4 So I'm suggesting that it read, "In
5 the Committee's view, the decision to refer
6 charges to trial by general court-martial, in the
7 absence of sufficient admissible evidence to
8 obtain and sustain a conviction, has significant
9 negative implications for the accused, the
10 victim, and the military justice process."

11 Thank you.

12 CHAIR BASHFORD: This is Martha
13 Bashford. I'm going to adopt Judge Grimm's
14 suggestion. Is anybody opposed to General
15 Schwenk's amendment of this?

16 Hearing no opposition, we'll amend it
17 as General Schwenk suggested.

18 BGEN SCHWENK: Thank you, Meg.

19 MS. GALLAGHER: All right. All right.
20 Moving on to slide 16, slide 16 is just a
21 reminder that, in reviewing the cases and
22 assessing the materials for sufficient admissible

1 evidence to obtain and sustain a conviction, the
2 reviewers did not determine whether or not the
3 evidence was likely to result in a conviction.
4 What they did is looked to say, is there
5 sufficient admissible evidence that, if
6 everything went the way the Government hoped that
7 it would, that there should be a conviction? And
8 so, throughout, everyone wanted to make sure that
9 they weren't looking to prohibit the hard cases
10 from going forward, just the ones that are
11 unsupported by sufficient admissible evidence in
12 the first place.

13 So slide 17, proposed finding 14.

14 What that does is point out that the review
15 showed Article 32 and Article 34 as they
16 currently exist do not prevent the referral and
17 trial of charges that lack sufficient admissible
18 evidence to obtain and sustain a conviction, and
19 that this is harmful. That is, there's a great
20 detriment of the accused, the victim, and the
21 military justice system.

22 Turning to slide 18, proposed finding

1 18, the decision to refer to trial by general
2 court-martial charges lacking in sufficient
3 admissible evidence does contribute directly to
4 the 61.3 percent acquittal rate for these
5 offenses and that 61.3 percent of cases tried to
6 verdict.

7 Slide 19, proposed finding 15.

8 MS. GARVIN: Ms. Gallagher?

9 MS. GALLAGHER: Yes, ma'am.

10 MS. GARVIN: My apologies. Back on
11 slide 18 and the proposed finding -- and I
12 apologize for not being able to ask this question
13 in the preparatory session because it's a process
14 question for the Subcommittee and for the staff
15 -- I'm curious about the term "directly
16 contribute" and how that assesses that it
17 directly contributes. Was that simply a
18 subjective assessment that, based on your review
19 of the record, that it, of course, must have
20 directly contributed, or was there something in
21 addition that led to the inclusion of the word
22 "directly"?

1 BGEN SCHWENK: This is Jim Schwenk.

2 CHAIR BASHFORD: Go ahead.

3 BGEN SCHWENK: Yes, I think "directly"
4 was connected to the acquittal rate, in that if
5 you decide to take a case that doesn't have
6 sufficient evidence to obtain and sustain a
7 conviction, that directly contributes to the
8 acquittals because the likelihood of getting a
9 conviction in those cases, as demonstrated by our
10 knowledge, by our numbers -- I think there were
11 73 cases, and there were two convictions, and one
12 of those got overturned on appeal for
13 insufficient evidence. So that brings you up
14 with 72 acquittals out of 73 tries. That's the
15 "directly". The "directly" doesn't go back
16 towards our review of the evidence or anything.
17 The "directly" is supposed to point to the
18 acquittal rate.

19 Thank you.

20 MS. GALLAGHER: Does that answer your
21 question, Ms. Garvin?

22 MS. GARVIN: It does. Thank you.

1 MS. GALLAGHER: All right. Turning
2 now to slide 19, proposed finding 15, the data
3 clearly indicates that no penetrative sexual
4 offense charge should be referred to trial by
5 general court-martial without sufficient
6 admissible evidence to obtain and sustain a
7 conviction on the charged offense. And Article
8 34, the Uniform Code of Military Justice, should
9 incorporate this requirement.

10 Turning to page 20, the proposed
11 directive 6, General Schwenk referred to before
12 the actual proposed directive goes to the Policy
13 Subcommittee, so that they are to develop
14 proposals to require the Staff Judge Advocate to
15 advise the convening authority in writing before
16 the convening authority may refer a charge and
17 specification to trial by general court-martial.

18 Now the question in contemplating
19 proposed directive 6 is, in light of the change
20 to the words, that there is a systemic problem
21 and acknowledgment of the harm, the negative
22 implications caused by that problem, should there

1 be some kind of a temporal segment or component
2 to this directive to kind of make a priority for
3 this proposal to come forth, or is it fine as it
4 is? Is there any discussion on proposed
5 directive 6?

6 MS. LONG: Long.

7 CHAIR BASHFORD: Go ahead.

8 MS. LONG: This may also be a process
9 question. But if you change that, if we have to
10 change our recommended change to Article 34, is
11 there any other procedural change that has to
12 occur, so that both the defense and the
13 prosecutors are working through pretrial motions
14 that might answer some of the admissibility
15 questions? Is there any other consequence to
16 this? Because, if so, I would just ask that we
17 include it in the directive or finding.

18 BGEN SCHWENK: Jim Schwenk.

19 CHAIR BASHFORD: Go ahead.

20 BGEN SCHWENK: I think that the idea
21 here is not to hamstring the Policy Subcommittee
22 from exercising its discretion any more than we

1 have to. And the "have to" is the narrowly-
2 focused you can't refer a case unless the SJA
3 advises there's sufficient evidence to obtain and
4 sustain a conviction, sort of like the federal
5 system and many state systems, and not beyond
6 that.

7 And that way, the Policy Subcommittee
8 can decide how to amend Article 34 to do that,
9 whether they should also amend Article 32 since
10 the SJA is going to advise, under our proposal,
11 is going to advise on whether there's sufficient
12 evidence to obtain and sustain a conviction.
13 Maybe the Policy Subcommittee will decide,
14 Article 32, the preliminary hearing officer
15 should be tasked with assessing whether there is
16 sufficient evidence to obtain and sustain a
17 conviction, and so advising the convening
18 authority and the SJA. And maybe, since nobody
19 is doing probable cause under that system, maybe
20 the Article 32 preliminary hearing officer ought
21 to continue to be tasked with making a probable
22 cause determination, that now that probable cause

1 determination becomes binding.

2 So if the Government shows up with a
3 case that's so weak at an Article 32 they can't
4 even get to probable cause, the Article 32
5 preliminary hearing officer can shut them down,
6 and that's it; it's over. Case done, unless you
7 come back with better evidence.

8 So I think there are fallouts going
9 backwards in the process, but not necessarily
10 forward, that the Policy Subcommittee might want
11 to consider. And so I sort of like the way this
12 is written because it narrowly circumscribes
13 their discretion and allows the Policy
14 Subcommittee to, then, exercise their discretion.
15 And then, we, as the big Committee, can sit back
16 and see what they come up with and have a
17 discussion about it at that time.

18 Thank you.

19 MS. TOKASH: Meghan Tokash.

20 CHAIR BASHFORD: Go ahead, Meghan.

21 MS. TOKASH: I'd like to recommend
22 that the change to Article 34 actually happen,

1 not punt it to the Policy Subcommittee, or that
2 we change the rule for court-martial to require
3 it. I think we have enough data, and we've had
4 enough analysis at this point, that I think we
5 are in a place to be able to make the
6 recommendation that the change to Article 34
7 should happen.

8 Thank you.

9 MS. CANNON: Kathleen Cannon.

10 CHAIR BASHFORD: Go ahead, Kathleen.

11 MS. CANNON: I agree with Meghan in
12 terms of we should go ahead and say what she just
13 said, impose that, and then, direct the Policy
14 Subcommittee to come up with suggestions or
15 directives as to how to go about implementing it
16 and where it needs to be changed within 32, 34,
17 33, wherever. But I agree that we should say it
18 should happen.

19 BGEN SCHWENK: Jim Schwenk.

20 CHAIR BASHFORD: Go ahead, Jim.

21 BGEN SCHWENK: I don't disagree with
22 that. That would just be adding a recommendation

1 to this report that said, you know -- it would be
2 the only recommendation, recommendation 1, or
3 whatever, or I don't know how we number them, but
4 recommendation. And it would be that Congress
5 amend Article 34, and then, all the language at
6 the end that we have after Article 34 in this
7 proposed directive. So we would just say that
8 Congress amend Article 34 to require the Staff
9 Judge Advocate to advise the convening authority,
10 and et cetera, to the end.

11 And then, we keep this policy
12 directive as it is to the Policy Subcommittee, so
13 they can do what I said earlier, look backwards
14 at Article 32, and what have you. But I don't
15 oppose us discussing a formal recommendation of
16 change Article 34.

17 CHAIR BASHFORD: This is Martha
18 Bashford. Are there any other comments for
19 anybody?

20 I agree with Ms. Tokash and General
21 Schwenk, actually.

22 BGEN SCHWENK: Jim Schwenk.

1 CHAIR BASHFORD: Go ahead.

2 BGEN SCHWENK: On the other hand, I
3 mean, remember that we came out of this from the
4 pandemic-sequestered Case Review Subcommittee,
5 and we have not had an opportunity, I don't
6 believe, to actually trot this out for comment to
7 the Services, or what have you, to see if there
8 is a downside we didn't think of. So, although,
9 personally, I'm with Kathleen Cannon and Meghan
10 Tokash and the Chair, I do want to make sure
11 everybody understands we have not had a chance, I
12 don't believe, to get direct comments on that
13 specific change to Article 34.

14 Thank you.

15 CHAIR BASHFORD: Any further comments
16 by anyone?

17 MS. TOKASH: This is Meghan Tokash.

18 CHAIR BASHFORD: Go ahead.

19 MS. TOKASH: I know that we haven't
20 officially trotted it out to the Service reps,
21 but I think we know, by preview of the evidence
22 that came in from the Chiefs of Justice and the

1 senior defense counsel, what their positions are
2 going to be. It's probably going to be something
3 to the tune of that the defense bar would
4 probably find this helpful. And if the
5 prosecutors are being smart, they would find this
6 helpful as well.

7 And again, it goes back to the slide
8 that we were talking about that used the word
9 "injustice". You know, I think that we have to
10 keep our eye on the ball here to say that we have
11 to do what's best for the accused, the victim,
12 the military justice system, and, also, the
13 military itself and the units in the military.

14 So I'm not sure what value-added there
15 is going to be to the Services, you know, letting
16 us know how they weigh-in. I, for one, feel like
17 we have plenty of information from the Services
18 as to how they would weigh-in on this. But
19 that's just my two cents.

20 I think we are ready to make a
21 recommendation that Article 34 be changed; that
22 the Policy Subcommittee doesn't need to make that

1 determination, or that we change the RCM to
2 require it.

3 Thank you.

4 CHAIR BASHFORD: Any further comments?

5 Okay. So there is a proposal to add
6 a recommendation to this report that Congress
7 amend Article 34 that the SJA advise the
8 convening authority about the sufficiency of the
9 evidence.

10 Is anyone opposed to that as a
11 recommendation?

12 Hearing nobody in opposition, then
13 -- I'm sorry, go ahead.

14 Was somebody speaking?

15 Well, hearing no opposition, then
16 we're going to ask the staff to add that as a
17 recommendation,

18 BGEN SCHWENK: Jim Schwenk.

19 CHAIR BASHFORD: Go ahead, Jim.

20 BGEN SCHWENK: Okay. Meghan made me
21 actually read proposed directive 6. And I now
22 think that we don't need it. So I'm now

1 recommending that we get rid of it. It's
2 overcome by the recommendation.

3 CHAIR BASHFORD: Yes, I agree.

4 Anybody opposed?

5 So this would simply be, in light of
6 our recommendation, that we no longer need
7 proposed directive 6 to the Policy Subcommittee.

8 Hearing nobody opposed, we'll get rid
9 of that. And, of course, the staff will then
10 have to reflect that in the report.

11 MS. GALLAGHER: Yes, ma'am.

12 CHAIR BASHFORD: Terry, do you want to
13 continue?

14 MS. GALLAGHER: I do.

15 All right. We'll turn now --

16 CHAIR BASHFORD: Okay. We're actually
17 up at our lunch break. So how much longer do you
18 have?

19 MS. GALLAGHER: We do have a couple of
20 alternates to proposed directive 4 and proposed
21 directive 3, as well as a little bit of
22 discussion on another issue. But, other than

1 that, it's pretty straightforward. So there's
2 about three discussion topics just on the slide
3 deck. I don't know if you want to drive through
4 with the slide deck or just break, so that
5 everybody comes back fresh.

6 CHAIR BASHFORD: Let's break and
7 reconvene at one o'clock sharp.

8 COL WEIR: Okay. This is Colonel
9 Weir.

10 If you could all use this call-in
11 number when you reconvene. And I would request
12 that you try to do this at like five to 1:00. So
13 if we have any problems, we can iron those out.

14 But thank you very much, and we'll see
15 you at five to 1:00 back on the line.

16 (Whereupon, the above-entitled matter
17 went off the record at 12:32 p.m. and resumed at
18 1:01 p.m.)

19 CHAIR BASHFORD: So, Terry, I think we
20 were at slide 21.

21 MS. GALLAGHER: Yes, ma'am. Let me --
22 the staff had one follow-up recommendation to the

1 recommendation that Congress amend Article 34
2 (telephonic interference) then we'll pull that
3 language from proposed Directive 6 to require the
4 Staff Judge Advocate to advise the convening
5 authority, in writing, which is sufficient
6 admissible evidence to obtain and sustain a
7 conviction on the charge defenses.

8 Before a convening authority may refer
9 charge and specification to trial by general
10 court-martial. And then the question is, as
11 suggested, that we draft amendment language and
12 make it an appendix to the report, as well as the
13 proposed amendment to the corresponding RCM.

14 CHAIR BASHFORD: Okay.

15 MS. GALLAGHER: Is there any -- so we
16 will do that as an appendix.

17 Now, moving along to Directive 4 on
18 page 21 we have -- well, it's actually page 21,
19 or slide 21 and 22. We have the proposed
20 directive with the original. And it was flagged
21 for discussion.

22 And Ms. Bashford has come in with a

1 proposed alternate directive (telephonic
2 interference) in trying to alleviate some
3 concerns about possible misinterpretation of
4 Directive 4.

5 Does anybody have any discussion or
6 preference with regards to the original language
7 that some thought was confusing, or the
8 alternate?

9 CHAIR BASHFORD: This is Martha
10 Bashford. I think the original language left the
11 impression that we were saying to find any case
12 there's sufficient admissible evidence to sustain
13 a conviction should have been a conviction. And
14 that is, that is too strong.

15 We don't think that every case that we
16 thought had sufficient admissible evidence would
17 necessarily bring a verdict of guilty. And we
18 weren't privy to anything that the defense might
19 come up. It still warrants, I think a close look
20 at what is going on.

21 But I felt it seemed as though we
22 thought somehow there was a complete here in all

1 of these cases.

2 MS. GALLAGHER: If you look at the
3 proposed directive, it is much clearer as to what
4 the proposal is. The staff added a sentence for
5 consideration to the language drafted by Ms.
6 Bashford.

7 And that would be at the last
8 sentence, reads, part of the CRSC's assessment
9 and consideration of these matters should involve
10 observation of courts-martial to reflect that
11 it's not going to be just a -- that it shouldn't
12 be just a paper review, that we should get at
13 more of the things that Ms. Long talked about,
14 which would be the actual viewing of the
15 statement and the credibility issues.

16 CHAIR BASHFORD: Any comments by
17 committee members?

18 MS. GALLAGHER: And, ma'am, if I may,
19 the very last point on the alternative proposed
20 directive, the last three lines, the question is
21 whether you want that to be part of the
22 directive, part of the EXSUM, or whether it

1 should be removed altogether.

2 Those kind of explanatory comments in
3 the EXSUM -- this one is not -- but we have a
4 series of them in the Executive Summary, but it
5 is not part of the directive or the findings. So
6 the question is whether you would want that last
7 sentence to be part of the directive in your
8 proposal.

9 CHAIR BASHFORD: I don't have an
10 opinion one way or the other on that.

11 Any comments from the committee?

12 MS. GALLAGHER: Do we want to start
13 with a vote on the alternative proposed
14 directive, including all of the language on the
15 slide?

16 CHAIR BASHFORD: The proposed language
17 on slide 22.

18 (Telephone interference.)

19 CHAIR BASHFORD: I don't know what to
20 do about that.

21 MS. CANNON: Kathleen Cannon.

22 (Telephonic interference.)

1 PARTICIPANT: I'm having trouble
2 hearing. I just heard you, Kathleen.

3 BGEN SCHWENK: Jim Schwenk. I heard
4 Kathleen, but I am not hearing the Chair at all.

5 CHAIR BASHFORD: Can you hear me, Jim?

6 BGEN SCHWENK: Barely. It's garbled.
7 Is it garbled to you?

8 CHAIR BASHFORD: You're coming across
9 clear. Everybody else I can hear.

10 BGEN SCHWENK: You're clear now,
11 Martha.

12 CHAIR BASHFORD: Okay. Because of all
13 the garbling, I wasn't sure if anybody was
14 opposed to the language in slide 22. Is there
15 any opposition? Okay, hearing none, then
16 (telephonic interference).

17 Terry?

18 MS. GALLAGHER: My mute is now off.
19 We'll go forward then with alternative proposed
20 Directive 4. And turn now to slide 23.

21 The slide 23 illustrates an issue that
22 in the Executive Summary we reference a total

1 number of victim statements establishing probable
2 cause. Whereas, in the report we have breakdown
3 charge for the victim statements and their
4 probable cause determinations for no action
5 cases, and we have it broken down for preferred
6 cases.

7 We do not have any kind of slide or
8 data currently in the report that does the total.
9 And it's in the Executive Summary as this total
10 that you see here on slide 23.

11 And the question really for you all is
12 whether you want to leave it as a total or
13 whether you just want us to stick with the
14 breakdown of the victim statements establishing
15 probable cause of percentages for no action, and
16 for preferred cases.

17 CHAIR BASHFORD: Anyone have an
18 opinion? Jim, I think you were the one who
19 raised.

20 BGEN SCHWENK: Jim Schwenk.

21 CHAIR BASHFORD: Go ahead.

22 BGEN SCHWENK: I think it's fine as it

1 is.

2 MS. GALLAGHER: Okay. So we'll go
3 ahead and leave the language in the Executive
4 Summary.

5 And there is a sentence then that we
6 can -- we can, if you want, take that total and
7 also insert it appropriately into the report.

8 CHAIR BASHFORD: Okay.

9 MS. GALLAGHER: All right. We'll do
10 that then.

11 On page 20 -- or slide 24, we again
12 have two Directive 3's for you, but now they have
13 expanded to four different possible Directive
14 3's. And let me walk you through the two that
15 aren't on there.

16 And all of the proposals come from --
17 two of the proposals, one comes from Ms.
18 Bashford, one comes from Mr. Kramer. And one was
19 drafted by the staff as a means to clarify the
20 Directive in response to the points marked for
21 deliberation.

22 So proposed Directive 3, the original

1 one, there were some concerns over what exactly
2 it means and the ramifications of putting
3 something in about to determine how to improve
4 the efficacy of such statements.

5 Ms. Bashford recommended changing that
6 proposed directive to read exactly the same,
7 except it would say, and to determine how to
8 enhance the quality of such statements.

9 Mr. Kramer has recommended a similar
10 amendment, and that would read, and to determine
11 how to ensure that such statements are as
12 complete as possible.

13 Now, the proposed, the alternate
14 proposed directive prepared by the staff takes a
15 little different tack than the proposed Directive
16 3 did. And I'll ask that you read that language.

17 So really it's a little more focused
18 in that you're saying the victim statements, in
19 light of the determination that 41.3 percent of
20 victim statements to law enforcement do not
21 establish probable cause that the subject
22 committed the alleged penetrative sexual offense,

1 the Case Review Subcommittee continued to review
2 and assess such statements in order to examine
3 the factors that may contribute to this result
4 and make appropriate findings and
5 recommendations.

6 The intent of that is to make it broad
7 enough to examine training on sexual assault that
8 leads to the allegation, the investigation
9 threshold, the methods of investigation. It ties
10 in perhaps some earlier recommendation about when
11 cases should be closed or -- and who would review
12 them. As well as the proposals already out there
13 concerning victims' statements and being able to
14 ask follow-up questions of the investigators and
15 such.

16 Is there any discussion on proposed
17 Directive 3 or any of the alternatives?

18 MR. KRAMER: This is A.J. Kramer.

19 CHAIR BASHFORD: Go ahead.

20 MR. KRAMER: I'd leave it up to the
21 committee (telephonic interference) study is
22 warranted. And if that's the case, then

1 obviously the last clause about to determine how
2 to improve the efficacy, the discussion isn't
3 necessary.

4 So I'm fine with that if the committee
5 thinks that's what should be done.

6 Otherwise, I think I'm not sure, Ms.
7 Bashford, we exchanged some emails about -- and I
8 thought it should be how to, that they should be
9 a complete as possible. In other words,
10 subjectively or pejoratively indicating one way
11 or the other about efficacy, but just that they
12 should be complete as possible. I thought that
13 was the best language.

14 So I'm fine if the committee wants to
15 adopt the staff's recommendation, otherwise --

16 CHAIR BASHFORD: This is Martha.

17 I like the staff's recommendation.
18 And very much appreciate Mr. Kramer raising to
19 our attention that improving the efficacy almost
20 makes it as though we have an end goal, which we
21 do not. So I like the staff's recommendation
22 which is very open-ended.

1 Comments from anybody?

2 As there are no comments or further
3 discussion, then I would propose that we adopt
4 the alternate proposed Directive No. 3, which is
5 the bottom of slide 24.

6 Is there anyone opposed to that?

7 Hearing no opposition, we will adopt
8 the one submitted by the staff.

9 Terry, want to continue?

10 MS. GALLAGHER: Yes, ma'am.

11 So now if we turn to page 20 -- or
12 slide 25, it just addresses the Judge Advocate's
13 probable cause opinion that is found in some of
14 the cases. And that in 54.6 of the cases in
15 which there was a Judge Advocate opinion there
16 they did opine that there was probably cause, and
17 in the remaining they opined there was no
18 probable cause.

19 Turning to slide 26. This gets more
20 into the probable cause data as opposed to the
21 sufficiency of the evidence data. And just
22 states that of these 517 preferred penetrative

1 sexual offense charges, 13.2 of the cases did not
2 establish probable cause.

3 Slide 27, proposed finding 10, of the
4 235 cases tried to verdict, in 10.6 percent of
5 the cases the evidence in the material reviewed
6 was not sufficient to establish probable cause.
7 And the government obtained a conviction on the
8 penetrative sexual offense in one of those cases,
9 and that's the case that was overturned on appeal
10 because of factual insufficiencies.

11 Turning to slide 28, proposed finding
12 19, of the 282 cases with a preferred adult
13 penetrative sexual offense charge resulting in no
14 verdict -- so those are the cases in which we had
15 a charge preferred but it did not go to trial, so
16 there was no conviction or acquittal -- those
17 charges ended up being dismissed, either before
18 referral or after referral.

19 In 83.7 percent of those cases the
20 material reviewed was sufficient to establish
21 probable cause. And in 15.2 percent of those
22 cases the evidence was not sufficient to

1 establish probable cause.

2 With regards to the sufficiency, in
3 48.9 percent of the cases that were dismissed
4 after preferral, the material reviewed contained
5 sufficient admissible evidence to obtain or
6 sustain a conviction. And in 49.6 percent, the
7 materials did not contain sufficient admissible
8 evidence.

9 Turning to slide 25, proposed finding
10 22. Of the cases resulting in a preferral of
11 charges for a penetrative sexual offense, 18.2
12 percent of the cases the charge was not referred
13 after preferral. But in 81.8 percent of the
14 cases, every charge that was preferred was
15 referred to trial.

16 Of the charges that were referred to
17 trial, 55.6 went to trial, to verdict, and 188,
18 which is 44.4 percent, were dismissed after
19 referral.

20 So it just iterates that most of these
21 cases, really the large majority of the cases are
22 going ahead to referral to the court-martial.

1 If you'd turn to slide 30, proposed
2 Directive 5. The cases review subcommittee
3 should review and assess the reasons for these
4 post-referral dismissals of the penetrative
5 sexual offenses in light of the significant
6 impacts that have already occurred to the
7 accused, victim, and command by this point in the
8 military justice process, and make appropriate
9 findings and recommendations.

10 Really, there is a concern as to
11 things getting as far along in the system as they
12 are, and whether or not there is appropriate
13 action at that point.

14 And if you look at slide 31, this also
15 is a very important assessment. It's a proposed
16 directive to the Policy Subcommittee that they
17 take -- that they review and assess how the
18 Services are implementing Article 33.

19 And, you know, they are to look at the
20 uniformity of training, the content and quality
21 of Judge Advocates' advice to commanders
22 regarding the sufficiency of admissible evidence,

1 and the documentation of the disposition
2 decision. And that they should consider policy
3 changes to require mandatory consideration of
4 sufficiency of the admissible evidence as part of
5 the initial disposition decision.

6 And the final directive I'm going to
7 consider or brief is slide 32, proposed Directive
8 2. And the intent of proposed Directive 2 was a
9 feeling amongst the Case Review Subcommittee that
10 there should be some other -- that this should
11 not just end any review of investigations, that
12 there should be perhaps one more, at least one
13 more sometime within the next perhaps five years.

14 The original directive did not have a
15 time frame in it. General Schwenk submitted some
16 comments that perhaps, standing alone, the
17 Directive needed a little more specificity. So
18 the highlighted-in-red language was added to the
19 original Directive to try and make it more of a
20 stand-alone directive.

21 But it's really to just see where the
22 investigations lie, whether they are implementing

1 and reflect implementation of all the statutory
2 and regulatory modifications, and that the
3 investigations be examined again, to examine
4 perhaps the different statements.

5 They wanted to leave it open enough to
6 be able to further refine what they wanted to
7 look at at the time of the review.

8 Are there any comments on proposed
9 Directive 2, any suggestions?

10 Does that address your concerns,
11 General Schwenk?

12 BGEN SCHWENK: Yeah, that's fine with
13 me. I like the change of where you added the
14 quality of investigations instead of the language
15 that was there before.

16 Thank you.

17 MS. GALLAGHER: All right. If there's
18 nothing else, we'll now turn to the Executive
19 Summary. There's only a couple of things we need
20 to address in there because many of the issues
21 have been taken care of.

22 If you look on page 2, there is a

1 proposed recommendation. General Schwenk
2 proposed to add in the second full paragraph at
3 the end a phrase of in conjunction with advice
4 from Judge Advocates, so that the commanders are
5 tasked with the responsibility to make these
6 decisions in conjunction with advice from Judge
7 Advocates on their initial disposition authority.

8 And he thought that the in conjunction
9 with advice from Judge Advocates should be
10 deleted, that it unnecessarily detracts from the
11 main thought. And the staff response was it was
12 inserted to try and acknowledge that, in
13 practice, commanders are at least consulting with
14 their Judge Advocates, if not making the
15 determination in conjunction with Judge
16 Advocates.

17 So there's no requirement that that
18 happen. However, other than Article 34, of
19 course, that the initial disposition authority is
20 at a prior point and there is no mandated legal
21 advice or guidance.

22 So the question is whether you want to

1 leave in the in conjunction with advice from
2 Judge Advocates, change it to consultation, in
3 consultation with Judge Advocates, or whether you
4 just want to delete the language altogether?

5 BGEN SCHWENK: Jim Schwenk.

6 MS. GALLAGHER: Yes, sir, did you have
7 a comment?

8 BGEN SCHWENK: Oh, yes. Okay, I don't
9 think it doesn't belong where it is. I do take
10 the staff's point that it's a point worth making.

11 So here's what I think we ought to do.
12 Keep the sentence that's there now simple. Get
13 rid of the stuff about advice from Judge
14 Advocates and say, commanders tasked with the
15 responsibility to make these decisions are known
16 as initial disposition authorities.

17 Then have another sentence that says
18 commanders make initial disposition decisions
19 after receiving advice from Judge Advocates, or
20 in practice commanders receive -- make initial
21 disposition decisions after receiving advice from
22 Judge Advocates.

1 So two sentences, two thoughts, both
2 simple, we don't meld them together. So that's
3 my thought.

4 Thank you.

5 CHAIR BASHFORD: This is Martha. That
6 works for me.

7 All right. Let's go ahead and
8 separate that into two sentences, if there is no
9 objection.

10 MS. GALLAGHER: Next, there was
11 changed language on page 3. But I believe that
12 that's all be discussed through the slides.

13 So we're going to move on.

14 And we've already addressed that one.

15 So one of the comments that was made
16 on page 9 of the Executive Summary is that all
17 directives are not necessarily in the Executive
18 Summary. I think they are in some, to some
19 extent. Certainly all findings are not in the
20 Executive Summary.

21 Does anyone have any desire to include
22 anything in the Executive Summary that is not

1 currently in the Executive Summary?

2 And we'll conform the language to the
3 amended language that has been reviewed already.

4 So it doesn't sound like there's any
5 changes anyone would necessarily like to make to
6 the Executive Summary. So we'll move along to
7 the report. And there's only a few points that
8 we haven't discussed.

9 BGEN SCHWENK: Jim Schwenk.

10 MS. GALLAGHER: Yes?

11 BGEN SCHWENK: While we're there at
12 the Executive Summary, before we leave it, for
13 the record I would like to read the last two
14 paragraphs titled Recognition of Committee Staff
15 and Military Services.

16 Finally, the truly exceptional work of
17 the committee staff and the sterling support
18 provided by the military services need to be
19 recognized. This report would not have been
20 possible without the extraordinary efforts of the
21 committee staff during the past three years.

22 Staff Director Colonel Stephen Weir

1 and the Deputy Director Julie Carson superbly led
2 the entire staff on this unprecedented journey.
3 The services expeditiously provided the committee
4 with the full investigative files for all adult
5 penetrative sexual offenses closed in Fiscal Year
6 2017, which was a massive undertaking. Each
7 member of the staff participated in the detailed
8 review of these almost 2,000 investigative files,
9 and also significantly contributed to the
10 analysis, writing, and editing of the report.

11 But the key to this sustained effort
12 and final work produce were the three -- were the
13 four staff assigned to the Case Review
14 Subcommittee: Theresa Gallagher, Stacy Powell,
15 Kate Tagert, and Glen Hines. Their many, many
16 hours of toil and, at times, struggle developing
17 our case review checklist, obtaining and
18 preparing the investigative files for review,
19 compiling the results of the reviews, and
20 drafting this report epitomize all of the very
21 best qualities of a truly exceptional civil
22 servant. To them and to all the other members of

1 the committee and staff, and to the military
2 services, the members extend our deepest and
3 sincerest thanks.

4 I just wanted to call that out to
5 everybody to make sure you read it and you don't
6 have a problem it. I personally believe in it a
7 hundred million percent. That's more than 100
8 percent, I guess. But anyway, and I just wanted
9 to thank them and get it on the record at the
10 hearing.

11 Thank you.

12 MS. GALLAGHER: Thank you, General
13 Schwenk. It's much appreciated by the staff.

14 And in light of that, I'm going to
15 tell you that I only have one point to take you
16 to in the draft report. We have sufficiently
17 covered everything else.

18 If you turn to page 59 of the draft
19 report, and the only --

20 CHAIR BASHFORD: Did you say 59 or 69?

21 MS. GALLAGHER: Fifty-nine, five nine.

22 And it just pertains to the word

1 significant, and General Schwenk's concern as to
2 whether or not it does amount to a significant
3 factor.

4 Did you you want to discuss that,
5 General Schwenk?

6 BGEN SCHWENK: Sure, if I can
7 remember. Isn't this the one, the 55 percent?

8 MS. GALLAGHER: Yes, sir.

9 BGEN SCHWENK: Yeah. So I have no
10 problem with us saying it's a factor in
11 conviction, but when it's 55 percent I don't know
12 how significant I think that is as a factor. So
13 I didn't bring it up. If it were me, I'd just
14 take significant out and leave it as it's a
15 factor.

16 But if somebody thinks that it is
17 significant even though it's only 55 percent,
18 then I'm happy to listen.

19 That's my thought. Thank you.

20 CHAIR BASHFORD: This is Martha. I'm
21 not sure where you're getting the 55 percent. It
22 says in 97.8 percent of cases resulting in

1 convictions, materials contain sufficient
2 admissible evidence. But where's the 55 percent
3 coming from?

4 BGEN SCHWENK: Good question. I don't
5 remember. But I know that I wrote it down, so I
6 must have figured it out somehow.

7 Conviction rate of 55 -- let's see, 73
8 plus 89. So where's 73 plus 89? So in Table 3
9 on the right-hand side it says, were there
10 sufficient to obtain and sustain a conviction?
11 And the answer yes in 73 cases, and no in 71.

12 And then on Table 4, same columns, the
13 89 to 2. So I added the 89 and the 73 and I got
14 162 cases. And that was out of a total of 235
15 cases. And so and that's how I got 55 percent.

16 So the question then is if the
17 sentence says the data in those two tables
18 indicate that a prosecutorial assessment that
19 there is sufficient admissible evidence to obtain
20 convictions is a significant factor in predicting
21 convictions.

22 And it looked to me like it's a factor

1 in 55, you know, 55 percent; 162 out of 235.

2 CHAIR BASHFORD: Table 3 was
3 acquittals. Table 4 is convictions.

4 BGEN SCHWENK: Ah, okay.

5 CHAIR BASHFORD: That's where that's
6 coming from.

7 BGEN SCHWENK: Ah, okay. So then 89.

8 Never mind, I withdraw my, my comment.

9 MS. GALLAGHER: All right. With that
10 being said, we are done with my portion of the
11 presentation. And I will happily turn it over to
12 Ms. Kate Tagert to discuss the data.

13 MS. TAGERT: Thank you, Terry.

14 Good morning, or good afternoon at
15 this point. This is Kate Tagert. And I, along
16 with Dr. William Wells, will be walking you
17 through the data portion of the report this
18 afternoon.

19 And the intent of the presentation is
20 to give you a bird's eye view of the types of
21 facts and factors that were associated with the
22 investigations that were reviewed in the

1 military, for those of you that could not review
2 the actual files themselves.

3 Your colleagues on the subcommittee,
4 pre-COVID of course, traveled to our offices
5 quite regularly to review these files and give us
6 their perspective. And we are grateful for their
7 time and dedication.

8 So if we look on slide 33, there are
9 various reports that you were provided over the
10 last couple of weeks. And they contain the same
11 data, but they differ in a couple of ways.

12 The first is that the DAC-IPAD report
13 that we looked at this morning described all the
14 descriptive data that reviewers were able to
15 extract from the investigative case files. But,
16 in addition, it also described how reviewers
17 recorded particular data and provides a little
18 background of what the data actually is.

19 So almost like a mini methodology for
20 each question that was answered if, indeed, that
21 was relevant and necessary.

22 And, additionally, the DAC-IPAD report

1 synthesizes the information from Dr. Wells'
2 report so that only the bivariate and
3 multivariate data that was statistically
4 significant is highlighted.

5 So those are the major departures that
6 are different, as well as the fact that Dr.
7 Wells' report, other than the Coast Guard, does a
8 service-specific bivariate and multivariate
9 analysis, while the DAC-IPAD report concentrates
10 on the DoD-wide analysis.

11 So those are the main differences just
12 in case you're confused as to why there are two
13 different data reports, as well as Dr. Wells'
14 report being a lot more technical than ours is
15 currently drafted.

16 So moving on to slide 34, the data is
17 really focused on three types of information and
18 serves as the descriptive data, which can be
19 referred to as univariate data because it only
20 describes one variable at a time.

21 The second type of information
22 presented is the bivariate. And the bivariate

1 data looks at the relationship between
2 independent variables and three dependent
3 variables to see what factors are predictive of
4 these three outcomes. And the independent
5 variables that we studied, based on the
6 committee's guidance was:

7 One, the decision to prefer or take no
8 action; the result of the trial; and a victim's
9 decision to choose to participate or not in the
10 criminal justice system.

11 I'm going to pass the baton to Dr.
12 Wells to go over how the multivariate model is
13 analyzed as well.

14 So, Bill.

15 DR. WELLS: Sure. Yeah, okay.

16 So the multivariate model's built on
17 what we learn when we examine bivariate
18 relationships between independent variables and
19 those three dependent variables that Kate talked
20 about: the preferral decision; acquittal versus
21 conviction; and then the different decision to
22 participate.

1 So when we build multivariate models
2 we examine those bivariate relationships and
3 identify those bivariate relationships that seem
4 to be important or statistically significant.
5 And then the multivariate models allow us to
6 understand which of those relationships truly are
7 driving these outcomes, like the decision to
8 prefer a case.

9 Because we know that several variables
10 can go into that decision to prefer a case: the
11 strength of the evidence, for instance; and the
12 severity of the crime might drive that decision.

13 When we have multiple variables
14 driving that decision, it's really important to
15 try to unpack all of those patterns of
16 relationships so we can isolate the ones that are
17 truly most important. In a little bit we're
18 going to talk about some of these relationships,
19 and we'll be able to talk about a good example of
20 this.

21 And we see a relationship between
22 confessions, Service branch, and the likelihood

1 of convictions resulting. What we see there is
2 that multiple factors drive these outcome
3 decisions.

4 And the beauty of the multivariate
5 model is they allow us to isolate the independent
6 effects of those predictor variables apart from
7 the other predictor variables.

8 So the multivariate models build on
9 those bivariate patterns.

10 MS. TAGERT: Okay. So, again, just
11 due to the large amount of data that the report
12 has, today we're going to be focusing on more
13 limited data, generally the data that is linked
14 to potentially the committee directing the
15 subcommittee to potentially do more research and
16 investigation, as well as the data that Dr. Wells
17 has selected to present as what, based on his
18 expertise, is the important finding.

19 So we are going to start on slide 35.

20 And this is basic information that we
21 retrieved from the case files that shows that
22 when a penetrative sexual offense does occur with

1 a military member and the subject, that they are
2 fairly evenly split between being on- and off-
3 post locations.

4 Civilian law enforcement, based on the
5 investigative case files, we found that they were
6 involved in nearly 45 percent of all off-
7 installation investigations. And out of those
8 they were the lead in approximately 31 percent of
9 the cases.

10 None of the cases that the case review
11 reviewed had prosecution by civilian authority.
12 However, going back to our first annual report,
13 we did note that 14 cases were prosecuted by
14 civilians in the 2017 pool according to the
15 military investigators.

16 However, those cases weren't relevant
17 to our study of what was going on in the criminal
18 justice system, so they were excluded under our
19 methodology. However, that shouldn't retract
20 from the data that shows that there are a
21 majority of cases happening off-post.

22 The second slide is representative of

1 the number of days between the offense and the
2 report of the assault to military authorities.
3 And the timing of the report to law enforcement
4 can be important from an evidentiary standpoint.
5 And the timing of the report does have an impact
6 on whether or not charges are preferred.

7 As you can see, 31 percent of victims
8 report within 7 days of the offense, meaning that
9 the majority of victims report sometime after.

10 The timing of the report will have an
11 impact on certain evidentiary factors that are
12 then important for a prosecutor, and potentially
13 at trial. And as you can see, in -- sorry --
14 30.4 percent of the cases we reviewed, there was
15 a sexual assault forensic exam. And DoD and a
16 large number of jurisdictions recommend that a
17 SAFE be performed within seven days of the
18 assault.

19 So we know that in 37.1 percent of the
20 cases the victim reports within 7 days of the
21 assault, meaning that the majority of victims
22 would not undergo a SAFE exam based on common

1 standards of the 7-day recommendation.

2 Moving on to slide 38 is also
3 obviously sexual assault forensic exams can be a
4 valuable tool in connecting DNA evidence. And
5 reviewers recorded whether or not the
6 investigative file indicated if DNA was tested.

7 Again, the study was limited because
8 the reviewers did not further go on to analyze
9 the results because oftentimes the results were
10 not actually in the investigative case file,
11 there was just an indication that it had been
12 sent to USACIL or another lab. So we only
13 recorded that if it did in fact take place.

14 So we can't make any judgment on how
15 effective the DNA testing was or whether or not
16 DNA testing would have been something that would
17 be necessary based on the facts of the case.

18 BGEN SCHWENK: Jim Schwenk.

19 MS. TAGERT: Yes, sir.

20 CHAIR BASHFORD: Go ahead.

21 BGEN SCHWENK: Yeah, one thing that
22 Kate had pointed out in the past in the

1 subcommittee meetings, and Jim Markey brought up,
2 is that that no, that 78.6 percent no, that
3 includes a whole mess of cases where there wasn't
4 anything to do DNA testing on.

5 So it's not they could have done it
6 and they didn't in 78.6, some of it is that, but
7 a lot of it, from our memories, we didn't keep
8 count, but a lot of it is cases where there
9 wasn't anything to do DNA with.

10 Thank you.

11 MS. TAGERT: Thank you for that
12 clarification, sir.

13 On slide 39 we see why the SAFE, as
14 well as DNA testing, can have an impact on later
15 prosecutorial system because cases are more
16 likely to result in a preferral if a victim
17 undergoes an exam. Same with the DNA, cases were
18 more likely to be preferred where there was DNA
19 at least tested. So that was an interesting
20 finding.

21 As well as victims were more likely to
22 participate in the criminal justice process when

1 a SAFE was performed, as well as when DNA was
2 analyzed. So there was an impact there.

3 And as General Schwenk previously
4 noted, the reviewers couldn't make an assessment
5 of the DNA collected and whether or not that
6 would have been a determinative factor in a case.
7 However, based on the importance of those two
8 evidentiary considerations, the committee could
9 choose to have the subcommittee examine the law,
10 the policies, and practices which are connected
11 to the DNA connection as well as the SAFE, if
12 they find that would be an appropriate use of the
13 subcommittee's time.

14 So I was wondering if any of the
15 members have an opinion on that or would like to
16 elaborate?

17 BGEN SCHWENK: This is Jim Schwenk.

18 MS. TAGERT: Go ahead. I'm on slide
19 41.

20 BGEN SCHWENK: Yeah, okay. Well,
21 that's all I wanted to check was we were on
22 Directive 7.

1 Thank you.

2 MS. GARVIN: Meg Garvin.

3 CHAIR BASHFORD: Go ahead, Meg.

4 MS. TAGERT: Go ahead.

5 MS. GARVIN: Just going back to the
6 question or the comment that was made before
7 about the 78.6 percent on cases with DNA and
8 without DNA, and how many of those actually had
9 testable DNA, do we -- am I right that we don't
10 know how much had testable DNA versus not? This
11 is just how many cases there actually was
12 testing?

13 I'm trying to understand the data just
14 a little bit more -- I apologize -- before I
15 comment on the directive.

16 MS. TAGERT: So this is Kate.

17 Yes, Ms. Garvin, your question is, so,
18 the fact of the matter is is that when we did the
19 reviews we never got a clear picture of the DNA
20 testing and whether or not it should have been
21 happening, whether or not it could be tested. We
22 were only able to focus on whether or not there

1 was something in the case file that indicated
2 that DNA testing had taken place.

3 And Mr. Markey, I think we, right, you
4 spoke about this at a subcommittee meeting in
5 your civilian case reviews that sometimes the
6 testing is not clearly in the investigations. I
7 don't know if you want to talk to that, if Mr.
8 Markey's on.

9 MR. MARKEY: Yes, I'm on. I think Meg
10 still had some comments, if she wants to continue
11 with that.

12 MS. TAGERT: Okay.

13 MS. GARVIN: No, sir, I'm fine. I'm
14 starting to understand the data. And that's what
15 I thought was understanding. Of course, it might
16 not be in the file, and we don't know why it's
17 not in the file, and we don't know whether it
18 exists in the first place in order to be tested.

19 So I'm understanding it. So go ahead.

20 MR. MARKEY: Okay, thank you. This is
21 Jim Markey again.

22 Yeah, I think what we've seen in some

1 of our experience and, in fact, a study that Dr.
2 Wells did out of Houston with their sexual
3 assault kits, that there were opportunities for
4 follow-up or additional evidence to be collected
5 that were not being -- that were not being
6 followed.

7 That point being maybe we should look
8 at when we -- if we're going to look at this data
9 points that we wanted to collect, maybe it would
10 be, it would be good or nice to have how many of
11 these cases actually had the opportunity for
12 actually evidence outside a SAFE kit was
13 collected, and was there an opportunity for
14 investigators to collect evidence, and whether
15 they did or didn't investigate those.

16 And those, those are some of the data
17 points that we've been collecting in some of our
18 civilian case reviews. And I don't know if the
19 committee would think that would be -- for this
20 point I think it would be, it would be nice to
21 have that information as well.

22 And it also could direct policy and

1 practices for investigators during the initial
2 portion of the investigation. And it would seem
3 to be common sense if there is an opportunity to
4 collect evidence, to go do it. What we're finding
5 is that that's not happening. And it's happening
6 in a significant way negatively where it's not,
7 it's not occurring. And that could come down to
8 a training issue or a resource issue, too. So
9 those are some things that I think this directive
10 can help address.

11 Thank you.

12 MS. TAGERT: Is there any other
13 feedback of whether or not Directive 7 would be
14 something that the committee would want the case
15 review subcommittee to further explore?

16 MS. GARVIN: This is Meg Garvin.

17 CHAIR BASHFORD: Go ahead.

18 MS. GARVIN: I would love for them to
19 further explore this. I'm going to put one thing
20 on the record.

21 In terms of the drafting of the
22 directive, I'm not recommending we change it, I'm

1 just putting a personal statement on record that
2 in light of the data that we have, I would hope
3 that the subcommittee first focuses on practices,
4 and then law, and then policy, and figure out
5 what is actually going on before we look at law
6 or policies to try to identify changes.

7 I know the subcommittee always
8 approaches it that way. I just wanted, because
9 of the way it's drafted, I think sometimes
10 there's a perception that we start with law, and
11 then policy, and then practice. But I think in
12 light of the data it should be, like, look at the
13 practice, the facts, what is there.

14 And then I also would like to just put
15 out that I'm always cautious about the what we
16 see in the civilian side. And I think most folks
17 would agree, the risk of the CSI-type effect that
18 DNA is the be-all/end-all in public perception of
19 making these cases, and with it you have a case,
20 without it you don't. And I'm always cautious of
21 too much attention on DNA and the risk that that
22 can cause, does not affect my assessment that

1 this is a positive directive. I'm just putting
2 it out there.

3 MS. TAGERT: Okay. This is Kate.

4 Do we want to vote on the directive
5 now or take it up at the end?

6 CHAIR BASHFORD: We're going to take
7 them all up at the end.

8 MS. TAGERT: Okay. Moving on to slide
9 42, we're talking about the reviewers captured a
10 lot of demographic information, but overall the
11 data was very similar to other data that we've
12 heard Mr. Mason describe, which is that all
13 subjects were male and all victims were female.
14 Additionally, the vast majority of the subjects
15 on those case files were enlisted, as opposed to
16 being an officer.

17 So what we were able to capture,
18 though, that was a little different was the
19 breakdown of the victim status because,
20 obviously, victims have different statuses than
21 just Service members.

22 As you can see here, in 44.5 percent

1 of all cases, the victim was a civilian. And out
2 of those, 22.8 percent were DoD spouses.

3 It should be noted, though, that out
4 of those civilian DoD spouses there was 70
5 percent of those cases the subject was the
6 spouse, and in the other percent the subject was
7 not the spouse, the DoD spouse. Sorry, I know
8 that's confusing.

9 But that was the breakdown of the
10 status of the victim at the time of the assault.

11 The next slides are the demographic
12 information of the subject's race. The reviewers
13 tried to record the race and ethnicity of both
14 the subject and the victim. But the task for
15 identifying the race and ethnicity from the
16 investigative case files was more challenging
17 than originally expected.

18 First, it was assumed that both race
19 and ethnicity would be captured in what is
20 commonly referred to as the titling block of
21 military investigations in this block with common
22 information like name, rank, age, and Service, so

1 that there's some identifying information. But
2 the reviewers soon learned that all the Services
3 did not -- all the Services did not report
4 ethnicity in that section. And then the Air
5 Force and the Coast Guard didn't identify race at
6 all.

7 The Air Force only identified race in
8 that titling block when race is an element of the
9 crime itself.

10 So due to these discrepancies among
11 the Services, as well as the different documents
12 that the reviewers then potentially relied on,
13 only race can be described here based on the
14 information that was provided in the files. But
15 the staff is hopeful that for the DAC-IPAD, the
16 race and ethnicity report that is due in
17 December, that they'll have access to potentially
18 better information.

19 But, as we can see overall, in 66.5
20 percent of cases the subject was white, and in
21 72.1 percent of the cases the victim was white.

22 And then in 26 percent of cases the

1 subject was listed as black, and the victim was
2 listed as black in 15.5 percent of the cases.

3 So on slide 44 you'll see the victims'
4 breakdown of race.

5 Moving on to slide 45, just to give
6 you some perspective, General Schwenk has asked
7 for a what the Services looked like in 2017. And
8 we were able to find this demographics report
9 provided by DoD. It's not a perfect comparison
10 to our data, based on the fact that some of these
11 investigations are not -- they were initiated
12 before 2017.

13 But in this particular report DoD
14 found the active duty force was 68.7 percent
15 white and 17.3 percent black or African American.

16 The investigative review, the racial
17 make-up based on the investigations, found that
18 66.5 percent of subjects were white, and 26
19 percent of subjects were black.

20 This may suggest, based on the data,
21 that 26 percent of investigations involve a black
22 or African American subject, and that they are

1 disproportionately affected by allegations of
2 penetrative sexual assault investigations when
3 comparing to the overall demographics that were
4 reported by DoD in the profile of the military
5 community. That's from the investigative
6 standpoint.

7 The data analysis or the bivariate
8 found that the race of the subject did not
9 influence the decision to prefer. But cases
10 involving white victims make it more likely that
11 a case will be preferred in the bivariate
12 analysis. And Bill will be talking about that a
13 little bit more.

14 But, the race of the subject and
15 victim were not related to court-martial outcome.

16 Again, Dr. Wells has Service-specific
17 findings to this, because there were some
18 differences across the Services, and if you're
19 more interesting in driving deeper on this data.

20 MS. GARVIN: Ms. Garvin.

21 MS. TAGERT: Yes?

22 MS. GARVIN: I just had a question.

1 I'm probably missing it in a bullet, so I
2 apologize.

3 Was there any assessment of, so, if
4 the subject was a person of color, specifically
5 as you've called out, black or African American,
6 and the victim was white versus subject was black
7 or African American and victim was black or
8 African American? That multivariate going that
9 way, was there concern there to figure out
10 perhaps a actually even more disproportionate
11 effect based on who is making allegations against
12 persons of color?

13 MS. TAGERT: Bill, do you want to
14 speak to that?

15 DR. WELLS: Yes, I can speak to that.
16 That's a great question.

17 And there is a historically good body
18 of research to suggest that the intersection of
19 subject and victim race and the various
20 combinations will have an impact on justice
21 system processing.

22 Our concern with some of the

1 limitations of these data precluded us from
2 really digging into those sorts of details with
3 these data we have right now. But I think with
4 future analyses of race of subject and victim we
5 might be able to dig into that.

6 MS. GARVIN: Thank you. This is Ms.
7 Garvin. Thank you. And just strongly encourage
8 us to move that direction to make sure, if
9 possible, we have the data so we can do that
10 analysis because, yes, there is a lot of research
11 outside of the set point for that.

12 Thank you.

13 MS. TAGERT: Okay. So we are moving
14 to slide 47. And we are talking about the use of
15 threat, or force, or coercion that was recorded
16 in the case file.

17 The use of force or the threat of
18 force is found to be relatively rare in the files
19 that we reviewed. And the reviewers reported
20 whether or not the victim or any witnesses
21 described force, use of a weapon, coercion, or
22 threat, or placing in fear. And in 84.9 percent

1 there was none reported.

2 There were similar findings for
3 injuries. Overall the most common injuries that
4 were reported were bruising, as well as redness.
5 And the information was either supplied by the
6 victim statement or any records or third party
7 witnesses to any medical, to any injuries that
8 were relevant to the case.

9 Moving on to slide 49, we also
10 attempted to measure impairment, as described by
11 the victims. And what we found, that it was very
12 difficult to ascertain what the impairment was
13 describing and the types of incapacitation that
14 were in the files.

15 The language that was used by the
16 victims to describe impairment ranged from
17 blacked out, unconscious, partial memory, no
18 memory, passed out. And oftentimes victims would
19 use multiple terms to describe their level of
20 impairment.

21 Due to this, Dr. Wells applied a
22 hierarchy rule to report the data on impairment

1 by placing emphasis on the greatest level of
2 impairment that was reported in a particular
3 case. So the victim statements when describing
4 events, if they used words, some words that were
5 partial memory and then unconscious, the case was
6 coded as unconscious.

7 And if you look at slide 50, you'll
8 see the breakdown of the hierarchy which has
9 people passed out, unconscious, or asleep at 53.8
10 percent; and then blacked out, no memory, or
11 partial memory at 41.3 percent.

12 So this set of data takes us to slide
13 51, which is Directive 8, where potentially the
14 committee would like the subcommittee to look at
15 the statements involving impairment in order to
16 get a better idea of how they can be improved
17 when a victim is reporting impairment.

18 So the CRSC would like to -- or the
19 Chief, the subcommittee would like to review
20 victim statements to understand what victims are
21 describing as it relates to incapacitation. In
22 other words, if reviewers can't understand the

1 level of impairment, it may be difficult for
2 prosecutors, and later a fact finder, to assess
3 as well.

4 And this is somewhat linked to the
5 next directive in that there are very few cases
6 that involved the use of force or coercion. And
7 so the subcommittee thought while maybe those
8 other percentage of cases will be those where
9 there was impairment and incapacitation, but
10 based on the data that we have now, there is a
11 subset of cases that hinge on only the non-
12 consent element alone without any force or
13 incapacitation as a theory of criminal liability.

14 So the subcommittee wanted to examine
15 those types of cases, isolate them, so they can
16 be further analyzed and further understood by the
17 committee in general. And Dr. Wells would be
18 able to look at what, what variables are driving
19 these non-consent cases. Are they based on the
20 relationship because the person's married to that
21 subject? Things like that.

22 So those are the other two directives

1 that were directly linked to the data that we
2 have, as well as the experience of reviewing the
3 cases to try to figure out what the statements
4 are when it comes to a victim having
5 incapacitation based on alcohol or drugs, which
6 is a factor on the report.

7 I don't know if any member would like
8 to elaborate on those directives, any member of
9 the subcommittee?

10 BGEN SCHWENK: Jim Schwenk.

11 CHAIR BASHFORD: Go ahead.

12 BGEN SCHWENK: Yeah, I think from the
13 subcommittee members' point of view and the
14 staff, both of these issues were well worth
15 looking at.

16 And so we felt like we should ask the
17 full committee to direct us to add them to our
18 list and see what we can come up with and report
19 back to the full committee and let them know what
20 data is available and what isn't and what the
21 data tells us.

22 So I think we all felt pretty strongly

1 that they're both worth doing. Thank you.

2 MS. TAGERT: Okay. Moving on to slide
3 52, in addition to tracking the background
4 characteristics, like age and grade, the
5 subcommittee also captured more complex factors
6 that may be relevant at trial dates on what was
7 in the investigative case files.

8 In some academic research, these
9 factors have been called credibility factors.
10 But we're using the term complexity to try and
11 understand the facts that may have a potential
12 impact on the commander's decision to prefer or
13 the prosecutor's ability to obtain and sustain a
14 conviction.

15 And for both the subject and the
16 victim, the complexity factors vary slightly.
17 But as you can see, military, oftentimes when
18 talking about collateral misconduct, was talking
19 about the victim only.

20 But in our study, we looked at the
21 misconduct that was occurring by the subject as
22 well during the time of the sexual assault. And

1 as you can see, there was a large percentage of
2 cases that involved collateral misconduct by the
3 subject.

4 The second misconduct category
5 included other misconduct. So this is misconduct
6 that is not linked to the timing of the sexual
7 assault or rape. And it includes things like
8 DUIs, assaults, Article 15 for regulatory
9 violations, and things like larceny.

10 So the other misconduct really ran the
11 gamut of subject matter, some minor, some major.
12 So that was fairly interesting.

13 And then the reviewers also captured
14 whether or not there was any Military Rule of
15 Evidence 413 or 404(b) that would have been
16 relevant. And generally, for the non-
17 practitioners, this type of evidence is generally
18 known as propensity evidence and generally not
19 permissible in a criminal trial.

20 But particularly MRE 413, which is
21 similar to its federal counterpart, it allows for
22 the admissibility of propensity evidence when the

1 accused has committed a prior act of sexual
2 assault. So those were some complexity factors
3 that the reviewers were able to take from the
4 investigative case files.

5 For the victim, the collateral
6 misconduct was also tracked. However, we did not
7 know whether or not the victim was punished for
8 any of the collateral misconduct. The majority
9 of collateral (telephonic interference) was
10 underage drinking.

11 And then as you can see, for the
12 victim there was cases involving loss of memory
13 or consciousness. That data point is a little
14 different than the impairment database, or
15 impairment data, which is linked to the victim's
16 statements.

17 For this set of data on loss of memory
18 or consciousness, this was from the perspective,
19 subjective perspective of the reviewer. So if
20 you're confused about that, those are the
21 differences for that information.

22 So those were the complexity factors

1 that were tracked by the reviewers. And they
2 will become relevant in Bill's analysis.

3 So if no one has any questions on that
4 data, I'm going to pass it over to Bill to talk
5 about the bivariate and multivariate findings.

6 MS. LONG: Jen Long.

7 MS. TAGERT: Yes.

8 MS. LONG: Hi. And thank you again
9 for doing all of this great analysis. And I
10 apologize if I'm repeating something that we've
11 gone over before.

12 But in the category of loss of memory
13 or consciousness, the fact that those two are put
14 together, because I guess how I would put this,
15 they raise a little bit of a different complexity
16 I guess in a case, because when there is a loss
17 of consciousness, although there can be the
18 argument that the victim didn't remember maybe
19 what happened, it's a little different than what
20 happens strategically with loss of memory or
21 blackout where the accused or the defense might
22 offer a different strategy of what this person

1 looked like they were consenting and everything
2 seemed like it was okay.

3 And just because of those two
4 strategies, I know on the report, Dr. Wells, and
5 you, in previous discussions you've described
6 that those, if someone reported blackout, they
7 were maybe moved into the same category of loss
8 of consciousness.

9 But I do think that there is some
10 value in pulling that out to see if there is a
11 difference in outcomes between those two types of
12 victim reports, understanding that both might
13 exist in the same case.

14 MS. TAGERT: So, Ms. Long, this is
15 Kate. On slide -- so based on your comments
16 previously, as a subcommittee we did -- we lumped
17 passed out, unconscious, and asleep together, and
18 put the memory, the blacked out, no memory, or
19 partial memory in its own category.

20 So we tried to address that concern.
21 But with the complexity factors between loss of
22 memory or consciousness, because that was just a

1 checked box, we were not able to separate those
2 two pieces of data --

3 MS. LONG: Okay.

4 MS. TAGERT: -- as we were in the
5 hierarchy. But --

6 MS. LONG: Okay.

7 MS. TAGERT: But to your point, I
8 think Directive 8 was based on your concern to
9 try to flesh out a little more the different
10 described states of mind for further analysis --

11 COL WEIR: This is Colonel Weir. When
12 we went through these investigations, the
13 methodology for the level of impairment was what
14 the victim or the subject or witnesses said.

15 So sometimes the victim would say I
16 was passed out and list a number of impairment
17 factors. She might have said I don't have any
18 memory after this, I think I blacked out, and
19 then I passed out.

20 So as a reviewer, we checked all those
21 boxes based upon what her statement was. And so
22 there maybe, you know, where lies the problem,

1 because the victim's not necessarily expressing
2 clearly what her level of impairment was.

3 And so then you would -- you know, did
4 witnesses see her drink? And that was yes. Did
5 the victim or subject consume alcohol? And
6 sometimes that was a -- it was a self-admission
7 by the victim or the subject. And then witnesses
8 would say yes, I saw the victim, it looked like
9 she did four shots while I was there.

10 So we originally tried to figure out
11 when we first started the project if we could
12 actually come up with the amount of alcohol that
13 the individual consumed. And we've quickly found
14 out that that was not possible because a lot of
15 the time they had no idea. They just woke up in
16 bed and don't have any memory of what happened.

17 So, you know, the methodology for the
18 impairment was based upon what the individual
19 stated to the investigators.

20 MS. LONG: Thank you. I have one
21 other separate comment on 404(b).

22 CHAIR BASHFORD: Go ahead.

1 MS. LONG: And this is more of just
2 the language piece, because there certainly is
3 this little difference between 413 and 404(b).
4 And I guess I bristle a little bit when I hear
5 404(b) discussed as propensity. And I apologize
6 that I did not flag this earlier.

7 But I would like to -- I think it
8 needs to be described as a rule of inclusion, not
9 exclusion, where the acts, the other acts are
10 offered for purposes other than to show character
11 or propensity, because it does spell it out and
12 it is for another purpose.

13 And I know it may seem like semantics.
14 But I feel like it's important for this group to
15 be very intentional and specific when we're
16 talking about the purposes of 404(b) so we don't
17 give the sense that we are proposing propensity,
18 even though 413 is certainly more forgiving and
19 probably does allow it in that way.

20 MS. TAGERT: This is Kate.

21 HON. GRIMM: Grimm.

22 MS. TAGERT: Go ahead, sir.

1 HON. GRIMM: Could someone read me the
2 language, the 404(b) descriptive language,
3 please? I'm having trouble getting access to my
4 copy of the reports. I'd just like to hear the
5 language in light of the concern that's just been
6 expressed.

7 COL WEIR: Sir, this is Colonel Weir.
8 404(b), subject to the limitations in Military
9 Rule of Evidence 412, the accused may offer
10 evidence of an alleged victim's pertinent trait.
11 And if the evidence is admitted, the prosecution
12 may offer evidence to rebut it and offer evidence
13 of the accused's same trait. So that's 404(b).

14 HON. GRIMM: So does the -- do the
15 federal, or do the Military Rules of Evidence
16 have the equivalent of Federal Rule 404(a)(2),
17 which is -- allows a defendant to introduce
18 evidence of a pertinent character trait of either
19 the defendant or the victim?

20 MS. TAGERT: Yes, sir.

21 HON. GRIMM: Okay. Then could I have
22 that again read back to me a little bit more

1 slowly please, because I'm hearing -- and it's my
2 fault I'm sure. But I want to make sure that the
3 description of 404(b) is not the same as what is
4 412(a)(2)(A) and (B).

5 COL WEIR: 404(b), subject to the
6 limitations in Military Rule of Evidence 412, the
7 accused may offer evidence of an alleged victim's
8 pertinent trait. And if that evidence is
9 admitted, the prosecution may, one, offer
10 evidence to rebut it and, two, offer evidence of
11 the accused's same trait.

12 HON. GRIMM: That's not 404(b).

13 That's 412 --

14 (Simultaneous speaking.)

15 HON. GRIMM: That's 404(a)(2). That's
16 not 404(b).

17 COL WEIR: No.

18 CHAIR BASHFORD: We quote 404(b) in
19 the report itself (telephonic interference) on
20 page --

21 MS. HAM: It's on page 89, ma'am.

22 CHAIR BASHFORD: Okay.

1 MS. HAM: Patty Ham.

2 CHAIR BASHFORD: Thank you.

3 MR. HINES: Judge Grimm?

4 HON. GRIMM: Yeah.

5 MR. HINES: It's Glen Hines. So I
6 think what we're talking about here is 404(b).
7 And, you know, what we all learned in law school
8 is the MIMIC rule. So, you know, motive,
9 opportunity, intent, preparation, plans,
10 identity, that's right out of the military rule.
11 I think it's substantially the same as the
12 federal rule. So evidence --

13 HON. GRIMM: Right. But --

14 MR. HINES: -- used (telephonic
15 interference) prove one of those things can be
16 admitted.

17 HON. GRIMM: Right, I mean, his last
18 point is well taken that 404(b) went into. They
19 do reiterate the rule of prohibition against
20 character evidence to show a specific character
21 trait or character in general to show action and
22 conformity therewith. That's 404(a)(1).

1 404(b)(1) repeats that, but 404(b)(2)
2 then gives the MIMIC, you know, motive, intent,
3 absence of mistake or acts of identity, common
4 scheme or plan, preparation, knowledge or
5 opportunity. And those are illustrative not
6 exclusive.

7 So, and the court cases do show that
8 this is an inclusive rule. Now, whether or not
9 it's offered to prove propensity or offered for
10 one of the other purposes, then that's where the
11 challenge comes in. And there are factors that
12 allow a judge to make that determination.

13 But the -- but I -- and again, it's my
14 apology because I can't find the written copy of
15 it based upon the digital devices I have
16 available to me here right now.

17 But it sounds to me like we're
18 conflating the 404(a)(2)(B) that says when the
19 defendant chooses to open the door to a pertinent
20 character trait of the victim, then the
21 government can rebut as to that character trait
22 of the victim using 405(a), opinion or reputation

1 testimony, and also introduce affirmatively
2 405(a), opinion, reputation testimony regarding
3 that same character trait of the defendant
4 regardless of whether the defendant intended to
5 open the door as to his character for that
6 particular trait. It's a penalty to that.

7 And I'm -- again, it's just my fault
8 I'm sure. But it sounds to me like we're saying
9 that 404(b) allows that. It's not 404(b).

10 MS. LONG: Is this for Long or for
11 Weir?

12 HON. GRIMM: It's for anyone.

13 (Simultaneous speaking.)

14 MS. LONG: I'm sorry. Judge Grimm, I
15 agree with you. I was reading 404(b)(2). I just
16 wanted to make sure we were not using propensity
17 to describe those. I think what I heard read
18 first was 404(a)(2)(B), big B.

19 HON. GRIMM: Okay. Great. So --

20 CHAIR BASHFORD: We use the word --
21 this is Martha. We use the word propensity twice
22 in the body of the report (telephonic

1 interference) in the same paragraph under
2 Military Rules of Evidence 413 and 404(b).

3 One, we say 404 bars propensity
4 evidence. And then we say 413, like its federal
5 counterpart, provides for the admissibility of
6 propensity evidence when the accused has
7 committed a prior act of sexual assault. That's
8 the only time we use propensity. So --

9 MS. LONG: Okay. I was reacting to
10 the description in that --

11 CHAIR BASHFORD: I know, but that was,
12 that's not the --

13 MS. LONG: Okay. Just I couldn't,
14 because I couldn't find it in the report either,
15 but I got concerned. Thank you.

16 HON. GRIMM: Okay. This is Grimm. It
17 is absolutely correct that 413, 414, and, of
18 course, inapplicable in the military context,
19 would be 415, are propensity evidence because
20 they were not offered by the Evidence Rules
21 Advisory Committee. They were imposed by
22 Congress.

1 And Congress specifically intended to
2 override 404(a)(1)'s restriction on propensity
3 evidence in the so-called sexual predator
4 instances that include a defendant in a sexual
5 assault case that committed a prior sexual
6 offense. So that is clearly propensity. But
7 404(b)(1) and (2) are not propensity.

8 MS. TAGERT: Yeah, and this is Kate.
9 I didn't -- I think I was misunderstood when I
10 was talking. But I don't think -- the report is
11 correct I believe. So --

12 HON. GRIMM: Great, great. So sorry
13 if I got us on a sidetrack. I apologize.

14 MS. LONG: I apologize, too. I think
15 I'm the one who did it, but that's why, Kate.
16 I'm sorry. I started panicking. It was in the
17 report, and I couldn't put my hands on it.

18 MS. TAGERT: Okay. So, Bill, do you
19 want to start?

20 DR. WELLS: Sure. Do we want to keep
21 going and --

22 MS. TAGERT: Yes.

1 DR. WELLS: -- with an overview of the
2 bivariate, okay, great.

3 So we have quite a few bivariate and
4 multivariate results to discuss. So I just want
5 to let you all know that the results and patterns
6 we're going to describe right now are based on
7 the DoD-wide analyses. In other words, we can
8 combined all of the different service branches
9 together for these analyses.

10 But in the results that I provided
11 back to the Case Review Subcommittee in tables 8-
12 13 through 8-16, we summarized all of this
13 information about the bivariate and multivariate
14 findings for each of the service-specific branch
15 analyses.

16 So if you're interested in looking at
17 those analyses, they're available in the report
18 that went to the subcommittee.

19 So we're going to start with our
20 patterns of bivariate findings. And we have a
21 lot to present here. So we are not going to go
22 through every single bullet point on the slides.

1 We want to point out some of the
2 patterns that we found compelling and noteworthy
3 in the bivariate results. And then the
4 multivariate results are a little bit more
5 advanced and sophisticated and give us greater
6 confidence in understanding which factors truly
7 matter in impacting these three dependent
8 variables.

9 And remember, our three dependent
10 variables are the preferral decision. In other
11 words, was the case preferred or was no action
12 taken? Did the court-martial verdict end in
13 acquittal or conviction? And then we know that
14 victim participation matters. So the third
15 dependent variable is did the victim participate
16 in the investigation or did they decline.

17 So we're going to start with slide 55.
18 And these first few slides highlight the factors
19 that are related to the preferral decision. And
20 again, in these cases, we have 517 preferred
21 cases and 1,336 no action cases.

22 A prompt report, which we defined it

1 being made within seven days of the incident, is
2 related to the preferral decision.

3 So in this case, we don't have the
4 percentages here. But just to illustrate the
5 point, 32.5 percent of the prompt reports were
6 preferred compared to 25.3 percent of the reports
7 that were made outside of 7 days were preferred,
8 so about 33 percent versus 25 percent. So a
9 prompt report impacts the decision to prefer.

10 We also see that victim injuries
11 matter in the preferral decision. So when the
12 victims were injured, we see that 41 percent were
13 preferred compared to 26 percent when the victim
14 was not injured. And that difference is
15 statistically significant.

16 And last on this slide, when the
17 victim received a SAFE, it increased the chances
18 of preferral. So in this case, when a SAFE was
19 performed, 40 percent of the time the case was
20 preferred. When a SAFE was not performed, the
21 case was preferred in 22.7 percent of those
22 cases.

1 So if we go on to the next slide, we
2 want to highlight victim participation, victim
3 participation in civilian data and civilian
4 analyses. Victim participation matters quite a
5 bit in criminal justice system processing.

6 And we find a pretty clear pattern
7 here as well. When the victim participated, 36
8 percent of those cases were preferred. When the
9 victim declined, about ten percent of those cases
10 were preferred. So we see a pretty clear pattern
11 here that victim participation matters.

12 We also see that the probable cause
13 determination matters here as well. When
14 probable cause was determined to exist, over half
15 of those cases were preferred. When no
16 determination was made, 23 percent were
17 preferred. And then fewer than two percent were
18 preferred when no PC was determined to exist.

19 So we can move on to slide 57. We see
20 that a couple of those victim complexity factors
21 mattered. And when these factors existed, there
22 was a reduced chance that the case would be

1 preferred.

2 And those two factors are essential
3 motive to fabricate the incident, that reduced
4 the chances of preferral. And when the victim
5 provided inconsistent statements, that also
6 reduced the chances of preferral.

7 So those are the bivariate results
8 with regard to the preferral decision. And we
9 see that there were several factors that were
10 related to those.

11 When we move on to slide 58, one of
12 the overall patterns to observe here is that,
13 based on these investigative case file data,
14 there were relatively few factors that seem to be
15 related to the conviction outcome versus
16 acquittal outcome.

17 One of the factors that we would
18 expect to matter is subject confessions. And
19 I'll give you the numbers here in just one
20 second. That increased the chances of
21 conviction.

22 And in this case, we see that when the

1 suspect confessed, 25 percent ended in a -- no,
2 I'm sorry, sorry, 74 percent ended in a
3 conviction. And that was significantly higher
4 than when the suspect provided other forms of
5 defense about the case.

6 When the victim was not represented by
7 counsel, it increased the chances of conviction.
8 And when we talk about representation here, we're
9 talking about representation during the course of
10 the investigation. And we don't have information
11 about what happened during the court-martial
12 proceedings.

13 But relatively few of these
14 investigative factors and relatively few of the
15 subject and victim characteristics influenced or
16 were related to this conviction outcome.

17 So we move on, then, to slide 59. We
18 begin looking at the patterns of results for the
19 victim participation variable.

20 When the victim was a service member
21 as opposed to a civilian, they were more likely
22 to participate. About 73 percent of the military

1 victims participated in the investigation. And
2 this was significantly higher than when it was a
3 civilian victim.

4 In addition, the performance of a SAFE
5 exam was related to participation. When a SAFE
6 exam was performed, 73 percent of the time the
7 victim participated. Now, when a SAFE exam
8 wasn't performed, 66 percent participated. But
9 that difference was statistically significant.

10 And then the other one we want to
11 highlight here is victim attorney representation
12 prior to trial. When the victim had attorney
13 representation during the course of the
14 investigation, they participated 71 percent of
15 the time. And this is compared to 66 percent of
16 the time when they did not have victim
17 representation during the course of the
18 investigation.

19 If we move on to slide 60, we see that
20 several subject and victim complexity variables
21 matter. So we're not going to walk through the
22 patterns for all of these. But on slides 60 and

1 61, you'll see that several of these victim and
2 subject factors mattered.

3 Subject confession mattered, so that
4 when the subject confessed to the crime, victims
5 were more likely to participate. So when the
6 subject confessed, 84 percent of the time the
7 victim participated in the investigation.

8 If we move on to slide 61, we again
9 see that victim legal representation mattered to
10 the victim. And in this case, it increased the
11 chances of victim participation.

12 And when probable cause existed, there
13 was also a greater chance that the victim would
14 participate.

15 Those are the patterns, bivariate
16 relationships for our three dependent variables.
17 So we move on to slide 62. We begin to talk
18 about the results of our multivariate patterns.

19 And just to refer, the report goes
20 over this. But we began building our
21 multivariate models by focusing on those patterns
22 of bivariate relationships that seemed to be

1 important. And those were the variables that we
2 entered into our multivariate models.

3 And when we began building those
4 models, certain variables became statistically
5 insignificant. In other words, that bivariate
6 pattern became less important when these other
7 factors were entered into those relationships at
8 the same time. So when those variables became
9 less important, we pulled them out of our
10 multivariate models.

11 So what we're left with here are the
12 multivariate relationships that are statistically
13 significant. In other words, these are the
14 variables that appear to be driving these
15 outcomes. And that's what we've summarized for
16 you here in these next sets of slides.

17 So I'm going to talk about the
18 preferal decision first. And as we might
19 expect, when probable cause existed, there was an
20 increased chance of preferal in the case.

21 In addition, when the victim
22 participated in the investigation, that also was

1 associated with an increased chance that the case
2 would be preferred. And that's what we have
3 there on slide 62.

4 If we move forward to slide 63, we see
5 that these factors are also related to a greater
6 chance that the case was preferred, victim
7 representation by counsel, any DNA evidence
8 testing in the case, and when the subject used
9 force or threatened to use force against the
10 victim. All of those factors, when they were
11 present, they increased the chances that the
12 commander preferred the case.

13 Okay. Moving on to slide 64, when the
14 victim reported being impaired in any way, there
15 was a greater chance that the case would be
16 preferred.

17 When one of those victim complexity
18 factors existed -- so we have a pretty crude
19 measure here. So if any one of those six
20 complexity factors existed for the victim, that
21 reduced the chances that the case would be
22 preferred. In other words, it increased the

1 chances that the commander did not take action.

2 We also see, though, that those
3 subject complexity factors also matter. So when
4 any one of those six subject complexity factors
5 existed in the case, that served to increase the
6 chances of preferral.

7 So the subject and victim complexity
8 factors seem to matter when commanders decide
9 what to do with the case.

10 Last on this slide is subject
11 confessions. As we might expect, if a subject
12 confessed to the offense, then that increased the
13 chances of preferral. And that was all
14 independent of these other variables.

15 The last set of findings we have about
16 preferral are on slide number 65. We see that
17 compared to Army, Marine, and Navy cases, Air
18 Force cases were more likely to be preferred.
19 Marine Corps cases were also more likely to be
20 preferred than Army cases.

21 Last, we see that the identity of the
22 individual reporting the incident to law

1 enforcement seemed to matter here as well. They
2 were less likely to be preferred when the command
3 or a third party reported the incident as opposed
4 to the victim or a victim-authorized
5 representative.

6 So if the victim made the report or a
7 victim-authorized representative made the report,
8 then those cases were more likely to be
9 preferred.

10 So the multivariate model for the
11 preferral versus no action in the case identified
12 several predictor variables that seem to matter
13 in those decisions.

14 When we go on to the next dependent
15 variable, which I've already alluded to, there
16 were much fewer, there were fewer independent
17 variables about the investigation that predicted
18 convictions versus acquittals.

19 So if you look at slide 66, you see
20 here that the multivariate model only identified
21 a handful of variables that seemed to matter in
22 terms of the conviction outcome.

1 So the chances of a conviction were
2 lower when the victim had legal representation
3 during the course of the investigation. And I
4 think Kate had some ideas about why this pattern
5 maybe was revealed if anyone wants to talk about
6 that.

7 Victim complexity factors also seem to
8 matter here. So when at least one of those
9 victim complexity factors existed in the case, it
10 was more likely to end in acquittal than in a
11 conviction.

12 And then again, as we might expect,
13 one of the most important variables here was
14 subject confessions. So when the subject
15 confessed in the case, it was more likely to end
16 in a conviction.

17 The last thing we looked at was --

18 HON. WALTON: This is Reggie Walton.
19 Can I ask a question? When you say confess, are
20 you saying confessed to having committed a crime
21 or confessed to having sex with the alleged
22 victim?

1 MS. TAGERT: This is Kate Tagert.
2 Sir, confessed to the crime.

3 HON. WALTON: Okay, okay.

4 DR. WELLS: So the last thing we did
5 with this multivariate model was enter the
6 variable that measured the service branch to
7 determine whether there were significant effects
8 of the particular branch the case came from that
9 influenced the outcome.

10 And when we enter the service branch
11 into our model, we find that this does not
12 matter. These other investigative case variables
13 remained important. But the branch of the
14 service did not have an influence on the chances
15 that the case ended in a conviction. And I know
16 there was a --

17 CHAIR BASHFORD: Dr. Wells?

18 DR. WELLS: Yes.

19 CHAIR BASHFORD: Yes, this is Martha
20 Bashford. When I looked at your report, it seems
21 -- I looked at the acquittal rate. The Air Force
22 was high with 73.5. Coast Guard was low with

1 28.6 acquittal rate. But the others were like
2 55, 57, 62 depending on the service. Are those
3 simply statistically insignificant?

4 DR. WELLS: Yes, ma'am. That's
5 correct.

6 And that's a great question that you
7 asked about why this variable wouldn't be
8 significant in our multivariate models when we
9 see some important differences across the
10 branches. So I dug into that a little bit. And
11 you're absolutely right.

12 So, you know, the conviction rates
13 were lowest in the Air Force. They were at 26.5
14 percent conviction rate. And they were highest
15 in the Army at 44.7 percent. And that's ignoring
16 the Coast Guard because of their small numbers of
17 cases.

18 And this illustrates the real value of
19 a multivariate model because several of these
20 independent variables can be related to one
21 another. And the multivariate model is going to
22 identify the factor that is most closely related

1 to the outcome.

2 So in this particular case, what we
3 find is that rates of suspect confessions are
4 different across the service branches. And it
5 works in such a way that the rates of suspect
6 confessions are lowest in the Air Force.

7 So if we look at only the cases that
8 go to trial, confessions occur in Air Force cases
9 at a rate of ten percent. Among those same sets
10 of cases in the Army, rates of confessions are 23
11 percent.

12 So this might be a factor to explain
13 why those conviction rates are lowest in the Air
14 Force and highest in the Army is that these
15 different branches entail different rates of
16 suspect confessions.

17 Now why confessions may be higher in
18 the Army and lower in the Air Force we can't say.
19 But that might be one factor that drives this
20 pattern.

21 CHAIR BASHFORD: Okay. Thank you.

22 DR. WELLS: You're welcome.

1 CHAIR BASHFORD: It's quite
2 interesting.

3 DR. WELLS: And, yeah, I found that
4 quite interesting as well, especially since we
5 see that it's not a trivial difference.

6 Confessions in the Air Force, 10 percent,
7 confessions in the Marines were at 30.8 percent.

8 Okay. Moving on, then, to slide 67,
9 Kate is going to lead the discussion of this
10 proposed directive.

11 MS. TAGERT: Yes. So one of the
12 counterintuitive findings in the multivariate was
13 that the chances of conviction were lower when
14 the victim had legal representation.

15 And the JPP had heard, and, General
16 Schwenk, correct me if I'm wrong, when the site
17 visits were conducted potentially that
18 prosecutors weren't able to have as much access
19 to victims. But I'm not sure if that is still
20 the most up-to-date perspective as far as SVC or
21 VLC involvement or a civilian attorney for the
22 victim.

1 However, the subcommittee found that
2 this was a counterintuitive finding, when we were
3 looking at why there would be a lower rate of
4 conviction when there was counsel involved in the
5 case.

6 That would be up to the committee to
7 decide whether or not that is something that they
8 want to further explore in site visits or RFIs
9 from those programs that are currently in the
10 military. That's all I have on that. Bill.

11 DR. WELLS: Okay. We don't -- no
12 discussion about it at this point?

13 MS. TAGERT: Unless the members have
14 any thoughts.

15 DR. WELLS: Okay. We'll move on to
16 slide 68 then. And this is the last dependent
17 variable that we examined in our multivariate
18 models.

19 And in this one, we know that victim
20 participation matters in CJ system processing.
21 So we wanted to look at factors that were related
22 to the likelihood of victim participation. And

1 these multivariate models that we built show that
2 there were several factors that are related to
3 the chances that the victim would participate.

4 Service members were more likely,
5 active duty service members were more likely to
6 participate in these investigations. Victims
7 were more likely to participate as opposed to
8 decline when at least one of those subject
9 complexity factors existed in the case.

10 Victims appeared more likely to
11 participate when the case was more serious, as
12 indicated by physical injuries. So when the
13 victim was physically injured, the victim was
14 more likely to participate in the investigation.

15 And then the last point we want to
16 highlight here again is the importance of subject
17 confessions. So victims were more likely to
18 participate when the subject had confessed to the
19 crime in the particular case.

20 Last slide for multivariate results,
21 slide 69. I want to highlight a couple of things
22 here. We do see some service-specific

1 differences in terms of rates of victim
2 participation.

3 Victims were more likely to
4 participate when the Army investigated the case
5 in comparison to the Air Force and the Marines.
6 Victims in the Navy were also more likely to
7 participate when compared to the Air Force and
8 the Marines. So, but we don't see any difference
9 between the Army and the Navy.

10 So we do see some service-specific
11 patterns here where victims are more likely to
12 participate in the investigations when the Army
13 and the Navy conduct those investigations than
14 when the Air Force and the Marines conduct those
15 investigations.

16 And that is independent of those other
17 variables that we identified in slide 68. So in
18 other words, controlling for victim physical
19 injuries and controlling for subject confession,
20 we do see some service-specific differences here.

21 And with that, I'll wrap up. That
22 wraps up our discussion of the multivariate

1 patterns.

2 BGEN SCHWENK: Jim Schwenk.

3 CHAIR BASHFORD: Go ahead, Jim.

4 BGEN SCHWENK: I just want to say,
5 Bill, that we really appreciate all the work you
6 did on this for the subcommittee. You gave us a
7 wealth of information that we thought about and
8 talked about for quite a while.

9 And I think that information is going
10 to continue to be used by the subcommittee as we
11 look at many of these issues in the months to
12 come. I don't want to say years to come because
13 I wouldn't wish that on myself, but the months to
14 come.

15 And I just want to say thanks in front
16 of everybody because we really appreciate it.

17 DR. WELLS: Thank you, sir. It's been
18 a real pleasure to work with Kate and the entire
19 group and Stacy and everybody who's worked on the
20 data. Thank you.

21 CHAIR BASHFORD: Okay. It's Martha
22 Bashford. Before we turn it over to the rest of

1 the agenda, I know we've gone a little bit late.
2 But we need to vote on the report.

3 There are 47 findings, I believe, and
4 10 recommendations or directives. We got rid of
5 proposal number 6 and -- but we added the
6 directive, we added the recommendation to amend
7 Article 34. So I think we're still at 47
8 findings and 10 recommendations or directives.
9 Is that correct, Colonel Weir? Hello?

10 COL WEIR: Yes, ma'am.

11 CHAIR BASHFORD: Okay. So I'm going
12 to ask -- some of these were amended, and we'll
13 be voting on the findings and recommendations or
14 directives as amended if they were. Because this
15 is a vote on the entire report, Colonel Weir, can
16 you do the roll call and get the votes, please?

17 COL WEIR: Yes, ma'am.

18 CHAIR BASHFORD: I vote yes.

19 COL WEIR: Ms. Cannon.

20 MS. CANNON: I vote yes.

21 COL WEIR: Ms. Garvin.

22 MS. GARVIN: I vote yes, noting my one

1 objection previously on the record.

2 COL WEIR: Judge Grimm.

3 HON. GRIMM: I vote yes.

4 COL WEIR: Mr. Kramer.

5 MR. KRAMER: Yes.

6 COL WEIR: Ms. Long. Ms. Long, I

7 didn't hear you if you said anything.

8 MS. LONG: Yes. I vote yes.

9 COL WEIR: Okay. Mr. Markey.

10 MR. MARKEY: Yes.

11 COL WEIR: Chief McKinley.

12 CMSAF MCKINLEY: Yes.

13 COL WEIR: General Schwenk.

14 BGEN SCHWENK: I vote yes.

15 COL WEIR: Ms. Tokash.

16 MS. TOKASH: Yes.

17 COL WEIR: Judge Walton.

18 HON. WALTON: Yes.

19 COL WEIR: Ma'am, that was a unanimous
20 vote by all committee members present today.

21 DR. SPOHN: You didn't call me, Cassia
22 Spohn.

1 COL WEIR: Oh, I'm sorry. Dr. Spohn.

2 DR. SPOHN: Yes, I vote yes.

3 COL WEIR: Great.

4 CHAIR BASHFORD: So the report, then,
5 is unanimously adopted. And thanks again for
6 everybody's hard work. And what do we have next,
7 Colonel Weir?

8 COL WEIR: We're going to do a quick
9 update on the status of the review, the
10 committee's review and assessment of racial and
11 ethnic disparities. And if I can get Patty Ham,
12 Eleanor Vuono, and Nalini Gupta to take over the
13 discussion.

14 MS. VUONO: Great. Thank you. Good
15 afternoon, everyone. This is Eleanor Vuono. And
16 I am going to provide you with a very brief
17 introduction to the race and ethnicity study that
18 is currently underway for the DAC-IPAD.

19 All of the materials related to the
20 race and ethnicity study that I'm about to
21 explain are at tabs 7 and 8 of the meeting
22 materials. But if the public is following along

1 from the materials on the website, you can find
2 these at pages 249 and page 252 of the PDF that's
3 posted on the website.

4 So by way of background, in the fiscal
5 year 2020 NDAA, Congress included Section 540I
6 with a requirement for the DAC-IPAD to conduct,
7 quote, a review and assessment, quote, of the
8 race and ethnicity of service members at three
9 specific stages in the military justice process.

10 So, first, the race and ethnicity of
11 each service member accused of a penetrative or
12 contact sexual offense, second, the race and
13 ethnicity of each service member against whom a
14 penetrative or contact sexual offense were
15 preferred, and third, the race and ethnicity of
16 each service member convicted of one of those
17 offenses.

18 And as you know, the word accused in
19 the legislation could be confusing, because in
20 the military justice system that term applies to
21 a service member who is charged with offenses
22 under the UCMJ.

1 But in the legislation, that term
2 refers to a service member who is the subject of
3 an allegation to a military criminal
4 investigative organization of either a
5 penetrative or contact sexual offense.

6 So as part of that same statutory
7 provision, Congress also tasked the Secretary of
8 Defense with new reporting requirements for race
9 and ethnicity.

10 So although the DAC-IPAD project
11 differs from the directive to the Secretary of
12 Defense, it reflects great congressional interest
13 in race and ethnicity data. And we are very
14 aware that the services are answering a number of
15 taskings from Congress on this topic. And the
16 DAC-IPAD project is only one of many race and
17 ethnicity studies that are currently ongoing in
18 the DoD.

19 So just a brief word about how we're
20 organizing this project. It is due to -- the
21 report will be due to Congress on December 19th
22 of this year. The lead attorneys for the project

1 are Patty Ham, Nalini Gupta, and I.

2 We're also coordinating closely with
3 Chuck Mason, who is our expert on data collection
4 and the military service databases, and also with
5 Dr. Wells, who we just heard from, who will
6 assist us with similar sorts of analyses to
7 perform once we receive that data from the
8 services.

9 Chair Bashford sent Request for
10 Information 18A to the Service Judge Advocates
11 General. And that request for information asked
12 the services to provide their race and ethnicity
13 data responses in a standardized format to the
14 DAC-IPAD. Again, you can turn to tab 8 to find
15 that or page 252 of the materials posted on the
16 website.

17 All of the data requested is limited
18 to cases completed in fiscal year 2019. And by
19 completed, we are using the definition in the
20 legislation. So that is completed means a case
21 tried to verdict, dismissed without further
22 action, dismissed and then resolved by non-

1 judicial or administrative proceedings, or no
2 legal action taken at all, again, asking only for
3 those cases completed in 2019.

4 So the services first will provide a
5 spreadsheet with every unrestricted report of a
6 contact or penetrative sexual offense that was
7 investigated by the MCIOs in FY19. Certainly, a
8 report or allegation may have been initiated in a
9 prior fiscal year or years.

10 That second category will be a smaller
11 subset of the first category, so the race and
12 ethnicity data when there was a contact or
13 penetrative sexual offense charge preferred
14 against a service member. And those same cases
15 closed in FY19.

16 And finally, the third category of
17 cases will be the smallest subset, which is the
18 race and ethnicity data for every conviction for
19 (telephonic interference) contact or penetrative
20 sexual offense cases closed in FY19.

21 And here's another way to think about
22 this. We're going to use the case number that is

1 assigned to the criminal allegation by the MCIOs
2 to collect that race and ethnicity data as these
3 FY19 closed cases move through the military
4 justice system.

5 We've also heard it creatively
6 described as we'll be watching one particular
7 rabbit as it moves through the snake. So I hope
8 that helps everyone to see what the universe of
9 cases is that we'll be assessing.

10 You will also see that RFI 18A asks
11 the services for 33 separate items of
12 information, more than just the race and
13 ethnicity of the accused and the victim.

14 And this extra information will allow
15 us to ensure that each service response is
16 complete and that it tracks the DAC-IPAD other
17 data on FY19 sexual offense cases.

18 Those 33 data points also will give
19 valuable information for Dr. Wells to analyze for
20 the DAC-IPAD's review and assessment.

21 All of those service responses are due
22 September 7th. And once we have those back,

1 we'll give the data without any PII, personally
2 identifiable information, to Dr. Wells to break
3 down the race and ethnicity information for each
4 of those three categories requested by Congress.

5 He will be able to conduct the
6 bivariate analysis of the data. But this will be
7 a limited study and will not go so far as telling
8 us why the results are what they are.

9 So, for example, we won't be able to
10 explain the causes for the findings or conduct
11 multivariate analysis as Dr. Wells was able to do
12 for the case review project we just heard about.
13 The multivariate analysis would require an in-
14 depth study with much more information.

15 So we expect Dr. Wells will need about
16 a month to turn around those results. And in the
17 meantime, excuse me, the staff will be working on
18 the rest of the report, so explaining how the
19 services collected race and ethnicity data in
20 fiscal year '19, looking at previous race and
21 ethnicity studies in the DoD, and also
22 identifying any comparable civilian studies of

1 race and ethnicity for sexual offense cases.

2 We'll present the draft report for
3 your deliberations, including the data and any
4 proposed findings, at the November public
5 meeting, followed by delivery of the report to
6 Congress on December 19th.

7 So at this time, if there are any
8 questions or issues that the members would like
9 to discuss, otherwise thank you.

10 COL WEIR: This is Colonel Weir. I
11 would just like to add that we sat down with the
12 service reps and brought them all in so we would
13 all be on the same sheet of music so when we
14 drafted the RFI, that everyone was clear as to
15 what information that we were requesting from the
16 services, similar to what we did on the
17 collateral misconduct report when we brought in
18 the service reps and those folks working on
19 gathering the information.

20 So, hopefully, we'll get back the
21 information that we requested in a form that we
22 can use for this report. But that's all I have.

1 And we can move into the, unless
2 there's any questions, we can move into the
3 Policy Subcommittee update with Meghan Peters and
4 Terri Saunders. Hello?

5 MS. PETERS: Hi. This is Meghan
6 Peters, if we're ready to move on to the Policy
7 Subcommittee update. The Policy Subcommittee --

8 COL WEIR: We are.

9 MS. PETERS: Okay. Sir, the -- I
10 should say good afternoon, everyone. The Policy
11 Subcommittee is continuing its review of Articles
12 32 and 33 and 34.

13 Most recently, we have undertaken to
14 compare military and civilian preliminary
15 hearings and pretrial procedures by engaging in
16 interviews with individual prosecutors from
17 various state and federal jurisdictions.

18 The goal here is to provide background
19 information for the subcommittee and the
20 committee's future analysis and for future
21 reports.

22 Again, we wanted to compare military

1 and civilian procedures. And we have been able
2 to engage on the following topics, how a
3 prosecutor develops the case it receives from
4 investigators, the charging decisions and
5 standards used by federal and state prosecutors.
6 The procedures applicable in the various
7 jurisdictions we've surveyed regarding grand jury
8 and preliminary hearings. And we've also
9 discussed plea negotiations and trial outcomes.

10 Now, these interviews have all
11 involved one or more members of the subcommittee,
12 I think with the exception of maybe one or two
13 interviews where staff and staff leadership were
14 present.

15 And we've been making notes and
16 developing the information and consolidating the
17 information that we receive from these
18 interviews.

19 We have discussed in the subcommittee
20 that we should continue these interviews and
21 pivot to talking with defense counsel, victims'
22 counsel, and magistrates in the coming months.

1 And so we will schedule that. And the staff has
2 already begun that process.

3 We also intend to leverage the
4 expertise of members of this committee for
5 additional background information on state and
6 federal charging practices and pretrial hearings.

7 So we may reach out to some of you
8 individually to get your thoughts on the way
9 things work in practice and what your experience,
10 you know, can tell us about how these hearings
11 work and how to compare those things with the
12 military's process.

13 Moving forward, the Policy
14 Subcommittee is going to hold preparatory
15 sessions in October and November to deliberate on
16 this pass from DoD OGC and also on the directive
17 that we've now received from the case review
18 project and, of course, the relevant findings and
19 wealth of information provided in the case review
20 report.

21 Once we complete interviews with
22 civilians and the various practitioners, the

1 staff will arrange additional interviews likely
2 with military practitioners in order to, again,
3 advance its review of the relevant UCMJ articles.

4 We anticipate that the Policy
5 Subcommittee, since it's looking at a broad range
6 of procedures, will look to assess all aspects of
7 the pretrial phase of the military justice
8 process before really advancing final findings
9 and recommendations in any one particular area.

10 And the strength there is that these
11 differing (telephonic interference) points in the
12 system, the charging decision, the preliminary
13 hearing, the preferral process are all very
14 (telephonic interference).

15 We want to take a well-rounded view of
16 all of those procedures before finalizing any
17 particular findings, assessments, or possible
18 recommendations regarding any one aspect of the
19 proceeding or any one aspect of the pretrial
20 process.

21 So that is what we've been up to, and
22 those are our plans going forward. That is all I

1 have, sir.

2 COL WEIR: Thank you, Meghan. Does
3 anybody have any questions of Meghan or Terri
4 concerning the Policy Subcommittee?

5 Hearing no questions, then I think
6 we're at the meeting wrap-up and public comment.
7 I do not believe we've received any comments
8 either in writing or based on telephone calls to
9 Mr. Trexler.

10 So at this point, I have a few
11 comments. First of all, as the Chair mentioned
12 this morning, this is my last official duty as
13 the DAC-IPAD director.

14 It's been my distinct pleasure to work
15 for the committee in this capacity. I appreciate
16 each and every one of you's attention to detail,
17 your willingness to go above and beyond the call
18 of duty, and your expertise that you bring to the
19 committee, not only that, but I also am very
20 grateful that you all really believe in the
21 mission of the DAC-IPAD.

22 And it's clear in your, in the work

1 ethic that you do and the time you spent and you
2 spend on this project and supporting the full
3 committee. And I know you do this without any
4 pay. And you do it because you all understand
5 the importance of tackling the very important
6 issues of sexual assault in the armed forces.

7 The other comment I'd like is I would
8 like to publicly thank the staff. I couldn't
9 have asked for a better staff. And in my almost
10 30-year career, I don't think I've worked with a
11 finer group of people from top to bottom.

12 And they never look at the clock to
13 see if it's time to go. They just put their
14 noses down and do what needs to be done. And I
15 am so thankful that I was lucky to be a part of
16 that.

17 I'd also like to thank Julie Carson.
18 You couldn't ask for a better deputy. And I was
19 so fortunate that Julie was here. And I'm
20 forever grateful for everything that you've done,
21 Julie, to help run this organization.

22 And, you know, we were a team. And I

1 think that we did a good job. And I appreciate
2 everything you did as your role as the deputy to
3 get the mission accomplished.

4 So having said that, Madam Chair,
5 unless you have anything, I think we could
6 conclude the meeting.

7 CHAIR BASHFORD: Well, as much as it
8 pains me to say goodbye to you, Colonel Weir, I
9 am forced to do so.

10 Colonel Calese, you've got some big
11 shoes to fill. But I'm sure you will be able to
12 fill them admirably (telephonic interference).

13 So I wish we were in person to say
14 goodbye to you, Colonel, but we're not. So this
15 will have to suffice.

16 And I believe, Mr. Sullivan, it's time
17 to draw us to a close.

18 MR. SULLIVAN: Roger that. This
19 meeting is officially closed.

20 (Whereupon, the above-entitled matter
21 went off the record at 3:07 p.m.)
22

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