

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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13TH PUBLIC MEETING

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FRIDAY
AUGUST 23, 2019

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The Committee met at DoubleTree By Hilton Crystal City, 300 Army Navy Drive, Arlington, Virginia, at 9:00 a.m., Ms. Martha Bashford, Chair, presiding.

PRESENT:

Ms. Martha S. Bashford, Chair
Hon. Leo I. Brisbois
Ms. Kathleen Cannon
Ms. Meg Garvin
Hon. Paul W. Grimm*
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Sgt. James "Jim" Markey (Ret.)
Dr. Jenifer Markowitz
CMSAF Rodney J. McKinley, USAF (Ret.)
BGen James R. Schwenk, USMC (Ret.)
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash

STAFF:

Col. Steven Weir, USA, Staff Director
Ms. Julie Carson, Deputy Staff Director
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
Ms. Marguerite McKinney, Analyst
Mr. Chuck Mason, Attorney-Advisory
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Attorney-Advisor
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Mr. Dale Trexler, Chief of Staff
Dr. William "Bill" Wells, Criminologist
Mr. David Gruber, Alternate Designated Federal
Officer (ADFO)

ALSO PRESENT:

Lieutenant Colonel Adam Kazin, U.S. Army, Policy
Branch Chief, Criminal Law Division, Office
of the Judge Advocate General
Lieutenant James Kraemer, U.S. Navy, Head of the
Sexual Assault Prevention and Response
Policy Branch, Criminal Law Division, Office
of the Judge Advocate General
Major Paul Ervasti, U.S. Marine Corps, Judge
Advocate, Military Justice Policy and
Legislation Officer, Military Justice
Branch, Judge Advocate Division
Lieutenant Colonel Jane M. Male, U.S. Air Force,
Deputy of the Military Justice Division, Air
Force Legal Operations Agency
Lieutenant Adam Miller, U.S. Coast Guard, Legal
Intern, Office of Military Justice
Colonel Patrick Pflaum, U.S. Army, Chief,
Criminal Law Division

Captain Robert P. Monahan, Jr., U.S. Navy,
Deputy Assistant Judge Advocate General
(Criminal Law) and Director, Office of the
Judge Advocate General's Criminal Law Policy
Division

Lieutenant Colonel Adam M. King, U.S. Marine
Corps, Military Justice Branch Head, U.S.
Marine Corps Judge Advocate Division

Colonel Julie Pitvorec, U.S. Air Force, Chief,
U.S. Air Force Government Trial and
Appellate Counsel Division

Captain Vasilios Tasikas, U.S. Coast Guard,
Chief, Office of Military Justice

Colonel Lance Hamilton, U.S. Army, Program
Manager, Special Victims' Counsel Program

Captain Lisa B. Sullivan, U.S. Navy, Chief of
Staff, Victims' Legal Counsel Program

Lieutenant Colonel William J. Schrantz, U.S.
Marine Corps, Officer-in-Charge, Victims'
Legal Counsel Organization, Judge Advocate
Division, HQMC

Colonel Jennifer Clay, U.S. Air Force, Chief,
Special Victims' Counsel Division

Ms. Christa A. Specht, U.S. Coast Guard, Chief,
Office of Member Advocacy Division

Colonel Roseanne Bennett, U.S. Army, Chief,
Trial Defense Service

Commander Stuart T. Kirkby, U.S. Navy, Director,
Defense Counsel Assistance Program

Colonel Valerie Danyluk, U.S. Marine Corps,
Chief Defense Counsel

Colonel Christopher Morgan, U.S. Air Force,
Chief, Trial Defense Division, Air Force
Legal Operations, Joint Base Andrews

Commander Shanell King, U.S. Coast Guard, Chief
of Defense Services

Ms. Janet K. Mansfield, Chief, Programs Branch,
Criminal Law Division, Office of the Judge
Advocate General for the U.S. Army

*Present by telephone

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to DAC-IPAD Questions Regarding

Conviction and Acquittal Rates, the

Case Adjudication Process, and Victim

Declination; DAC-IPAD Future Planning

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Public Meeting Adjourned 384

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

2 9:02 a.m.

3 CHAIR BASHFORD: Good morning. I
4 would like to welcome the Members and everyone in
5 attendance today at the 13th Public Meeting of
6 the Defense Advisory Committee on Investigation,
7 Prosecution, and Defense of Sexual Assault in the
8 Armed Forces, the DAC-IPAD.

9 Of the 15 Committee Members, 11
10 Members are present this morning and a twelfth
11 Member, Judge Paul Grimm, will be joining us by
12 telephone at ten o'clock this morning.

13 Two Members were not able to attend
14 today, Major General Marcia Anderson, and Judge
15 Reggie Walton.

16 The DAC-IPAD was created by the
17 Secretary of Defense in 2016, in accordance with
18 the National Defense Authorization Act for Fiscal
19 Year 2015, as amended. Our mandate is to advise
20 the Secretary of Defense on the investigation,
21 prosecution, and defense of allegations of sexual
22 assault and other sexual misconduct involving

1 Members of the Armed Forces.

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

5 Today's meeting will begin with the
6 DAC-IPAD's Data Working Group presenting the
7 Fiscal Year 2018 conviction and acquittal rates
8 for sexual assault in the military based on its
9 collection of case documents from all military
10 sexual assault cases closed during the Fiscal
11 Year.

12 Next, the Staff Director will provide
13 an overview of the Draft Department of Defense
14 Report on Allegations of Collateral Misconduct
15 Against Individuals Identified as the Victim of
16 Sexual Assault. This draft report was submitted
17 to the DAC-IPAD for its input by the DoD General
18 Counsel in fulfillment of Section 547 of the
19 Fiscal National Defense Authorization Act for
20 Fiscal Year 2019.

21 Following the overview of the report,
22 Service representatives involved in the report

1 drafting and data collection will appear before
2 the committee to answer questions about the data
3 and the report methodology.

4 Following the collateral misconduct
5 discussion, the committee will hear from three
6 additional Panels: the Services Military Justice
7 Division Chiefs, the Services Special Victims'
8 Counsel Program Managers, and the Services Trial
9 Defense Service Organization Chiefs. These
10 panelists will each respond to questions from
11 committee Members regarding their organization's
12 written responses to questions the DAC-IPAD
13 submitted in May on the topics of sexual assault
14 conviction and acquittal rates, the case
15 adjudication process, and the victim declination
16 to participate in the Military Justice process.
17 And I want to thank the people who responded
18 because those were very, very substantive
19 responses.

20 Following these Panel discussions, the
21 committee will receive a status update from its
22 Case Review Working Group and a presentation by

1 its Data Working Group regarding the Fiscal Year
2 2018 Case Adjudication Data Report Plan.

3 For the final session of the meeting,
4 the committee will deliberate on the DoD
5 Collateral Misconduct Report and the Services'
6 responses to its written questions.

7 Each public meeting of the DAC-IPAD
8 includes a period of time for public comment. We
9 have received no request for public comment for
10 today's meeting.

11 During the meeting, if a member of the
12 audience would like to make a public comment on
13 an issue before the committee report, please
14 direct your request to the DAC-IPAD Staff
15 Director, Colonel Steven Weir. All public
16 comments will be heard at the end of the meeting
17 and at the discretion of the Chair.

18 Written public comments may be
19 submitted at any time for committee
20 consideration.

21 Before we do the Data Review, though,
22 I want to thank everybody for being here today

1 and I think we'll start off with Colonel Weir.
2 We're ready for your remarks.

3 COL. WEIR: Okay, thank you, ma'am.

4 As the Chair mentioned, this
5 Collateral Misconduct Study was a result of the
6 National Defense Authorization Act, Public Law
7 115-232. And in that legislation, it set out the
8 Secretary of Defense, acting through the DAC-
9 IPAD, shall submit a report to the Congressional
10 Defense Committees that includes the following
11 information. And I am reading now from the
12 legislation.

13 There are three requirements that this
14 legislation put out. Number one, the number of
15 instances in which a covered individual was
16 accused of misconduct or crimes considered
17 collateral to the investigation of a sexual
18 assault committed against the individual.

19 So it's important to understand what
20 a covered individual is. It's defined in this
21 section. It means an individual who is
22 identified as a victim of a sexual assault in the

1 case files of a military criminal investigative
2 organization.

3 Number two, the number of instances in
4 which an adverse action was taken against a
5 covered individual who was accused of collateral
6 misconduct or crimes as described in paragraph 1.

7 And number three, the third piece of
8 information that was required was the percentage
9 of investigations of sexual assaults that
10 involved an accusation or adverse action against
11 a covered individual as described in paragraphs 1
12 and 2.

13 The Services were tasked with
14 gathering the requested information and that
15 information, in a draft report, was forwarded to
16 the DAC-IPAD in a letter from DoD General
17 Counsel, Mr. Paul Ney, on June 11, 2019. Mr. Ney
18 provided the draft report to give the DAC-IPAD an
19 opportunity to offer any additional information
20 or analysis and provide that feedback to the
21 Secretary of Defense.

22 Mr. Ney has requested that the DAC-

1 IPAD reply by September 15th. The report is due
2 to Congress on September 30th.

3 The DAC-IPAD Staff reviewed the draft
4 reports submitted by each of the Services, to
5 include the Coast Guard.

6 The Staff requested a meeting with the
7 Service representatives and the individuals who
8 were responsible for compiling the information in
9 the draft reports. This meeting was held on July
10 9th in the DAC-IPAD conference room. The Staff
11 requested this meeting so we could better
12 understand the methodology behind the gathering
13 of the information because it was clear that
14 there were differences in methodology and
15 definitions between the Services.

16 For example, the Army definition of
17 accused is different from the Navy and Marine
18 Corps definition. The Navy and Marine Corps only
19 counted collateral misconduct committed by the
20 victim if an inquiry into the collateral
21 misconduct was actually initiated. We were told
22 that meant a report of investigation was

1 initiated.

2 The Army defined accused as a victim
3 who may have potentially committed a UCMJ
4 violation.

5 The Air Force had a slightly different
6 definition but the Air Force did not require a
7 separate investigation into the misconduct.

8 The Army had a very low number of
9 sexual assault investigations for the time period
10 April 1, 2017 to March 31, 2019 involving an Army
11 victim. Based upon the experience with the case
12 reviews and the courts-martial database, we knew
13 that something was off. During the meeting we
14 discovered that the Army only counted penetrative
15 sexual assault investigations; whereas, the other
16 Services counted penetrative and contact.

17 After the meeting, the Navy, Marine
18 Corps, and Air Force sent us corrected numbers,
19 which changed the percentages in their original
20 draft report. As the Staff reviewed the
21 percentages, it became apparent that the
22 percentages perhaps did not accurately reflect

1 those victims who had been punished as a
2 percentage of those victims who committed
3 collateral misconduct. Instead, the Services
4 reported the number of victims receiving adverse
5 action out of the total number of sexual assault
6 investigations involving Servicemember victims
7 from their respective Services.

8 And so as a result of the report and
9 the different methodologies, we thought it was
10 important that the DAC-IPAD Committee have an
11 opportunity to review the Services' report, which
12 we've sent to you for your review, and also have
13 an opportunity to deliberate and discuss, which
14 is going to occur near the end of this public
15 session, in order to compile a letter back to the
16 Secretary of Defense.

17 And pending any of your questions,
18 that's all I have right now.

19 CHAIR BASHFORD: Anybody have any
20 questions for Colonel Weir?

21 Then we'll turn to Mr. Mason for your
22 remarks.

1 MR. MASON: Good morning, ma'am.

2 You don't have to strap in this
3 morning because I'm not as excited as I was
4 yesterday. So, we are only going to cover just
5 the conviction and acquittal rates. It's a
6 couple of slides.

7 This afternoon, I cannot promise we
8 will not be excited again because we are going to
9 do all the data.

10 But for conviction and acquittal
11 rates, the first chart that we have up is the
12 outcomes for penetrative offenses that were
13 referred to courts-martial. And I apologize,
14 there's just the one slide that is only on the
15 left-hand side of the room.

16 But if you look at the top line,
17 that's the FY2018, when somebody had a referred
18 penetrative offense, in 28.2 percent of the time,
19 they were convicted for a penetrative offense.
20 But the other extreme is 37.3 percent of the
21 time, they were acquitted of all charges. So if
22 they had multiple charges against them with the

1 most serious offense being the penetrative
2 offense, in 37.3 percent of the time, they were
3 acquitted of everything. And that is an increase
4 over FY17 when the overall acquittal rate for a
5 penetrative referred was almost 31 percent.

6 When you look at that same class of
7 cases, where it's a penetrative referred to trial
8 and then handled -- adjudicated by a Military
9 judge, the conviction rate for the penetrative
10 offense goes to 33.3 percent, which was
11 previously 28.2 for overall. And the acquittal
12 rate, though, dropped to 17 percent. So you have
13 a much lower acquittal rate when you're going
14 before a Military judge and it's a penetrative
15 offense.

16 Where it gets interesting is when you
17 now look at -- when it's adjudicated by a Panel
18 of Members, the conviction rate is 23.2 percent,
19 which is slightly lower than the overall rate,
20 but the acquittal rate is 59.4 percent. So
21 looking at this statistic, it might be safe to
22 say that if you have a penetrative case that is

1 preferred, you may want to have it adjudicated in
2 front of Members because your chances for
3 acquittal are much higher than if you go before a
4 Military judge.

5 And if you look, we have the numbers
6 for '18, '17, '16, and '15, the acquittal rate
7 bounces back and forth. So there isn't a true
8 trend that we can identify that it's going in one
9 direction or the other, only to say that in the
10 most recent year, the acquittal rate with Members
11 is much higher than it was in the previous year.

12 And now we want to look at those same
13 metrics when we're talking about a contact
14 offense that was referred to trial. And you have
15 a much smaller universe of cases but when you are
16 looking at convicted of a contact offense as the
17 most serious offense, it's almost 14.5 percent
18 and then the acquittal rate is 20.9 percent. And
19 just going back to when we were talking about
20 penetrative, it was 28.2 percent for a convicted
21 of a penetrative and the acquittal was 37.3. So
22 you had a higher acquittal rate, overall, for

1 penetrative than you are realizing with the
2 contact offenses.

3 If you have a contact case that is
4 adjudicated in front of a judge, you are at 14,
5 almost 15 percent for a conviction for the
6 contact and only 6.5 percent for an acquittal.
7 But you have a much larger 78.7 percent that are
8 convicted of some other offense.

9 So the contact sexual assault was the
10 most serious offense they were charged with, one
11 or multiples, and then there were other offenses,
12 maybe an Article 92 or an Article 112a, something
13 along those lines. They were found guilty of
14 those, rather than -- more likely to be found
15 guilty of those offenses than the sex assault or
16 be completely acquitted.

17 And then when you look at it for
18 Military Members, the overall acquittal rate,
19 again, is much higher when you're dealing with
20 Members. So the Military judge was realizing 6.4
21 percent overall acquittal rate for the contact.
22 In front of Members, it was 46.7 percent

1 acquittal.

2 Interestingly though, the convicted
3 for a contact offense with Members was almost 17
4 percent and it was 15 percent with a judge. So
5 the Members are finding them guilty of a contact
6 offense more than the judge is but the judge is
7 finding them guilty of something and the Members
8 are more likely to acquit.

9 So we wanted to just give you an
10 overview of what's happening with penetrative and
11 contact, so that you have that in the back of
12 your mind as you are hearing your professionals
13 today and you can ask their opinion of if they
14 see this as a trend. Do they see this as a
15 problem? Is this how the system should work?

16 We are not drawing any conclusions
17 that it's right or wrong. We are just giving you
18 what we actually know from our statistics in the
19 system of what is happening at the trial level.

20 Thank you, ma'am.

21 CHAIR BASHFORD: Thank you, Mr. Mason.
22 I have a couple of questions.

1 On the contact offenses, where the
2 Military judge was convicting a substantial
3 number of non-sex offenses, would those charges,
4 standing alone, have had to go to a general
5 courts-martial?

6 MR. MASON: Without knowing the
7 specific other offenses, I can't tell you. In
8 our database we -- in order for a case to be in
9 our database, it has to be either a penetrative
10 or contact sexual assault but we also enter every
11 other offense on the charge sheet.

12 So we could go through our database
13 and look and say contact was the most serious
14 sexual assault but was there an attempted murder
15 or was there something else that was a rather
16 extreme offense, a serious offense that would
17 rise to the level of a general courts-martial.
18 We could tell you that. I just don't have it off
19 the top of my head.

20 CHAIR BASHFORD: But things such as
21 underage drinking or fraternization, would those
22 have gone to general courts-martial?

1 MR. MASON: Not necessarily.

2 CHAIR BASHFORD: And can you just go
3 back to your very first slide for a moment?

4 MR. MASON: Yes, ma'am.

5 CHAIR BASHFORD: So if you take the
6 full acquittal rate for Fiscal Year '18 and
7 convicted of non-sexual offense, I just can't
8 really see the numbers that well. What's the
9 total percentage then?

10 MR. MASON: Your total -- if you do
11 convicted of sexual assault, any penetrative or
12 contact sexual assault, you are going to be at 28
13 percent -- 29 percent. And then your acquittal
14 --

15 CHAIR BASHFORD: Acquittal or
16 conviction?

17 MR. MASON: -- it's going to be 70.
18 Acquittal is about 70 percent.

19 CHAIR BASHFORD: Okay, so acquittal of
20 any sexual assault --

21 MR. MASON: Yes.

22 CHAIR BASHFORD: -- even if you're

1 convicted of something else, is about a 70
2 percent rate?

3 MR. MASON: Yes.

4 CHAIR BASHFORD: Thank you.

5 MR. MASON: Yes, ma'am.

6 Are there any other questions for Mr.
7 Mason?

8 MS. LONG: I have a question.

9 Mr. Mason, thank you. I'm just
10 curious if there is any similarity in the
11 civilian context for a judge or jury outcomes on
12 cases that you know of?

13 MR. MASON: I am not aware of it. We
14 have talked and when Kate is up speaking later,
15 she can probably tell you about other studies
16 that she's looked at with respect to the
17 investigations and going forward.

18 MS. LONG: Right.

19 MR. MASON: We could probably look at
20 the Sentencing Commission and see what metrics
21 they're tracking to see if something would
22 address it but I don't know of anything that is a

1 direct correlation to what we have.

2 MS. LONG: Okay. And just to be
3 clear, these -- this data tells you what's
4 happening but it doesn't tell you why anything is
5 happening.

6 MR. MASON: It does not.

7 MS. LONG: So that would involve
8 further analysis.

9 MR. MASON: Absolutely. And we can
10 tell you these are the results and if you want to
11 see the record of trial for these cases, we have
12 much of the documents. We don't have the
13 complete transcript but we can pull out what the
14 Article 32 hearing report was. We can look at
15 what the SJA advised. We can say that the
16 convening authority decided to go forward or not.
17 And we can tell you the way our database, because
18 it's severely antiquated at this point, we aren't
19 able to follow every specific charge on a
20 straight line. It puts them into blocks and we
21 have to then look within each block and try to
22 marry up the lines to figure out the results for

1 each of those.

2 MS. LONG: Okay.

3 MR. MASON: But that doesn't mean we
4 can't do it. It's just labor-intensive.

5 MS. LONG: Okay. And just one more
6 question. Sorry, Chair Bashford.

7 I just -- I just want to make sure I
8 understand this. So but when I'm looking at the
9 Fiscal Year, though, I see the 37.3 percent of
10 all but the other pieces, they are convicted of
11 something.

12 MR. MASON: They are convicted of
13 something. And we will have in the report, when
14 this chart is published, it will say that the
15 most serious offense referred to the courts-
16 martial was a penetrative offense. However, if
17 they were found not guilty of the penetrative but
18 found guilty of a contact offense or assault and
19 battery, then the assault and battery would be in
20 that blue column, the 30.3. So we're saying yes,
21 there was a conviction. It just wasn't for the
22 penetrative.

1 MS. LONG: Okay, thank you.

2 MR. MASON: Yes, ma'am.

3 CHAIR BASHFORD: And Mr. Mason, I just
4 want to make sure I understand. In order for the
5 DAC-IPAD to do the best work at grabbing the
6 data, you need a better database -- consistent.
7 Is that correct?

8 MR. MASON: We actually need a
9 legitimate database. We are using a SharePoint
10 website. SharePoint was developed as a way to
11 share documents. Because we are a document-based
12 system and we have to have a legal document that
13 we can look at and pull the information from, we
14 take those and enter them into fields so that we
15 can aggregate what we have. But then to get an
16 outcome, the only way you can do it is do an
17 Excel spreadsheet and sort by columns and count
18 them.

19 So it's not a database. If you ask
20 anybody that works in databases, this is not.
21 It's a workaround. It has served remarkably well
22 for its purposes. The JPP started this with

1 limited funds, limited people. I mentioned it to
2 you yesterday, because of one person, we have one
3 individual, Stayce, who has entered all 4,000
4 cases into our database. So she's read every one
5 of those documents and then categorizes it and
6 enters it.

7 But the only way we can do this going
8 forward is with a legitimate database that you're
9 able to track an offense, each individual offense
10 as a unit, and then combine those units into the
11 case, and then look at the cases out. We are
12 unable to do that at this point.

13 CHAIR BASHFORD: And that would better
14 serve the Members of this committee. Is that
15 correct?

16 MR. MASON: It would better serve the
17 Members of this committee and it would allow you
18 to present the information to the Services, as
19 customers, as well as to Congress, who has asked
20 you to investigate this. It would allow you to
21 actually do the job that you've been asked to do.

22 CHAIR BASHFORD: Thank you.

1 MR. MASON: Yes, ma'am.

2 SGT. MARKEY: Chair Bashford?

3 CHAIR BASHFORD: Yes.

4 SGT. MARKEY: Thank you so much for
5 the information. I call you our Inspector Gadget
6 with all the data. And we love it. You have to
7 understand your information and be able to manage
8 it.

9 Are you aware -- in the different
10 branches of the Military, are you aware of any
11 information management system or database that is
12 able to track the information and report data, as
13 you have presented to us today?

14 MR. MASON: There are systems within
15 each Service that attempt to track courts-martial
16 that are happening from beginning to end.
17 However, and it's something I'll get into with
18 the data report, we asked them to provide the
19 cases to us so that we could add them to our
20 database. We do not have the -- when a charge
21 sheet is created, we don't have access to it at
22 that point. We have to wait for them to provide

1 it to us. And the problem that we have run into
2 is the number of cases that the Services report
3 to us as being a valid case for the purposes of
4 our study, the actual responsive rate is nowhere
5 near what they think it should be.

6 So as an example, the Services gave us
7 774 cases in this past year that they believe are
8 a penetrative or contact sexual assault that was
9 resolved in that Fiscal Year. Only 574 of those
10 were actual cases that we could track. So 75
11 percent of what they told us were actually the
12 cases. The other ones that were reported were
13 maybe a child sex assault that we don't track, or
14 maybe it was a different Fiscal Year that just
15 happened to surface in their system, or they
16 duplicated and they told us the same name two or
17 three times.

18 Unfortunately, this year we ran into
19 an issue where we have a multitude of cases that
20 they were reported as being cases but they have
21 no documentation to back it up in their system.
22 So we have a name but we don't have an actual

1 case. So we don't know that it's actually a case
2 and we can't count it.

3 So the short answer is no. There is
4 not a system that I am aware of that can do what
5 we are trying to do.

6 CHAIR BASHFORD: Thank you, Mr. Mason.
7 I think we're ready for the Panel -- Service
8 Panel on collateral misconduct. And that would
9 be Lieutenant Colonel Kazin, Lieutenant Kraemer,
10 Major Ervasti, Lieutenant Colonel Male, and
11 Lieutenant Miller.

12 Good morning and welcome. Thank you
13 for being here to share your perspectives on the
14 collateral misconduct and the results of your
15 studies. I'm going to start it off with one
16 question and we'll see what the other Members
17 have.

18 Do you all agree that you should be
19 using the same definitions for the same terms as
20 you're reporting data out? Because of some of
21 your different definitions, the Army's figures
22 showed a ten percent adverse action in collateral

1 misconduct and the Marine Corps showed a 92
2 percent adverse action, which seems absurd, until
3 you realize you're talking apples and oranges.

4 So my question for each of you, and I
5 guess we'll start with you, Lieutenant Miller,
6 and go across: Do you think we should be using
7 -- you should all be using the same definitions?

8 LT MILLER: Yes, ma'am, but I think
9 this is just a function of the first time
10 conducting this type of study.

11 CHAIR BASHFORD: And I noticed that
12 Congress didn't actually give you very many
13 definitions, I think, other than covered
14 individual.

15 Lieutenant Male?

16 LT. COL. MALE: Yes, ma'am, uniform
17 definitions would be useful.

18 MAJ. ERVASTI: Yes, ma'am, we agree it
19 would provide a much more useful measure across
20 the Services if there were uniform definitions.
21 And our responses, for the Marine Corps anyway,
22 would have likely been much different had the

1 term suspected of collateral misconduct been used
2 instead of accused of collateral misconduct.

3 LT KRAEMER: I agree, as well, ma'am.

4 LTC KAZIN: Yes, ma'am, we generally
5 agree that having universal definitions and there
6 were attempts by Services to try to coordinate.
7 This didn't actually come through like the Joint
8 Services Committee but we basically got together
9 and tried to hash out some of the distinctions of
10 how the Services define things. But some of them
11 are just cultural things of how the Service
12 defines adverse information or adverse conduct
13 and so there were some differences in those
14 opinions. But we definitely made attempts to try
15 to smooth out some of the differences, based on
16 the lack of statutory guidance that was provided
17 to us initially.

18 And so as I mentioned, it was the
19 first time going through this iteration. We've
20 definitely seen where the bumps are, and
21 hopefully can smooth this process out, and clean
22 up where there are distinctions and, also going

1 for the future, to get better data pulls.

2 MR. KRAMER: I'm sorry, Major, what
3 would be the -- I'm sorry, I can't pronounce your
4 last name. Is it Ervasti?

5 MAJ. ERVASTI: Yes, sir, Ervasti.

6 MR. KRAMER: What's the difference
7 between suspected of collateral misconduct and
8 accused of collateral misconduct? Sorry.

9 MAJ. ERVASTI: Yes, sir. So accused
10 of collateral misconduct, normally we think of an
11 accusation in the terms of a charge sheet or some
12 sort of formal accusation, where somebody is
13 being accused of something. Suspected would
14 include things like where a witness statement or
15 some other information came to the light of the
16 commander, where they could have been accused of
17 collateral misconduct but they weren't. And
18 that's where those numbers were not reflected in
19 the Marine Corps' or the Navy's responses.

20 MR. KRAMER: So they're treated
21 differently now?

22 MAJ. ERVASTI: No, sir, they're not

1 treated differently. They're just not captured
2 in the numbers.

3 I think across the Services it's
4 important to point out that when we analyze the
5 numbers, we're all talking about a very, very
6 small percentage of cases that we're dealing with
7 in the first place. So for the Marine Corps'
8 numbers, for example, 826 victims that we looked
9 at, ten of them received any sort of adverse
10 action.

11 Now, there were probably a higher
12 number included where there was some sort of
13 underage drinking or some sort of offense where
14 the command could have taken action but there was
15 no formal inquiry, no formal action taken. So we
16 define those as being not accused of collateral
17 misconduct because there was no accusation made.

18 MR. KRAMER: Thank you.

19 MS. LONG: And this is sort of maybe
20 going out a little bit towards the end but I know
21 that we're looking at this data for one reason
22 but do the Services find this data important for

1 you, your work handling sexual violence cases?
2 Is it useful data to know if there are victims
3 that are facing collateral -- consequences for
4 collateral misconduct and what's happening to
5 those cases, in terms of whether you feel you are
6 improving justice, safety, or is this something
7 that you just see as an exercise in people
8 overseeing what you're doing?

9 LTC KAZIN: So from our point of view,
10 it's useful in the sense, more of a policy sense,
11 of when there are concerns about retaliation
12 because retaliation is often linked to some sort
13 of adverse action, of whether or not there is
14 adverse action being taken against victims that
15 might dissuade them from reporting.

16 And so separating social retaliation
17 and social ostracism is one concept and looking
18 at retaliation as in actual adverse act by the
19 chain of command, knowing that overall the
20 consistency amongst the Services of a very low
21 percentage of actual adverse action helps us
22 understand that yes, there are valid concerns

1 about retaliation but the reality of the overall
2 percentages versus anecdotal stories tells a lot
3 of those anecdotal stories are in the minority,
4 in that one percent, and lets us focus more on
5 what is probably the greater issue, which is
6 social ostracism and how do we get after that to
7 make that not a factor in victims coming forward
8 to report.

9 CHAIR BASHFORD: Please go across and
10 everybody answer.

11 LT KRAEMER: Absolutely, ma'am. I
12 would agree with that as well. I think just
13 having the data by itself is important. I'm sort
14 of a proponent of that.

15 I also, as a victim advocate, too, I
16 know it's important from that perspective because
17 that's something that gets talked about as well,
18 if you report sex assault, you know what kind of
19 potential adverse consequences that might expose
20 you to.

21 So I'm actually very glad that we took
22 this time to get an answer on what the numbers

1 are on that.

2 MAJ. ERVASTI: Yes, I agree, as well,
3 that it was very useful. And one trend that we
4 hadn't been aware of before pulling these numbers
5 is, at least in our case, is 70 percent of the
6 victims who were -- received some sort of adverse
7 action of collateral misconduct had had previous
8 disciplinary action.

9 Say for example if a victim received
10 an adverse counseling for underage drinking or
11 some sort of offense, in 70 percent of the cases,
12 there was a prior incident preceding the sexual
13 assault. And that's important information for
14 commanders because, from the commander's
15 perspective, we can certainly see why it might be
16 reasonable for them to feel like they need to
17 take action but also understanding it from the
18 victim's perspective as well. That certainly
19 would be the toughest case for a victim to come
20 forward and report having had previous adverse
21 action in the past.

22 LT. COL. MALE: Yes, it's important

1 and we were glad to have the data. Certainly, we
2 are all concerned and want to understand that
3 there are circumstances that would dissuade a
4 victim from coming forward because of the
5 collateral circumstances.

6 LT MILLER: Yes, I think all the
7 highlights have been discussed, at this point.
8 The one thing I know it was valuable for the
9 Coast Guard for was looking at a one-size-fits-
10 all approach to collateral misconduct. But I
11 think that was guided more by what was perceived
12 instead of the actual numbers that we found
13 because I think, as everyone here has stated,
14 that the percentage of actual collateral
15 misconduct is very low in comparison to what I
16 think somebody who doesn't have access to these
17 numbers would look at and say is happening
18 because those are the cases that you do hear
19 about the most.

20 So this gives actual data to drive
21 policy decisions, as well as I think, as we've
22 mentioned here, it reinforces the unit

1 commander's discretion and to address issues
2 where you might have other good order and
3 discipline issues that need to be addressed and
4 really can only be addressed in a very specific,
5 fact-specific scenario.

6 MS. GARVIN: Chair, thank you.

7 When you all were looking at what
8 constituted collateral misconduct, was there a
9 time frame that you were looking at in the data
10 that you gave? Was it coincident with the
11 alleged sexual assault? And then combining with
12 that, because I assume for most of you the answer
13 was yes, do you agree that you see sometimes
14 conduct that comes downstream after a sexual
15 assault that might be misconduct that could be
16 causally related potentially to the sexual
17 assault that would not be captured in these
18 numbers but could result in adverse action --
19 self-soothing behavior or self-medication later?

20 LT MILLER: Yes. It's a yes. So we
21 often had to look at whether or not -- how it was
22 captured in the investigation report initially

1 because that was our first pull. We went and got
2 every case from the time period and identified
3 that victim and pulled that -- and pulled that
4 case.

5 In some of the cases we found, where
6 the collateral misconduct was what was the
7 impetus of the reporting. So we had an example
8 of someone came up hot for cocaine and they were
9 being processed for separation and adverse
10 action, as is done under the Service regulations.
11 And during that time period, during the
12 administration of the adverse action is when the
13 report came down.

14 So we considered that collateral
15 because it was really very close in time and it
16 could have been self-soothing or self-medicating
17 to deal with the trauma. So that was captured in
18 the overall numbers because we considered that to
19 be collateral. That involves a little bit of
20 judgment on our part because we could have just
21 said well, it didn't happen until -- it didn't
22 happen before, not after. So there's a little

1 bit of judgment there.

2 And in that particular case, the
3 sexual assault was used as essentially mitigating
4 evidence but they continued with the adverse
5 action because it had occurred prior to the
6 reporting. But the command used their discretion
7 and said okay, we understand now that there was a
8 sexual assault involved here and how that cocaine
9 use might be related to that and they suspended
10 all of the actions in it.

11 So at least the way the Army
12 approached it was is that we looked at anything
13 that was around that time period and then there
14 was a specific -- you know we had each unit go
15 through that case file and tell us hey, was this
16 related to the misconduct or related to the
17 sexual assault in any way, and we reported that
18 back in our numbers.

19 LT KRAEMER: In the Navy, I mean all
20 the collateral misconduct that we reported here
21 was actually -- did have some direct coincidence
22 with the sex assault. So it occurred, generally,

1 it was happening the same night, maybe just an
2 hour, or during the assault. But that's not to
3 say that we didn't also get, when we were
4 collecting the data, we got some reports made
5 from commands that didn't quite understand what
6 we were asking for but they gave us reports of
7 misconduct by the victim that happened afterwards
8 that clearly had a connection to the sex assault.
9 I mean you know the psychological trauma maybe
10 led them to become engaged in substance abuse.

11 So we did actually -- we have that
12 data but we didn't consider that to be collateral
13 misconduct for the task here.

14 MAJ. ERVASTI: Yes, I agree as well.
15 That would be incredibly useful data to have.
16 And again, it wasn't included in the Marine
17 Corps' numbers as well.

18 So we had a number of cases, for
19 example, where we double checked what the command
20 was sending us for numbers by pulling the records
21 ourselves. In doing that, we would go through
22 and see, for example, that the victim had been

1 NJP'd a month or two months after the report of
2 sexual assault. So we would go back and say hey,
3 double check this. Are you sure there was no
4 punishment for collateral misconduct? And the
5 command would come back usually saying yes, that
6 was a totally separate incident. So, it was not
7 collateral misconduct.

8 Now I do think having -- when we did
9 go through all of those records, it was almost
10 sad or heartbreaking to see the high percentage
11 of cases where the person is being separated a
12 year, six months after the report of sexual
13 assault for something like a mental health
14 condition or some sort of other underlying. So
15 that is an issue that we did bring up and have
16 addressed or at least decided that it warrants
17 further study.

18 I do think that a study that looked at
19 victims after they report a sexual assault, the
20 percentages of them that six months, a year, two
21 years down the road are separated or get out of
22 the Service and what the reasons are that they

1 separate would be very useful and beneficial.

2 LT. COL. MALE: Thank you for asking
3 the question, ma'am, because the temporal aspect
4 is I think a key distinction between the
5 definitions in the Services. The Air Force did
6 something slightly different than the Navy in
7 that we only included conduct that was happening
8 at the time of the allegation that wasn't already
9 known. Meaning, if it happened after, it was not
10 included and then when we further reviewed our
11 numbers, which were provided in supplemental --
12 by supplemental report, we also excluded that
13 misconduct that was already known.

14 Our initial numbers were any
15 misconduct that was happening, roughly, in the
16 same course of the investigation but we excluded
17 that misconduct that was already known because
18 our understanding was that this study was to
19 figure out if there's information that would
20 dissuade a victim from coming forward. If the
21 misconduct was already known, presumably, it
22 wouldn't dissuade a victim from coming forward.

1 So for example, the Air Force had one
2 victim who was already -- there was already a
3 command-directed investigation for the
4 misconduct. During the course of that
5 investigation, a sexual assault was alleged, very
6 similar to what the Army has described. But in
7 that case, we excluded it because our
8 understanding of the basis for the study was
9 different.

10 LT MILLER: Yes, ma'am, I think that
11 this would be of value but the Coast Guard did
12 something very similar or identical to what the
13 Air Force did, in that you had to have the sexual
14 assault first in time and then the misconduct
15 came next, so that the convening authority had to
16 have been aware of both the sexual assault
17 allegations as well as the misconduct for us to
18 count it in our numbers.

19 We did not include anyone but the
20 subsequent, what I would refer to as subsequent
21 misconduct, did come up in certain cases.
22 Similar I think was the substance abuse, where

1 you had somebody several years down the road,
2 either drugs or alcohol, and that was being
3 processed for discharge and, through that, it
4 came to light that there was a previous sexual
5 assault.

6 But I think, as well, it would be very
7 difficult in certain situations to understand you
8 know what subsequent misconduct would look like,
9 whether that is just a decline in performance or
10 somebody that does get Article 15 punishment down
11 the road, where what the actual causal link is to
12 the sexual assault. I think when you look at
13 separations, that might be easier but if you have
14 a high performer and then all of a sudden their
15 performance declines for them but they're still
16 an average performer, or even slightly below
17 average, you wouldn't be able to necessarily
18 capture that that was directly related to the
19 sexual assault like you would if there is the
20 substance abuse aspect or -- thank you.

21 DR. SPOHN: So one of the things that
22 we discovered when we looked at the data is that

1 the Services had a very different approach to
2 what was called false reports, with the Air Force
3 counting false reports as part of their data on
4 collateral misconduct and the other Services did
5 not.

6 So the question is: How did you
7 define a false report? Did it require
8 recantation by the victim or what was the -- what
9 were the criteria you would use to determine that
10 a report was false? And how did you make the
11 determination that a report was false?

12 And do you think it's appropriate to
13 consider issues of false report in collateral
14 misconduct data?

15 LT MILLER: The Coast Guard, looking
16 at our numbers, there were two incidents of false
17 reports. One was actually from a third party
18 that witnessed the sex act that was then
19 discovered to be consensual during the course of
20 investigation. And then there was another one
21 where an alleged victim alleged sexual assault
22 and it was determined that it was not a sexual

1 assault. Both of those numbers were included in
2 our numbers, however, there was no adverse action
3 taken for the false report, one, obviously,
4 because it was a third party that perceived
5 something that wasn't actually happening and the
6 other instance, there just was no action taken.
7 But both of those numbers were included in our
8 collateral misconduct.

9 LT. COL. MALE: So it's difficult to
10 know. I think what would be useful for us to
11 know is whether a false allegation should or
12 should not be included. It's logical that if the
13 basis of the sexual assault allegation is found
14 to be false, it wouldn't be collateral
15 misconduct. So a recommendation would be to
16 exclude that but certainly, goes back to the
17 initial questions that uniformity in definitions
18 would be useful.

19 At the Headquarters level, we didn't
20 make a determination or define false allegation.
21 We looked to whether there were circumstances or
22 an allegation that there was a false allegation.

1 For the Air Force, there were five of those
2 cases. In two of the cases, there were adverse
3 action given. So that would have been at the
4 command and the local servicing legal office
5 whether they would have made that determination.
6 So we left it at that.

7 We had additional cases where there
8 were other false official statements that were
9 not related to false allegations. We categorized
10 those differently but we didn't make an internal
11 definition of false allegation simply if there
12 was a false official statement related to the
13 sexual assault happening at all.

14 We also didn't include a similar but
15 different question where there was a cross-claim
16 of sexual assault. Those were a challenge. We
17 had ten of those cases where there's an
18 allegation of sexual assault and then the
19 victim's collateral misconduct was that no, you
20 sexually assaulted me -- or the accused, rather,
21 said no, you sexually assaulted me. So we had a
22 cross-claim. We found it challenging to count

1 those. So we counted that as false official
2 statement, not false allegation, whether it was a
3 collateral -- I'm sorry -- we counted that as a
4 sexual assault that was a cross-claim.

5 So we found those very challenging all
6 relating to that question of false allegation.

7 MAJ. ERVASTI: And we did it the same
8 way. So we did not attempt to get into the
9 underlying merits of any one allegation.

10 We defined a false allegation as the
11 command had taken action against that person, so
12 either an NJP or a courts-martial for the false
13 official statement.

14 We did have other cases. So there
15 were five cases where a person was punished for
16 making a false allegation and that was not
17 included in the collateral misconduct report.

18 We did have other cases in the numbers
19 that were included, where the timing and the
20 nature of the way the incident was reported, led
21 the commander to believe that taking action
22 against that person was, nonetheless,

1 appropriate. For example, cases where say a
2 person is pulled over for a DUI and then a month
3 later at the NJP says you know I was driving
4 intoxicated to flee a sexual assault that
5 happened at an unknown location that I am not
6 going to provide any statement to NCIS about.
7 Cases like that, again, our position is we're not
8 going to define that as false or true. We're not
9 going to look at the merits of the allegation.
10 We will support that victim in whatever way we
11 can but the commander may, nonetheless, feel that
12 it is appropriate to take disciplinary action
13 against that person for the offense that was
14 discovered by the command.

15 LT KRAEMER: So we looked -- we asked
16 NCIS for data. So out of those total number of
17 sex assault investigations that they handed us,
18 they had a certain number of those where that
19 investigation had sort of transitioned into an
20 investigation for either perjury or false
21 official statement against the victim. And then
22 they had a case synopsis for each of those.

1 So then we took a look at a number --
2 five, I believe, in total. We looked at those
3 and determined sort of what exactly were they
4 investigating. Does this look like a false
5 allegation of sex assault or was it just a false
6 official statement that happened during the
7 investigation?

8 If it was they determined that the
9 false official statement or the perjury was
10 actually tied to the allegation itself, we
11 considered that to be a false report of sex
12 assault. And then we looked at the case outcome
13 and actually reached back out to the commands and
14 asked them what adverse action did you take in
15 those cases. We didn't consider that to be
16 collateral misconduct. We just decided to
17 include that in the report as an additional data
18 point.

19 LTC KAZIN: So when we put our
20 guidance out to the field on how to define
21 collateral misconduct, we actually cited to the
22 DoDI, to DoDI 6495.02, because they've got a

1 definition that is broadly defined as a victim
2 misconduct that might be in time, place, or
3 circumstances associated with the victim's sexual
4 assault incident.

5 And so false reporting is one of those
6 concepts that is it a true/false report, as in
7 someone is saying that it's not true, or is it
8 something not sufficient evidence? And so those
9 are two different things.

10 We identified eight cases out of the
11 154, where there was someone that received
12 misconduct that we identified as a false report.

13 Typically, in CID reports, when we
14 close out a case, there is a distinction between
15 when we're closing it for insufficient evidence,
16 no probable cause, there is just not enough
17 evidence versus a false report.

18 So I would go back -- I would have to
19 go back and check those eight cases to see if
20 that's how they were classified in the report
21 themselves. But they were in the universe of
22 cases that we had pulled for that time period

1 and, because some would consider an allegation of
2 false reporting to be collateral to the victim
3 coming forward and making an allegation, I think
4 that trying to get at the intent of seeing our
5 people who are reporting sexual assaults somehow
6 being punished and they're saying let's not,
7 getting to that kind of concept of how many of
8 those cases are out there. How many victims are
9 being accused of making a false report? It is a
10 useful data point and it seems to be a very low
11 number.

12 MS. GARVIN: Yes. She asked me if I
13 could take over.

14 MR. KRAMER: Thank you, Chair.

15 I have a question. I'm curious and it
16 might make a difference to the victims. How does
17 collateral misconduct come to light? And I can
18 think of three ways, there may be more: the
19 victim self-reports it and says you should know
20 that something happened or later on tells; or the
21 investigators uncover it somehow on their own; or
22 the accused makes an allegation or says something

1 about misconduct.

2 So I'm curious about how the
3 misconduct comes to light, generally, or maybe
4 it's just all different ways.

5 LTC KAZIN: So many different ways
6 they come to light. And if you look at the
7 highest percentage of the ones that we saw were
8 like underage drinking. Well, that's going to
9 come out to light very early in the
10 investigation, particularly if it's an alcohol-
11 facilitated sexual assault. You're going to know
12 how old everyone is and you're going to know
13 everyone was drinking. So it doesn't really
14 require self-reporting.

15 Sometimes it comes to light during the
16 disciplinary proceedings. So, someone is being
17 disciplined for fraternization and, during that
18 disciplinary proceeding, they find they make an
19 allegation during it of sexual assault.

20 Sometimes it comes from third parties. It's just
21 it can come -- which is why we threw a fairly
22 broad net on the term accused.

1 And I agree, maybe suspected might
2 have been better but the word accused has a very
3 specific meaning in the code but we all know that
4 accused in normal parlance just means that
5 basically someone is telling you that you did
6 something.

7 So because of the broad ways in which
8 it can be reported, we tried to cast as broad a
9 net as possible.

10 LT KRAEMER: I would agree with that.
11 We didn't really look at how the collateral
12 misconduct in each individual case came to light.
13 We sort of, just for every single sex assault
14 case, we contacted the command and just said hey,
15 was there a collateral misconduct in this case;
16 did you take adverse action? We didn't ask them
17 how they learned about it, was it through the
18 investigation, or some sort of independent
19 command action.

20 MAJ. ERVASTI: And we approach it the
21 same way. So it could have come to light in a
22 number of different ways and we didn't break out

1 by and specify which way the command became aware
2 of this collateral misconduct, other than to say,
3 like we had discussed earlier, in about 70
4 percent of the time, the allegation of the sexual
5 assault preceded the collateral misconduct. So
6 it's those other 30 percent of times where the
7 commander is already aware or tracking some sort
8 of issue with misconduct and then the sexual
9 assault allegation was made after that. So
10 that's really the only way that we broke out that
11 distinction.

12 LT. COL. MALE: I have nothing to add
13 as to how collateral misconduct comes to light.
14 And only just to emphasize an earlier point that
15 we only examined it in light of the temporal
16 aspect. So, just taking out those things that
17 were already known that came to light as a
18 command-directed investigation.

19 LT MILLER: I don't have anything else
20 to add. We didn't look or break out how that
21 report of collateral misconduct came about.

22 CHAIR BASHFORD: Since the number of

1 people that actually receive adverse consequences
2 seems to be quite low across the Services, that
3 would mean that the bulk of people don't receive
4 adverse consequences.

5 Are your Services tracking -- tracking
6 that in some way? Because I would think somebody
7 would then, if they are part of the whatever low
8 percent that received an adverse consequence
9 would say well, but this person also did underage
10 drinking and they got a pass; this is somehow
11 retaliation.

12 Let me start with you, Colonel Kazin.
13 Do you track that?

14 LTC KAZIN: We don't track it.
15 There's certainly guidance in our regulations
16 that commanders need to be cognizant of taking
17 action against the person who has alleged victim
18 of sexual assault. I believe it's in Army
19 Regulation 600-20 that often encourages to wait
20 until after all the other proceedings are done
21 with the sexual assault investigation and
22 disposition of those proceedings before

1 considering whether to take action.

2 It's also, by DoD requirement, held up
3 to the special courts-martial convening level.
4 So we don't have company or even battalion
5 commanders that are able to simply take action
6 without going through some sort of higher review
7 process.

8 So we haven't been tracking. A lot of
9 times it doesn't happen because it's an exercise
10 of prosecutorial judgment by what the commander,
11 in association with what their judge advocate is
12 saying. I see the larger issue here. In this
13 particular case, I don't think any additional
14 action is necessary. And that's where, again, we
15 trust those special courts-martial level
16 commanders to make that decision.

17 So we haven't been tracking it,
18 outside of this right here, realizing that
19 there's a very low percentage really of even
20 those cases where there's an accusation. I mean
21 of the 1200 cases that the Army identified,
22 there's only 154 with the broadest net possible

1 identified as accused of collateral misconduct.
2 If you spread that across the size of our force,
3 the Army being as large as and as spread out as
4 it is, that's a very, very low percentage of even
5 an accusation of collateral misconduct.

6 So it's not something that we've
7 tracked right now but it's something that we're
8 aware of and that's why I think that the
9 withholding policy makes a lot of sense.

10 LT KRAEMER: So I concur with all of
11 that. First, it's not something that we track,
12 whether -- at least not now, if there's
13 collateral misconduct sort of in the fact pattern
14 of a particular case and whether a commander
15 decides not to take action. We don't currently
16 track that.

17 As far as you know tracking where
18 adverse action is taken, obviously, now that
19 there's an ongoing requirement to record that, we
20 will be tracking that. In the Navy, as well, it
21 was a very low number of cases in which it even
22 happened. So it's not a significant thing that

1 happens.

2 MAJ. ERVASTI: I agree with everything
3 that was said earlier. And the only thing that
4 I'll add is the very low number of cases that we
5 see would not include the informal type actions
6 that might be taken by a squad leader or some
7 sort of other leader. Say for example,
8 informally counseling somebody or canceling their
9 weekend plans as a response to collateral
10 misconduct.

11 So it may be the case that victims
12 might have a different perspective on our numbers
13 than are reported because they might feel like
14 adverse action was taken against them for
15 collateral misconduct but it was something that
16 was at a lower level that was not documented
17 anywhere.

18 LT. COL. MALE: I would echo what's
19 already been said by the other Services and also
20 add, though, that even though as a policy there's
21 a very low incidence of collateral misconduct and
22 we tend to defer that to the end, at least

1 anecdotally, it's fair to say that we hear that
2 often victims want the collateral misconduct
3 addressed so that that's not an issue at trial.

4 So that's better addressed to one of
5 my colleagues in the trial division but that a
6 victim would want, say underage drinking, go
7 ahead and receive the punishment so that that's
8 not an issue and doesn't cast any doubt on the
9 accusation of sexual assault.

10 We don't formally track but, as a part
11 of the 140a uniform standards, we are adding
12 victim information into our case management
13 system. And so obviously, going forward for
14 purposes of this biennial report, we will track
15 and also we will be adding into our system
16 information about victims because, of course, all
17 military justice systems are accused-based at
18 this point and we're not tracking victim data but
19 we are interested to know both -- we have victim
20 information added officially and then any related
21 cases in the case notes.

22 So that is something that we're doing

1 as a result of the 140a Initiative.

2 LT MILLER: I think everything has
3 been hit. We are -- the Coast Guard is not
4 tracking in any type of real time, other than for
5 this report, collateral misconduct. And
6 currently, there's no specific guidance to
7 commanders. So I think that there is maybe some
8 ambiguity about what discretion does exist for
9 commanders to punish either for false reports or
10 collateral misconduct when there is a sexual
11 assault allegation.

12 MS. GARVIN: So going back to the very
13 start with you, Lieutenant Colonel Kazin, you had
14 said -- and thank you all for going down the
15 line, even when you're kind of saying I echo. It
16 really helps us understand. We don't assume one
17 Service agrees. So thank you for that.

18 Lieutenant Colonel, right at the
19 beginning, you had mentioned that you all had
20 tried to come up, definitionally, with some
21 common ground. And one thing that you noted was
22 that there was some differences of opinion of

1 those and like some cultural differences. And
2 then you said, for example, adverse. You gave
3 that as the example of maybe cultural differences
4 of definition.

5 And I just wondered if you could maybe
6 tell us just a little bit more what you meant by
7 that specific example.

8 LTC KAZIN: Sure. So almost everyone
9 agrees that Article 15 is adverse, and that an
10 administrative separation is adverse, or a
11 courts-martial is adverse. But in terms of a
12 reprimand --

13 UNIDENTIFIED SPEAKER: Microphone.

14 LTC KAZIN: I apologize.

15 So everyone agrees on certain
16 definitions of adverse Article 15, courts-
17 martial, administrative separation proceedings.
18 But things like non-punitive letters of reprimand
19 that are filed or not filed, so if you don't file
20 it, it's not considered adverse under certain
21 Army regulation definitions; it's the equivalent
22 of a counseling statement. But a soldier on the

1 ground considers it to be adverse to them if they
2 get a negative counseling statement or if they
3 get a negative comment in an evaluation. And we
4 consider negative formal evaluations to be
5 adverse information in their personnel files.

6 So that's where there might be some
7 differences because some things are handled at
8 the lowest level. It's what we try to do. It's
9 not adverse under any systems definition but it
10 might be perceived as adverse action against a
11 victim.

12 CHAIR BASHFORD: I think we're at our
13 time. I want to thank you all for coming. And
14 we're going to hold you, two years from now,
15 you're going to use the same time frame for the
16 same group of sexual offense, and you're going to
17 use all the same definitions. Correct?

18 Okay, great. Thank you so much.

19 And we'll now move on to our next
20 Panel. And I believe Judge Grimm has joined us
21 on the line. Is that correct? Judge Grimm, are
22 you on the line?

1 Okay, thank you for joining us this
2 morning. We're going to be looking at the
3 perspectives of Services' Military Justice
4 Division Chiefs regarding conviction and
5 acquittal rates, case adjudication process, and
6 victim declination.

7 Thank you, Captain Tasikas, Colonel
8 Pitvorec, Lieutenant Colonel King, Captain
9 Monahan, and you've got a lot of light on that
10 one, Colonel Pflaum. Thank you.

11 Meghan -- Ms. Peters.

12 MS. PETERS: Good morning. My name is
13 Meghan Peters. For those of you who don't know
14 me, I'm an attorney-advisor on the DAC-IPAD
15 Staff. I'm just going to lead off with a
16 question. The reference is the written responses
17 we received from the Services in response to, I
18 guess, a request for information that the
19 committee sent previously. That's just for
20 everyone's information.

21 And at the Chair's request, I will
22 start off with the first question, which begins

1 for Article 32 preliminary hearings. Some
2 Members of the committee have reviewed sexual
3 assault case files indicating that the
4 preliminary hearing lasted roughly 15 minutes
5 because the Government called no witnesses. In
6 those cases, trial counsel specifically provided
7 the hearing officer with select documents from
8 the investigative file for review.

9 Does the Article 32 Statute and its
10 implementing rule, Rule for Courts-Martial 405,
11 as currently drafted, provide an effective check
12 against charges for which there is no probable
13 cause?

14 CHAIR BASHFORD: Why don't we start
15 with you, Colonel Pflaum?

16 COL PFLAUM: Sure. So I think it's
17 safe to say that over the past several years, the
18 procedural requirements of the Article 32 have
19 diminished greatly. And one significant change
20 is the statutory policy or the statutory change
21 to eliminate the requirement for a victim to
22 testify and as a result, in many cases, that's

1 the Government's most significant evidence.

2 And in those cases where a victim
3 chooses not to testify, the Government is
4 basically making its case based on the paper
5 file.

6 And so I will say that those changes,
7 over time, have reduced the procedural
8 requirements of the Article 32 but I still think
9 that it is a valuable check. First off, there is
10 an experienced Judge Advocate looking at the case
11 and at the evidence. There is also the
12 opportunity for the defense to present evidence
13 at the case. And I, as a former Staff Judge
14 Advocate, have seen, even in those diminished
15 proceedings, where an Article 32 officer will
16 make notes or make findings that are relevant for
17 me to consider and highlight to the convening
18 authority when I am providing my advice on
19 disposition.

20 So I think it has been -- was built
21 into the system for a reason and I still think
22 that reason exists currently.

1 CAPT MONAHAN: And I would agree with
2 Colonel Pflaum but I would emphasize two points.
3 First, that the Article 32, in its current form,
4 still features a neutral and detached preliminary
5 hearing officer providing advice to the convening
6 authority, the Staff Judge Advocate, making a
7 determination or recommendation as to probable
8 cause. That is still value added.

9 And additionally under the current
10 rules, R.C.M. 405(k) does give the defense, the
11 victim, and the Government the opportunity to
12 provide matters for the SJA, the convening
13 authority, to consider that were not presented at
14 the hearing itself. So there is an additional
15 avenue in which information that is important to
16 the determination of probable cause to be brought
17 to the decision-maker who is the convening
18 authority.

19 LT. COL. KING: I agree the Article 32
20 still performs a valid function. I think one
21 thing that's not captured in the time lines that
22 were mentioned, the 15-minute hearing, is that

1 these preliminary hearing officers are also
2 taking hours of video interviews with victims,
3 and other witnesses, or parties, and sometimes
4 even including the accused, where there is an
5 interrogation that's included.

6 So I think it's important when you put
7 the 32 preliminary hearing report into context
8 that it usually involves an interview with the
9 victim, a detailed interview with the victim,
10 that is usually an hour or two long that covers a
11 number of issues. So that's just an important
12 part that needs to be included in the analysis of
13 the preliminary hearing.

14 COL. PITVOREC: I will probably sound
15 like a broken record because I'm going to echo
16 many of the sentiments.

17 I do think that Lieutenant Colonel
18 King points out a really good point is that while
19 the hearing itself seems somewhat abbreviated,
20 that when you go back and look at the evidence
21 that is being reviewed and the time spent doing
22 that, sometimes you know victim interviews can be

1 four or five hours long, and they are reviewing
2 every bit of those, and they are all videotaped
3 now because the Military Criminal Investigation
4 Offices are videotaping both victim and suspect
5 interviews.

6 And so all of that stuff is being
7 provided and it's being reviewed by that
8 investigating officer. So while the content of
9 the hearing or the actual hearing may be very
10 abbreviated, I think that going through that
11 thorough investigation would take -- could take
12 hours and hours.

13 The other thing I would point out is
14 that oftentimes, I know the other Services do
15 this as well but, in the Air Force, particularly
16 with sexual assault cases or penetrative sexual
17 offense cases, we have sitting Military judges
18 that will be the preliminary hearing officer. So
19 not only are they neutral and detached, but they
20 are very experienced Military judges who have
21 been through the Military Judges Course, who
22 understand the probable cause standard extremely

1 well, who are able to then make a recommendation
2 to the Staff Judge Advocate that's well thought
3 out and well-reasoned.

4 CAPT TASIKAS: I guess my view is that
5 the Article 32 has transformed itself from what
6 it originally had intended. And so in the
7 earlier intent, I think the Article 32 was more
8 of a tool for the defense.

9 Yes, the IO was there to look at all
10 available facts and evidence and make an
11 impartial determination but it was a discovery
12 tool for the defense. And also the defense could
13 put on a very, very deliberate defense,
14 mitigation, and extenuating evidence as well.
15 That transformed in 2014, as we all know, and now
16 it's changed again a little bit in 2019.

17 So from that standpoint, the original
18 purpose of Article 32 has changed. It's a
19 probable cause hearing. For those purposes,
20 alone, I think it's fine. Does it perfect the
21 Government's case? I don't think that's the
22 intent of the Article 32. It's put on as what is

1 necessary to get to PC.

2 Talking to some SJAs in the field,
3 they are frustrated, as some of it is just a
4 paper review and they do last as little as 15
5 minutes, where they just hand in, literally, the
6 record of investigation. So from that
7 standpoint, I don't think it's very helpful.

8 As far as the Government is concerned,
9 it gives some notice to the defense.

10 So while there may be some other
11 features that the other Services had talked
12 about, I don't want to not highlight that there
13 is some level of a paper shuffle. And I don't
14 know how much more informed the convening
15 authority and SJA are because of it because they
16 can read the ROI as well.

17 CHAIR BASHFORD: Is the entire
18 investigative file turned in? Are portions of it
19 turned in? Is there a summary of it given to the
20 32 officer?

21 CAPT TASIKAS: So I just talked to an
22 SJA yesterday about a particular case and it was

1 not adult sexual assault. It was child sexual
2 assault. And the Government put in a limited
3 amount of the ROI and, surprisingly enough, the
4 defense wanted the entire ROI submitted.

5 So I would say it depends on the
6 strategy and notion of the trial counsel itself.
7 So I think it's case-by-case.

8 I'm speculating, and I don't like to
9 speculate, I would assume that most of the time
10 it's just the full ROI but I couldn't be certain
11 for that.

12 COL. PITVOREC: For the Air Force I
13 know that we try to focus on the actual evidence
14 that's contained within the ROI. So we would
15 point to more of like the videotapes that were
16 done from the MCIO, as well as any statements
17 that are contained by witnesses that are not
18 present to testify.

19 But for us, the Office of Special
20 Investigations, their thoughts and feelings, and
21 the stuff that gets contained at the beginning of
22 the ROI, that does not go before the

1 investigating officer because I don't believe
2 that's relevant.

3 LT. COL. KING: A similar response for
4 the Marine Corps. In some instances, you may
5 have an entire ROI that's presented to the
6 Article 32 officer by the Government. But in
7 some instances, we may look at a complete cell
8 phone extraction that includes every text message
9 that the accused sent for a one-year period. We
10 wouldn't provide that entire enclosure to the
11 investigation. We would pull an excerpt from it.

12 CAPT MONAHAN: And again for the Navy,
13 it's case-dependent, similar to what the other
14 Services have stated.

15 LT. COL. KING: And similarly with the
16 Army, the Government puts on the evidence that
17 they believe is relevant and helpful to obtain
18 the probable cause. And there could be other
19 parts brought in by other parties, to echo what
20 the other Services said, but again, the
21 Government typically starts with those key
22 relevant pieces of evidence.

1 HON. BRISBOIS: So the Section
2 832(a)(2)(B), whether or not there is probable
3 cause to believe that the accused committed the
4 offense charged, that's the general provisions,
5 giving the authority to the investigating
6 officer. In some cases it's a Judge Advocate.
7 Sometimes it's not a Judge Advocate with Judge
8 Advocate advice. Sometimes it's a military judge
9 or a military magistrate.

10 Regardless of the process, if there's
11 a finding that there is not probable cause, that
12 does not result in a dismissal without prejudice,
13 does it?

14 COL PFLAUM: No, it does not. That's,
15 in essence, a recommendation that would then go
16 to the next level of convening authority,
17 whichever convening authority appointed that
18 investigation for their determination to the
19 point that it's not binding on.

20 HON. BRISBOIS: So that's consistent
21 throughout the Services?

22 COL. PITVOREC: That's correct.

1 HON. BRISBOIS: So it's really not a
2 true preliminary hearing in the sense of my
3 court, my federal courts or even the state
4 courts, who have omnibus hearings or preliminary
5 hearings, where the if the Government fails to
6 show a probable cause, according to the judicial
7 officer, the neutral detached hearing officer,
8 the case is dismissed without prejudice. It can
9 be brought back and renewed if further
10 investigation gives a new basis but that's the
11 end of the case. Right?

12 CAPT MONAHAN: So sir, in our system,
13 that check is held at the Staff Judge Advocate
14 level under Article 34 of the UCMJ. The Staff
15 Judge Advocate of the convening authority would
16 receive the preliminary hearing officer's report
17 and if he or she determined there was no probable
18 cause, that would be determinative.

19 HON. BRISBOIS: Is that consistent
20 throughout the Services?

21 LT. COL. KING: That's correct, sir.

22 COL. PITVOREC: That's correct for the

1 Air Force, absolutely.

2 CAPT TASIKAS: As well as the Coast
3 Guard.

4 HON. BRISBOIS: And the Staff Judge
5 Advocate, however, though, is in the role of the
6 legal advisor to the convening authority. So the
7 Staff Judge Advocate is not, in a true sense, a
8 neutral detached, as a magistrate judge would be
9 or as a military -- because the military judicial
10 system is a stovepipe standalone system, which
11 their decisions, and their recommendations, or
12 rulings cannot be adversely impacted on their
13 careers. Correct? There's the independence
14 built into the system.

15 CAPT TASIKAS: I think, if I may, the
16 original idea I think of Article 32 and Article
17 34 was to ensure there weren't baseless charges
18 that went to courts-martial. And then I'm
19 talking again pre-2014. So taken together, those
20 vehicles were to ensure, again, baseless charges
21 or maybe like trivial charges that shouldn't see
22 the inside of a general courts-martial anyways,

1 maybe a summary or NJP, those kind of protections
2 were -- and so some of the features of the old
3 Article 32 have carried over.

4 For example, the waiver still remains
5 with the accused. So if the accused says I waive
6 my right to an Article 32, of course that doesn't
7 have to be accepted by the convening authority,
8 but if they do that and then it's not required,
9 then you don't have a PC determination under
10 Article 32. It still resides with the convening
11 authorities and the advice of the SJA.

12 The SJA's Article 34 advice is just to
13 say hey, we have jurisdiction and there's
14 probable cause; I believe these offenses were
15 committed, and specification alleging the facts
16 just to ensure the very basic aspects of a case
17 go forward.

18 But the other features over
19 conviction, or what form, and all those kinds of
20 things, those are still reasonable determinations
21 in the discretion of the convening authority with
22 the advice of the SJA. It's just they're

1 different than the civilian context.

2 And so we tried to make an analysis to
3 an analogize Article 32 with the civilian sector.
4 I just think it's a different creature
5 altogether, at least originally designed, and now
6 it's kind of morphed into something else. And I
7 don't think making a direct comparison is
8 helpful.

9 COL. PITVOREC: I would agree, and I'd add
10 a couple of points.

11 As a staff judge advocate I really
12 tried very hard to evaluate the evidence that was
13 presented at the Article 32 by the preliminary
14 hearing officer. I tried to take a good fresh
15 eyes look at what was going on.

16 As a staff judge advocate you are not,
17 you are not personally involved in the court, so
18 you are trying to pull yourself back and actually
19 get a good perspective on not only what's going
20 on in this particular case, but you should be
21 reading into what's right for the good order and
22 discipline of the unit that you are serving.

1 So, I think a staff judge advocate --
2 and sometimes that goes awry. Sometimes people
3 get too close -- but the goal is really for the
4 staff judge advocate, as they're advising a
5 neutral and detached convening authority, to sit
6 down and try to remain neutral and detached as
7 well.

8 The other part of that is I know for
9 the Air Force, and I believe for the other
10 services, it's always a judge advocate who does
11 an Article 32. It's always a judge advocate
12 that's a preliminary hearing officer. And we try
13 really hard to make sure that they have the right
14 training and the right experience before becoming
15 a preliminary hearing officer. But that's not
16 always possible, given time lines and what's
17 going on.

18 The staff judge advocate is not
19 limited to the four corners of the document that
20 is presented by the preliminary hearing officer.
21 As you previously mentioned, the defense counsel,
22 the trial counsel, and the SVC, or VLC for the

1 other services, the victim's counsel can provide
2 additional information to the staff judge
3 advocate that's going to the convening authority.

4 So, while the neutral and detached
5 preliminary hearing officer gets evidence and can
6 make a recommendation, the staff judge advocate
7 is not limited to only that information that goes
8 to the convening authority, and determining
9 whether or not there's probable cause.

10 LT. COL. KING: Sir, the Marine Corps
11 agrees with the position that the 32 preliminary
12 hearing officers probable cause determinations
13 should not be a binding decision. And it's
14 important to look at both in a historical context
15 in the role of the commander and the role of the
16 SJA in that process.

17 The commanding -- the convening
18 authority shouldn't abdicate their role in the
19 process to the preliminary hearing officer. The
20 SJA does have essentially the veto power with
21 that probable cause determination. And they are
22 in a position to look at the entire evidence for

1 a particular case, and also give the commander an
2 informed decision.

3 And that's really what this process is
4 designed to do. The Article 32 process is to
5 help give the commander an informed decision on
6 the evidence, and then the SJA also assists with
7 that informed decision process.

8 I think the historical context is
9 important because you look at the qualifications
10 for the actual preliminary hearing officer. And
11 in most circumstances, your staff judge advocate
12 is going to be a more experienced judge advocate
13 than the preliminary hearing officer. There are
14 some instances where military judges have served
15 as preliminary hearing officers, but that's not a
16 requirement. And in that circumstance you may
17 have a preliminary hearing officer that has less
18 experience than the SJA, who is looking at the
19 same evidence but is also using their experience
20 to provide that commander with an informed
21 decision.

22 CAPT MONAHAN: I echo that. But I

1 would also say there are checks in place that if
2 either the convening authority of the staff judge
3 advocate demonstrates less than official interest
4 in the case, that individual can be disqualified
5 from further participation in the case.

6 So, it is a complex system of checks
7 and balances. And I would agree that although
8 different, the federal civilian system and the
9 military system are different, both have pathways
10 to a binding determination of no probable cause
11 there.

12 COL PFLAUM: And I will echo a lot of,
13 a lot of the prior comments that my colleagues
14 made in this. But the way, sir, I understood
15 your question to start with that, that the staff
16 judge advocate isn't somehow neutral and
17 detached, they are, in essence, part of the
18 prosecution. And it is true that the prosecution
19 arm falls under supervision of the staff judge
20 advocate.

21 But I think that the staff judge
22 advocate is overall responsible for providing the

1 convening authority the advice on the military
2 justice system. And they have an interest, and
3 they have an obligation to advise that convening
4 authority on those interests of discipline that
5 might warrant prosecution, as well as justice and
6 making sure that frivolous charges or baseless
7 charges don't go to trial.

8 And so, I think the 32 informs that
9 ultimate advice that that experienced staff judge
10 advocate provides to that convening authority in
11 making a decision to refer a case to trial.

12 And, again, the 34 advice, the advice
13 under Article 34, 10 U.S.C. 834, is not just
14 whether there's probable cause. That is, in
15 essence, a low subjective standard of whether
16 probable cause exists. The value and the key
17 portion of the staff judge advocate's
18 recommendation under Article 34 is the
19 recommendation as to disposition. And so that's
20 where the SJA is saying, yes, there's probable --
21 I mean, if there's a find by the staff judge
22 advocate that there's no probable cause, that's

1 binding on the convening authority; the case
2 can't proceed forward.

3 However, it's the recommendation where
4 the SJA is advising that convening authority
5 based on that experience, based on the full
6 review of the case file in terms of what's the
7 right disposition, whether it's referral to a
8 court martial, or taking some other action.

9 HON. BRISBOIS: Thank you.

10 CHAIR BASHFORD: We're going to be
11 asking some questions in a little bit about
12 whether the 32 officer's finding of no probable
13 cause should be binding. But I noted that in
14 your introductory remarks these 32 judges were
15 the most experienced, highly trained, very
16 experienced military, experienced, had the right
17 training, neutral and experienced until we start
18 talking about whether their recommendation should
19 be binding. And then maybe not so much.

20 (Laughter.)

21 CHAIR BASHFORD: So, my question for
22 you before we get to that is if a finding of no

1 probable cause isn't binding, and if it's really
2 kind of a paper chase at this point, because I
3 believe very few complainants actually elect to
4 testify at the Article 32 these days, kind of
5 what's the point? Like, why not just, then just
6 go straight to the staff judge advocate?

7 If he's got access to more
8 information, like, why are we even, why are we
9 even bothering with having these very experienced
10 people taken away from their other duties to look
11 at hours and hours of video, and read through
12 hundreds of pages of paper.

13 Let me start with you, Captain
14 Tasikas.

15 CAPT TASIKAS: Well, it's a good
16 question. And, again, I think I always like to
17 go back again to why the Article 32 came into
18 existence in the first place. And it was a check
19 of sorts against the awesome plenary authority of
20 the convening authority. Because it was not
21 necessarily open, but open. The accused had a
22 right to counsel, to cross-examine, to present

1 evidence, to even lay out a defense,
2 constitutional defense, mitigation, and
3 affirmative defenses.

4 And that was quite useful for the
5 convening authority because if there was a case
6 on the margins, they would want to have an
7 Article 32 to flesh those out. And maybe a case
8 would go away, if you will, because there wasn't
9 a strong inclination.

10 Now, with a probable cause
11 determination it's less helpful in that regard.
12 However, I think it does give some level of
13 protection to the accused again on those very
14 basic tenets of what they're looking for, the
15 scope of their current Article 32.

16 So, issues of, again, is a
17 specification actually a crime, is there
18 jurisdiction? You know, lately retirees have
19 become an issue of whether or not those are
20 jurisdictional issues. So there is just again a
21 floor that they're looking at, just a very basic
22 to ensure that a case going to the convening

1 authority has the very basic notions of
2 jurisdictional and other substantive issues
3 before they go forward with a crime.

4 I don't think it's there, again, to
5 perfect a case for the government or for
6 prosecution, it's just I think it's a very narrow
7 protection, again, for the accused. So, in that
8 regard it's helpful.

9 If we're thinking as being more broad
10 or more expansive, then I would argue going back
11 to the pre-2014 Article 32, which was very
12 informative for both the defense and for the
13 prosecution and convening authority.

14 COL. PITVOREC: So, I believe that the
15 preliminary hearing officer does provide fresh
16 eyes on a case. I think they can take a look at
17 the form of the charges. They can recommend,
18 particularly in penetrative sexual offenses, the
19 greater offense, whether or not there's
20 sufficient force, whether or not there's not
21 force, whether it should be a lesser offense.

22 And I do believe that it still

1 provides the defense a forum to be able to
2 provide evidence. I think that is the unique
3 aspect of an Article 32 is that the defense has
4 the ability to provide evidence to the
5 preliminary hearing officer and, therefore,
6 really directly to the convening authority to get
7 whatever evidence that they deem is relevant and
8 necessary in making a recommendation as to
9 disposition of charges before the person who's
10 actually making that recommendation.

11 So, I do believe that it still has a
12 value to our system.

13 I will agree, however, that we've got
14 a lot more information in a prior iteration of
15 the Article 32. It was much more comprehensive.
16 We had a better idea what disposition of charges,
17 what the charges should look like, particularly
18 in an era where the charges themselves have
19 changed dramatically over the course of the last
20 probably I think 12 or 13 years. We've had many,
21 many changes to Article 120 over the course of
22 that time frame.

1 And so, having someone with fresh eyes
2 look at it and make sure that you are looking at
3 the right charge time frame for that particular
4 iteration of Article 120 is important to look at.

5 LT. COL. KING: I agree. It does
6 still have an important procedural function. The
7 fresh eyes description is a good one.

8 I think that in addition to the points
9 already mentioned, you have the ability to
10 conduct a detailed charging analysis of this
11 process. And focusing back on the informed
12 decision for the commander, and providing the
13 commander with an informed decision, the Article
14 32 also provides the staff judge advocate with a
15 more informed decision. It provides a forum for
16 the accused to present challenges to a particular
17 charging theory, if there are charges.

18 So, the accused may not actually
19 present a case, or testify, or call witnesses,
20 but it does give the defense the opportunity to
21 present challenges to the charges themselves.
22 And it would enable the SJA to also have a more

1 informed decision.

2 There certainly can be some
3 improvements, procedurally. In our written
4 comments we mentioned that the ideal scenario
5 would be to have a military judge serve as a
6 preliminary hearing officer. We have not
7 advocated for that military judge's
8 recommendation to be binding.

9 But in certain cases in the Marine
10 Corps where there is a complex charging theory,
11 or if we're looking at some offenses that involve
12 murder allegations or laws on complex
13 allegations, we have brought in military judges
14 to serve as the preliminary hearing officer. And
15 in those instances we do feel that the commander
16 and the staff judge advocate are provided with
17 the most informed decision prior to referral.

18 CAPT MONAHAN: So, I believe that the
19 system benefits in every case with Article 32,
20 and that the defense and government can,
21 depending on the facts of the case, derive a
22 benefit from an Article 32 in its current

1 iteration.

2 With regard to the system, the current
3 iteration of the Article 32 provides an
4 opportunity for a qualified judge advocate to
5 conduct a deep dive into the facts presented at
6 the Article 32 preliminary hearing to include
7 what is commonly submitted, several hours of
8 investigative video, recorded interviews with
9 alleged victims, witnesses, and sometimes the
10 accused.

11 And that provides the preliminary
12 hearing officer or PHO an opportunity to prepare
13 a comprehensive charging analysis for the benefit
14 of the staff judge advocate and the convening
15 authority.

16 Now, if a case is particularly weak,
17 whether or not the, whether or not the PHO's
18 recommendation of, say, no probable cause is
19 ultimately adopted by the convening authority,
20 the defense can still gain a benefit from that
21 comprehensive analysis because a well-written
22 Article 32 PHO's report can oftentimes provide a

1 roadmap to an acquittal at a contested trial
2 because it points out the flaws in the
3 government's case, which a savvy defense counsel
4 can use to his or her advantage.

5 But, in a particularly strong case I
6 would argue that the government can use a well-
7 written PHO report to its benefit because it can
8 incentivize a guilty plea if a guilty plea is
9 warranted under the facts, because the govern --
10 the defense will see from a qualified, neutral
11 and detached judge advocate laying out why the
12 case is so strong against their client.

13 So, I do see that under, even under
14 its current iteration the Article 32 does still
15 provide benefits to all parties and, most
16 importantly, to the system.

17 COL PFLAUM: So, I'm actually going to
18 start by disagreeing with the marines on just one
19 minor point, at my peril I believe.

20 (Laughter.)

21 COL PFLAUM: But just on the fact that
22 whether you should have judges, a formal

1 requirement for judges on 32's if that rule was
2 taken away from that statement. And I think that
3 that is of value. And I've seen that in, for
4 example, perhaps a capital case or something
5 along those lines. But as a matter of practice,
6 I disagree with that, mainly from a logistics
7 experience, but also -- a logistics issue, but
8 also I don't think it's necessary

9 I think that, at least in my
10 experience, we had officers in the rank of major
11 who were judge advocates performing a PHO role.
12 And I think that they did a marvelous job, and
13 exactly what the Article 32 and R.C.M. 405 were
14 designed to get after. So, just on that point.

15 But I will agree with my colleagues
16 that it is still of value and on a number of
17 different levels. The first one is for me, as a
18 staff judge advocate, I benefitted from a formal
19 process by which the government presented its
20 case, the defense had an opportunity to present
21 its evidence. And that was given to me in a
22 report that I could then utilize in advising the

1 convening authority.

2 It's way too early in the full
3 prosecution process to be, to be required to be
4 binding. There's a lot of work that can be done.
5 Like Captain Monahan referred to in his
6 statement, after the 32, the case isn't complete
7 at that point.

8 And, sir, you made the point that at
9 the 32, if it were binding it could be dismissed
10 with prejudice and the government could come back
11 and try again. But that in the military process
12 we require us going all the way back to the
13 preferral process in cases, which could add time
14 and delay.

15 Whereas, as Captain Monahan referred
16 to, the government and/or the defense can take
17 that 32 and fix the issues in the case and fix
18 their case as it proceeds forward, as long as
19 there's probable cause and the recommendation is
20 to, is to dispose of the case by general court
21 martial.

22 So, I do believe there's value. There

1 was value to me in a formal process having a
2 neutral and detached judge advocate look at both
3 sides of the case, having the prosecutors bring
4 their case to an outside party for evaluation,
5 and getting that analysis by that officer.

6 DR. MARKOWITZ: So, some of you
7 mentioned that while clearly there's value in
8 this process, the process has changed. It's not
9 what it used to be.

10 So, we've heard a couple suggestions
11 about what you would like to see different. But
12 from all of you, can you talk to us a little bit
13 about recommendations to the 32 process that you
14 would each like to see to make the process more
15 meaningful?

16 And we can start with whomever.

17 COL PFLAUM: I can start. And I think
18 that one, one issue might be to broaden the
19 powers of the Article 32 officer to seek evidence
20 that he believes, or he or she believes is
21 missing in the case. I would start with that.

22 CAPT MONAHAN: And at the risk of

1 being unresponsive, I would say, I would remind
2 the committee that we are living in a time of
3 great change to the military justice system.
4 Just January 1st we instituted the Military
5 Justice Act of 2016, which is widely described as
6 the most sweeping change in the past 50 years to
7 the UCMJ.

8 So, I would be a voice of restraint as
9 far as great change, further great change to our
10 system to allow the years and recent decade or so
11 of changes to our system to play out so that we
12 can gather data before we make further
13 significant changes to the system.

14 But, of course, you know, I would not
15 be opposed to relatively minor changes at the
16 margins. So, I guess I'm a voice of restraint
17 for further great change.

18 BRIG. GEN. SCHWENK: So, our 25
19 changes start going 20, we should --

20 CAPT MONAHAN: General, I respect the
21 mission of the DAC-IPAD.

22 (Laughter.)

1 CAPT MONAHAN: But, in all
2 seriousness, sir, I would respectfully counsel
3 caution to further radical change to our system
4 because every, every change of significance has
5 second and third order effects that well-meaning
6 people may not anticipate. And so that's all I'm
7 saying, sir.

8 BRIG. GEN. SCHWENK: Okay. How about
9 the Army's recommendation to go back to the days
10 when the IO had the responsibility to go ferret
11 out whatever the IO -- or the PHO, excuse me, the
12 PHO had the legal authority to go ferret out
13 whatever evidence the PHO thought the PHO needed
14 in order to be able to write the report, instead
15 of today having to beg the trial counsel to
16 provide them the additional information? That
17 doesn't seem like a very major change.

18 CAPT MONAHAN: I would tend to agree
19 with you, sir.

20 BRIG. GEN. SCHWENK: Okay.

21 DR. MARKOWITZ: And for the record, I
22 didn't find that to be non-responsive.

1 (Laughter.)

2 LT. COL. KING: At the risk of
3 agitating Colonel Pflaum again.

4 (Laughter.)

5 LT. COL. KING: And I apologize, sir.
6 So, the recommendation on the military judge is
7 certainly one that would require some study and
8 some analysis logistically to see if it would be
9 possible. We're a smaller service and have fewer
10 cases to work with. But, so that is one that I
11 think could use some analysis if that would even
12 be feasible.

13 But some of the things on the margin
14 for the 32 that I think we could improve or
15 continue to improve are the capabilities to
16 conduct remote proceedings, improve technology in
17 our courtrooms that we could typically have these
18 Article 32's, to perhaps open up the ability to
19 call witnesses remotely that may not want to
20 travel for a 32. That's one area that I think
21 that we can improve the process.

22 And, it has gotten much better to hold

1 these remote proceedings. But it also, I think,
2 can be improved in certain circumstances.

3 COL. PITVOREC: So, again, I'm just
4 echoing a lot of comments. But I would like to
5 point out that the current process that we have
6 is a floor, not a ceiling. And so, I think that
7 I think it's incumbent upon the services to push
8 down to their young trial counsel that are
9 presenting evidence that it doesn't have to just
10 barely meet the probable cause standard.

11 And that's one of the things that we
12 are constantly training our young judge advocates
13 is, again, it's a floor, that you are building
14 your case for probable cause. The government in
15 and of itself, we should be transparent. We
16 should be pushing evidence out there.

17 And just because the victim in a case
18 can elect not to testify doesn't mean that there
19 isn't buckets of evidence that either
20 corroborates or doesn't that version of events.
21 And so, to the extent that -- I don't know that
22 perhaps changes on the margin -- and I definitely

1 agree that broadening the powers to seek
2 evidence, that there's a lot of stuff to include
3 digital evidence that's out there that would be
4 nice to be able to read -- but I do think that,
5 as the services, that we really need to be
6 pushing information down that says, look, just
7 because you can barely meet the probable cause,
8 or just because you have barely met the probable
9 cause, doesn't mean that's what this hearing was
10 intended to do.

11 And there's nothing wrong with adding
12 more evidence and letting people consider more
13 evidence in an Article 32 investigation. And we
14 really should be beefing that up I think
15 internally making those requirements. I don't
16 know that we need changes to the UCMJ, but I do
17 think that internally our services really should
18 be pushing down information that says that you
19 need to be doing better. You need to be adding
20 more evidence.

21 Just because it's a floor doesn't mean
22 that you just need to barely clear that. You

1 need to add what would be helpful to the
2 convening authority to make that informed
3 decision.

4 CAPT TASIKAS: I think it's a good
5 question. I'll just add that I don't want to
6 imply that people are lamenting about the current
7 Article 32, I think it depends on where you sit,
8 where you stand kind of adage. And so, if you
9 are perhaps a trial counsel or an SJA, you find
10 that very valuable.

11 But there was a policy determination
12 a few years ago to change the Article 32 to take
13 the equities of a victim in play and allow her to
14 say into the system or see a case go to court
15 martial because of the perceived notion of
16 Article 32 as it was currently constituted, so,
17 or back then anyway.

18 So, there's no perfect fix. I think
19 what you do is, you know, there's pluses and
20 minuses in every system, you just have to know
21 what you're losing out by changing, and what
22 you're gaining by what you're changing. So,

1 there's no perfect, I think, system.

2 You know, again, talking historically,
3 when the military first brought in lawyers, I'm
4 sure the convening authorities and commanding
5 officers weren't happy with that. And a few
6 years ago, when the SVCs were brought in, a lot
7 of people weren't happy with that. But now
8 they're part of the system and part of our
9 culture of the military justice system and
10 they're facilitating a policy objective, if you
11 will.

12 So, I wouldn't suggest that we change
13 Article 32 just for changing it for lawyers, for
14 convening authorities.

15 I think, and then one last point, I
16 think the -- you know, going back prior to 2014,
17 convening authorities would take those tough
18 cases to Article 32 to flesh them out so they
19 don't go to court martial if they were
20 particularly weak cases. So, now you're going,
21 just going to see more cases go to court martial
22 and maybe get a higher acquittal rate. That's

1 just the reality of how it is.

2 And so, if you're willing to live with
3 that, then I think Article 32 is okay. If you
4 want to have Article 32 as more robust so you
5 don't have to go to court martial, then the old
6 system was probably better.

7 But, I wouldn't say better, I would
8 say it's different; right? And that's how I
9 would look at it.

10 CHAIR BASHFORD: Ms. Peters, we're
11 going to move on to Section 2. If people want to
12 come back and we have time, we just have a lot to
13 cover with this panel.

14 MS. PETERS: Yes. The next question
15 concerns the referral process. The Air Force RFI
16 response to the military justice division says
17 that when a victim wants to participate in the
18 court martial and the standard of probable cause
19 is met, a case will typically be referred to
20 court martial to allow the victim to have his or
21 her day in court.

22 How does this approach incorporate the

1 non-binding disposition guidance factors such as
2 whether the admissible evidence will likely be
3 sufficient to obtain and sustain a conviction in
4 a trial by court martial?

5 And I would request, I think this
6 question is designed to have the Air Force
7 respond and then have the other services weigh in
8 on the weight they'd give to that factor, the
9 ability to obtain and sustain a conviction at a
10 referral.

11 COL. PITVOREC: Thank you. I know the
12 Air Force is the outlier on this because we work
13 at the probable cause standard, and the referral
14 standard, and take into consideration the wants
15 of the victim. And when we evaluate whether or
16 not that probable cause standard has been met,
17 and we have a cooperating victim we choose to go
18 forward.

19 I know that is not necessarily --
20 excuse me -- what every other service does. And
21 I respect that they have the right to differ in
22 their opinion.

1 What I would say to that is that we
2 have a lot of cases that go forward and evidence
3 is developed as we're going forward on that case.
4 Evidence is accumulated. We are gathering
5 information. And we are going out -- and, again,
6 as I've mentioned before, that you should be
7 corroborating every fact of consequence that you
8 can that the victim asserts in her testimony.

9 And if you're doing that, you can get
10 convictions in cases that you didn't previously
11 think, that you didn't previously think were a
12 slam dunk, or that -- or take into consideration
13 that there was a probability or a high
14 probability of a conviction. And so, if we are
15 training our prosecutors to do their very best,
16 and you have a credible, reliable victim that
17 wants to participate, we feel strongly that the
18 probable cause standard allows us to go forward
19 in that case and give the victim the opportunity
20 to say what they want to say in court before the
21 military judge and members, and whoever else
22 happens to be present.

1 CHAIR BASHFORD: Go through and see
2 what the rest of the services say.

3 CAPT TASIKAS: So, I would like to
4 think that our service is different. But I would
5 suggest that probably the Air Force -- I mean the
6 Coast Guard probably has a similar mindset with
7 convening authorities. If you have a victim who
8 is willing to participate in the military justice
9 system and would like to see their case go to
10 court martial, that is a huge, you know,
11 ingredient in the convening authority's decision
12 making process.

13 And then the conviction, the
14 likelihood of conviction is important, very
15 important, significant, but probably not
16 determinative.

17 So, in that regard, I think it is a
18 little problematic because convening authorities
19 are not going to be second guessed if they send a
20 case to court martial. They will be if they
21 don't, especially if you have a willing
22 participant in a court martial case.

1 So, there is a little bit of friction
2 there that you cannot deny, you know, I think if
3 you look at this objectively. And so those, you
4 know, some outside observers may view that as
5 problematic. Now, they get a fair trial and
6 that's what, you know, they're entitled to, so in
7 that regard it's a fair process. But there is
8 certain factors in there that I think are maybe
9 different in these type of cases than in others.

10 LT. COL. KING: I agree with the Coast
11 Guard's perspective that the strength of the
12 evidence is certainly a factor. It's an
13 important factor. And I would say that the
14 victim preference and the strength of the
15 evidence in the sexual assault case are probably
16 the two most difficult factors to weigh,
17 considering the other Appendix 2.1 factors.

18 In a sexual assault case, kind of
19 leaning towards moving forward to a court
20 martial, such as the seriousness of an offense,
21 leaning towards moving to a court martial.

22 And I also agree with Captain Tasikas

1 that in most cases, similar to the Air Force, in
2 most cases where the victim wants to move forward
3 and the evidence may not certainly result in a
4 conviction, we're going to lean towards moving
5 forward to a court martial. And a lot of that
6 centers around the fact that determining the
7 likelihood of a conviction is just so difficult
8 at that stage of trial when you haven't seen
9 sworn testimony at that point from any of the
10 witnesses or the victim, and we're going to err
11 on the side of moving forward in that
12 circumstance.

13 Now, there are certainly some
14 situations where you can look at the evidence and
15 determine that it is very likely this is going to
16 result in an acquittal. But, in sexual assault
17 cases that situation is rare, it's very rare.
18 So, we find ourselves in a similar position where
19 we're going to move forward in most of those
20 circumstances where we have a victim that wants
21 to participate.

22 CAPT MONAHAN: So, I believe that the

1 likelihood of conviction, the likelihood that
2 there's evidence supporting conviction, which is
3 a factor in the Article 33 mandated non-binding
4 guidelines is a very important consideration for
5 convening authorities when they bring cases
6 forward because, as a system of justice, we
7 should take hard cases to trial, cases that may
8 not -- that, you know, it's not clear if a
9 conviction will be obtained or not, we should
10 take those hard cases to trial.

11 But on the other hand, cases that,
12 although meeting the probable cause standard,
13 have a very low probability of success, I think
14 that in the vast majority of cases it's not
15 advisable to take those cases to trial. And, if
16 we do take those cases to trial that have a very
17 low probability of success, then I believe that
18 if they inevitably result in acquittals, there's
19 no gain for the system.

20 I believe the Navy's VLC program in
21 their response has indicated that although all
22 victims are different, their VLCs in the field,

1 what we call our SVCs in the field, have when
2 queried said universally most victims feel a
3 negative emotional effect after full acquittal,
4 which is intuitively obvious. Right?

5 But then you look at the accused. And
6 I believe our defense counsel assistance program
7 representative might testify that many accused
8 who are found not guilty of a sexual assault
9 offense many times after that acquittal will
10 leave the service because they feel that the
11 service has turned their back on them through
12 this ultimate process.

13 And then, from a systemic process,
14 from a systemic standpoint I also believe that
15 it's inadvisable to take cases with a very low
16 probability of success to trial because those,
17 that case may consume vital resources that might
18 be otherwise dedicated to cases that have a
19 stronger chance for success.

20 So that's, those are my thoughts on
21 the matter.

22 COL PFLAUM: So, to start, first-off

1 from the Army's perspective I would not
2 characterize it as a policy or an advised best
3 practice in the Army that if there's probable
4 cause and a victim wants to go forward that we go
5 forward as a matter of course. Victim preference
6 is, of course, a key consideration. It's listed
7 in the non-binding disposition guidance. And it
8 is a factor that weighs on SJAs in advisement to
9 convening authorities as important to the
10 convening authorities because there, in the
11 interests of justice, the victim's views and
12 desires matter and are important.

13 But that has to be considered in light
14 of all of the other factors that others have
15 articulated in determining whether to take a case
16 to trial, of course the availability of
17 admissible evidence to obtain and sustain a
18 conviction. So that is -- it is there is no
19 mathematical formula that I use or that I'm aware
20 other SJAs use to say, you know, victim
21 preference is, you know, 65 percent, et cetera.
22 It's all provided in the package that's advised -

1 - brought to the convening authority to make a
2 disposition decision on that case.

3 But that disposition, the decision to
4 refer a case to trial is based on probable cause.
5 And as we've articulated I think throughout,
6 there is other evidence that's obtained. There
7 are other investigative efforts that continue to
8 take a case as that case is approaching trial.
9 And one of those is input from the defense. And
10 that's one factor that as this process is
11 proceeding the defense does have a say in an
12 adversarial process, and so they can choose to
13 participate in Article 32 or they could not.
14 But, certainly at trial they have evidence, they
15 have a side of the story that comes out that
16 affects, that affects conviction rates.

17 And so, as the referral decision,
18 there is a need to consider all of the criteria
19 in advising. But to just make a disposition
20 decision solely -- well, to make a disposition
21 decision there's a lot that can change after that
22 initial disposition decision.

1 And I would be loath to advise a
2 convening authority in a case where a victim
3 wants to participate and the evidence is
4 otherwise strong to not go forward because there
5 is also a risk of criticism. I think as easily
6 as there could be slides up there talking about
7 conviction rates, there could also be slides up
8 there talking about non-disposition rates to
9 where a command has elected to choose some
10 alternative disposition or to not try a case that
11 someone else thought was otherwise meritorious.

12 COL. PITVOREC: I think we both want
13 to add something. I just wanted to add that I
14 think one of the things that we're seeing
15 routinely these days is that the Special Victims
16 Counsel and the Area Defense Counsel or the
17 defense counsel on the case begin talking and
18 discussing alternative dispositions that would
19 not otherwise happen if we weren't referring
20 cases to trial.

21 So, I do think that we have a high
22 incidence of a discharge in lieu of court

1 martial. We have a high incidence of ideas of
2 how the victims and the accused can both be
3 satisfied with the process. But that only comes
4 after referral. And I think that's an important
5 factor.

6 I'm not saying the Air Force does it
7 specifically to get to that, the idea is that
8 we're going to trial, I think the reality is that
9 there are alternate dispositions that are
10 available that are sometimes used and utilized
11 based upon that decision to go forward in the
12 case.

13 CAPT TASIKAS: If I can add, the
14 system is designed, again, for a military
15 context. So why -- you know, we've talked about
16 reasonable likelihood of conviction and a low
17 probability of conviction. Those are easy calls.
18 And there's ambiguity in between there. And we
19 have a probable cause standard.

20 So, I would envision a convening
21 authority under probable cause in a case of
22 sexual assault to court martial because, for

1 example, you have a very senior officer or
2 commanding officer who is having an affair with a
3 married subordinate, for example, and then there
4 might be some issues with favoritism or
5 fraternization. And if the person wants to break
6 it off there is a coercive nature, just because
7 it is the rank differential.

8 So, you would send that case for a
9 court martial with the sexual assault allegation
10 because you still have fraternization, you still
11 have adultery. And that's why you have the
12 probable cause standard for sexual assault.

13 Now, you may not get the conviction
14 for sexual assault because it's somewhere between
15 low probability and reasonable likelihood. You
16 just, you may. You know, there's always a
17 possibility. But the point is, is that those
18 type of cases are where I think a military
19 justice context is different than the civilian
20 context of sending sexual assault cases to a
21 trial. Those are the type of cases that the
22 system is designed to ensure convening officers

1 or convening authorities have that flexibility to
2 showcase certain issues in their command culture
3 in a case, even though maybe the Article 120 is
4 not likely to get a conviction.

5 COL PFLAUM: And if I may piggyback on
6 that a little bit. Again, the trial and the
7 court martial system is the ultimate adversarial
8 fact finding process that we can utilize to get
9 after -- not get after, I think to look at these
10 very close, very difficult, very serious cases
11 and allow either a judge or a panel to look at a
12 full range of evidence in an adversarial process
13 to come to a finding of fact on a criminal
14 offense.

15 CHAIR BASHFORD: We jumped ahead a
16 little more than we had planned to. We're not
17 letting you off the hook on Article 32 quite yet.
18 But I think, Ms. Long, you had a question about
19 this section.

20 MS. LONG: I did. But it was raised,
21 so I'm going to ask a question. If you think
22 it's beyond the scope, I can keep it.

1 Because it's been raised many times,
2 this term reasonable likelihood of conviction,
3 which I'm curious what the, what the definition
4 is that you're using. Because what the research
5 tells us, and the experience is that this is an
6 area where speculation typically takes over
7 analysis. And as you sort of rightly pointed out
8 when you describe your practice here, that
9 determining a strong or a weak case is, could be
10 subjective and can be based on how experienced
11 you are analyzing things.

12 And I'm wondering objectively what is
13 your test for determining that?

14 CHAIR BASHFORD: Starting with Colonel
15 Pflaum.

16 COL PFLAUM: Yeah. I think you hit
17 the nail on the head, ma'am. It is, it is
18 inherently subjective. And it is based on our
19 experience within the military justice system
20 what we have seen in terms of how cases are
21 presented, how evidence has been, has been
22 received by the fact finder, what evidence can

1 get into trial. But, also, an evaluation of the
2 case file. Is there -- in overall evaluation of
3 the case, is there a readily available defense?
4 Is there inconsistent statements made? Is there
5 evidence in the trial that tends to negate guilt
6 or that cuts against a story?

7 And so, again, the reasonable
8 likelihood of conviction is in providing that
9 advice, the staff judge advocate is looking at
10 the entire case file, understanding the court
11 martial process, the dynamics of the particular
12 case. Because this applies in sexual assault, of
13 course, but also in every case that we try, to
14 make our best assessment. And it is that: it's
15 an assessment.

16 I don't think that there can be
17 necessarily a mathematical or scientific approach
18 to it, but our best assessment of the likelihood
19 of success at trial.

20 MS. LONG: And just in following up,
21 because you're saying with your experience in the
22 courtroom and your experience with your panels,

1 and that makes me think that it could be leading
2 to self-fulfilling prophecies of we put these
3 cases forward, our panels don't like them. And,
4 therefore, when we're assessing reasonable
5 likelihood of conviction perhaps this isn't a
6 case that should go forward, rather than
7 thinking, okay, looking at all of the available
8 admissible evidence, looking at the elements of
9 the case, should a reasonable, educated jury,
10 panel, determine someone's guilt beyond a
11 reasonable doubt, not will they based on our
12 experience.

13 I don't think you meant that but I
14 didn't -- I just wanted to make sure I understood
15 what you meant.

16 COL PFLAUM: I understand. No, I
17 think that, again, we are applying -- rather than
18 this specific judge or this specific panel, we
19 are applying. I'll say this, I have applied and
20 I believe others apply a standard of sort of what
21 a reasonable fact finder would -- how a
22 reasonable fact finder would come out on this

1 case.

2 MS. LONG: Would come out or should
3 come out?

4 COL PFLAUM: I think that's a good
5 question. Let me think for just a moment, but.

6 (Laughter.)

7 MS. LONG: And you can think. I don't
8 want to determine --

9 MS. LONG: Yeah. No, I mean I think
10 that's a tough question, right, because now I'm
11 substituting my judgment for the fact finder.
12 But I think, I think should come out is fair.
13 But, again, that's not my call.

14 And, also, at that stage in the trial
15 I have not heard all of the evidence, so I think
16 it would be precocious a bit to suggest that I
17 know everything at this point, that I'm providing
18 advice to say they were wrong, they came to the
19 wrong conclusion should they come to a conclusion
20 opposite of mine.

21 MS. LONG: Thank you.

22 CAPT MONAHAN: And I would agree that

1 it is at its core a subjective standard. So it's
2 difficult to arrive at an objective standard.

3 But I, I would agree that a workable
4 objective standard would be looking at the
5 evidence, based on your experience, what should a
6 reasonable finder of fact return a verdict of.
7 And I think that would be a working, a workable
8 approach to the issue.

9 LT. COL. KING: Ma'am, I think when we
10 conduct our analysis and give recommendations to
11 the staff judge advocate, or when the staff judge
12 advocate gives the recommendation to the
13 convening authority, really the standard should
14 be factual and legal sufficiency to obtain and
15 sustain a conviction.

16 And so, yes, we're going to rely on
17 experience but we're also going to look at the
18 appellate case law where appellate courts do have
19 a factual sufficiency review that gives us the
20 ability to look at what facts might have been
21 reversed by the appellate court. And then, of
22 course, the legal sufficiency.

1 So, when you're dealing with some of
2 the Article 120 offenses that -- where the
3 charging theory is incapacity, looking in detail
4 at whether or not a certain legal standard has
5 been met for incapacity based on the fact
6 patterns you have, and this really surrounds a
7 lot of, some of the incapable of consent due to
8 impairment by intoxication and situations where
9 you may have a blackout that's involved.

10 And going to the actual case law to
11 review the factual and legal sufficiency would be
12 a standard that we're, that we should be focusing
13 on as well.

14 COL. PITVOREC: I'm probably glad that
15 the Air Force now just, you know, answered the
16 question originally the way that he answered.
17 And so, the idea of reasonable likelihood, I mean
18 obviously that is not what we use, and I'm not
19 saying that we shouldn't. I'm just saying that
20 we look at the case in a much more clear-cut
21 fashion and try to remain objective about what
22 the probable cause standard means and, again,

1 looking to, you know, the desires of the victim
2 in wanting to go forward.

3 But we do assess the credibility of
4 the victim when making that recommendation. If
5 there is a victim that is wholly, you know,
6 contradicted by all the other evidence of the
7 case, I mean, we're not, we're not blind to that.
8 We don't just blindly follow the victim wants to
9 go forward. We do assess the credibility of the
10 victim and whether or not the victim is supported
11 or contradicted by other evidence in the case.

12 But I do appreciate that we have a
13 much more clear-cut standard that may be not as -
14 probably -- it's all subjective, but it's maybe
15 not as falls to the subjectivity that, you know,
16 reasonable likelihood of conviction is.

17 CAPT TASIKAS: I just think it's one
18 of those things that if you're an experienced
19 trial counsel, prosecutor, and you're kind of
20 aware what you have. You know, I'm from Greek
21 descent. My mom knows when the spanakopita is
22 done because she's done it so many times, right,

1 and I don't. And I think when you see it from
2 afar and see what you have, you can make those
3 kind of -- to say subjective it's not just, you
4 know, a layperson's perspective. They know the
5 cases and are aware of what evidence they have to
6 get to the reasonable doubt standard.

7 The variable is how people are going
8 to hold up in court. Maybe you get an adverse
9 ruling. Maybe the testimony of your key witness
10 falls apart at the last second. Those things are
11 a reality.

12 So if you're surprised, or from afar
13 like where I am in policy in headquarters, I can
14 almost kind of project the ones that are going to
15 have an acquittal. There are some cases where
16 I'm, like, that's a good case, that's going to
17 get a conviction, and then something happens in
18 the court and you're surprised by those.

19 And I think those are the reasonable
20 likelihood that you think that the members should
21 have come back with a conviction. For some
22 reason they just didn't buy the argument the

1 government had. That happens. That's part of
2 the system we have.

3 But to say that we don't tee up cases
4 that we pretty much know we're not going to get a
5 conviction, I think that happens in our system
6 for sure. And I don't know, you know, that's
7 just a policy call and a judgment call by the
8 convening authority and allowed, the system
9 allows for that, so.

10 MS. TOKASH: Many of you talked about
11 other evidence that's presented to the staff
12 judge advocate after the preliminary hearing. My
13 question is, could you give some concrete
14 examples of what type of evidence that might be
15 and why prefer charges if you don't have that
16 evidence prior to preferral?

17 CAPT TASIKAS: I'm going to defer to
18 my colleagues. They might know a little bit more
19 of that than I do from where I am in my
20 experience.

21 COL PFLAUM: So, one example might be
22 DFE. So, it might take a long to get DFE.

1 MS. TOKASH: And that's a digital
2 forensic examiner?

3 COL PFLAUM: I'm sorry, digital
4 forensic examination that might reveal evidence.
5 There may be a discovery request that comes in at
6 trial to tell the government to look in a
7 particular place for evidence. And we look there
8 and find some evidence, either inculpatory or
9 exculpatory.

10 And another example that I just had
11 and now I lost it. But anyway -- oh, witnesses
12 that the defense may find that the government
13 didn't have at the preferral stage.

14 So, as the defense starts to do their
15 investigation they talk to witnesses that perhaps
16 the government didn't find, didn't know about,
17 didn't interview, and bring forward either sworn
18 statements or eyewitness testimony that they
19 didn't have at that time.

20 And so, I think that raises an
21 important point. There are times where just
22 because a case was preferred to trial does not

1 prevent an alternative disposition down the line
2 should the case change in a significant way. And
3 so, and actually I think this is raised -- and I
4 can't remember where it's raised in the written
5 products -- but the issue of delay in
6 investigation to adjudication of a case. And one
7 concern that I had as an SJA, and I still have in
8 our system, for many of the reasons that Colonel
9 Pitvorec raised, is if we wait till our case is
10 perfect at preferral we -- it can be perhaps too
11 long.

12 And by preferring, it triggers
13 processes that help us determine the right answer
14 on a particular case.

15 CAPT MONAHAN: And I agree. In the
16 electronic age, electronic evidence is something
17 that does take time to develop due to the demands
18 on the forensic examiners. Additional witnesses
19 may come to light as a result of that. And just
20 the ebb and flow of the trial process or the
21 pretrial process usually brings at least some
22 amount of evidence to the fore that was not

1 present at the time of preferral from our
2 perspective.

3 MS. TOKASH: And so, could that be a
4 reason that if a PHO finds, determines what I
5 consider a threshold constitutional issue of
6 probable cause, if a PHO finds no probable cause
7 could that possible be -- this additional
8 evidence could be, the SJA could reverse that no-
9 PC decision based on this additional evidence?

10 CAPT MONAHAN: Yes, certainly.

11 LT. COL. KING: In addition the
12 digital evidence, I've also seen evidence of
13 mental health of the accused to be something that
14 is still a matter that's pending at the 32
15 process. So, the R.C.M. 706 proceeding to
16 examine the accused mental capacity at the time
17 of trial where lack of mental responsibility
18 could be something that's pending.

19 And I think one important note is that
20 during the trial itself the defense does have the
21 ability to raise an issue to reopen the Article
22 32 process.

1 COL. PITVOREC: I think MJA, the
2 Military Justice Act of 2016 actually changed the
3 landscape a little bit. Prior to that, which
4 just, obviously, we talked about earlier was
5 implemented in January of this year, trial
6 counsel does not have the ability to issue
7 subpoenas until referral. And so, when you look
8 at that landscape about how long it took before
9 we could issue subpoenas in a case, that there
10 were, there was so much information that you got
11 but you only got it after the case was referred
12 to trial.

13 And so, when we're talking about going
14 out, especially with social media that requires a
15 subpoena, so if you're looking at the victim's
16 social media account, my children tell me that
17 it's not Facebook, that it has to be Instagram
18 because Facebook's for old people. So, I'm sorry
19 if all of you have Facebook; we're all old.

20 But, you know, the Instagram account
21 that's owned, you know, you have to reach out.
22 We were limited to waiting until referral of the

1 case. So there's really no way to, quote-
2 unquote, perfect a case prior to referral because
3 you didn't have subpoena power.

4 And so, MJA 16 has changed that
5 landscape but we don't know yet exactly what
6 that's going to look like because all of those
7 things have not yet been implemented. So, we're
8 still waiting to see how that all plays out. But
9 there's a lack of evidence that kind of comes in,
10 that used to trickle in basically after referral.
11 Obviously, when trying to make a probable cause
12 determination that's not necessarily helpful.
13 But knowing that it's out there, knowing that
14 those -- you know, you can go out and see maybe
15 not on Instagram but on Facebook, if you could
16 see the post you could see what people are
17 saying. It's just going back and getting, you
18 know, that provider to provide that information.
19 That's incredibly important.

20 MS. TOKASH: And so we, basically,
21 have been reviewing cases -- at least the Case
22 Review Working Group where we see this trend.

1 And, again, we don't know what it means, but
2 we've seen a trend where the preliminary hearing
3 officer finds no probable cause. The staff judge
4 advocate says I disagree, there is probable
5 cause. The CG refers to trial, and then it
6 ultimately ends in an acquittal on the
7 substantive offense of sex assault.

8 You know, so we're, I guess what we're
9 really trying to find is the why behind there.
10 And there's a lot of variables I'm sure.

11 CHAIR BASHFORD: If you could just --
12 because a lot of you said one of the reasons you
13 don't want the either highly qualified or not so
14 qualified Article 32 judge finding of no probable
15 cause be binding is because so much information
16 comes in prior to referral. You've talked about
17 information that comes in post-referral,
18 developed at trial.

19 If you could just focus on that one
20 chunk of time, what would, what would come in
21 that would take a no probable cause to a probable
22 cause non-binding likelihood of success at trial

1 referral decision?

2 I understand things can come in
3 post-referral. Defense can come forward, I don't
4 think there's anything stopping defense from
5 coming forward pre-referral either. But could
6 you just focus on that chunk of time in response
7 to Ms. Tokash's question?

8 COL. PITVOREC: For the Air Force I
9 think some of the things, like as I was saying
10 before, the social media. So, if somebody goes
11 to a social media page and does a print screen,
12 that's not going to be provided to the
13 preliminary hearing officer.

14 So, something that somebody may have
15 posted on social media we may be able to look at
16 it but that's not going to have the necessary
17 parameters for the preliminary hearing officer to
18 take a look at that and say, yes, that's
19 something I can consider. It doesn't, it doesn't
20 meet any of the standards.

21 But that's something that the staff
22 judge advocate may be aware of. There are

1 different things throughout social media,
2 different information, witnesses that were not
3 available.

4 So, again, as we talked about before,
5 we have a lot of -- we, I think all the services
6 are still deploying at a high rate, and people
7 are deploying and going overseas. To the extent
8 that you cannot get them back or they didn't make
9 a statement in the case that may have evidence,
10 if they're willing to write a letter or provide
11 evidence if the trial counsel is able to find
12 them, or the defense counsel is able to find them
13 and they're able to gather that evidence, they
14 can provide that to the convening authority but
15 that maybe not be something that would be
16 considered by the preliminary hearing officer.

17 So, all of that kind of extrinsic
18 evidence, if you will, can be gathered up and
19 provided to the staff judge advocate and,
20 therefore, to the convening authority in making
21 that decision. But that may or may not be
22 something that could be considered by the

1 preliminary hearing officer based on whatever the
2 rules of evidence that apply to that preliminary
3 hearing.

4 COL PFLAUM: Just one thing to offer
5 is at least under the new rules the, oftentimes
6 the 32 preliminary hearing officer doesn't have
7 the full benefit of the victim's testimony
8 because of their election not to participate in a
9 preliminary hearing. And that is the trial
10 counsel, the special victim's prosecutor
11 assessment of the victim may weigh in the staff
12 judge advocate's decision, and may sway their
13 opinion on probable cause different from the
14 Article 32 officer.

15 But I, actually, also too would be
16 curious -- and I don't have the data in front of
17 me -- to understand the number of cases, you
18 know, how statistically significant the
19 difference is in cases where the PHO found no
20 probable cause to where they did find probable
21 cause and then it still ended up as a result in
22 acquittal. And that's because of the wide gulf

1 that differs between probable cause and beyond a
2 reasonable doubt.

3 And so, even in a case where there is,
4 you know, again, the 32 PHO's determination that
5 there is not probable cause is a strong signal to
6 everyone involved in the process that this case
7 is a difficult case and there are issues with it
8 that everyone needs to look for. But just
9 because there is probable cause found, does not
10 equate to a conviction at a criminal trial
11 because of the beyond reasonable doubt standard.

12 So, I'm a little bit, I would be
13 concerned about, you know, signing -- anyway, I
14 would just be -- that needs further study, from
15 my perspective.

16 MS. CANNON: I hail from state court
17 criminal defense. And we have preliminary
18 hearings that are binding and can be overruled
19 with legal process by the prosecution.

20 The concern I have with some of the
21 things that you're pointing out as problems of
22 proof availability at the 32 is that, if it were

1 binding, wouldn't you be inclined to be ready and
2 take the time if you need continuances, and be
3 ready with that information? We have media. We
4 have all kinds of things that you're talking
5 about available at the prelim.

6 And if it was binding, that might,
7 one, get you already, and; two, influence this
8 number of cases that you're dealing with post-32
9 where you're angst over it's close, it's weak,
10 she should have a right or he should have a right
11 to have his day in court or her day in court.

12 Meanwhile, there is a suspect that's
13 having to deal with the consequences. And
14 waiting for that trial when it could have gone at
15 the 32 is something to balance.

16 So, the question I have is would a
17 more binding effect at the 32 alleviate some of
18 these concerns, as I've just described, and get
19 rid of some of these weaker cases where you can
20 turn to the victim and say, you know, we don't
21 have anything more to provide to overrule that
22 judge or that magistrate. Because if it's just

1 another set of eyes, that doesn't really help you
2 make that decision, the decision is still in your
3 lap.

4 So, your thoughts.

5 COL PFLAUM: I think that forcing the
6 government to have its case in essence complete
7 at the 32, I can't say that there is not value in
8 that. Right? I mean, the obvious -- it appears
9 to be common sense that the government should
10 have its strongest case as early as possible.

11 I would be concerned about two things.
12 And the first is, is the -- well, let me just, I
13 think I'll say my concern is that that may be
14 unnecessary delay in waiting until the -- it may
15 cause unnecessary delay in waiting for that 32 to
16 -- the case can continue to improve as it's
17 working through the process. There is a value
18 in, at least in the military justice system, of
19 allowing a case to proceed versus waiting too
20 long before an initial disposition decision.

21 CAPT MONAHAN: So, I certainly take
22 your -- sorry.

1 MS. CANNON: I'm sorry.

2 CAPT MONAHAN: I'm sorry. I certainly
3 take your point as far as it may, it may force
4 the government's hand to have a better case to
5 present prior to going to the 32. But I think if
6 we were to go in that, go down that road it would
7 negate the role in our system of the staff judge
8 advocate who does currently possess the check,
9 who holds, he or she holds the probable cause
10 check in his or her hands.

11 And in our system, although we have,
12 we do have qualified preliminary hearing officers
13 serving in all of our cases, oftentimes they are
14 not as experienced as the staff judge advocate.
15 And so it might be more appropriate for the staff
16 judge advocate to retain that role to serve as
17 the probable cause check.

18 LT. COL. KING: Ma'am, I'll loop back
19 around to answer your question. I'll loop back
20 around to Ms. Tokash's question as well as to
21 what additional evidence is a convening authority
22 considering to sway them in that small window.

1 And in my experience I haven't seen
2 new evidence really being the thing that might
3 sway a convening authority to move forward. It's
4 contrary analysis, contrary analysis by the
5 prosecution who is working with the SJA to
6 provide that informed decision.

7 So, I haven't seen many instances
8 where there's evidence that's outstanding that
9 comes in after the Article 32 that serves to sway
10 the proceeding.

11 And so that moves over to your
12 question, ma'am, that really if it was a binding
13 proceeding then that process would require the
14 convening authority to abdicate that role of
15 making the ultimate disposition decision. And it
16 would also cut the SJAs' informed decision and
17 informed advice out of the process.

18 COL. PITVOREC: So, Ms. Cannon, you
19 really have hit on probably every debate that we
20 have had internally within our office probably
21 for the last 5 years. Because this is a, it is a
22 difficult decision.

1 And we talk about binding versus
2 non-binding, whether or not it should be a
3 military judge, whether it should be just an
4 experienced judge advocate that has, you know,
5 lots of military justice experience, and trying
6 to get to the heart of that.

7 As many of you know, you put, you
8 know, four lawyers in a room together you're
9 going to have four different opinions. And so,
10 but I think on something as important as probable
11 cause, I mean, I would like to see cases that,
12 that only meet the probable cause standard. I
13 would like to see that disposition, or that the
14 preliminary hearing officer's decision have more
15 weight.

16 What I would like, really like to see
17 is that staff judge advocates then take into
18 consideration and then try to figure out really
19 what's out there. I think MJA 16 is just so new
20 right now. And we're still relying on the old
21 version where there was just so much information
22 and so much evidence that you didn't get until

1 after referral. And so -- or that you were
2 actively trying to get.

3 But our 120-day standard is real. It
4 is not a joke. We see cases dismissed --

5 BGEN SCHWENK: The 120-day standard is
6 the speedy trial standard?

7 COL. PITVOREC: Yes, sir. Yes, sir.
8 My apologies.

9 We see cases all the time dismissed
10 because you didn't meet the 120-day standard and
11 then you have to start over from scratch, or the
12 case goes away. Generally speaking, if you can
13 show why the delay, but just pure like, oh, the
14 government is still assembling its evidence,
15 that's not sufficient.

16 So, so that the idea that they are
17 trying to move the cases, and to get a
18 preliminary hearing, to get an Article 32
19 investigation you have to have preferred charges.
20 And preferring charges is the trigger, unless the
21 person is in pre-trial confinement. And
22 sometimes they are. So, you're moving fast. And

1 you don't have the ability to delay beyond while
2 you're waiting for a forensic examination of a
3 cell phone, or for subpoenas to go out to various
4 places that you haven't yet received.

5 So, there's lots of stuff that comes
6 in that you're waiting for. But if you say we're
7 not waiting for that, we can't, we can't wait to
8 do a 32, we have to get moving because the
9 military judge is checking. There's a tick,
10 tick, tick on that clock. And if you're not
11 showing what you're doing to further that case
12 along, it is in all likelihood your case may go
13 away. And it could be a no kidding win, it could
14 be a no kidding win for the defense in a case
15 that should have been a win for the government.

16 I do understand where you're coming
17 from. I'm a three-time defense counsel. I
18 understand that. You know, the Article 32
19 process I think is a good one in trying to moot
20 that out. But right now the way -- and I do
21 think that it's a good way. The staff judge
22 advocate who has the benefit of knowing what's

1 going on, who has maybe additional evidence says
2 -- and again, just disagrees with the PHO, I
3 think you have to give them that benefit.

4 And there really is no mechanism right
5 now for then coming back in and saying, oh, well
6 here's all this extra evidence, because by then
7 the clock has ticked to a point where that case
8 is going to go away because of speedy trial.

9 CAPT TASIKAS: I go back to my earlier
10 comments about the original idea of an Article 32
11 was to protect the accused from the plenary
12 authority of the convening authority. And so,
13 the idea of having an open forum with
14 cross-examination, be able to provide evidence,
15 to make sure there wasn't baseless charges that
16 were going to go forward, or a valid defense that
17 was going to go forward. And so, now we're in
18 this moment where we're trying to push the
19 Article 32 into something else that's more
20 civilian-like, which is great.

21 And the question I have then is, you
22 know, if we continue to make the military justice

1 system more civilian-like, then why do we need a
2 military justice system? And so, again, if you
3 gain something, you lose something.

4 Under our system, jurisdiction over
5 the accused is status of their service, you know,
6 active duty. So, the more time we have in our
7 system, the more time we have somebody under our
8 laws. So, I think already now we have a system
9 that's taking a little bit too long under what it
10 was originally envisioned. And the more process
11 we have, the more likely these cases are going to
12 take even longer. You have an accused who's been
13 in the service for a long period of time. So, I
14 would not want to have that.

15 And then the other idea, again, is
16 while these systems operate wonderfully in
17 peacetime in CONUS, we still have to envision a
18 system that can operate in armed conflict in
19 foreign venues. And so that is a very important
20 facet of our system, that it's mobile, it's not
21 just here in time of normalcy, if you will, so.

22 MS. TOKASH: I think it was

1 interesting hearing about kind of the abdication
2 of the SJAs' responsibility if -- I don't like
3 using the word binding or non-binding, I like
4 looking at probable cause as a threshold -- it's
5 a constitutional issue, right. I would hope we
6 would all agree about that.

7 And so in a way it's inherently
8 binding or it should be inherently binding
9 because it's a basic constitutional issue. So, I
10 don't think from a comparative standpoint that
11 the 93 U.S. attorneys, you know, nationwide feel
12 that every time a grand jury votes to bill or no-
13 bill a case, their responsibility is being
14 abdicated. And that decision is resting with, I
15 mean, I have a pig farmer from Chautauqua County
16 sitting on my Tuesday grand jury. And we vest
17 the PC determination in him, and in the school
18 teacher from Erie County, and in American
19 citizens all across the country.

20 So, you know, why can't the military
21 trust a judge advocate to make a determinative,
22 binding threshold issue on probable cause at the

1 preliminary hearing?

2 And I, I would like to tip my hat to
3 at least the Navy and the Marine Corps who
4 acknowledged in their answers that, if it were
5 binding, this would afford due process
6 protections to the accused. And shouldn't we all
7 be concerned about due process?

8 I mean, I think that that's really,
9 you know, the heart of the issue when it comes to
10 this. It's not about changing things or taking
11 things away, it's really about making things
12 better. Isn't that what we should all be working
13 toward?

14 CAPT TASIKAS: I think the issue is
15 then the present nature of the probable cause
16 standard of Article 32 is when the PHO finds no
17 probable cause for a specification, and now does
18 that bar the convening authority from taking NJP
19 action, administrative action?

20 That's very important. I think, like,
21 to tie the hands of the convening authority from
22 all other action, because the no probable cause,

1 whether it's a 120 or Article 92, is a lawful
2 general order whether the person was absent from
3 their duty, or sleeping on post. That's a very
4 important factor.

5 So, maybe you can't get a conviction
6 or court martial, but I sure want to have the
7 ability to take that person to Article 15. In
8 our system it's preponderance of -- Article 15 is
9 preponderance. For other services it's
10 reasonable doubt, I think. But that's a policy
11 determination.

12 And, again, so I would be, I would be
13 careful because having the Article 32 be a
14 jurisdictional process in our system would be
15 problematic. And then if there are defects in
16 Article 32, those are issues that can be raised
17 at appellate level, and then a case is
18 overturned.

19 I just think that the nature of the
20 Article 32 was not envisioned to be something
21 like that. I agree with you that the -- you
22 know, we all want due process. But this is

1 military due process, it's different than
2 constitutional due process. And so there is,
3 there is -- they go hand in hand but it's
4 slightly different.

5 LT. COL. KING: And I would just
6 offer, ma'am, that there is a judge advocate that
7 is put in this process to determine whether or
8 not probable cause is met. It's just, it's the
9 staff judge advocate, not the preliminary hearing
10 officer.

11 So, if the staff judge advocate says
12 there's no probable cause then the commander
13 cannot prefer the charge.

14 MS. TOKASH: Right. And I'm just
15 point out if the preliminary hearing officer
16 who's also a lawyer tethered to a bar, who is
17 licensed by a bar, I mean why cannot, why can't
18 that opinion be determinative, I'd like to use
19 the word determinative of the constitutional
20 issue of probable cause. That's really only what
21 I'm getting at.

22 LT. COL. KING: Yes, ma'am.

1 CHAIR BASHFORD: I have two final
2 questions. And then I'm going to delay our break
3 for 5 minutes if the staff has anything.

4 My two questions are, again, there's
5 been talk about how things would abdicate the
6 role of the commander in making the decision.
7 But, realistically, if the staff judge advocate
8 has said there is probable cause, how often does
9 the commander feel comfortable in saying I'm not
10 going to forward it, I'm not going to refer this
11 to a general court martial because, if my
12 understanding is correct, that has to go up to
13 the Secretary?

14 Has that ever happened that you know
15 of where the staff judge advocate has said, yes,
16 PC, and the commander in exercising his role has
17 said, but I'm not going to refer it? That's one
18 question.

19 Then second is how often are members
20 -- administratively discharged after an acquittal
21 on a sexual assault charge?

22 Let's start with you. I realize

1 they're completely unrelated, but.

2 COL PFLAUM: And, candidly, I don't
3 know if the Army has collected data on the
4 Secretary of the Army review after a convening
5 authority's decision to not refer after a staff
6 judge advocate's advice to refer.

7 I, anecdotally, I believe that it is
8 exceedingly rare because it is a check on that
9 convening authority's exercise of his discretion
10 to understand that that decision will be reviewed
11 by a higher level. So, I do believe that it's
12 exceedingly rare.

13 And to your second question, ma'am, if
14 you could reiterate your second question?

15 CHAIR BASHFORD: After a full
16 acquittal of a sexual assault charge, how common
17 is it for the member to be administratively
18 discharged from the service?

19 COL PFLAUM: So, and again based on
20 Army regulations, if there is a full acquittal,
21 absent other evidence or other misconduct, that
22 would be a barrier to administrative separation

1 for that particular offense. So, that would be
2 rare.

3 Would they be separate, might they be
4 separated for other misconduct that they commit,
5 or other bases, again I don't specifically have
6 the data for that.

7 CAPT MONAHAN: And to answer the
8 second question first, I believe we have similar
9 policies in the Navy.

10 To the first question, I'm not aware
11 of any case in which a, in which an SJA found
12 probable cause and make a recommendation to go
13 forward to trial, did a general court martial
14 convening authority go to the Secretary of the
15 Navy and request -- or not refer, thereby
16 triggering a policy of having to go to the
17 Secretary of the Navy.

18 LT. COL. KING: I'd agree that the
19 first question it's very rare. I do know that it
20 has occurred. But in the instance where I've
21 seen it happen there was an additional victim
22 preference that was provided after the Article 32

1 process, and after the actual probable cause
2 finding was made prior to preferral. There was a
3 small period of time in there.

4 And then for the administrative
5 separation, I agree with Captain Monahan that the
6 service regulations do prohibit acquittals moving
7 forward for enlisted personnel. For officers,
8 after an acquittal there can be a show-cause
9 separation proceeding, but I have not seen that
10 occur after an acquittal for a sexual assault.

11 COL. PITVOREC: Ma'am, to go to your
12 first question, there's a -- the staff judge
13 advocate's recommendation is not limited to just
14 whether or not there's PC. That, it's PC and
15 then a recommendation, a couple of other things,
16 but a recommendation of whether or not to go
17 forward.

18 In the Air Force we have not had a
19 convening authority. We have had staff judge
20 advocates say there is PC but I do not recommend
21 that you go forward for the following reasons,
22 and lay out the reasons. And then the convening

1 authority did not go forward.

2 We have not had the situation, to my
3 knowledge, where they said, yes, PC, yes, go
4 forward, and then the convening authority said,
5 no, I'm not going forward. We have not had to go
6 to the Secretary as of yet.

7 To your second question on
8 administrative discharges, in the Air Force an
9 acquittal or the underlying basis, the underlying
10 facts that led rise to the acquittal cannot serve
11 as the basis for an administrative discharge.
12 However, again, like the other services, if there
13 is other underlying misconduct, and I have seen
14 subsequent misconduct then trigger an
15 administrative discharge.

16 I would also -- and I guess this is
17 not really the era for this because if there is,
18 if there is a conviction of any sort of sexual
19 offense it automatically requires a discharge
20 from the court martial. But in a prior lifetime
21 as a defense counsel we had, I did see
22 convictions of a sexual offense that then did not

1 receive a discharge, but then that could not be
2 used as a basis to trigger an under other than
3 honorable conditions discharge. They were
4 limited to getting a general discharge for that
5 member.

6 CAPT TASIKAS: I have the same
7 sentiments for both questions. I think the issue
8 going back, though, about the policy of an
9 acquittal goes back to the Article 32. And if
10 you find no probable cause in an Article 32, that
11 has triggering repercussions for administrative
12 avenues. So, I would envision a system -- and I
13 don't mean to go back -- but that if you find no
14 probable cause in an Article 32 that's binding,
15 that the commanding officer would be barred from
16 taking other administrative actions.

17 And that's not a system I think we
18 would want.

19 But as far as directed to your
20 questions, ma'am. I echo the same things that my
21 colleagues do.

22 CHAIR BASHFORD: And we have time for

1 one staff question.

2 MS. PETERS: I'm sure it's a short
3 answer but.

4 (Laughter.)

5 MS. PETERS: In practice, how do staff
6 judge advocate's convey information contained in
7 the Article 32 report to a convening authority?

8 Does the SJA summarize the Article 32
9 report orally, or does the convening authority
10 get to read the Article 32 report?

11 And is there anything in the Manual or
12 a service regulation that requires or dictates
13 how the Article 32 information is conveyed to a
14 convening authority?

15 COL PFLAUM: I'm going to start with
16 that. So, the 32 report is in the file.

17 And I will say that in a case where
18 there is a negative Article 32 officer finding,
19 that's highlighted in my Article 40 -- or, I'm
20 sorry, my Article 34 advice. So, it draws the
21 convening authority's attention. And it is, it
22 depends on the case and the convening authority

1 whether they read everything or whether I
2 summarize that for the convening authority.

3 CAPT MONAHAN: And I would agree. In
4 the Navy it's case by case. It depends on
5 variables such as the command, the convening
6 authority and the staff judge advocate how much
7 the convening authority reads and how much is
8 orally briefed to him or her.

9 LT. COL. KING: I would agree with my
10 colleagues.

11 COL. PITVOREC: Well, that was short
12 and sweet.

13 I think, generally speaking, in my
14 experience, staff judge advocates provide both
15 written advice and oral advice to the convening
16 authorities. And in my experience in assisting
17 three different convening authorities, they've
18 read every word of that Article 32 investigation,
19 the PHO's report, and had questions for me about
20 it and why they're different, if there is a
21 difference in the PHO's advice.

22 So, they are I think very, very

1 cognizant of what's going before them, very
2 interested in making sure that they make the
3 right decision for the right reasons. And I've
4 seen them be very thorough.

5 I had one convening authority that had
6 tabbed the 32 report so that we could go in and
7 sit and talk about it, and had questions about
8 different testimony back -- this was pre-2014 --
9 but very aware of what's going on. And very
10 interested to know why there is a difference.

11 CAPT TASIKAS: I would echo that.
12 It's exactly true. I think it's a very dynamic
13 process. In talking to the SJA's out in the
14 field, the convening authorities are very detail-
15 oriented. They read everything or near
16 everything, and they have a lot of questions.
17 This is definitely not just a routine oriented
18 exercise.

19 So, I would just suggest that it is
20 dynamic and a give-and-take, back and forth. And
21 they have to feel comfortable with the decisions
22 they're making.

1 CHAIR BASHFORD: Thank you all very
2 much. I'm going to try to compress our break
3 from 15 minutes to 10 minutes so that we can try
4 to keep staying on track.

5 Thank you so much for coming.

6 (Whereupon, the above-entitled matter
7 went off the record at 11:39 a.m. and resumed at
8 11:53 a.m.)

9 CHAIR BASHFORD: Great, thank you very
10 much for coming today. We're going to be talking
11 about the perspectives of the services' special
12 victims' counsel, victims' legal counsel program
13 managers regarding conviction and acquittal
14 rates, the case adjudication process, and the
15 victim declination in the military justice
16 process.

17 So, thank you, Ms. Specht. Specht,
18 right? Colonel Clay, Lieutenant Colonel
19 Schrantz, Captain Sullivan and Colonel Hamilton.

20 MS. SAUNDERS: So, I'm Terri Saunders,
21 I'm one of the staff attorneys for the DAC-IPAD.
22 To begin with, just as with the last one, we'll

1 begin by talking about the Article 32 process.

2 Some of the RFI responses, and they
3 raise concerns that the judge advocates serving
4 as preliminary hearing officers, lack extensive
5 experience dealing specifically sexual assault
6 cases.

7 Other responses indicated that due to
8 the limited scope of Article 32, preliminary
9 hearing officers do not have all of the
10 information needed to make probable cause
11 determination for their findings.

12 The overall assessment was that the
13 staff judge advocate, who is more -- a lot more
14 experienced, is in a better position to advise
15 the convening authority on probable cause.

16 Should a judge advocate -- and I have sat in as a
17 hearing officer or served in that role -- have
18 significant litigation experience on sexual
19 assault?

20 CHAIR BASHFORD: Colonel Hamilton.

21 COL. HAMILTON: Ma'am, the ideal
22 answer would be, yes, you would want someone with

1 the requisite skill set to go ahead and serve as
2 the preliminary hearing officer. But
3 unfortunately, that's not always the ideal case
4 as we're structured with personnel throughout the
5 Army.

6 However, I do believe that the best
7 person for the final determination is the staff
8 judge advocate because of his or her experience
9 and the fact that they had additional resources
10 available to them, starting with the special
11 victims prosecutor, the senior trial counsel, the
12 trial counsel, to advise what may have or may not
13 have been raised during the 32 process. And then
14 make the requisite advice and provide the
15 requisite 34 advise to the convening authority.

16 CAPT.SULLIVAN: Good morning, ma'am.
17 Yes, absolutely. The preliminary hearing officer
18 should have extensive litigation experience.

19 The Navy just recently stood up a
20 reserve unit of preliminary hearing officers to
21 assist in that capacity, where we have prior
22 active duty judge advocates who, in their

1 civilian capacity, work in some experience --
2 have extensive experience in litigation or maybe
3 a U.S. Attorney's Office. It might be
4 prosecution or defense.

5 However, unfortunately the numbers in
6 that unit just don't meet the need of the numbers
7 of preliminary hearing officers that we have. So
8 in that capacity, the Navy, next up is to use our
9 military justice career track folks who do have
10 extensive litigation experience to sit in that
11 capacity as the preliminary hearing officer.

12 However, again, based on the numbers,
13 they're not always available, depending on the
14 location. If it's a remote location or just
15 given then other needs for prosecution or defense
16 services, filling those roles with our limited
17 number of military justice career track
18 personnel.

19 LT. COL. SCHRANTZ: Yes, ma'am, we
20 agree. In addition to being a fully trained and
21 certified and sworn judge advocate to conduct the
22 hearing, it would be very important to the SJA to

1 examine and identify a PHO that has the
2 experience and expertise and knowledge to
3 adequately assess the evidence at the hearing.

4 And the only one real key way to do
5 that is the officers will know generally the
6 background training and experience of potential
7 PHOs that are out there. And the SJA would have
8 the opportunity to assess whether or not that
9 officer would be able to conduct a thorough and
10 fair and well thought out hearing with a solid
11 recommendation.

12 COL. CLAY: And I would echo what has
13 already been stated. Ideally it would be someone
14 with extensive military justice and criminal
15 justice experience.

16 In the Air Force, we often use
17 military judges, however, they are not always
18 available. So a person with extensive knowledge
19 of the system and criminal law would be ideal.

20 But again, sometimes just because of
21 the numbers and availability, they're not always
22 going to be able to have either a judge or

1 someone with extensive military justice
2 experience.

3 MS. SPECHT: For the Coast Guard,
4 definitely, in a perfect world, they have
5 litigation experience, they would have military
6 justice experience. Unfortunately, the Coast
7 Guard being as small as it is, there is just less
8 opportunities for them to get that military
9 justice experience.

10 So, if there were to be some sort of
11 requirement, I think it would make sense for the
12 Coast Guard to -- it just couldn't pull from a
13 bench of experienced personnel, to at least
14 require some sort of training on sexual assault.
15 So, they would be aware of the nuances in sexual
16 assault cases.

17 CHAIR BASHFORD: We heard a lot about
18 the change in the Article 32, so post-that
19 change, 2014, have any of you had clients testify
20 in a 32? Let me just start with you, Ms. Specht.

21 MS. SPECHT: Yes, the Coast Guard has
22 definitely had clients who have wanted to and

1 have testified at Article 32 hearings. In those
2 instances that I can think of right now, they've
3 actually desired the opportunity to speak, or
4 they've thought that their attorney has been
5 anxious for them to have that experience first,
6 because of various reasons related to what's been
7 relayed to them.

8 COL. CLAY: Similar in the Air Force,
9 we have had some clients who have testified.
10 Often it's to add additional information that was
11 not in their original statement to law
12 enforcement, or it would be beneficial for them
13 to have the experience of sitting on a stand and
14 going through the process of testifying.

15 Although I will say it's probably not
16 the norm, it's a few outlier cases. And the
17 majority of our clients choose not to testify.

18 LT. COL. SCHRANTZ: I'm not able to
19 answer that right now, ma'am, I'm not aware of
20 that. I know that my deputy who works for me, he
21 came to be the VLC -- the deputy VLC, at the
22 headquarters, previously served as the RVLC in

1 Camp Lejeune, North Carolina. And his experience
2 and information, to me, was that his clients did
3 not testify.

4 CAPT. SULLIVAN: Yes, ma'am, for the
5 Navy we have had clients who have testified after
6 consultation with their victim legal counsel,
7 with the trial counsel, for the same reasons
8 articulated by the other panel members.

9 COL. HAMILTON: Ma'am, I'm not sure
10 I'm qualified to answer that question. I've been
11 the program manager for a little over a month.
12 However, from the SJA perspective, which I have
13 been in the past, most of the client victims have
14 chosen not to participate in the Article 32. But
15 there have been some cases where they do.

16 CHAIR BASHFORD: We saw -- I don't
17 know if you were here for that, I mean, there are
18 pretty high acquittal rates. Either complete
19 acquittal rates or acquittal rates on all the
20 sexual assaults. And we certainly read from the
21 victim representative perspective, how
22 devastating that is. Whether they feel they

1 weren't believed or they went through this whole
2 process for nothing.

3 Given that, do you think there should
4 be a higher threshold other than probable cause?
5 There's the non-binding guidance, but to push a
6 case and to refer it to court-martial? Colonel
7 Hamilton?

8 COL. HAMILTON: No, ma'am, I do not
9 believe there should be a higher threshold.
10 Victims do not like full acquittals, obviously.
11 However, the process, I believe, has significant
12 protections built in. It's not only about the
13 conviction, it's about making sure the process
14 worked fairly, inevitably, for both the victim
15 and the accused, in that regard.

16 But the -- focusing on the victim and
17 their opportunity to participate with full
18 understanding of the potential consequences of a
19 full acquittal I believe is best for the victim,
20 in my experience. What I'm learning in the
21 process is their ability to know that they have
22 been validated and heard through the process as

1 significant for their healing. And that is
2 something that we need to protect.

3 CAPT. SULLIVAN: Yes, ma'am, I don't
4 think there should be a higher bar, however, I
5 think one of the other questions that we were
6 asked regarding the victims' expectations, given
7 the entire process and understanding at each
8 point in the process and the effects. And
9 although victims are emotionally devastated, some
10 of them are happy to have gone through the
11 process and to have seen it and to have
12 experienced that. That they feel like their
13 voice was heard ultimately by the trier of fact.
14 And others do not.

15 As you articulated at the end, they
16 feel like the system was not fair and that they
17 did not get a fair shake at it. But I don't
18 think that changing the standard would fix that.

19 LT. COL. SCHRANTZ: I agree, ma'am.
20 I don't think changing the standard would be
21 beneficial. But continuing to allow the victim
22 to participate and be educated and informed

1 through the process is what's most important.

2 COL. CLAY: And I would also agree
3 that changing the standard would not be in the
4 best interest.

5 Our clients often express that while
6 they are disappointed or devastated, depending on
7 the acquittal, often the way that they perceive
8 how they've been treated throughout the entire
9 process in their interactions with investigators
10 and trial counsel, defense counsel, and other
11 individuals involved in the process, that has a
12 great influence in how they perceive whether or
13 not they were treated fairly and given an
14 opportunity to present to a finder of fact, that
15 -- what happened to them. And then have it go
16 through the process.

17 MS. SPECHT: I just reiterate exactly
18 what everybody has said. I think there is value
19 to victims to go through the process itself.
20 There's points throughout the process. They have
21 an opportunity to participate.

22 So, the idea that by making the

1 probable -- making a higher determination of
2 probable cause would somehow alleviate the
3 despair or the negative feelings with an
4 acquittal, it's not really the right way to look
5 at it. In the sense that they have an SVC or a
6 VLC that's helping them the entire time sort of
7 manage expectations and talk about success, aside
8 from the ultimate conviction. And if they're
9 working -- if SVC and trial counsel are working
10 together, you can really help the victim
11 understand that what the panel says is not
12 definitive. Right? The value in going through
13 this, what the panel says isn't necessarily what
14 the victim actually experienced.

15 CSMAF MCKINLEY: I'll go. Thank you
16 for your service.

17 After the acquittal, the victim -- how
18 do you see the victim being able to adapt, go
19 back to the unit, get back into the mission of
20 that unit, and how many of them do you see that
21 just throw their hands up and say, I'm out of
22 here, I'm gone?

1 MS. SPECHT: Sir, it really sort of
2 piggybacks on what I just said. I really feel
3 like the quality of the response will lead to the
4 recovery. So, if there was an engaged trial
5 counsel, if there was a supportive command, if
6 the victim felt all the way through that he or
7 she was allowed to participate in meaningful
8 ways, then I think the recovery process is much
9 easier for them, regardless of what the panel
10 might say.

11 No doubt again that there's
12 disappointment there. But I don't see, across
13 the board, victims throwing up their hands and
14 saying, I'm leaving the service as a result of
15 this.

16 COL. CLAY: Yes, and I would echo
17 that. It's very individual. It's going to be up
18 to that individual and how he or she perceives
19 how they were supported and what's going on in
20 their life, where they are in the recovery
21 process.

22 So, it's very, very individual, very,

1 very specific. And in fact, even when there is a
2 conviction, that healing process is not complete,
3 they're still going through that. So an
4 acquittal or a conviction is not necessarily
5 closure for that individual.

6 As far as how many clients did we see
7 choosing to separate, I don't have that data
8 available.

9 LT. COL. SCHRANTZ: I agree, sir. And
10 it's not just the importance of the expectation
11 management and the care and advocacy for your
12 client through the process, but it's also
13 important to remember that that Marine is coming
14 in the unit and that Marine is going to have,
15 probably for an extensive period of time, then
16 suffering through the process procedurally.

17 And so, as that unit is there
18 supporting that victim through the process, that
19 includes whatever the result of the trial may be.
20 But where it really is going to be important,
21 regardless of the outcome is the post-trial.
22 Obviously with the impact that a full acquittal

1 can have, you're going to have to have some
2 leadership, some commanders, some NCOs take care
3 of that Marine and ensure that Marine's well-
4 being.

5 And similarly, the culmination of a
6 long process, even if it was a successful
7 conviction, is going to come with some
8 significant emotional challenges in and of
9 itself. The concluding this process that's been
10 dominating a large aspect of their life for so
11 long, it's important to remember that, in either
12 case, acquittal or conviction, that Marine is --
13 and service member, is going to need some
14 significant help and support afterwards.

15 As for the numbers of how many choose
16 to separate, I don't have those numbers, sir.

17 CAPT. SULLIVAN: And we likewise do
18 not have the numbers on -- I don't have the
19 numbers on how many choose to separate or how
20 many choose to remain. And some do choose to
21 leave. And as others have stated, it's important
22 for even those folks who do choose to leave, as

1 they're making that decision, that we provide
2 them with the right resources in order to help
3 them make that decision, make sure that they're
4 cared for.

5 Afterwards, whether it be under the
6 disability evaluation system or other resources
7 available to those Servicemembers who do choose
8 to leave and make that decision, with the help of
9 the resources that we have.

10 COL. HAMILTON: I concur with what my
11 colleagues have said. And I think the benefit to
12 the way we're structured right now is the fact
13 that there's an opportunity for some who choose
14 to leave will go ahead and leave. Others will
15 ask for a permanent change of station to get a
16 fresh start somewhere else following it.

17 Throughout the process or early in the process
18 some have automatically requested an expedited
19 transfer to be in a location that is divorced and
20 separate from the horrors of where the incident
21 occurred and the accused at that point.

22 So, those options are available to the

1 victims. And the other benefit is, that when
2 they move someplace else, we've improved the
3 process so that we've provided for very good warm
4 hand-offs so that the physical, emotional well-
5 being of the victims are taken care of at the new
6 installation.

7 CHAIR BASHFORD: I know you said none
8 of you had those numbers, but do you know if your
9 services are tracking, and not just after court-
10 martial, after filing a complaint, because a lot
11 of the cases don't even go to referral, do you
12 know if your services are tracking filing a
13 complaint and fairly shortly after the resolution
14 of the complaint, leaving the service? Ms.
15 Specht?

16 MS. SPECHT: I don't believe so. I
17 just got a head shake from my Captain.

18 (Laughter.)

19 COL. CLAY: I am unaware of tracking
20 that information.

21 LT. COL. SCHRANTZ: I'm just not sure,
22 ma'am, but I definitely can take that back and

1 research it for you.

2 CAPT. SULLIVAN: And, ma'am, I was
3 informed that we do not track that.

4 COL. HAMILTON: Likewise, like Ms.
5 Specht, I looked around to my support --

6 (Laughter.)

7 COL. HAMILTON: -- and got the same
8 head shake. We are not tracking those statistics
9 right now, ma'am.

10 CHAIR BASHFORD: Sure.

11 BRIG. GEN. SCHWENK: To go back to
12 Article 32's for a minute. What difference would
13 it make to your clients if there was no Article
14 32 at all? And whatever you would offer to a --
15 in a case if you had something to offer to a 32
16 PHO, instead you offered it to the SJA, would it
17 make any difference to your clients?

18 MS. SPECHT: Conceivably. I think
19 sometimes because SJAs are in the same area as
20 the victims, there is -- even though the SVC will
21 try to explain the process of, and the roles of
22 the military justice practitioners, I can

1 envision, I don't know this for sure, I can
2 envision a victim embracing a PHO because they
3 believe them to be the neutral, unattached,
4 individual who is looking at all of the evidence
5 by someone who's sort of a friend of the command,
6 so to speak.

7 COL. CLAY: I think there is some
8 value in the Article 32 in that the victim is
9 able to attend and watch the proceedings.

10 BRIG. GEN. SCHWENK: All 15 minutes of
11 it?

12 COL. CLAY: Yes. If there are
13 evidentiary issues that come up, such as perhaps
14 MRE 412 issues regarding past sexual history, the
15 SVC is able to advocate on behalf of their
16 client's privacy rights at that Article 32. And
17 then have that PHO look at that issue and make an
18 appropriate determination based upon the law and
19 facts of that particular case.

20 And that they get a copy of the
21 reporting at the end as well. So I think there
22 is value to the victim to see that process in

1 work.

2 LT. COL. SCHRANTZ: Yes, sir, I agree.

3 I think there's value as the line VLCs are
4 sitting and working and explaining the process to
5 the victim. The feedback from the field has
6 been, the trust in the system, the thoroughness,
7 despite the conversation earlier about it being a
8 15 minute paper drill, it is an additional step
9 in the process where you can convey to your
10 client that an independent officer with legal
11 training is going to take a good close look at
12 the evidence and make a recommendation and write
13 a report.

14 With that said, I think some of the
15 answers that we provided to some of the other
16 questions highlight the importance to the client
17 and some frustrations that can exist with delay,
18 just to the overall system. And so, I think if
19 there was a way, if there was a system in place
20 that could help expedite the 32 process, or in
21 your example, just to get rid of it all together,
22 of course that would potentially shrink the

1 process. And that would be something that would
2 be appealing to a victim, potentially.

3 CAPT. SULLIVAN: Yes, sir. And I do
4 see value in it to the victim as far as requiring
5 that faith in the process as far as checks and
6 balances, that there is an analysis of the facts
7 of the hearing of the -- or after the hearing.
8 And there's another entity looking at the
9 charges.

10 Because sometimes the trial counsel
11 may not have presented to the victim all of the
12 information. And so then, getting that
13 transcript and getting the tape on having that
14 information helps them see the process as it's
15 proceeding forward.

16 COL. HAMILTON: Sorry, I absolutely
17 think there's value to it. I think it's the
18 first step toward healing for the victim.

19 Now, going through the process or
20 getting the information, reading it,
21 understanding what's going out there and the
22 finding of the preliminary hearing officer is

1 sort of an acknowledgment that something happened
2 even though it's a lower threshold of just
3 probable cause. Something happened. I think
4 that's crucial to victims and their healing.

5 CHAIR BASHFORD: So, one of you had
6 mentioned, and I just want to follow-up on that,
7 there's some frustration with the length of the
8 process. If there was a way of expediting the
9 length of the investigation, the process.

10 Do you have any suggestions to how
11 this process could be expedited without
12 sacrificing fact gathering? I'm going to start
13 with you, Colonel Hamilton.

14 COL. HAMILTON: I don't have a clear
15 answer for you, ma'am, on a way to expedite it.
16 Because I think if we attempt to expedite too
17 quickly we will rush things to the point where we
18 may not ensure justice is served. Either for the
19 victim or the accused.

20 So I think we -- the process, while it
21 has its flaws, is working. And I'm seeing the
22 mere fact that more victims are willing to come

1 forward and request SVC and engage in the process
2 is significant from where remembering that the
3 SVC program is, it hasn't even reached its five
4 year anniversary for the Army. I mean, six year
5 anniversary. We're in our fifth year now. The
6 numbers and the increase that, of how many people
7 are requesting SVC shows that the process is
8 becoming more familiar and victims are more
9 willing to engage in the process.

10 So, as far as a way to expedite it, I
11 don't have an answer for your specifically, other
12 than I know it's working for victims.

13 CAPT. SULLIVAN: And, ma'am, before I
14 answer that question I'd like to go back to the
15 last answer as well.

16 I think the Article 32 is also good
17 for the victims in the case where there is no
18 probable cause finding because, again, they're
19 able to see that. The hearing, the analysis and
20 the input. So I don't want it to be thought that
21 we're only looking toward prosecution of the
22 accused for the benefits of the victim's healing.

1 I think it also does help with the
2 victims understanding of a no probable cause
3 finding if there is a full -- the full Article 32
4 hearing in the sense that we have it now.

5 As far as speeding the process, I
6 don't have any suggestions for that. I think our
7 military justice folks have talked about that and
8 suggestions on ways to change the system, once
9 again, to expedite the process.

10 But I know we've all been working very
11 hard at certain steps in the procedure to really
12 get down those processing times as far as the
13 trial counsel -- working on their prosecutorial
14 merits memo, getting all those time frames
15 shortened. But overall, Article 32, I don't have
16 any good suggestions for you.

17 LT. COL. SCHRANTZ: Yes, ma'am, and I
18 was the one that mentioned it but unfortunately
19 don't have any recommendations --

20 (Laughter.)

21 LT. COL. SCHRANTZ: -- to fix it. But
22 I mentioned it not -- just to be clear, not as a

1 critique of the military justice practitioners or
2 the commanders who were carefully considering
3 these cases, in which our investigating offices
4 are diligently and thoroughly investigating them.
5 It's very important that they do it. And
6 expediting it just for the sake of expediting it
7 would not be prudent for anybody's interest.

8 But I think for the VLCs, the reason
9 why I brought it up as an issue of length of time
10 and concern is, where the VLCs can be of great
11 value is to really thoroughly and proactively
12 communicate with their clients frequently, daily.
13 Weekly at least, sometimes daily.

14 Just to keep them informed so that
15 their clients know that the process is moving
16 forward, even though nothing is happening in the
17 courtroom or no statements are being provided
18 that despite the length of time, that the process
19 is moving in the right direction.

20 And the feedback from the field is, if
21 the victim's legal counsel do that with their
22 clients and keep them informed and keep in touch

1 with them, that they're satisfied and feel happy
2 about the fact that they know that someone is
3 still marshaling their case from beginning to
4 end.

5 COL. CLAY: Similar to my colleagues,
6 I don't have any specific comments from an SVC
7 perspective. I know our military justice folks
8 are working on ways to improve timelines. I know
9 one initiative within our judiciary is to get our
10 circuit trial counsel. Those are more
11 experienced prosecutors, our special victims
12 qualified prosecutors involved in the cases at
13 base level early in the process to hopefully get
14 better quality investigations earlier in the
15 process to reduce those timelines of having to go
16 back and look at other things that may have been
17 missed during the initial look.

18 There are other things that they are
19 working on to improve those timelines, while
20 still getting quality investigation that looks at
21 all the facts, to ensure fairness to everyone
22 involved in the allegations.

1 MS. SPECHT: I can speak only for the
2 Coast Guard, and it's sort of like what the Air
3 Force was talking about. As I mentioned, the
4 Coast Guard doesn't have a lot of experienced
5 trial counsel. We don't have special victim's
6 prosecutors, but what the Coast Guard is trying
7 to do is build experience at two separate
8 locations. But what has happened, sort of as a
9 result to that, is that the investigation happens
10 at the district level and then it's handed over
11 to the people who are actually going to try the
12 case.

13 So there's just not this ability to
14 really integrate with the investigators. Really
15 discuss what needs to be happening based on the
16 people who are actually going to be prosecuting
17 the case. So, I wish there was more overlap in
18 the Coast Guard between investigators and trial
19 counsel.

20 I also think that the way that the
21 Coast Guard defines restricted reports, they put
22 themselves in a bind because we have a lot of

1 third-party reports then, so you have a very
2 uninterested, unwilling, victim having to go
3 through the process. And if there was a way just
4 to shut those down in the beginning, then
5 resources could go towards those who are really
6 integrated and interested in moving forward.

7 MS. GARVIN: Thank you, Chair. So,
8 we've heard a lot this morning about if the PHO
9 does no PC finding, right, so we come out and a
10 hearing officer says no PC but the SJA can still
11 find probable cause. What is the advocacy of
12 VLCs and SVCs in that window of time?

13 If the PHO says no PC but the SJA has
14 not found yet, what is a VLC, SVCs role?

15 CHAIR BASHFORD: Its awful that the
16 Coast Guard and the Army --

17 (Simultaneous speaking.)

18 COL. HAMILTON: The role of the SVC,
19 for the Army, during that time would be just
20 communicating their clients interest and where,
21 from their perspective, what their client is
22 looking for through their trial counsel and the

1 prosecution team, who are the advisors to the SJA
2 before he or she goes in and meets with the
3 convening authority.

4 So, the SVC role is to communicate the
5 client's wishes and desires through the
6 prosecution team.

7 CAPT. SULLIVAN: And that is the role,
8 to continue advocating on behalf of the victim
9 and providing that information that the victim,
10 victim's counsel, may have felt it was not fully
11 vetted during the Article 32 or not brought up
12 during the Article 32, communicating that
13 information for the convening authority's
14 benefit.

15 LT. COL. SCHRANTZ: Yes, ma'am. And
16 for the convening authority's benefit it is the
17 important point that VLC is going to continue to
18 represent, advocate, communicate with, explain
19 the process to the client.

20 And importantly, whether the PHO's
21 determination was that there was probable cause
22 or that it doesn't reach probable cause. It

1 assures, and the victim is assured that the
2 convening authority is going to know right up
3 until the SJA goes in and advises.

4 If the VLC is properly communicating
5 with the government and properly communicating in
6 the timely manner, the victim's wishes, the
7 victim will know that the convening authority is
8 considering their input right up until his final
9 decision -- or, her final decision.

10 COL. CLAY: It's the same process in
11 the Air Force, I don't really have much to add.

12 MS. SPECHT: Same with the Coast Guard
13 as well.

14 MS. TOKASH: Have any of you been
15 privy to what's been explained as this post-
16 preliminary hearing, additional evidence session
17 with the staff judge advocate?

18 If you have been in your role as a
19 special victim counsel or victim's legal counsel,
20 what are you telling the SJA and why could that
21 not have been presented to the preliminary
22 hearing officer?

1 LT. COL. SCHRANTZ: Ma'am, I've not
2 been privy to that or discussed that with any of
3 the -- our VLCs.

4 I think similar to what I've mentioned
5 in my previous answer is, because the victim
6 can't be compelled to testify at a 32 or provide
7 a statement, it could be just a situation to
8 where with proper communication the VLC is
9 communicating with the SJA, right up until that
10 moment the SJA goes into the convening authority.

11 MS. TOKASH: Doesn't that seem like
12 you're trying get through the backdoor that which
13 you're not able to get through the front, by
14 having some type of ex parte communication with
15 the staff judge advocate?

16 LT. COL. SCHRANTZ: Well, the victim
17 has the ability to testify in a 32 if they
18 elected to.

19 MS. TOKASH: Right. Assuming they
20 don't --

21 LT. COL. SCHRANTZ: Yes.

22 MS. TOKASH: -- they still can have an

1 audience with the SJA, correct?

2 LT. COL. SCHRANTZ: Well, the SJA is
3 going to understand -- the victim's preference is
4 a big part of this process. For all of us
5 through the process is properly understanding at
6 all times what the victim's preference is.

7 And so, as an SJA, I would certainly
8 want to know and verify at any given time, not
9 necessarily by audience with the victim. In my
10 role as a SJA I did not do that, but I would
11 certainly make sure that prior to going in to
12 meet with my commander that I was up to speed and
13 could properly communicate to the commander what
14 the current victim preference feeling was.

15 CAPT. SULLIVAN: And, ma'am, I believe
16 under the new rules, under 405(k), that defense
17 has the opportunity to present additional
18 information as well. So, it's pinned to that.

19 And I haven't been privy to any of the
20 conversations, and I don't know that the victim's
21 legal counsel have taken that opportunity under
22 the new availability of that, but I think more

1 defense has the ability to provide additional
2 information after the Article 32.

3 COL. HAMILTON: Ma'am, from the SVC
4 side of the house I have no experience regarding
5 it, but from the SJA side I've never met with the
6 victims.

7 The SVC, often represented by counsel,
8 would communicate through their trial team, trial
9 team would, you know, brief me on where, what the
10 victim is looking for, what the SVC is looking
11 for, the concerns they have or whatever other
12 evidence or information. But I also want to be
13 clear that I haven't had a case where there was
14 no PC finding, no activity from the preliminary
15 hearing officer that we switched going to the
16 convening authority. However, the information,
17 the communication comes through their trial team.
18 And the SVC to the SJA.

19 And while there would be an
20 opportunity, if the victim wanted to come and see
21 the SJA, I don't know of many cases, or if any, I
22 have never experienced any, where the victim

1 wants to come in and meet with the SJA. And if
2 they did so, they would do so through the SVC.
3 And there would be something rather significant
4 that is virtually, you know, it would be novel.

5 COL. CLAY: Again, similar to my
6 colleagues, I don't have any personal knowledge
7 of these post-discussions with SJAs or others, as
8 an SVC.

9 In my prior role as an SJA, I can tell
10 you that I did get written matters through the
11 trial counsel and the SVC, regarding the victim's
12 preference on disposition, which would then be
13 provided to the convening authority for his or
14 her consideration.

15 MS. SPECHT: And just similarly, I've
16 never known of a victim or an SVC to provide
17 evidence that was not included as part of the ROI
18 during the 32, it's really just victim
19 preference, and that was afforded to the victims
20 by Congress. So it's just them providing, again,
21 saying I'm ready to move forward, I would like to
22 move forward. It's not anything different than

1 what had already been provided, it's what's going
2 to the convening authority already.

3 MS. TOKASH: Thanks.

4 MS. CANNON: Is the victim advised if
5 a 32 officer -- hearing officer, finds no
6 probable cause, and if so, what, if anything,
7 additional occurs to try and influence the SJA,
8 if at all, in overcoming that lack of probable
9 cause?

10 COL. HAMILTON: Ma'am, if the SVC and
11 the VLC are doing their job the victim would know
12 exactly the process and what the finding was.
13 And that is, first and foremost in our charter in
14 our mission to keep the victim informed of things
15 going through the process.

16 As far as what would then -- what
17 strategy, I cannot speak to that because I have
18 no experience as far as what they would attempt
19 to do to change the planning of a preliminary
20 hearing officer or to influence the SJA, before
21 going to the convening authority.

22 CAPT. SULLIVAN: And I think, as far

1 as the recommendation of probable cause, I think
2 I'm not directly aware of it, but I would imagine
3 that they would -- if there was any issue with
4 the actual hearing, any problem with the 32,
5 anything that was left out, then identify that to
6 the trial counsel. And we do -- the VLC do
7 inform the victim of the recommendation and the
8 decision by the convening authority.

9 LT. COL. SCHRANTZ: Yes, ma'am, the
10 victim would know the results and continue to
11 communicate and work with the victim's legal
12 counsel.

13 In terms of what next, I think just
14 close and proper work with the trial counsel, and
15 perhaps some additional information that may have
16 not been presented or conveyed properly or
17 communicated up to that point. You can do that
18 by communicating with the trial counsel as
19 they're preparing documents like case analysis
20 memos, prosecution merit memos, that they're
21 going to present.

22 COL. CLAY: Again, yes, the victims

1 would be informed of the PHO and SJAs
2 recommendation. The only time that I have seen
3 anything after that point would be if the SVC
4 perceived, there were some legal error in the
5 proceedings, and they might bring that forward
6 for the consideration of both the SJA and the
7 convening authority. But again, that's pretty
8 rare that they would see that kind of error and
9 then bring it to the attention of the appropriate
10 individuals.

11 MS. SPECHT: Not really anything
12 different to add, just similar to whatever has
13 been gone on before. What the SJA is really
14 concerned about is, is the victim still willing
15 to move forward and what are the victim's
16 desires.

17 COL. HAMILTON: Ma'am, if I could add
18 to Colonel Clay and Captain Sullivan had
19 mentioned. What we try to do is we try to get
20 our SVC to have already been -- have already
21 participated as a trial counsel or defense
22 counsel or somewhere in the justice process

1 before becoming SVC.

2 So, if for instance, the SVC were in
3 -- sitting in on a 32 and there was something
4 that was wrong or missed by the prosecution team
5 or the trial counsel, whose responsible for
6 trying the case, and then the SVC, merely to
7 ensure that his or her client's wishes were being
8 -- or, wishes were being pursued or their rights
9 being protected, would communicate that to the
10 trial team. And then the trial team would then
11 hopefully, if doing their job, which they are,
12 take it to the SJA, which would then be contrary
13 to, I guess the finding of the 32 officer.

14 CHAIR BASHFORD: Dr. Spohn?

15 DR. SPOHN: So, one of the findings of
16 research on sexual assault case processing in the
17 civilian context is that the victims willingness
18 to cooperate in an investigation and prosecution
19 of the case is one of the strongest predictors of
20 whether the police will make an arrest, whether
21 the prosecutor will file charges, and whether the
22 case will result in a conviction.

1 And our case review, we've been
2 reviewing cases that have been reported to all of
3 the services, and we discovered that there's a
4 very high rate of victim declination in these
5 cases. And that it occurs at various stages in
6 the process.

7 And many of you have just now
8 mentioned the importance of the victim's
9 preferences or the victim's willingness to move
10 forward with the case. So, in your experience,
11 what are the reasons that motivate victims to
12 decline to cooperate after having made an
13 allegation of sexual assault?

14 LT. COL. SCHRANTZ: Ma'am, the
15 feedback from the field seems to indicate just a
16 strong desire to put the issue behind them and
17 move on with their lives and with their careers,
18 while still acknowledging that something terrible
19 happened. They do just a personal decision that
20 they make on their own that they just want to
21 move on. And it could be influenced by their
22 close-knit team that they're a part of that's

1 supporting them through the process.

2 They do have -- whether or not it
3 remains in the military justice realm or not, I
4 think we have done a tremendous job in the
5 military providing additional resources for
6 victims of these types of crimes to recover and
7 succeed with or without the military justice
8 process.

9 It is important to some, but some
10 individuals have just chosen to take the benefit
11 of the resources that are available outside the
12 military justice system and move on with their
13 lives as quickly as they can.

14 COL. CLAY: And I would echo that.
15 It's an individual decision. And the reasons are
16 pretty much individual that -- in the person, and
17 that a desire to move on and heal and get to a
18 better place in their journey after experiencing
19 a trauma. And also, we often see a desire to
20 protect their own privacy through that healing
21 process as well, as common issues. Although
22 there are many different reasons and they're as

1 individual as the people involved.

2 MS. SPECHT: I'm going to mention
3 again, just, I see a lot of times with the Coast
4 Guard, because of the way that we define
5 restricted reporting, so a lot of individuals are
6 telling friends, and they never intended it to go
7 to investigation, it gets reported and then
8 they're sort of pushed forward. And so that's
9 why they decline to prosecute.

10 CAPT. SULLIVAN: And the reasons for
11 the Navy victims are similar. Every victim is
12 unique, every case is unique, every case is
13 different, and they have different motivations
14 and different reasons for wanting to decline and
15 move on. And as far as the resources, providing
16 them with the resources, that they need to do
17 that as very important for the services to do.
18 So the restricted reporting is very helpful in
19 that they're able to do that, to have those
20 resources available to them without the need to
21 report if they don't desire to participate in the
22 process.

1 COL. HAMILTON: Yes, I think we
2 covered just about everything that everyone has
3 said. I think victims go through their own cost
4 benefit analysis of pursuing and continuing on
5 and what pain that would bring to re-live it or
6 just move on, put it behind them. PCS to a new
7 location, permanent change to a station or a new
8 location, or expedited transfer, and heal in
9 their own way. So it's too hard to know for sure
10 all the different reasons.

11 CHAIR BASHFORD: Okay. I heard
12 mention from the Coast Guard of third-party
13 reports plus, because of the way you structured
14 the inadvertent disclosures, but we've seen
15 inadvertent disclosures in other services as
16 well. They don't realize they're saying
17 something to somebody who then has a duty to
18 report.

19 In our third annual report issued last
20 year, we advocated allowing, sort of, a clawback
21 to change an unrestricted report back to a
22 restricted report when that was not the intent of

1 the person, as to make such a report, or with a
2 third-party reports.

3 Are you in favor of that sort of
4 clawback provision and would you be in favor of a
5 third-party report, where the victim says, I
6 don't want anything to do with this, being able
7 to shut down the investigation rather than the
8 full talking to all the friends, the co-workers,
9 the supervisors, people in the barracks, et
10 cetera?

11 COL. CLAY: We've kind of done that in
12 the Air Force already. By policy, the Office of
13 Special Investigations, if they have no other
14 leads beyond what a victim can provide to them,
15 they will shut down the investigation.

16 So, we have given that option to
17 victims within the Air Force.

18 As far as shutting down an
19 investigation that is because of a victim's
20 preference, I think that's generally a good idea.
21 However, there may be those cases in which it's a
22 multiple victim case, in which it should be

1 investigated anyway because of the other
2 individuals involved with a particular case.

3 CHAIR BASHFORD: I'm just going to
4 follow-up quickly on that because OSI wouldn't
5 know there's no other leads, other than the
6 victim, until they did a full blown
7 investigation, correct?

8 Until they talked to everybody and
9 they were able to say, there's no other way of
10 getting evidence.

11 COL. CLAY: Unless there's third-party
12 complaints or another victim came forward.

13 LT. COL. SCHRANTZ: Ma'am, I support
14 that ability to clawback and while also retaining
15 some of the ability for the commander to act and
16 respond as needed. Obviously you'll always want
17 to continue to provide the resources needed for
18 the victim.

19 Continue to allow the expedited
20 transfer ability and just try to get that victim
21 in a position to recover, adhere to what their
22 preferences are, but allow that victim to recover

1 from the assault.

2 CHAIR BASHFORD: And what about the
3 ability to shut down a third-party complaint
4 where the victim says, either I don't want to do
5 anything or nothing happened?

6 LT. COL. SCHRANTZ: The inadvertent
7 disclosure that then the third-party --

8 CHAIR BASHFORD: Some third-party
9 calls in and says, I know this person was
10 sexually assaulted and the victim either says,
11 no, it wasn't or I just don't want to talk about
12 it?

13 LT. COL. SCHRANTZ: I'd support the
14 victim, ma'am.

15 CAPT SULLIVAN: Yes, ma'am. And I
16 would support in the same manner.

17 The one issue that you identified
18 though is, a difficult question is, how do you
19 know if there are other victims, until you
20 investigate. So at what point do you stop that
21 investigation.

22 But I think, given the limited

1 resources that we have and given the interests of
2 the accused, that, unless there is really good
3 information as far as going down to a full
4 complaint, if the victim does not want to
5 participate and does not want to, any action on
6 the third-party complaint, we should provide them
7 with the resources and not pursue that.

8 COL HAMILTON: Ma'am, from my SJA side
9 I'm torn. I believe that failing to pursue to
10 remove a cancer or a problem within the
11 organization will have a negative impact on good
12 order and discipline.

13 So, being able to just shut it down
14 based on the victim poses a problem. And I was
15 just split. Let me go back to this in a second.

16 But from, now we're in the SVC side of
17 the house, the one thing I loathe is to have to
18 re-victimize the victim already. And empowering
19 the victim to, with the expedited transfer and
20 being able to shut down the investigation does
21 help with that person's healing.

22 However, when you look at it in the

1 sense that, which was the note I received, some
2 type of recruiter malfeasance or basic training
3 malfeasance and then the victim says, I don't
4 want to participate when you're talking about a
5 drill instructor or a recruiter who may have the
6 tendency to repeat.

7 And then by not going forward to
8 ensure good order and discipline is there, we
9 have put others in harm's way. And so it's, I
10 think it's a double-edged sword and I don't know
11 that I have a very clear answer for you.

12 I don't like re-victimizing victims,
13 but I also want to remove problem individuals
14 from the formation because that is what degrades
15 good order and discipline and effects all of us.

16 MS. SPECHT: I would agree with
17 Colonel Hamilton. I think the command has, needs
18 to have the ability if there is some pervasive
19 issue that is happening within their command.
20 Again, Coast Guard being very small, it can
21 really deteriorate the ability of the unit to get
22 the mission done.

1 So, I really like the Air Force's sort
2 of methodology there in that it's only if, sort
3 of, there was this one time, one person said
4 something and then OSI sort of brings them in and
5 says, do you want to move forward and they say,
6 no I don't, but then OSI has the obligation if
7 additional evidence comes forward.

8 Or if the command provides additional
9 evidence, where I assume it mostly comes from.
10 That they would still move forward with the
11 investigation.

12 Again, I would just like the way that
13 everybody else does restricted reports, to be for
14 the Coast Guard. That would be a success for me.

15 MS. GARVIN: So, I think it was you,
16 Colonel Clay, but forgive me if I'm wrong, but
17 had mentioned, so I'm going back to 32 for a
18 second, you had mentioned, I think, that during
19 the 32 both the victim can be there but also the
20 SVC or VLC can be there. And if a victim's
21 rights issue comes up, most likely a 412 or a
22 513, but maybe a different Article 6b right could

1 present in that moment. But the SVC, VLC
2 participates.

3 So, a two-part question. What does
4 that actually look like and do you think that the
5 SVCs and VLCs have sufficient standing to protect
6 rights that might arise or violations of rights
7 that might arise in a 32, both in the moment and
8 then any possible appellate moment out of that?

9 COL. CLAY: Generally, the way it
10 looks, is if an issue arises during the hearing,
11 the SVC will stand up, be recognized and then
12 have an opportunity to object or make an oral
13 argument.

14 In some cases, this is the ideal
15 situation. Trial counsel has talked to the SVC
16 prior to the hearing, so those issues have been
17 resolved before they walk in.

18 Sometimes, as we all know, things
19 don't go according to plan and the SVC has to
20 stand up and object to make their argument as to
21 why a particular issue is affecting their
22 client's rights and their ability to argue on

1 behalf their client, to protect their client's
2 rights.

3 That's typically the way it looks. At
4 trial, obviously, that's going to be a little bit
5 more formal with written motions and everything
6 else. But at the 32 hearing it's usually oral
7 argument.

8 And I'm sorry, what was the second
9 part of your question?

10 MS. GARVIN: Just whether it was
11 sufficient standing that they have right now to
12 protect the rights in a 32.

13 COL. CLAY: As a 32, yes. We believe
14 that it is sufficient.

15 And that we haven't really had any
16 issues that have risen to the point where we have
17 to actually file an appeal through that avenue.
18 So we haven't actually tried to do that or exceed
19 what happens to the courts if that type of issue
20 has risen.

21 MS. GARVIN: Do you have concerns, if
22 you had a case, that you would be well received

1 at the appellate court or do you think you could
2 move forward?

3 COL. CLAY: I think we could move
4 forward --

5 MS. GARVIN: Okay.

6 COL. CLAY: -- if we had the right
7 case, with the right facts and aligned with what
8 the law says.

9 MS. GARVIN: Okay. I'd like to hear
10 from others too about this.

11 LT. COL. SCHRANTZ: Similar for us,
12 ma'am. I don't have anything to add to that.

13 CAPT SULLIVAN: Ma'am, the process is
14 the same.

15 COL HAMILTON: I'm tracking the
16 process to be the same for us. I think the
17 standing piece is a larger issue the closer you
18 move to trial and the control being more in the
19 judge's as far as whether or not, how, just
20 speaking to some of the Military judges, the
21 judge's course, and the role of the SVC is not,
22 you know, under case law and statute, the actual

1 party in interest there for the SVC to stand and
2 make an objection from behind the bar. So that
3 is an issue that's still being resolved.

4 And through case law or statutory
5 change then maybe there would be more of an
6 opportunity for SVC to object and interject at
7 trial. But as far as a 32, I think we're okay
8 right now.

9 MS. SPECHT: Very similar in the Coast
10 Guard. I think practically speaking, some of it
11 is dependent on the experience level of the PHO
12 as to how comfortable they feel with the SVC
13 standing up and making argument extemporaneously.
14 It may come after the fact and potentially
15 appended to the PHO's report.

16 MS. GARVIN: Thank you.

17 MR. MARKEY: Well, thank you for being
18 here, thank you for your service, taking time out
19 of your day to really give us some great
20 information to help this, can we kind of look,
21 are there areas and gaps that we can improve the
22 process. Kind of along the same vein of victim

1 participation, Article 32.

2 We heard about collateral misconduct.

3 And I guess I was looking for some clarity on
4 when that comes up it usually, probably I would
5 assume comes up in the investigative process
6 initially, so I'm wondering, what is your
7 experience with how that's managed, what does
8 that look like and is that considered a factor,
9 or have you seen that considered as a factor for
10 victims who don't want to move forward or don't
11 want to participate?

12 And I know there's a lot of things
13 wrapped up in there, but basically I'm looking to
14 see some clarity about the collateral misconduct
15 and how is that, what does that look like, you
16 know, is it a formal identification of an
17 investigation, is it running up the chain of
18 command that we're going to have to report this
19 and what impact does that have on your clients?

20 LT. COL. SCHRANTZ: Sir, thank you.

21 And in the case of where a line VLC will meet
22 with and consult with and have the initial

1 meeting with the victim, if information is
2 presented that there could be collateral
3 misconduct, that VLC will arrange for
4 representation from the defense counsel there in
5 the region locally.

6 And the communication and interaction
7 for the line VLCs that are out there representing
8 their clients doesn't exist just between them and
9 the government and the trial counsel, but with
10 the defense bar as well.

11 And so, in the case where there would
12 be a potential exposure for that individual, it's
13 not for the victim's legal counsel to represent
14 and advise on potential collateral misconduct,
15 it's going to be for that victim's defense
16 counsel if one is ultimately made available.

17 MR. MARKEY: Sure.

18 CAPT SULLIVAN: To answer, the process
19 is similar in the Navy. And as far as your
20 question regarding how that's dealt with, it
21 really depends on the victim on the collateral
22 misconduct and the duty.

1 Sometimes the convening authorities,
2 as you heard earlier, will dispose of it prior to
3 the court-martial. Some will hold it until after
4 the court-martial.

5 Some victim's prefer to have it
6 adjudicated prior if they're going to captain's
7 mast or if they're going to begin some type of
8 formal reprimand, have it taken care of ahead of
9 the time that they're going to testify. The
10 potential to be cross examined on it. It's just
11 really dependent on the victim and the misconduct
12 that's involved.

13 And the same thing with the factor as
14 far as whether it's determined for whether they
15 move forward or not. It depends on the victim,
16 the type of, kind of misconduct.

17 Their, just their, I guess their job,
18 right, because they're looking at the job. If
19 they have this misconduct that's adjudicated
20 that's their future in the Military.

21 But again, we do have them consult
22 with defense counsel on those issues if there is

1 anything under the military justice misconduct
2 system that they're going to be facing charges
3 for.

4 COL HAMILTON: Similarly, TDS, Trial
5 Defense Services, will take in for the collateral
6 misconduct. And the SVC will refer the client
7 over to trial defense services.

8 But the protections that I think
9 you're alluding to also are built in, in the
10 sense that if the offense was something along the
11 line of underage drinking but there was a serious
12 aggravated sexual assault in addition to the
13 underage drinking, we'll deal with the collateral
14 misconduct so that the strength for the victim,
15 if he or she chooses to go forward, will then be
16 able to say yes, that was dealt with.

17 So, at the time of trial, during the
18 cross examination, you know, oh, you're only here
19 because you were involved in some other offense
20 and you're not getting prosecuted or charged with
21 that. Now, I've already made, received my
22 reprimand or my Article 15 for the under aged

1 drinking, but what happened to me is even more
2 egregious and that provides some of the
3 protections in there.

4 But yes, we do separate the special
5 victim's counsel advice to when there's
6 collateral misconduct and send them over to trial
7 defense services.

8 MR. MARKEY: And I'll just interrupt
9 real quick, is that automatic?

10 As soon as there is information that's
11 received of collateral misconduct, they're
12 automatically giving that information to TDS for
13 them to manage that?

14 COL HAMILTON: Well, I mean, that
15 would be, depending on how, once we, the special
16 victim's counsel gets information about
17 collateral misconduct or the victim starts
18 raising other collateral misconduct to the
19 special victim's counsel, the victim's counsel
20 are trained, go through the training so that they
21 understand, when you hear information of another
22 UCMJ, uniform code of military justice violation

1 or something else that the victim may have done,
2 you say, okay, it is best for you to seek trial
3 defense services in the event the chain of
4 command choose to come after you or to prosecute
5 or move to some other adverse administrative
6 action for the victim because of the collateral
7 misconduct.

8 So it's up to the SVC to then look at
9 that. From the SJA side, if we hear of the
10 collateral misconduct then we're going to look to
11 the chain of command and say, what are you
12 recommending for this person who, although a
13 victim, also engaged in some other type of
14 violation. Did I answer your question, sir?

15 MR. MARKEY: What kind of impact does
16 SVC have in your relationship with your client?

17 COL HAMILTON: I think if the SVC is
18 doing his or her job, I don't think it impacts
19 it. It's like, hey, I need to protect you. I'm
20 going to protect the, what your result of the
21 sexual assault, but hey, now to look at added
22 protection for you, let's go over and meet with

1 trial defense services because they're going to
2 discuss things with you that are outside of my
3 scope of representation for the sexual assault.

4 COL. CLAY: And very similar in the
5 Air Force. Often it comes up during the
6 investigation, but it could be, come from other
7 sources, including the victim in their protected
8 conversation with their SVC.

9 If the SVC becomes aware of collateral
10 misconduct, they will talk to their client. And
11 with the client's consent, make a referral to the
12 area defense counsel so they can be represented
13 for those matters by defense counsel.

14 MS. SPECHT: Similar in the Coast
15 Guard to the Air Force. It's more of a
16 conversation with the client and the SVC because
17 generally, when we're talking about collateral
18 misconduct in the Coast Guard, at least it's
19 going to be underage drinking.

20 So it's a fairly low-level offense and
21 it's going to come out because everybody was at
22 the party, everybody saw everybody drinking. So

1 it's not something that necessarily needs to be
2 referred to the defense counsel at that stage.

3 However, if it's something more
4 serious, if it's something that we think is
5 potentially a court-martial offense, they're
6 definitely going to be referring over to our
7 defense counsel. We have a --

8 MR. MARKEY: It sounds like it's a
9 low-level offense you may not.

10 MS. SPECHT: I mean, that would be
11 with the client's consent if they saw --

12 MR. MARKEY: Is there any guidance on
13 that?

14 MS. SPECHT: No, it's within our
15 instruction itself.

16 CAPT SULLIVAN: And it's with the
17 client's consent because to seek advice of
18 defense counsel, that is the client's decision
19 whether they wanted to seek the advice of defense
20 counsel. We can't force them to speak with
21 defense counsel.

22 CHAIR BASHFORD: Apart from collateral

1 misconduct, have you personally seen or have you,
2 just more broadly seen, any instances of
3 retaliation in the chain of command against
4 somebody or, I supposed what a client perceived
5 as retaliation, apart from social consequences
6 which I don't think people can really control all
7 that well, but have you seen retaliation?

8 MS. SPECHT: I'm wracking my brain
9 because I would say we see retaliation
10 frequently. Or not frequently, what the victim
11 perceives as retaliation.

12 And I think it's difficult because
13 they're in a situation where they don't feel
14 super connected with a command, so everything
15 feels like retaliation. Like anything that might
16 have been just normal in the normal course of
17 business.

18 But I would say, yes, we've seen
19 retaliation in the sense that if they don't have
20 a supportive command, I'll use the cadet at the
21 academy, maybe they don't get to go on their
22 first, second, third order of where they wanted

1 to go over the summer, they may feel like that's
2 retaliation in and of itself.

3 I'm trying to think, we had one very,
4 very formal retaliation claim and that ended up
5 getting investigated by CGIS and was
6 substantiated and was acted upon by the command
7 at that time.

8 COL. CLAY: Similar, as far as
9 official chain of command, professional
10 retaliation is extremely rare. In fact, nothing
11 is coming to mind as an example, but I'm sure it
12 has come up, I'm just not aware of it. But it is
13 extremely rare to have actual professional
14 retaliation through the chain of command.

15 LT. COL. SCHRANTZ: I'm not aware of
16 any at this time, ma'am.

17 CAPT SULLIVAN: My answer is similar
18 to the Air Force, where it's very rare to see the
19 senior level professional retaliation. Sometimes
20 what we've seen is members of the command think
21 they're doing something good for the victim that
22 then the victim perceives as retaliation.

1 Changing a work schedule or something
2 that really isn't necessary from the victim's
3 perspective and the victim thinks that that's
4 retaliation or punishment whereas the command was
5 trying to do something to help without
6 communicating effectively. So we always
7 encourage our VLCs and our victims talk with the
8 VLCs and work with the command on that as far as
9 working out those issues.

10 Sometimes in the mid-level senior
11 enlisted arena, again, not to the level of
12 retaliation but sometimes with the idea that
13 they're protecting the victim or their assisting
14 the victim, they do certain things that may be
15 perceived as retaliation. And then with
16 communication and education, our VLC have been
17 able to resolve those issues.

18 COL HAMILTON: Very similar to what
19 Captain Sullivan is saying, I've not been a party
20 to or experienced any professional retaliation
21 but the perceived retaliation usually gets dealt
22 with, with a phone call or two. And once you

1 hear that information, you talk to the chain of
2 command or send the trial team back to make sure
3 that it's taken care of.

4 And I've yet to hear anything further
5 from it.

6 MS. LONG: Hi, thank you for being
7 here. I wanted to go back to the Article 32 and
8 the usefulness of it.

9 And thinking about some of the
10 comments this morning and your very unique
11 position, I'm wondering if you think that,
12 understanding it's been changed, that it is
13 stronger when the victim testifies and that it's
14 useful for preparing the victim for trial when
15 victim testimony is involved in that process?

16 And Colonel Hamilton, I guess I would
17 start with you.

18 COL HAMILTON: Ma'am, I must
19 apologize, could you rephrase the question --

20 MS. LONG: Sure. Whether at the
21 Article 32, having a victim testify, I know it's
22 their choice, but having that testimony, does it

1 make the Article 32 hearing stronger, the
2 evidence that goes in stronger, and is it useful
3 for the victim to get experience testifying?

4 From your perspectives now as an SVC
5 and others.

6 COL HAMILTON: Ma'am, from the SJA
7 perspective, I'll answer that first, I would
8 prefer more information. We're learning more
9 about the SVC program and victims and the trauma
10 they go through. I think we're doing the best
11 thing by leaving it up to the victim to go
12 forward.

13 The experience of, yes, everyone wants
14 a little bit more experience, but it's one thing
15 when you're putting your personal trauma out
16 there for that experience. I don't know that you
17 learn from having said it multiple times at the
18 32 or through the investigation and then the 32
19 and then at trial and subject to cross
20 examination.

21 I'm not sure that's beneficial. So
22 what we train and we teach is, leave it up to the

1 victim, discuss the process. The SVC needs to
2 discuss the process with the victim and let it be
3 the victim's decision at that point so long as
4 they fully understand and appreciate what the
5 process is about, and if the SVC are doing their
6 job, the victims, I believe, are making informed
7 decisions on that.

8 CAPT SULLIVAN: And I have the same
9 concern regarding the, having the victim tell the
10 story again, yet again and again.

11 And the parameters of the 32
12 previously where we had the instances where the
13 victims were on the stands for days. And I think
14 procedures and processes would need to be changed
15 to ensure that there are protections of the
16 victim during that process.

17 Again, I was chief of defense for a
18 while and so from that perspective, from the
19 accused, definitely like to have that opportunity
20 to talk to the victim prior to the court-martial,
21 as well as the trial counsel. You can get an
22 idea of how the victim is going to react or hold

1 up on the stand.

2 But I don't think testing the victim
3 in that capacity is really useful for the
4 purposes of the ultimate trier of fact at a
5 court-martial. And the dangers and just
6 everything that's involved with re-victimizing
7 the client.

8 Re-victimizing the victim in that
9 setting with the, what we've seen in the past, I
10 do not think it's a good idea.

11 LT. COL. SCHRANTZ: Agree, ma'am. I
12 would like to continue to allow it to be what the
13 victim would prefer to do.

14 One, as part of our training a few
15 weeks ago, one instance that really stuck with me
16 from hearing from an actual victim of a case that
17 was successfully prosecuted, she flat out said
18 that the actual act of testifying at the trial
19 was worse, felt worst to her and that the anxiety
20 and pain and suffering of having to retell it was
21 worse than the assault. And it just stuck with
22 me for hearing her.

1 So having that type of action imposed
2 again on them to add in Article 32, I would not
3 want to see that in terms of victims.

4 As far as getting them ready, I think
5 the victim's legal counsel and the trial counsel,
6 you can only do the best that they can in
7 preparing that victim to testify through
8 preparation and assurances and education and just
9 trying as best they can to support that victim
10 through the process so that they are as ready as
11 they can possibly be during such a difficult
12 event, as testifying is.

13 COL. CLAY: And to really kind of echo
14 what was already said, it should be a victim's
15 choice and a case-by-case basis. They will have
16 an opportunity to have the advice of their SVC or
17 VLC, an opportunity to consult with trial counsel
18 ahead of time.

19 So the victim, in consultation with
20 their SVC, is in the best position to make a
21 decision whether they should or should not
22 testify at an Article 32.

1 And, again, depending on the victim
2 and the nature of the alleged assault, it may be
3 more emotionally damaging to them to testify
4 twice versus just at the trial itself.

5 MS. SPECHT: Just pretty much the same
6 as what everybody else has said. It's going to
7 be a conversation between the SVC and the client.
8 And it will depend on the specifics of the case.

9 MS. TOKASH: So --

10 MS. GARVIN: Oh, I'm sorry, I didn't
11 see you Meg.

12 So, we've talked a little bit about
13 collateral misconduct. And then, I don't know if
14 everyone was here this morning when we had the
15 panel talking about it, but one of the things
16 that we discussed was the definitional
17 differences in the reports that came from each of
18 the services as they were trying to collect the
19 data. And as we were unpacking that a little bit
20 we talked a little bit about the definitional
21 differences in adverse action.

22 And so, I'm just curious what your

1 opinions, if you have them, it might be something
2 you need to think about, about if we're going to
3 try and help folks come up with definitions in
4 order to respond to those types of queries, and
5 maybe even encourage Congress to be a little more
6 specific when they give certain things.

7 Would you all from the SVC, VLC
8 perspective, have a recommended definition of
9 adverse action that a survivor might suffer in
10 response to collateral misconduct?

11 And because what we were talking about
12 this morning is formal adverse action and
13 informal adverse action. I'm seeing lots of
14 furrowed brows --

15 (Laughter.)

16 MS. GARVIN: -- which probably means
17 that either my question was inarticulate or
18 you'll be graceful and say you need time to think
19 about it.

20 LT. COL. SCHRANTZ: Ma'am, an
21 excellent question and --

22 (Laughter.)

1 LT. COL. SCHRANTZ: -- I was here this
2 morning and --

3 BRIG. GEN. SCHWENK: You weren't
4 paying attention.

5 (Laughter.)

6 LT. COL. SCHRANTZ: Sir, I was, I
7 promise. But it is something, ma'am, honestly
8 that I'd like to think a little bit more about.
9 Thank you.

10 CAPT SULLIVAN: Yes, ma'am, the same,
11 to think about it. Because it could be very
12 broad so we would need time to think about it.

13 BRIG. GEN. SCHWENK: Let me help a
14 little bit. So, this morning, it seemed like
15 there was a general consensus, a court-martial is
16 adverse.

17 (Laughter.)

18 MS. GARVIN: Correct.

19 BRIG. GEN. SCHWENK: And NJP is
20 adverse and an administrative discharge is
21 adverse. And so then, you get to other measures
22 that could be labeled non-punitive measures.

1 MS. GARVIN: Yes.

2 BRIG. GEN. SCHWENK: So, I'm going to
3 give you a letter.

4 MS. GARVIN: Right.

5 BRIG. GEN. SCHWENK: Okay. If I'm
6 going to give you a letter and send you a copy
7 for your official file, that might look awfully
8 adverse.

9 If I'm going to give you a fitness
10 report or whatever you call it, and in it I'm
11 going to be less than glowing, I haven't said
12 anything bad but I just haven't glowed very much
13 like we normally lie and, oh, I mean embellish,
14 some people might perceive that as adverse,
15 others might not.

16 If I'm going to give you a letter and
17 stick it in my drawer, because it's a non-
18 punitive letter and it's more a corrective
19 measure, maybe you don't consider that adverse.
20 Although, as a recipient of two of those, I
21 considered them adverse at the time.

22 (Laughter.)

1 BRIG. GEN. SCHWENK: So, I think we're
2 really looking at the low end of things. At the
3 top end of things probably pretty easy but we're
4 getting towards the low end of any thoughts you
5 have on that. Right?

6 COL HAMILTON: Yes. So, that's
7 exactly where I jump to looking at the reprimand
8 --

9 BRIG. GEN. SCHWENK: Well, then you're
10 screwed up. If you're at my level, we've got
11 problems.

12 COL HAMILTON: I'm sorry, sir. The
13 reprimand, whether it be an official file, a
14 local file, which is basically in the drawer as
15 far as where adverse and for, especially for the
16 victim as a form of the collateral misconduct.

17 But what I'm hesitant to do, which I
18 would ask for more time to really look at is
19 having something directed put out regarding that.
20 I'm always fearful of when you take that option
21 away from commanders to figure out what is best
22 for good order and discipline within the unit at

1 that time. And also considering the victim and
2 the trauma that he or she has already endured,
3 what is the best way to ensure and enforce good
4 order discipline across the formation as to what
5 degree.

6 Because, some would say that if you're
7 junior enough in rank even an Article 15 may be
8 survivable as a, because it's non-judicial
9 punishment. However, like you said, sir, it's
10 adverse. An official reprimand is adverse.

11 In a drawer, it's a reprimand so it
12 adverse, but it may be able to survive so that he
13 or she may have a successful career thereafter.

14 CAPT SULLIVAN: And, sir, I'm thinking
15 of even other things like deeper into the weeds
16 as far as possible, if you're up for a certain
17 school and because you were found guilty of
18 drinking under, underage drinking, you lose that
19 school so that then affects your whole career
20 path.

21 Or not extra Military instruction as
22 much, but the other thing I'm thinking is deeper

1 into the weeds as far as losing some opportunity
2 that you may have had to progress on your career
3 path because of that collateral misconduct.

4 BRIG. GEN. SCHWENK: Thrown out of the
5 special whatever program --

6 CAPT SULLIVAN: Yes, sir.

7 BRIG. GEN. SCHWENK: -- that you have.

8 CAPT SULLIVAN: Yes, sir. Or even
9 being set back for a couple of months or so, so
10 that you're not on the same track now as your
11 peers.

12 BRIG. GEN. SCHWENK: So like what
13 happens to the accused?

14 CAPT SULLIVAN: Absolutely, sir.

15 BRIG. GEN. SCHWENK: -- record.

16 CAPT SULLIVAN: Absolutely, sir.

17 LT. COL. SCHRANTZ: That's right, sir.

18 And so, like Captain Sullivan mentioned,
19 regardless of the outcome of the military justice
20 proceedings there is the potential of certain
21 hang-up and delay and awkwardness that a Service
22 Member's record will look like.

1 Even with no adverse material in it at
2 all formally. If someone on a promotion board or
3 a school board is looking at that individual's
4 record, there may be consequences because the
5 board member doesn't have the benefit of knowing
6 what happened but it just looks odd. It's the
7 odd career progression. And it could just
8 potentially be due to delay.

9 It could also be that that individual
10 victim felt that in addition to an expedited
11 transfer just to avoid this local geographic area
12 that they were in a particular MOS or field of
13 practice that really required them to get out of
14 that field. It's too small.

15 Everyone knows so they do a lateral
16 move into an additional MOS. Well then you get
17 into the situation to where, as career advisors
18 would recommend is, you know, how would you get
19 that victim with a new MOS into a position to get
20 MOS job credibility in a completely new and
21 different job.

22 And so, those are the type of

1 challenging adverse actions that aren't adverse
2 in terms of formal written counselings that's in
3 someone's record, but in terms of a victim's
4 career progression and overall standing over a 20
5 year career, it could be a one to two year blip
6 that looks very odd that could have negative
7 impacts on them.

8 Just something that until this morning
9 hadn't thought about much, sir.

10 MS. TOKASH: In the responses by SVCs
11 and VLCs to the request for information for this
12 particular speaker group, there was an indication
13 that even though the reaction of victims vary
14 case-by-case, many of them expressed devastation
15 at an acquittal.

16 So, my question is, do you think,
17 based on the very high acquittal rate in the
18 Military that we're seeing as a group through the
19 case review working group and the actual raw data
20 that we're seeing from analyzing cases in the
21 field, do you think given the very high acquittal
22 rate in the Military coupled with the

1 devastation, the feelings of devastation from the
2 victim, that there should be a higher standard
3 for referral of cases to trial?

4 If so, what do you think that should
5 be?

6 BRIG. GEN. SCHWENK: We almost had
7 somebody down here, but if you had just waited
8 you could have gone last.

9 (Laughter.)

10 BRIG. GEN. SCHWENK: But too late, the
11 red light is on.

12 COL HAMILTON: Sir, like you said,
13 we're similar in some ways.

14 (Laughter.)

15 COL HAMILTON: Ma'am, I do not think
16 it should be a higher standard. I obviously feel
17 for, empathize with victims who feel devastated.
18 And who wouldn't?

19 However, I think the process there, I
20 think some victims, although devastated, at least
21 feel through the process, if the SVC was doing
22 their job, the chain of command and everyone, the

1 resources, the treatment to care was there for
2 the victim, at least I think there is some
3 healing in the fact that they, their story was
4 heard, their trauma was heard.

5 And while it may not have reached to
6 the level of beyond a reasonable doubt for a
7 conviction, there was some empathy through the
8 process for the victims. So while they're
9 disappointed with the result, I think that they
10 have taken a giant step toward healing by having
11 had the opportunity to tell their story.

12 And I think if we just look at
13 conviction rates for these victims as a means of
14 success or making it more of a challenge to get
15 them to the opportunity to have that healing, I
16 think we're missing the boat on the trauma that
17 these victims experience through the sexual
18 assault.

19 CAPT SULLIVAN: And, ma'am, I'm
20 thinking back to, I read through the responses
21 from our military justice folks and as far as the
22 acquittal rate really is difficult to judge on

1 because every case is different and the reason
2 for the acquittal is different.

3 And these cases are tough. I mean,
4 these many times are two people in a room,
5 something happens and there are different reports
6 of what happened. So I think it would be very,
7 changing the standard I don't know would fix
8 that.

9 And I don't think that basing the
10 decision on the acquittal rate would just really
11 help the system. But again, I defer to the,
12 think back to the answers that I read to this
13 question from our military justice folks, I would
14 defer to them.

15 MS. TOKASH: Because in theory,
16 changing the standard to prove beyond a
17 reasonable doubt at referral, could kill a lot of
18 cases right there.

19 CAPT SULLIVAN: Yes.

20 MS. TOKASH: True?

21 CAPT SULLIVAN: It could, yes.

22 MS. TOKASH: It could, right.

1 CAPT SULLIVAN: Yes.

2 LT. COL. SCHRANTZ: That's right,
3 ma'am, it could. And you would, although it
4 might not be to the same level, and I agree
5 Colonel Hamilton's feedback up to this point, or
6 comments to this point, but you raise the
7 standard, you use the term kill it would sort of
8 expedite the devastation from the victim at that
9 point rather than having them wait till the trial
10 after, saw all the factors were considered by the
11 Article 32 officer at the same standard and then
12 the SJA and the trial counsel and then the
13 convening authority made that determination of
14 which sustaining the conviction is one of the
15 factors to consider.

16 And so, I think if you made it a
17 higher standard and it precluded it from moving
18 forward at all, much of the benefit that our
19 field VLCs have communicated to us about willing
20 participants who want to go forward, who have the
21 opportunity with their VLC to work through the
22 case, that would be gone at that point.

1 COL. CLAY: And I would agree that
2 there is a value from the victim's perspective of
3 going through the process, having an opportunity
4 to tell the juror or the judge what they
5 experienced.

6 It does come back to managing
7 expectations of the client. And as you all know,
8 oftentimes it's not a result that our client
9 wants at the end of the day, but I do believe
10 there is a value to that victim to publicly state
11 that I was wronged and have that made known.

12 MS. SPECHT: Just to expound on what
13 everybody else has said, and what I was saying to
14 the Chair earlier, there is value in the process
15 itself to victims.

16 I don't think that, I think they want
17 to have it heard by a panel member. And if the
18 SVC is working well, especially with the TC, they
19 will be aware of the potential problem, you know,
20 consequences of moving forward.

21 CHAIR BASHFORD: Staff? All right,
22 then thank you so much for coming. And we'll

1 adjourn for lunch and come back at 2 o'clock. If
2 anybody is going out, out to the courtyard.

3 (Whereupon, the above-entitled matter
4 went off the record at 1:18 p.m. and resumed at
5 2:03 p.m.)

6 CHAIR BASHFORD: We're continuing this
7 afternoon with Panel 3, so we're going to get the
8 Perspectives of Services' Trial Defense Service
9 Organization Chiefs Regarding Conviction and
10 Acquittal Rates, the Case Adjudication Process,
11 and Victim Declination.

12 I suspect we might hear something
13 slightly different than we've heard this morning.
14 But, Staff, can you tee this up please?

15 MS. SAUNDERS: This is, based on the
16 response to the RFIs we've been putting together,
17 and I'm going to read the first one. It's
18 referred to as the referral process.

19 The defense RFI responses indicate the
20 victim preference may play an outside role
21 whether or not a sexual assault case is referred
22 to trial. What consideration or weight should be

1 given to the convening authority given the
2 victim's wishes regarding the disposition of the
3 sexual assault case?

4 CHAIR BASHFORD: Colonel Bennett,
5 could you start us off?

6 (Laughter.)

7 COL BENNETT: So, obviously the voice
8 of the victim is something that should be
9 considered, but when we give too much weight to
10 it, when the wishes or the desires of a victim
11 are going to overwhelm what the evidence should
12 support, if you have a no PC but, hey, the victim
13 wants to go and the SJA is looking at what the
14 victim wants and deciding, no, there really is
15 PC, I think that's problematic.

16 If you have PC but you're looking at
17 it and saying, you know, the chances of a
18 conviction are either slim or, you know what, the
19 evidence really doesn't even support a conviction
20 but still the thought that we should go forward
21 because a victim wants their day in court,
22 absolutely raises the rights of a victim above

1 and beyond that of the rights of the accused.

2 And at the end of the day, there is
3 one person who potentially is facing confinement,
4 loss of liberty. And that's the accused in the
5 case.

6 So while there's a place to understand
7 what the victim wants, there should be some
8 consideration. At the end of the day, the
9 evidence and the analysis by whether it's the
10 PHO, this morning they said the SJA is the right
11 person, the analysis of the evidence, in and of
12 itself, should actually carry the day not the
13 request or the wishes of the victim.

14 CDR KIRKBY: Thank you. I would
15 agree. I believe the standard we should use is,
16 can we obtain and sustain the conviction at
17 court-martial.

18 If we, cannot based upon the evidence,
19 then there should be no, nothing else should make
20 us go forward. The desire of a victim to have
21 their, quote, day in court, should be a
22 consideration.

1 But really I believe it should be a
2 consideration if they don't want to participate.
3 Then no matter what the other evidence, then
4 maybe the commander needs to take that into mind
5 and say, without the participation of a victim,
6 under policy, we don't go forward because if a
7 victim doesn't want to participate, we're not
8 going to force them to come in and testify and go
9 through that process.

10 But to say, well, they want their day
11 in court therefore regardless of the evidence,
12 the state of the evidence, the best interest of
13 the PHO, the best judgment of the PHO, the best
14 judgement of everybody else, the legal process to
15 say, we should go forward anyway I think is the
16 wrong decision.

17 So, I think it has some weight, but it
18 shouldn't overcome the obtain to same standard
19 that we should be using.

20 CDR KING: I agree with my colleagues.
21 What really matters is whether or not the victim
22 is willing to participate. And past that point

1 the evidence and the rest of the military justice
2 process should lead on the charging decision and
3 whether we go forward after a 32.

4 So, again, I think it's, we really
5 have to pay attention to whether or not the
6 victim is willing to participate, because without
7 the victim it's going to be very hard to get a
8 conviction without lots of independent evidence.

9 But after that question is answered
10 then I think that we need to rely on the rest of
11 the process.

12 COL. MORGAN: Good afternoon again.
13 I agree with my colleagues. I believe that the
14 desire of the victim should be fully and fairly
15 considered but should not necessarily override
16 legal standards.

17 The PHO's determination of probable
18 cause, the Article 33 guidance as to the
19 likelihood of conviction. And I would also just
20 like to take a moment to discuss the fairly
21 profound impact that a Military member goes
22 facing a type sexual assault allegation.

1 There's the stress associated with a
2 fairly lengthy process. I believe the last
3 number I had for the average general
4 court-martial for 120 offense was something like
5 508 days.

6 During this time frame --

7 BGEN SCHWENK: From what to what?

8 COL. MORGAN: I believe from the
9 beginning of the investigation until --

10 BGEN SCHWENK: Yes, from the
11 allegation to the --

12 COL. MORGAN: Yes.

13 BGEN SCHWENK: -- until the MCIO
14 till a final decision at the court-martial?

15 COL. MORGAN: Yes, sir. During this
16 time period, frequently, not always, but
17 typically, the member is removed from their
18 normal duties. Oftentimes has their security
19 clearance pulled, may have access to certain
20 areas restricted, be subject to a protective or
21 restraining order further limiting their access.
22 They're placed on a control roster,

1 they can't test, they can't PCS. Or, sometimes
2 they're actually transferred to another
3 installation during the pending trial.

4 We've seen that even if they're
5 acquitted at that point they're typically eager
6 to administratively separate, which parallels
7 oftentimes what we see when there is a conviction
8 with respect to the victim. They're both eager
9 and frustrated with the process to separate.

10 (Off microphone comment.)

11 COL. DANYLUK: -- about the victim's
12 desires to go to a consideration, to the
13 convening authority about whether or not perhaps
14 they desire the Military to be involved at all or
15 if it's possible that the civilians take it if
16 there's a civilian jurisdiction.

17 And then as it is to the weight, it's
18 really, I agree with all my colleagues, about
19 whether or not they are going to be a willing
20 participant in the process.

21 I'm sure the prosecutors would all
22 agree that having a willing victim that wants to

1 participate makes their job a little bit easier
2 as they go through the process.

3 And we haven't always respected the
4 rights or the voice of the victim in that
5 decision making. We've, in my Marine Corps
6 career, ordered sexual assault victims to
7 testify. We don't do that anymore I'm happy to
8 say.

9 But I am aware of how important it is
10 that people feel heard in the process. And so, I
11 think having the voice in the process, having
12 their desires made known to the convening
13 authority whether or not at the end of the day
14 they follow that choice that's being advocated
15 for, is the convening authority's decision.

16 MR. KRAMER: Thank you. I have a
17 question that by the time I get through may have
18 eight or ten parts to it --

19 (Laughter.)

20 MR. KRAMER: -- but I hope you can
21 keep track.

22 So, we heard --

1 (Laughter.)

2 MR. KRAMER: I'm just winding up here.
3 We've heard testimony about how, that if there is
4 a recommendation of probable cause that's
5 essentially never overturned or extremely rare.

6 But what I don't know is if there is
7 statistics or at least anecdotal -- of how often,
8 how often is a finding of no probable cause at
9 the Article 32.

10 And then the second step is, how often
11 that's overturned if there's statistics about
12 that or anecdotal information about that.

13 And then the second part of that
14 question is, if it's overturned is it done, we've
15 heard about a process where additional evidence
16 can be submitted and we also heard, I think that
17 defense counsel can do that also.

18 So I'm curious again how often that
19 the SJA recommends overturning it just on the
20 basis of the evidence, disagreement with the
21 Article 32 with the PHO based on just
22 disagreement or based on new evidence, how often

1 it occurs that there's new evidence and they
2 disagree with the finding of no probable cause?

3 And how often, and the bigger question
4 I guess is, how often is defense counsel, do you
5 participant in this procedure to funnel
6 information to the SJA after the Article 32
7 proceeding?

8 COL. DANYLUK: I think the Marine
9 Corps is a little different just based on the
10 responses that I, I was saying that the Marine
11 Corps, I think, is a little bit different based
12 on the responses provided from all the services
13 in that we see a higher degree of cases maybe
14 that don't go to court because of the
15 prosecutorial merits memo recommends to the SJA
16 that they not go forward on a case.

17 Or if at the Article 32 hearing the
18 PHO recommends that it not go forward. Whether
19 or not they find that there's no, they say
20 there's no probable cause or if they say there is
21 probable cause but there is like zero chance of
22 success on the merits at a court-martial.

1 Some cases are successfully then
2 dismissed. And I think that that's reflected
3 probably by the conviction rates.

4 Based on just my conversations with my
5 colleagues, are higher in the Marine Corps. So I
6 think they're taking less of the very weakest
7 cases to trial.

8 The idea that the SJA is providing to
9 the convening authority all this additional
10 information that's not presented at the 32 is a
11 little perplexing to me. We would like the PHO's
12 recommendation, if there is no probable cause for
13 that to be binding.

14 We feel like the government should
15 present their evidence. I don't understand why
16 they would be hiding that from anybody. And I
17 don't know why they would be funneling it through
18 the SJA to then overturn the PHO's recommendation
19 that there is no probable cause.

20 I don't think any of us opposed the
21 ability for the government to go back for another
22 hearing, subsequent if there was a finding of no

1 probable cause. But I think we all agree that it
2 should be binding.

3 CHAIR BASHFORD: Go ahead.

4 CDR KIRKBY: I don't think we have
5 statistics to answer Parts 1, 2 and 4.

6 (Laughter.)

7 MR. KRAMER: I don't even remember
8 what those were.

9 CDR KIRKBY: But I think by analogy,
10 we do have some cases where we find, where the
11 PHO finds no probable cause. And those cases are
12 not continued, those are killed at that stage.

13 We also have cases where we know that
14 the PHO has recommended no, who has found no
15 probable cause, those cases have gone forward.
16 And we've challenged that finding through motions
17 saying, hey, wait a second, there is no probable
18 cause, how did we even get to the court.

19 Judges have, based upon the
20 recommendation nature of the 32, simply not
21 allowed those motions to succeed.

22 How many have been overturned, again,

1 I don't know. The concept of the defense putting
2 in evidence to try and convince the convening
3 authority of a position, the SJA has now weighed
4 in on.

5 I can't think of a case where the
6 defense would ever want to play that game.
7 Unless there is such overwhelming evidence that
8 was clearly prohibited at the 32.

9 Now, there are rules that prohibit
10 what we can do. There is certain things that the
11 convening authority should know and the
12 complaining witness should know that defense
13 knows about. So we put that stuff forward.

14 But usually, that's not a good
15 strategic decision to go and put, play all your
16 cards and say, well look, we know you've got this
17 and we know your SJA is disagreeing with us, but
18 what about all this stuff.

19 Now, we'll hold that back and we'll go
20 to trial and that may contribute to the acquittal
21 rate where we obviously look at a different
22 standard.

1 The binding nature of this I agree.
2 And I'm trying to think of a Military reason why
3 the 32 is not binding, and I simply cannot come
4 up with one as I've thought about this process
5 over the last few years.

6 To your question earlier on, should
7 there be a difference in our systems between the
8 federal system, I don't think so. I can't think
9 of a Military reason.

10 And that should be the standard we're
11 looking at. Is there a Military reason.
12 Difference in members, conviction, you know,
13 two-thirds or three-quarters versus a unanimous
14 verdict. That may be a Military thing.

15 Twelve versus eight versus four. That
16 may be a Military thing. There's arguments for
17 those.

18 But to not have this binding at this
19 stage where we simple have one person. And I
20 heard a lot of arguments during the other panel
21 saying, well, some of the PHOs are not well
22 trained.

1 The government gets to pick the
2 PHO. (Laughter.)

3 CDR KIRKBY: That's not a great
4 argument for them. We pick somebody who doesn't
5 like the standard.

6 If this is the floor, the government
7 should be required to reach the floor. Or they
8 should be able to go back down, start again. And
9 maybe explain to their bosses how you didn't
10 reach it.

11 I know in the U.S. Attorney's Office,
12 if they don't find a, if they get a no true bill,
13 they have to go and explain how this happened.

14 MS. TOKASH: We did hear this morning
15 though that there may be a difference between
16 Military due process and constitutional due
17 process.

18 CDR KIRKBY: Yes.

19 MS. TOKASH: So, there's that.

20 (Laughter.)

21 CDR KIRKBY: That was a fairly scary
22 answer. I think due process. And now of course

1 due process is, how much due process do we want
2 to give people. Military, maybe just a little
3 bit.

4 But the standard we've set is probable
5 cause. Let's at least hold them to that and say,
6 hey, if you think you can go forward to trial.
7 This isn't a game. There's no gamesmanship here.

8 So, that should answer Part 3, 7 and
9 9.

10 (Laughter.)

11 CDR KING: Just so I can jump in, I'm
12 going to take a step back and explain why the
13 Coast Guard has decided to move themselves for
14 this panel.

15 (Laughter.)

16 CDR KING: So, for defense counsel, we
17 have a memorandum of agreement with the Navy and
18 the Navy handles most of our defense matters.
19 So, for a lot of these questions we will be
20 echoing what the Navy says because they have
21 better first-hand knowledge.

22 But in this situation, there is a

1 couple of pieces that I think are slightly
2 different for the Coast Guard. Especially when
3 it comes to whether or not it should be binding.

4 I think we agree with that, but I can
5 also understand, from the government's
6 perspective, why there are times that they may go
7 against the probable cause ruling because the
8 Coast Guard's military justice bench is not as
9 deep.

10 So we may have to assign a PHO who
11 doesn't have the experience necessary to actually
12 give a thorough determination. And so, with
13 further information or further discussion, they
14 may decide that even though they found that it
15 wasn't probable cause maybe there was enough to
16 go forward.

17 As far as, are there statistics out
18 there as far as how many times the Coast Guard
19 does a different finding than what the PHO found,
20 I don't have statistics, but I know that it
21 happens. There are times that we will say there
22 is no probable cause.

1 But the SJA will recommend that they
2 go forward. And again, I think that has
3 something to do, a little bit to do with just --
4 how we're still growing when it comes to military
5 justice. Yes, thank you.

6 COL BENNETT: So, again, no stats, no
7 numbers but there are absolutely times where a
8 PHO has said no PC and the SJA has changed it,
9 said PC and gone forward to the court-martial.
10 Overwhelmingly they end up in acquittal.
11 Eighteen plus months later in many cases.

12 Does the defense counsel have an
13 opportunity? There is that right, but I am going
14 to go with Commander Kirkby and why would we.
15 Very unique specific cases do we afford.

16 Right now we have a capital case and
17 I know my lead counsel has afforded himself that
18 opportunity to present directly to the convening
19 authority, not just the SJA. But it's a very
20 unique case. A very different case.

21 In most cases, the thought that
22 defense is going to get a full hearing, that you

1 have that neutral detached that will look at the
2 defense evidence and take it into consideration
3 and make a different determination that can be,
4 you'll have the ability to sway.

5 I don't think we have a lot of
6 confidence in that so we're going to hold it.
7 We're going to wait until trial rather than that
8 information being given to the government and the
9 government find a way then to counter that while
10 we'll hold our cards.

11 It kind of goes to why we don't avail
12 ourselves with the Article 32. Without the
13 binding recommendation of a PHO, there is little
14 or no reason defense would ever put a case on.

15 Now, in the past it hasn't been
16 binding and defense would pick those cases and we
17 would try it at the 32, but we had a little bit
18 more faith that all of that evidence would be
19 taken into consideration and we could win a case
20 at the 32.

21 There is not the sense within the
22 defense bar, at least in the Army, that we can

1 win a case at the 32. It is an absolute paper
2 case without that binding recommendation. It's
3 just not worth it.

4 Going to whether it should be binding
5 or not, the arguments of the government this
6 morning is a little bit disingenuous. They pick
7 the time to prefer the charges.

8 If you look at from the time an
9 investigation starts to when we actually prefer
10 charges in the Military, it is a substantial
11 length of time. Yes, the preferral of charges
12 triggers a 120 day clock.

13 Other than the pretrial confinement
14 will also do it, I understand that piece. But
15 they control everything about that 32. They
16 control when it's preferred, they control the
17 investigators, they control the amount of
18 resources that are provided to the case, they
19 have more paralegal support in order to be ready
20 and prepared.

21 So at the preferral of charges, it
22 doesn't have to be perfected, I get it. I've

1 been an SJA, but they should be ready to go to
2 court in a very quick time.

3 What if defense comes in and demands
4 a speedy trial, when you have those cases the
5 government unbearably says, oh no, no, not quite
6 ready. Then why did you trigger a court-martial.

7 And all of that entails for a soldier,
8 an airman, a sailor, a Coast, whatever.

9 (Laughter.)

10 COL BENNETT: Why are you, as the
11 government, with that incredible prosecutorial
12 power, triggering something when you're not
13 ready. And we keep forgetting the accused. We
14 keep forgetting what they, and our length of time
15 is 500. Sometimes it's longer.

16 We are talking about life altering
17 events for what, when you can look at it, the
18 experienced counsel, the ones who have it look at
19 the fact pattern and say, that's going to be an
20 acquittal. And yet we have to go through an 18
21 to 24 month process to get that result.

22 Meanwhile, the accused, the family,

1 the victims, everyone else is going along in this
2 process simply to go through the process for what
3 we know the end result is going to be. I think
4 it's problematic.

5 COL. MORGAN: Thank you, ma'am. We,
6 to my knowledge, we do not retain these statics
7 as well. The trial defense division does not.
8 If those statistics were maintained it would be
9 by the military justice policy division, JM.

10 Anecdotally, we do see cases more
11 frequently than not where the PHO recommends, or
12 determines rather, that there's no probable cause
13 and yet, the government proceeds despite that
14 recommendation.

15 I do concur with everything my
16 colleagues have said. I would add that the
17 process whereby an SJA can present all of this
18 unexamined evidence ex parte to the convening
19 authority, does seem somewhat peculiar.

20 And it doesn't require that this be
21 memorialized anywhere. At least the Air Force,
22 pursuant to its administration military justice

1 instruction, AFI-51201, simply has a template
2 that answers in a conclusory fashion the four
3 questions.

4 There is probable cause, there is
5 jurisdiction, there is a basis to go forward.
6 I've gotten the fourth one.

7 CHAIR BASHFORD: The charges are in
8 the appropriate form.

9 COL. MORGAN: The charges are in the
10 appropriate form. Thank you.

11 (Laughter.)

12 COL. MORGAN: Thank you. But again,
13 these are highly complex, difficult decisions.
14 And it seems a little strange that none of this
15 has memorialized anywhere.

16 Convening authorities are highly
17 intelligent individuals. They read everything.
18 And why this somehow wouldn't be captured
19 somewhere, for the purposes of transparency and
20 to make a better-informed decision, is a little
21 unusual.

22 With respect to whether the PHOs

1 determination should be binding, again, I concur
2 with my colleagues, yes. What I would add is
3 that it would be binding but without prejudice.

4 So there would be a mechanism whereby
5 the government could reopen or re-prefer charges
6 and hold a new 32 if in fact there is new
7 evidence. Or arguably, even if the PHO committed
8 some legal error, applied the wrong standard,
9 perhaps there could be an appeal to a Military
10 judge or take it to the next higher level
11 convening authority, which would leave it in
12 command channels as to make a determination
13 whether charges should in fact be re-preferred.

14 But a PHO's determination of probable
15 cause should be a condition precedent for
16 referral of charges.

17 CHAIR BASHFORD: I have a question for
18 you. Several of you have said that although you
19 have the option, at least on paper to bring
20 evidence to the SJA before the commander's
21 decision, you don't, you'd rather hold it. In my
22 practice I call that the Perry Mason option.

1 And I regularly encourage defense
2 attorneys, both pre and post arrest to, if you
3 think we have it wrong please come in and tell
4 us, don't wait 18 months down the road and do an
5 ah-ha you got it wrong. If we have it wrong, we
6 have it wrong, we can deal with this up front.

7 So is it that you don't believe you're
8 going to get a fair, if you bring in this
9 evidence that you believe shows they have it
10 wrong, do you think it's not going to get a fair
11 hearing?

12 COL BENNETT: I think it may be a
13 difference of what type of evidence. Is it truly
14 exculpatory.

15 It's like, nope, here is a text
16 message that says, after the fact that, yes, it
17 was all consensual, right? I mean, that's a
18 little bit of a difference. You would then bring
19 it over to the trial counsel, to the SJA, have
20 that taken in and hopefully be dispositive of the
21 case.

22 But I think there's other types of

1 evidence that maybe you're going to hold the
2 inconsistent statements, some of the character
3 evidence that you're going to kind of withhold
4 that a little bit. You're not going to bring it,
5 again, it depends on the weight of the evidence
6 and that you think it's going to be given.

7 So the truly exculpatory, I would
8 encourage my counsel, give it over so we can end
9 this system. But the ones where is doesn't quite
10 get us completely on the side of, it just didn't
11 happen to, it makes it more questionable, whether
12 you're going to conviction.

13 Then I don't know that there's value
14 of giving that over to the government earlier in
15 the process versus waiting.

16 CDR KIRKBY: No, I would agree. I
17 think there is, in every case the counsel on the
18 case has to decide, is this dispositive, is this
19 the text message that clears my client or is
20 something that the government is going to be
21 surprised by it at trial and if they got it
22 beforehand they can remedy it, they can come up

1 with something different.

2 A lot of our cases we do, if we have
3 the evidence, if our investigators, we have DLSS,
4 defense investigators, if they come up with
5 information that is exculpatory, we will put that
6 forward at any stage of, we don't really care if
7 it's 32, post-32, the day before trial, whatever,
8 we will try and get that in. Because, obviously,
9 the best outcome for our clients is, don't go to
10 trial.

11 Acquittal is not as good as don't go
12 to trial if you're innocent. It's not worth the
13 risk.

14 So, I think in those cases we would
15 absolutely go forward. But a lot of the times,
16 as the Colonel said, it's evidence that calls
17 into question the accused, the complaining
18 witness' behavior.

19 Her history, her reaction afterwards.
20 There may be messages that the government is not
21 aware of that call into question the entire story
22 that they're giving.

1 If we don't think it's going to be
2 dispositive, we're not going to turn it over,
3 we're going to wait and do that in cross
4 examination.

5 CDR KING: I would agree with what my
6 colleagues have said. And I don't think that I
7 have anything additional to add as to why we
8 wouldn't other than its strategy. Like it's
9 trial strategy.

10 And if we can't walk in knowing that
11 it's going to make the case go away, then we have
12 to decide when is the best time to bring that
13 forward and when would we have the best results.

14 COL. MORGAN: So, I agree with the
15 question. The premise of the question in theory.
16 If we were in a position to present evidence
17 which would paint the case in an entirely
18 different light and perhaps cause the government
19 to rethink its prosecution.

20 Our general default position would be
21 to do so, but you heard from the Air Force this
22 morning that the likelihood of a conviction does

1 not factor into their analysis.

2 So, at least for our service there is
3 very little point in presenting this evidence.
4 If the government is going to go forward
5 regardless, it merely gives the government an
6 opportunity to perfect its case.

7 COL. DANYLUK: As I mentioned, I think
8 the Marines handle it a little bit differently.
9 We're more likely to participate in the 32 and
10 not waive it. And we do participate in the
11 post-32 document submission.

12 We have realized some degree of
13 success. Maybe we're naive in that. But I think
14 as a group we have determined that winning the
15 case at a dismissal is obviously, as we've all
16 said, better than winning it at the court-martial
17 process, if we can do that.

18 And so far, we have faith that that
19 system is working with some degree of success.

20 MS. CANNON: Speaking of the 32, I'd
21 like to understand better what it looks like,
22 because we're hearing that it's just a bunch of

1 paper, 15 minutes. And now that there may be a
2 different experience across the different
3 services.

4 So, I'm wondering, what occurs at a 32
5 now, what would make it better?

6 I get the sense unanimously binding
7 decisions would make it better. So, assuming
8 short of that, or in addition to that, what else
9 would make it better and what's happening over in
10 the Marine Corps that might be different than the
11 experiences over here.

12 So, if we could hear all the
13 experiences of what's going on in the 32
14 hearings, what would you like to see that's
15 different that we haven't discussed as binding?

16 CDR KIRKBY: I think what we're seeing
17 is many times, especially in sexual assault
18 cases. Now, sexual assault cases are unique and
19 I know this panel is here to discuss sexual
20 assault cases, but changes we make to the Article
21 32 effect every case not just these.

22 We recently had a case where the

1 Article 32 was two and a half days. It was not a
2 sexual assault case. In the sexual assault case
3 it's usually a paper case.

4 I think if we wanted to make a change
5 we say that can't happen. You can't simply come
6 in and put down a bunch of papers and say, here's
7 your 15 minutes. It takes eight minutes to read
8 the script, it takes, you know, to read the
9 rights and to go through everything that's going
10 on.

11 So really, what are we talking about?
12 The government presents exhibits 1 through 27.
13 Thank you for your consideration, we think this
14 should go forward to a general court martial.

15 That's next to useless. In fact, that
16 may be on the same parallel as useless.

17 What we'd like to see, put the
18 witnesses on the stand. Put some. If you still
19 want to maintain that the victim has a right not
20 to testify, and if that's Congress' position,
21 there are some problems with that but let's just
22 say that is it, put the NCIS agents on, put other

1 people on to say, this is really what happened.

2 Rather than simply here is a report of
3 investigation, just put the agent on the stand.
4 The government should have to produce a living
5 person to allow some kind of cross examination.
6 To allow some kind cross examination, to allow
7 some kind of involvement by the defense.

8 Rather than simply saying, defense, so
9 you can put anybody you want on but we're not
10 going to give you anybody to put on. Which
11 essentially means, you can put the accused on if
12 you really want to.

13 And no defense counsel in their right
14 mind is going to do that. So, I think if we were
15 looking at a change, that would be one.

16 The other thing I think we probably,
17 as we go through this process and we see the
18 equivalent rates and we see everything else
19 that's playing into this, we need to consider
20 whether the complaining witness not testifying is
21 a good idea.

22 In many cases, we used to do it in the

1 old system, we would have the complaining witness
2 come in, they would testify and you would turn to
3 your client and say, that went really badly for
4 us. That was terrible.

5 We need a deal. We need to never make
6 that happen again. If she gets up there up or he
7 gets up there and testifies, you are going down.
8 So let's make a deal.

9 So I think what we've given up is that
10 demonstration to the defense, this is how strong
11 the government's case is.

12 MS. CANNON: Well, and just to
13 interrupt for a moment, in the private sector
14 there is, at least where I come from in
15 California, there is Prop 1, whatever, 114. And
16 they come in through testimony of investigators.

17 CDR KIRKBY: Yes.

18 MS. CANNON: Not bring in the victims.
19 But there is still prelims. There is still
20 hearings. And is that what, that is also what
21 you're talking about?

22 CDR KIRKBY: I do. And I think,

1 earlier I mentioned, is there a Military
2 necessity to the reason we have a 32 as not being
3 binding.

4 I think there are lots of things that
5 we can take from state court proceedings and
6 federal proceedings that we can box into what we
7 term the Article 32 process without going through
8 these additional steps.

9 Because really in the Military process
10 there is a reason not to keep doing all these
11 other steps. But if we could have the same
12 foundational issues resolve at this Article 32, I
13 think that's beneficial for everybody,

14 Looking at the black and white on the
15 paper you may say, oh, well, we don't want this
16 thing to happen. We don't want an investigation
17 is what Congress has said.

18 But at some stage everybody does an
19 investigation. Every state, every federal entity
20 does an investigation. We've simply obliterated
21 that and now our conviction rates have tanked.

22 MS. CANNON: Okay. Can I hear from

1 the other services.

2 CDR KING: I think I agree with
3 everything that the Navy said because they do our
4 cases.

5 (Laughter.)

6 CDR KING: But one of the things that
7 I think would help the Coast Guard specifically
8 is, to work on a system to increase, or to get
9 PHOs qualified.

10 Whether that's some type of training
11 before they're allowed to be a PHO or you have to
12 have a certain amount of experience. Because
13 that's part of the investigation.

14 So they're going to ask the informed
15 questions and they're going to help draw out some
16 of the information. And if they don't have the
17 background knowledge to ask those right
18 questions, then it's, I think, worse than just a
19 paper case. So, that's the additional piece for
20 the Coast Guard.

21 CHAIR BASHFORD: Okay.

22 COL. MORGAN: We're largely seeing the

1 same thing in the Air Force that Commander Kirkby
2 described. We're largely seeing perfunctory
3 Article 32s where select pieces of the report of
4 investigation are offered for the 32 PHO, along
5 with perhaps video recordings. And no live
6 witnesses are called.

7 So, to answer your question, the
8 calling of live witnesses would certainly be
9 beneficial to the truth finding process.

10 Expanded powers of the preliminary hearing
11 officer to direct that the government actually
12 produce evidence and perhaps empower the PHO to
13 issue some sort of sanctions if the government
14 fails to comply.

15 The binding determination of course.
16 And I would echo the comments with respect to
17 some sort of robust training, perhaps
18 certification process for preliminary hearing
19 officers. That's what I would add.

20 I'm not sure that our actual 32
21 process is any different than the other services.
22 It's mostly paper. They don't call live

1 witnesses.

2 I think the outcomes, it sounds like
3 the outcomes are just sometimes different in the
4 Marine Corps.

5 We would like to have live witnesses
6 too and we would like to have better trained
7 PHOs. If that's what's holding the SJAs back
8 from relying more on the PHOs then we feel like,
9 then maybe they should be better trained or have
10 different qualifications. Maybe they should be
11 magistrates or judges.

12 But other than that, I don't think the
13 actual execution of it is any different for us.

14 COL BENNETT: Your question was, what
15 other than making it a binding recommendation,
16 and I hesitate because I think really if you make
17 it binding, a lot of the changes that we would
18 advocate for would happen because the government
19 would have to put thought, care and preparation
20 into the 32.

21 They're not going to sit there and
22 put, unless it's an incredibly strong, here is

1 the victim's statement, here is the accused
2 confession, right? Oh, by the way, those
3 generally don't go with 32.

4 But everything we're talking about,
5 right, if I was the government trial counsel and
6 this is going to be, this was going to make or
7 break my case, I'm going to either go forward or
8 not, I'm going to put the live witnesses on. I'm
9 going to assess my case.

10 I'm going to make sure that I am
11 providing that PHO with all the information. And
12 if that PHO says I have this question and I need
13 this, this and this, the government is going to
14 get it to them.

15 So, a lot of the changes that are made
16 I think would almost be taken care of by making
17 it binding, enforcing the government to resource
18 the article 32 the way it should be so they can't
19 say, well, the PHOs aren't all that experienced.

20 Well, give us your experienced
21 individuals to your PHOs then. Train them.

22 You know, probable cause, we had the

1 conversation that's law school 101. That's your
2 first year of law school, you get what probable
3 cause is.

4 So to say, typically for sexual
5 assaults for the Army, our PHOs are majors. So
6 to say a major judge advocate in the Army cannot
7 make a probable cause determination, which would
8 be binding, that's kind of questionable.

9 But if we make it binding, the
10 government then has all of the reasons to do what
11 we're saying to make it more of a true
12 preliminary hearing and really put in that
13 constitutional protection for the accused.

14 CHAIR BASHFORD: Given the increased
15 number of waivers of the 32 that we are seeing,
16 and if it were to stay in its current posture of
17 a lack of a PC not being binding and no live
18 witnesses, it seems like the Marine Corps at
19 least thinks there still is some utility to it.
20 What about the rest of the services?

21 CDR KIRKBY: I would say there's still
22 some utility to it. We still would like to see

1 what the government is going to present.

2 It gives us another opportunity to
3 file a motion with the court. And hopefully one
4 day the court listens and says, we agree, this
5 was misleading, they didn't put in the entire ROI
6 even though it was a 200 page paper case that
7 they put in, they did not put in this exculpatory
8 things that the convening authority should have,
9 should have done.

10 So, I think there is still utility in
11 it, I just, I think it's the exception rather
12 than the rule. If the rule is there should be a
13 hearing that has some benefit across the board,
14 then I think we need to change it. We need to
15 modify it. I'm not sure how much we need to
16 change it.

17 I echo Captain Monahan's comments from
18 earlier. We've had a lot of changes over the
19 last ten years. I would be reticent to suggest
20 we need wholesale change.

21 But there are some certain
22 modifications that would benefit the system,

1 benefit the victims, the accused and the system
2 as a whole.

3 MS. TOKASH: I'm curious about your
4 motions that you talked about before, Commander
5 Kirkby.

6 So, in a case where there was a no
7 probable cause determination made by the
8 preliminary hearing officer yet the staff judge
9 advocate recommends to the CG to refer and the CG
10 does so, now you're sitting at defense counsel
11 table representing a service member accused of a
12 crime, in a general court-martial. And you filed
13 a motion to dismiss with the Military judge.

14 Is your dismissal motion based on the
15 threshold constitutional issue that is that
16 probable cause has already been determined and
17 the SJA and convening authority are summarily
18 ignoring that constitutional issue, and might
19 that be one of the differences that was alluded
20 to between Military due process and
21 constitutional due process?

22 CDR KIRKBY: I hate to agree that

1 there is a difference. I think due process is
2 due process. We still have some constitutional
3 rights.

4 But I think that's -- because of the
5 language used in the statute for the Article 32,
6 it is a recommendation. It is not binding.
7 Therefore, we lose the motion fairly, almost
8 every time.

9 We win on the fringes of some other
10 misconduct or other happenings by the government.
11 But generally speaking, we lose the motion based
12 upon our argument that the PHO, the neutral and
13 impartial person hearing this determined there
14 was no probable cause and the judges say, that's
15 great, your absolutely right, move on. Because
16 it's just not binding.

17 MS. TOKASH: And if you think it were
18 binding, then maybe the military judges might
19 view the issue differently and rule on your
20 motions differently?

21 CDR KIRKBY: Oh, I believe so. I
22 think, but I think also the SJAs and the

1 convening authorities would understand more. And
2 I think this goes back to the whole argument that
3 Colonel Bennett was making.

4 If you make this binding, I think
5 everybody's game is upped. I think everybody
6 steps up.

7 A lot of the issues we're talking
8 about, that we need to improve this and we need
9 to do this.

10 I think all of those have to follow
11 suit in order to meet that threshold, in order to
12 avoid the risk of, no, we're going to do this
13 again if you think you've got more evidence.

14 MS. TOKASH: And do you think that
15 making that binding would have an impact on, what
16 I think Judge Grimm might have characterized it
17 before as the abysmal conviction rate that the
18 military has currently?

19 CDR KIRKBY: I think fewer cases would
20 go forward. I think therefore if the good cases,
21 government version of the good case is one, I
22 think the conviction rate goes up, right?

1 The acquittal rate goes down because
2 the terrible cases for the government are simply
3 not being prosecuted, they are dying an
4 appropriate death out in 32. There's no PC and
5 we're not going forward.

6 MS. TOKASH: Can I hear from the other
7 services please?

8 COL BENNETT: I would agree that it
9 would have an impact of being able, one, as an
10 SJA, having served as an SJA twice now, if I had
11 that no PC, I would not go forward.

12 But if it's a binding decision, it
13 really takes some pressure from the victim of we
14 can't go forward. You refused to testify, your
15 statement had inconsistencies.

16 That ability then to fairly easily
17 dispose of cases based on the binding
18 recommendation of a 32 officer would be crucial
19 in order to get rid of the really bad cases.

20 Even on the ones where it says, hey,
21 you have PC but recommendation, disposition not
22 going forward, that wouldn't be binding.

1 However, once you invite the 32 with the
2 authority in the PC, say this is a binding
3 recommendation, this is someone who we trust to
4 make this very basic, that even would allow me to
5 go back to an SVC saying, we're not going
6 forward, this is where it's going to end up.

7 You're providing more information to
8 the SJA, to the convening authority to help them
9 make proper disposition of the really hard cases
10 rather than saying, we're going to take all these
11 cases to trial regardless and we'll let the court
12 figure it out.

13 And then we'll also go back, if it's
14 a binding, then from a defense point of view do
15 we offer more information. Do we go to a little
16 bit more of a trust, that if we bring out all
17 these prior inconsistent statements of the victim
18 at the 32 and they really look at what that case
19 is about versus just what the victim statement
20 says, then maybe defense brings more information
21 sooner in the process and we can now get rid of
22 this case and then look at using all of our

1 resources at the other cases that are going to go
2 forward.

3 COL. MORGAN: So we have had defense
4 counsel motion the court to dismiss the charges.
5 Looking at the historical and legislative history
6 behind Articles 32 and Article 34, that Article
7 32 was principally designed to function as a
8 protection against baseless charges, that Article
9 34 is an additional protection that's designed
10 to, again, screen out merit-less cases, even
11 despite a probable cause determination.

12 And then the other piece is based on
13 the statutory construction of Article 32 itself.
14 It actually uses the term determination.

15 So the PHO makes a probable cause
16 determination whereas in other places in the
17 statute it uses the term recommendation, and that
18 utilization of the term determination actually is
19 a legal term of art. Which requires that it be
20 honored as a final, the finality, given finality
21 to the action.

22 And we have had no luck with this

1 motion.

2 COL. DANYLUK: I would just add that
3 if we're not going to get there where it's
4 binding, we would like to know why the SJA is
5 finding that there's probable cause when a PHO
6 has already determined that there's not probable
7 cause.

8 So we think that that is something
9 that should be part of the Article 34 advice
10 letter when they are finding probable cause when
11 there's been a determination about probable
12 cause.

13 MS. TOKASH: Well, your colleagues in
14 the military justice division chiefs panel
15 referenced that one of the factors might be this
16 additional evidence. And I'm not talking about
17 the additional evidence that's noted in the
18 R.C.M. 405.

19 It sounds like they're talking about
20 even further additional evidence that's almost
21 like ex parte with the, I mean, that's what I was
22 left, the impression I was left with that it's

1 this ex parte presentation of evidence to the
2 convening authority without defense counsel there
3 to overwhelm the prior no PC determination made
4 by the PHO.

5 Do you have any comment on that and
6 would you recommend maybe adding a rule for
7 court-martial between the preliminary hearing
8 rule and 405 and Rule 406 pretrial advice that
9 talks about this mysterious additional evidence
10 procedure that we've heard about today?

11 COL. DANYLUK: So, Colonel King, I
12 think, disavowed this finding of new evidence in
13 the interim. I think that you had asked him
14 about.

15 But instead, the SJA was providing,
16 not new information to the government, but
17 information that wasn't contained in the, maybe
18 presented at the 32. I mean, I guess I don't
19 really know exactly what it is because we don't
20 get a copy of it and we don't know what they've
21 told them.

22 So if it's part of this prosecutorial

1 merits memo system or something like that, that's
2 not provided to us so I'm not sure.

3 CHAIR BASHFORD: I think that I have
4 a question on -- we've seen several reports from
5 the 32 officer that says, sort of the equivalent
6 of, well, there is probable cause but there is
7 serious credibility issues. On the other hand,
8 that's not for me to determine, that's for the
9 court-martial.

10 Obviously, it's hard to make
11 determinations on credibility based on papers,
12 but sometimes it's not. Do you think that the
13 32, to the limited extent they're able to, do you
14 think credibility should be a consideration or
15 should that be something referred downstream to a
16 court-martial?

17 COL BENNETT: I think it should
18 absolutely be part of a 32 determination.
19 Especially when you look at the sexual assault
20 and when you look at those classic he said, she
21 said, which is so many of our cases, it comes
22 down to the credibility. And to have a 32

1 officer being able to look and make that
2 determination.

3 We do it for 15-6 investigating
4 officers. One of the things we want them to do
5 is a credibility of the witnesses that they've
6 interviewed.

7 And if there's a change --

8 CHAIR BASHFORD: I'm sorry, what's a
9 15-6?

10 COL BENNETT: I'm sorry, that's our
11 administrative investigation. So non-criminal
12 typically.

13 But we require that if there's a
14 difference between two witnesses, that the IO
15 really take a look at those two statements and
16 come up with a determination where he thinks is
17 truth or where is the credibility issues between
18 those witnesses.

19 So to have an Article 32, we're at the
20 probable cause determination, not, to be able to
21 just defer credibility down to the court-martial,
22 we are, again, missing an opportunity to

1 foreclose proceedings.

2 And the time between a 32 and a trial,
3 I don't know the average time. But it can go up
4 to 12, 18 months from a 32 actually getting into
5 a court-martial and not being able to have a
6 truly neutral detached party look at the
7 credibility issues when they're evident.

8 When there's inconsistent statements
9 within the victims primary, we're not even
10 talking any consistent statements outside of the
11 primary statement but within the statement itself
12 and yet we're not having credibility
13 determinations by all the PHOs.

14 I don't know how you can get to a
15 probable cause without thinking about the
16 credibility of those witnesses and those
17 statements.

18 CDR KIRKBY: Ma'am, that's a very
19 interesting question because I think if we made
20 it binding, if we said, if we said you have to
21 make a credibility determination and we didn't
22 change anything else, so that was the only in a

1 vacuum thing we changed, my fear would be the
2 government would simply be able to put in
3 statements that were from NCIS or CGIS or
4 whatever, investigative service that had none of
5 that information in there. So they would simply
6 be able to avoid the credibility issue.

7 The onus would then fall to the
8 defense to say, wait, there are these other
9 inconsistent things which would essentially mean
10 we would be forced to show our hand.

11 And I don't know that the consequence
12 of that is what we would want to see. That's an
13 interesting question I think we need to think
14 further on how we would specifically do it and
15 what the governments, you know, what's the fourth
16 order of effect of what that change would do
17 without any other changes.

18 CDR KING: I think one of the
19 difficult things with the question is, is to
20 create a blanket rule. Credibility issues are
21 not all created equally.

22 So, if it's a clear situation where we

1 have a piece of evidence that says one thing and
2 another that says exactly the opposite, well
3 maybe they can make a determination and present
4 that to the convening authority so that they can
5 make a final determination.

6 But some of the other credibility
7 issues, it's not as easy to say, absolutely, this
8 person doesn't have credibility or absolutely
9 they do. So, I would probably resist the urge to
10 give a blanket rule but to work in some kind of
11 guidance so that the PHO is thinking about it and
12 presenting evidence that would help the convening
13 authority see what happened during that hearing.

14 Because they were the eyes and the
15 ears. So help make sure that you are detailing
16 it in such a way that when the convening
17 authority is making a decision, they have all of
18 the evidence and all of the information so that
19 in the end it's the best decision for the
20 military justice process.

21 And I think sometimes we lose sight of
22 the military justice process and we really are

1 trying to figure out how to serve justice, right?
2 And sometimes justice is not a conviction. We do
3 the best that we can.

4 And the convening authority needs the
5 information so that they can do the best they can
6 to make the best decision for the service as a
7 whole.

8 COL. MORGAN: So, credibility in these
9 situations is often times the central issue where
10 alcohol is involved and there is the absence of
11 physical evidence, sometimes there is a prior
12 relationship between the accused and the victim.

13 Collateral misconduct, as we know
14 often times comes into play, which may provide
15 the motive. And so, these things are often times
16 critical to a determination.

17 So, I would certainly empower the PHO
18 to consider these factors in making a
19 recommendation.

20 But to Colonel Bennett's point, our IG
21 investigations as well, often times perform a
22 credibility determination when there is

1 conflicting testimony. So we have case law, we
2 have guidance, we have a panel instruction for
3 determining credibility.

4 So, I would also second the
5 recommendation that perhaps this be formalized
6 and actually included as factors that the PHO is
7 to consider.

8 CDR KING: Agreed. I think it should
9 be a factor the PHO can consider. I'm not sure
10 it should be mandated that he consider it.
11 Because, as you mentioned, maybe it's impossible
12 for them to determine.

13 My only concern is that it might have
14 the unintended consequence of now they are often
15 times putting in the video interviews of the
16 alleged victims and it could be then that they
17 stop putting the videos in. And so then the SJA
18 and the convening authority have less information
19 than they're having now if the PHO is making a
20 credibility determination based on a video tape.

21 CHAIR BASHFORD: I don't actually know
22 if this is a question as much as an observation,

1 but you have -- obviously, it's an adversarial
2 process, but we see and hear from the prosecutors
3 that if they write down their advice to the
4 convening authority and then have to give that
5 over, that's like a roadmap of possible
6 weaknesses to their case.

7 In my experience, defense attorneys
8 know very well the weaknesses of my case. You on
9 the other hand are saying if we show our cards,
10 that's a roadmap to the prosecutors to fix the
11 weaknesses of their case.

12 I know the weaknesses of my case, I
13 don't need defense attorneys usually to tell me
14 about something unless there's really something
15 outlying there.

16 And I guess this is why this is more
17 of an observation. Despite it being an
18 adversarial process, it would be nice if people
19 came to it more in an atmosphere of trust. That
20 you don't think the prosecution is hiding the
21 information or the parts of the interviews that
22 make the witnesses subject to, you know, raised

1 eyebrows and the, so I guess that's really more
2 of an observation.

3 If that were a goal, that would be
4 where I would like to see everybody get to.
5 Despite recognizing it as an adversarial process.
6 So, I don't actually have a question.

7 MS. LONG: I have a -- maybe this is
8 also an observation/question. Because I have
9 heard over and over again, and as a prosecutor
10 doing these cases, it's something I've probably
11 heard for over 20 years, credibility, it's all
12 about victim credibility, alcohol matters.

13 Prior relationship, collateral
14 misconduct, inconsistent statements. All of the
15 things that exist in sexual violence cases.

16 You've all been trial counsel you
17 know, as well as anyone else. And so, if you are
18 trying to make credibility, so, I'm going to
19 take, at this point knowing you're sitting in the
20 defense seat, I understand that you're not going
21 to acquiesce to a lot of these things.

22 And there certainly is a difference

1 between a material or an immaterial
2 inconsistency, but to have then a credibility
3 assessment made based on those things when we
4 know that this is what offenders can exploit, it
5 seems a little early in the system with total and
6 complete information of the 32.

7 But it does make me wonder perhaps,
8 and I also think it's too early to draw any
9 conclusions about conviction rates, besides the
10 fact that it's somewhat misleading when you say
11 there's a 20 percent conviction rate when you're
12 just looking at the lead charge and you're not
13 understanding what's happening.

14 I also wonder if maybe this is why the
15 military judges are giving a better conviction
16 rate on the bench trials, depending on wherever
17 we look versus the panel. Because there's more
18 of an understanding.

19 And so, I guess what I would just
20 caution against is that knowing how complex these
21 cases are and knowing how, for decades these
22 cases, there are --- and we never want to see an

1 innocent person being dragged through them, I
2 mean, I think we're all on the same page, but
3 there are guilty people that their cases will not
4 progress because of all the barriers.

5 Finding an area where we're protecting
6 defendants' rights but remembering fairness to
7 the accused is due the accuser also.

8 And really trying to keep the balance,
9 to plagiarize a justice. But to keep the balance
10 true when we're trying to figure out a system
11 that does both of those things.

12 That certainly allows for defendant or
13 an accused not to have their life derailed
14 inappropriately, but not to try and make pretend
15 right now that a conviction or an acquittal rate
16 is a representation of innocent people being
17 brought to the system when we know that there is
18 so much misunderstanding and gaps in the
19 practice.

20 So, that was more of an observation I
21 think.

22 MR. KRAMER: So, I have an observation

1 but a question too.

2 (Laughter.)

3 MR. KRAMER: I share Chair Bashford's
4 wish that there would be more trust in the
5 system, but believe me, the civilian system has
6 plenty of mistrust in it as well, so, it would be
7 nice for all systems to have more trust.

8 But my question is, now I want to move
9 way beyond the Article 32. And Jennifer, Ms.
10 Long talked about it.

11 We saw what I would call striking
12 difference in conviction and acquittal rights
13 between a judge trial and a member's trial. And
14 I don't think we have the stats to show whether
15 why it went to the judge trial.

16 Was there some very prejudicial fact
17 that they didn't want the members to know, was
18 there a racial component, was there -- so, the
19 question is, finally, why would, given those
20 numbers, why would defense counsel ever agree to
21 a judge trial?

22 And is it similar to the civilian

1 world where a judge can kick the case before it
2 ever gets to the members?

3 In other words, in the civilian world
4 a judge can grant a judgement of acquittal and
5 the jury will never get the case. Is there a
6 procedure for that in the military, if so, or
7 even if not, why would, given the numbers we saw,
8 why are defense, why would a defendant or the
9 accused agree to a judge trial?

10 COL DANYLUK: I'm glad you asked the
11 question, I've been waiting all day to speak to
12 this.

13 (Laughter.)

14 COL DANYLUK: And I have been a judge
15 a couple times, but I'm here as a defense
16 counsel. But what I didn't hear in the stats was
17 a distinction between a contested case and a
18 guilty plea case.

19 All of the guilty plea cases are going
20 judge alone. So when you see a higher conviction
21 rate, especially in those middle cases where it's
22 not the contact but it's some other assault type

1 of allegation and charge that is a conviction, I
2 suspect if they broke those statistics down more
3 you would find that the higher rate is not
4 necessarily because they went judge alone, it's
5 because it's a guilty plea and so they had to go
6 judge alone.

7 CDR KIRKBY: And so, we do have the
8 equivalent of a, it's called 917 motion in the
9 military. Basically the judge, if he finds a
10 lack of evidence by the government on a specific
11 element, can kick the case before it ever gets to
12 all the charge. Can kick the entire case, but
13 usually the charge, before it ever gets to the
14 member. So we do have the equivalent.

15 COL BENNETT: I would also, I was
16 curious on, they just gave me the numbers. Quite
17 honestly, from our perspective, whether our
18 counsel are recommending to their client to go
19 judge alone or to the panel is very jurisdiction
20 specific. It's specific on who are your judges,
21 who are your panels, what's the composition of
22 the panels, what have the panels done in the

1 past.

2 So there are so many different
3 variables. One, it would be interesting to take
4 out the actual guilty plea.

5 We have any number of acquittals from
6 our military judges. And I have a number of
7 jurisdictions that pretty much we don't do panel
8 cases and we are very, still very successful at
9 either getting an acquittal or getting the
10 sentence that we think is appropriate from the
11 military judge.

12 So, again, very specific to the facts,
13 very specific to the jurisdiction, very specific
14 to who the military judge is.

15 COL. MORGAN: And it's generally a
16 requirement. At least in the Air Force, that a
17 term in the plea agreement include that the
18 member go before a military judge alone. With
19 respect to a guilty plea.

20 I would just echo the comments that,
21 right, our litigators are expected to know their
22 installations, know the local conditions and to

1 know their military judges. But additionally,
2 there very well may be an instance where a
3 defense may turn on a particular point of law
4 that may be better received by the military judge
5 than the members.

6 CDR KING: For the Coast Guard cases,
7 there's a little bit of trust, or an issue of
8 trust for us, I think without panels as well, but
9 we've had some cases recently where the advice
10 that went out to the convening authority to pick
11 their panels was less than transparent and
12 probably less than legal, if I should say.

13 (Laughter.)

14 CDR KING: So then there is that trust
15 factor too. So are we getting a fair panel if we
16 select a panel or should we just go with the
17 judge that we already know.

18 CHAIR BASHFORD: It's been suggested
19 in several of the answers to the RFIs that an
20 acquittal is a demonstration of a process that is
21 fair and just and that acquittals aid in the
22 maintenance of good order and discipline.

1 At the levels we're seeing here, do
2 you agree with those statements or disagree?

3 COL. DANYLUK: It seems to be an
4 unfair burden on an accused person to prove that
5 the system works just by putting them through the
6 process. Does that make sense?

7 Like, if we all know that it's going
8 to be an acquittal at the end of the day, but we
9 feel like we need to send it to the members just
10 to show that the system works, that seems to not
11 really be justice to me.

12 COL. MORGAN: I --

13 COL BENNETT: I, oh, I'm sorry. A
14 certain level of acquittals, right? I mean,
15 because if you had a hundred percent conviction
16 rate, then we're absolutely going to question the
17 fairness of our system.

18 So a certain level of acquittals I
19 think does. It really shows the system works,
20 you're getting that chance, at the court-martial,
21 to put on the full case. And the panel or the
22 judges, the final trier of fact, are really

1 looking at the evidence.

2 But when you're looking at the
3 acquittal rates and the sexual assaults going
4 over 50 percent, I think we really then have to
5 say, what is the process. You know, as an SJA I
6 looked really hard at -- what I told my counsel
7 is I don't really care about the end state, I
8 care about the process, how did we get there.

9 So, if I had ten cases and nine
10 acquittals, I need to be looking at, what is
11 wrong in the process, how we are not evaluating
12 these cases, did we just luck out and we just
13 really had nine really hard cases that had a go?

14 I kind of think we're missing some
15 steps to really look, analyze. I think one of
16 the panel members earlier this morning said,
17 speculation is taking over analysis. When we
18 don't know what we have.

19 You know, we had the government up
20 here this morning saying, well, we're not ready
21 at the 32, we shouldn't be bound by the evidence
22 we're able to present because we're continuing to

1 investigate. Well, how did you prefer charges?

2 You're having your commanders, you
3 were signing charges and saying, these, the
4 evidence support the charges. How are we getting
5 there if you don't know what's out there.

6 So, it is problematic where we're
7 sitting. But if we're accepting this over 50
8 percent acquittal rate of, well, that's just the
9 system and it really shows the system works,
10 we're missing an opportunity to go back and look
11 at our process and look at individuals who are in
12 charge of it saying, where did we miss, how can
13 we get better, how can we keep this 18 to 24
14 month process of this accused not to happen.

15 So, some acquittals, right, we've
16 always had them. But the level of acquittals
17 we're having.

18 And the other thing, I think it has
19 the opposite effect on good order and discipline.
20 So if you have that commander who has had the
21 soldier in his command for 24 months and they've
22 gone through this process and it ends in an

1 acquittal or you have soldiers sitting in the
2 court-martial saying, it should end in an
3 acquittal, I can't believe this happened, we're
4 losing faith. We're losing faith.

5 If you have an acquittal rate of 59.4
6 percent by panel members, how do those panel
7 members take a look at the cases the government
8 are presenting and acquittal after acquittal,
9 we're not taking the right cases so why should we
10 trust the system? How does that truly support
11 good order and discipline in the military.

12 So some yes. I think the numbers that
13 we have, we need to be doing a really hard look
14 at what we're doing, what our processes are and
15 why we, why we are where we are at.

16 COL. MORGAN: So, Colonel Bennett made
17 a number of my points, but --

18 (Laughter.)

19 COL. MORGAN: -- thank you. But I
20 think it's a confluence of events looking at the
21 entire system, beginning with investigations that
22 are oftentimes incomplete.

1 We heard that sometimes charges are
2 preferred, they go to the 32 without the
3 evidence, hoping that at some point before trial
4 the evidence will materialize and often times it
5 doesn't.

6 This is followed by an often times
7 perfunctory, Article 32, with a determination
8 that there is no probable cause which is then
9 disregarded by the convening authority resulting
10 in a foreseeable acquittal, which then has the
11 effect, I think, of hardening some of the members
12 to the process.

13 CDR KIRKBY: I think in addition,
14 we've got to look at, I mean, other, other
15 victims looking at the process saying, well, that
16 case happened, the government said it had a good
17 case, it moved forward through all of these
18 steps.

19 As a victim, if I were saying I have
20 a good case, this actually has really happened to
21 me, but why would I go through that process
22 because if it's a good case and they lost 58.2

1 percent of the last time, why would I go through
2 this.

3 And so, I think good order and
4 discipline has a number of different issues. The
5 accused themselves, I don't think they see this
6 as good order and discipline.

7 It is very difficult to convince
8 somebody, hey, you're facing 20 plus years in
9 jail, but don't worry, it's good order and
10 discipline. That's a difficult sell for a
11 defense counsel.

12 For a victim, future victim saying,
13 oh, don't worry, the government has lost 50 to 80
14 percent of the last cases, but yours is a really
15 strong case, don't worry, I don't see how that is
16 beneficial to that victim in the future.

17 So, I think there is an effect of the
18 acquittal rate. I think it's detrimental, the
19 good order and discipline across the board.

20 CDR KING: And I hope I don't sound
21 cynical, but our court-martials are usually not
22 happening where the offenses are. So, folks

1 aren't following it.

2 So, you will hear that something
3 happened to a member and then that member has
4 disappeared. If you follow back in a year or two
5 when the process is over, they have no idea what
6 happened.

7 They don't know if they got
8 discharged, they went to a court-martial, were
9 found guilty. And if the crew aren't following
10 the results, I can't image it's having any impact
11 on good order and discipline.

12 MR. KRAMER: So, is there a sense in
13 the high acquittal rate you talked about, is
14 there a sense that, because of the times or
15 whatever, maybe the publicity going on, that
16 there's pressure, and I don't mean improper
17 pressure, but there's pressure to proceed with
18 the cases that maybe ten years ago would not have
19 proceeded?

20 Does it seem like there's more, I
21 don't know if pressure is, you know what I'm
22 trying to say, I think, that cases may be now

1 because of the publicity or proceeding that may
2 not have in the past?

3 CDR KIRKBY: Sure. And, sir, somebody
4 said earlier in a sidebar, no convening authority
5 has ever been removed for referring a case to
6 court-martial.

7 I mean, is there a pressure? Is there
8 improper command, I don't know, unlawful command
9 influence, that's not what we're talking about.

10 MR. KRAMER: Right.

11 CDR KIRKBY: There is a pressure from
12 above. The existence of this panel is a
13 pressure. Everybody who knows about the review
14 by Congress, by all the changes, suggested to the
15 military justice process, the changes over the
16 last ten years.

17 Yes, there's a pressure, there has to
18 be. I mean, if, it's naive to think there's not.

19 To what extent does that go forward,
20 I don't know. I'm sure there's some science,
21 there's some algorithm out there that would tell
22 us exactly what the answer is, but there has to

1 be. I mean, there is that pressure, it exists.

2 COL BENNETT: And going back to Ms.
3 Long's comment about the years that we really
4 haven't given the victims a voice, right, and now
5 we're more of a voice for the victims.

6 A real concern, I think the military
7 system is generally considered with the SVC
8 program and where we put victims in the process
9 to be ahead of most of our civilian counterparts.
10 But then you also have the #metoo movement.

11 All of the other movements that are
12 out there, that pressure of, no, we have to
13 provide these, the due process and the rights to
14 the victim in order -- to some extent, it's
15 almost we have to make up for our past, but we're
16 doing it at the expense of a Soldier or a Service
17 Member in order to make sure that that victim has
18 all of the rights that, and is heard. Fully
19 heard.

20 This morning they talked about the,
21 having their day in court. Even a couple of the
22 panel members this morning said, even if they

1 don't think it's going forward, if the victim
2 wants to, we're going to go forward.

3 And that's problematic. And I think
4 that goes to the pressure, right?

5 It's not necessarily a new command
6 influence, but it's societal pressure. It's all
7 around us and we can ignore the elephant in the
8 room, but that is absolutely driving some of the
9 decisions.

10 And it goes back to, maybe some of the
11 trust or maybe the lack of trust. How can the
12 defense bar overcome some of those societal
13 pressures?

14 And we'll leave it at societal versus
15 systematic within the military justice system.
16 Victims are our priority. Victims have to be
17 heard.

18 And again, some of it is simply, we
19 haven't, your comment earlier, ma'am is we
20 haven't given them that voice, we haven't
21 listened to them for 20 years. You're right.

22 I cannot deny that it crossed our

1 jurisdiction. Not just in the military
2 jurisdiction, across our jurisdictions, sexual
3 assault, domestic violence has gotten short
4 thrift in our justice systems.

5 But I think we always have to be
6 careful of raising the rights of the alleged
7 victims. And when you had the SVCs up here and
8 talking about the acquittals, there was an
9 absolute guarantee they were all victims. Right?

10 Maybe not every acquittal is the
11 acquittal of an innocent man, but there are
12 acquittals out there, when you're looking at it,
13 looking at all the facts, I can look at it and
14 say, he didn't do it or that wasn't a crime.

15 So, yes, there is absolute pressure,
16 yes, that is driving our system. And we can
17 ignore it or we can try to continue to balance
18 what is right for the victims, what is right for
19 society in order to take care of the sexual
20 assaults and domestic violence.

21 Let's not go back 20 years. We need
22 to take the hard cases. But we're not just

1 taking the hard cases, we're taking the
2 unwinnable cases. And we're doing it at the cost
3 and the expense of the accused, their families.

4 And in some cases, the military
5 itself, because we're taking really good soldiers
6 out of our formation. So there's a lot of
7 different issues that are at play, but there is
8 pressure and it's driving our system.

9 CHAIR BASHFORD: Did we hear from
10 everybody on that?

11 COL. MORGAN: No, ma'am. So, years
12 ago you may recall we had an issue with sexual
13 assault at BMT, at Lackland Air Force Base.
14 There were commanders that years after they had
15 PCS'd, years after they had left their squadron
16 commander positions, were then subjected to
17 adverse actions.

18 I believe some letters of reprimand
19 and promotions withheld for the manner in which
20 they dealt with the sexual assault atmosphere
21 within their squadrons.

22 So, I believe that eventually perhaps

1 some collateral relief was granted, these
2 commanders. But this is not unknown within the
3 Air Force and this definitely has an impact on
4 the way commanders will view whether they should
5 take a care forward.

6 As Commander Kirkby mentioned, it's
7 much easier to weather an acquittal as a
8 commander than it is the scrutiny of not
9 referring a case.

10 COL DANYLUK: I think our experience,
11 as I have spoken all day, is a little bit
12 different. I think that, and I don't want to
13 speak for the prosecutors, but they seem to be
14 trying to provide, I don't want to call it top
15 cover, but a very detailed analysis that gives
16 the convening authority the support that they
17 might feel that they need if they do decide to
18 not refer a case.

19 We still take weak cases to court, we
20 still get lots of acquittals. But I think we are
21 just a little bit more successful in providing
22 the convening authority the support that they

1 need. Both through the prosecution and the
2 prosecutorial merit memos, the PHO report and
3 also the SJA's advice.

4 CHAIR BASHFORD: I saw questions over
5 here.

6 HON. BRISBOIS: So, just to follow-up
7 on this a little bit. By way of comparators, in
8 non-Article 120 cases, you've been front line
9 trial defense lawyers, you've been chiefs of
10 justice for an SJA, you've been SJAs, you're now
11 back in trial defenders.

12 When you go through the Article 32
13 process as it exists now, get a non-probable
14 cause determination/recommendation, depending on
15 your point of view I guess, do you anecdotally
16 see the same sort of response and pressures to
17 take non-probable cases to trial like as you do
18 in the 120 area?

19 CDR KIRKBY: Sir, I don't. I think
20 there is, I think in the non-120 arena the
21 pressure isn't there. I think if the convening
22 authority doesn't have to report up to his boss

1 or his bosses' boss or the secretary of the Navy,
2 there is less pressure on it they say.

3 The juice just isn't worth the
4 squeeze. At the end of the day, in this single
5 spec drug case, it's just not worth it to go
6 forward, we've got other remedies here.

7 I think there are lots of binding
8 effects once we get to a general court-martial,
9 it's difficult to back out of it. So there is
10 people that are reticent to do that.

11 Once their case is going forward and
12 once we go through the 32, I don't think in a 120
13 case there is the same desire to find another
14 resolution. Especially from the accused.

15 I mean, it's difficult to say, I'm
16 going to plead guilty to a 120 case. The
17 long-term effects of that, which have questions.

18 So, from both sides there is a
19 different aspect of the pressure that comes in.
20 In a fraud case, it depends on the money amount.

21 If you're taking money from the
22 government, if it's \$1,000, maybe we can find a

1 way to end somebody's career and get the \$1,000
2 back. Difficult to do that with a victim centric
3 concept like 120. So, there is a difference,
4 sir.

5 HON. BRISBOIS: Well, what you've been
6 describing though is a difference where there is
7 probable cause and the ability to negotiate a
8 resolution different than court-martial.

9 My question was, one way to get a
10 handle on whether there is pressure, properly or
11 improperly, but political pressure, as to making
12 decisions is, what is the behavior like in other
13 areas under the punitive articles.

14 When in the non-probable cause area,
15 do you see if there's no probable cause in a
16 robbery or an assault of a fight nature, not
17 sexual nature, do they refer them, overrule the
18 non-probable cause determination and refer them
19 to the court-martial anyway or do they generally
20 say that sounds good and we'll go on for --

21 CDR KIRKBY: Well, I think there's two
22 issues. One, the pressure I think comes in in a

1 much greater -- that would suggest it's only, the
2 pressure is only on the Article 32. I think
3 getting to the Article 32 there is pressure.

4 So, in the simple assault case, we may
5 not get to a 32. Or a drug case, we may never
6 get there.

7 So we don't even need to make that.
8 People can say, hey, these are the results, we
9 have other avenues that we're very happy to take.
10 We can administratively discharge people for
11 drugs, we can do all those things.

12 So, if there is an Article 32 finding
13 of probable cause --

14 COL DANYLUK: Finding them.

15 CDR KIRKBY: No probable --

16 HON. BRISBOIS: No probable cause.

17 CDR KIRKBY: -- cause. I think, I
18 can't think of cases where there is no probable
19 cause in a non-sexual assault case. It's kind of
20 unique to the 120 charge because it's so
21 subjective.

22 HON. BRISBOIS: So it sounds like that

1 lack of creative resolution then, all the tools
2 to resolve at the lowest level misconduct just do
3 not apply in Article 120. They will find their
4 way to, once the charges are preferred, they will
5 find their way to an Article 32 hearing and then
6 regardless of the recommendation, likely end up
7 in courts-martial.

8 CDR KIRKBY: Sir, I have no statistics
9 on that, but my anecdotal experience is, that's
10 exactly what happens is, people are reticent to
11 take an alleged rape case to a non-judicial
12 punishment.

13 COL BENNETT: I would just say, one
14 other area we're starting to see more pressure
15 and that's the domestic violence. So, that would
16 be a caveat but otherwise if you have a case for
17 going forward, if you don't think you're going to
18 make PC, you're not taking it to the 32.

19 And you can dispose of that case,
20 whether it's alternate disposition or we're just
21 not going to go forward. But I would just caveat
22 as, I think we're seeing a little bit more in the

1 domestic violence arena and a little bit more
2 pressure there going forward without the victim
3 cooperation, things like that, would be the only
4 other area that I see. Not the same level of
5 pressure, but more pressure.

6 CHAIR BASHFORD: We're pretty much out
7 of time but I did see a hand over --

8 DR. MARKOWITZ: If we have time,
9 great, if not, that's fine.

10 CHAIR BASHFORD: We have time for your
11 question.

12 DR. MARKOWITZ: Sorry, as brief as
13 possible. I know both the Air Force and the
14 Marine Corps mentioned the issue of sexual
15 assault training as being one aspect of their
16 concern related to the conviction rates. I don't
17 know if the other services share that concern.

18 We see the whole concept of one drink
19 means you cannot consent often dealt with at voir
20 dire. For all of the members of this panel, do
21 you feel like voir dire is the best place to
22 address that issue, is there another way that you

1 all would prefer to be able to deal with it and
2 what would that be? Or does voir dire take care
3 of it, in your estimation?

4 CDR KIRKBY: I think as a final
5 result, voir dire is the appropriate place to
6 take care of it. But I think the training needs
7 to be correct.

8 And Navy has done a fairly good job of
9 dispelling the concept that one drink means you
10 can't consent. I mean, logically that's
11 irrational.

12 But we've done a good job of getting
13 away from that training. But training as a
14 whole, I mean, it's good in one respect. The
15 saturation of sexual assault training puts
16 everybody on the defense, on the defense side in
17 the panel.

18 They're just saturated with this. Oh
19 my God, another sexual assault issue. But the
20 training has to be correct. So I think first up,
21 the training needs to be correct. Second up, if
22 we need to get there, then voir dire is the place

1 to fix it.

2 DR. MARKOWITZ: And, sir, does the
3 defense have a look at the training? Are you
4 getting the opportunity to look at training or --

5 CDR KIRKBY: Actually, Code 20. So,
6 Captain Monahan's team looks at the training from
7 a neutral perspective and says, this is good or
8 bad. I don't, sorry, I just got in the seat on
9 Monday, so I haven't had a look at training
10 recently.

11 BRIG. GEN. SCHWENK: And you're
12 leaving today?

13 (Laughter.)

14 CDR KIRKBY: My boss is at the back,
15 so maybe, sir.

16 (Laughter.)

17 COL BENNETT: I'll say just real
18 quick, one of the things that we do, we don't get
19 to look at the overall training, but quite
20 honestly I'm not really concerned that the
21 training from the headquarters is the translation
22 at the local level.

1 CDR KIRKBY: Right.

2 COL BENNETT: That is problematic.
3 So, many of our counsel and our senior defense
4 counsel will actually make sure that they attend
5 the training. Even if that's sending a paralegal
6 over, so we know actually what is being said in
7 that jurisdiction, in that training.

8 And there have been times when we've
9 been able to go back and said, no, they stated
10 this, that's not correct and that's going to lead
11 to problems. And then it's also been absolute
12 fodder for us at voir dire.

13 So, there is some proactive nature of
14 us actually going and see what the training is.
15 At the local level. It's not at the higher
16 headquarters level that I'm most concerned.

17 CDR KING: My training piece I think
18 would be with the convening authorities and the
19 SJAs and CGIS. Because they're the ones that's
20 going to drill down and make sure that as their
21 investigating and deciding which ones to bring
22 forward as cases, if they understand the

1 questions to ask the victims, then the end
2 product works.

3 So, whether or not one of our young
4 folks feel like that, hey, I had one drink so now
5 I can't, well, hopefully that makes them a little
6 safer. But it's, how does it translate when we
7 get ready to bring forth a charge.

8 COL. MORGAN: Our division is not
9 consulted on the substance of the training. But
10 I agree that the training is, it has some utility
11 perhaps as using social standards, but it does
12 not, to my knowledge, include appropriate legal
13 standards.

14 COL. DANYLUK: The way it trickles
15 down, sometimes even when the accused is
16 interviewed, because of the training he received,
17 one and done type training, he will be confessing
18 to a rape allegation because his understanding of
19 SAPR training was that, well, she had something
20 to drink, I shouldn't have touched her. So
21 that's somewhat problematic.

22 And then also I've seen records of

1 trial where the trial counsel is saying, she was
2 too drunk to sign a recruiting contract so she is
3 too drunk to consent to have sex, and making
4 those kind of analogies which then the judge has
5 to then try to undo.

6 DR. MARKOWITZ: Okay, thank you.

7 COL. DANYLUK: Thank you.

8 CHAIR BASHFORD: Thank you all very
9 much for appearing as a lively discussion. Thank
10 you so much.

11 I don't know how much, do people need
12 break? Okay.

13 (Whereupon, the above-entitled matter
14 went off the record at 3:27 p.m. and resumed at
15 3:30 p.m.)

16 CHAIR BASHFORD: Ms. Tagert, Ms.
17 Gallagher, take it away.

18 MS. TAGERT: Good afternoon. The
19 purpose for us being here this afternoon is just
20 to give a very brief and quick update on the case
21 review progress to the DAC-IPAD and the public.
22 We have now completed the review of the 2,000

1 investigative case files including the
2 preliminary hearing reports that were available
3 for cases where 32 was held. And we have begun
4 the inputting process of the information that was
5 gleaned from those investigations.

6 We have completed the analysis of the
7 Air Force data, and we will continue to work on
8 the other services to have the data produced so
9 that we can answer the questions that were raised
10 here today about probable cause and whether or
11 not there was an acquittal or further appellate
12 overturn.

13 And we hope to have the data completed
14 for you by late spring and then for analysis.
15 And then if you vote to go on site visits later
16 today, potentially we'll be drafting questions
17 for those site visits to answer any of the
18 questions that the data has raised for your
19 review.

20 Pending any questions, that is the
21 update from the case review today.

22 CHAIR BASHFORD: Thank you. Well put.

1 Before we start our next which is the data
2 working group presentation, is there anybody --
3 it's been proposed that members of the DAC-IPAD
4 do site visits. Is there anybody who is opposed
5 to that general idea? Seeing no opposition, then
6 we can go ahead and start planning for those.

7 It's also been proposed at an earlier
8 meeting that we form an Article 32 working group.
9 I think we already voted in favor of that. So I
10 know Judge Grimm who couldn't be here was
11 interested in that. If other people are
12 interested, please let Colonel Weir or Ms. Carson
13 know that they're interested in participating in
14 that group.

15 MS. CARSON: By Monday, please,
16 because we'll just start with --

17 CHAIR BASHFORD: Great.

18 MS. CARSON: -- contacting you.

19 CHAIR BASHFORD: Mr. Mason, Dr. Wells,
20 the floor is yours.

21 MR. MASON: When they get the
22 presentation up, we'll move on to that. But I

1 did want to just clarify. The question was
2 raised whether we are actually looking at the
3 conviction acquittal rates for contested cases
4 versus those that were just preferred and
5 referred.

6 We have, and they are in the appendix.
7 We've done it for the past three years. We have
8 data for 15 through 18 breaking it out. Those
9 slides for the report, we've had them actually in
10 the data report body itself. And they're going
11 to go back in.

12 So we will have them. I apologize.
13 We did a little different by this time around
14 saying that we wanted to look at the referred so
15 that you were looking at the big picture. But
16 just off the top, I can tell you that with a
17 military judge on a contested trial, so they did
18 not plead guilty to the sex offense, convicted of
19 a non-sex offense or acquitted of all charges
20 with 77.6 percent of the time. And the actual
21 flat out acquittal rate was 21.6. And that's
22 very similar to what we were seeing when the plea

1 deals are included as well.

2 The presentation is just spinning, so
3 we will continue on. I can tell you about the
4 data without having to show you a pretty chart.
5 One thing that we've been discussing is the rate
6 of cases, how they have fallen year over year.

7 In FY15, we received 780 cases that
8 were added to the database. This most recent
9 year, we have 574 cases. So that is a rather
10 steep decline over the past four years. And that
11 is for penetrative and contact sexual assault
12 that were preferred. So 574 cases in the
13 database.

14 We talked this morning about the fact
15 of how many cases we're actually receiving when
16 we do the RFI and what they tell us they believe
17 are the cases. And 75 percent of the cases that
18 they have given to us for this past year were
19 valid. The other 25 percent were because they
20 were the wrong fiscal year or it was a child sex
21 case or there was some other reason of why we
22 could not add it to our database.

1 So the takeaway from that is that we
2 rely on the services that tell us which cases
3 exist. And the information that we're getting
4 from them is not 100 percent accurate.

5 BRIG. GEN. SCHWENK: So the 574 --
6 pardon me for interrupting, but I'm interrupting.
7 So the 574 is the 75 percent or is it 75 percent
8 of 574?

9 MR. MASON: It's 75 percent of 774.
10 And so the actual cases that are in our database
11 for this year is 574.

12 BRIG. GEN. SCHWENK: So those are the
13 valid cases?

14 MR. MASON: Yes sir.

15 CMSAF MCKINLEY: So the 774, we don't
16 know exactly how many of those are real cases?

17 MR. MASON: Well, I can tell you. I
18 mean, we track, and I have a tracking sheet for
19 each service when they give us the RFI. I can
20 tell you down to the line whether it was a child
21 case, if it was a duplicate case, if it was the
22 wrong fiscal year. Or we have 90 percent of the

1 documents but we can't get enough to get it into
2 the database.

3 I can tell you down to the line and
4 number how it breaks out. There is -- with
5 respect to one service, there were quite a few
6 that there was just no documents to support. So
7 we don't know what happened, how that name got on
8 the list. But we didn't see that with the other
9 services.

10 CMSAF MCKINLEY: With that significant
11 drop from last year to this year, there'll be two
12 questions. Number one, do we have less sexual
13 assaults in the military? And number two, or are
14 there less victims coming forward?

15 MR. MASON: And unfortunately what the
16 data is going to tell you is how many cases were
17 seen go through the system. It doesn't tell us
18 if there's less happening, if there are less
19 victims, if there are victims that are not coming
20 forward. It doesn't tell us any of that.

21 One of the conclusions that we can
22 draw, though, is that the distribution of

1 penetrative versus contact offenses has remained
2 consistent over the past three years. So even
3 though the number of cases are falling, your
4 distribution is the same.

5 So we can reasonable say, and Dr.
6 Wells can correct me if I'm wrong, that we're not
7 focusing our attention just on penetrative cases
8 because contact cases are still 25 percent of
9 what's going forward. Or we're not just focusing
10 on contact because penetrative is still 75
11 percent. So you can see that there is a decline,
12 but your distribution hasn't changed.

13 And again, I apologize. For the two
14 of you, the presentation is behind you. What
15 this slide tells you is that the percentage of
16 cases within our database for each service. So
17 if you look at the fourth column or the second
18 from the left, FY 2018, you can see that that the
19 Army had 40.4 percent of the cases in our
20 database for FY18.

21 The column next to that tells you that
22 their percentage of the active duty force is

1 actually 35 percent. So the Army's cases in our
2 database are an over-representation when compared
3 to what their service is. You can look by
4 looking across the years. You can see how the
5 different services bounce back and forth.

6 The Coast Guard is fairly consistent.
7 We generally see the same basic number of cases.
8 And just as an aside, last year in FY18, the
9 Coast Guard had 15 cases. So it is a much
10 smaller sample that we're working with.

11 So we discussed this yesterday a bit,
12 but the charts have changed this year from what
13 we did in the past. We changed the way that we
14 represent it. You look top to bottom. So FY
15 2018 will be on the top of our tables. And we've
16 included raw numbers as well as percentages so
17 that depending on how you visually receive
18 things, you can get the answers you're looking
19 for.

20 So for sex of the accused in FY 2018,
21 males were 99.7 percent of the accused, 0.3
22 percent were female which works out to there are

1 two females accused of sexual assault in the
2 services that had a preferred penetrative or
3 contact offense last year. And that number has
4 varied always right in that same category. So
5 you're always looking at 99 percent are male and
6 less than one percent are female.

7 So this chart here represents what the
8 pay grade of the accused was for each case where
9 it was preferred in FY18. In the chart -- or I'm
10 sorry. In the report, you will see that this
11 chart has been replicated four times, one for
12 each fiscal year from '15 to now. And why it's
13 an interesting chart this year compared to the
14 others is previously the peak for the enlisted
15 would've been an E-4 and the peak for officers
16 would've been the O-3 pay grade.

17 But in FY18 -- and we don't know why
18 this has happened. But in both instances, it
19 shifted to the left. So the peak this year you
20 have is E-3 for enlisted and O-2 for officers.
21 It's something that as the data working group we
22 will look at when we do the FY19 data and see if

1 this is a new trend that maybe we're getting.

2 That might've been something with
3 training. We have younger people, though, that
4 are getting in more trouble. Whatever the issue
5 might be, it will be a data point that we can try
6 to track down going forward. But again, we can't
7 tell you right now why that is the case.

8 CHAIR BASHFORD: And just so I'm
9 clear, the E-3, E-4 as a proportion of the
10 service are very high?

11 MR. MASON: Yes, E-3, E-4, E-5 are
12 roughly 80 percent of the service for the
13 enlisted. So you're going to see that peak
14 should be in that area. However this year, it's
15 just shifting to the left.

16 CMSAF MCKINLEY: Would it be good in
17 the future possibly to go with what the chair
18 said is when you have the number, you can
19 correlate below it what percentage of the force
20 it is.

21 MR. MASON: And we can absolutely do
22 that now.

1 CMSAF MCKINLEY: That would be real
2 easy? It'd be very --

3 MR. MASON: In the text of the report
4 underneath this, it does have a breakout
5 explaining the 80 percent component. But it
6 would not be a problem to add in additional
7 detail.

8 So the next slide is a representation
9 of the sex of the victims of the cases that we
10 have documented. Nine percent of the victims
11 were male and 91 percent were female. This
12 number has again been very close over the past
13 few years. There isn't a massive variation in
14 the number.

15 HON. BRISBOIS: With the number of
16 total cases is --

17 MR. MASON: It's 574.

18 HON. BRISBOIS: And the number of
19 victims for fiscal year. That means cases with
20 multiple victims.

21 MR. MASON: Yes sir. We categorize
22 and I took out of the presentation for today but

1 it's actually in the report. We do know how many
2 cases were one victim, how many cases were two
3 victims, and how many cases were three or more as
4 a percentage.

5 And in the last fiscal year, I think
6 the highest victim count that we have in a case
7 is 13 or 15 victims. And they were -- it was a
8 male with all female victims.

9 Stayce just provided to me. So in
10 fiscal year '18, 4 percent of the cases has three
11 or more victims, 10 percent of the cases had two
12 victims, and 86 percent had one victim. But that
13 will be in the actual published report.

14 So the next slide is status of the
15 victim. This is something we've always been
16 tracking but we didn't put it into a graphical
17 representation. And I'm not sure why I hadn't
18 done it in the past, so I wanted to include it
19 this year to show that 60.5 percent -- 61 percent
20 in FY 18 were all military victims, 36 percent
21 were all civilian, and 3 and a half percent were
22 military and civilian.

1 And if you look at the previous years,
2 and again this is another issue or instance of
3 that, the number of cases are falling. But that
4 percentage is staying fairly consistent that 61
5 percent are all military. So you see you would
6 think again that there might be a shift someplace
7 but it's not happening. We're seeing the number
8 across the same way.

9 And then victim relationship to
10 accused, why this is interesting and why it's
11 important is we've talked about with the fact
12 that in the past we used SAPRO, their report as a
13 basis for getting information. And then we
14 realized that SAPRO is not reporting all of the
15 cases because they have a different mandate.

16 Well, in this case when you look,
17 there are 82 cases in FY18 that were spouse or
18 intimate partner. That means those cases would
19 not make it into the SAPRO report because that
20 would fall under FAP. So our project is unique
21 in that we talk about all the sexual assaults
22 that we know of.

1 This is something I've mentioned
2 already. The penetrative versus contact
3 distribution, 75 percent of the cases last year
4 were penetrative, 25 percent were contact. And
5 that is the same percentage for '18, '17, and
6 '16. So again, cases dropping, percentages
7 staying the same.

8 Chair, you brought up Article 32
9 hearings earlier today. Once again, you can see
10 the number of 32 hearings that were held was 373
11 last year compared to 422 the year before. The
12 number where they were waived, 104 last year
13 versus 117 the year before. But when you look at
14 the percentages, it's 78 percent and 21 percent
15 or 22 percent.

16 So once again, they're declining. But
17 what are the chances that they're declining at
18 the same exact percentages?

19 MS. LONG: Can you remind me when were
20 the changes to the 32?

21 MR. MASON: 2015, and you can see --

22 MS. LONG: Okay.

1 MR. MASON: -- where, 2015. It then
2 jumps to '16 and the numbers skew. That's when
3 we started tracking. And this is a new version
4 of an older chart dealing with conviction rate to
5 give you an idea that when a 32 was waived, what
6 was the ultimate conviction rate? If they were
7 found guilty of something, what were we looking
8 at?

9 And in the last year, 32 percent,
10 almost 33 percent were found guilty of a non-SA
11 offense. A contact offense was only in four
12 cases which was 3.8 percent. And then they were
13 found guilty of a penetrative offense 32 times
14 which is 30.8 percent.

15 So it just gives you an idea of how
16 the distribution is, where they're getting
17 convicted of something, what is it. And this
18 again is only after they waive the 32. So they
19 decided it wasn't worth going to a 32 for
20 whatever reason and these are the conviction
21 rates you're seeing.

22 BRIG. GEN. SCHWENK: These are all

1 contested?

2 MR. MASON: Some. It's possible
3 they're contested.

4 BRIG. GEN. SCHWENK: So we don't know
5 whether these are pleas or contested cases?

6 MR. MASON: Right. We're looking at
7 the fact that the 32 was waived and then there
8 was an ultimate conviction for a non-SA offense.
9 We can tell you. It's just not a way that we've
10 looked at the numbers. We were looking at just
11 what is there a conviction.

12 BRIG. GEN. SCHWENK: That's fine. I
13 just wondered.

14 MR. MASON: Yes sir. So this chart
15 will tell you how are cases being resolved. So a
16 case -- a penetrative offense is preferred and
17 ultimately resolved at court martial. So we have
18 removed alternative dispositions from this chart.
19 We've removed the dismissals. It's going to
20 trial at some level.

21 And we ran into this issue with the
22 report last year, and that's why I'm drawing your

1 attention to it now. By law, we should not be
2 seeing a penetrative offense being resolved at a
3 summary court martial. And on this chart, you'll
4 see that there are two cases where that is
5 allegedly or possibly the case.

6 In reality, what has happened in those
7 two cases is that charges were preferred for a
8 penetrative offense. What was ultimately
9 resolved at a summary was not a penetrative
10 offense. It might've been an assault and
11 battery. It could've been anything.

12 The penetrative offense fell off and
13 it was not resolved at the summary. But they had
14 preferred the charge. Now in order to avoid any
15 miscommunication, any problems, misinterpretation
16 in the future, we've included an appendix to the
17 report that specifically lays out these cases and
18 tells you these were the charges that were
19 preferred. This is what the SJA advice to the
20 convening authority was.

21 This is what the pretrial agreement
22 was that tells you what happened to the charges

1 or what deal they were making. And then it tells
2 you what was referred, the pleas, and the
3 findings. So we have done that for all these
4 special and summary cases that were penetrative
5 so that if somebody wants to see what's going on,
6 they can look and see. And it shows that the
7 services are not resolving these cases at a
8 summary in violation of the law.

9 BRIG. GEN. SCHWENK: I guess my
10 problem is the heading. I would read that
11 penetrative offenses resolved at court martial.
12 So I would think that there were two penetrative
13 offenses that were resolved at a summary court
14 martial.

15 So I would recommend that we just
16 think about if they weren't penetrative when they
17 got resolved at the summary court martial because
18 the penetrative offenses were dismissed and it
19 was something else that ended up at the summary
20 court. Maybe they shouldn't be on the chart. I
21 don't know.

22 MR. MASON: And sir, we had that

1 conversation. We've tried to go back and forth
2 and we changed the language. And it changed
3 actually in the report last year. And we haven't
4 found the right way to word it. And I will go
5 back and revisit it. It might be the penetrative
6 offense initially preferred and then charges
7 resolved.

8 I'll find a new way. And when you get
9 the report in a couple weeks for review, I'll
10 draw your attention to where I put it and you can
11 tell me if it works.

12 BRIG. GEN. SCHWENK: Thank you.

13 MR. MASON: Absolutely. And that will
14 be the case on the next chart as well, sir, where
15 it says contact offenses resolved at court
16 martial. Because here you have a case where the
17 charge ultimately was a contact offense. And
18 then whether the contact went forward or not,
19 this is how the case ultimately was resolved.
20 And I will figure out the wording for there as
21 well, sir.

22 That is the snapshot view of the data.

1 As I said, I want to clarify the earlier point.
2 The appendix to the report is going to be roughly
3 100 pages, 100-plus pages. And it's every data
4 point you could want and interpretation of it.
5 So we provide that to the services so that they
6 can see all the information that's out there and
7 how we got from A to B.

8 That is the basis of the next part
9 which is all the data point which we then give to
10 Dr. Wells who does the multi-variate. And he's
11 got a few slides now to explain the multi-variate
12 results for FY18.

13 MS. GARVIN: Mr. Mason and Dr. Wells,
14 sorry. Before you transition, I believe you have
15 showed this before and I'm sorry for forgetting.
16 Is one of the data points whether the victim had
17 an SVC or VLC? Is that in the data?

18 MR. MASON: We can tell if they are on
19 record at some point. If we have some sort of a
20 document saying that victim's counsel was
21 involved, we will notate it. And that's just by
22 looking at the record of trial.

1 When Stayce goes and takes the record
2 apart, if she comes across that, we scan it and
3 add it. But that isn't -- we're not saying that
4 we're 100 percent confident on that. But we do
5 have it as a data point that's in our --

6 MS. GARVIN: So it could be part of an
7 analysis to see what happened to a case when they
8 did or did not --

9 MR. MASON: Yes.

10 MS. GARVIN: -- have one.

11 MS. ROZELL: Fortunately, the new
12 format for the Air Force is really great at
13 outlining the SVC portion of whether or not they
14 have an SVC available to them or not.

15 MS. GARVIN: Thank you.

16 MS. LONG: I have a question. Just I
17 don't know if it was before or not. Of the 574
18 cases, do we have data comparing that with all of
19 the reports for penetrative or all of the reports
20 that came in that year?

21 MR. MASON: No, we don't. With the
22 case review, they've been looking at the

1 investigations for FY17. We can take their
2 numbers for FY17 and look at them compared to our
3 numbers of cases that were resolved in FY17. The
4 problem is they are saying a case that it was
5 closed -- the investigation was closed in '17.
6 And we're looking at a court martial. So we can
7 try to put those together, but we don't have --

8 MS. LONG: I didn't mean that.

9 MR. MASON: Oh, I'm sorry.

10 MS. LONG: I meant reports across this
11 -- across this service, do we know, let's say,
12 that there were -- I'm making up a number --
13 2,000 reports and then 574 cases? Or do we not -
14 - are we not able to do that?

15 MR. MASON: We can try to give an idea
16 based on the SAPRO report. But again because
17 they don't report FAP, we can't pull that across.
18 So we have to say that we can give you statistics
19 based on what we say in a court martial.

20 MS. LONG: The cases. Okay. Thank
21 you.

22 DR. WELLS: So the multi-variate

1 results that we have to summarize today are very
2 similar to the models that we estimated with the
3 FY16 and '17 data. And it's similar to the
4 models that Dr. Spohn estimated with the FY15
5 data.

6 So we built models to understand the
7 relationship between case characteristics and a
8 set of outcomes in that case. So we looked at
9 dismissals, acquittals, conviction on a
10 penetrative offense, any conviction. And then we
11 looked at sanctioning outcomes given that there
12 was some convictions.

13 So we looked at punitive separation,
14 confinement length, and then a combined
15 sentencing severity scale that combined both of
16 those sanctions together. So what I have for you
17 today is a summary of some of the key results
18 from those multi-variate models.

19 To cut to the chase, a lot of the
20 results we see here in the FY18 data are very,
21 very similar to what we observed in the '16 and
22 '17 data. So nothing new jumps out here.

1 We see that four predictor variables
2 are important across several of these models. So
3 service branch, number of charges that were filed
4 in the case, the conviction offense, and then we
5 see two victim variables that jumped out as being
6 important.

7 So the first thing I note, acquittals
8 have been a part of the discussion of the
9 committee. And we don't find any differences in
10 these multi-variate models between the service
11 branches in terms of the likelihood of an
12 acquittal compared to any other outcome in the
13 case. So no differences between the service
14 branches.

15 In the FY16 data, we did see that the
16 Air Force differed from the Marines. And in the
17 FY17 data, we saw that the Air Force differed
18 from the Army. But those were the only
19 differences that have emerged over the past three
20 years with acquittals.

21 The likelihood of being convicted on
22 a penetrative offense was a little bit higher in

1 the Army and the Marines when we compared them to
2 the Air Force and we saw the same thing or
3 similar patterns in '16 and '17.

4 And then in terms of the likelihood of
5 being convicted on any charge, it was greater --
6 it was highest in the Army, the Marines, and the
7 Navy. And this was statistically different from
8 the rate in the Air Force and in the Coast Guard.
9 So we see that.

10 And then last with regard to a
11 sanction, the chances of a punitive separation,
12 they were highest in the Army and in the Air
13 Force when we compared those two service branches
14 to the Navy.

15 The second predictor variable is the
16 number of charges. And we see here that the
17 likelihood of any conviction and conviction on a
18 penetrative offense goes up as the number of
19 charges increases. And then the chances of an
20 acquittal or a dismissal are reduced as the
21 number of charges increase. So an inverse
22 relationship there.

1 CHAIR BASHFORD: And just to clarify
2 again, the number of charges doesn't mean number
3 of sexual assault charges. It means number of
4 charges for anything. Is that correct?

5 DR. WELLS: That's correct.

6 CHAIR BASHFORD: So adultery, false
7 statement, leaving the base, something like that?

8 DR. WELLS: Correct. And we see that
9 in the data. We didn't separate out those
10 qualitative -- the qualitative nature of all
11 those different charges. It's just a summary
12 count.

13 And then last as the number of charges
14 increase, we see an increased chance of a more
15 severe sanction being levied given that there was
16 some conviction in the case.

17 Next, conviction offense. The highest
18 chances of a confinement sentence stemmed from
19 convictions on a penetrative sexual assault
20 conviction. And there's no difference in the
21 chances of a confinement between contact offenses
22 and non-sexual assault offense convictions.

1 Punitive separation chances were
2 greatest for penetrative and contact offenses
3 than for non-sex assault convictions. And then
4 the sentencing severity scale that we created is
5 related to the type of conviction offense. So
6 it's highest for penetrative, next for contact
7 offenses, and then lowest for non-sexual assault
8 offenses. And all three of those were
9 statistically significant in terms of their
10 differences.

11 Last, we see a couple of victim
12 characteristics, and these also were observed in
13 our '16 and '17 data. So the likelihood of case
14 dismissal was higher when the parties involved
15 were intimate or intimate partners, either
16 current or former. And the chances of punitive
17 separation were lower in cases that involved
18 victims who were military Servicemembers compared
19 to those other categories.

20 MR. KRAMER: Sorry. The first one,
21 dismissal at what stage?

22 DR. WELLS: Post-preferral. And then

1 the chances of punitive separation were lower in
2 cases that only involved victims who were
3 military Servicemembers as opposed to civilians
4 and cases with a combination of military and
5 civilian victims. So those are the multi-variate
6 results for the FY18 data.

7 CHAIR BASHFORD: Thank you.

8 DR. WELLS: You're welcome.

9 MS. LONG: I have a question. I'm
10 sorry. When you said that there's no
11 statistically significant difference between
12 military services and acquittals. So before when
13 we heard the Marines saying that they have a
14 different level of screening that's harsher, but
15 their acquittal rate is the same as the other
16 services.

17 DR. WELLS: That's correct.

18 MS. LONG: And the second --

19 CHAIR BASHFORD: But their conviction
20 rate was higher, I believe, right? Marines
21 conviction rate was --

22 DR. WELLS: Yes, that's correct.

1 MS. LONG: So how does that happen?
2 Can you describe that?

3 DR. WELLS: Yeah, so --

4 MS. LONG: Because that might be my
5 next -- okay.

6 DR. WELLS: Yeah, exactly. So when we
7 make these comparisons, we are lumping together a
8 whole variety of outcomes together into one
9 category and comparing it to a single other
10 category.

11 So for instance, the acquittal
12 comparison is the likelihood of an acquittal
13 compared to everything else. Dismissal,
14 conviction on a penetrative offense, conviction
15 on a contact offense, and conviction on a non-
16 sexual assault. So we're combining things
17 together. Now when we go to the conviction on
18 the penetrative offense, it's that category
19 versus everything else.

20 MS. LONG: Okay. So --

21 DR. WELLS: So that might explain kind
22 of how they don't always line up.

1 MS. LONG: Okay. And this is somewhat
2 related which is then when you talk about the
3 conviction rates being higher, likelihood is
4 higher when you have greater charges, are we able
5 to know which service? Is there a difference in
6 how many charges are happening across the
7 services?

8 DR. WELLS: Right. What we do in that
9 sort of model is we control for the service
10 branch. So it's parsing out the effect of the
11 service branch on that outcome and then isolating
12 the number of charges. So it's just the number
13 of charges.

14 We could do that analysis where we
15 compare the number of charges across the service
16 branches and then see how that may have
17 differential impacts. I don't know the numbers
18 off the top of my head to know if we would have
19 enough different kinds of combinations to do any
20 meaningful analyses. But if you're interested,
21 that's something we could do.

22 MR. MASON: And ma'am, I would just

1 add that in the appendix for last year's report
2 which these numbers have been updated because we
3 received more cases for FY17 in this data pool.
4 But for penetrative, the accused charge for the
5 penetrative offense in the Marine Corps, they
6 were acquitted of all charges 18.2 percent of the
7 time. But then convicted of a non-sex offense
8 was 43.2 percent, and the other services were at
9 21.5, 23.3, and 9.

10 So they were not -- they're convicted
11 of a penetrative, convicted of a contact was
12 slightly lower than the other services. But they
13 were much higher on the non-sex offense they
14 found guilty of. So they have a higher guilt
15 rate in that sense or a conviction rate. But yet
16 the acquittal rate is a little bit lower. And
17 that could be looked at, and we have that for
18 '15, '16, '17 as well.

19 CMSAF MCKINLEY: Do you know what the
20 female population in the Marines is?

21 MR. MASON: I do not, sir, but I could
22 find out. Absolutely.

1 CMSAF MCKINLEY: The comparison, I
2 think, in the Air Force, 20 percent of the Air
3 Force population is female. And I would guess
4 Marines probably well under 10 percent.

5 MR. MASON: And it's a great point.
6 These are the types of things we can -- because
7 we have the data, we can show what we have in our
8 database. But then we can also go back to DoD,
9 get the official numbers, and include it in the
10 appendix. But I will get an answer for you.

11 CMSAF MCKINLEY: What do you think,
12 General? Do you think that's about right?

13 BRIG. GEN. SCHWENK: I don't know.

14 MR. MASON: Unless you have any other
15 questions, that's all we have for data for you.

16 CHAIR BASHFORD: Thank you very much,
17 and keep up the good work with a better system.
18 We're now scheduled for deliberations on the
19 collateral misconduct report. Colonel Weir, are
20 you going to lead that?

21 COL. WEIR: What I recommend is that
22 based upon the guidance we get here today that we

1 draft a draft letter back to the Secretary of
2 Defense and pointing out some of the problems
3 that we saw today in the report.

4 And I would recommend that based upon
5 the draft reports -- and I keep saying they're
6 draft reports to us so they're not finalized. So
7 we have an opportunity -- the committee has the
8 opportunity to have input into the Secretary of
9 Defense on how those final reports perhaps are
10 done and before they're sent over to the armed
11 services committees.

12 So one of my recommendations, and you
13 all discuss whether that makes sense to define
14 some of these terms in a way that across the
15 services will get more consistent information.
16 And that way in the future when the DAC-IPAD is
17 requested to review and analyze the reports,
18 we'll have consistent information across the
19 services.

20 One of the areas -- and you just heard
21 from Dr. Wells and Chuck -- is you can make
22 comparisons between services that more likely you

1 get acquitted here in the Army on this or the
2 Marines. But you have to be coming from the same
3 basic information.

4 And right now, we can't tell if you're
5 more likely to be -- if you've committed
6 collateral misconduct, are you more likely to be
7 punished in the Navy, the Marine Corps, the Army?
8 Because the numbers are different. They didn't
9 use the same thing.

10 So one of the areas I think you all
11 need to discuss and deliberate on right off the
12 bat is what you would like to do with the false
13 reporting information that you receive because
14 that seemed to be an area that was a topic of
15 conversation. And I think part of this
16 deliberation on how we kind of draft the report,
17 we need to cover that area so we know from a
18 staff where you all stand on that.

19 CHAIR BASHFORD: It seemed to me that
20 they were struggling with that, with the
21 definition of it, with how they came up, with
22 cross complaints. I think it would be much

1 easier if they simply -- if we recommend that
2 they eliminate that category from any analysis of
3 collateral misconduct.

4 If it's a truly false report, the
5 misconduct isn't collateral. It is the
6 misconduct. And it was impossible to tell. Some
7 people left it out. Some people put it in. I
8 think it would be much easier if they all left it
9 out if that's --

10 DR. MARKOWITZ: I would like to say
11 that I agree that it's not collateral misconduct.
12 I do want to make sure that it doesn't appear
13 that this committee is somehow hiding the idea
14 that there may be false reports by having it
15 taken out.

16 I think we need to address the fact
17 that they were brought up. It doesn't appear to
18 be a collateral misconduct. Because of that, it
19 wasn't -- I think we need to acknowledge the
20 existence of that category in some way, shape, or
21 form and not just pretend we never got that
22 information so that it doesn't look like we just

1 pretended we never --

2 COL. WEIR: Would it be beneficial to
3 get to where you want to be is that the
4 definition of collateral misconduct lays out what
5 they mean by collateral misconduct? Because I
6 think I don't know if we would be hiding the fact
7 that there was a -- and we're not really sure as
8 a committee because we don't have the statement
9 made by the people whether or not it was actually
10 false.

11 DR. MARKOWITZ: Correct. I mean, I
12 think there are a number of issues related to how
13 people were defining it. Who exactly was being -
14 - where the false allegation was actually
15 falling. Was it the subject as part of a cross
16 complaint? Was it the victim coming forward? I
17 think there were a number of issues related to
18 the false allegation component. So I think there
19 are a number of reasons not to necessarily
20 include it.

21 My only caution in all of this is I
22 don't want it to seem as though we are just

1 running away from the notion that false
2 allegations may exist at all. And so I would
3 prefer to not just pretend like it never existed
4 whatsoever, if that make sense.

5 And it's possible I'm being completely
6 inartful here after a long day. So if I'm not
7 making sense, I'm happy to --

8 BRIG. GEN. SCHWENK: I agree with Jen,
9 but I think that maybe your concern -- Jen's
10 concern is satisfied by the fact that we're
11 expressly going to address false reporting as a
12 category in our letter which is a public letter
13 and everybody can read it. So it'll be clear
14 we're not --

15 DR. MARKOWITZ: Yes.

16 BRIG. GEN. SCHWENK: -- sweeping it
17 under the rug. We're saying, there's
18 inconsistencies in all these areas. One area
19 will say false reporting. Here's the
20 inconsistency. Here's our recommendation.

21 Now my approach to the false reporting
22 is as I understand it -- and I'm usually wrong.

1 But as I understand it, collateral misconduct
2 concerns stemmed years and years ago from the
3 deterrent effect on reporting sexual assaults.

4 COL. WEIR: Yes sir.

5 BRIG. GEN. SCHWENK: Because if I say
6 I got sexually assaulted, I'm going to get
7 hammered for collateral misconduct. If that's
8 true, all the definitions should be focused on
9 identifying that kind of collateral misconduct
10 and clearly filing a false report is not one of
11 those things.

12 COL. WEIR: Yes sir.

13 BRIG. GEN. SCHWENK: And so it's not
14 collateral misconduct. So I think maybe we can
15 solve that by --

16 DR. MARKOWITZ: Yeah.

17 HON. BRISBOIS: So the basic problem
18 from the morning's opening panel is the
19 inconsistency of definitions. And the area where
20 they had the greatest inconsistency was in this
21 false reporting.

22 So since that's the tone and tenor of

1 the likely proposed response, that should be
2 extra highlight that Congress, the committees
3 should not rely on that data at all because they
4 were completely -- I think the point was made,
5 was it the initial victim reporting or was it a
6 cross claim by the initial suspect?

7 I mean, we don't -- there's absolutely
8 zero consistency. And so that's the sort of most
9 egregious example of the lack of uniform
10 definitions.

11 COL. WEIR: Yes sir, I agree. Even
12 after listening to the panel, I still don't
13 really have a firm grasp on what they meant by a
14 false report.

15 DR. MARKOWITZ: And I think that's
16 part of the problem here is that I don't know
17 that we ever got a firm definition of what false
18 report actually is defined as in any given
19 service which is potentially another topic
20 altogether. Well, I'll just leave it at that.

21 MS. LONG: But I think something
22 significant happened, and I don't want to

1 misstate which service that was. But one of them
2 counts somebody who sees something that they
3 perceive as an assault. So it wasn't what we
4 would normally think of as a false allegation.
5 And that, because of how loaded this word is,
6 that definitely needs to be taken out of that.

7 COL. WEIR: As I recall --

8 MS. LONG: It may be an incorrect
9 report.

10 COL. WEIR: -- it was a third-party
11 report that the witness saw what he or she
12 perceived to be a sexual assault and reported it.
13 And then when the alleged victim was questioned
14 about that assault, and we don't know whether it
15 was a he or a she, the victim said, no, I wasn't
16 assaulted. That was consensual. They counted
17 that report by the witness as a false report.

18 Now I think a way to handle this would
19 be to come up with -- for us as a staff when we
20 were talking about collateral misconduct and the
21 case review working group, and some of you have
22 sat on that, have a pretty good idea what

1 collateral misconduct is which is some conduct
2 that results or was just prior to or after or
3 during the sexual assault.

4 So for example, underage drinking.
5 The victim is underage drinking and then there's
6 a sexual assault, and that's collateral to that
7 misconduct. Or there's a fraternization, the
8 disparity in ranks between the two individuals.
9 Adultery is another one. The violation of an
10 Article 92 where the victim didn't sign the
11 suspect into the barracks and therefore she's
12 guilty of a barracks violation.

13 Those were the kinds of offenses. If
14 they were smoking marijuana right before they had
15 sex, I guess. The sexual assault occurred. That
16 could be considered collateral misconduct because
17 it occurred a time very close to the incident.

18 I don't know how many weeks went by
19 before the subject in these false official
20 statement cases made that allegation. So I think
21 what we could do is draft the definition of
22 collateral misconduct. Point out in the letter

1 to the SECDEF about the false swearing cases that
2 were received, and make a recommendation that
3 those not be included in a report to Congress
4 because the services themselves have not defined
5 and it opens up to more questions than they have
6 answers to.

7 And we can draft it. And obviously
8 when it gets out to you all, you can track change
9 and comment on it. But I think you're absolutely
10 right. I think it needs to be addressed and it
11 needs to be addressed in a way that we know it's
12 there.

13 As the DAC-IPAD committee, you know
14 it's there. But you also don't think it should
15 be included in the collateral misconduct because
16 it doesn't meet what the definition that you all
17 will eventually approve. I think we can handle
18 it that way to alleviate any concerns.

19 CHAIR BASHFORD: So although I'm not
20 sure they're the decision makers, they certainly
21 all agree that they are going to, the next
22 report, pull the same types of cases, whether

1 it'd be only penetrative or penetrative and
2 sexual abuse, the years of cases and have the
3 same definition.

4 So I think we could really help by
5 suggesting whether they pull just penetrative or
6 penetrative and sexual contact. I think the
7 latter. And if we could provide to them
8 suggested definitions of the terms that they then
9 all use.

10 COL. WEIR: And it's up to you, but --
11 I don't want to misstate what you said, ma'am.
12 But you think it should be penetrative and
13 contact offenses, they count all of those?

14 CHAIR BASHFORD: If you're looking at
15 collateral consequences, I think you should look
16 at the big universe of what does reporting
17 something mean to me.

18 COL. WEIR: Sure, and I agree. So
19 what we can do is put together the recommendation
20 that these should be the definitions that the
21 services follow across the board. And one is
22 collateral misconduct.

1 Now another question is some of the
2 services used a closed case. Some used open and
3 closed cases. And I think that's another
4 definition. You can only -- this is up for
5 debate. You can only count those collateral
6 misconduct cases where the case has been closed
7 or action has been taken on the collateral
8 misconduct.

9 There needs to be some uniformity
10 across the services. And as it was, each counted
11 their misconduct a different way. I believe it
12 was the Air Force that didn't count anything that
13 wasn't a completed case. But that's just
14 something for your consideration.

15 CHAIR BASHFORD: It gets complicated,
16 I think, because as we heard, some victims want
17 the collateral consequences adjudicated close in
18 time to the report and some want to wait till
19 after the termination of the case.

20 So what we don't want to do is have
21 something where the collateral consequence comes
22 way after determination of a case and we don't

1 see it because it wasn't pulled. Because then
2 you would just lose it forever. I don't know how
3 you would attach it to anything. I don't know
4 what the solution is.

5 MS. MANSFIELD: Yeah, can I just speak
6 for a minute? So as somebody who had to take a
7 part of this, the first pool of cases in order to
8 identify the victims that we were going to look
9 at is we had to define which subject cases.
10 Because everything is going to be by subject in
11 investigative files.

12 So FY17 closed. Law enforcement
13 investigations was kind of the starting point.
14 And then you identified all the victims in those
15 offenses. And then you went out to the field to
16 say, for these victims, what happened? So I
17 think the first place we have to be consistent is
18 the initial pull of what cases where we're even
19 identifying the pool of victims.

20 CHAIR BASHFORD: And I think everybody
21 agreed that they would be consistent in what they
22 pulled. But we can give guidance on that too.

1 COL. WEIR: The legislation in my mind
2 is pretty clear on what the services were
3 required to report. And I think that when the
4 committee -- when you all looked at the draft
5 report, it all looks like one percent, one
6 percent, one percent.

7 But when you actually compare what the
8 legislation required which was the number of
9 victims who committed collateral misconduct. And
10 then of those victims, the number who received
11 adverse punishment for that collateral
12 misconduct. And then third, what was that
13 percentage?

14 And clearly, there wasn't specific
15 guidance from Congress on the specificity of
16 that. But when we looked at those numbers, it
17 changed from one percent to the various -- and
18 you saw in the draft, the various percentages. I
19 think the Marine Corps was the highest at 90
20 percent. If a victim committed collateral
21 misconduct, she was punished 90 percent of the
22 time.

1 MR. KRAMER: What's it mean, committed
2 collateral misconduct?

3 COL. WEIR: Well --

4 MR. KRAMER: There's some
5 adjudication? Because somebody said the -- I
6 forget the exact words. I asked a question and
7 he said --

8 COL. WEIR: Right, and I'm glad you
9 brought that up, sir, because that's another
10 definition, accused. Us in the military justice
11 system have a specific word for accused. That
12 means a charge sheet has been preferred, and
13 there's charges that that individual has
14 committed. An officer has signed off on that
15 charge sheet, and that starts the process.

16 So suspect, suspected of committing
17 collateral misconduct. The Army's, potentially.
18 I don't know what -- it's either evidence in the
19 case file that she admitted that I was underage
20 and I was drinking. That's not potential. I
21 mean, she's admitted it. She's suspected of it
22 because she's admitted it. So I think we can do

1 a better job of the definition of accused because
2 that means --

3 MR. KRAMER: Or committed, I guess, is
4 the -- yeah.

5 COL. WEIR: Yeah, I mean, we can
6 wordsmith, the suspect may have committed this
7 collateral misconduct. But accused to me was
8 confusing because I'm thinking if you've accused
9 some way there's an investigation, there's a
10 charge sheet, and it's going down that path to
11 some end result.

12 And the other issue, I think, that we
13 can help them out is you could -- I mean, me not
14 making general is an adverse -- I mean, you can
15 say adverse to anything. But really what adverse
16 is general court martial, non-judicial
17 punishment, administrative separation for the
18 misconduct.

19 A letter of reprimand whether it goes
20 in your file or not. I mean, I drafted too many
21 to count which says, you have embarrassed the
22 United States Army, this, blah, blah, blah.

1 You're hereby reprimanded. Now if it gets filed
2 in the local file, it's still adverse. It stays
3 in that file for a period of time till you leave
4 the command. A non-punitive letter is still a
5 reprimand.

6 Now because I didn't get to go to a
7 school eight months from now that I -- I mean,
8 you can pull the string on this and everything
9 can become adverse to me if I don't think I got
10 what I should get.

11 So I would recommend that we define
12 adverse to those things I mentioned. Now
13 depending upon what service you're in, a non-
14 punitive letter, a letter of reprimand. We give
15 adverse counseling statements. You have failed
16 to do this. You were underage drinking. You're
17 told not -- don't do it again. If you do it
18 again, there's going to be adverse consequences
19 to you.

20 That's not a good counseling
21 statements. You get good -- hey, Steve, you did
22 a great job digging this foxhole. Keep up the

1 good work. That's a different kind of counseling
2 statement than, you screwed up. Don't screw up
3 again.

4 Because they use those counseling
5 statements to build a packet for the
6 administrative separation. And so you pull out
7 the ten bad counseling statements. You throw out
8 a packet for misconduct and off you go. The
9 person is out of the military.

10 So I think we can help them narrow
11 their definition. And I don't believe in my
12 experience with being purple that there's a lot
13 of difference between what an adverse action is
14 across the services. So we can help them help
15 themselves to make it clear what the adverse
16 action is.

17 And I'd recommend that we request that
18 the services specifically say of the ten victims
19 who receive adverse punishment, this is what it
20 was, two Article 15s for adultery or letters of
21 reprimand, and spell it out.

22 I don't know if we need to get into

1 the punishment, what they received. But a field
2 grade Article 15 for underage drinking. A
3 company grade Article 15 for violation of a
4 barracks policy.

5 But we want to fully inform those
6 people who have requested that this committee
7 look at this and analyze it and make
8 recommendations back to the armed services
9 committee. And that's not a heavy lift for the
10 services because there's really few numbers.

11 And if they can't readily pull those
12 numbers from their systems, then maybe that's a
13 recommendation that we have a centralized system
14 where we can pull information.

15 CHAIR BASHFORD: Document based.

16 COL. WEIR: Yeah, document based. But
17 I think that would be important for people to
18 know what the punishment was. So it may help
19 inform. You don't know what -- they may think
20 they all received court martials, they all got
21 administrative separations. If some of that
22 happened, well, that's fine. But it needs to be

1 documented. Do you all have any questions of --

2 BRIG. GEN. SCHWENK: I think we ought
3 to, right up front, address the 140a issues
4 because that's the overriding issue. And we
5 right up front ought to say, this highlights what
6 we were concerned about in our memorandum to the
7 Secretary of Defense on whatever date, copy
8 attached. And if that gets taken care of, we
9 will not have these kinds of inconsistencies in
10 the future. Meanwhile, let us help you with your
11 immediate tasking.

12 The other thing when you're working on
13 it, Congress asked for certain things. And it's
14 sort of unusual for DoD to give more than they
15 ask for. But sometimes we do. And they don't
16 ask for much. They ask for numbers.

17 So when we start providing more, the
18 numbers, especially if the DAC-IPAD is going to
19 ask the services to go spend more time and effort
20 beyond what Congress asked for, we need to be
21 real careful if that's really what we want to do.

22 COL. WEIR: Yes sir. They've provided

1 us the adverse action information. But basically
2 the draft report from the services contain more
3 information than -- I mean, they didn't ask for
4 the total number of sexual assault investigations
5 during this time period. They only asked for the
6 number of victims in this time period that
7 committed collateral misconduct.

8 So we can -- you all can deliberate
9 over how much or how little information that
10 should go over back to the Secretary of Defense.

11 CHAIR BASHFORD: I'm a great believer
12 that more information is more information. And
13 if it's susceptible to misinterpretation that
14 somebody has to choose between reporting a sexual
15 assault with the understanding they're going to
16 be kicked out of the service. And really what it
17 is, is a letter of reprimand.

18 I think Congress should understand
19 that there's a whole variety of adverse things
20 that happen. And most of them seem to be fairly
21 on the lower end.

22 BRIG. GEN. SCHWENK: If they already

1 have the information provided, which they do in
2 their reports, that's fine. But if we're asking
3 them, I thought you were talking about asking to
4 go back out and look for more stuff.

5 COL. WEIR: I think the good news
6 story for the services' perspective which we'll
7 highlight is the percentage of victims who aren't
8 committing any collateral misconduct. And that
9 kind of got lost in the shuffle in the draft
10 report from the services. But that should be
11 something.

12 I want to say it's in the 90 percent
13 that that's a good news story that we don't have
14 a lot of victims. Because that clouds the whole
15 prosecution investigation issue. But if you
16 don't have that issue involved in the
17 overwhelming majority of cases, that's good news
18 that we ought to make sure that is projected out
19 to the armed services committees through the
20 Secretary of Defense.

21 CHAIR BASHFORD: So Colonel, do you
22 need this committee to approve the path forward

1 of definitions, what to pull, asking about and
2 recommending that they include what the adverse
3 consequence was?

4 COL. WEIR: And then once -- if that's
5 the way you'd like to go and you vote on that,
6 then what we'll do is put together a draft letter
7 and then provide that to you all. And then on
8 the 12th of September, we will have a public
9 meeting telephonically.

10 Prior to that, obviously, you'll all
11 be sent the draft that you can -- you cannot
12 discuss it amongst yourselves. But you can send
13 it back to our office and we can compile it. And
14 then on the 12th, we will have all the changes
15 that you've recommended. And then we'll
16 deliberate at that point and vote on the final
17 product.

18 CHAIR BASHFORD: Does anybody --

19 HON. BRISBOIS: That's the way
20 forward.

21 CHAIR BASHFORD: I second that.
22 Anybody opposed? Seeing no opposition.

1 COL. WEIR: Okay. Thank you very
2 much. And I think --

3 CHAIR BASHFORD: Mr. Gruber?

4 MR. GRUBER: Madam Chair, I'm unaware
5 of anybody requesting to appear before the panel.
6 The Federal Register notice did notify the public
7 of their opportunity to do so. Colonel, are you
8 aware of anyone?

9 COL. WEIR: No.

10 MR. GRUBER: With that, ma'am, unless
11 you have other matters, it would appear you can
12 conclude the meeting at your discretion.

13 CHAIR BASHFORD: This meeting is now
14 concluded. Thank you.

15 (Whereupon, the above-entitled matter
16 went off the record at 4:28 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: DAC-IPAD Public Meeting

Before: US DOD

Date: 08-23-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

Court Reporter

NEAL R. GROSS

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