

# DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES



## MEETING AND REFERENCE MATERIALS

PUBLIC MEETING  
OCTOBER 19, 2018  
ARLINGTON, VIRGINIA

**Defense Advisory Committee on Investigation, Prosecution, and Defense of  
Sexual Assault in the Armed Forces (DAC-IPAD)  
Public Meeting**

**October 19, 2018  
Preparatory Materials**

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- *DAC-IPAD staff-prepared document containing Service responses to a request for information requesting transfer data for alleged sexual assault offenders.*

**Tab 24** Collateral Misconduct Study – National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, (2018), Section 547 (1 page)

- *Report on Victims of Sexual Assault In Reports Of Military Criminal Investigative Organizations. Section 547 requires the Secretary of Defense, acting through the DAC-IPAD, to submit a report on collateral misconduct involving victims of sexual assault by September 30, 2019 and every two years thereafter.*

**Defense Advisory Committee on Investigation, Prosecution, and Defense  
of Sexual Assault in the Armed Forces (DAC-IPAD)**

**PUBLIC MEETING AGENDA**

**October 19, 2018**

**One Liberty Center, Suite 1432  
875 North Randolph Street, Arlington, Virginia**

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|--------------------------------|--|
| <b>8:30 a.m. – 9:30 a.m.</b>   | <b>Administrative Session (41 C.F.R. § 102-3.160, not subject to notice &amp; open meeting requirements)</b>   |
| <b>9:30 a.m. – 9:40 a.m.</b>   | <b>Public Meeting Begins – Welcome and Introduction</b> <ul style="list-style-type: none"><li>- <i>Designated Federal Official Opens Meeting</i></li><li>- <i>Remarks of the Chair</i></li></ul>   |
| <b>9:40 a.m. – 10:30 a.m.</b>  | <b>Effects of Sexual Assault Investigations on Accused Service Members</b> <ul style="list-style-type: none"><li>- <i>Ms. Kathleen Coyne, U.S. Marine Corps Defense Highly Qualified Expert</i></li></ul>  |
| <b>10:30 a.m. – 10:40 a.m.</b> | <b>Break</b>   |
| <b>10:40 a.m. – 12:00 p.m.</b> | <b>Perspectives of Civilian Sexual Assault Investigators</b> <ul style="list-style-type: none"><li>- <i>Sergeant Detective Kelley O’Connell, Boston Police Department</i></li><li>- <i>Sergeant Amanda Wild, Albuquerque Police Department</i></li><li>- <i>Major Steve Hohman, Baltimore Police Department</i></li></ul>  |
| <b>12:00 p.m. – 1:00 p.m.</b>  | <b>Lunch</b>   |
| <b>1:10 p.m. – 1:50 p.m.</b>   | <b>Case Review Working Group Presentation and Committee Deliberations on Initial Findings and Recommendations Related to Sexual Assault Investigative Case File Reviews</b> <ul style="list-style-type: none"><li>- <i>Brigadier General James Schwenk, U.S. Marine Corps, Retired, DAC-IPAD Case Review Working Group Chair</i></li><li>- <i>Ms. Kate Tagert, DAC-IPAD Attorney Advisor</i></li></ul> |

**Defense Advisory Committee on  
Investigation, Prosecution, and Defense of  
Sexual Assault in the Armed Forces (DAC-IPAD)  
Public Meeting Agenda**

<b>1:50 p.m. – 3:10 p.m.</b>	<b>Committee Deliberations on Expedited Transfer—Final Assessment</b>  <i>- Ms. Terri Saunders, DAC-IPAD Attorney Advisor</i>
<b>3:10 p.m. – 3:50 p.m.</b>	<b>Briefing and Committee Deliberations on Judicial Proceedings Panel Recommendations Related to Articles 32, 33, and 34 of the Uniform Code of Military Justice Referred to the DAC-IPAD for Examination</b>  <i>- Ms. Meghan Peters, DAC-IPAD Attorney Advisor</i> <i>- Ms. Terri Saunders, DAC-IPAD Attorney Advisor</i> <i>- Ms. Nalini Gupta, DAC-IPAD Attorney Advisor</i>
<b>3:50 p.m. – 4:00 p.m.</b>	<b>Break</b>
<b>4:00 p.m. – 4:30 p.m.</b>	<b>Briefing and Committee Deliberations on Fiscal Year 2019 NDAA Required Collateral Misconduct Study</b>  <i>- Ms. Julie Carson, DAC-IPAD Deputy Staff Director</i>
<b>4:30 p.m. – 4:45 p.m.</b>	<b>Data Working Group Update</b>  <i>- Mr. Chuck Mason, DAC-IPAD Attorney Advisor</i> <i>- Ms. Stayce Rozell, DAC-IPAD Senior Paralegal</i>
<b>4:45 p.m. – 5:00 p.m.</b>	<b>Public Comment</b>
<b>5:00 p.m.</b>	<b>Public Meeting Adjourned</b>



**GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE**

**1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600**

JUN 7 2018

GENERAL COUNSEL

**MEMORANDUM FOR CHAIR, DEFENSE ADVISORY COMMITTEE ON  
INVESTIGATION, PROSECUTION AND DEFENSE OF  
SEXUAL ASSAULT IN THE ARMED FORCES**

**SUBJECT: Assessment of Judicial Proceedings Since Fiscal Year 2012 Amendments Panel  
Recommendations 54, 55, 57, 58 and 60**

The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), a congressionally mandated federal advisory committee, concluded its work on October 9, 2017 with the issuance of its final report. Having reviewed the recommendations, I have determined that the Defense Advisory Committee on Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)'s analysis of recommendations 54, 55, 57, 58 and 60 would be helpful, and respectfully request that the DAC-IPAD examine these recommendations.

I respectfully request that the DAC-IPAD include its analysis and findings, if any, of the aforementioned recommendations in its next annual report.

William S. Castle  
Acting

## **Recommendations of the Judicial Proceedings Panel Assigned to The DAC-IPAD by DoD on June 7, 2018**

### **A. Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 (September 2017)**

**Recommendation 54:** The successor federal advisory committee to the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, should consider continuing to analyze adult-victim sexual assault court-martial data on an annual basis as the JPP has done, and should consider analyzing the following patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data:

- a. Cases involving military victims tend to have less punitive outcomes than cases involving civilian victims; and
- b. The conviction and acquittal rates for sexual assault offenses vary significantly among the military Services.
- c. If a Service member is charged with a sexual assault offense, and pleads not guilty, the probability that he or she will be convicted of a sexual assault offense is 36%, and the probability that he or she will be convicted of any offense (i.e., either a sex or a non-sex offense) is 59%.

### **B. Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice (September 2017)**

**Recommendation 55:** The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

**Recommendation 57:** After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

**Recommendation 58:** The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision

**Recommendation 60:** The Secretary of Defense and the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

**B. Information Presented to the JPP.** One senior defense counsel told the JPP, “The lack of a thorough pre-trial investigation and prosecutorial discretion combined with the nature of acquaintance sexual assaults and the new incentives to fabricate [allegations] are a recipe for wrongful convictions.”<sup>115</sup> She stated that despite changes to the system that favor victims and the prosecution, defense counsel are achieving more acquittals than ever before in sexual assault cases. She further observed, however, that the high acquittal rate demonstrates that many of the cases being “pushed through the system” should not be at court-martial and that, although the accused in these cases is often found not guilty, the trial process incurs “a real cost to the accused’s life, reputation, family and career.”<sup>116</sup> In her view, “the sands have shifted in favor of the victim at the expense of the accused.”<sup>117</sup> Another defense counsel expressed his opinion that because of the changes in the military justice system, the rights of the accused to due process and a speedy trial are being eroded.<sup>118</sup> He noted that cases are lingering for as long as two years from report until the case goes to trial, putting the accused’s and victim’s life on hold for a significant period of time.<sup>119</sup>

## V. CONCLUSIONS AND RECOMMENDATIONS

It appears that recent sexual assault legislation and policy changes that have benefited sexual assault victims and made the military justice system less intimidating to them have also had some negative consequences that must be addressed. These changes have affected the perceived legitimacy of the justice system. While legislative changes have substantially reduced the number of victims who testify at Article 32 hearings and have clarified that this hearing is not intended to be a discovery mechanism for the defense, there has been no corresponding new legislation or policy to provide defense counsel access to important case information.<sup>120</sup> In addition, changes in the military justice system, such as the addition of SVCs/VLCs, have greatly benefitted sexual assault victims and given them a much-needed voice in the system. Some defense counsel, however, feel this unfairly tips the scales of justice against the defendant. Also, when SVC/VLC limit a prosecutor’s access to the victim, it may adversely affect case outcomes. SVC/VLC must understand that in spite of their laudable intentions, they may inadvertently harm a victim’s goals or interests by weakening the criminal case, thereby increasing the chances of an acquittal at trial.

The consensus among counsel interviewed during the installation site visits was that the combination of a less robust Article 32 process, pressure on convening authorities to refer sexual assault cases to courts-martial, and the low standard of probable cause for referring cases to courts-martial has led to cases being referred to courts-martial in which there is little chance for a conviction. Many counsel felt that the result has been a high acquittal rate in sexual assault cases, which, in turn, has caused military

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115 *Transcript of JPP Public Meeting 211* (Jan. 6, 2017) (testimony of LCDR Trest).

116 *Id.* at 212–13.

117 *Id.* at 252.

118 *Transcript of JPP Public Meeting 250* (Jan. 6, 2017) (testimony of Maj Argentina).

119 *Id.* at 249.

120 The SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES, *supra* note 2, highlights significant due process issues regarding defense counsel and makes four recommendations, including that defense counsel be provided with independent investigators, that defense offices be appropriately staffed and resourced, and that expert witness approval and funding be vested in Service defense organizations. The Subcommittee’s report and recommendations were approved, with modifications, by the JPP. The JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES is available at [http://jpp.whs.mil/Public/docs/08-Panel\\_Reports/06\\_JPP\\_Defense\\_Resources\\_Experience\\_Report\\_Final\\_20170424.pdf](http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf).

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members to question the fairness of the military justice system. In addition, some counsel worried that when the word gets around that sexual assault cases are going to courts-martial supported only by weak evidence, military juries may be much more skeptical of the charges and the prosecution and thus may be more likely to acquit. Perhaps inevitably, as Service members become aware of weak cases and high acquittal rates, victims may become more reluctant to make unrestricted reports.

Even when Article 32 officers have recommended against the referral of charges, those recommendations are not always followed by convening authorities. A substantial sampling of sexual assault cases tried in fiscal year 2015 reveal 54 cases in which the convening authority referred charges despite Article 32 investigating officers or PHOs finding that there was no probable cause or advising against the referral of sexual assault charges. In 45 of those cases, the accused was acquitted of the charges at trial, a number suggesting that perhaps the staff judge advocates and convening authorities should have paid more attention to the Article 32 officers' recommendations.

While most counsel now view the Article 32 process as having little value for scrutinizing the evidence in a sexual assault case, there has yet to emerge a formal written process for ensuring that the convening authority is made fully aware of the strengths and weaknesses of a case and has guidance for deciding an appropriate disposition. There are often good reasons, such as maintaining good order and discipline and respecting a belief that the assault took place, to refer a case to court-martial even when the likelihood of acquittal is high. But a convening authority should not be forced to make the critical decision about referral, with its life-changing impact on both the victim and the defendant, without clear guidelines and a better sense of the evidence's strength. Convening authorities must be corrected if they erroneously believe that a decision to refer a case to court-martial will have few consequences for the accused, the victim, or the public's perception of the military justice system. An accused facing court-martial is exposed to numerous adverse career and personal consequences, such as loss of promotion and career advancement opportunities, ostracism by peers, and the ongoing stress of knowing that a federal conviction, confinement, and sex offender registration are possible. Even if ultimately acquitted, the accused often suffers the enduring social and professional stigma of simply having been accused of these reprehensible offenses.

Recent legislation directing the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and staff judge advocates in determining an appropriate case disposition may help meet this need. Such formal case disposition guidance, in written form, should provide convening authorities with additional considerations, beyond whether the charges are supported by probable cause, as they decide whether to refer a case to court-martial or to resolve it through disposition at some lower level.

Several prosecutors discussed their practice in sexual assault cases of producing a prosecution merits memo to lay out the strengths and weaknesses of the evidence and the likelihood of a conviction at trial, thereby aiding the staff judge advocate and convening authority in making an appropriate decision on disposition. While this seems like a useful tool to fill the void left when a more robust Article 32 process was replaced, it is worth noting that under Article 34 of the UCMJ and under R.C.M. 406, the staff judge advocate's pretrial advice to the convening authority and accompanying documents must be provided to the defense if charges are referred to trial. A prosecution merits memo detailing evidentiary problems can go to the staff judge advocate without also being given to the defense, but any information provided in writing to the convening authority with the pretrial advice presumably must then be provided to the defense if charges are referred. This legal requirement may make staff judge advocates and prosecutors reluctant to write such candid memos to the convening authority for fear of disclosing a case's evidentiary problems to the defense. There is no such parallel in civilian jurisdictions, where information provided by a prosecutor to his or her superiors would not

have to be provided to the defense counsel unless it revealed potentially exculpatory evidence (as also must be done by military prosecutors). More research and thought should be devoted to enabling the convening authority in the military justice system to be given enough information to make a proper decision, since the convening authority, like prosecutors in civilian jurisdictions, are responsible for determining which cases are prosecuted and which are not.

On site visits, counsel also discussed their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial regardless of their merits. Counsel are concerned that cases are being sent to courts-martial even when the evidence is weak or the allegations involve less serious conduct, such as an attempted kiss or slap on the buttocks, that could be resolved through nonjudicial punishment or administrative action. The Subcommittee notes, however, that in the fiscal year 2015 case data collected from the Services, convening authorities either dismissed charges prior to trial or disposed of cases by alternative means in almost 30% of all cases in which charges were preferred. Without knowing the facts of these cases, we cannot draw conclusions about why they were not referred to trial. But these data do reveal that while convening authorities may be experiencing pressure to refer sexual assault cases to court-martial, they are declining to do so almost 30% of the time. In addition, it may be that convening authorities are referring more sexual assault cases to courts-martial not because of outside pressure but because they now take sexual assault cases more seriously than they had done in the past and feel that disposition by courts-martial is the most appropriate way to resolve these grave allegations. So long as statutory language requires elevated review of a convening authority's decision not to refer a sexual assault case to court-martial, however, convening authorities will always feel some pressure to refer cases to trial against their better judgment.

Counsels' perceptions of a high acquittal rate for sexual assault offenses are borne out by the data. Among cases referred to courts-martial in fiscal year 2015, only 40% of the cases involving a penetrative sexual assault offense resulted in a conviction of any type of sexual assault offense. Just 25% of sexual contact cases resulted in conviction for any sexual offense. While the conviction rate is higher when convictions for non-sex offenses are included, the acquittal rate for sexual assault offenses is significant.

Although the JPP Subcommittee does not have the time to continue investigating the potential causes of this high acquittal rate, this issue must be explored further. The Subcommittee notes that the authorizing legislation for the JPP's successor panel, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, requires the panel to conduct an ongoing review of cases involving sexual misconduct allegations.<sup>121</sup>

The inherent difficulties in evaluating sexual assault case evidence, combined with the widespread perception that convening authorities are referring weak cases, have led to the belief by many of the Subcommittee's interviewees that the military justice system is weighted against the accused in sexual assault cases. Such one-sidedness is particularly serious in light of the potentially catastrophic effects of being accused of a sexual crime. The high rate of acquittal in military sexual assault cases can feed into this perception and lead to a general mistrust of the military justice system, which may lead Service members to acquit when they serve on panels in sexual assault courts-martial.

The public may view the high acquittal rate as a result not of the more aggressive approach to sexual offense prosecution described in the site visits but of the military's indifference to sexual assault. Public loss of confidence in the military and the military justice system has the potential to harm military enlistment and officer accession rates, as well as retention rates. In short, there must be a balance—a

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121 FY15 NDAA, *supra* note 21, § 546.

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system that treats sexual assault victims fairly and compassionately and that also provides defendants with procedures that are perceived to be, and are, fair. It is not the accused alone who suffers when a sexual assault case for which there is little chance of winning a conviction is referred to court-martial—the victim is also forced to endure a lengthy, difficult process at whose end the accused is very likely to be found not guilty.

## RECOMMENDATIONS:

*Recommendation 1:* The JPP Subcommittee recommends that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP no longer serves a useful purpose. Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the preliminary hearing officer against referral, based on lack of probable cause, should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP Subcommittee reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

*Recommendation 2:* The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

*Recommendation 3:* The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

*Recommendation 4:* The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

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*Recommendation 5:* The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

*Recommendation 6:* The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

*Recommendation 7:* The JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim-clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

*Recommendation 8:* The JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

*Recommendation 9:* The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs/VLCs should all receive training in how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

## **DAC-IPAD Staff-Proposed Plan for DAC-IPAD Review of Judicial Proceedings Panel Recommendations 55, 57, and 58**

1. **Task.** In a memorandum dated June 7, 2018, the Acting General Counsel for the Department of Defense (DoD) requested the DAC-IPAD examine five Judicial Proceedings Panel (JPP) recommendations, JPP Recommendations 54, 55, 57, 58, and 60, and include its analysis in the next DAC-IPAD annual report.

### **2. Review of JPP Recommendations.**

Of the five JPP Recommendations, Recommendations 54 and 60 concern data collection and analysis, which is ongoing by the DAC-IPAD and will be discussed in the DAC-IPAD's next annual report. JPP recommendations 55, 57, and 58 all come from the JPP's *Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases*, released in September 2017. These, along with the other recommendations contained in this report, stem from concerns regarding due process in the military justice system that were raised to JPP Subcommittee members during military installation site visits conducted July through September 2016.

Some of the primary issues raised in the JPP report center around concerns that the combination of a less robust Article 32 pretrial hearing, perceived pressure on convening authorities to refer sexual assault charges to court-martial, and the low standard of probable cause for referring cases to courts-martial has led to cases being referred to courts-martial in which there is little chance for a conviction. Reviewing JPP recommendations 55, 57, and 58 will allow the DAC-IPAD to address some of these concerns raised by the JPP report.

**JPP Recommendation 55:** The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

**JPP Recommendation 57:** After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

**JPP Recommendation 58:** The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

### **3. DAC-IPAD Staff Recommended Actions and Proposed Timeline.**

- Send an initial request for information (RFI) to DoD and the Services requesting responses by **December 6, 2018**.
- DAC-IPAD form a new working group to study JPP recommendation 55 on the Article 32 process and assemble future working groups to address JPP Recommendations 57 and 58.
  - The working group(s) would primarily work through email and telephonic meetings, but may occasionally need to meet in person.
  - The working group would identify potential witnesses to appear before the working group or Committee to provide relevant information and develop additional RFIs for DoD and the Services.
- The DAC-IPAD would make an initial report on these topics in its **March 2019** Annual Report.
- The Committee members would conduct military installation site visits beginning **February 2020** to assess the effects of changes to the Article 32 process and implementation of Article 33 disposition guidance, which go into effect January 1, 2019, as well as other relevant issues identified by the Committee.

**DAC-IPAD Staff Prepared Information Paper:  
JPP Recommendation 55 Regarding Article 32, UCMJ, and Defense Investigators**

**I. Overview of Article 32, UCMJ – present, past, and future.**

**A. Current version of Article 32, UCMJ, in effect since December 2014.**

Article 32 of the UCMJ requires an independent inquiry into preferred charges before a convening authority may refer the charges to trial by a general court-martial. This statute requires that an impartial preliminary hearing officer (PHO), who is typically a judge advocate, conduct a hearing limited to the following issues:

- Whether each specification alleges an offense.
- Whether there is probable cause to believe that the accused committed the offense(s).
- Whether there is jurisdiction over the accused and over the offense.
- The disposition that should be made of the case.

The preliminary hearing officer's determinations are advisory, as is his or her recommendation as to the appropriate disposition of the charges. A defendant may waive his right to an Article 32 hearing. The staff judge advocate communicates the Article 32 preliminary hearing officer's findings and recommendations to the convening authority, along with the Staff Judge Advocate's advice regarding referral of charges under Article 34, UCMJ.

**B. Historical changes to Article 32, UCMJ**

In the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Congress changed Article 32 proceedings from a searching investigation into the "truth and form" of the charges, and one that served as a discovery tool for the accused, to a more narrowly-drawn preliminary hearing focused on an initial probable cause determination and on the disposition that should be made of the case. Congress also eliminated the hearing officer's ability to compel a military member who is a sexual assault victim to testify at the Article 32 preliminary hearing. However, the revised Article 32 proceedings allow a preliminary hearing officer to consider other forms of evidence, such as written or recorded statements made by the victim to law enforcement. These changes went into effect for Article 32 preliminary hearings conducted on or after December 27, 2014.

Congress again amended Article 32, UCMJ, in a portion of the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA), known as the Military Justice Act of 2016. This revision was based, in part, on the recommendations of the DoD Military Justice Review Group (MJRG). The reforms proposed by the MJRG were designed to enhance the utility of the Article 32 preliminary hearing for the staff judge advocate and convening authority, and to expand the opportunity for parties and victims to submit relevant information to the convening authority on the appropriate disposition of offenses.

The Military Justice Act of 2016, which goes into effect on January 1, 2019, changes Article 32 in two primary respects: (1) it more closely aligns the language of Article 32 with the provisions governing the staff judge advocate's advice to convening authorities as well as the convening authority's decision to refer charges to court-martial; and (2) calls for a more robust written analysis of the charges and the underlying evidence in the Article 32 report than previously required.

## **II. Judicial Proceedings Panel Subcommittee Observations During Site Visits**

From July through September 2016, members of the JPP Subcommittee visited military installations across the United States and Asia and spoke with members of each military Service who were involved in the military justice system—prosecutors, defense counsel, victims' counsel, staff judge advocates, commanders, and victim services personnel—regarding several aspects of the military justice system.<sup>1</sup> At each site visited, JPP Subcommittee members asked participants for their perspective on a variety of topics, among them how the changes to Article 32, in effect since December 2014, were working. The consensus among trial, defense, and victims' counsel across the Military Services was that the Article 32 hearing is no longer a useful tool for evaluating the strength of a case, or for any other purpose.

## **III. Judicial Proceedings Panel Public Meeting Testimony Regarding Article 32, UCMJ**

Senior trial and defense counsel and former military judges, speaking to the JPP at a public meeting in January 2017, reinforced the comments of counsel on site visits that Article 32 hearings in sexual assault cases have become “paper drills” at which neither the victim nor other witnesses testify.

A number of counsel expressed the concern that the more superficial process mandated by the current Article 32 is leading convening authorities to make court-martial referral decisions with less information than was available to them in the past. These counsel corroborated the perception of counsel interviewed by the JPP Subcommittee during site visits that the reforms to Article 32 have made the hearings less meaningful, and as a result more sexual assault cases are referred despite weak evidence and little chance of conviction at trial.

Practitioners who testified before the JPP in January 2017 stated they were aware of cases in which Article 32 PHOs either found no probable cause for a charge or recommended against

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<sup>1</sup> On the basis of the feedback received by members of the JPP Subcommittee during military installation site visits, the JPP Subcommittee issued three reports that were adopted by the JPP:

- 1). *Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases* (December 2016)
- 2). *Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military* (February 2017)
- 3). *Subcommittee of the Judicial Proceedings Panel Report on Barriers to the Fair Administration of Military Justice* (May 2017)

sending the charge to trial, but their advice was not followed by the staff judge advocate and convening authority.

#### **IV. Judicial Proceedings Panel Findings and Recommendations Regarding Defense Investigators**

In April 2017, the JPP made the following recommendation to the Secretary of Defense:

In order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.<sup>2</sup>

In making this recommendation, the JPP found that

- In its June 2014 report, the [Response Systems Panel, or RSP,] recommended that the Secretary of Defense direct the Services to provide independent, deployable defense investigators. The RSP noted that civilian public defender offices routinely employ investigators and consider them indispensable.
- Since the RSP made this recommendation, statutory changes have been made to the Article 32 process. Under the new Article 32 pretrial hearing process, witnesses, including the victim, testify at the Article 32 hearing far less frequently and less evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case.

Subsequently, in September 2017, the JPP assessed the combined effect of a number of reforms to the UCMJ on the due process rights of Service members accused of sexual assault.<sup>3</sup> The JPP specifically reiterated concerns about the accused's reduced opportunity to discover information about his or her case through Article 32 proceedings. In so doing, JPP noted that in the case of *Hutson v. United States*, 42 C.M.R. 39 (1970), the CAAF relied on the utility of the Article 32 hearing in upholding a judge's refusal to grant the defense's request for appointment of an investigator. While acknowledging that investigative assistance is provided for indigent defendants in federal courts, the CAAF held that the federal statute used to grant such assistance was not available to military defendants, stating: "[I]t should be noted that the pretrial investigation to which these charges have been referred is the accused's only practicable means of discovering the case against him." The JPP concluded that removing the Article 32's utility as an investigative and discovery tool has disadvantaged military defendants and suggests changes are needed to restore fairness in the military justice system.

To date, the Department of Defense has not responded to several of the JPP's recommendations, including those calling for an evaluation of the Article 32 process and for defense investigators.

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<sup>2</sup> See *Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases* (April 2017).

<sup>3</sup> See *Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (September 2017).

## **DAC-IPAD Staff Proposed Plan for Analyzing JPP Recommendation 55**

**JPP Recommendation 55:** The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

1. JPP Recommendation 55 says the DAC-IPAD should review the post-December 2014 Article 32 preliminary hearing process; this review should include the following issues:

- Whether PHOs in sexual assault cases should be military judges or other senior judge advocates with military justice experience
- Whether a PHO recommendation against referral, based on lack of probable cause, should be given more weight by the convening authority
- Determine whether any further analysis of, or changes to, the Article 32 process are required
- Whether the Military Services should provide defense counsel with independent investigators

2. The DAC-IPAD invites trial and defense counsel, special victims' counsel, PHO's, and commanders who serve or have served as the initial disposition authority for sexual assault cases to DAC-IPAD public meetings and/or working group sessions in 2019, and 2020 as needed, to discuss issues related to the current Article 32 process, and the potential impact of future changes.

Proposed issues for discussion:

- Should the Article 32 officer's determination that a charge lacks probable cause be given more weight by the convening authority? Should such a finding bar referral to general court-martial?
- Assuming Article 32 findings and recommendations should be given more weight, what is the best way to accomplish this goal? Would changing the rank of the PHO suffice?
- Should the law require the Staff Judge Advocate (SJA) to address PHO findings and recommendations in his or her advice to the convening authority at referral?
- How do victims and/or special victims' counsel feel about the changes to the Article 32 process since December 2014?
- What changes or improvements to Article 32, and/or its implementing rules, would trial or defense counsel recommend?
- How is the pre-referral investigative subpoena affecting the Article 32 process after January 1, 2019?
- Should the scope of the Article 32 preliminary hearing be broadened beyond an initial probable cause determination?

3. Proposed requests for information from the Military Services:

- In fiscal year 2018, how many PHO's were military judges?
- Do any of the Military Services employ full-time defense investigators within their respective defense services organizations? If so, how many?
- What are the Military Services' responses to the requirement, contained in the House Report on the National Defense Authorization Act for Fiscal Year 2018, that the Military Services submit a report no later than April 1, 2018, concerning whether military defense counsel require independent investigators in order to adequately defend their clients, and the costs associated with providing such investigators.

4. Examine FY17 court-martial data obtained by the DAC-IPAD, and review Article 32 records from individual cases as needed. The DAC-IPAD's database can provide information concerning the following:

- In fiscal year 2018, how Article 32 hearings were held in sexual assault cases? Has the number of hearings increased or decreased over time?
- In fiscal year 2018, how many defendants elected to waive their right to a hearing pursuant to Article 32, UCMJ?
- In fiscal year 2018, how many victims chose to participate in the Article 32 hearing? How many victims declined to participate in the hearing?

5. Evaluate Article 32 changes effective Jan. 1, 2019, during future DAC-IPAD meetings and on military installation site visits by DAC-IPAD members.

**DAC-IPAD Staff Prepared Information Paper:  
JPP Recommendations 57 and 58 Regarding Articles 33 and 34, UCMJ**

**I. Referral of Charges to a General Court-Martial**

R.C.M. 601(d)(1) provides that a convening authority generally may refer charges to any court-martial as long as “the convening authority finds or is advised by a judge advocate” that there is probable cause for the specification and that the specification alleges an offense. The rule further provides that the convening authority may rely on information from any source when making the referral decision, including hearsay and other evidence that may not be admissible at trial.

Following an Article 32 preliminary hearing or waiver, the staff judge advocate (SJA) forwards the Article 32 report, along with the charges and his or her written advice, to the general court-martial convening authority (GCMCA) for disposition decision. Under Article 34 of the UCMJ, the GCMCA may not refer charges to a general court-martial unless the SJA advises him or her in writing that the specification alleges an offense under the UCMJ, there is probable cause to believe the accused committed the offense, and a court-martial would have jurisdiction over the offense and the accused.<sup>1</sup> In addition, the SJA must also provide his or her written recommendation to the GCMCA as to the disposition of the offenses.<sup>2</sup>

R.C.M. 406(c) states that if the GCMCA decides to refer the case to a general court-martial, the SJA’s Article 34 pretrial advice must be provided to the defense, along with a copy of the charges, the Article 32 report, and other accompanying papers.<sup>3</sup>

While Article 34 requires the SJA to advise the convening authority whether probable cause exists to refer a specification to court-martial, the Military Justice Act of 2016 created a new Article 33 directing the Secretary of Defense to issue additional guidance for SJAs and convening authorities to consider, beyond just probable cause, in determining an appropriate disposition of the charged offenses.

**II. New Article 33, Disposition Guidance**

**A. The Military Justice Act of 2016**

The Military Justice Act of 2016 (which will go into effect on January 1, 2019) created a new Article 33, entitled “Disposition guidance.” This article states:

“The President shall direct the Secretary of Defense to issue . . . non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of

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<sup>1</sup> This language reflects recent statutory changes enacted by the Military Justice Act of 2016.

<sup>2</sup> A statutory change to Article 34 enacted in the Military Justice Act of 2016 requires a special court-martial convening authority to consult with his or her SJA prior to referring charges to a special court-martial.

<sup>3</sup> Amendments to R.C.M. 406, which take effect January 1, 2019, do not explicitly require that a copy of the SJA’s Article 34 pretrial advice be provided to the defense if charges are referred to a general court-martial. However, the language of Article 34, as well as R.C.M. 701 on discovery, make it clear that this is still a requirement.

justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.”

The Military Justice Review Group’s report, which was the catalyst behind the Military Justice Act of 2016, noted that such disposition guidance “would help to ‘fill the gap’ that currently exists in military practice between the probable cause standard for referral of charges to court-martial and the ‘beyond a reasonable doubt’ standard for conviction. In civilian practice, this gap has been filled with structured decisional principles and charging standards to help guide prosecutors in the prudent and effective exercise of prosecutorial discretion.”

## **B. U.S. Attorneys’ Manual**

The U.S. Attorneys’ Manual, referenced in the new Article 33, provides that probable cause is a threshold requirement that, if met, does not automatically warrant prosecution. The manual articulates the following standard:

“The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person’s conduct constitutes a Federal offense and that **the admissible evidence will probably be sufficient to obtain and sustain a conviction**, unless, in his/her judgment, prosecution should be declined because:

- (1) No substantial Federal interest would be served by prosecution;
- (2) The person is subject to effective prosecution in another jurisdiction; or
- (3) There exists an adequate non-criminal alternative to prosecution” [emphasis added].<sup>4</sup>

## **C. JPP Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases**

In its *Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases*, published in September 2017, the JPP made the following recommendation:

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<sup>4</sup> The ABA Criminal Justice Standards for the Prosecution Function contain a similar elevated standard for filing and maintaining criminal charges as the Attorney General’s Manual, stating: “A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.” Similarly, the National District Attorneys Association National Prosecution Standards states that “[a] prosecutor should file charges that he or she believes adequately encompass the accused’s criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.” The discussion section specifies, “While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge.”

“Article 33, UCMJ, nonbinding case disposition guidance for convening authorities and staff judge advocates should require that the following standard be considered for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial. The nonbinding disposition guidance should require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor.”

#### **D. Disposition Guidance**

On March 1, 2018, the President signed Executive Order 13825, which contains Appendix 2.1, “Nonbinding disposition guidance.”

Unlike the U.S. Attorneys’ Manual, Appendix 2.1 does not contain a clear standard for when charges in a case *should* be referred. Instead, the guidance states when a convening authority *may* refer charges, repeating the probable cause minimum requirement stated in R.C.M. 601:

“If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed, the accused committed it, and the specification alleges an offense, the convening authority may refer such charges and specifications to a court-martial.”

The guidance further directs convening authorities to consider the following factors to “determin[e] whether the interests of justice and good order and discipline would be served by trial by court-martial or other disposition in a case”:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused’s culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;**
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused’s willingness to cooperate in the investigation or prosecution of others;
- l. The accused’s criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and

- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused’s potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

The guidance also lays out inappropriate considerations for the disposition determination, which are:

- a. The accused’s race, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;
- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused’s associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander or convening authority’s military career or other professional or personal circumstances; or
- e. Political pressure to take or not to take specific actions in the case.

## **DAC-IPAD Staff Proposed Plan for Analyzing JPP Recommendations 57 and 58**

**JPP Recommendation 57:** After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

**JPP Recommendation 58:** The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

1. The Committee may wish to send a Request for Information to the Services including the following questions:

*Article 34, Pretrial Advice:*

- What is the general practice or practices within each Service for how the SJA provides pretrial advice to the GCMCA?
  - Does the SJA conduct a face-to-face meeting with the GCMCA in addition to providing the written Article 34 advice?
  - During the meeting between the SJA and the GCMCA, are there typically other attorneys present, such as the trial counsel or the SVC/VLC? If so, do these other attorneys provide information about the case directly to the GCMCA or is that left primarily to the SJA?
- In addition to the written Article 34 advice and the Article 32 report, if applicable, how is information about the case, such as strengths and weaknesses of the case, evidentiary issues, or victim or witness credibility issues—information not always contained in the Article 34 advice or Article 32 report—conveyed to the GCMCA prior to the GCMCA making a disposition decision in a sexual assault case?
  - How common is it for SJAs to utilize prosecution merits memos or similar documents to discuss these aspects of a sexual assault case with the GCMCA?
  - If utilized, are these prosecution merits memos or similar documents provided to the GCMCA for review? If not, how is the information in these documents conveyed to the GCMCA?

- If these documents are provided to the GCMCA, are they then provided to the defense if the case is referred to trial?
- Is it currently the practice for SJAs to advise GCMCAs on the likelihood of a conviction should a sexual assault case be referred to trial?
  - How large of a consideration is that in the disposition decision making process?
  - How much weight do the SJA and the GCMCA give to a sexual assault victim's wishes regarding an appropriate disposition of the case? How are the victim's wishes regarding having the case proceed to court-martial balanced against the strength of the case and the likelihood of achieving a conviction?

*Article 33 Disposition Decisions:*

The Air Force Guidance Memorandum for AFI 51-110, Professional Responsibility Program, states that “[a] trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.” The Air Force is the only Service to have implemented this standard.

- How has this standard been interpreted?
- Has this standard affected the number/types of cases that are referred to court-martial in the Air Force?

*Elevated Review of Non-Referral Decisions:*

- How many times since January 1, 2017 has the Service Secretary reviewed a convening authority's decision not to refer qualifying sex-related offenses to court-martial?
  - How many times did the Service Secretary decide to refer the charge(s) to court-martial based on that review?
  - How many cases reviewed by the Service Secretary originated from the Chief Prosecutor for the Service pursuant to Section 541 of the FY15 NDAA?
  - How many times since January 1, 2017 has a detailed trial counsel requested that the Chief Prosecutor for the Service review a case in which the general court-martial convening authority decided not to refer a qualifying sex-related offense?
- How many times since January 1, 2017 has a case been forwarded for review to the next superior commander after a general court-martial convening authority (GCMCA) decided not to refer a qualifying sex-related offense to trial by court-martial?
  - How many times did the next superior commander decide to refer the charge(s) to court-martial based on that review?

2. The Committee may wish to consider conducting site visits in February 2020, one year after the disposition guidance has taken affect. The Committee could meet, on a non-attribution basis, with commanders, staff judge advocates, trial counsel, defense counsel, and special victims' counsel/victims' legal counsel. Possible questions for these groups include:

- How and to what extent are the following groups utilizing the Article 33 disposition guidance contained in Appendix 2.1:
  - Prosecution offices?
  - Staff judge advocates?
  - Commanders and convening authorities?
- Based on the stated purposes of Appendix 2.1, does the disposition guidance effectively:
  - Assist commanders in exercising their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law?
  - Serve as a training tool for convening authorities, commanders, staff judge advocates, and judge advocates in the proper discharge of their duties?
  - Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources?
  - Enhance the relationship between military commanders, judge advocates, and law enforcement agencies, including military criminal investigation organizations, with respect to investigations and charging decisions?
- Are commanders referring cases to courts-martial that meet the probable cause requirement but are unlikely to result in conviction based on the admissible evidence? In these cases, what are the factors that influence the decision to refer the case?
- Would prosecutors/staff judge advocates/commanders find it useful for the disposition guidance to contain a clearly articulated standard for when cases should be referred to trial, similar to civilian guidance?
- Is there any reason the military should not adopt the U.S. Attorneys' Manual standard for when to commence a prosecution?
- Should convening authorities be required to document the basis for their decision to refer or not refer charges, including what factors informed their decision?
- How and to what extent is section 2.7 from Appendix 2.1 (Inappropriate considerations) having an impact on the disposition decision-making process?

**Section 6.** Appendix 2.1 of the Manual for Courts-Martial, United States is new and reads as follows:

## **APPENDIX 2.1 NON-BINDING DISPOSITION GUIDANCE**

This Appendix provides non-binding guidance issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 833.

### **SECTION 1: IN GENERAL**

- 1.1. Policy
- 1.2. Purpose
- 1.3. Scope
- 1.4. Non-Litigability

### **SECTION 2: CONSIDERATIONS IN ALL CASES**

- 2.1. Interests of Justice and Good Order and Discipline
- 2.2. Consultation with a Judge Advocate
- 2.3. Referral
- 2.4. Determining the Charges and Specifications to Refer
- 2.5. Determining the Appropriate Court-Martial Forum
- 2.6. Alternatives to Referral
- 2.7. Inappropriate Considerations

### **SECTION 3: SPECIAL CONSIDERATIONS**

- 3.1. Prosecution in Another Jurisdiction
- 3.2. Plea Agreements
- 3.3. Agreements Concerning Disposition of Charges and Specifications
- 3.4. Agreement Concerning Sentence Limitations

## **SECTION 1: IN GENERAL**

### **1.1. Policy.**

a. This Appendix provides non-binding guidance regarding factors that convening authorities, commanders, staff judge advocates, and judge advocates should consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purpose of military law.<sup>1</sup>

b. This Appendix supplements the Manual for Courts-Martial. Reference to or reliance upon this Appendix, or to the guidance contained herein, does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this

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<sup>1</sup> “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2018).

Appendix have been cast in general terms, with a view to providing guidance rather than mandating results. The intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

**1.2. Purpose.** This non-binding guidance is intended to:

- a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;
- b. Serve as a training tool for convening authorities, commanders, staff judge advocates, and judge advocates in the proper discharge of their duties;
- c. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and
- d. Enhance the relationship between military commanders, judge advocates, and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions.

**1.3. Scope.** This Appendix is designed to support the exercise of discretion with respect to the following disposition decisions:

- a. Initiating and declining action under the UCMJ;
- b. Selecting appropriate charges and specifications;
- c. Selecting the appropriate court-martial forum or alternative mode of disposition, if any; and
- d. Considering the appropriateness of a plea agreement.

**1.4. Non-Litigability.** This non-binding guidance has been developed solely as a matter of internal Departmental policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to create a right, benefit, or defense, substantive or procedural, enforceable at law by any person.

## **SECTION 2: CONSIDERATIONS IN ALL CASES**

**2.1. Interests of Justice and Good Order and Discipline.** In determining whether the interests of justice and good order and discipline would be served by trial by court-martial or other disposition in a case, the commander or convening authority should consider, in consultation with a judge advocate, the following:

- a. The mission-related responsibilities of the command;

- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

**2.2. Consultation with a Judge Advocate.** If a member of a command is accused or suspected of committing an offense punishable under the UCMJ, a commander is advised by a judge advocate of the available options for the disposition decision and the considerations that will affect not only the decision but also the further progress of any case. The cognizant commander should consider all available options.

**2.3. Referral.** If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed, the accused committed it, and the specification alleges an offense, the convening authority may refer such charges and specifications to a court-martial. In making that decision the convening authority should consider the matters described in paragraph 2.1.

**2.4. Determining the Charges and Specifications to Refer.** Ordinarily, the convening authority should refer charges and specifications for all known offenses to a single court-martial. However, the convening authority should avoid referring multiple charges when they would:

- a. Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;
- b. Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;
- c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or
- d. Be disposed of more appropriately through an alternative disposition.

**2.5. Determining the Appropriate Court-Martial Forum.** In determining the appropriate court-martial forum, a convening authority should consider:

- a. The advice of a judge advocate;
- b. The interests of justice and good order and discipline (*see* paragraph 2.1);
- c. The authorized maximum and minimum punishments for the offenses charged;
- d. Any unique circumstances in the case requiring immediate disposition of the charges;
- e. Whether the court-martial forum would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and
- f. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific forum.

**2.6. Alternatives to Referral.** In determining whether a case should not be referred to court-martial for trial because there exists an adequate alternative, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1:

- a. The options available under the alternative means of disposition;
- b. The likelihood of an effective outcome;
- c. The views of the victim, if any, concerning the alternative disposition of the case; and
- d. The effect of alternative disposition on the interests of justice and good order and discipline.

**2.7. Inappropriate Considerations.** The disposition determination must not be influenced by:

- a. The accused's race, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;
- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander or convening authority's military career or other professional or personal circumstances; or
- e. Political pressure to take or not to take specific actions in the case.

### **SECTION 3: SPECIAL CONSIDERATIONS**

**3.1. Prosecution in Another Jurisdiction.** When the accused is subject to effective prosecution in another jurisdiction, a judge advocate should advise on and the convening authority should consider the following additional factors when determining disposition:

- a. The strength of the other jurisdiction's interest in prosecution;
- b. The other jurisdiction's ability and willingness to prosecute the case effectively;
- c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;
- d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;
- e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and
- f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

**3.2. Plea Agreements.** In accordance with Article 53a, the convening authority may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. A judge advocate should advise on and the convening authority should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

- a. The accused's willingness to cooperate in the investigation or prosecution of others;
- b. The nature and seriousness of the offense or offenses charged;
- c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;
- d. Restitution, if any;
- e. The accused's criminal history or history of misconduct, whether military or civilian;
- f. The desirability of prompt and certain disposition of the case and of related cases;
- g. The likelihood of obtaining a conviction at court-martial;
- h. The probable effect on victims and witnesses;
- i. The probable sentence or other consequences if the accused is convicted;
- j. The public and military interest in having the case tried rather than disposed of by a plea agreement;
- k. The time and expense associated with trial and appeal;
- l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and
- m. The potential of the accused for rehabilitation and continued service.

**3.3. Agreements Concerning Disposition of Charges and Specifications.** With respect to the convening authority's disposition of charges and specifications, the plea agreement should require the accused to plead guilty to charges and specifications that:

- a. Appropriately reflect the nature and extent of the criminal conduct;
- b. Are supported by an adequate factual basis;
- c. Would support the imposition of an appropriate sentence under all the circumstances of the case;
- d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and
- e. Appropriately serve the interests of justice and good order and discipline.

**3.4 Agreements Concerning Sentence Limitations.** A convening authority, in consultation with a judge advocate, should ensure that any sentence limitation of a plea agreement takes into consideration the sentencing guidance set forth in Article 56(c).

**Analysis:**

This appendix implements Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association (ABA), Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association (NDAA), National Prosecution Standards. Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related, civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders and convening authorities to exercise wide discretion in order to meet their responsibilities with respect to maintaining good order and discipline.

**UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

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**UNITED STATES**

Appellee

**v.**

**Keith E. BARRY, Senior Chief Special Warfare Operator**  
United States Navy, Appellant

**No. 17-0162**

Crim. App. No. 201500064

Argued March 22, 2018—Decided September 5, 2018

Military Judges: A. H. Henderson (USN), and  
B. L. Payton-O'Brien, (USN) (trial); and  
Vance H. Spath, (USAF) (*DuBay* hearing)

For Appellant: *Lieutenant Jacob E. Meusch*, JAGC, USN (argued); *Commander Richard Federico*, JAGC, USN, *Commander Brian L. Mizer*, JAGC, USN, *David P. Sheldon*, Esq. (on brief); *Lieutenant Christopher C. McMahon*, JAGC, USN.

For Appellee: *Major Kelli A. O'Neil*, USMC (argued); *Lieutenant Megan P. Marinos*, JAGC, USN, and *Brian K. Keller*, Esq. (on brief); *Lieutenant Commander Jeremy R. Brooks*, JAGC, USN, *Lieutenant James M. Belforti*, JAGC, USN, *Lieutenant Taurean K. Brown*, JAGC, USN, *Captain Brian L. Farrell*, USMC, and *Lieutenant Robert J. Miller*, JAGC, USN.

Chief Judge Stucky delivered the opinion of the Court, in which Judge OHLSON and Senior Judge ERDMANN joined. Judge RYAN filed a separate dissenting opinion in which Judge MAGGS joined.

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Chief Judge STUCKY delivered the opinion of the Court.

It is not every day that a general court-martial convening authority begs our forgiveness for his failure of leadership in approving findings he believed should not be approved. As a result of this unusual admission, we granted review to determine whether the most senior officials in the Navy Judge Advocate General's Corps (JAGC) unlawfully influenced the convening authority or created the appearance of doing so. We further specified the issue of whether the Deputy Judge

Advocate General (DJAG), the JAGC's second highest ranking officer, is capable of exerting unlawful influence. We hold: (1) that a DJAG can indeed commit unlawful influence; and (2) that the Navy DJAG actually did so in this case.

### **I. Procedural History**

A military judge sitting alone as a general court-martial convicted Appellant, contrary to his pleas, of a single specification of sexual assault—forcing his girlfriend to engage in nonconsensual anal sex—in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2012). The military judge sentenced Appellant to a dishonorable discharge and confinement for three years. Operating under incorrect advice given by his Staff Judge Advocate (SJA), Commander (CDR) Dominic Jones, the convening authority, Rear Admiral (RADM) Patrick J. Lorge, believed he lacked the discretion to do anything but affirm the findings and sentence. Consequently, he approved the adjudged sentence and ordered the confinement executed.

Realizing the error, the Navy-Marine Corps Appellate Government Division moved to remand for new post-trial processing. The United States Navy-Marine Corps Court of Criminal Appeals (CCA) set aside the convening authority's action, and remanded the record of trial for preparation of a new SJA's recommendation (SJAR) and a new action. *United States v. Barry*, No. NMCCA 201500064 (N-M. Ct. Crim. App. Mar. 16, 2015) (remand order).

On remand, RADM Lorge, now properly advised of the scope of his powers, raised concerns regarding the fairness of Appellant's trial and the appropriateness of Appellant's sentence in his new action. There, he included the following unusual statement:

In my seven years as a General Court-Martial Convening Authority, I have never reviewed a case that has given me greater pause than the one that is before me now. The evidence presented at trial and the clemency submitted on behalf of the accused was compelling and caused me concern as to whether SOCS Barry received a fair trial or an appropriate sentence. I encourage the Appellate Court to reconcile the apparently divergent case law addressing the testimony that an accused may pre-

*United States v. Barry*, No. 17-0162/NA  
Opinion of the Court

sent during sentencing for the purpose of reconsideration under R.C.M. 924. Additionally, having personally reviewed the record of trial, I am concerned that the judicial temperament of the Military Judge potentially calls into question the legality, fairness, and impartiality of this court-martial. The validity of the military justice system depends on the impartiality of military judges both in fact and in appearance. If prejudicial legal error was committed, I strongly encourage the Appellate Court to consider remanding this case for further proceedings or, in the alternative, disapproving the punitive discharge pursuant to Article 66(c)[.] UCMJ, thereby allowing the accused to retire in the rank that he last honorably served.

Notwithstanding those concerns, RADM Lorge ultimately approved the adjudged findings and sentence in unambiguous language: “the sentence as adjudged is approved.”<sup>1</sup> The CCA affirmed. *United States v. Barry*, No. NMCCA 201500064, 2016 CCA LEXIS 634, at \*37, 2016 WL 6426695, at \*12 (N-M. Ct. Crim. App. Oct. 31, 2016).

Appellant filed a timely petition for review, which this Court granted and summarily affirmed on April 27, 2017. *United States v. Barry*, 76 M.J. 269 (C.A.A.F. 2017) (summary disposition). Appellant then timely petitioned for reconsideration, requesting relief on the basis of a May 5, 2017, declaration submitted under penalty of perjury by RADM Lorge, who averred that he “had serious misgivings about the evidence supporting [Appellant’s] conviction” and that he “was [initially] inclined to disapprove the findings.” RADM Lorge attested that while he ultimately approved the findings, he would not have done so absent the pressure he perceived from senior civilian and military leaders.

In order to resolve this explicit allegation of unlawful influence, this Court granted Appellant’s petition for reconsideration and returned the record of trial to the Judge Advocate General (TJAG) of the Navy for further factfinding, under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411

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<sup>1</sup> In the absence of contrary evidence, a convening authority approves the findings by approving the sentence. *United States v. Diaz*, 40 M.J. 335, 337 (C.M.A. 1994).

(1967). *United States v. Barry*, 76 M.J. 407 (C.A.A.F. 2017) (summary disposition).

The *DuBay* hearing ordered by this Court was held on September 26 and 27, 2017. In accordance with the requirement of this Court's order that the hearing be conducted by an officer from outside the Navy and Marine Corps, the Chief Judge of the Air Force Trial Judiciary, Colonel (Col) Vance H. Spath, presided. Upon completion of the *DuBay* hearing, the military judge returned the record of the proceeding as well as his findings of fact and conclusions of law to this Court. This Court then granted the specified issue and modified the original granted issue. *United States v. Barry*, 77 M.J. 118 (C.A.A.F. 2017) (order granting review).

## **II. Background**

The facts underpinning Appellant's conviction for sexual assault are not relevant to the issues before us, which concern only the post-trial processing of Appellant's case. Accordingly, we proceed only with a recitation of those facts that shed light on Appellant's allegation of unlawful influence.

Following the *DuBay* hearing ordered by this Court, the *DuBay* military judge, in relevant part, made the following factual findings:

The central character of this saga, RADM Lorge, was the General Court-Martial Convening Authority (GCMCA) for Naval Region Southwest—San Diego during the processing of Appellant's case. He was an experienced convening authority, and had even served another tour as a GCMCA.

In February 2014, well before the subject case involving Appellant, RADM Lorge received a courtesy office call from Vice Admiral (VADM) Nanette DeRenzi, who, at the time, served as TJAG. During this site visit, VADM DeRenzi discussed with RADM Lorge the realities of the current operating environment for military justice, particularly in relation to sexual assault. Specifically, they discussed the fact that "commanders were facing difficult tenures as convening authorities due to the political climate surrounding sexual assault." She shared that, every few months, a decision in a sexual assault case would lead to increased scrutiny by Con-

gress as well as other political and military leaders. As a result, much of her time was spent testifying and visiting both Capitol Hill and the White House.

VADM DeRenzi made no attempt to influence any action in Appellant's case or any other case then pending before RADM Lorge. She "was simply discussing the realities of the current environment."

The month following VADM DeRenzi's meeting with RADM Lorge, Captain (CAPT) Christopher W. Plummer, acting in RADM Lorge's temporary absence as the GCMCA, referred two allegations of sexual assault against Appellant to a general court-martial. Following Appellant's conviction for a single charge and specification of sexual assault, RADM Lorge received conflicting and erroneous advice with respect to the action he could take in Appellant's case. As a result, his original action was set aside, and Appellant's case was remanded for a new SJAR and action.

During corrective post-trial processing for Appellant's case, RADM Lorge spent two-and-a-half months carefully reviewing the record of trial and the clemency submissions. He developed significant concerns regarding the fairness of Appellant's trial, and believed that Appellant might be innocent. He shared these concerns with multiple people, and discussed his concerns with his SJA, CDR Jones, and other lawyers. Throughout this period, RADM Lorge was "generally aware of the political pressures on the military justice system in relation to sexual assault." While he could not recall specific comments from civilian or military leaders or identify any sexual assault cases that had garnered negative attention, he knew the system was under pressure from "many fronts."

Contemporaneously, CDR Jones, "strongly, and on multiple occasions, advised RADM Lorge not to set aside the findings or sentence in the case or order a retrial." He reminded RADM Lorge of the political pressures on the system and told him not to make a political decision, for those were best left to the appellate courts. CDR Jones also told RADM Lorge that he could not order a new trial for Appellant.

On April 30, 2015, RADM Lorge received an office visit from RADM James Crawford, the DJAG of the Navy.<sup>2</sup> While it was a courtesy visit and the two RADMs also discussed other matters, RADM Crawford knew prior to the meeting that RADM Lorge wanted to talk about a particular case. During this meeting, RADM Lorge told RADM Crawford that he was struggling with his decision and that he was troubled by Appellant's case. RADM Crawford advised RADM Lorge that he (Lorge) had smart lawyers so he should let them figure it out. He also either told RADM Lorge "not to put a target on his back" or, through similar language, gave RADM Lorge the impression that failing to approve the findings and sentence would place a target on his back. Shortly after his meeting with RADM Crawford, RADM Lorge shared this comment with Lieutenant Commander (LCDR) John Dowling, the Deputy SJA, who remembered it clearly because he was surprised by it.

RADM Lorge has no recollection of RADM Crawford's comment regarding putting a target on his back and claims that had RADM Crawford said it, he would have taken it as a joke. RADM Crawford denied making the comment. However, RADM Lorge left their meeting believing he received legal advice from RADM Crawford and that approving the findings and sentence was the appropriate course of action in Appellant's case.

RADM Lorge and CDR Jones continued to discuss Appellant's case after RADM Lorge's meeting with RADM Crawford. In an effort to give RADM Lorge another option, CDR Jones suggested adding language to the convening authority's action to signal RADM Lorge's "sincere and strong reservations about [Appellant's] case."

After receiving that advice but prior to taking action, RADM Lorge spoke with RADM Crawford by telephone and discussed the proposed plan of action. While RADM Lorge could not recall any specific advice provided by RADM Crawford during this call, the call left him with the impression

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<sup>2</sup> Since the events in question, RADM Crawford was promoted to VADM. He now serves as TJAG. Because he was a RADM at all times relevant to Appellant's post-trial processing, we refer to him as such.

that CDR Jones’s proposed plan was “the best he could do in [Appellant’s] case.” As a result, RADM Lorge believed he received legal advice during the course of the phone call.

RADM Lorge continues to believe that Appellant’s guilt was not proven beyond a reasonable doubt at his court-martial.

The *DuBay* military judge found that VADM DeRenzi, RADM Lorge, and LCDR Dowling were all credible witnesses in this case. No such finding was made as to RADM Crawford or CDR Jones.

In addition to his findings of fact, the *DuBay* military judge also analyzed the facts and made several conclusions of law. He did so “with full understanding the issue will be reviewed *de novo*.” The *DuBay* military judge concluded that RADM Lorge did not take the action he wanted to take in this case. Instead, he was influenced by conversations with senior military leaders, specifically VADM DeRenzi and RADM Crawford in reaching his decision. In particular, VADM DeRenzi, whose comments were made during a courtesy call well before the current case, (unintentionally) drew RADM Lorge’s attention to the difficulties faced by commanders and the increased congressional and presidential scrutiny the services faced in sexual assault cases. Nevertheless, the *DuBay* military judge specifically found that RADM Crawford’s two more focused discussions with RADM Lorge, which were made in the midst of Appellant’s post-trial processing, played a “more concerning” role in RADM Lorge’s decision-making process. Moreover, while the *DuBay* military judge made no finding as to whether RADM Lorge believed he received legal advice from VADM DeRenzi, he determined that RADM Lorge believed he received legal advice from RADM Crawford during their discussions, and RADM Lorge relied on this advice when taking action in this case. Ultimately, Chief Judge Spath concluded that, as a result of external pressures, actual or apparent unlawful command influence tainted the final action in Appellant’s case.

### III. Discussion

#### A. A DJAG Can Commit Unlawful Influence

As an initial matter, we must first determine whether a DJAG is capable of unlawfully influencing the action of a convening authority. We review questions of statutory construction *de novo*. *United States v. Wilson*, 76 M.J. 4, 7 (C.A.A.F. 2017).

Article 37(a), UCMJ, provides that:

*No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.*

10 U.S.C. § 837(a) (2012) (emphasis added). Accordingly, this Court has long recognized that Article 37(a) prohibits unlawful influence by *all persons subject to the UCMJ*. *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004).

Pursuant to Article 2(a)(1), UCMJ, all “[m]embers of a regular component of the armed forces” are persons subject to the UCMJ. 10 U.S.C. § 802(a)(1) (2012). As such, a plain reading of Article 2 and Article 37 together makes clear that a DJAG, just like any other military member, is capable of committing unlawful influence. The Government concedes this point, but argues that the DJAG can only commit unlawful influence when he or she acts with the “‘mantle of command authority.’” (citation omitted).

This argument fails, for the UCMJ imposes no such requirement. Although our cases have focused on unlawful influence exerted by those in formal command, the plain language of Article 37(a), UCMJ, does not require one to operate with the imprimatur of command, and we decline to read a supposedly implied condition into congressional silence. Congress is presumed to know the law, *see United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979), and we have faith that Congress knows how to change the law if it so desires. To date, Congress has elected against predicating the prohibition of unlawful influence upon the mantle of com-

mand authority.<sup>3</sup> Therefore, we hold that a DJAG, even one acting without the mantle of command authority, can commit unlawful influence.

B. Unlawful Influence in this Case

“This Court regards unlawful ‘[c]ommand influence’ as ‘the mortal enemy of military justice.’” *United States v. Kitts*, 23 M.J. 105, 107 (C.M.A. 1986) (alteration in original) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). Consequently, “[t]his Court ... is dedicated to the Code’s objective to protect the court-martial processes from improper command influence.” *United States v. Cole*, 17 C.M.A. 296, 297, 38 C.M.R. 94, 95 (1967). We are likewise committed to preventing interference from non-command sources. We take this responsibility seriously, for its fulfillment “is fundamental to fostering public confidence in the actual and apparent fairness of our system of justice.” *United States v. Harvey*, 64 M.J. 13, 17 (C.A.A.F. 2006).

As a preliminary matter, we recognize, as noted above, that our case law with respect to unlawful influence has previously concentrated almost exclusively on abuses perpetrated by those in command or those acting with the mantle of command authority. When presented with a more generalized allegation of unlawful influence, however, we see no reason to deviate from the test we have established to evaluate claims of unlawful command influence.

Accordingly, we review allegations of unlawful influence de novo, *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013), assessing findings of fact that inform this legal question under a clearly erroneous standard. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). In cases such as here, where a “military judge made detailed findings of fact ... and these findings are clearly supported by the record,” we adopt them for our analysis. *Id.*

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<sup>3</sup> Although the second sentence of Article 37(a), UCMJ, does not contain a statutory *requirement* for a mantle of command authority, we note that it may be a relevant factor for determining whether there is a violation of Article 37, UCMJ. See *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994).

Actual unlawful influence “occur[s] when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.” *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017). Appellant bears the initial burden of raising an issue of unlawful influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). In order to succeed on appeal, the accused must establish: (1) facts, which if true, constitute unlawful influence; (2) unfairness in the court-martial proceedings (i.e., prejudice to the accused); and (3) that the unlawful influence caused that unfairness. *Boyce*, 76 M.J. at 248 (citing *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)); *Salyer*, 72 M.J. at 423. While Appellant’s initial burden is low, it requires more than mere allegation or speculation. *Salyer*, 72 M.J. at 423; *see also United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009) (“Mere speculation ... is not sufficient.”). Instead, an appellant must show “‘some evidence’” in order to sufficiently raise the issue. *Salyer*, 72 M.J. at 423 (quoting *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)).

Once an appellant meets his initial burden of raising an issue of unlawful influence, the burden shifts to the government to rebut the allegation by persuading the Court beyond a reasonable doubt<sup>4</sup> that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful influence; or (3) the unlawful influence did not affect the findings or sentence. *Salyer*, 72 M.J. at 423 (citing *Biagase*, 50 M.J. at 151).

Relying on the findings of the *DuBay* military judge, which we conclude are not clearly erroneous, we are left with no choice but to conclude that Appellant met his initial burden by successfully showing “some evidence” of facts which constitute unlawful influence on the part of RADM Crawford.<sup>5</sup> For example, the military judge found that

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<sup>4</sup> To the extent that our decision in *United States v. Stombaugh*, 40 M.J. 208, 213–14 (C.M.A. 1994), can be construed as requiring the application of a preponderance of the evidence standard for unlawful influence claims, we clarify that the harmless beyond a reasonable doubt standard applies to all claims under Article 37(a), UCMJ.

<sup>5</sup> We conclude that VADM DeRenzi’s conversation with RADM Lorge did not constitute unlawful influence. The conversation oc-

RADM Crawford “either told RADM Lorge ‘not to put a target on his back’ or, by similar comments, left RADM Lorge with the impression that not affirming the findings and sentence in [Appellant’s] case would put a target on RADM Lorge’s back.” Similarly, the military judge determined that a phone call took place between RADM Crawford and RADM Lorge in which the two men discussed the plan proposed by CDR Jones for RADM Lorge’s action, namely inserting language that conveyed RADM Lorge’s deep-seated reservations, and RADM Lorge left that conversation believing he had received legal advice to the effect that approving the findings and sentence in an action that detailed his strong concerns “was the best he could do in [Appellant’s] case.”<sup>6</sup>

Additionally, while RADM Lorge testified that he did not perceive any potential threat to his career in the event he disapproved the findings, his sworn statements make clear to us that, due (in no small part) to his conversations with Navy officials including RADM Crawford, RADM Lorge believed harm would befall the Navy if he did not fall in line. In particular, he averred that:

[A]s I considered whether to disapprove the findings, I was also concerned about the impact to the Navy if I were to disapprove the findings. At the time, the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, would bring hate and discontent on the Navy ....

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curred during a courtesy call well before the instant case and merely consisted of two senior officers discussing current events and trends affecting the military. Both temporally and substantively, it stands in a completely different relationship to this case than the actions of RADM Crawford. As such, Appellant has not met his burden of demonstrating unlawful influence under these circumstances.

<sup>6</sup> We reject any suggestion that the provision of such advice was authorized, for the DJAG was not entitled to provide RADM Lorge with legal guidance. While SJAs are statutorily required to do so pursuant to Articles 6(b) and 60(d), UCMJ, 10 U.S.C. §§ 806(b), 860(d) (2012), no such authority extends to senior JAGC leadership.

... I perceived that if I were to disapprove the findings in the case, it would adversely affect the Navy. Everyone from the President down the chain and Congress would fail to look at its merits, and only view it through the prism of opinion. Even though I believed then, and I believe now, that I should have disapproved the findings, my consideration of the Navy's interest in avoiding the perception that military leaders were sweeping sexual assaults under the rug ... affected my decision of whether to approve or disapprove the findings or sentence in this case.

Given RADM Lorge's expressed misgivings concerning Appellant's guilt, his acknowledgment of the role the Navy's reputation played in his decision to approve the findings, and his statements swearing that external pressures informed his action), we further conclude that Appellant has met his burden in demonstrating prejudice and proximate cause. As such, we agree with Chief Judge Spath's determination that, absent external factors, "RADM Lorge would have taken different action in the case."

As Appellant met his initial burden in raising an issue of unlawful influence, the burden shifts to the Government to rebut the allegation beyond a reasonable doubt. *Salzer*, 72 M.J. at 423. This has not been done. Absent clear error, we are bound by the *DuBay* military judge's findings with respect to the predicate facts. *See Villareal*, 52 M.J. at 30. Furthermore, the record clearly demonstrates that, but for external pressures including, but not limited to, RADM Crawford's improper advice, RADM Lorge would have taken different action in Appellant's case.

Such an "improper manipulation of the criminal justice process," *Boyce*, 76 M.J. at 247, even if effectuated unintentionally, will not be countenanced by this Court. While we do not question RADM Crawford's motives or believe he acted intentionally, the plain language of Article 37(a), UMCJ, does not require intentional action. Article 37(a), UCMJ, clearly provides that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action ... of any convening, approving, or reviewing authority with respect to his judicial acts." (Emphasis added.) While the dissent interprets "attempt to" as a modifier for

each of the subsequent verbs, and thus reads an intent requirement into Article 37(a), UCMJ, we disagree. “[A]ttempt to coerce” is a separate form of violation than “by any unauthorized means, influence.” While we acknowledge that, in the absence of some other indication, a modifier typically applies to an entire series, *see, e.g., Long v. United States*, 199 F.2d 717, 719 (4th Cir. 1952) (applying the series-qualifier canon to a statute that included a long list of verbs without any adverbs, prepositions, or articles interrupting the sequence of verbs), here the syntax involves something other than an unbroken series of verbs. Instead, we have an adverbial clause—“by any unauthorized means”—that interrupts the sequence of verbs, and is preceded by the coordinating conjunction “or.” Under such circumstances, we think it more appropriate to treat “attempt to” as a modifier only as to the nearest reasonable verb—in this case, “coerce.” As such, an “attempt to coerce” necessarily requires intent, whereas influencing an action via unauthorized means violates the statute, regardless of intent.<sup>7</sup> In this case, because the impact of RADM Crawford’s unauthorized guidance on RADM Lorge’s action is undeniable, we cannot escape the conclusion that actual unlawful influence tainted Appellant’s case.<sup>8</sup>

### III. Remedy

“We have long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies

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<sup>7</sup> We concede that our jurisprudence has traditionally recognized unlawful influence only in cases involving intentional interference with the military justice system, *United States v. Barry*, \_\_ M.J. \_\_ (8–9) (C.A.A.F. 2018) (Ryan, J., with whom Maggs, J., joins, dissenting). However, our cases have previously focused on allegations of unlawful *command* influence. Where the mantle of command involvement pertains, this Court has understandably examined the intent of the commander or his proxy in determining whether error was committed. Without such an examination, it would be difficult to distinguish a legitimate exercise of command authority from an illegitimate one.

<sup>8</sup> In light of our conclusion regarding the presence of actual unlawful influence, we need not determine whether, under the facts presented here, apparent unlawful influence also tainted the processing of Appellant’s case.

are available.” *Lewis*, 63 M.J. at 416 (citation omitted). However, we have not shied away from endorsing this drastic measure in actual unlawful influence cases when warranted. *See Gore*, 60 M.J. at 189 (holding that a military judge did not abuse his discretion by dismissing charges with prejudice). The dismissal of charges is warranted “when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.” *Id.* at 187 (citing *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978)). We have further held that “[d]ismissal of charges with prejudice ... is an appropriate remedy where the error cannot be rendered harmless.” *Lewis*, 63 M.J. at 416 (citing *Gore*, 60 M.J. at 189).

This is a case in which the error cannot be rendered harmless and no useful purpose would be served by continuing the proceedings. In terms of fashioning an appropriate remedy, we note that RADM Lorge has been less than clear as to what exact action he would have taken absent the unlawful influence. We further note that the *DuBay* military judge found that RADM Lorge “would have taken different action in the case, *likely ordering a new trial*.” (Emphasis added.) Regardless, it is clear that Appellant would have received some form of clemency.<sup>9</sup> While we decline to fashion a remedy based on what RADM Lorge wished he had done, we are cognizant that any appropriate remedy must serve to protect the court-martial process and foster public confi-

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<sup>9</sup> We note that the *DuBay* military judge’s determination that RADM Lorge would likely have ordered a new trial is contrary to his finding that RADM Lorge believed the prosecution failed to establish Appellant’s guilt beyond a reasonable doubt. While Chief Judge Spath uses the term “new trial,” in military law that term is reserved for actions taken by higher authority after the convening authority approves the sentence. Article 73, UCMJ, 10 U.S.C. § 873 (2012). A convening authority, however, does have power to grant a rehearing, but only where there is sufficient evidence in the record to support the findings. *See* Article 60(e)(3), UCMJ. Under these circumstances, if RADM Lorge truly believed that Appellant’s guilt had not been proven beyond a reasonable doubt, he would have been required to disapprove the findings and sentence and dismiss the charge and specification. Article 60(e)(3), UCMJ.

dence in the fairness of our system. *See Cole*, 17 C.M.A. at 297, 38 C.M.R. at 95; *see also Harvey*, 64 M.J. at 17.

After taking into account the facts and circumstances of this particular case, and in light of the unlawful influence committed by the DJAG, it would be inappropriate for us to subject Appellant to a new convening authority's action or rehearing, particularly as to do so would only serve to lengthen a protracted litigation that has already reached its natural conclusion.

Instead, we believe nothing short of dismissal with prejudice will provide meaningful relief. While we do not reach this conclusion lightly, "the nature of the unlawful conduct in this case, combined with the unavailability of any other remedy that will eradicate the unlawful ... influence and ensure the public perception of fairness in the military justice system, compel this result." *Lewis*, 63 M.J. at 416.<sup>10</sup>

#### IV. Judgment

The judgment of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The findings and sentence are set aside. The Charge and its Specification are dismissed with prejudice.

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<sup>10</sup> While we are all in agreement that "Appellant's finding of guilty therefore should not, and may not, stand," *Barry*, \_\_ M.J. at \_\_ (1) (Ryan, J., with whom Maggs, J., joins, dissenting), the dissent believes that Rule for Courts-Martial (R.C.M.) 1107(g) provides a better basis for rectifying the injustice suffered by Appellant. We disagree. We recognize that, under our precedent, a successor convening authority should be guided by the original convening authority's intent. *See, e.g., United States v. Mendoza*, 67 M.J. 53, 54 (C.A.A.F. 2008). Nevertheless, we are not convinced that this Court or anyone else has the power actually to dictate to a new convening authority the content of a corrected action, as R.C.M. 1107(b)(1) clearly provides that "[t]he action to be taken on the findings and sentence is within the sole discretion of the convening authority."

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,  
  
Appellee

v.

Keith E. Barry  
Senior Chief Special Warfare  
Operator (E-8)  
United States Navy,

Appellant

DECLARATION OF RADM  
PATRICK J. LORGE, USN (RET.)

Crim.App. Dkt. No. 201500064

USCA Dkt. No. 17-0162/NA

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE ARMED FORCES:

I, Patrick J. Lorge, USN (ret), do hereby swear and attest that the following  
is true and accurate to the best of my knowledge:

1. I am a retired Rear Admiral in the United States Navy.
2. In 2015, I was the General Court-Martial Convening Authority in the  
matter of *United States v. Barry*.
3. In that capacity I reviewed the trial in the post-trial clemency phase.
4. Upon review of the record, I had serious misgivings about the evidence  
supporting this conviction. Specifically, I did not believe the evidence supported  
the alleged victim's account of events. I was inclined to disapprove the findings.
5. My Staff Judge Advocate was CDR Dominic Jones and my Deputy Staff

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Judge Advocate was LCDR Jon Dowling. They advised me on my legal options regarding this case, and tried to convince me to approve the findings in the case.

6. As I considered whether to disapprove the findings, I was also concerned about the impact to the Navy if I were to disapprove the findings. At the time, the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, would bring hate and discontent on the Navy from the President, as well as senators including Senator Kirsten Gillibrand. I was also aware of cases from other services that became high profile and received extreme negative attention because the convening authorities upset guilty findings in sexual assault cases.

7. I perceived that if I were to disapprove the findings in the case, it would adversely affect the Navy. Everyone from the President down the chain and Congress would fail to look at its merits, and only view it through the prism of opinion. Even though I was convinced then, and am convinced now, that I should have disapproved the findings, my consideration of the Navy's interest in avoiding the perception that military leaders were sweeping sexual assaults under the rug outweighed that conviction at the time.

8. Prior to my action in this case, VADM Nanette DeRenzi, the then-Judge Advocate General of the Navy, expressed a similar concern to me about the reputation of the Navy in a conference in my office, although she did not address

this specific case. This was a personal conversation, not part of an instruction or informational course. She conveyed the importance that convening authorities held and how tenuous the ability of an operational commander to act as a convening authority had become, especially in findings or sentences in sexual assault cases due to the intense pressure on the military at the time. She mentioned that every three or four months military commanders were making court-martial decisions that got questioned by Congress and other political and military leaders including the President. This conversation reinforced my perception of the political pressures the Navy faced at the time.

9. In addition to the advice from my staff judge advocates, I also discussed the case with then- RADM Crawford, who is now the Judge Advocate General of the Navy.

10. I have known VADM Crawford since 2001. LT McMahon's questions about my action in this case led me to recall—vaguely—conversations I had with VADM Crawford, in my office and on the telephone, about my action.

11. Upon my review of the record of trial from this case, I did not find that the Government proved the allegation against Senior Chief Barry beyond a reasonable doubt. Absent the pressures described above, I would have disapproved the findings in this case.

12. On a personal note, I would ask you to forgive my failure in leadership and right the wrong that I committed in this case against Senior Chief Barry; ensure justice prevails and when doubt exists, allow a man to remain innocent.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

Date: 5 MAY '17

Signed: \_\_\_\_\_

Patrick J. Lorge

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

UNITED STATES,

Appellee

v.

Keith E. Barry  
Senior Chief Special Warfare  
Operator (E-8)  
United States Navy,

Appellant

**AMENDED DECLARATION OF  
RADM PATRICK J. LORGE, USN  
(RET.)**

Crim. App. Dkt. No. 201500064

USCA Dkt. No. 17-0162/NA

**TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE ARMED FORCES:**

I, Patrick J. Lorge, USN, do hereby swear and attest that the following is true and accurate to the best of my knowledge:

1. I am a retired Rear Admiral in the United States Navy.
2. I previously submitted a declaration to the United States Court of Appeals for the Armed Services, dated May 5, 2017, in connection with the above-captioned action (the "Declaration"). At that time, I did not have the benefit of counsel. Now that I have had the opportunity to consult with counsel, and to refresh my recollections by reviewing certain documents that I did not have at the time I submitted the Declaration, I submit this amended declaration (the "Amended Declaration") to clarify or elaborate on certain points in the Declaration to make it more complete.

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3. In 2015, I was the General Court-Martial Convening Authority in the matter of *United States v. Barry*.

4. In that capacity I reviewed the trial in the post-trial clemency phase.

5. Upon review of the record, I had serious misgivings about the evidence supporting the conviction. Specifically, I did not believe that the evidence supported the alleged victim's account of events. I was inclined to disapprove the findings.

6. My Staff Judge Advocate was CDR Dominic Jones, and my Deputy Staff Judge Advocate was LCDR Jon Dowling. They advised me on my legal options regarding this case, and tried to convince me to approve the findings in the case.

7. On January 29, 2015, CDR Jones issued a Staff Judge Advocate Recommendation (the "January 29 SJAR") in the case. The January 29 SJAR advised me that I had discretion to take any appropriate action on the findings and sentence in the case. The January 29 SJAR indicated that ALNAV 051/14, which imposed certain restrictions on a General Courts-Martial Convening Authority's clemency powers, did not apply to the case because the offenses occurred before June 24, 2014. Nevertheless, the January 29 SJAR recommended based on the trial record that I approve the sentence as adjudged.

8. On February 26, 2015, before I took action in the case, CDR Jones issued an Addendum to the January 29 SJAR (the "February 26 Addendum"). The

February 26 Addendum advised me that, contrary to the January 29 SJAR, ALNAV 051/14 applied to the case and precluded my disapproval of the findings or sentence in the case. The February 26 Addendum concluded that corrective action on the findings and sentence was not appropriate, and, like the January 29 SJAR, recommended based on the trial record that I approve the sentence as adjudged.

9. On February 27, 2015, I approved the sentence in the case. At that time, consistent with the February 26 Addendum, I believed that I lacked authority to disapprove the findings or sentence in the case.

10. On March 16, 2015, the United States Navy-Marine Corps Court of Criminal Appeals set aside my February 27, 2015 action, and ordered that the record be returned to the Judge Advocate General for remand to the Convening Authority for a new action. The order was based upon the Government's Consent Motion to Remand for New Post-Trial Processing, filed March 13, 2015 (the "Government's Consent Motion for Remand"). The Government's Consent Motion for Remand indicated that, while the January 29 SJAR had correctly advised me that new statutory limits on a Convening Authority's clemency powers set forth in ALNAV 051/14 did not apply because the offenses occurred prior to June 24, 2014, the February 26 Addendum had erroneously overruled that advice

and had incorrectly advised me that ALNAV 051/14 precluded consideration of the clemency request in the case.

11. Upon remand from the United States Navy-Marine Corps Court of Criminal Appeals, on April 13, 2015, CDR Jones issued a second Addendum in the case that was intended to supersede the February 26 Addendum (the "April 13 Addendum"). The April 13 Addendum advised me that the advice in the February 26 Addendum regarding the limits of my clemency powers had been incorrect, that the United States Navy-Marine Corps Court of Criminal Appeals had set aside my first action in the case, and that I had authority to disapprove the findings or sentence in the case. The April 13 Addendum nevertheless suggested that corrective action was not warranted in the case, and recommended based on the trial record that I again approve the sentence as adjudged.

12. On June 3, 2015, I approved the sentence as adjudged. Although my June 3 action indicated that my Staff Judge Advocate had retrieved the record to clarify that I had authority to grant clemency, my Staff Judge Advocate did not present to me clearly the scope of my authority here, especially in light of consistently voicing my belief to my Staff Judge Advocate that SOCS Barry should not have been found guilty and that I was inclined to disapprove the findings. As a result, I did not understand at that time that I had sufficient grounds to properly exercise that authority in this case by disapproving the findings or

sentence. My June 3 action noted, however, that I had never reviewed a case that gave me greater pause, and that I had concerns about whether SOCS Barry received a fair trial or an appropriate sentence. My June 3 action therefore strongly encouraged the Appellate Court to review the case for prejudicial error. Also, on June 10, 2015, I sent a letter to VADM Nanette DeRenzi expressing some concerns I had about the case.

13. At times during these post-trial proceedings, as I considered whether to disapprove the findings, I was also concerned about the impact to the Navy if I were to disapprove the findings. At the time, the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, could bring hate and discontent on the Navy from the President, as well as senators including Senator Kirsten Gillibrand. I was also generally aware of cases from other services that became high profile and received extreme negative attention because the convening authorities upset guilty findings in sexual assault cases.

14. I perceived that if I were to disapprove the findings in the case, it could adversely affect the Navy. Everyone from the President down the chain and Congress might fail to look at its merits, and only view it through the prism of opinion. Even though I believed then, and I believe now, that I should have disapproved the findings, my consideration of the Navy's interest in avoiding the

perception that military leaders were sweeping sexual assaults under the rug, along with the confusion stemming from my Staff Judge Advocate's myriad SJARs providing me with conflicting, confusing, and erroneous legal guidance, affected my decision of whether to approve or disapprove the findings or sentence in this case.

15. Sometime likely after my first action in this case but before I wrote my letter to her (although I do not recall the specific date of this meeting), VADM Nanette DeRenzi, the then-Judge Advocate General of the Navy, expressed a similar concern to me about the reputation of the Navy, in a conference in my office, although she did not address this specific case. This was a personal conversation, not part of an instruction or informational course. She conveyed the importance that convening authorities held and how tenuous the ability of an operational commander to act as a convening authority had become, especially in findings or sentences in sexual assault cases due to the intense pressure on the military at the time. She mentioned that every three or four months military commanders were making court-martial decisions that got questioned by Congress and other political and military leaders including the President. This conversation reinforced my perception of the political pressures the Navy faced at the time.

16. In addition to the advice from my staff judge advocates, I also discussed the case with then-RADM Crawford, who is now the Judge Advocate General of

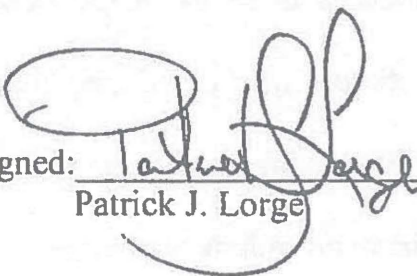
the Navy. I was open to discussing the case with VADM Crawford due to the lack of confidence I developed in the advice provided to me by my Staff Judge Advocate.

17. I have known VADM Crawford since 2001. LT McMahon's questions about my action in this case led me to recall—vaguely—conversations I had with VADM Crawford, in my office and on the telephone, about my action.

18. Upon my review of the record of trial from this case, I did not find that the Government proved the allegation against Senior Chief Barry beyond a reasonable doubt. Absent the erroneous and conflicting legal advice I received from my SJAs and the pressures described above, I would have disapproved the findings in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct to the best of my information, knowledge, and belief.

Date: 21 SEP 17

Signed:   
Patrick J. Lorge

# Mattis wants commanders to rely more on UCMJ for disciplinary problems

By: **Aaron Mehta** August 14, 2018

<https://www.armytimes.com/news/2018/08/14/mattis-wants-commanders-to-rely-more-on-ucmj-for-disciplinary-problems/>



*Secretary of Defense Jim Mattis wants to see the military justice system used for discipline more than in the past. (Jim Watson/AP)*

Secretary of Defense Jim Mattis has issued new guidance to commanders across the military: Stop relying on administrative actions for disciplinary problems and start using the military justice system more often.

In the **new memo** dated Aug. 13, Mattis calls the military justice system a “powerful tool” for good order and discipline, and he says flatly it is a “commander’s duty to use it.”

“Military leaders must not interfere with individual cases, but fairness to the accused does not prevent military officers from appropriately condemning and eradicating malignant behavior from our ranks,” Mattis wrote, according to a copy of the memo that was **obtained by Military Times**.

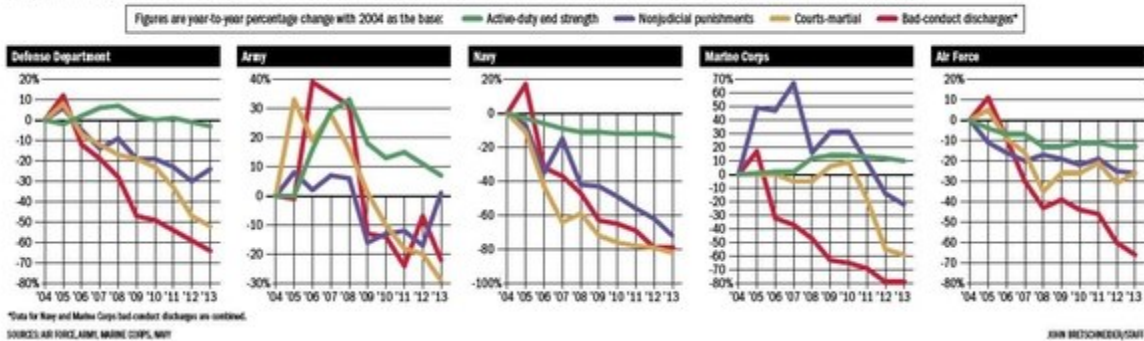
“Leaders must be willing to choose the harder right over the easier wrong. Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system. Leaders cannot be so risk-adverse that they lose their focus on forging disciplined troops ready to ferociously and ethically defeat our enemies in the battlefield.”

A 2014 Military Times investigation found that the figures for punishment handed down by the Uniform Code of Military Justice spiked during the 2006-2007 surge in Iraq, and then declined precipitously. The investigation found that military commanders are more likely to rely on administrative punishment, including issuing a non-judicial punishment and quickly seeking administrative separation, rather than pushing for a full court-martial.

Those numbers coincided with a 2014 decision by then-Secretary of Defense Chuck Hagel to launch a sweeping review of the military justice system.

## DECLINE IN PUNISHMENT

After a spike that roughly coincided with the "surge" in Iraq, all the services have seen significant declines in courts-martial, bad-conduct discharges and nonjudicial punishments over the past decade.



A graphic from the 2014 Military Times investigation into punishment figures from military courts.

A graphic from the 2014 Military Times investigation into punishment figures from military courts. The memo comes just a day after President Donald Trump signed into the law the 2019 National Defense Authorization Act, which includes language creating a new category under the UCMJ for **domestic violence**. The act also creates new laws for **child-on-child sexual assault** on military bases.

As with most Mattis statements, the memo couches the guidance in terms of increasing lethality for the troops.

"If a subordinate makes a mistake, leaders should learn to coach them better," he writes. "But we must not tolerate or ignore lapses in discipline, for our enemies will benefit if we do not correct and appropriately punish substandard conduct. Time, inconvenience, or administrative burdens are no excuse for allowing substandard conduct to persist."



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

AUG 13 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHIEFS OF THE MILITARY SERVICES  
COMMANDERS OF THE COMBATANT COMMANDS

SUBJECT: Discipline and Lethality

As we aggressively execute our National Defense Strategy and make our force more lethal, I remind you that enhanced lethality demands more than increasing the size of our formations and obtaining newer, more advanced equipment – it also requires having a more disciplined force.

General Washington once commanded an outmanned and outgunned group of patriots that defeated Great Britain, then the strongest military in the world. He observed: “Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.”

Today, we are the most powerful military in the world and find ourselves in a competition among great powers. Our National Defense Strategy requires us to expand the competitive space to challenge those competitors. We *must* have better individual and unit discipline than our enemies.

It is incumbent on our leaders to ensure that American Forces are always the most disciplined on the battlefield, whatever the domain might be. The discipline of today includes vigilant operational security, protection of electronic equipment, and responsible social media activity. We must demonstrate respect for all Service members, build trust, and remove the cancer of sexual misconduct from our ranks. All Service members learn to fight well by doing the little things perfectly, otherwise they cannot possibly get the big things right when all goes wrong.

Enforcing standards is a critical component of making our force more lethal. Our leaders must uphold proven standards. They should know the difference between a mistake and a lack of discipline. If a subordinate makes a mistake, leaders should learn to coach them better. But we must not tolerate or ignore lapses in discipline, for our enemies will benefit if we do not correct and appropriately punish substandard conduct. Time, inconvenience, or administrative burdens are no excuse for allowing substandard conduct to persist.

The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander’s duty to use it. Military leaders must not interfere with individual cases, but fairness to the accused does not prevent military officers from appropriately condemning and eradicating malignant *behavior* from our ranks. Leaders must be willing to choose the harder right over the easier wrong. Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system. Leaders cannot be so risk-averse that they lose their focus on forging disciplined troops ready to ferociously and ethically defeat our enemies on the battlefield.

We have no God-given right to victory. Discipline is a competitive edge we must seek and maintain each day if we are to keep America safe from its enemies. As General Washington learned first-hand, discipline will make us stronger and more lethal. Therefore, let *nothing* prevent us from becoming the most disciplined force this world has ever known.

cc:  
CJCS

# UCMJ crackdown: Why Mattis thinks commanders have gone soft on misconduct

By: [Geoff Ziezulewicz](#) 9/10/2018

[https://www.militarytimes.com/news/your-military/2018/09/10/ucmj-crackdown-why-mattis-thinks-commanders-have-gone-soft-on-misconduct/?utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=NewCampaign&utm\\_term=Editorial](https://www.militarytimes.com/news/your-military/2018/09/10/ucmj-crackdown-why-mattis-thinks-commanders-have-gone-soft-on-misconduct/?utm_source=Sailthru&utm_medium=email&utm_campaign=NewCampaign&utm_term=Editorial) - Army - Daily News Roundup



*Secretary of Defense Jim Mattis re-enlists members of the 3rd U.S. Infantry Regiment (Old Guard) during a ceremony Sept. 21, 2017, at Joint Base Myer-Henderson Hall, Va. (Tech. Sgt. Brigitte N. Brantley/Air Force)*

The number of courts-martial and other severe [punishments](#) meted out to misbehaving troops across the military has steadily declined in recent years, raising concerns at the Pentagon's highest levels that some commanders have gone soft on traditional [military discipline](#).

The total of general, special and summary court-martial cases handled by the Army, Navy, [Air Force](#) and Marines has plummeted by nearly 70 percent during the past decade — down from 6,377 in 2007 to 1,980 in 2017, according to a Military Times analysis.

Military Times found that less severe [non-judicial punishment](#) cases also tumbled — down nearly 40 percent over the same span.

The dive in [Uniform Code of Military Justice](#) enforcement far outpaced the drawdown in overall active-duty troops. Combined end strength of the four services dropped by 14 percent since 2007 to roughly 1.3 million in 2017.

Many military experts believe a primary cause for the falling [UCMJ](#) numbers stems from commanders' decisions to opt against courts-martial proceedings or NJPs and instead lean on

administrative discipline, which often results in the accused service member getting kicked out of the military.

Administrative discipline tends to be bureaucratically easier and less time-consuming than traditional UCMJ measures to punish misconduct.

That may explain the highly unusual Aug. 13 memo that Secretary of Defense Jim Mattis fired off, when he voiced concerns that today's military commanders may be jeopardizing the force's long-term good order and discipline.

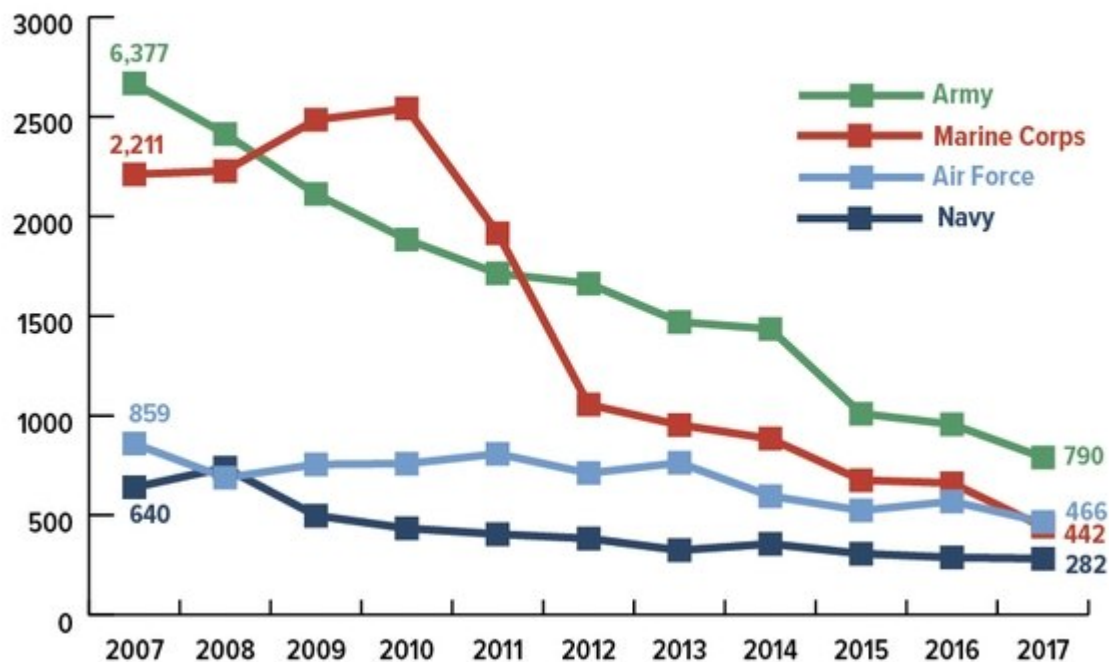
"Leaders must be willing to choose the harder right over the easier wrong," Mattis wrote in the memo, which was obtained by Military Times.

"Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system."

The retired four-star Marine general cautioned commanders to never be "so risk-averse that they lose their focus on forging disciplined troops ready to ferociously and ethically defeat our enemies in the battlefield."

### ***Court-martial prosecutions***

The armed forces have seen a drop in court-martial prosecutions. Between Fiscal Year 2007 and 2017 court-martial cases fell by nearly 70 percent across all the services.



Source: Department of Defense, Military Times research

(Devan Feeney/Staff)

Pentagon officials declined further comment on the Mattis memo.

"It speaks for itself," Pentagon spokesman Johnny Michael wrote in an email to Military Times.

"It is general guidance to the Department on the need for discipline within the ranks and is not intended in any way to suggest the outcome of any case or for all cases."

Neither the Pentagon nor service leaders would speculate about what caused the decade-long drop in disciplinary actions.

But civilian attorneys who specialize in military criminal justice suggested a wide range of reasons for the decline.

Along with a hike in administrative separations, they also suspect the drop might reflect an institutional focus on prosecuting time-consuming sexual assault cases or even a military force that's less prone to committing crimes.

### **Adseps to the rescue**

Military Times could not independently verify whether administrative separations are eating into the number of traditional punishment proceedings.

Those administrative measures are not tracked in the annual UCMJ reports to Congress and only the Marines provided "adsep" data in response to a request from Military Times.

The Marines' data did not reflect a significant rise in the number of service members who were involuntarily booted from the Corps. That number peaked in 2013 at 10,772 cases before falling to 8,902 in 2017.

Although the smallest of the four services, the Marines accounted for 35 percent of the military's total court-martial proceedings over the decade, trailing only the Army at 39 percent.

But Phil Stackhouse, a civilian defense attorney who served 22 years in the Marines, suspects that commanders in the other services might opt for adseps "as a quick method to kick out the service member."

"I think overall they are trying fewer cases, but it's because the service members are offering a quick resolution by agreeing to adsep, or the command is using adsep as a quick method to kick out the service member," Stackhouse said.

Commanding officers must decide whether they want to evict a troublemaker quickly through administrative separation or make an example for other troops by sending the suspect to court-martial, he said.

From a commander's perspective, administrative discipline is faster than court-martial proceedings, which can hurt the defendant's unit in a wide number of ways, said Lauren Hanzel, a former Navy attorney now practicing in South Carolina.

"If you're going to wait six, eight, 12 months for a court-martial to run its course, that service member isn't usually doing the same job they've done before," she said. "You lose a body for that entire time the court-martial is running its course."

Joseph Jordan, a former Army prosecutor, said he's not convinced that adseps should bother Mattis.

"If you have a problem child in your formation, maybe the easiest way to get rid of this problem child and not affect the rest of your good soldiers is to get him out of the service as quickly as possible," Jordan said.

"Commanders do that. I'm not sure it's necessarily a problem."

### **Recruiting woes and sexual assault**

Retired Marine Corps judge Patrick McLain pointed to another possible reason for fewer disciplinary cases: better troops.

A decade ago, Iraq and Afghanistan were hotter counterinsurgency wars that required far more boots on the ground.

A recruiting crunch led the Army and Marine Corps to **lower standards**, in some cases offering entry waivers to convicted criminals.

“They’ve been able to recruit a force, as years have progressed, that has less indicators or less predictors of misconduct,” McLain said. “You hate to peg people, but the truth is those are indicators of future conduct if you have that kind of stuff in the background.”

Another factor may be **Capitol Hill’s pressure** on commanders to crack down on sex crimes at the expense of other offenses, including acts of violence.

“There’s such a focus on that offense that I think all the other offenses look less serious,” attorney Hanzel said.

Crimes such as insubordination, assault consummated by a battery and false official statements are lower priorities due to the “external pressures of how commanders deal with sexual assault,” she said.

“When certain members of Congress were quite openly saying, ‘if we don’t like the way a particular flag officer is disposing of these cases, we’re not going to concur with their selection to the next rank’ ... that had a chilling effect,” McLain added.

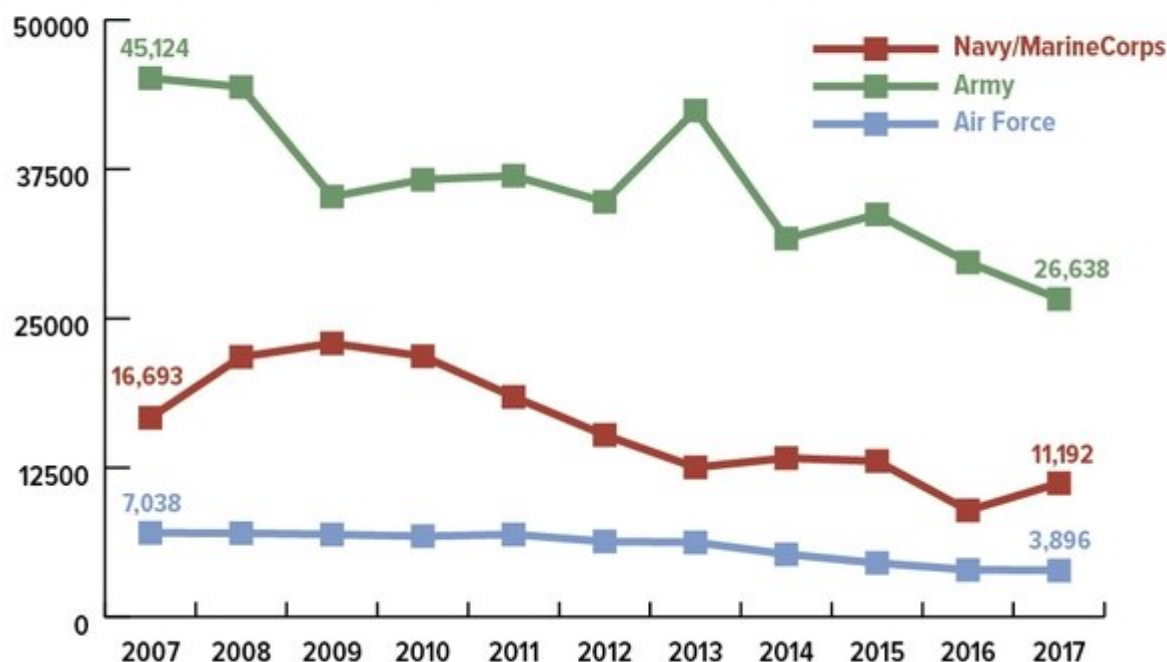
To former Air Force attorney Grover Baxley, that raises the question of whether a military criminal justice system already fixated on sex crimes has the capacity to investigate and prosecute a far larger pool of cases.

“The problem is the JAG Corps is right now 100 percent fully worked prosecuting sexual assault cases because that’s the direction they’ve received from Congress,” he said. “Sexual assault prosecution is the number one priority of the JAG Corps. You only have so many prosecutors and so many judges.”

“Given the choice, they’re going to prosecute the sexual assault and let the other stuff fall by the wayside,” Baxley said.

## Plummeting punishment

The armed forces are notching fewer non-judicial punishment cases. Between Fiscal Year 2007 and 2017, NJPs fell more than 39 percent across all the services.



Source: Department of Defense, Military Times research

## The mind of Mattis

As the Mattis memo ripples through the services, critics wonder if it might backfire.

“It would not surprise me if defense counsel made the secretary’s memorandum the basis for claims of unlawful command influence,” said Eugene Fidell, a UCMJ expert who teaches at Yale University. “Whether such claims, if there are any, will gain traction is another matter.”

Called the “mortal enemy of military justice,” unlawful command influence, or UCI, occurs when senior uniformed or civilian leaders utter words or take actions that wrongfully influence the outcome of court-martial cases, jeopardize the appellate process or undermine the public’s confidence in the armed forces by appearing to tip the scales of justice.

To McLain, Mattis appeared to urge commanders to act more carefully when handling disciplinary cases, but “there’s still always that issue of telling commanders how to dispose of misconduct.”

It’s a concern also raised by the military’s top officer, Marine Gen. Joseph Dunford, the chairman of the Joint Chiefs of Staff.

He told Military Times that commanders “ought to be clear what the standards are that are expected in a unit and not be concerned that that’s undue command influence.”

“Articulating the standards that we are going to hold our men and women [to] is not undue command influence, and you ought to use all the tools that are available to you, because I’m holding you accountable and responsible for the environment within which your men and women are being led,” Dunford said.

The canary in the UCI coal mine might be marijuana cases, Hanzel said.

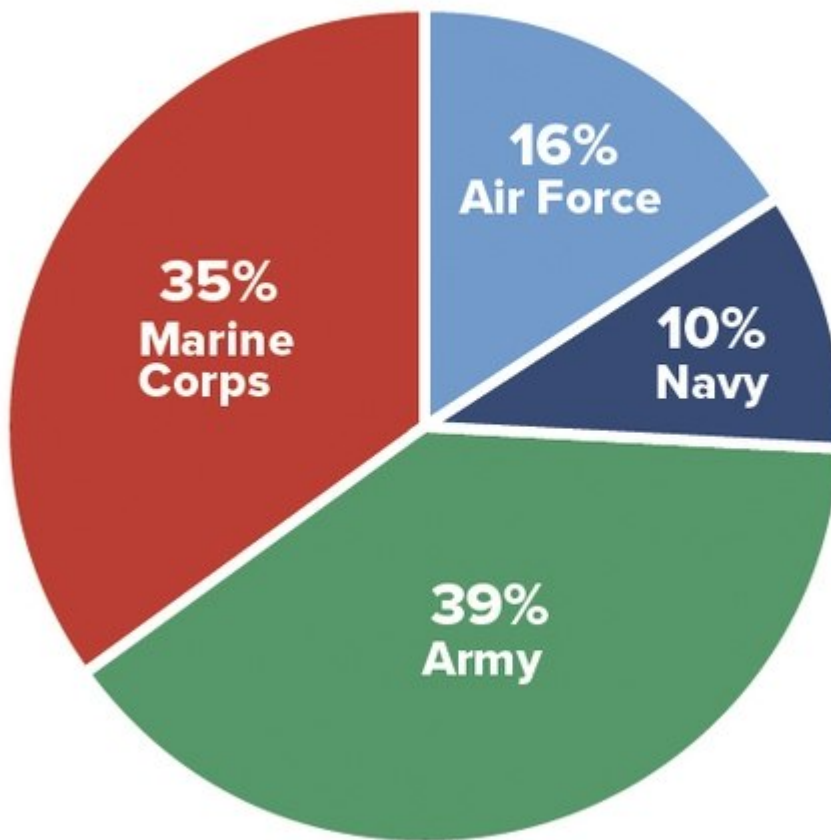
She pointed out that commanders increasingly have come to rely on administrative actions to deal with pot smokers in the ranks, a tool they might use less often now that the secretary of defense has spoken.

“If we see that happening after the Mattis memo, I think we have maybe more traction on the [unlawful command influence] motions that I see coming,” she said.

*Military Times* Pentagon Bureau Chief Tara Copp and Senior Reporter Shawn Snow contributed to this report.

## **A few bad men**

Although the Marines are the smallest of the four services in the Department of Defense, they account for a large portion of court-martial prosecutions.



Source: Department of Defense, Military Times analysis of 46,317 court-martial convictions between 2007 and 2017.

**Uniform Command Action Form**  
**Section 535 of the NDAA for Fiscal Year 2019**

**Public Law 115-232, (Aug 13, 2018)**

**SEC. 535. UNIFORM COMMAND ACTION FORM ON DISPOSITION OF  
UNRESTRICTED SEXUAL ASSAULT CASES INVOLVING MEMBERS OF THE  
ARMED FORCES.**

The Secretary of Defense shall establish a uniform command action form, applicable across the Armed Forces, for reporting the final disposition of cases of sexual assault in which—

- (1) the alleged offender is a member of the Armed Forces; and
- (2) the victim files an unrestricted report on the alleged assault.



THE DEFENSE ADVISORY COMMITTEE ON  
INVESTIGATION, PROSECUTION, AND DEFENSE OF  
SEXUAL ASSAULT IN THE ARMED FORCES

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**MINUTES OF MARCH 6, 2018**  
**CASE REVIEW WORKING GROUP PREPARATORY SESSION 9**

**AUTHORIZATION**

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee”) is a federal advisory committee established by the Secretary of Defense in February 2016 in accordance with section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Public Law 113-291), as amended. The purpose of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of such cases on an ongoing basis.

The Case Review Working Group (CRWG) was tasked to support the Committee by reviewing cases adjudicated within the military justice system involving rape, forcible sodomy, sexual assault and other sexual misconduct and reporting its findings and proposed recommendations to the DAC-IPAD for consideration.

**EVENT**

The CRWG held its ninth preparatory session on March 6, 2018 from 8:22 a.m. to 3:05 p.m. The members received briefings from Service prosecutors, investigators, and defense counsel on issues they face in investigating and adjudicating sexual assault offenses.

**LOCATION**

The meeting was held at One Liberty Center, Suite 150, 875 North Randolph Street, Arlington, Virginia 22203.

**PARTICIPANTS**

Participating Working Group Members

Brigadier General James R. Schwenk, U.S. Marine Corps, Retired, Chair  
Ms. Martha S. Bashford  
Ms. Kathleen B. Cannon  
Ms. Jennifer Gentile Long (via telephone)  
Dr. Cassia C. Spohn  
Ms. Meghan A. Tokash

### Absent Working Group Members

Mr. James P. Markey

### Committee Staff

Colonel Steven Weir, JAGC, U.S. Army, Deputy Staff Director

Ms. Julie Carson, Deputy Staff Director

Dr. Janice Chayt, Investigator

Ms. Theresa Gallagher, Attorney-Advisor

Mr. Glen Hines, Attorney-Advisor

Ms. Meghan Peters, Attorney-Advisor

Ms. Stacy Powell, Senior Paralegal

Ms. Kate Tagert, Attorney-Advisor

### Presenters

Lieutenant Colonel Rebecca Farrell, U.S. Army, Special Victim Prosecutor

Lieutenant Commander Christopher Deerwester, U.S. Navy, Senior Trial Counsel

Major Clare Hodge III, U.S. Marine Corps, Deputy Branch Head, Military Justice Branch

Colonel Christopher Brown, U.S. Air Force, Chief, Military Justice Division

Colonel Matthew Jarreau, U.S. Air Force, Staff Judge Advocate

Commander Cassie Kitchen, U.S. Coast Guard, Chief, Military Justice and Command Advice

Special Agent Clarence Joubert III, U.S. Army, Supervisory Special Agent and Program Manager for the Special Victim Unit

Special Agent Lisa Medrano, U.S. Army, Chief, Special Victim Team

Robert Diederichsen, U.S. Navy, Program Management Analyst

Special Agent Stephanie Winters, U.S. Navy, Family and Sexual Violence Investigator

Special Agent Ernest Slatinsky, U.S. Air Force, Chief of Quality Assessments

Special Agent Marta Sivert, U.S. Air Force, Chief, Violent Crimes

Special Agent Barry Buck, U.S. Coast Guard, Family and Sexual Violence Investigator

Major Jamal Rhinehardt, U.S. Army, Senior Defense Counsel

Commander Chad Temple, U.S. Navy, Director, Defense Counsel Assistance Program

Major John Boyer, U.S. Marine Corps, Senior Defense Counsel

Major Marquita Ricks, U.S. Air Force, Senior Defense Counsel

Commander Shanell King, U.S. Coast Guard, Senior Defense Counsel

## **PREPATORY SESSION MINUTES**

CRWG Chair James Schwenk called the preparatory session to order at 8:22 a.m. He explained that the purpose of the session was to hear perspectives from Service prosecutors, investigators, and defense attorneys on the processes and procedures related to sexual assault reports from initial report through the initial disposition decision.

### Perspectives of Service Prosecutors Regarding Initial Case Disposition

Chair Schwenk began by explaining that the focus of this session is on the initial sexual assault allegation up until the initial disposition decision. He first asked what kind of training judge advocate's receive about their role as a trial counsel from the time of an allegation through disposition.

Commander Cassie Kitchen, Chief of Military Justice and Command Advice for the U.S. Coast Guard Legal Service Command, responded by explaining that Coast Guard judge advocates receive both formal and informal training. At the Naval Justice School, she said, they are taught basic lessons on charging and about the Uniform Code of Military Justice. If Coast Guard judge advocates go on to become full-time trial counsel, they are then paired with a senior trial counsel in order to become proficient as an attorney and an officer.

Chair Schwenk asked what the role of a trial counsel is when an allegation is first made. Major Clare Hodge, Deputy Branch Head for Military Justice for the Judge Advocate Division Headquarters, Marine Corps, explained that the Naval Criminal Investigative Service (NCIS) is required to make contact with the regional trial counsel, who serves as the complex trial team head, within 24 hours of receiving an allegation. He said that the trial counsel assists in reviewing affidavits and search warrants and maintains situational awareness of the case but will not perform a service such as preparing a prosecutorial merits memorandum (PMM) until requested by the command. He noted that the SJA will advise the commander to submit a request for legal services.

Chair Schwenk asked Major Hodge to explain the relationship between the trial counsel and the investigator during the investigative phase. Major Hodge explained that the investigator contacts the complex trial team about the case and that this contact is documented in the investigator's file. He noted that the investigator may ask for advice for authorization of a search and seizure; they might ask the trial counsel to review an affidavit that is going to be presented to the commander to obtain a command authorization; or they may ask for advice on the Stored Communications Act or to seek a preservation letter to freeze data. He commented that this process is going to get a lot better after January 2019 (when the Military Justice Act goes into effect) as it will hopefully allow some pre-preferral investigative work.

Major Hodge further explained that in the Marine Corps, PMMs are conducted in all special victims' cases—as mandated by MCBUL-5800 (May 25, 2017)—before preferral, even in cases lacking a threshold of evidence. He said that if the complex trial team determines that they can't make a recommendation because there isn't enough information, the investigators go back out to collect additional information. He explained that there should be an investigation and a PMM for every sexual assault allegation that will inform the commander, through the advice of the SJA, in making a disposition decision. Major Hodge continued that the SJA's advice to the command should also take into consideration the victim's preference for prosecution and that the PMMs are generated for the SJA in order to assist him or her in advising the command. They are considered attorney work product and are kept between the prosecution and the SJA and not shared elsewhere. He explained that the PMMs are kept for at least two years, but he wasn't sure exactly how long they are required to be kept.

Lieutenant Colonel Rebecca Farrell, U.S. Army Special Victim Prosecutor for Fort Campbell and Redstone Arsenal, concurred with Major Hodge, stating that in the Army, the commander is briefed on the prosecution memorandum but it is not provided to them. Ms. Meghan Tokash asked what the fear or concern was about prosecution memorandums being provided to the command. Major Hodge offered his personal opinion that sharing PMMs could result in a chilling effect on a trial counsel's "openness about the ability to prosecute a case and trial strategy and what information that they might need to go after and how they might go after it." He believes it would have a chilling effect on "free and full analysis and [the] recommendation process."

Major Hodge next discussed the Defense Sexual Assault Incident Database (DSAID). He explained that the Navy and Marine Corps populate this database with the information from Sexual Assault Disposition Reports (SADR), which are eight to ten-page sexual assault reports. He explained that the commander completes the report once all action is complete in a case.

Major Hodge further explained that his office enters the data from the SADRs into DSAID. He said that a case file is initially opened in DSAID by a sexual assault response coordinator (SARC) and that Department of the Navy (DON) SAPRO and NCIS as well as headquarters Marine Corps checks the data that is entered to make sure it is accurate. He noted that there should be a PMM and SADR for all sexual assault cases, including those not prosecuted. He reported that the PMMs are kept in the prosecutor's case file and are uploaded into the case management system (CMS) for the Marine Corps and Navy.

Ms. Kate Tagert, CRWG Attorney-Advisor, asked whether the SADR is filled out by the command or judge advocates or paralegals. Major Hodge responded that the commander prepares and signs off on the forms with the advice of the judge advocate. Chair Schwenk asked whether DSAID tracks the reason for the initial disposition decision for every case. Major Hodge stated that it does.

Responding to Chair Schwenk's question about PMMs, Commander Kitchen explained that for the Coast Guard, she prepares "merits review memos" for any report of investigation received, even for minor misconduct. All of the sexual assault merit memorandums are routed to her at headquarters and she makes the disposition recommendations in writing and prepares a draft charge sheet, if applicable, and provides that, as well as the merits review memo, to the SJA.

Commander Kitchen explained that for sexual assault cases where there is insufficient evidence to prosecute or sufficient evidence but victim declination to participate, in the last few months the Coast Guard has begun preparing a "non-pros" memo to memorialize the decision not to charge. She said the form will indicate that the trial counsel recommends against prosecution and provides the reason. This form is then signed by the senior trial counsel and Commander Kitchen and provided to the SJA so they are fully informed and can advise the commander.

Like the other Services, Commander Kitchen reported that in the Coast Guard, the memos are not provided to the command and do not accompany the paperwork the commander reviews in making a disposition decision. She said they are treated as attorney work-product and the reason they are not provided to commanders is because the memos would have to be disclosed to the defense in discovery and this would have a chilling effect on trial counsel's ability to be candid about the case.

Chair Schwenk asked whether the Coast Guard has a database or other method that captures the "why" for the commander's initial disposition decision. Commander Kitchen responded that the Coast Guard uses Law Manager software which is not able to upload documents, but does maintain attorney notes, party names, timelines and the disposition advice provided to the commander with a notation of whatever the command decided to do. She said the documents are kept on their network.

Ms. Kathleen Cannon asked how the CRWG would obtain information as to why a case was preferred or not. Commander Kitchen stated it would probably be best to create a request for

information and send it to the Office of Military Justice. Commander Kitchen further explained that the “non-pros” form does indicate a reason as to why a case was not preferred. Ms. Cannon asked about requesting the merits memo and the information it contains.

Commander Kitchen explained that the “non-pros” form indicates a reason for the decision, a brief recitation of the facts, the offenses the subject is suspected of committing, whether or not trial counsel consulted with either special victims’ counsel and/or the victim, and a conclusion as to why the recommendation was made—whether it is that the victim declined to participate, or insufficient evidence to sustain a conviction—which is briefly documented on a form that is releasable, called the “non-pros recommendation form.”

Ms. Tagert asked the presenters whether or not the term “insufficient evidence” was still used in connection with case closure. Lieutenant Colonel Farrell explained that the Army does not use that term, stemming from a memorandum agreement from March of 2016 between the Army Office of the Judge Advocate General (OTJAG) and the Army Criminal Investigation Command (CID), which changed how the Army handles probable cause opines. She said they did away with the term “insufficient evidence” and replaced it with two terms: “baseless” and “false.” She noted that baseless is what used to be insufficient evidence. It is not a determination that the allegation was false or that the crime didn't occur or that the accused is the wrong suspect. She explained that it's simply that there isn't enough evidence of one or more elements in order to go forward with the case or even define probable cause in the instance of issuing a probable cause opine.

Dr. Cassia Spohn noted that “false” and “baseless” are the terms used in the Uniform Crime Report. Ms. Tagert asked whether the term “unfounded” was used. Lieutenant Colonel Farrell said that term “doesn't exist anymore.” Ms. Tagert followed up by noting that “unfounded” is a classification in the Defense Incident Based Reporting System (DIBRS) that is used by MCIOs and asked how that determination is being made by the MCIOs.

Lieutenant Colonel Farrell explained that the Army legal organization does not use the DIBRS codes other than for post-trial for confinement paperwork that goes to the appellate court. She said that CID uses the DIBRS codes for its own documentation. She noted that judge advocates issue the probable cause opine and a case closure opine, and are not involved further in the process.

Lieutenant Colonel Farrell explained next that commanders, not judge advocates, fill out the Department of the Army Form 4833 which is the commander's disposition report and shows what action he or she took. She stated that the judge advocate will advise the command on what the legal analysis and recommendation is for disposition, but they don't tell the command what to fill in. She noted that 99.9 percent of the time a commander is going to follow the recommendation of their judge advocate.

Responding to a question, Lieutenant Colonel Farrell said she doesn't have a fear of the merits memos being disclosed, but believes it is best that they be considered work-product. She said that she has had to pull up non-pros memos from predecessor trial counsel, because a case is resurrected, and she doesn't think it serves the aims of justice to disclose the thought process of the trial counsel when they may end up taking that case forward later.

Ms. Theresa Gallagher, CRWG Attorney-Advisor, asked where the pros and non-pros memos are housed. Lieutenant Colonel Farrell responded that they are maintained locally at the installation military justice office and brigade legal office's prosecution files. She said they are available on a shared drive, accessible to everyone practicing criminal law at the installation, as well as the deputy judge advocate and the SJA. She noted that the memos are not forwarded to a central database and explained that if higher headquarters is interested in looking at memos to respond to an inquiry, for instance, they request them from the installation military justice office and they are then emailed to the office requesting them.

Lieutenant Colonel Farrell also explained that prosecution memos are not required by Army policy for cases where there is no probable cause but she noted that some field offices may still require them in sexual assault cases. She said the memos are less formal when there is no probable cause. They generally don't have an elements analysis but instead describe the investigative efforts made, the evidence that has been gathered, and the reasons why the judge advocate believes probable cause does not exist. She said these memos are then forwarded to and approved by the senior trial counsel, the Lieutenant Colonel herself, and the chief of justice. If anyone non-concurs, the memos are returned to trial counsel for further work.

Lieutenant Colonel Farrell further explained that in cases where no probable cause exists, the judge advocate office will send a one-page "no probable cause memorandum" to CID for the case agent's file. The full legal analysis memos are maintained on the shared drive at the field legal office as work product, however. They are not shared with CID.

Ms. Tokash asked each of the presenters to explain the definition of probable cause that they use. Lieutenant Colonel Farrell stated that the term was defined decades ago by the Supreme Court in *Illinois v. Gates* and is codified in the Manual for Courts-Martial as, "a reasonable belief that a crime has been committed and this person has committed the crime" based on a totality of circumstances. She said the Army relies on the Supreme Court definition.

Dr. Spohn asked how the victim declining to participate relates to probable cause. Lieutenant Colonel Farrell replied that victim declination is not relevant for probable cause. She said that in determining probable cause, she looks at the evidence available in the case file which would include everything the victim has said, even if they do not wish to proceed to trial at the time. She added that there are some cases that go to trial without a victim, though it is not the preferred course of action, adding that trial counsel always considers the victim's wishes.

Ms. Martha Bashford followed up by asking whether trial counsel interview witnesses or just read the investigative file when preparing the merits memos. Lieutenant Colonel Farrell explained that for penetrative offenses she will sit down with the victim as well as material witnesses before drafting a PMM.

Colonel Christopher Brown, Chief of the Military Justice Division of the U.S. Air Force, spoke next, returning to Chair Schwenk's original question regarding initial notification of trial counsel about a sexual assault investigation. Colonel Brown stated that for the Air Force, it is mandatory for the Office of Special Investigations (AFOSI) to notify the legal office and that the chief of military justice would then begin providing advice to investigators as well as attending weekly meetings to review cases or observe interviews. He reported that the Air Force does not do "non-pros" memorandums. He continued that if the command decides to go forward with the preferral of charges, a PMM is not needed because the legal advice is already documented in the pre-trial

advice (Article 34) and the Article 32 investigation. However, if the disposition decision is that no action is going to be taken, that is when they do the sexual assault legal review.

Chair Schwenk asked Colonel Brown what the special court-martial convening authority has in front of him or her when making the initial disposition decision. Colonel Brown responded that the O-6 will have a memo from the lower-level commander with their recommendation and a sexual assault legal review if the recommendation is not to go forward with charges. He noted that most of the time if they are not going forward with charges it is because the victim has decided not to go forward and there is not otherwise enough evidence to support the case. He also noted that the legal reviews are considered work-product and are kept at the base-level in the trial folder.

Ms. Bashford asked how a case where a victim has decided not to go forward is communicated to the investigative branch. Colonel Brown stated that if a special victims' counsel is involved he or she is the person that will be the conduit for getting the victim declination, hopefully in writing, and trial counsel will share the information with AFOSI, typically during their weekly meetings.

Lieutenant Commander Christopher Deerwester, a U.S. Navy Senior Trial Counsel, explained that for the Navy, when a decision not to go forward in a case is made, the investigators are generally notified informally at the weekly meetings but they are also provided with a copy of the Sexual Assault Disposition Report (SADR) which documents that the case is not going forward and why. Lieutenant Commander Deerwester also explained that when a decision is made not to go forward, the prosecutor will hold a meeting with the victim and victim's legal counsel.

Ms. Bashford asked who communicates to the alleged subject a case is not going forward. Lieutenant Colonel Farrell explained that in the Army, the commander will notify the subject and explain whether an administrative action will take place or their administrative flag will be lifted. Lieutenant Commander Deerwester and Colonel Brown agreed that was also the process in the Navy and Air Force.

Lieutenant Commander Deerwester stated that the Navy, like the Marine Corps, also prepares PMMs and they are work-product and stored locally as well as in the Navy's internal case management system (CMS). Additionally, he noted, the Navy provides a "prosecutorial merit review" (PMR) document to the command which explains, but in less detail than a PMM, why the case shouldn't go forward. This document is given to the command at the same time they receive the investigation for review. He said these reviews are conducted for all sexual assault allegations and for other offenses, such as domestic violence, when requested by the command.

Colonel Steven Weir, DAC-IPAD Director, asked the Air Force presenters about the purpose of Air Force Form 115, which he has seen in the investigative files he's reviewed. Colonel Brown answered that the purpose of the form is to document whether or not there is probable cause that an offense was committed by a subject or to index the subject in the appropriate criminal database until there is a the final disposition of the case. He said the name and fingerprints go into the database when probable cause is determined but it is temporary unless there is a conviction. He also noted that in the Air Force, the probable cause determination is typically done around the time the subject is interviewed.

Colonel Brown mentioned that the Air Force has learned a lot from the Kelly incident (the shooting in Texas by a former AF member who was erroneously not in the FBI database) about gaps in the indexing process and they are working to educate the field on how the form should be filled out. He said it is a probable cause determinant test conducted by an attorney and in the revised form the attorney should indicate whether there is probable cause for each offense and the reason why.

Ms. Bashford explained to the presenters that in the investigation files she has reviewed she often sees interviews where the investigators are interviewing colleagues of the subject and victim. She asked the attorneys whether or not they find those character interviews useful. Lieutenant Colonel Farrell stated she did not believe those interviews were useful and that she wasn't seeing them in the more recent investigations. Colonel Brown stated that the interviews are useful if they tend to show some corroboration.

### Standards for Preferral Versus Referral

Chair Schwenk asked the presenters what legal standard they are using for recommendations to commanders throughout the process. Lieutenant Colonel Farrell explained that probable cause is the initial standard for a preferral, but if that is the only standard considered it could lead to a dismissal before trial. However, she feels there is no quantifiable standard beyond probable cause that must exist to take a case to court-martial because of the wide range of evidence and issues involved in each case. She believes setting a higher standard would discourage prosecutors from taking the hard cases. Lieutenant Colonel Farrell did express that she, herself, needs more than just probable cause to take a case to trial.

Ms. Tokash asked what sources the Services were consulting when making the decision as to whether to bring a case to court martial. Commander Kitchen reported that the Coast Guard's justice manual references the American Bar Association standard for prosecution, which is "sufficient evidence to sustain a conviction." She said she also directs her trial counsel to reference the U.S. Attorney's manual to ascertain if there is a "reasonable likelihood of success on the merits" in the case and these standards are referenced in the merits review memos.

Colonel Matthew Jarreau, U.S. Air Force, Staff Judge Advocate, explained that in the Air Force trial counsel prepare what is known as a "proof analysis" where they match the elements with the available evidence and identify responses to anticipated objections. He noted that this is an internal product that is shared with the wing SJA and goes up to Numbered Air Force (NAF) headquarters. Ms. Tokash asked if there was a uniform analysis or standard that the Air Force uses. Colonel Jarreau responded that there is not one uniform way other than matching up the elements and evidence. Colonel Brown noted that in addition to the SJA, the most experienced prosecutors in sexual assault cases are going to have input on the proof analysis. He also noted that commanders don't generally go against their SJA's advice. He said it is rare, but he has seen it happen. In his opinion, if the Air Force is "erring on the side of over-prosecuting," he felt that is acceptable sometimes as long as it meets the ethical requirements.

Major Hodge explained that for the Marine Corps, the PMM must include an evaluation of the documentary and testimonial evidence including any jurisdictional or statute of limitations issues, a proof analysis, and a discussion of whether or not there's a reasonable likelihood of a sustainable conviction. He explained there is not a set standard that has been formally adopted, but the PMM must include a full and frank discussion of the reasonable likelihood of success. On

a concluding note, Major Hodge pointed out that the victims' legal counsel play an important role by seeing that their clients' decisions are fully informed and that their clients' preferences, which can sometimes be beneficial to the defense, are expressed.

Ms. Bashford asked where a victim's preference is documented. Major Hodge replied that in the Marine Corps, it would be memorialized in the merits memo and in the SADR. He indicated that it might also be found in the investigative file if it came up in a victim interview.

Regarding the Navy's prosecution memos, Lieutenant Commander Deerwester stated that the Navy memos are similar to the Marine Corps and include a proof analysis, summaries of interviews, and discusses the victim's preference. He noted that the Trial Counsel Assistance Program (TCAP) makes modifications to the memo including incorporating current case law. After the PMM is completed there will be a murder board within the judge advocate office and a final recommendation based on whether there is a reasonable likelihood of success.

Lieutenant Colonel Farrell reported that the Army doesn't have a standard codified, though they do look to the ABA standards in their recommendations. She said the Army also creates a proof analysis memorandum by element. In addition to the proof analysis, counsel are required to do a section on anticipated defense motions as well as what the government response would be and the expected likelihood of success.

Ms. Bashford asked whether there was ever any tension between military investigators who have a probable cause standard versus prosecutors who may look to the likelihood of conviction when deciding if a case should go forward in the justice system. Lieutenant Colonel Farrell explained that in the past there may have been some tension but currently the investigators and prosecutors work much more closely with one another and there is rarely an issue. Ms. Tokash followed up by asking whether commanders considered the "reasonable likelihood of a conviction" standard. Colonel Brown stated that Air Force commanders will ask that question often to their judge advocates. Lieutenant Colonel Farrell responded that in the Army, generally with the O-6 brigade commander and certainly at the general court-martial convening authority level, the conversations usually end with "This has to go to trial. The panel's always right. Let's see what happens."

Ms. Tagert asked about the probable cause standard being used for different things, noting that in the case reviews the CRWG has undertaken they are finding an initial probable cause determination, which she assumes is to detain someone, and then often there can be a reversal of the probable cause determination. Lieutenant Colonel Farrell stated that from the Army's perspective, she isn't sure why their process requires a probable cause determination that has to be communicated to investigators by judge advocates, because it isn't required by law—it is something the Army has imposed. Colonel Brown noted that a probable cause determination is required by DoD policy (DoDI) for fingerprint indexing. He said if not for this requirement, he's not sure the probable cause legal opinions would need to be given other than for something like a search authorization.

Ms. Cannon asked the panelists at what point a defendant is "flagged" and who makes that decision. Commander Kitchen explained in the Coast Guard there is something called a legal hold which is generally only used near the end of someone's enlistment to avoid losing jurisdiction over an alleged subject when a court martial is likely. Ms. Cannon followed up by

asking when fingerprints are taken and sent for federal indexing. Commander Kitchen stated that this happens at referral in the Coast Guard.

Colonel Jarreau explained that in the Air Force there is an active dialogue between the command, law enforcement, and the legal office and once the subject is notified that he is under investigation, that is usually when the legal office, in coordination with the command, puts the administrative hold in place. He said it is usually a memo to the military personnel center, which puts on the hold. Major Hodge explained that for the Marine Corps, as long as the commander is considering judicial action with an investigation pending, he or she can place the accused on legal or administrative hold, which is independent from any advice as to whether there is probable cause authorization to conduct search and seizure. He said it is usually the commander together with the SJA making those decisions.

Lieutenant Commander Deerwester explained that in the Navy, Sailors can be placed on a legal hold at the commander's discretion. He said as long as a case is heading toward court-martial a commander can keep a subject on legal hold, which can be a significant amount of time. He said that a legal hold can be placed on a Sailor from the investigation until final disposition is complete regardless of the amount of evidence.

In the Army, Lieutenant Colonel Farrell explained, a flag is placed immediately on a defendant once an allegation is made, noting that a very low level of evidence triggers the flag. She explained that in the Army a flag means no promotion or positive career movement. She further explained that defense counsel are free to talk with the command during the investigation about the disposition of the case and that this is common at company, battalion, and brigade level, but not at the general court-martial convening authority level. She noted, however, that Article 31 rights and preferral are generally the triggers for most defense offices to assign a defense counsel to a case.

Chair Schwenk thanked the presenters for their participation and the session ended.

#### Perspectives of Military Investigators on Case Disposition Standards

Chair Schwenk greeted the MCIO presenters and explained that the CRWG has been reviewing investigation files and initial disposition decisions as part of the DAC-IPAD's statutory task to review cases. He expressed his appreciation that the MCIOs have been very cooperative in providing the information that the working group has requested.

Chair Schwenk asked the investigators at what point they first interact with trial counsel on a sexual assault investigation. Mr. Clarence Joubert, U.S. Army Supervisory Special Agent and Program Manager for the Special Victim Unit at Fort Polk, explained that Army CID immediately contacts the trial counsel or special victim prosecutor (SVP) and invites the trial counsel and SVPs to all victim and subject interviews.

Ms. Lisa Medrano, U.S. Army, Chief, Special Victim Team, reported that at Fort Riley their practice is also to invite the trial counsel to observe the interviews to assist in making sure the elements of proof are met. She said that they continue to coordinate with trial counsel throughout the life of the investigation and that a probable cause determination by a legal officer will come towards the end of the investigation.

Ms. Stephanie Winters, Family and Sexual Violence Investigator for the U.S. Navy, explained that within 24 hours of a complaint a phone call is made to the prosecutor and to the SARC or victim advocate. Mr. Ernest Slatinsky, Chief of Quality Assessments for the U.S. Air Force Office of Special Investigations (OSI), reported that upon receiving a report he immediately calls the prosecutor and SARC and invites them to observe the victim and subject interviews. He said they continue collaborating on an ongoing basis at a weekly staff meeting including coordinating probable cause determinations for searches. Mr. Slatinsky noted that the weekly meetings are not a policy but as a general practice they have occurred at every detachment he has been at for the last 24 years.

Mr. Joubert explained that there is no mandated Army policy but that generally Army investigators and prosecutors meet on a weekly basis and the investigators find it helpful to involve the prosecutor at the outset of an investigation to help law enforcement develop questions and limit the number of re-interviews needed. He said that by the time they request a probable cause determination, the attorneys are well read on the posture of the case and where it is going, whether or not adjudication is going to be sought.

Ms. Winters reported that for the Navy, they have a policy that victims are to be updated every 30 days and they generally speak to trial counsel at least that much. She said reports of investigation (ROIs) are due every 60 days, though in practice, agents call the prosecutor more often than that.

Ms. Marta Sivert, Chief, Violent Crimes for the U.S. Air Force, noted that in the Air Force, there is also written policy that trial counsel must be contacted by OSI within 24 hours of the report with an update every 30 days. Mr. Barry Buck, Family and Sexual Violence Investigator for the U.S. Coast Guard, explained that in the Coast Guard, investigators reach out to the prosecutor as soon as they get a call about an incident and they call every time there is an update on the case such as a witness or subject interview. He said trial counsel make the trip often to sit in on interviews.

Dr. Spohn asked the presenters how a case is investigated when there is a third party report and once contacted, the victim tells investigators they don't want to participate. Mr. Slatinsky explained that it depends on how much information is provided by the third party. For example, if there were logical leads provided by the third party then AFOSI would follow those leads despite the victim refusing to cooperate. However, if that isn't the case and if the victim refused to talk with investigators, he would then look to an SVC to get a victim declination letter. He noted that he finds it a moral dilemma when the victim does not want to participate but there are logical leads to follow and described a case where the investigators went to great lengths to investigate a case where a victim refused to participate, noting that this probably caused additional trauma to the victim.

Mr. Joubert expressed his opinion that a victim's choice to not be involved in the investigation should be given consideration. He believes that the victim, irrespective of who they have spoken to, should be able to make the decision for the report to be restricted or unrestricted. He noted that he often sees this issue present itself in the context of domestic violence and intimate partner relationships.

Ms. Bashford followed up by asking whether or not investigators gave any weight to the "mischief-making" possibility of some third party reports—such as an ex-girlfriend or ex-

boyfriend making a third party report of a sexual assault. Ms. Medrano stated they would still launch an investigation because they are required to do so if there are any identifiable leads. She noted that the person may come back in five years after receiving therapy and decide to pursue the case and so it is better to have had the investigation done five years ago. She also noted that often a victim doesn't want to make a complaint when there is collateral misconduct involved. She said victims often see punishment for underage drinking, for example, as more serious than the actual sexual assault. Mr. Buck agreed that investigators have to follow all leads and noted that mischief-making usually presents itself early on.

Ms. Tagert asked the presenters what was needed to close a case. Mr. Joubert said it is not set, but is determined on a case-by-case basis dependent on the specificity and details of the case. He said he felt comfortable that if there is no violation they would memorialize it in the report and close the case early on. Ms. Tagert asked if that was the commander's decision and Mr. Joubert responded that it is not.

Mr. Slatinsky explained that it is necessary to clarify the linguistics of closed cases. He said that for the Air Force, a "closed case" is when all action has been completed and an "investigatively closed case" is when the investigator has run out of logical leads. He further explained that a case is investigatively closed when the special agent in charge, the detachment commander, or the superintendent of that unit signs off on the report that says it is investigatively closed and it is handed over to the legal office and to the commander to make a determination as to what action they are going to take on a case based on the investigative report. He said sometimes commanders will coordinate with the investigators and sometimes they won't—they may just talk to the legal office.

If a case goes to trial, Mr. Slatinsky said, it is easy to close the case because they send back the report of trial. If the commander decides to take some other action under his or her authority, they are supposed to report back to the investigator what they did. However, he noted that commanders are not always good about returning that paper work.

Ms. Cannon asked whether an investigator who believes a case was not going to go anywhere and that all leads had been exhausted and who has discussed this with an attorney could close the investigation and turn it over to someone. Mr. Slatinsky responded no, that the investigator would need to write a full blown report of investigation (ROI) that gets loaded into the AF systems. Mr. Joubert explained that the Army has a Department of the Army Form 4883 which is the commander's action document that records the final action on any investigation where a commander has taken action on an offender.

Mr. Joubert noted that once the action is taken on any offender, whether it be a court-martial or a non-judicial punishment, or no action, the responsible commander has to sign the DA Form 4833 and return it to the investigative office where it will be saved for 40 years. CID considers the case closed once that completed form is received.

Ms. Bashford asked what the purpose of interviews pertaining to a victim or subject's character were and whether or not they had value. Ms. Sivert stated that those interviews were meant to capture any predatory behavior of the accused by investigating whether or not additional victims existed.

Chair Schwenk noted that the CRWG is seeing a lot of investigation work in the cases where ultimately no action is taken. Ms. Winters explained that it can be frustrating that investigators no longer have much discretion in how they conduct their investigations and that investigators feel that they must do absolutely everything that is on the checklist, though she didn't cite a specific policy requiring this when asked. She explained that they are required to follow every single lead that may be out there even if it's not helpful. Ms. Winters explained that it can be difficult to apply the same standards to all cases even if the evidence just isn't there in some. Ms. Sivert agreed with this frustration.

Chair Schwenk asked how the decision is made to send evidence to the lab even when it appears a lab result would not change already known facts. Ms. Medrano responded that the decision is made after speaking with the trial counsel if lab results may corroborate the alleged victim. Ms. Bashford asked what the turnaround time was for lab processing. Mr. Joubert stated it is less than 60 days; however for digital analysis it takes longer. Ms. Medrano stated that digital evidence could take up to six or nine months.

Ms. Tagert asked what information investigators use when entering information into DIBRs for case disposition. Mr. Slatinsky responded that the agent looks at the DIBRS codes provided in a dropdown menu and compares them to the result of trial document received after a court-martial. Ms. Tagert followed up by asking, in investigations where no prosecution occurs, what the DIBRs entry is based on. Mr. Slatinsky stated the agent takes whatever information is given to him from the command and does the best he can to fit it into a DIBRS category.

Mr. Robert Diederichsen, U.S. Navy Program Management Analyst, explained that every reportable case needs to be cleared in DIBRS through one of three incident categorizations: arrest equivalent or arrest, unfounded, or other exceptional means. Mr. Diederichsen explained that in the Navy there is guidance given to agents to figure out the different categories for cases, but the guidance for DIBRs and how it relates to NIBRs is "as clear as mud."

Ms. Sivert explained the clearance reasons in DIBRS as: death of the offender; prosecution declined; extradition declined; victim refused to cooperate; juvenile custody; unfounded, unresolved; and arrest. She said nonjudicial punishment and cases referred to court-martial are reported in DIBRS as arrests, noting that this comes from the DoD Manual for DIBRS.

Chair Schwenk asked the agents, based on their experience, what categories they think should be used for classifying case dispositions. Mr. Joubert answered that the Army uses "founded" and "unfounded" based on whether probable cause is found or not. He explained that if there is a probable cause finding that the accused committed the offense, it is going to be a founded offense. If there is no probable cause, then the JAGs, in accordance with a memorandum of understanding, further analyze whether it is false or baseless. He summarized that for CID an offense is founded or unfounded based on legal analysis of probable cause or no probable cause.

Mr. Diederichsen explained that in DIBRS there is no differentiation between founded and unfounded—the case disposition code is just /C which means closed. He continued that the incident is cleared by the previously discussed DIBRS categories and that there is a separate subject disposition.

Ms. Tagert asked if the investigators enter data into the Defense Sexual Assault Incident Database (DSAID). Ms. Medrano explained that for the Army the headquarters level inputs data

into DSAID. Mr. Joubert reported that at the installation level in the Army they do a weekly “deconflict” with the SHARP office regarding DSAID error reports. Ms. Sivert stated that for the Air Force, the field agents give the information to the SARC to input into DSAID and conflicts are handled by the headquarters level—the systems do not connect. Ms. Sivert further explained that the legal office enters the information into DSAID as to why an investigation is closed. Mr. Slatinsky explained there were one or two blocks within the DSAID system with information that the investigators need for their system such as the SAPRO location.

Ms. Bashford asked when a delayed report of sexual assault is reported whether investigators were asking why the alleged victim has chosen to report now. Ms. Medrano stated she does encourage her agents to ask those questions. Ms. Sivert stated she did not believe the question was being asked in the Air Force. Ms. Bashford stated she had not seen it annotated in the files. Ms. Winters said she believes it is an important question noting that in one of her cases the alleged victim didn’t report because the accused was her father and at the time she was living with him. Mr. Joubert stated for those agents worried about appearing to be blaming the victim for not coming forward immediately he tries to explain to them it’s a safety concern.

Dr. Spohn explained that many of the cases that have been reviewed by the CRWG involved alcohol use by both parties and often the victim either blacked out or had trouble with recall. She asked if there were tactics used by investigators to overcome those challenges. Mr. Joubert stated the Army has training on these types of cases and they can sometimes use pretext calls as a tool. Ms. Winters stated they can ask victims sensory questions to draw out information that may be relevant to a case. For example asking, “What did you hear during that time or what did you smell?”

Colonel Weir asked whether or not there were issues getting the alleged victim’s cell phone. Ms. Sivert responded sometimes and Mr. Joubert reported yes. Mr. Buck stated he hasn’t had any trouble in the Coast Guard. Ms. Bashford asked whether or not the agents are able to retrieve the phone records between the alleged victim and accused. Ms. Bashford explained that on the civilian side, sometimes the phone records show significantly more interaction than disclosed by either side. She added that in a lot of the cases she has reviewed, reports state that deleted messages were not recoverable. Mr. Joubert responded that it depended on the IT person and that with the new phones they are not able to even get into the phones. Ms. Sivert explained that the phone companies have different procedures as far as subpoenas are concerned on the type of information they will provide.

Ms. Cannon asked whether or not the agents have any contact with the defense attorney before charges are preferred and if not whether that would add any value to their investigations. Ms. Medrano responded that CID doesn’t have a lot of contact with the defense side of the house but on occasion defense counsel may provide them with information or a lead. She said CID will pursue a lead whether incriminating or exculpatory. Ms. Winters said NCIS has very little interaction with defense attorneys unless an attorney wanted to be present at the interrogation. Ms. Cannon followed up by asking whether or not it would be valuable. Ms. Winters replied and Ms. Medrano and Mr. Buck concurred that information provided by defense may be valuable.

Colonel Weir asked whether investigators are obligated to investigate when a statement made by an alleged victim does not meet the elements of a crime. Mr. Joubert stated he would present that information to a judge advocate and if no criminal complaint was described CID would not pursue it. Mr. Slatinsky responded that the Air Force has an “information portal” and they will

document such a report but after coordination with the legal office if no crime is described the case will be closed.

Chair Schwenk asked the presenters their overall impression on special victims' counsel. Mr. Slatinsky said he feels the Air Force program is helpful because it gives investigators a point of contact with someone who understands the process so that they can relay information back to the victim. Mr. Joubert said that in the Army, sometimes counsel can interfere with a victim volunteering to engage in a pretext call with the alleged subject. Mr. Buck said he has found the few special victim counsel they have in the Coast Guard helpful and useful in getting phones.

Ms. Gallagher asked whether or not an investigation is opened when the subject was on active duty at the time of the incident but is no longer on active duty at the time of investigation. Ms. Medrano replied that CID will absolutely investigate that type of case as if the suspect was still on active duty. The investigation is then given to the Special Assistant United States Attorney who will coordinate for prosecution at the federal level. Ms. Winters responded that the Navy will also investigate on the possibility they will be brought back on active duty again or seek out a civilian course of action. The Coast Guard and Air Force representatives also agreed that they would investigate those types of cases even without jurisdiction.

Colonel Weir asked whether there is jurisdiction with civilian authorities when the alleged crime happens off an installation. The investigators all stated they coordinate with civilian agencies and do either a joint investigation or jurisdiction is given to the military by civilian law enforcement.

Chair Schwenk thanked the investigators for their insights and comments.

#### Deliberations on DAC-IPAD Annual Report

Ms. Gallagher led the members through a discussion of several minor recommended changes to the CRWG section. Agreement was reached on minor changes to clarify the information being presented to the DAC-IPAD members.

#### Perspectives of Defense Counsel Regarding the Investigation and Initial Disposition Decision

Chair Schwenk began by introducing the CRWG and explaining the working group's current focus on reviewing cases where no action was taken. The first speaker, Major Jamal Rhinehardt, U.S. Army, Senior Defense Counsel at Fort Benning, explained that based on his experience, the amount of involvement of defense counsel during the investigation varies from case to case and is usually minimal prior to preferral. He said that in many cases, defense counsel does not know about the investigation until it is complete and the command has preferred charges. After preferral, he said, the command will typically send the soldier to trial defense services (TDS) and the defense counsel will receive a charge sheet and some of the evidence considered at the time of preferral.

Generally speaking, he continued, if a Soldier seeks TDS assistance during the criminal investigation, an attorney will meet with them to discuss the Soldier's rights and how to best proceed during the investigative process. At that point, defense counsel involvement in the criminal investigation typically includes contacting the trial counsel about the case, requesting to speak to the case agent, or requesting to review investigation documents.

Major Rhinehardt explained that assistance prior to preferral can be very time-consuming because TDS does not have its own defense investigators, and will likely have very little information regarding the evidence in the law enforcement investigation, if any.

He believes that CID's objective is to find evidence to support a finding of probable cause to believe that a crime has been committed and they do not investigate the defense theory of the case, nor can they, if the soldier acts in accordance with his or her right not to speak to law enforcement.

As for investigative interviews, Major Rhinehardt said he has not been present during an interview of a soldier by CID agents, but has attended one polygraph examination. Instead, if he wants to get involved during the investigation and wants his client to actually talk to the government, he will set up an opportunity for the client to talk with the prosecutors in accordance with Military Rules of Evidence 410.

Regarding access to case files prior to preferral, Major Rhinehardt reported that defense counsel must contact the trial counsel and request to review the file, and if the trial counsel agrees, he or she will then contact CID. Without trial counsel approval, he does not believe that most agents will allow defense counsel access to the file.

Additionally, Major Rhinehardt emphasized that the investigative process can be very difficult on Soldiers. In his experience, soldiers who are trainees during the investigation are placed in a holdover status and are typically required to perform miscellaneous details until trial.

Regarding sexual assault training, Major Rhinehardt has not noticed any positive or negative effects, but he suspects that raising awareness about sexual assault situations is good for Soldiers, though he expressed concerns that the training may lead to confusion regarding what conduct actually amounts to a crime. For instance, he continued, to the extent that the training recommends certain actions in order to avoid an alcohol-related sexual assault incident, failure to act in accordance with the recommendations does not necessarily mean a crime was committed. He also has concerns regarding how the training may impact a panel's view of sexual assault cases involving alcohol.

With respect to defense counsel involvement with the command, Major Rhinehardt explained that if a soldier arrives at TDS for advice prior to preferral of charges, defense counsel may have an opportunity to provide input to the command. But, he noted, he prefers to make argument to the trial counsel for a certain disposition because he believes it's more convincing to the command to receive case disposition information from the trial counsel opposed to defense counsel.

As for outside pressure to prefer charges affecting the command's disposition decision, he said he does not know whether outside pressure affected a decision to prefer charges in any specific sexual offense case, but suspects that outside pressure does have an effect. Major Rhinehardt said he believes that a significant number of cases involving sex offenses that are litigated at courts-martial would not make it to trial if the military justice system required a grand jury indictment, essentially involving a secret vote by multiple people.

He thinks there is a belief that commanders attempt to avoid the negative scrutiny that may result by not sending a case to trial, even when success at trial is likely very low. He noted that he has

personally been involved in a sexual assault case where the Article 32 officer recommended not going forward to trial, but the case was referred to trial anyway and the soldier was fully acquitted.

Regarding the charging standards, Major Rhinehardt stated he does not believe the standard to prefer charges is stringent enough. In his opinion, too many charges proceed to trial based on “reasonable grounds to believe” which he says makes little sense because the burden of proof for conviction requires proof beyond a reasonable doubt. He believes that the standard policy for preferring charges, or at least for proceeding to trial, should require substantial evidence of guilt.

As for defense counsel involvement with prosecutors and SVC, he explained that if Soldiers seek assistance prior to preferral, defense counsel may talk to the SVC in an attempt to influence the disposition decision. However, in his personal experience, SVCs are not all that receptive to talking to defense counsel.

Major Rhinehardt noted that in cases involving sexual misconduct, he has not personally experienced much success with avoiding preferral, even in cases where the civilian authorities determined that there was not enough evidence to support prosecuting a case. He reported that it seems that once the command and prosecutors and advocates get involved, the case is going to trial, if the “reasonable grounds to believe” standard is arguably met.

Regarding the effect of investigations on subjects, Major Rhinehardt explained that while the Soldier is flagged, favorable actions are suspended; the Soldier may be assigned to an area that is not directly related to the Soldier's MOS, or it may lack leadership responsibility, which could impact evaluations. He stated that some Soldiers, especially trainees in a holdover status, may commit other misconduct; for instance, Soldiers in a holdover status during investigations still fall under the conduct policy for trainees. These conduct policies often prohibit drinking alcohol or they will have curfews and there may be restrictions for going off post and restrictions regarding off-duty activities. Many of these soldiers find it difficult to avoid violating these policies when an investigation takes many months or even a year.

As for negative consequences when there is no preferral, the most common complaint that Major Rhinehardt reported receiving from soldiers is the fact that they received a criminal record based being titled, even though the command didn't actually prefer charges. He said that if he could change anything in the investigation process, he would provide each field office a defense investigator.

Commander Chad Temple, Director of the Defense Counsel Assistance Program for the U.S. Navy, stated that he concurs with his colleague that there is limited opportunity for defense counsel involvement before preferral. He explained that in the Navy, they do have what is called a personal representation, or “pers rep” process. He said that when an individual who is under investigation with NCIS or some other entity wants to come and get legal advice, defense counsel can provide that on a limited basis.

Major John Boyer, U.S. Marine Corps, Senior Defense Counsel agreed with the previous presenters that the pre-preferral process is a phase in which the defense plays a limited role, but that there could be an opportunity, with proper resources, namely defense investigators, to increase the efficiency in the working of cases on the defense side, and to decrease uncertainty for both the accused and the victims, and then certainly protect the rights of suspects and those

who are ultimately accused of crimes.

As far as the nature of defense involvement in a criminal investigation, Major Boyer explained that a Marine Corps policy memo outlines when defense counsel are detailed to cases. If the subject is in pretrial confinement, they must have an attorney within 10 days. If defense counsel receives the preferred charge sheet, administrative separation package, or Board of Inquiry notification, the Marine Corps has five days to detail an attorney.

He explained that defense counsel are detailed pre-preferred on occasion, and that it seems to occur with officer cases or senior staff NCOs who are a little more savvy perhaps and come in during walk-ins. He explained that the defense offices have regularly scheduled walk-in counseling periods, and people will come in and say either "Something happened, I think I might get charges," or "NCIS approached me, and they want to take my cell phone, and they'd like me to sit down for an interview. Can you come and be my lawyer?"

He explained that defense counsel will walk the Marine through the phases of an investigation and generally talk about what may have happened. He said almost every time defense counsel advise them not to make a statement and not to give their phone over to NCIS. However, he noted that after consultation with other attorneys, they do sometimes advise an accused to make a statement or to turn over the cell phone, so, he concluded, there is an opportunity for Marine Corps defense counsel to be involved during the criminal investigation pre-preferred.

Major Boyer explained that for the regional defense counsel (RDC) and the senior defense counsel (SDC), 20 to 25 percent of their time will be handling the pre-preferred clients who are not going to appear in the case information system, but it will be a "ghost roster" of clients that are either going to develop into something or defense counsel is just holding their hand through that nervous period during which they might be under investigation.

Major Boyer next explained that CIS is the Marine Corps defense counsel case information system. He stated that when defense counsel receive a preferred charge sheet or notice of a Marine in the brig, or a sailor, or they receive an administrative separation package or a Board of Inquiry notification, that case gets uploaded in that system and it counts against defense counsel's numbers. He noted that at Lejeune he had about 137 active cases as of Friday as well as an additional half-dozen folks who have been recommended by a friend or a friendly staff NCO to come in and talk to an attorney.

Ms. Bashford asked how many attorneys were handling the 137 cases Major Boyer discussed. He replied that he has 11 in addition to himself right now, and that all but he and another major are first-tour judge advocates. He noted that experience was an issue that it's a challenge to get people spun up where they need to be, given the nature of some of the charges. He said that the general courts-martial are mostly sex assault cases and there are 120 of them.

Major Boyer explained that for defense counsel to receive the case file before preferred, it is at the discretion of the government and extremely limited. He said the only cases where they have received a true pre-preferred package have been with the recent drill instructor misconduct cases, and those were all provided by the government, redacted for the most part, and comprised a very brief selection of statements that they thought relevant to the defense office's various clients. He said the purpose was to get the pre-trial negotiations rolling. He noted that it was probably an effective strategy of the trial counsel, but from the defense perspective, it put the defense counsel

in a complicated position because they had to advise a client on limited information.

He believes that ultimately, the best protection that a Service member might have is going to be a good command and a fair-minded leadership—good SJAs who have tracking on their cases, and are giving good advice to their command. In that way, he continued, he thinks at times the system seems to feel personality or relationship-driven. If the defense counsel has been a senior trial counsel or trial counsel, or has worked with that SJA previously, defense counsel may be able to make a friendly call and just get whatever information they can.

Regarding sexual assault training, Major Boyer said he believes overall it is positive and that more training is typically better. He feels that on the defense side it has led those who will be suspected or accused to come in sooner and speak with defense counsel.

He doesn't think training has increased the number of cases or people who would come in for counseling, but it does lead the accused to come in sooner, which he thinks is a positive thing for all parties involved. He said that he still hears misperceptions from witnesses about the inability to consent, even after one glass of wine, but he thinks that is something training can address. Chair Schwenk asked whether that still a common voir dire question. Major Boyer replied that it is.

Ms. Gallagher asked Major Boyer about the number of first-tour defense counsel he supervises. Major Boyer responded that manpower is an issue, and that while the VLC program is a good program, it draws away more experienced judge advocates after their trial counsel tour, who would otherwise become defense counsel.

Regarding effects on the accused, Major Boyer believes that any resources for defense counsel to do work pre-preferred up front would help defense counsel clarify what is going to happen, increase their efficiency, decrease the accused's uncertainty, and make sure their rights are being protected. He noted that they have had a suicide of a client in the last 12 months.

He emphasized that the stress of these cases up front is massive for accused Service members—especially when the incident happened years ago and the accused has been in legal hold for a year. He stressed the importance of looking at what can be done to get the process moving faster—for both the victim and the accused.

Major Boyer concluded by noting that the NCIS agents he worked with in Okinawa expressed to him their frustrations of having to go and take photographs and document a base housing when there had been three families who filtered through that unit, but they still had to go and take photographs because an allegation had been made from an incident three years ago, four years ago. They felt that that drained away their time and energy from other cases.

Major Marquita Ricks, U.S. Air Force, Senior Defense Counsel, Eastern Judiciary Circuit, Langley Air Force Base told the CRWG that she supervises five area defense counsel at five installations: Andrews Air Force Base and Bolling Air Force Base (Joint Base Anacostia-Bolling?) in the National Capital Region; Dover Air Force Base in Delaware, McGuire Air Force Base (Joint Base McGuire-Dix-Lakehurst?) in New Jersey, and Wright-Patterson Air Force Base in Ohio, as well as her own caseload that is typically comprised of the most complex cases in the Air Force—the majority of which are sex assault cases.

Major Ricks first discussed the defense's involvement during the investigation process. She agreed with the previous presenters, reporting that the Air Force defense counsel have very limited involvement during the investigation process, though she said it does vary slightly from base to base, and it has a lot to do with the nature of the relationship. She noted one difference between the Marine Corps at least and the Air Force is that every one of the Air Force defense counsel have been a trial counsel for at least one assignment, and so that's at least two years in most cases, sometimes a little bit more.

She explained that there is no statutory or constitutional requirement for investigators, prosecutors, or a command to share information with defense counsel in the investigation process, and oftentimes they don't. And so, in most cases, the way that the defense counsel learns of an Airman being investigated for sexual assault is when that Airman has invoked their right to counsel when they were pulled in to be questioned by investigators, and then they come to visit our office and we form an attorney-client relationship.

Major Ricks continued that defense counsel then sends a notice of representation out to the investigators, to the commander, as well as to the prosecution. In some instances, depending on the workload of that defense counsel at that particular base, that's where defense involvement in the investigation process ends. She noted that in some cases, resources permitting, the ADC, area defense counsel, and the defense paralegal team will start out on their own investigation, so that they can get ahead of some of the information that is out there, try to preserve it when it's fresh with the witnesses, if that's possible, if it is a recent allegation.

She continued that for those bases that do not have resources for the defense paralegal and the area defense counsel to do investigation work, the defense is kind of hamstrung in that way, and defense-focused investigators would definitely help with that process. Regarding defense counsel's involvement with the interview or a polygraph—often if the Airman comes in to seek defense representation they will not go back and submit to an interview or a polygraph. However, there are those times when, after consultation and after being advised of the pros and cons of that particular action, they will decide to submit to an interview or submit to a polygraph. And if that does happen and they are represented, then that defense counsel will accompany that member to that process.

Occasionally, Major Ricks explained, when the defense counsel has a good working relationship with the investigators, commanders, and prosecutors, then the defense counsel will receive more information regarding the allegation that has to do with the status of the investigation, how things are progressing along, and in what direction this case may be headed with regards to disposition.

She stated that the average length of an investigation is about 12 months, and that's even in cases when the disposition is short of preferral—even in those cases when there is ultimately no action taken, which has a very significant effect on the member. Major Ricks explained that once the accused is flagged for a sexual assault investigation, or any investigation, they are placed on an administrative hold which prohibits an Airman from being able to change duty stations or PCS, and from being able to deploy; from taking advantage of temporary duties for very important things, like educational opportunities for upgrade training which for some of the Airmen is a requirement function of their job; or from taking advantage of professional military education, which for officers can have a very significant adverse effect on their career progression.

Major Ricks noted that it is not required, but in most cases an Airman will also have their security clearance suspended; they will not be nominated for any awards, quarterly awards, or annual awards, no matter how noteworthy their accomplishments may have been prior to being flagged for an investigation, or even during that time, when they are continuing to do a very good job while they are pending investigation for sexual assault. For security forces members, they are placed on a “do not arm” roster which prohibits them from doing their primary job. She said that some of the younger Airmen, when they are placed on a “do not arm” roster in security forces, are forced to clean toilets or to do other menial tasks like clean dog kennels—things that contractors typically do.

Major Ricks explained that another very significant repercussion is, if the Airman is under investigation when their performance report comes due, they will often receive a less-than-glowing performance report. It's not a referral performance report, or an inherently negative performance report, but, it's similar to not being submitted or recommended for awards. That performance report, even if there is no action taken, will have a significant effect on that Airman's career, because anyone looking at their records in the future will wonder what happened.

And, finally, in some cases—and this, Major Ricks expressed, is one of the most disheartening potential repercussions for Airmen—and that's when they are subject to the expedited transfer process. She explained that typically when one hears about the expedited transfer process, it's when the complainant requests to move to a different duty location. However, at least in the Air Force, she said, there is an option to have the alleged offender moved to a different duty location instead—with very little involvement in the process.

Major Ricks reported that while there is an option to consult with a defense counsel there is not an opportunity for the defense counsel to advocate to the commander that the Airman not be moved. In some cases, when there is short notice, some of the potentially catastrophic consequences to this Airman's life and career are that if the Airman is married with children, the entire family has to move or they have to be separated. As with any move, there might also be financial difficulties.

She continued that depending on the Airman's Air Force specialty code, or their job designator, he might be moved to a location that does not provide meaningful career progression. For example, she cited an Airman that specializes in Morse code. If the one or two locations that require an airman with that particular specialty are not available, they will find themselves PCS'ed to an area where they will be forced to reclassify or to separate. Again, this is all while an Airman is pending investigation or under investigation for a sexual assault.

And so, Major Ricks concluded, based on her experience, after one year or two years under investigation, or going through a court-martial that ultimately ends in an acquittal, many Airmen find themselves unable to continue in the Air Force because it's just too difficult to serve in an organization that has treated them so unfairly.

She believes that many commanders feel like they have to take some of these administrative actions, pull security clearances, deny awards, deny TDYs, when they don't. And so if there is one thing that could be changed, she suggests, some level of due process should be implemented into the system during the investigation process, before a commander can take these sort of administrative actions that have these very significant and long-lasting repercussions, and this is

especially important in those cases with a disposition short of preferral.

Commander Shanell King, U.S. Coast Guard, Senior Defense Counsel, explained that although her title is Chief of Defense Services, the Coast Guard doesn't have defense counsel in the traditional sense. She explained that the Navy trains Coast Guard defense counsel and that it is the Navy's defense organization that defends Coast Guard personnel at courts-martial for the most part. Commander King expressed concern that Coast Guard suspects don't necessarily know that Navy defense counsel are available to them, they only know that the Coast Guard doesn't have them and she said the Coast Guard is not training people where to go. She noted that a command may provide an accused with a list of Navy counsel that they can call, but there isn't someone they can go see on their base.

Regarding the effects on an accused, Commander King noted that because the Coast Guard is such a small organization, the stigma of an investigation is considerable—everybody knows something is happening when an accused is taken off the cutter and sent to the base or the sector. Another issue she raised is that most of the Coast Guard SJAs don't have defense experience, so their mindset is very government-oriented and they don't necessarily have a balanced perspective. Commander King also expressed concern that most of the judge advocates the Coast Guard sends to the Navy to train as defense counsel are brand new attorneys and brand new to the Coast Guard. She indicated that this is having a negative effect because these new attorneys don't have all of the Coast Guard resources at their disposal to help them maneuver through their first tour.

Another concern Commander King relayed is that the Coast Guard special victims' counsel program and the defense counsel report through the same chain of command. In fact, they are in the same office location which causes a major perception problem. She said that the Coast Guard's mission is very much going out and saving lives and drug interdiction, and that when it comes to military justice, "we are just making it work."

She concluded with a final concern that in order to promote, Coast Guard judge advocates must spend as much of their career outside of the legal organization as in it, in jobs such as boat driver or logistics which prevents attorneys from perfecting their litigation skills. Further, she explained, the Coast Guard doesn't have a litigation track.

Ms. Cannon asked for more information regarding how Coast Guard defense counsel are incorporated into the Navy. Commander King responded that there is a memorandum of understanding with the Navy and each year nine Coast Guard personnel work under the Navy defense counsel program. Ms. Cannon asked where the cases were being preferred from. Commander King said that the prosecution, and the convening authority are all based at the Coast Guard. Ms. Cannon asked if that interfered with the relationships a defense counsel would have with the Command as was mentioned previously by the speakers. Commander King responded that yes relationships were everything and it was to the detriment of the accused. Commander Temple explained that whether or not an accused Coast Guard member is represented by a Navy or Coast Guard judge advocate depends on the detailing authority and how complex the case is.

Ms. Bashford told the presenters that she was fairly stunned by the length of investigations even in cases where charges are not ultimately preferred. She followed up by asking whether or not it really took ten days for an accused to see an attorney when in pre-trial confinement.

Commander Temple explained that counsel could be detailed up to ten days out; however there is an initial review process where a defense counsel represents the accused's interests to determine the appropriateness of confinement. She explained that that counsel may not be the person who is ultimately detailed, however.

Chair Schwenk asked whether or not the counsel who initially speaks to the accused can provide advice on the case specifically or just on confinement. Commander Temple explained that the counsel who handles the initial review hearing understands that he or she may not be the appointed counsel however they may talk about the case but not necessarily provide long-term advice. Ms. Cannon asked if there was time-sensitive information that needs to be investigated and whether or not there was anything that could be done during that initial consultation time period. Commander Temple explained that the local commanding officer could assess the circumstances and detail someone to represent them during the investigative stage.

Ms. Bashford asked what happens if, at that initial meeting, the client says to the attorney that if they get the video from the bar that night it would be helpful and that the video itself will be destroyed very soon. Major Rhinehardt answered that before a counsel is actually detailed, an attorney would be hard pressed to send even a preservation letter. He explained that there is a gap between that hearing and having counsel appointed. Chair Schwenk asked whether the attorneys are trained to ask at these hearings whether or not there was any evidence that may be time sensitive. Major Rhinehardt answered that typically in the Army they try and assign the counsel they plan to detail to the pre-trial confinement hearing. There, he said, the issue of probable cause is explored so the substance of the case will be discussed.

Ms. Jennifer Long asked whether the premise that military prosecutors have a heightened duty to be responsible for a defendant's due process is true from the defense perspective. Commander Temple stated that he valued the open file policy but that he felt that the information that prosecutors need or have is not necessarily what the defense is seeking and he gave as an example, preservation letters. Ms. Long asked whether or not there was any accountability in terms of a prosecutor not sending a preservation letter for evidence that was inadvertently destroyed. Commander Temple cited *United States v. Stellato* for the most recent example of accountability associated with the loss or destruction of evidence due to either forgetfulness, incompetence, or a variety of reasons. Ms. Long asked whether or not there was an adverse action made against the government for a misstep and Commander Temple explained that dismissal could be the relief.

Major Ricks clarified that in the Air Force, the attorney-client relationship is formed somewhat earlier than the other Services. She explained that once someone knows they are under investigation they will talk to an attorney in-depth about the allegation. She said that the positive effect of speaking with an attorney early is their ability to send out preservation letters or collect evidence early. Ms. Cannon asked how personnel know to come to the defense office. Major Ricks responded that there is some public outreach and they try to forge relationships with the First Sergeants' Council.

Dr. Spohn asked the presenters to discuss plea agreements and their role in them. Commander Temple responded that negotiations generally happen after the preferral process but before a preliminary hearing takes place. Major Rhinehardt concurred, explaining that it is the same in the Army except that if the client disagrees with the plea it may not be entered until a few days before trial. He noted that the plea agreements focus more on the severity of the punishment as opposed to the charges. However, in sexual assault cases, he said, the dishonorable discharge needs to be addressed so defense counsel will try and negotiate to plead to a lesser charge than sexual assault.

Ms. Bashford asked how they negotiate sexual assault registration. Major Rhinehardt replied that typically defense counsel will work to have those types of charges dismissed during the plea agreement. Major Boyer commented that with the introduction of the special victims' counsel, defense counsel may approach the SVC first in negotiations to understand the victim's outlook in the hopes that the commander would be more willing to sign off on a plea agreement with victim support.

Ms. Bashford asked whether or not trial counsel will enter into a plea agreement if they don't have the approval of the victim's counsel. Major Boyer responded in the affirmative. Ms. Cannon asked the Air Force counsel whether she believed having access to an attorney early on in the process had an effect. Major Ricks stated she wasn't sure but that clients at least are put at ease as they go through the process. Ms. Cannon then asked whether defense counsel could provide the command with mitigation or dispute facts during the investigative stage. Major Ricks responded that she could and that its success depended on the relationships formed within that community.

Ms. Tokash asked the counsel to comment on the high acquittal rate in sexual assault cases. Commander Temple said he felt a lot of military cases that go to trial wouldn't necessarily have gone in the civilian world because of the pressure on commanders to err on the side of forwarding to trial. Commander Temple believes many of the cases have really bad facts from the prosecutor's perspective and that sometimes the preliminary officer recommends no referral but the case still gets referred.

Chair Schwenk asked how important the victim's preference is to the command in deciding whether to prefer a case. Commander Temple stated that it is a significant consideration. The other Service representatives agreed. Major Boyer also stated that the new preliminary hearing has affected the acquittal rate because the hearings have become boiler plate with very little evidence provided. When commanders receive a recommendation to go forward from the preliminary officer, he or she really doesn't have any grounds not to go forward. Major Boyer said that he believes the new preliminary hearing has done a disservice to the command. Major Ricks has found that in the Air Force, the complainant's perspective is dispositive, irrespective of the evidence. She added that the defense has started asking for preliminary officers to be judges in hopes they will recommend a case not go to trial when there is weak evidence.

Chair Schwenk ended the session by thanking the defense counsel for their time and sharing the DAC-IPAD's website information for their review if interested.

### Deliberations on Potential April Presentations

The CRWG members agreed to meet on Thursday, April 19, 2018, the day before the next scheduled DAC-IPAD public meeting, to conduct case reviews and prepare for the working group's presentation at the public meeting. The issues the CRWG members agreed to address at the preparatory session are the harmful effects of a lengthy investigation to both the offender and the victims. The staff was tasked to identify appropriate people to present to the DAC-IPAD at the April meeting.

The meeting ended at 3:05 p.m.

### **CERTIFICATION**

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



James Schwenk  
Chair, Case Review Working Group

### **MATERIALS**

1. Agenda
2. Biographies of presenters
3. Potential Questions for Presenters, prepared by CRWG staff
4. Department of the Army Memorandum of Agreement Between the Office of the Judge Advocate General and Commander, U.S. Army Criminal Investigation Command (CID), Subject: Legal Coordination for Reports of Investigation (Mar. 7, 2016)



THE DEFENSE ADVISORY COMMITTEE ON  
INVESTIGATION, PROSECUTION, AND DEFENSE OF  
SEXUAL ASSAULT IN THE ARMED FORCES

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**MINUTES OF AUGUST 23, 2018**  
**CASE REVIEW WORKING GROUP PREPARATORY SESSION 12**

**AUTHORIZATION**

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee”) is a federal advisory committee established by the Secretary of Defense in February 2016 in accordance with section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 537 of the NDAA for FY 2016. The Committee is tasked to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of such cases on an ongoing basis.

The Case Review Working Group (CRWG) was established under the DAC-IPAD. The CRWG is tasked to support the DAC-IPAD in fulfilling the Secretary’s objectives by reviewing cases on an ongoing basis, assessing reviewed information, and reporting information, findings and recommendations to the DAC-IPAD for development of advice to the Secretary of Defense.

**EVENT**

The CRWG held its twelfth preparatory session on August 23, 2018 from 10:02 a.m. to 1:42 p.m. The members discussed the status of the case review project, the working group’s presentation to the Committee, and the working group’s way ahead.

**LOCATION**

The meeting was held at One Liberty Center, Suite 150, 875 North Randolph Street, Arlington, Virginia 22203.

**PARTICIPANTS**

Participating Working Group Members

Brigadier General James Schwenk, U.S. Marine Corps (Retired), Chair  
Ms. Martha Bashford  
Ms. Kathleen Cannon  
Ms. Jennifer Long (via telephone)  
Ms. Meghan Tokash

#### Absent Working Group Members

Mr. James Markey

Dr. Cassia Spohn

#### Committee Staff

Ms. Julie Carson, Deputy Staff Director

Dr. Janice Chayt, Investigator

Ms. Theresa Gallagher, Attorney-Advisor

Mr. Glen Hines, Attorney-Advisor

Ms. Meghan Peters, Attorney-Advisor

Ms. Stacy Powell, Senior Paralegal

Ms. Kate Tagert, Attorney-Advisor

#### Presenters

Ms. Kate Buzicky, Assistant U.S. Attorney, District of Minnesota

### **MEETING MINUTES**

CRWG Chair Schwenk started the meeting at 10:03 a.m. on August 23, 2018. Ms. Tagert introduced the issue of whether the current standard of proof, probable cause, is the appropriate standard to use for referring a case to trial. She noted that in reviewing investigative files, the members make an assessment of probable cause and of whether a conviction could be sustained on the evidence.

#### DOJ Charging Standards

Kate Buzicky, Assistant U.S. Attorney, District of Minnesota provided an overview on policies and procedures of her office. Ms. Buzicky stated one of the most helpful procedures they use is approaching cases as a team. When an investigative agency notifies her office of an incident, a discussion is held between the attorney and supervisory attorney as to whether the case is something they can and should pursue, considering such factors as whether there are further investigative leads to develop or some other investigative tool to confirm the allegations. If the internal assessment is to accept the case for further development, the investigative agent joins the discussion and collaborates on the investigative plan. Discussions between the prosecutor and investigative agent continue to occur until the case is developed sufficiently for a charging decision.

Ms. Buzicky told the panel that when a case is being prepared for indictment, a thorough memorandum explaining the facts of the case, available evidence and witnesses, and litigation risks is presented to a committee of senior leadership in the office who make the ultimate decision of whether to present a case to the grand jury for indictment. The indictment committee is composed of the U.S. attorney, the first assistant, the criminal chief, the deputy criminal chiefs for the different sections, and the senior litigation counsel. All members are attorneys and in position to talk frankly to each other. A case is unlikely to be prepared for the indictment

committee if there is not enough evidence to sustain a conviction even though the DOJ Principles of Federal Prosecution establishes probable cause as the standard for indictment. The decision of the ability to obtain and sustain a conviction is made by the indictment committee. Prosecutors have discretion to consider factors in determining whether a case is appropriate for federal prosecution; such as, whether the case is appropriate for federal resource expenditure, whether the state is better positioned to dispose of the case, the impact on both the victim and the subject, and victim preferences. Victim preferences are not dispositive, cases can go forward without the victim's cooperation and are sometimes declined even though the victim wants to go to trial. In areas of exclusive federal jurisdiction, the consequences of declining a case or pursuing an alternative to prosecution are closely considered. When a decision is made to take a case forward, the prosecution believes the case can be proven beyond a reasonable doubt.

Ms. Buzicky explained that no specific set of facts are dispositive for a prosecution decision, but contemporaneous or close in time reports by the victim, technological evidence such as social media, cell phone records, computers, IPADs, GPS devices, and witnesses that can corroborate the victim's movements are helpful evidence in sexual assault cases, in addition to a victim's testimony.

Ultimately, if all evidentiary leads are exhausted and the evidence is insufficient to meet the elements, the case must be declined. Cases are also declined when the original facts turn out to be false or a key witness becomes unavailable. For every case that is declined, a declination memo for the case file is produced explaining the decision. The declination memo is an internal document, which is not released to law enforcement or the public.

Regarding interaction with defense counsel, Ms. Buzicky reported that Federal prosecutors do have contact with defense counsel prior to indictment and can receive information that might have a bearing on a prosecutorial decision, but in many sexual assault cases, the individual doesn't know that they are under investigation until they are formally charged. At that point, they are brought in for their initial appearance and are assigned a federal defender or other defense attorney. In a sexual assault case, the interview typically occurs in a custodial setting, so there is not a period of time between arrest and charging.

Ms. Buzicky told the CRWG that she believes the grand jury indictment process is a valuable investigative tool to assess a victim or witness under oath and develop a record of factual testimony. In determining whether to call a victim to testify before the grand jury, given the risk of further trauma, consideration is given to whether and how much other evidence there is to corroborate the victim's initial statement, whether there is additional information for the victim to provide, and whether there is a need to lock in a reluctant victim's testimony. The case agent is also called as a witness to summarize the facts and the elements of the offense so the grand jury can vote on whether or not there is probable cause to go forward with a prosecution.

In discussing when the U.S. Attorney's Office gets involved in a case, Ms. Buzicky explained that before a case is opened for investigation by the AUSA, a preliminary assessment has been made that a crime has been committed but there need not be probable cause yet. The standard for the prosecutor to open an investigation is very low and some cases are investigated for years. During the investigation stage, prosecutors can use the grand jury as an investigative tool to issue

subpoenas and search warrants even though the case may ultimately end up being closed and not presented to the grand jury for indictment.

Ms. Buzicky further explained that when an allegation is made to the FBI that is unclear as to whether a crime has been committed, the duty agent can call the duty AUSA and discuss the allegations before either the FBI or the AUSA opens an investigation. She said her preference is to have input into the investigation at the earliest possible stage, even if it is at the initial complaint. If the facts are something the prosecutor wants to develop or if they believe they will spend significant time investigating, the prosecutor will open a case for investigation. She reiterated that the standard for opening a case for investigation only is pretty low, explaining that a case can be opened based solely on a victim's statement; however, that does not determine whether the case will be charged. When asked about the FBI's standard for opening or closing a case, Ms. Buzicky said she cannot speak to the internal FBI policies on opening investigative files or closing an investigation when the FBI determines no crime has been alleged.

Ms. Buzicky noted that every five years the DOJ evaluates prosecution case files to make sure DOJ standards are being complied with and files are properly documented.

#### CRWG Deliberations on Initial Case Review Findings and Recommendations

Mr. Hines highlighted a few key points from a recent meeting the staff held with representatives from FBI and DoD to learn more about the National Incident Based Reporting System (NIBRS) implemented and managed by the FBI as well as the DoD version of NIBRS, known as the Defense Information Reporting System (DIBRS). A written summary of the meeting was also presented to the members. Mr. Hines stated that DIBRS as it has been used is going away and the new system is not expected to be fully operational until 2021. He also noted that currently, no federal agency is reporting into NIBRS.

The discussion turned to the findings and recommendations contained in the deliberation outline prepared by the CRWG Staff.

Proposed Recommendation 6 (concerning revision of closure disposition categories used by DoD investigative agencies). The members first discussed proposed recommendation 6 and after discussion agreed that it was premature to make a recommendation as to appropriate case closure classifications but it is appropriate for the CRWG to raise the issue to the DAC-IPAD and recommend it be studied. Chair Schwenk emphasized that case closure is important because it is the beginning data element when analyzing the military justice process. He stated that one of the things the DAC-IPAD can do is set the stage for data collection and data analysis for the future Article 146 Military Justice Review Panel's reviews of the military justice system. He also noted that having a delay until 2021 gives the DAC-IPAD time to influence the development of criteria and definitions for case closure.

Proposed Recommendation 3 (commanders should make action/no action determinations and judge advocates should make probable cause or unfounded determinations). Next the members discussed proposed recommendation 3. The members agreed that judge advocates should and are making the probable cause determination regarding the submission of fingerprints to the FBI and

DNA to CODIS. The CRWG members agreed that when the SJA advises there is no probable cause for the reported offense, the commander should make the decision to not go forward with a case. The members expressed concern that commanders, who are not lawyers, appear to be making criminal law decisions. Chair Schwenk stated there are two issues from recommendation 3, the issue of commanders making the initial disposition decision and reporting that decision to the MCIOs and the issue of commanders making a probable cause determination. The members agreed it was premature to make any recommendations regarding these issues until new policies are fully implemented and the DAC-IPAD members have an opportunity to conduct site visits to obtain information from practitioners in the field. The DAC-IPAD should study the issues in greater depth.

Proposed Recommendation 4 (command action reports should not be based on SAPRO terminology because the options are not meaningful for criminal justice purposes).

The members determined that proposed recommendation 3 and proposed recommendation 4 are both wrapped up in proposed recommendation 6 and the staff will rework them together as one recommendation with three parts to it – that they are three issues that are related that the CRWG thinks the DAC-IPAD should take on.

Proposed Finding 4 (concerning the standard for referral). The members discussed proposed finding 4. The CRWG members discussed their concern about whether the current standard is appropriate. The members discussed whether to find that the current standard was too low and overall felt that the CRWG is not ready to make any conclusions yet. Ms. Bashford proposed making a finding that the standard for referral in the military is inconsistent with that of the U.S. Attorney's Office and a recommendation for further study to determine whether the standard should be brought in line with the U.S. Attorney's standard or whether it should remain unchanged. After further discussion, the members made three findings:

Finding: The standard for conviction under the UCMJ and the standard for conviction under federal criminal law is proof beyond a reasonable doubt.

Finding: The standard for referring a case to general court-martial, currently probable cause, is different than that articulated by the Department of Justice ("Sufficient admissible evidence to obtain and sustain a conviction").

Finding: The JPP in recommendations 55, 57, and 58 requested the DAC-IPAD review and assess the Article 32 process, the effect of new case disposition guidance, and the Article 34 advice. The DoD General Counsel also requested the DAC-IPAD review these issues and include its analysis and findings in the next annual report.

Chair Schwenk recommended the issues of what the standard for referral should be, and how that standard should be incorporated with Article 34 advice and Article 32 preliminary hearings should be presented to the DAC-IPAD for further study. The CRWG Staff will further revise these findings and the recommendation for presentation to the DAC-IPAD.

Proposed Finding 1 (reported information in command disposition reports are often unclear, incomplete, and not uniformly documented within or across the services). The members discussed proposed finding 1. The members agreed to add a finding to emphasize the importance of documenting the disposition decision to precede proposed finding 1 and agreed to leave proposed finding 1 as it was. The additional finding is: Transparency, clarity, and consistency of the disposition decision and the reason for the disposition are essential in evaluating the military justice process.

Proposed Recommendation 2 (concerning SJA assistance in preparing command action reports). The members agreed to make a finding that staff judge advocate offices should assist the commands in completing command action reports. As amended, recommendation 2 will be presented to the DAC-IPAD as a completed finding but with a recommendation that implementation should wait until the study of recommendations 3, 4, and 6 is complete.

Proposed Recommendation 1 (command disposition decisions should be based on legal and investigatory standards). The members discussed and agreed that the recommendation should be amended to refer to disposition reports and not disposition decisions. Chair Schwenk asked whether recommendation 1 should still be lumped in with recommendations 3, 4, and 6. He noted that “reports” are discussed in recommendation 1 and “disposition categories” are discussed in recommendation 6. He feels that these are related and ought to be studied together.

Proposed Finding 2 (concerning investigator discretion). After discussion, the CRWG agreed on the following revised finding: investigators have little discretion in deciding the best investigative techniques to use. The CRWG also agree on the following recommendation: the investigator in conjunction with the judge advocate should be able to use discretion to determine which investigative actions will have value in each particular case.

Proposed Finding 3 (concerning CRWG determination of reasonableness). The CRWG discussed proposed finding 3 and determined that if a reviewer finds a commander’s action was unreasonable, the case would be reviewed by two staff and one CRWG member. The data from each reviewer will be recorded separately in the database.

#### Planning for CRWG presentation to DAC-IPAD at October meeting.

The members agreed that Chair Schwenk will be the spokesperson for the CRWG during the October Public Meeting. The CRWG members will meet prior to the public meeting to finalize their findings and recommendations for presentation.

The meeting ended at 1:42 p.m.

## **CERTIFICATION**

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.

A handwritten signature in blue ink, appearing to read "James Schwenk".

James Schwenk  
Chair, Case Review Working Group

## **MATERIALS**

1. Agenda
2. DIBRS-NIBRS meeting summary prepared by CRWG Staff
3. New MCM Appendix 2.1-Non-Binding Guidance for Disposing of UCMJ Violations
4. U.S. Attorney's Manual 9-27.220.
5. DoD GC Memorandum for DAC-IPAD (7 Jun 18)
6. Executive Order, 2017 Amendments to the Manual for Courts-Martial
7. Deliberation outline prepared by CRWG Staff

# Sexual Assault Case Review

DAC-IPAD Control Number: \_\_\_\_\_

Reviewed by: \_\_\_\_\_ Date: \_\_\_\_\_

<b>Report</b>	
<b>1. MCIO Case Report Number</b>	
<b>2. MCIO Office</b>	
<b>3. Civilian Investigative Agency Involvement</b>	<p>Incident Occurred On / Off Military Installation</p> <p>Civilian Agency Involved: Yes / No</p> <p>Agency Name: _____</p> <p>Civilian Lead: Yes / No</p> <p>Civilian Prosecution: Yes / No</p> <p>Comments:</p>
<b>4. All Sexual Assault Offense(s) Reported</b>	
<b>5. Date(s) of Occurrence(s)</b>	
<b>6. Date Reported to MCIO</b>  <b>*(Delayed Report = More than 48 Hours after Incident)</b>	<p>Date: _____</p> <p>If delayed report, was a reason provided? Yes / No / N/A</p> <p>Comments:</p>
<b>7. Was Report Originally Restricted</b>	<p>Yes / No / N/A</p> <p>Date restricted report made: _____</p>

DAC-IPAD Control Number: \_\_\_\_\_

<b>8. Date MCIO Report Finalized</b>  <b>8a. Date MCIO Case Closed</b>	Date: _____ (Report Finalized)  Date: _____ (Case Closed)  Comments:
<b>9. Reporting Person</b>  <b>*(To Law Enforcement)</b>	Relationship:  <input type="checkbox"/> Victim <input type="checkbox"/> Victim Authorized Representative (SARC, SVC/VLC, FAP) <input type="checkbox"/> Reported by Command <input type="checkbox"/> Third Party _____
<b>10. Location of Incident</b>  <b>*(Installation/City/State/Country)</b>	
<b>11. Location Type</b>  <b>*(Check all that apply)</b>	CONUS / OCONUS / Vessel  Deployed Location: Yes / No  <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"> <input type="checkbox"/> Barracks/Dormitory  <input type="checkbox"/> On installation housing  <input type="checkbox"/> Private residence  <input type="checkbox"/> Office/Workplace  <input type="checkbox"/> Vehicle  <input type="checkbox"/> Hotel/Motel  <input type="checkbox"/> Club  <input type="checkbox"/> Medical/Hospital  <input type="checkbox"/> Unknown         </div> <div style="width: 50%;"> <input type="checkbox"/> School  <input type="checkbox"/> Church/Chapel  <input type="checkbox"/> Park/Beach  <input type="checkbox"/> Wooded/Open area  <input type="checkbox"/> Swimming pool  <input type="checkbox"/> Daycare/CDC  <input type="checkbox"/> Retail store  <input type="checkbox"/> Other _____         </div> </div>

Overall Comments/Summary on Reporting:

<b>Suspect</b>	
<b>Name (Last, First, Middle, Suffix)</b> _____	
<b>12. Number of Suspects</b>	_____ (separate checklist for each suspect)
<b>13. Status, Grade, &amp; Branch of Service at Time of Incident</b>	<input type="checkbox"/> Active Duty <input type="checkbox"/> Reserves <input type="checkbox"/> National Guard (Pay Grade): _____  Service <input type="checkbox"/> Army <input type="checkbox"/> Air Force <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Coast Guard
<b>14. Suspect Status at Time Investigation Initiated (If different from time of incident)</b>	<input type="checkbox"/> N/A <input type="checkbox"/> DoD Contactor <input type="checkbox"/> DoD Civilian <input type="checkbox"/> Civilian <input type="checkbox"/> Reserve <input type="checkbox"/> National Guard <input type="checkbox"/> Retiree
<b>15. Assigned Command at Time of Incident</b>	
<b>16. Gender</b>	<input type="checkbox"/> Male <input type="checkbox"/> Female
<b>17. Date of Birth and SSN (Last Six Only)</b>	
<b>18. Race and Ethnicity of Suspect</b>	<input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> Hispanic, Latino, or Spanish origin <input type="checkbox"/> Middle Eastern or North African <input type="checkbox"/> Native Hawaiian or Other Pacific Islander <input type="checkbox"/> White <input type="checkbox"/> Some other race, ethnicity, or origin <input type="checkbox"/> Unknown
<b>19. Relationship to Victim(s)</b>  <b>*(Per Suspect)</b>	<input type="checkbox"/> Not Provided <input type="checkbox"/> Stranger <input type="checkbox"/> Acquaintance <input type="checkbox"/> Friend <input type="checkbox"/> Roommate <input type="checkbox"/> Supervisor <input type="checkbox"/> Subordinate <input type="checkbox"/> Co-Worker <input type="checkbox"/> Intimate Partner <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Spouse <input type="checkbox"/> Former Spouse <input type="checkbox"/> Boyfriend/Girlfriend <input type="checkbox"/> Family Member (other than spouse) <input type="checkbox"/> Doctor <input type="checkbox"/> Patient <input type="checkbox"/> Classmate <input type="checkbox"/> Other _____

<p><b>20. Suspect Statement to Law Enforcement</b></p> <p><b>*(Check all that apply)</b></p>	<p>Yes / No</p> <p>Date: _____ (Invoked and/or statement)</p> <p><input type="checkbox"/> None (Invoked right to remain silent)</p> <p><input type="checkbox"/> Verbal Statement</p> <p><input type="checkbox"/> Written Statement</p> <p><input type="checkbox"/> Recorded Statement (audio/visual)</p> <p><input type="checkbox"/> Multiple Statements to law enforcement? Number _____</p>
<p><b>21. Was Suspect Represented by Counsel At Rights Advisement?</b></p>	<p>Yes / No</p> <p>Comments:</p>
<p><b>22. Suspect Statement to Other than Law Enforcement (Oral, Written, Digital)</b></p> <p><b>*(Check all that apply and comment on each)</b></p>	<p>Yes / No</p> <p><input type="checkbox"/> Command</p> <p><input type="checkbox"/> Co-Worker</p> <p><input type="checkbox"/> Spouse</p> <p><input type="checkbox"/> Boyfriend</p> <p><input type="checkbox"/> Girlfriend</p> <p><input type="checkbox"/> Friend</p> <p><input type="checkbox"/> Victim</p> <p><input type="checkbox"/> Other</p> <p>Comments:</p>
<p><b>23. Suspect's General Description of Incident in His/Her Statement(s)</b></p> <p><b>*(Check all that apply)</b></p>	<p><input type="checkbox"/> N/A</p> <p><input type="checkbox"/> Denies sexual activity</p> <p><input type="checkbox"/> Confessed to crime</p> <p><input type="checkbox"/> Denies being the offender/Mistaken identity</p> <p><input type="checkbox"/> Other _____</p> <p><input type="checkbox"/> Act was consensual</p> <p><input type="checkbox"/> No recollection</p> <p><input type="checkbox"/> Partial recollection</p>

<p><b>24. Sexual Interaction with Victim</b></p>	<div data-bbox="548 170 1442 611"> <input type="checkbox"/> N/A  <input type="checkbox"/> None  <input type="checkbox"/> Prior consensual sexual contact  <input type="checkbox"/> Prior consensual penetrative acts  <input type="checkbox"/> Consensual sexual acts directly preceding the allegation of rape/sexual assault  <input type="checkbox"/> Consensual sexual acts after the allegation of rape/sexual assault  <input type="checkbox"/> Communications of a sexual nature preceding incident (including sexting, flirting, nude photos)  <input type="checkbox"/> Communications of a sexual nature following incident (including sexting, flirting, nude photos) </div> <div data-bbox="548 653 688 684"> <p>Comments:</p> </div>
<p><b>25. Suspect Consume Alcohol/Drugs at Time of Incident?</b></p>	<div data-bbox="548 884 1425 1083"> <p>Alcohol: Yes / No</p> <p>Basis (check all that apply):</p> <div data-bbox="548 1003 1425 1083"> <input type="checkbox"/> Self-Admission                      <input type="checkbox"/> Victim(s) statement  <input type="checkbox"/> Witness statement                      <input type="checkbox"/> Other _____ </div> </div> <div data-bbox="548 1125 1425 1318"> <p>Drugs: Yes / No</p> <p>Basis (check all that apply):</p> <div data-bbox="548 1239 1425 1318"> <input type="checkbox"/> Self-Admission                      <input type="checkbox"/> Victim(s) statement  <input type="checkbox"/> Witness statement                      <input type="checkbox"/> Other _____ </div> </div> <div data-bbox="548 1360 688 1392"> <p>Comments:</p> </div> <div data-bbox="548 1556 902 1587"> <p>Drug/Alcohol Test: Yes / No</p> </div> <div data-bbox="548 1629 639 1661"> <p>Results:</p> </div>

<p><b>26. Factors Affecting Suspect Reliability/Credibility</b></p> <p><b>*(Check all that apply)</b></p>	<div> <input type="checkbox"/> None in file         <input type="checkbox"/> Collateral misconduct (Underage drinking, fraternization, conduct unbecoming, drug use, adultery, other _____)         <input type="checkbox"/> Contradictory evidence         <input type="checkbox"/> Inconsistent statements         <input type="checkbox"/> Other misconduct (specify)_____         <input type="checkbox"/> Reported loss of consciousness         <input type="checkbox"/> Reported loss of memory         <input type="checkbox"/> M.R.E. 413 evidence (committed other sexual offense)         <input type="checkbox"/> M.R.E. 404(b) evidence (evidence of other crimes, wrongs or acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident)         <input type="checkbox"/> Corroboration (Physical tangible evidence, witness, medical evidence)         <input type="checkbox"/> Reputation for or opinion on truthfulness or untruthfulness         <input type="checkbox"/> Motive to lie         <input type="checkbox"/> Other _____       </div> <p>Comments:</p>
<p><b>27. Behavioral Health Issues Regarding Suspect</b></p>	<p>Yes / No</p> <p>Before Incident</p> <div> <input type="checkbox"/> Inpatient Treatment         <input type="checkbox"/> Outpatient Treatment         <input type="checkbox"/> Post-Traumatic Stress Disorder         <input type="checkbox"/> Traumatic Brain Injury         <input type="checkbox"/> Drug Treatment         <input type="checkbox"/> Alcohol Treatment         <input type="checkbox"/> Other       </div> <p>After Incident</p> <div> <input type="checkbox"/> Inpatient Treatment         <input type="checkbox"/> Outpatient Treatment         <input type="checkbox"/> Post-Traumatic Stress Disorder         <input type="checkbox"/> Traumatic Brain Injury         <input type="checkbox"/> Drug Treatment         <input type="checkbox"/> Alcohol Treatment         <input type="checkbox"/> Other       </div>

DAC-IPAD Control Number: \_\_\_\_\_

<b>27. Continued</b>	Comments:
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Overall Comments/Summary on Suspect:

<b>Victim</b>	
<b>Name (Last, First, Middle, Suffix)</b> _____	
<b>28. Number of Victim(s)</b>	_____ <b>(separate checklist for each victim)</b>
<b>29. Status, Grade, &amp; Branch of Service at Time of Incident</b>  <b>(DoD Spouse = Spouse of Suspect &amp; other DoD Spouses)</b>	<input type="checkbox"/> Active Duty <input type="checkbox"/> Reserves <input type="checkbox"/> National Guard (Pay Grade): _____  Service <input type="checkbox"/> Army <input type="checkbox"/> Air Force <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Coast Guard  <input type="checkbox"/> DoD Spouse <input type="checkbox"/> Civilian <input type="checkbox"/> Other Family Member <input type="checkbox"/> Foreign National <input type="checkbox"/> DoD Civilian <input type="checkbox"/> Other _____ <input type="checkbox"/> DoD Contractor
<b>30. Gender</b>	<input type="checkbox"/> Male <input type="checkbox"/> Female
<b>31. Date of Birth</b>	
<b>32. Race and Ethnicity</b>	<input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> Hispanic, Latino, or Spanish origin <input type="checkbox"/> Middle Eastern or North African <input type="checkbox"/> Native Hawaiian or Other Pacific Islander <input type="checkbox"/> White <input type="checkbox"/> Some other race, ethnicity, or origin <input type="checkbox"/> Unknown
<b>33. Relationship to Suspect</b>  <b>*(Per Victim)</b>	<input type="checkbox"/> Not Provided <input type="checkbox"/> Stranger <input type="checkbox"/> Acquaintance <input type="checkbox"/> Friend <input type="checkbox"/> Roommate <input type="checkbox"/> Supervisor <input type="checkbox"/> Subordinate <input type="checkbox"/> Co-Worker <input type="checkbox"/> Intimate Partner <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Spouse <input type="checkbox"/> Former Spouse <input type="checkbox"/> Boyfriend/Girlfriend <input type="checkbox"/> Family Member (other than spouse) <input type="checkbox"/> Doctor <input type="checkbox"/> Patient <input type="checkbox"/> Classmate <input type="checkbox"/> Other _____

<b>34. Sexual Interaction with Suspect</b>	<div data-bbox="558 174 1451 611"> <input type="checkbox"/> N/A  <input type="checkbox"/> None  <input type="checkbox"/> Prior consensual sexual contact  <input type="checkbox"/> Prior consensual penetrative acts  <input type="checkbox"/> Consensual sexual acts directly preceding the allegation of rape/sexual assault  <input type="checkbox"/> Consensual sexual acts after the allegation of rape/sexual assault  <input type="checkbox"/> Communications of a sexual nature preceding incident (including sexting, flirting, nude photos)  <input type="checkbox"/> Communications of a sexual nature following incident (including sexting, flirting, nude photos) </div> <div data-bbox="552 653 699 682"> Comments: </div>
<b>35. Evidence of Sexual Behavior or Predisposition (M.R.E. 412)</b>	<div data-bbox="558 808 1451 1043"> <input type="checkbox"/> Specific instances to prove someone other than suspect was the source of semen, injury, or other physical evidence  <input type="checkbox"/> Evidence of specific instances of sexual behavior with the suspect to show consent  <input type="checkbox"/> Constitutionally required  <input type="checkbox"/> None reported </div> <div data-bbox="552 1085 699 1115"> Comments: </div>
<b>36. Prior Allegation of Sexual Assault By Victim</b>	<div data-bbox="552 1245 659 1274"> Yes / No </div> <div data-bbox="552 1318 1427 1354"> If yes, annotate case number(s) if available: _____ </div> <div data-bbox="552 1398 699 1428"> Comments: </div>
<b>37. Victim Statement to Law Enforcement</b>  <b>*(Check all that apply)</b>	<div data-bbox="552 1554 659 1583"> Yes / No </div> <div data-bbox="552 1629 984 1665"> If yes, date: _____ </div> <div data-bbox="573 1709 1421 1904"> <input type="checkbox"/> None provided  <input type="checkbox"/> Verbal statement  <input type="checkbox"/> Written statement  <input type="checkbox"/> Recorded statement (audio/visual)  <input type="checkbox"/> Multiple statements to law enforcement? Number _____ </div>

<b>38. Circumstances of Statement to Law Enforcement</b>  <b>*(Check all that apply)</b>	<input type="checkbox"/> N/A <input type="checkbox"/> SVC/VLC present <input type="checkbox"/> Other person present _____ <input type="checkbox"/> Joint statement with military and civilian law enforcement <input type="checkbox"/> Statement taken immediately, within 48 hours of report <input type="checkbox"/> Statement taken after 48 hours of report
<b>39. Did <u>Statement</u> to Law Enforcement Establish probable cause Offense occurred?</b>	Yes / No / N/A
<b>40. Victim Statement to Other than Law Enforcement (Oral, Written, Digital)</b>  <b>*(Check all that apply and comment on each)</b>	Yes / No  <input type="checkbox"/> Command <input type="checkbox"/> Coworker <input type="checkbox"/> Spouse <input type="checkbox"/> Boyfriend <input type="checkbox"/> Girlfriend <input type="checkbox"/> Friend <input type="checkbox"/> Suspect <input type="checkbox"/> SANE <input type="checkbox"/> SARC <input type="checkbox"/> FAP <input type="checkbox"/> Other  Comments:
<b>41. Did Victim Participate in the Investigation?</b>	Yes / Declined  If victim declined, at what stage of the process did they stop cooperating?  <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Reporting  <input type="checkbox"/> Preliminary Hearing  <input type="checkbox"/> Other _____         </div> <div> <input type="checkbox"/> Investigation  <input type="checkbox"/> Court-Martial         </div> </div> Comments:

<b>42. Did Victim Provide Input to the Command/SJA?</b>	<p>Yes / No</p> <p>What type of input?</p> <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Pursue courts-martial  <input type="checkbox"/> Pursue counseling statement  <input type="checkbox"/> Other administrative action  <input type="checkbox"/> Refer to civilian court/authority  <input type="checkbox"/> Other _____ </div> <div> <input type="checkbox"/> Pursue non-judicial punishment  <input type="checkbox"/> Pursue administrative separation  <input type="checkbox"/> Take no action </div> </div>
<b>43. SVC/VLC Representation?</b>	<p>Yes / No / N/A</p> <p>SVC/VLC present at time of statement? Yes / No / N/A</p> <p>Date of Notice of Representation _____</p>
<b>44. Did Victim Request Expedited Transfer?</b>	<p>Yes / No / N/A</p> <p>If yes, was it approved: Yes / No</p> <p>Date: _____</p>
<b>45. Victim Consume Alcohol/Drugs at Time of Incident?</b>	<p>Alcohol: Yes / No</p> <p>Basis (check all that apply):</p> <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Self-Admission  <input type="checkbox"/> Witness statement </div> <div> <input type="checkbox"/> Suspect(s) statement  <input type="checkbox"/> Other _____ </div> </div> <p>Drugs: Yes / No</p> <p>Basis (check all that apply):</p> <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Self-Admission  <input type="checkbox"/> Witness statement </div> <div> <input type="checkbox"/> Suspect(s) statement  <input type="checkbox"/> Other _____ </div> </div> <p>Comments:</p>  <p>Drug/Alcohol Test: Yes / No</p> <p>Results:</p>

<b>46. Did Victim Report being Incapacitated?</b>	<p>Yes / No</p> <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"><input type="checkbox"/> Blacked-out</div> <div style="width: 50%;"><input type="checkbox"/> Asleep</div> <div style="width: 50%;"><input type="checkbox"/> Unconscious</div> <div style="width: 50%;"><input type="checkbox"/> Passed-out</div> <div style="width: 50%;"><input type="checkbox"/> Partial memory</div> <div style="width: 50%;"><input type="checkbox"/> Drugged</div> <div style="width: 50%;"><input type="checkbox"/> No memory</div> <div style="width: 50%;"><input type="checkbox"/> Other</div> </div> <p>Comments:</p>
<b>47. Factors Affecting Victim Reliability/Credibility</b>  <b>*(Check all that apply)</b>	<div style="display: flex;"> <div style="flex: 1;"> <input type="checkbox"/> None in file  <input type="checkbox"/> Collateral misconduct (Underage drinking, fraternization, conduct unbecoming, drug use, adultery, other _____)  <input type="checkbox"/> Contradictory evidence  <input type="checkbox"/> Inconsistent statements  <input type="checkbox"/> Other misconduct (specify) _____  <input type="checkbox"/> Reported loss of consciousness  <input type="checkbox"/> Reported loss of memory  <input type="checkbox"/> Corroboration (Physical tangible evidence, witness, medical evidence)  <input type="checkbox"/> Reputation for or opinion on truthfulness or untruthfulness  <input type="checkbox"/> Motive to lie  <input type="checkbox"/> Other _____         </div> <div style="flex: 1; padding-left: 10px;"> <p>Comments:</p> </div> </div>
<b>48. Behavioral Health issues regarding victim</b>	<p>Yes / No</p> <p>Before Incident</p> <div style="display: flex;"> <div style="flex: 1;"> <input type="checkbox"/> Inpatient Treatment  <input type="checkbox"/> Outpatient Treatment  <input type="checkbox"/> Post-Traumatic Stress Disorder  <input type="checkbox"/> Traumatic Brain Injury  <input type="checkbox"/> Drug Treatment  <input type="checkbox"/> Alcohol Treatment  <input type="checkbox"/> Other         </div> <div style="flex: 1; padding-left: 10px;"> </div> </div>

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<b>48. Continued</b>	<p>After Incident</p> <ul style="list-style-type: none"><li><input type="checkbox"/> Inpatient Treatment</li><li><input type="checkbox"/> Outpatient Treatment</li><li><input type="checkbox"/> Post-Traumatic Stress Disorder</li><li><input type="checkbox"/> Traumatic Brain Injury</li><li><input type="checkbox"/> Drug Treatment</li><li><input type="checkbox"/> Alcohol Treatment</li><li><input type="checkbox"/> Other</li></ul> <p>Comments:</p>
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Overall Comments/Summary on Victim:

Evidence	
<b>49. Victim Sexual Assault Kit Collected?</b>	<p>Yes / No</p> <p>Date collected: _____</p> <p>Date testing completed: _____</p>
<b>50. Location of Victim Sexual Assault Exam</b>	<p><input type="checkbox"/> Military Health Care Facility</p> <p><input type="checkbox"/> Civilian Health Care Facility</p> <p><input type="checkbox"/> N/A</p>
<b>51. Who Conducted the Victim's Sexual Assault Exam?</b>	<p><input type="checkbox"/> Military Examiner</p> <p><input type="checkbox"/> DoD Civilian</p> <p><input type="checkbox"/> Civilian Provider</p> <p><input type="checkbox"/> N/A</p>
<b>52. Suspect Sexual Assault Kit Collected?</b>	<p>Yes / No</p> <p>Date collected: _____</p> <p>Date testing completed: _____</p>
<b>53. Location of Suspect Sexual Assault Exam</b>	<p><input type="checkbox"/> Military Health Care Facility</p> <p><input type="checkbox"/> Civilian Health Care Facility</p> <p><input type="checkbox"/> N/A</p>
<b>54. Who Conducted the Suspect's Sexual Assault Exam?</b>	<p><input type="checkbox"/> Military Examiner</p> <p><input type="checkbox"/> DoD Civilian</p> <p><input type="checkbox"/> Civilian Provider</p> <p><input type="checkbox"/> N/A</p>
<b>55. DNA <u>Results</u></b>  <b>*(Both Suspect &amp; Victim)</b>	<p>Yes / No</p> <p>Comments:</p>

<p><b>56. Evidence of Use/Threat of Force</b></p> <p><b>*(Based on Totality of File)</b></p>	<p>Yes / No</p> <p> <input type="checkbox"/> Physical                      <input type="checkbox"/> Weapon  <input type="checkbox"/> Coercion                      <input type="checkbox"/> Threat  <input type="checkbox"/> Threat to Others         </p> <p>Physical injury – Yes / No</p> <p> <input type="checkbox"/> Bruising                      <input type="checkbox"/> Cuts  <input type="checkbox"/> Broken bones                      <input type="checkbox"/> Redness  <input type="checkbox"/> Scrapes         </p> <p>Comments:</p>
<p><b>57. Eyewitness(es) to Sexual Activity</b></p>	<p>Yes / No</p> <p>Number of witnesses: 1-5 / 6-10/ 11+</p> <p>Comments:</p>
<p><b>58. Third Party Witness(es)</b></p> <p><b>*(To events or statements before, during, or after the assault)</b></p>	<p>Yes / No</p> <p>Number of witnesses: 1-5 / 6-10/ 11+</p> <p>Comments:</p>
<p><b>59. Electronic Evidence</b></p>	<p>Yes / No</p> <p> <input type="checkbox"/> Victim                      <input type="checkbox"/> Suspect                      <input type="checkbox"/> Witness              ○ Cell phone                      ○ Cell phone                      ○ Cell phone              ○ Computer                      ○ Computer                      ○ Computer              ○ Social media                      ○ Social media                      ○ Social media              ○ Other                      ○ Other                      ○ Other         </p> <p>Comments:</p>

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<b>60. Other Evidence</b>	Yes / No  Comments:
<b>61. Pretext Communication</b>	Yes / No  Type: <input type="checkbox"/> Phone call <input type="checkbox"/> Text message <input type="checkbox"/> Email <input type="checkbox"/> In person <input type="checkbox"/> Other  Results: <input type="checkbox"/> Supports Victim's Account <input type="checkbox"/> Supports Suspect's Account <input type="checkbox"/> Neither  Comments:

Overall Comments/Summary on evidence:

Case Information	
<b>62. Investigator Bias</b>	<input type="checkbox"/> No indication of bias <input type="checkbox"/> Bias against victim <input type="checkbox"/> Bias against suspect
<b>63. Commander Disposition</b>  <b>*(Check all that apply)</b>	<input type="checkbox"/> Action Taken      Date: _____  <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Preferral  <input type="checkbox"/> Civilian authority  <input type="checkbox"/> Separation               </div> <div> <input type="checkbox"/> Non-judicial punishment  <input type="checkbox"/> Other administrative action  <input type="checkbox"/> Administrative  <input type="checkbox"/> Resignation/Discharge in lieu of court-martial  <input type="checkbox"/> Other Separation _____               </div> </div> <input type="checkbox"/> Other _____  <input type="checkbox"/> No Action Taken      Date: _____  <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> No Reason Provided  <input type="checkbox"/> Unfounded               </div> <div> <input type="checkbox"/> Baseless   <input type="checkbox"/> False   <input type="checkbox"/> Not specified               </div> </div> <input type="checkbox"/> Prosecution declined <input type="checkbox"/> Insufficient evidence <input type="checkbox"/> Victim uncooperative <input type="checkbox"/> Lack of jurisdiction <input type="checkbox"/> No probable cause <input type="checkbox"/> Other _____  <input type="checkbox"/> None Provided  Comments:
<b>64. Any Legal Memoranda Pertaining to Investigation/Disposition</b>	<input type="checkbox"/> None provided <input type="checkbox"/> Judge Advocate explanation _____ <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Probable Cause               </div> <div>Yes / No</div> </div> <input type="checkbox"/> Prosecution Memorandum <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> Probable Cause               </div> <div>Yes / No</div> </div> <input type="checkbox"/> Other _____  Comments:

<b>65. Probable Cause Determination per DODI 5505.11 and 5505.14 (FBI and CODIS Submissions)</b>	<p>Yes / No</p> <p><input type="checkbox"/> Probable cause <input type="checkbox"/> No probable cause</p> <p>Comments:</p>
<b>66. Commander Action Taken for Collateral Misconduct</b>	<p>Suspect: Yes / No</p> <p>Comments:</p>   <p>Victim: Yes / No / N/A</p> <p>Comments:</p>
<b>**67. Is the Command Action Decision Reasonable Based on the Totality of the Investigative File?</b>	<p>Yes / No</p> <p>Comments:</p>

**\*\*The reasonableness decision applies to the type of case being reviewed. In “no action taken” cases – Is the Commander’s decision to take “No Action” on the penetrative sexual assault offense reasonable? In “preferred” cases – Is the Commander’s decision to “Prefer” on the penetrative sexual assault offense reasonable?**

Additional Comments:

Preferral	
<b>68. Post Preferral Documents</b>	<p>Article 32 Report: Yes/ No</p> <p>Preliminary Hearing Officer find probable cause on the penetrative offense: Yes / No</p> <p>Comments:</p> <p>SJA Advice: Yes / No</p> <p>Comments:</p>
<p><b><u>69. Based on the Totality of the Investigative File:</u></b></p> <p><b>Was there Probable Cause to Believe an Offense was Committed and the Accused Committed It?</b></p> <p><b>Was there Sufficient Admissible Evidence Beyond a Reasonable Doubt to Obtain and Sustain a Conviction?</b></p>	<p>Yes / No</p> <p>Comments:</p> <p>Yes / No</p> <p>Comments:</p>

DAC-IPAD Control Number: \_\_\_\_\_

<b>**Is the Ultimate Command Action Decision Reasonable?</b>	Yes / No  Comments:
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**\*\*The reasonableness decision applies after preferral. Is the ultimate decision to refer to courts-martial, accept a plea, dismiss SA offenses, offer Administrative Separation, Non-judicial Punishment, or some other administrative action on non-SA offenses reasonable?**

Additional Comments:

DAC-IPAD Control Number: \_\_\_\_\_

Staff Only	
<b>70. Case Clearance Classification</b>	<b>MCIO DIBRS / NIBRS Classification:</b>  <div><input type="checkbox"/> Unfounded                      <input type="checkbox"/> Arrest or equivalent <input type="checkbox"/> Death of offender              <input type="checkbox"/> Prosecution declined <input type="checkbox"/> Extradition declined          <input type="checkbox"/> Juvenile <input type="checkbox"/> Victim declined to cooperate <input type="checkbox"/> Case not cleared <input type="checkbox"/> Referred for Court-Martial <input type="checkbox"/> Non-judicial punishment (Article 15) <input type="checkbox"/> Not Applicable</div>
<b>71. Is DIBRS/NIBRS Closure Listed by MCIO Consistent with Action Taken Reported by MCIO?</b>	Yes / No  Comments:

Additional Comments:

# **U.S. Army Commander's Report of Disciplinary or Administrative Action (DA Form 4833)**

**Agency:** U.S. Army Office of the Provost Marshal General

**Authority:** Title 28 USC 534 Section 614; E.O. 9397 (SSN) as amended; AR 190-45, "Law Enforcement Reporting" (Sep. 27, 2016)

**Principal Purpose:** To provide Commanders and Law Enforcement Officials with means by which information may be accurately identified for all offenses. The data is used to identify crime trends, establish command programs in law enforcement and other activities, and to ensure that resources are made available to support commanders who must address issues of soldier and family member indiscipline.

- Instructions for completing the form are detailed in AR 190-45, "Law Enforcement Reporting."
- Records actions taken against identified offenders for all offenses (not limited to sexual assault).
- The first lieutenant colonel in the chain of command is responsible and accountable for completing DA Form 4833 with support documentation (copies of Article 15s, court-martial orders, reprimands, etc) for all USACIDC investigations. The unit and brigade commander or their equivalent will also receive a copy of the DA Form 4833 for all USACIDC investigations.
- Company, troop, and battery level commanders are responsible and accountable for completing DA Form 4833 with supporting documentation in all cases investigated by MPI, civilian detectives employed by the Department of the Army, and the PMO.
- The commander completes the DA Form 4833 within 60 days of receipt and returns it to the originating office (the installation PMO, DES, or CID).<sup>1</sup>
- Accurate and complete DA 4833 disposition reports are required to meet installation, command, HQDA, DOD, and federal statutory reporting requirements.
- In court-martial cases, a conviction of an offense at court-martial may be for a different, or lesser included offense. The offense for which the individual was convicted at court-martial should be listed in the remarks section. For each offense marked "NO" for "Action Taken", commander must supply a reason.

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<sup>1</sup> Department of the Army, Regulation 190-45, Law Enforcement Reporting, paragraph 4-7 (Sep. 27, 2016), available at [http://www.apd.army.mil/pdffiles/r190\\_45.pdf](http://www.apd.army.mil/pdffiles/r190_45.pdf)

**COMMANDER'S REPORT OF DISCIPLINARY OR ADMINISTRATIVE ACTION**

For use of this form, see AR 190-45; the proponent agency is the Office of the Provost Marshal General.

**PRIVACY ACT STATEMENT**

**AUTHORITY:** Title 28 USC 534 Section 614: E.O. 9397 (SSN) as amended.

**PRINCIPAL PURPOSE:** To provide Commanders and Law Enforcement Officials with means by which information may be accurately identified. Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.

**ROUTINE USES:** The Routine Uses that appear at the beginning of the Army's A0190-45 OPMG, Military Police Reporting Program Records (MPRP) System of Record Notice may apply to this system.

**DISCLOSURE:** Voluntary, although without the SSN collection, Law Enforcement Records could not be accurately retrieved and the probability of misidentifying an individual would increase significantly.

**1. CONTROL INFORMATION**

Thru:	USACRC Number:	
To:	MP Report Number:	
	Sub-Installation:	
Referred By:	Referral Date:	Suspense Date:

The first Lieutenant Colonel in the chain of command is responsible and accountable for completing DA Form 4833 with support documentation (copies of Article 15s, court-martial orders, reprimands, etc) for all USACIDC investigations. The unit and brigade commander or their equivalent will also receive a copy of the DA Form 4833 for all USACIDC investigations.

Company, troop, and battery level commanders are responsible and accountable for completing DA Form 4833 with supporting documentation in all cases investigated by MPI, civilian detectives employed by the Department of the Army, and the PMO. Accurate and complete DA 4833 disposition reports are required to meet installation, command, HQDA, DOD, and federal statutory reporting requirements. The data is used to identify crime trends, establish command programs in law enforcement and other activities, and to ensure that resources are made available to support commanders who must address issues of soldier and family member indiscipline.

In court-martial cases, a conviction of an offense at court-martial may be for a different, or lesser included offense. List the offense for which the individual was convicted at court-martial in the remarks section. Provost Marshals must enter the "MP Report Number" (Block 1) for all cases referred to commanders. "Sub-Installation" (Block 1) is used to enter report number from a civilian law enforcement agency police report. Other information on the civilian law enforcement agency (e.g. civilian law enforcement agency address) may be entered in the remarks section.

**2. OFFENDER INFORMATION**

Last Name:	Cadency:	
First Name:	Grade:	
Middle Name:	SSN or ID Number:	Date of Birth:

**3. REFERRAL INFORMATION**

No.	Offense	Basis	Date	Commander Decision Date:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No    Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No
				Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No    Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No
				Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No    Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No
				Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No    Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No
				Reason:

3. REFERRAL INFORMATION (Continued)				
No.	Offense	Basis	Date	Commander Decision Date:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No      Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No      Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No      Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No      Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No      Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:
				Sexual Harassment: <input type="checkbox"/> Yes <input type="checkbox"/> No      Action Taken: <input type="checkbox"/> Yes <input type="checkbox"/> No Reason:

**NOTE:** For each Offense marked "NO" for "Action Taken", you must supply a Reason.

If "Action Taken" is "Yes" for any Offense, continue to Block 4 and choose the highest level. If you selected "Action Taken" "No" for ALL Offenses, go directly to "Commander's Remarks" (Block 10a) to expand on your Reasons, then sign, date and return the form to the agent specified in "Referred By" (Block 1).

4. ACTION TAKEN	
<input type="checkbox"/> <b>Administrative</b> Non-Adverse Referrals Adverse Personnel Actions	<input type="checkbox"/> <b>Non-Judicial (Article 15)</b> <i>(see details below)</i>
<input type="checkbox"/> <b>Judicial</b> Court Martial or Civilian Criminal Court	
<b>Non-Judicial Punishment Authority (select one):</b> <input type="checkbox"/> Summarized <input type="checkbox"/> GCMCA Imposed <input type="checkbox"/> Company Grade <input type="checkbox"/> General Officer Imposed <input type="checkbox"/> Field Grade <input type="checkbox"/> Principal Assistant	<b>Judicial Punishment Authority (select one):</b> <input type="checkbox"/> Summary Court Martial <input type="checkbox"/> General Court Martial <input type="checkbox"/> Civilian Criminal/Magistrate <input type="checkbox"/> Special Court Martial Jurisdiction: If Other:

5. NJP/Court-Martial/Civilian Criminal Court Proceeding Outcome				
No.	Charged Offense	Plea	Finding Offense	Trial/NJP Finding

**PLEA:** G=Guilty, C=No Contest, N=Not Guilty, D=Pre-Trial Diversion **TRIAL/NJP FINDING:** DCV=Dismissed (Civil), DCR=Dismissed (Criminal), P=Finding for Plaintiff, F=Finding for Respondent, G=Guilty, C=No Contest, N=Not Guilty, S=Settlement

5. NJP/Court-Martial/Civilian Criminal Court Proceeding Outcome (Continued)				
No.	Charged Offense	Plea	Finding Offense	Trial/NJP Finding

**PLEA:** G=Guilty, C=No Contest, N=Not Guilty, D=Pre-Trial Diversion **TRIAL/NJP FINDING:** DCV=Dismissed (Civil), DCR=Dismissed (Criminal), P=Finding for Plaintiff, F=Finding for Respondent, G=Guilty, C=No Contest, N=Not Guilty, S=Settlement

6. ADMINISTRATIVE ACTIONS								
Non-Adverse:				Adverse:				
Agency	Date Referred	Date Responded		Date Imposed	Type of Action	Oral	Written Local	Written OMPF
Family Advocacy					Counseling/Concern	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Drug/Alcohol Abuse					Reprimand	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Special Referral					Censure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Equal Opportunity					Admonition	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Legal Office								
Mental Health								
Relief Agency								

Adverse:	
Date Imposed	Description
	Withholding of Privileges
	Adverse Performance Evaluation (OER/NCOER/Academic Report)
	Relief for Cause (OER/NCOER)
	Mandatory Reassignment
	Transfer (such as rehabilitative)
	Adverse Record Entry - Flag
	Bar to Reenlistment
	Withholding of Promotion
	Delay of Promotion
	Promotion Revocation
	Clearance Revocation
	Control Roster (downgrade of clearance, PRP reclassification)
	Resignation
	Retirement
	Retirement at Lower Grade From: To:
	Transfer to Inactive Reserve
	Military Occupational Specialty Reclassification
	Civilian Debarment Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life

<b>6. ADMINISTRATIVE ACTIONS (Continued)</b>	
<b>Adverse: (Continued)</b>	
<b>Date Imposed</b>	<b>Description</b>
	Civilian Job Termination
	Civilian Job Suspension <span style="float: right;">Duration:    <input type="checkbox"/> Days    <input type="checkbox"/> Months    <input type="checkbox"/> Years</span>
	Civilian Leave Without Pay <span style="float: right;">Duration:    <input type="checkbox"/> Days    <input type="checkbox"/> Months    <input type="checkbox"/> Years</span>
	Loss of Warrant
	Voluntary Disclosure
	Restitution (to US Government) <span style="float: right;">Amount US\$:</span>
	Restitution (to third party Non-US Government) <span style="float: right;">Amount US\$:</span>
	Civil-Civil Action Initiation
	Other (return to States, etc.)
	Contract Suspension <span style="float: right;">Duration:    <input type="checkbox"/> Days    <input type="checkbox"/> Months    <input type="checkbox"/> Years</span>
	Contract Termination
	Cost Adjustment <span style="float: right;">Amount US\$:</span>
	Bid Rejection
	Recoupment <span style="float: right;">Amount US\$:</span>
	Denial of Continuation
	Other Contract Action

<b>7. DETAILS OF ADMINISTRATIVE SEPARATION</b>			
Date Imposed:	Regulation:	Chapter:	
Characterization:			Effective Date:

**NOTE:** Proceed to Commander's Remarks (Block 10a) if you chose Administrative Action in **Block 6 or 7.**

<b>8. NON-JUDICIAL/JUDICIAL SANCTIONS</b>	
<b>Date Adjudged</b>	<b>Sanction</b>
	Fine                      Amount US\$:
	Forfeiture                      Amount US\$:                      Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months
	Extra Duty                      Days:
	Restriction                      Days:
	Correctional Custody                      Days:
	Confinement                      Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life
	Bad Conduct Discharge    Effective Date:
	Dishonorable Discharge    Effective Date:
	Reduction in Grade                      From:                      To:
	Probation                      Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years
	Special Assignment                      Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years
	Total Forfeiture (all pay/allowance)                      Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life
	Death Sentence
	Civil Recovery                      Amount US\$:
	Civil Award                      Amount US\$:
	Dismissal (Officer Only)    Effective Date:

9. SUSPENDED SANCTIONS	
Were Any Sanctions Suspended? <input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>NOTE:</b> If no sanctions were suspended, proceed to "Commander's Remarks" (Block 10a).	
Suspended Sanction	Suspended Sanction Information
Fine	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion US\$: _____
	Suspension Conditions: _____
Forfeiture	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion US\$: _____ Suspended Portion Time: <input type="checkbox"/> Days <input type="checkbox"/> Months
	Suspension Conditions: _____
Extra Duty	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days <input type="checkbox"/> Months
	Suspension Conditions: _____
Restriction	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days
	Suspension Conditions: _____
Correctional Custody	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days
	Suspension Conditions: _____
Confinement	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life
	Suspension Conditions: _____
Reduction in Grade	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspension Conditions: _____
Probation	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspension Conditions: _____
Special Assignment	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days <input type="checkbox"/> Months
	Suspension Conditions: _____
Total Forfeiture	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion Time: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life
	Suspension Conditions: _____
Civil Recovery	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion US\$: _____
	Suspension Conditions: _____
Civil Award	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life <input type="checkbox"/> Undetermined
	Suspended Portion US\$: _____
	Suspension Conditions: _____
Administrative Separation	Date Suspended: _____ Suspension Duration: <input type="checkbox"/> Days <input type="checkbox"/> Months <input type="checkbox"/> Years <input type="checkbox"/> Life
	Suspension Conditions: _____
	_____
	_____
	_____

10a.

## Commander's Remarks

Checked box indicates that Commander's Remarks continue on the following page. ☐

11.

## COMMANDING OFFICER OR REPORTING OFFICER

Was a DNA sample collected from the offender? ☐ Yes ☐ No

Name:

Grade:

Official E-Mail Address:

Signature:

Signature Date:



# U.S. Navy Sexual Assault Disposition Report (SADR)

**Agency:** Navy Sexual Assault Prevention and Response Program

**Authority:** Supporting Directive OPNAVINST 1752.1C, Navy Sexual Assault Prevention and Response (SAPR) Program (Aug. 13, 2015)

**Principal Purpose:** Used for reporting disposition information for sexual assault offenses only. The form captures information to support reporting data required in DSAID and the annual SAPRO report.

- The SADR form is NAVPERS 1752/1 (Rev. 10-2016). Detailed instructions for completing the form are attached to the SADR form.
- Commanders, commanding officers and officers in charge are responsible for providing written disposition data (e.g., any administrative, NJP, judicial action taken) resulting from the investigation involving Service members from the command using the SADR.
- A written disposition report must be submitted [does not indicate to whom] within 2 business days of final disposition of all unrestricted reports of sexual assault. A final, official resolution refers to completion of judicial, investigative, disciplinary, and administrative actions (e.g., defendant found guilty or not guilty, alleged offender administratively separated, no action taken due to insufficient evidence). (Chp. 3, OPNAVINST 1752.1C)
- The SADR must be submitted by: (a) The CO of an alleged offender who is subject to the UCMJ; or (b) The victim's CO when an unrestricted report specifies an unknown offender or an offender not subject to the UCMJ.
- The form is short and interactive with drop down menus. For example, in the "Case Disposition" section, if "Command Action Precluded" is selected, a drop-down menu appears for further selection of the reason. Choices include: unfounded by command, victim declined to participate in military justice action, insufficient evidence to prosecute, and statute of limitations has expired. Another example concerns the selection of an incident being "unfounded by command," a follow on entry must be made regarding whether the incident was found to be false or baseless, with an explanation of each. There is a requirement for a case synopsis and an option to provide additional details regarding the disposition decision.
- The SADR will be retained by NCIS for a minimum of 20 years.
- A NAVPERS 1070/887 (Sex Offense Accountability Record) will be submitted to a Service member's official military personnel file within 5 business days from adjudication of a court-martial or NJP or at the completion of the NJP appeal process for any sex-related offenses to include violation of Articles 120, 120a, 120b, 120c, or 125 of the UCMJ, or an attempt to commit any of these offenses punishable under Article 80 of the UCMJ.

## SEXUAL ASSAULT DISPOSITION REPORT (SADR)

NAVPERS 1752/1 (Rev. 10-2015) PREVIOUS EDITIONS OBSOLETE

Supporting Directive OPNAVINST 1752.1C

**CAUTION/PII SENSITIVE INFORMATION:** This electronic message is intended solely for the use of the recipient(s) to whom it is addressed and might contain information that is privileged, confidential, otherwise exempt from disclosure under applicable law, or privacy act sensitive information. If the reader of this message is not an intended recipient, any dissemination, distribution or copying of this communication (including any attachments) is strictly prohibited. If you have received this communication in error, please delete it (including any attachments) from your system without copying or forwarding it, and notify the sender of the error by reply e-mail.

**A. Subject's Information.**

(If not known, enter "unknown". Do not include victim's information, even if the subject is unknown.)

1. First Name:		2. MI:	3. Last Name:	
4. Affiliation:	5. Pay Grade:		6. Was subject transferred from the command? <input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> N/A	
7. Was pre-trial confinement awarded? <input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> N/A			8. Date pre-trial confinement began: (MM/DD/YYYY)	
9. Was the subject referred to any of the following as a result of this incident? (select all that apply)				
<input type="checkbox"/> Medical <input type="checkbox"/> Mental Health <input type="checkbox"/> Chaplain/Spiritual Support <input type="checkbox"/> Alcohol/Drug Counseling <input type="checkbox"/> None <input type="checkbox"/> Other				

If other, enter information as appropriate:

10. Was the subject previously accused of a substantiated sexual assault other than this incident? <input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> ?	11. If "Yes", where did the allegation occur:	12. Was the subject admitted to armed forces with waiver for prior sexual misconduct? <input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> N/A
--	---	---

**B. Subject's Commanding Officer's (CO) Information.**

(If subject is unknown, a civilian or foreign national not subject to the UCMJ then the victim's commanding officer must complete.)

1. CO First Name:		2. MI:	3. CO Last Name:	
4. Affiliation:		5. Pay Grade:		
6. E-mail Address:			7. Telephone Number:	
8. JAG Consulted:		9. JAG E-mail Address:		
10. JAG First Name:		11. MI:	12. JAG Last Name:	

**C. Case Information.**

1. Was alcohol a factor in the incident?	2. DoD Action Decision Date: <input type="radio"/> ?
3. NCIS/MCIO Case Control Number: (Required)	4. DSAID Control Number: (Can be obtained from SARC)
5. List all related OPREP-3 Navy Blue/Navy Unit SITREPS Date Time Group (DTG):	
6. RLSO Prosecutorial Merits Memorandum Date (if applicable):	
7. CASE SYNOPSIS (e.g., Court-martial charge preferred: subject allegedly raped victim in an off-base apartment by holding the victim down and penetrating her anus with his penis. Subject was interrogated and stated that the sexual act was consensual. An article 32 hearing was held and the investigating officer recommended dismissal of all charges. The SA-IDA chose to dismiss all charges based on the investigating officer and Staff Judge Advocate's recommendations.): <input type="radio"/> ?	

## SEXUAL ASSAULT DISPOSITION REPORT (SADR)

NAVPERS 1752/1 (Rev. 10-2015) PREVIOUS EDITIONS OBSOLETE

Supporting Directive OPNAVINST 1752.1C

**D. CASE DISPOSITION:** This is an interactive form, please select ALL case dispositions that apply. Select the case disposition option(s) that best describes the circumstances at the time of submission. Example: Option "c. Court-Martial Charge Preferred" is an appropriate selection if charges are preferred regardless of eventual case outcome (i.e., charges withdrawal, case dismissal, etc.); Option "d. Non-Judicial Punishment (NJP) (Article 15, UCMJ)" is an appropriate selection if charges are not preferred and non-judicial punishment is instead pursued; Option "e. Administrative Discharge/Resignation NOT in lieu of Trial" is an appropriate selection if charges are not preferred and administrative separation proceedings are instead pursued. Again, you may select multiple options (e.g., if charges are preferred but the case later results in an NJP, please select options "c" and "d"), and complete all selected options accordingly.

## 1. Case Disposition (Select All That Apply - Interactive Layout):

- |  |  |
|--|--|
| <input type="checkbox"/> a. Offender Outside DoD'S Legal Authority | <input type="checkbox"/> d. Non-Judicial Punishment (NJP) (Article 15, UCMJ)                             |
| <input type="checkbox"/> b. Command Action Precluded               | <input type="checkbox"/> e. Administrative Separation Processing/Resignation <b>NOT</b> in lieu of Trial |
| <input type="checkbox"/> c. Court-Martial Charge Preferred         | <input type="checkbox"/> f. Other Adverse Administrative Action  |

**E. Additional Comments:****DO NOT INCLUDE PERSONALLY IDENTIFIABLE INFORMATION (PII).**

The Commander/Commanding Officer/Officer in Charge of the subject of a sexual assault allegation shall submit the NAVPERS 1752/1. However, where the subject is unknown, or a civilian or foreign national not subject to the UCMJ, then the victim's Commander/ Commanding Officer/ Officer in Charge shall complete this form. Submit the NAVPERS 1752/1 via e-mail within two business days of final disposition of the case.

Submit by E-mail to: [opnav\\_sapr\\_report@navy.mil](mailto:opnav_sapr_report@navy.mil) and [NCISSAPR@ncis.navy.mil](mailto:NCISSAPR@ncis.navy.mil)

A copy of the report shall also be provided to the local NCIS Special Agent and the SARC responsible.

## SEXUAL ASSAULT DISPOSITION REPORT (SADR)

NAVPERS 1752/1 (Rev. 10-2015) PREVIOUS EDITIONS OBSOLETE

Supporting Directive OPNAVINST 1752.1C

## INSTRUCTIONS

## A. Subject's Information

Number	Requirement
1	Enter the Subject's First Name. If not known, enter "Unknown".
2	Enter the Subject's Middle Initial (if any). Otherwise, enter "NMN".
3	Enter the Subject's Last Name. If not known, enter "Unknown".
4	Select the Subject's Affiliation from the List Provided.
5	Select Pay Grade of the Subject from the List Provided.
6	Enter the Date Pre-Trial Confinement Began, if applicable.
7	Select "Yes" or "No", as applicable.
8	Select "Yes" or "No", as applicable.
9	Select all that apply from the List Provided. If "Other", enter Information as appropriate.
10	Select "Yes" or "No", as applicable. Unrestricted Report that was investigated by an MCIO, provide to the appropriate military command for consideration of action, and found to have sufficient evidence to support the command's action against the subject. (DoDI 6492.02)
11	Select the Location of Previous Substantiated Sexual Assault from the List Provided.
12	Select "Yes" or "No", as applicable.

## B. Subject's Commanding Officer's Information

Number	Requirement
1	Enter the First Name of the Commanding Officer.
2	Enter the Middle Initial of the Commanding Officer (if any). Otherwise, enter "NMN".
3	Enter the Last Name of the Commanding Officer.
4	Select the Commanding Officer's Affiliation from the List Provided.
5	Select Pay Grade of the Commanding Officer from the List Provided.
6	Enter the Commanding Officer's E-mail Address.
7	Enter the Commanding Officer's ten-digit Commercial Telephone Number.
8	Select the JAG Consultation from the List Provided.
9	Enter the JAG E-mail Address.
10	Enter the First Name of the JAG.
11	Enter the Middle Initial of the JAG (if any). Otherwise, enter "NMN".
12	Enter the Last Name of the JAG.

## C. Case Information

Number	Requirement					
1	Select the Alcohol Involvement from the List Provided.					
2	<table><tr><td><b>Date the command determined if accused outside DoD's legal authority because of the following:</b>  - Unknown Offender - Accused died or deserted - Accused was a military member that a civilian or foreign authority is prosecuting - Accused is a civilian or foreign national</td><td><b>OR</b></td><td><b>If none of those apply, then the date the command made the decision not to take action because of one of the following:</b>  - Insufficient Evidence - Victim Declined to Participate - Victim Died before Completion of Military Justice Action - Statute of Limitations Expired - Allegation was Unfounded</td><td><b>OR</b></td><td><b>Date the command made a decision to proceed on one of the following four actions:</b>  - Preferral of Court-Martial Charges - Non-Judicial Punishment - Administrative Discharge -Take Adverse Administrative Action Against the Service Member</td></tr></table>	<b>Date the command determined if accused outside DoD's legal authority because of the following:</b>  - Unknown Offender - Accused died or deserted - Accused was a military member that a civilian or foreign authority is prosecuting - Accused is a civilian or foreign national	<b>OR</b>	<b>If none of those apply, then the date the command made the decision not to take action because of one of the following:</b>  - Insufficient Evidence - Victim Declined to Participate - Victim Died before Completion of Military Justice Action - Statute of Limitations Expired - Allegation was Unfounded	<b>OR</b>	<b>Date the command made a decision to proceed on one of the following four actions:</b>  - Preferral of Court-Martial Charges - Non-Judicial Punishment - Administrative Discharge -Take Adverse Administrative Action Against the Service Member
<b>Date the command determined if accused outside DoD's legal authority because of the following:</b>  - Unknown Offender - Accused died or deserted - Accused was a military member that a civilian or foreign authority is prosecuting - Accused is a civilian or foreign national	<b>OR</b>	<b>If none of those apply, then the date the command made the decision not to take action because of one of the following:</b>  - Insufficient Evidence - Victim Declined to Participate - Victim Died before Completion of Military Justice Action - Statute of Limitations Expired - Allegation was Unfounded	<b>OR</b>	<b>Date the command made a decision to proceed on one of the following four actions:</b>  - Preferral of Court-Martial Charges - Non-Judicial Punishment - Administrative Discharge -Take Adverse Administrative Action Against the Service Member		
3	Enter the Case Control Number Provided by the Military Criminal Investigative Organization (MCIO) (e.g., NCIS, OIS, CID).					
4	Enter the Defense Sexual Assault Incident Database (DSAID) Control Number Provided by the Sexual Assault Response Coordinator (SARC) (if known).					
5	List the Date Time Group (DTG) for All Related OPREP-3 Navy Blue or OPREP-3 Navy Unit SITREPS.					

## SEXUAL ASSAULT DISPOSITION REPORT (SADR)

NAVPERS 1752/1 (Rev. 10-2015) PREVIOUS EDITIONS OBSOLETE

Supporting Directive OPNAVINST 1752.1C

6	Enter the RLSO Prosecutorial Merits Memorandum Date <i>(if applicable)</i> .
7	Enter Case Synopsis Details. Do not include any Personally Identifiable Information (PII).

**D. Case Disposition**

Number	Requirement
1	Select ALL Case Disposition(s) that Apply.

**D1(a). Offender Outside DoD's Legal Authority**

Number	Requirement
(1)	Select Specific Reason from the List Provided
(2)	Select Justice System Type from the List Provided
(3)	Select "Yes" or "No", as applicable
(4)	Select from the List Provided if Case was Referred to Non-DoD Investigative Authority
(5)	Select from the List Provided if Referred for Prosecution
(6)	Enter All Civilian Offense(s) Charged
(7)	Enter All Results for Civilian Charges
(8)	Enter All Sentencing in Months <i>(Prison and or Probation)</i>
(9)	Select Disciplinary Action from the List Provided
(10)	Select Characterization of Discharge from the List Provided

**D1(b). Command Action Precluded**

Number	Requirement
(1)	Select Specific Reason from the List Provided
(2)	Select Reason from the List Provided

**D1(c). Court-Martial Charge Preferred**

Number	Requirement
(1)	Select All Sexual Assault Offense(s) Preferred That Apply
(2)	Enter All Non-Sexual Assault Offense(s) Preferred <i>(List all UCMJ articles and specific offense(s); e.g., Art. 128 - Assault Consummated by a Battery.)</i>
(3)	Select "Yes" or "No", as applicable
(4)	Enter Date of Dismissal
(5)	Select Reason for Dismissal from the List Provided
(6)	If Other is Selected, Enter Other Reason
(7)	Select "Yes" or "No", as applicable
(8)	If D1(c)(7) is "Yes", Enter Explanation of How the Case was Disposed (e.g., NJP)
(9)	Select "Yes" or "No", as applicable
(10)	Select Forum Type from the List Provided
(11)	If Referred, Select Specific Article(s) and Enumerated Offense(s) and Findings from the List Provided
(12)	Enter All Non-Sexual Assault Offense(s) Preferred <i>(List all UCMJ articles and specific offense(s); e.g., Art. 128 - Assault Consummated by a Battery.)</i>
(13)	Enter Date of Sentencing or Date of Acquittal
(14)	If Guilty of Lesser Included Offense (LIO), Enter Specific LIO
(15)	Select "Yes" or "No", as applicable
(16)	Enter the Total Number of Days in Confinement
(17)	Select "Yes" or "No", as applicable
(18)	Enter the Total Amount of Pay and Allowances Forfeiture
(19)	Select "Yes" or "No", as applicable
(20)	Enter the Total Amount of Fine(s) in U.S. Dollars

## SEXUAL ASSAULT DISPOSITION REPORT (SADR)

NAVPERS 1752/1 (Rev. 10-2015) PREVIOUS EDITIONS OBSOLETE

Supporting Directive OPNAVINST 1752.1C

(21)	Select "Yes" or "No", as applicable
(22)	Enter the Resultant Grade from the List Provided
(23)	Select Type of Court-Martial Discharge ( <i>if applicable</i> ) from the List Provided
(24)	Select "Yes" or "No", as applicable
(25)	Select the Restriction Limit from the List Provided
(26)	Enter the Total Number of Days of Restriction Awarded
(27)	Select "Yes" or "No", as applicable
(28)	Enter the Total Number of Days of Hard Labor Awarded
(29)	Select "Yes" or "No", as applicable
(30)	Enter the Total Number of Days of Extra Duty Awarded
(31)	Select "Yes" or "No", as applicable
(32)	Select Character of Discharge from the List Provided

**D1(d). Non-Judicial Punishment (NJP) (Article 15, UCMJ)**

Number	Requirement
(1)	Select All Alleged Sexual Assault Offense(s) Preferred ( <i>Select Only Those Offenses That Were Actually Charged At NJP</i> )
(2)	Enter All Alleged Non-Sexual Assault Offense(s) ( <i>List all UCMJ articles and specific offense(s); e.g., Art. 128 - Assault Consummated by a Battery.</i> )
(3)	Enter the Date NJP Punishment was Awarded or NJP Not Rendered
(4)	Select "Yes" or "No", as applicable
(5)	If "Yes" is selected in D1d(4), Select from the List Provided
(6)	Select "Yes" or "No", as applicable
(7)	Select "Yes" or "No", as applicable
(8)	Enter the Total Amount of Pay and Allowances Forfeiture
(9)	Select "Yes" or "No", as applicable
(10)	Enter the Total Amount of Fine(s) in U.S. Dollars
(11)	Select "Yes" or "No", as applicable
(12)	Enter the Resultant Grade from the List Provided
(13)	Select "Yes" or "No", as applicable
(14)	Select the Restriction Limit from the List Provided
(15)	Enter the Total Number of Days of Restriction Awarded
(16)	Select "Yes" or "No", as applicable
(17)	Enter the Total Number of Days of Hard Labor Awarded
(18)	Select "Yes" or "No", as applicable
(19)	Enter the Total Number of Days of Extra Duty Awarded
(20)	Select "Yes" or "No", as applicable

**D1(f). Other Adverse Administrative Action**

Number	Requirement
(1)	Select Type of Offense for the Basis of the Separation from the List Provided
(2)	Select Action Taken from the List Provided

(3)	Enter Offense(s)
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# **U.S. Marine Corps Sexual Assault Disposition Report (SADR)**

**Agency:** Marine Corps Sexual Assault Prevention and Response Program

**Authority:** ALNAV 061/14 (Aug. 2014), LSAM, Para 3115

**Principal Purpose:** Used for reporting disposition information for sexual assault offenses only. The form captures information to support reporting data required in DSAID and the annual SAPRO report.

- The form is similar to the Navy SADR, but it is not as interactive. Detailed instructions are provided as part of the form. There is a requirement for a case synopsis and an option to provide additional details regarding the disposition decision.
- The commander of the subject of a sexual assault allegation shall submit the SADR. However, where the subject is unknown or not subject to the UCMJ, then the victim's commander shall complete the form. The SADR is submitted via email to NCIS within two business days of final disposition of the case.
- Cognizant SJAs shall ensure legal review of the USMC SADR Form prior to submission and shall maintain a copy of the completed USMC SADR Form.

# USMC SEXUAL ASSAULT DISPOSITION REPORT (SADR)

## A. SUBJECT'S INFORMATION: IF NOT KNOWN, ENTER "UNKNOWN!"

1. FIRST NAME			2. MI	3. LAST NAME		
4. AFFILIATION	5. RANK	6. COMMAND (1stBN, 4th Marines, 1stMARDIV)		7. WAS SUBJECT TRANSFERRED FROM THE COMMAND? <div style="text-align: center;"><input type="radio"/> YES    <input type="radio"/> NO    <input type="radio"/> N/A</div>		
8. WAS PRETRIAL CONFINEMENT IMPOSED? <div style="text-align: center;"><input type="radio"/> YES    <input type="radio"/> NO</div>				9. DATE PRETRIAL CONFINEMENT BEGAN (MM/DD/YYYY)		
10. WAS THE SUBJECT REFERRED TO ANY OF THE FOLLOWING AS A RESULT OF THIS INCIDENT? (SELECT ALL THAT APPLY): <input type="checkbox"/> MEDICAL <input type="checkbox"/> MENTAL HEALTH <input type="checkbox"/> CHAPLAIN/SPIRITUAL SUPPORT <input type="checkbox"/> ALCOHOL/DRUG COUNSELING <input type="checkbox"/> NONE <input type="checkbox"/> IF OTHER, ENTER INFORMATION AS APPROPRIATE: <div style="border: 1px solid black; width: 400px; height: 20px; display: inline-block;"></div>						
11. WAS THE SUBJECT PREVIOUSLY ACCUSED OF A SUBSTANTIATED SEXUAL ASSAULT? <div style="text-align: center;"><input type="radio"/> Yes    <input type="radio"/> No    <div style="border: 1px solid black; padding: 0 5px;">?</div></div>			12. WAS PREVIOUS ALLEGATION AT CURRENT OR PREVIOUS COMMAND? CURRENT COMMAND		13. WAS THE SUBJECT ADMITTED TO ARMED FORCES WITH WAIVER FOR PRIOR SEXUAL MISCONDUCT? <div style="text-align: center;"><input type="radio"/> YES    <input type="radio"/> NO</div>	

## B. SEXUAL ASSAULT INITIAL DISPOSITION AUTHORITY INFORMATION: (Or equivalent commanding officer for the victim if the subject is unknown, or a civilian or foreign national not subject to the UCMJ)

1. FIRST NAME			2. MI	3. LAST NAME		
4. RANK	5. UNIT				6. EMAIL ADDRESS	
B7: SADR FORM REVIEWED BY: Enter name and e-mail of Judge Advocate who reviewed this form.						
1. FIRST NAME	2. MI	3. LAST NAME	4. RANK	5. UNIT	6. E-MAIL ADDRESS	

## C. CASE INFORMATION:

1. WAS ALCOHOL A FACTOR IN THE INCIDENT?		2. PROSECUTION/NON-PROSECUTION DATE (for penetration cases ONLY) (MM/DD/YYYY) <div style="text-align: center;"><div style="border: 1px solid black; padding: 0 5px;">?</div></div>	
3. DOD ACTION DECISION DATE (MM/DD/YYYY) <div style="text-align: center;"><div style="border: 1px solid black; padding: 0 5px;">?</div></div>		4. NCIS/MCIO CASE CONTROL NUMBER (REQUIRED)	5. DSAID CONTROL NUMBER (REQUIRED)
6. LIST ALL RELATED OPREP-3			

7. CASE SYNOPSIS (E.G., COURT-MARTIAL CHARGE PREFERRED: Subject allegedly raped victim in an off-base apartment by holding the victim down and penetrating her anus with his penis. Subject was interrogated and stated that the sexual act was consensual. An Article 32 hearing was held and the Investigating Officer recommended dismissal of all charges. The SA-IDA chose to dismiss all charges based on the Investigating Officer and Staff Judge Advocate's recommendations.) 

?

**Do NOT include any PII in the synopsis, but only a brief description of the pertinent facts of the case. DO NOT include the charges or punishment for the case within the synopsis block as that level of detail applicable to the individual case outcome will be provided in other sections of this form.**

## USMC SEXUAL ASSAULT DISPOSITION REPORT (SADR)

**D. CASE DISPOSITION:** Select court-martial charge preferred as the ultimate case disposition if court-martial charges were preferred and subsequently resulted in withdrawal and dismissal with no further action, non-judicial punishment (NJP), administrative discharge, other adverse administrative action, etc. Select NJP (Article 15, UCMJ) as the ultimate case disposition if the accused was awarded NJP (Article 15, UCMJ) and, subsequently, processed administratively or received other adverse administrative action.

**1. CASE DISPOSITION (SELECT ALL THAT APPLY):**

- ☐ 1a. OFFENDER OUTSIDE DOD'S LEGAL AUTHORITY      ☐ 1d. NON-JUDICIAL PUNISHMENT (ARTICLE 15, UCMJ)      ☐ 1g. NONE  
☐ 1b. COMMAND ACTION PRECLUDED      ☐ 1e. ADMINISTRATIVE DISCHARGE/RESIGNATION NOT IN LIEU OF TRIAL  
☐ 1c. COURT-MARTIAL CHARGE PREFERRED      ☐ 1f. OTHER ADVERSE ADMINISTRATIVE ACTION

UPON SELECTING CASE DISPOSITION ABOVE, COMPLETE ALL APPLICABLE SECTION(S) BELOW. LEAVE NON-APPLICABLE SECTIONS BLANK.

**1a. OFFENDER OUTSIDE DOD'S LEGAL AUTHORITY:**

**1. SPECIFIC REASON CASE IS CONSIDERED OUTSIDE OF DOD'S AUTHORITY (SELECT ONE):**

- ☐ UNKNOWN OFFENDER  
☐ OFFENDER IS A CIVILIAN OR FOREIGN NATIONAL (IF SELECTED, MUST COMPLETE SECTIONS D1a.2 - D1a.8)  
☐ MILITARY MEMBER THAT CIVILIAN OR FOREIGN AUTHORITY IS PROSECUTING (IF SELECTED, MUST COMPLETE SECTIONS D1a.2 - D1a.10)  
☐ SUBJECT DIED OR DESERTED

**2. JUSTICE SYSTEM TYPE**

- ☐ US      ☐ FOREIGN

**3. WAS CASE REFERRED TO NON-DOD INVESTIGATIVE AUTHORITY?**

- ☐ YES      ☐ NO

**4. IF CASE WAS REFERRED TO NON-DOD INVESTIGATIVE AUTHORITY, SELECT ONE:**

**5. IF REFERRED FOR PROSECUTION (SELECT ONE):**

**6. CIVILIAN OFFENSE(S) CHARGED**

**7. RESULTS OF TRIAL**

**8. SENTENCE (I.E., PROVIDE PRISON AND/OR PROBATION IN MONTHS)**

**9. SEX OFFENDER REGISTRATION?**

**10. DISCIPLINARY ACTION TAKEN AGAINST SUBJECT BY SERVICE**

**11. SELECT THE CHARACTERIZATION OF DISCHARGE**

**1b. COMMAND ACTION PRECLUDED:**

**1. SPECIFIC REASON COMMAND ACTION PRECLUDED (SELECT ONE):**

- ☐ UNFOUNDED BY COMMAND <sup>1</sup>      IF SO, SELECT ONE (SEE DEFINITION BELOW)      ☐ FALSE      ☐ BASELESS  
☐ VICTIM DECLINED TO PARTICIPATE IN THE MILITARY JUSTICE ACTION  
☐ INSUFFICIENT EVIDENCE TO PROSECUTE <sup>2</sup>  
☐ STATUTE OF LIMITATIONS HAS EXPIRED  
☐ VICTIM DIED BEFORE COMPLETION OF MILITARY JUSTICE ACTION

**1 - Command determination that the allegation did not occur nor was attempted. The case was either false or baseless. See definitions below:**

**False:** Evidence obtained through an investigation shows that an offense was not committed nor attempted by the subject of the investigation.

**Baseless:** Evidence obtained through an investigation shows that alleged offense did not meet at least one of the required elements of a UCMJ offense constituting the SAPR definition of sexual assault or was improperly reported as a sexual assault.

**2 - If there was insufficient evidence to prosecute due to victim declining to participate, select "Victim Declined to Participate in the Military Justice Action".**

# USMC SEXUAL ASSAULT DISPOSITION REPORT (SADR)

1c. COURT-MARTIAL CHARGE PREFERRED: (USE PAGE 5 FOR ADDITIONAL SPACE IF NEEDED)

1. SEXUAL ASSAULT OFFENSE(S) PREFERRED (SELECT ALL THAT APPLY):

- ☐ Rape (Art.120)
- ☐ Sexual Assault (Art.120)
- ☐ Aggravated Sexual Contact (Art.120)
- ☐ Abusive Sexual Contact (Art.120)
- ☐ Non-Consensual Sodomy (Art.125)
- ☐ Aggravated Sexual Assault (Art.120)
- ☐ Wrongful Sexual Contact (Art.120)
- ☐ Attempts to Commit Offenses (Art. 80)

2. NON-SEXUAL ASSAULT OFFENSE(S) PREFERRED (LIST ALL UCMJ ARTICLES AND SPECIFIC OFFENSE(S) (e.g. Art. 128 - Assault Consummated by a Battery)

3. DATE OF PREFERRAL (MM/DD/YYYY)

4. WERE **ALL** CHARGES DISMISSED FOLLOWING AN ARTICLE 32 INVESTIGATION? ☐ YES ☐ NO

5. IF YES, SELECT REASON FOR DISMISSAL FOLLOWING ARTICLE 32 INVESTIGATION

4.A DATE OF DISMISSAL (If ALL charges dismissed) (MM/DD/YYYY)

6. IF "OTHER" SELECTED IN D1c.4 ABOVE, PROVIDE THE REASON

7. IF DISMISSED FOLLOWING AN ARTICLE 32, DID THE COMMAND DISPOSE OF THE CASE IN ANY OTHER WAY? ☐ YES ☐ NO

8. IF "YES": SELECTED IN D1c.6, EXPLAIN HOW THE CASE WAS DISPOSED OF (e.g., NJP)

9. WERE CHARGES REFERRED TO COURT-MARTIAL? ☐ YES ☐ NO

10. FORUM TYPE  
☐ SCM ☐ SPCM ☐ GCM

11. IF REFERRED, LIST SPECIFIC ARTICLE(S) AND ENUMERATED OFFENSE(S) AND FINDINGS

G   NG   G-LIO   WD   WD&D

- |  |                          |                          |                          |                          |                          |
|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> Sexual Assault (Art.120)              | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Rape (Art.120)                        | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Aggravated Sexual Contact (Art.120)   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Abusive Sexual Contact (Art.120)      | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Non-Consensual Sodomy (Art.125)       | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Aggravated Sexual Assault (Art.120)   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Wrongful Sexual Contact (Art.120)     | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Attempts to Commit Offenses (Art. 80) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

<b>G</b>	Guilty
<b>NG</b>	Not Guilty
<b>G-LIO</b>	Guilty Lesser Included Offense
<b>WD</b>	Withdrawn
<b>WD&amp;D</b>	Withdrawn and Dismissed

12. NON-SEXUAL ASSAULT OFFENSE(S) REFERRED (LIST ALL UCMJ ARTICLES AND SPECIFIC OFFENSE(S) (e.g. Art. 128 - Assault Consummated by a Battery)

13. DATE OF SENTENCING (MM/DD/YYYY)

OR

14. DATE OF ACQUITTAL (MM/DD/YYYY)

15. SEX OFFENDER REGISTRATION?

16. IF GUILTY TO LESSER INCLUDED OFFENSE (LIO), LIST SPECIFIC LIO

17. CONFINEMENT  
☐ YES ☐ NO

18. LENGTH OF CONFINEMENT

19. FORFEITURE

☐ YES ☐ NO

20. PERCENTAGE OF PAY AND ALLOWANCES FORFEITED

21. FINE(S)

☐ YES ☐ NO

22. TOTAL AMOUNT OF FINE(S) (USD (\$) ###.##)

23. REDUCTION IN GRADE

☐ YES ☐ NO

24. REDUCED TO:

25. TYPE OF COURT-MARTIAL DISCHARGE (If applicable)

26. RESTRICTION AWARDED

☐ YES ☐ NO

27. RESTRICTION LIMIT

28. LENGTH OF RESTRICTION (DAYS)

29. HARD LABOR AWARDED

☐ YES ☐ NO

30. LENGTH OF HARD LABOR (DAYS)

31. EXTRA DUTY AWARDED

☐ YES ☐ NO

32. LENGTH OF EXTRA DUTY (DAYS)

33. DID THIS CASE RESULT IN RESIGNATION IN LIEU OF TRIAL/ SEPARATION IN LIEU OF TRIAL?

☐ YES ☐ NO

34. CHARACTERIZATION OF SEPARATION

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# USMC SEXUAL ASSAULT DISPOSITION REPORT (SADR)

## 1d. NON-JUDICIAL PUNISHMENT (ARTICLE 15, UCMJ):

1. ALLEGED SEXUAL ASSAULT OFFENSE(S) (SELECT ALL THAT APPLY)

- ☐ Rape (Art.120)
- ☐ Sexual Assault (Art.120)
- ☐ Aggravated Sexual Contact (Art.120)
- ☐ Abusive Sexual Contact (Art.120)
- ☐ Non-Consensual Sodomy (Art.125)
- ☐ Aggravated Sexual Assault (Art.120)
- ☐ Wrongful Sexual Contact (Art.120)
- ☐ Attempts to Commit Offenses (Art. 80)

2. ALLEGED NON-SEXUAL ASSAULT OFFENSE(S) (LIST ALL ARTICLES AND SPECIFIC OFFENSE(S) (e.g. Art. 128 - Assault Consummated by a Battery)

3. DATE OF NJP HEARING (MM/DD/YYYY)

4. WAS THE NJP HELD FOLLOWING DISMISSAL OF PREFERRED CHARGES?

☐ YES ☐ NO

5. IF "YES", SELECT ONE OF THE FOLLOWING AS APPROPRIATE

6. PUNISHMENT IMPOSED

☐ YES ☐ NO

**IF PUNISHMENT IMPOSED, COMPLETE APPLICABLE ITEMS 7-20 BELOW.**

7. FORFEITURE

☐ YES ☐ NO

8. PERCENTAGE OF PAY AND ALLOWANCES FORFEITED

9. FINE(S)

☐ YES ☐ NO

10. TOTAL AMOUNT OF FINE(S) (USD (\$) ###.##)

11. REDUCTION IN GRADE

☐ YES ☐ NO

12. REDUCED TO

13. RESTRICTION AWARDED

☐ YES ☐ NO

14. RESTRICTION LIMIT

15. LENGTH OF RESTRICTION (DAYS)

16. HARD LABOR AWARDED

☐ YES ☐ NO

17. LENGTH OF HARD LABOR (DAYS)

18. EXTRA DUTY AWARDED

☐ YES ☐ NO

19. LENGTH OF EXTRA DUTY (DAYS)

20. CORRECTIONAL CUSTODY (NJP ONLY) AWARDED

☐ YES ☐ NO

## 1e. ADMINISTRATIVE DISCHARGE/RESIGNATION **NOT** IN LIEU OF TRIAL:

1. PROVIDE BASIS FOR SEPARATION (LIST MARCORSEPMAN SECTION)

2. TYPE OF OFFENSE FOR THE BASIS OF THE SEPARATION

3. CHARACTERIZATION OF DISCHARGE

4. DATE SEPARATION WAS ORDERED (MM/DD/YYYY)

## 1f. OTHER ADVERSE ADMINISTRATIVE ACTION:

1. TYPE OF OFFENSE

2. TYPE OF ACTION

3. REASON(S) FOR ADMINISTRATIVE ACTION

4. DATE OF ACTION (MM/DD/YYYY)

### **DO NOT INCLUDE PERSONALLY IDENTIFIABLE INFORMATION (PII).**

The Commander of the subject of a sexual assault allegation shall submit the SADR. However, where the subject is unknown or not subject to the UCMJ, then the victim's Commander shall complete this form. Submit the SADR via e-mail to: JAD\_SADR@usmc.mil; NCISSAPR@ncis.navy.mil and NCIS\_SAPR@navy.mil within two business days of final disposition of the case.

Submit by E-Mail

A copy of the report shall also be provided to the local MCIO Special Agent and the SARC responsible.

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USMC SEXUAL ASSAULT DISPOSITION REPORT (SADR)

**E. ADDITIONAL COMMENTS: (SPECIFY BLOCK(S))**

NUMBER	REQUIREMENT
<b>A. SUBJECT'S INFORMATION</b>	
1	ENTER FIRST NAME OF THE SUBJECT. IF NOT KNOWN, ENTER "UNKNOWN".
2	ENTER MIDDLE INITIAL OF THE SUBJECT (IF ANY). OTHERWISE, ENTER "NMN".
3	ENTER LAST NAME OF THE SUBJECT.
4	INDICATE THE SUBJECT'S AFFILIATION FROM THE LIST PROVIDED (ARMY, NAVY, AIR FORCE, MARINE CORPS, COAST GUARD, DOD, NOAA, PUBLIC HEALTH, UNKNOWN).
5	INDICATE RANK OF THE SUBJECT FROM THE LIST PROVIDED.
6	INDICATE YES OR NO, AS APPLICABLE.
7	INDICATE YES OR NO, AS APPLICABLE.
8	ENTER THE DATE PRETRIAL CONFINEMENT BEGAN, IF APPLICABLE.
9	SELECT ALL THAT APPLY FROM THE LIST PROVIDED: MEDICAL, MENTAL HEALTH, CHAPLAIN/SPIRITUAL SUPPORT, ALCOHOL/DRUG COUNSELING, OTHER. IF "OTHER" SELECTED, ENTER INFORMATION AS APPROPRIATE.
10	INDICATE YES OR NO, AS APPLICABLE. SEE NOTE #1 BELOW.
11	INDICATE CURRENT COMMAND, PREVIOUS COMMAND, OR UNKNOWN, AS APPLICABLE.
12	INDICATE YES OR NO, AS APPLICABLE.
<b>B. SEXUAL ASSAULT INITIAL DISPOSITION AUTHORITY INFORMATION</b>	
1	ENTER FIRST NAME OF THE SAIDA.
2	ENTER MIDDLE INITIAL (IF ANY) OF THE SAIDA. OTHERWISE, ENTER "NMN".
3	ENTER LAST NAME OF THE SAIDA.
4	INDICATE RANK OF THE CO FROM THE DROP-DOWN LIST PROVIDED ON THE FORM.
5	UNIT IF SAIDA.
6	EMAIL ADDRESS OF SAIDA.
<b>B7. SADR FORM REVIEWED BY</b>	
1	ENTER FIRST NAME OF JUDGE ADVOCATE
2	ENTER MIDDLE INITIAL (IF ANY) JUDGE ADVOCATE
3	ENTER LAST NAME JUDGE ADVOCATE
4	INDICATE RANK OF JUDGE ADVOCATE FROM DROP-DOWN MENU PROVIDED
5	ENTER UNIT OF JUDGEADVOCATE
6	ENTER EMAIL ADDRESS OF JUDGE ADVOCATE
<b>C. CASE INFORMATION</b>	
1	INDICATE ALCOHOL INVOLVEMENT FROM THE LIST PROVIDED (VICTIM (SINGLE VICTIM), SUBJECT (SINGLE SUBJECT), BOTH VICTIM AND SUBJECT, ALL VICTIMS (MULTIPLE VICTIMS), ALL SUBJECTS (MULTIPLE SUBJECTS), ALL VICTIMS AND SUBJECTS (MULTIPLE PARTIES TO THE CRIME), INVOLVED, BUT NOT SPECIFIED, UNKNOWN).
2	<div> <div> ENTER THE DATE DOD ACTION WAS DECIDED UPON. </div> <div> <b>Date the command determined if accused outside DoD's legal authority because of the following:</b> <ul style="list-style-type: none"> <li>- Unknown offender</li> <li>- The accused died or deserted</li> <li>- The accused was a military member that a civilian or foreign authority is prosecuting</li> <li>- The accused is a civilian or foreign national</li> </ul> </div> <div> <b>If none of those apply, then the date the command made the decision not to take action because of one of the following actions:</b> <ul style="list-style-type: none"> <li>- There was insufficient evidence</li> <li>- The victim declined to participate</li> <li>- The victim died before completion of the military justice action</li> <li>- The statute of limitations had expired</li> <li>- The allegation was unfounded</li> </ul> </div> <div> <b>The date the command made a decision to proceed on one of the four actions:</b> <ul style="list-style-type: none"> <li>- Preferral of Court Martial charges</li> <li>- Nonjudicial punishment</li> <li>- Administrative discharge</li> <li>- Take adverse administrative action against the service member</li> </ul> </div> </div>
3	ENTER THE CASE CONTROL NUMBER PROVIDED BY THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATION (MCIO) (E.G., NCIS, OIS, CID).
4	ENTER THE DEFENSE SEXUAL ASSAULT INCIDENT DATABASE (D SAID) CONTROL NUMBER PROVIDED BY THE SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) (IF KNOWN).
5	LIST THE DTG FOR ALL RELATED OPREP-3 NAVY BLUE OR OPREP-3 NAVY UNIT SITREPS.
6	ENTER CASE SYNOPSIS DETAILS. DO NOT INCLUDE PII.
<b>D. CASE DISPOSITION</b>	
1	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: OFFENDER OUTSIDE DOD'S LEGAL AUTHORITY, COMMAND ACTION PRECLUDED, COURT-MARTIAL CHARGE PREFERRED, NON-JUDICIAL PUNISHMENT (ARTICLE 15, UCMJ), ADMINISTRATIVE DISCHARGE/RESIGNATION NOT IN LIEU OF TRIAL. COMPLETE THE CORRESPONDING BELOW SECTION(S). LEAVE NON-APPLICABLE SECTIONS BLANK.
<b>1a. OFFENDER OUTSIDE DOD'S LEGAL AUTHORITY</b>	
1	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: UNKNOWN OFFENDER, OFFENDER IS A CIVILIAN OR FOREIGN NATIONAL, MILITARY MEMBER THAT CIVILIAN OR FOREIGN AUTHORITY IS PROSECUTING, OR SUBJECT DIED OR DESERTED.
2	SELECT US OR FOREIGN, AS APPLICABLE.
3	INDICATE YES OR NO, AS APPLICABLE.
4	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: ALLEGATION UNFOUNDED, CASE ADMINISTRATIVELY CLOSED, REFERRED FOR PROSECUTION, NO ACTION BY POLICE.
5	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: CASE DECLINED FOR PROSECUTION, DISMISSED, CONVICTED, ACQUITTED, PENDING, NO ACTION.
6	LIST ALL CIVILIAN OFFENSE(S) CHARGED.
7	LIST ALL RESULTS FOR CIVILIAN CHARGES.
8	LIST ALL SENTENCING RECEIVED TO INCLUDE MONTHS OF PRISON AND/OR PROBATION .

INSTRUCTIONS FOR COMPLETING THE USMC SEXUAL ASSAULT DISPOSITION REPORT (SADR)	
9	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: COURT-MARTIAL CHARGE PREFERRED (INITIATED), COURT-MARTIAL CHARGE PREFERRED FOR NON-SEXUAL ASSAULT OFFENSE, NON-JUDICIAL PUNISHMENT (NJP), NJP FOR NON-SEXUAL ASSAULT OFFENSE, ADMINISTRATIVE DISCHARGE, ADMINISTRATIVE DISCHARGE FOR NON-SEXUAL ASSAULT OFFENSE, OTHER ADVERSE ADMINISTRATIVE ACTION, OTHER ADVERSE ADMINISTRATIVE ACTION FOR NON-SEXUAL ASSAULT OFFENSE, CADET/MIDSHIPMEN DISCIPLINARY SYSTEM ACTION.
10	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: UNDER OTHER THAN HONORABLE CONDITIONS (UOTH), GENERAL, HONORABLE, UNCHARACTERIZED, NONE.
<b>1b. COMMAND ACTION PRECLUDED</b>	
1	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: UNFOUNDED BY COMMAND, VICTIM DECLINED TO PARTICIPATE IN THE MILITARY JUSTICE ACTION, INSUFFICIENT EVIDENCE TO PROSECUTE, STATUTE OF LIMITATIONS HAS EXPIRED, OR VICTIM DIED BEFORE COMPLETION OF MILITARY JUSTICE ACTION.
<b>1c. COURT-MARTIAL CHARGE PREFERRED</b>	
1	SELECT ONE OF THE FOLLOWING REASONS AS APPROPRIATE: RAPE (ART 120), AGGRAVATED SEXUAL ASSAULT (ART 120), AGGRAVATED SEXUAL CONTACT (ART 120), ABUSIVE SEXUAL CONTACT (ART 120), WRONGFUL SEXUAL CONTACT (ART 120), INDECENT ASSAULT (ART 134), NON-CONSENSUAL SODOMY (ART 125), ATTEMPTS TO COMMIT OFFENSES (ART 80), SEXUAL ASSAULT (ART 120).
2	LIST ALL NON-SEXUAL ASSAULT ARTICLES AND OFFENSE(S) PREFERRED (E.G., ART 128 - ASSAULT CONSUMMATED BY BATTERY).
3	DATE OF PREFERRAL
4	INDICATE YES OR NO, AS APPLICABLE.
4.A	IF ALL CHARGES WERE DISMISSED, ENTER DATE OF DISMISSAL.
5	SELECT ONE OF THE FOLLOWING REASONS AS APPROPRIATE: EVIDENCE DID NOT SUPPORT A RECOMMENDATION FOR PROSECUTION, OTHER.
6	IF "OTHER" SELECTED IN D1c4, ENTER OTHER REASON FOR ARTICLE 32 DISMISSAL
7	INDICATE YES OR NO, AS APPLICABLE.
8	IF "YES" SELECTED IN D1c6, INDICATE HOW THE COMMAND DISPOSED OF THE CASE IF DISMISSED AFTER ARTICLE 32.
9	INDICATE YES OR NO, AS APPLICABLE.
10	SELECT THE APPROPRIATE COURT-MARTIAL FORUM FROM THE LIST PROVIDED: SCM (SUMMARY COURT-MARTIAL), SPCM (SPECIAL COURT-MARTIAL), GCM (GENERAL COURT-MARTIAL).
11	IF REFERRED, LIST SPECIFIC ARTICLE(S) AND ENUMERATED OFFENSE(S) AND FINDINGS.
12	ENTER DATE OF SENTENCE, IF ANY.
13	ENTER DATE OF AQUITTAL, IF APPLICABLE.
14	LIST ALL NON-SEXUAL ASSAULT ARTICLES AND OFFENSE(S) REFERRED (E.G., ART 128 - ASSAULT CONSUMMATED BY BATTERY)
15	FOR GUILTY TO LESSER INCLUDED OFFENSE (LIO) OFFENSES, LIST SPECIFIC LIO.
16	INDICATE YES OR NO, AS APPLICABLE REGARDING CONFINEMENT.
17	INDICATE THE TOTAL NUMBER OF DAYS OF CONFINEMENT
18	INDICATE YES OR NO, AS APPLICABLE REGARDING FORFEITURE.
19	ENTER THE PERCENTAGE OF PAY AND ALLOWANCE FORFEITED.
20	INDICATE YES OR NO, AS APPLICABLE REGARDING FINE(S).
21	ENTER THE TOTAL AMOUNT (U.S. DOLLARS) OF FINE(S) LEVIED.
22	INDICATE YES OR NO, AS APPLICABLE REGARDING REDUCTION IN GRADE.
23	INDICATE THE RESULTANT GRADE FROM THE LIST PROVIDED.
24	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: DD - DISHONORABLE, BCD - BAD CONDUCT DISCHARGE, DISMISSAL, NONE.
25	INDICATE YES OR NO, AS APPLICABLE REGARDING RESTRICTION.
26	INDICATE THE MAXIMUM AMOUNT OF RESTRICTION ALLOWED.
27	INDICATE THE TOTAL NUMBER OF DAYS OF RESTRICTION AWARDED.
28	INDICATE YES OR NO, AS APPLICABLE REGARDING HARD LABOR.
29	ENTER THE TOTAL NUMBER OF DAYS OF HARD LABOR AWARDED.
30	INDICATE YES OR NO, AS APPLICABLE REGARDING EXTRA DUTY.
31	ENTER THE TOTAL NUMBER OF DAYS OF EXTRA DUTY AWARDED.
32	INDICATE IF THE CASE RESULTED IN RESIGNATION IN LIEU OF TRIAL/SEPARATION IN LIEU OF TRIAL.
33	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: HONORABLE, GENERAL (UNDER HONORABLE CONDITIONS), OTHER THAN HONORABLE (OTH) CONDITIONS.

**1d. NON-JUDICIAL PUNISHMENT (NJP) (ARTICLE 15, UCMJ)**

1	SELECT ONE OF THE FOLLOWING REASONS AS APPROPRIATE: RAPE (ART 120), SEXUAL ASSAULT (ART 120), AGGRAVATED SEXUAL CONTACT (ART 120), ABUSIVE SEXUAL CONTACT (ART 120), NON-CONSENSUAL SODOMY (ART 125), AGGRAVATED SEXUAL ASSAULT (ART 120), WRONGFUL SEXUAL CONTACT (ART 120), ATTEMPTS TO COMMIT OFFENSES (ART 80).
2	LIST ALL NON-SEXUAL ASSAULT OFFENSE(S) THAT APPLY.
3	ENTER THE DATE NJP PUNISHMENT WAS AWARDED OR NJP NOT RENDERED.
4	INDICATE YES OR NO, AS APPLICABLE REGARDING NJP BEING HELD FOLLOWING DISMISSAL OF PREFERRED CHARGES.
5	IF "YES" SELECTED IN D1d4, SELECT ONE OF THE FOLLOWING AS APPROPRIATE: POST-PREFERRAL, PRE-ARTICLE 32, POST-ARTICLE 32.
6	INDICATE YES OR NO, AS APPLICABLE REGARDING PUNISHMENT BEING IMPOSED.
7	INDICATE YES OR NO, AS APPLICABLE REGARDING FORFEITURE.
8	ENTER THE TOTAL AMOUNT OF PAY AND ALLOWANCE FORFEITED.
9	INDICATE YES OR NO, AS APPLICABLE REGARDING FINE(S).
10	ENTER THE TOTAL AMOUNT (U.S. DOLLARS) OF FINE(S) LEVIED.
11	INDICATE YES OR NO, AS APPLICABLE REGARDING REDUCTION IN GRADE.
12	INDICATE THE RESULTANT GRADE FROM THE LIST PROVIDED.
13	INDICATE YES OR NO, AS APPLICABLE REGARDING RESTRICTION.
14	INDICATE THE MAXIMUM AMOUNT OF RESTRICTION ALLOWED.
15	INDICATE THE TOTAL NUMBER OF DAYS OF RESTRICTION AWARDED.
16	INDICATE YES OR NO, AS APPLICABLE REGARDING HARD LABOR.
17	ENTER THE TOTAL NUMBER OF DAYS OF HARD LABOR AWARDED.
18	INDICATE YES OR NO, AS APPLICABLE REGARDING EXTRA DUTY.
19	ENTER THE TOTAL NUMBER OF DAYS OF EXTRA DUTY AWARDED.
20	INDICATE YES OR NO, AS APPLICABLE REGARDING CORRECTIONAL CUSTODY (NJP ONLY).

**1e. ADMINISTRATIVE DISCHARGE/RESIGNATION NOT IN LIEU OF TRIAL**

1	LIST ALL MARCORSEPMAN SECTION(S) USED FOR THE BASIS OF SEPARATION, AS APPLICABLE.
2	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: SEXUAL ASSAULT OFFENSE, NON-SEXUAL ASSAULT OFFENSE.
3	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: HONORABLE, GENERAL (UNDER HONORABLE CONDITIONS), OTHER THAN HONORABLE (OTH) CONDITIONS.
4	ENTER DATE SEPARATION WAS ORDERED.

**1f. OTHER ADVERSE ADMINISTRATIVE ACTION**

1	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: SEXUAL ASSAULT OFFENSE, NON-SEXUAL ASSAULT OFFENSE.
2	SELECT ONE OF THE FOLLOWING AS APPROPRIATE: LETTER OF INSTRUCTION (LOI), LETTER OF REPRIMAND (LOR), LETTER OF COUNSELING (LOC), CADET/MIDSHIPMAN DISCIPLINARY SYSTEM, OTHER.
3	INDICATE REASON(S) (OFFENSE(S)) OTHER ADVERSE ADMINISTRATIVE ACTION WAS TAKEN
4	ENTER TYPE OF ADMINISTRATIVE ACTION.

**NOTE #1 - A10:**

Unrestricted Report that was investigated by an MCIO, provided to the appropriate military command for consideration of action, and found to have sufficient evidence to support the command's action against the subject (DoDI 6495.02).

**NOTE #2 - C2:**

Date the command determined if accused outside DoD's legal authority because of the following:

- Unknown offender
- The accused died or deserted
- The accused was a military member that a civilian or foreign authority is prosecuting
- The accused is a civilian or foreign national

OR,

If none of those apply, then the date the command made the decision not to take action because of one of the following actions:

- There was insufficient evidence
- The victim declined to participate
- The victim died before completion of the military justice action
- The statute of limitations had expired
- The allegation was unfounded

OR,

The date the command made a decision to proceed on one of the four actions:

- Preferral of Court Martial charges
- Nonjudicial punishment
- Administrative discharge
- Take adverse administrative action against the service member

# **U.S. Air Force Command Disposition Documentation**

**Agency:** Air Force Legal Operations Agency (AFLOA)

**Authority:** Air Force Instruction (AFI) 51-201, “Administration of Military Justice”

**Principal Purpose:** Military Justice Source Document

- The CRWG frequently sees memorandums similar to the attached template in the Air Force investigative case files. Template General Court-Martial Convening Authority’s Review of Initial Disposition Authority’s Decision for Sexual Assault Allegations (Attachment 3, Figure A3.12).
- There is no other standardized documentation of commander disposition actions taken routinely found in the investigative files reviewed by the CRWG.
- Effective 27 June 2013, the Under Secretary of the Air Force directed that the Special Court-Martial Convening Authority with initial disposition authority provide the General Court-Martial Convening Authority in the grade of O-7 or above written notice of the initial disposition within 30 days following the date of the initial disposition decision, with respect to rape, sexual assault, forcible sodomy and attempts to commit these offenses. (AFI 51-201, para. 3.7.5.1.)
- When disposition of the alleged offense is complete, the General Court-Martial Convening Authority signs the written review of the Initial Disposition Authority's action. This responsibility is not delegable.
- This review is maintained by Air Force Office of Special Investigations or Security Forces Office of Investigations. (AFI 51-201, para.3.7.5.2.)

Figure A3.12. Template General Court-Martial Convening Authority's Review of Initial  
Disposition Authority's Decision for Sexual Assault Allegations

(Date)

MEMORANDUM FOR ALL REVIEWING AUTHORITIES

FROM: [General Court-Martial Convening Authority]

SUBJECT: Report of Disposition for Covered Sexual Assault Allegation – [Name of Accused]

On [date], the allegation(s) of [describe the allegations] against [Accused] resulted in [describe the action (court-martial, nonjudicial punishment, administrative discharge, Letter of Reprimand, etc.) and the result of the action (findings and sentence at court-martial, Nonjudicial Punishment result, type of admin discharge, etc.)] I have reviewed this disposition pursuant to the Under Secretary of the Air Force's policy memorandum, effective 27 June 2013, requiring General Court-Martial Convening Authority Review of Certain Sexual Assault Cases.

(NAME), (Rank), USAF

(General Court-Martial Convening Authority)

Attachment:

Case File

# **U.S. Coast Guard Investigative Service Report of Adjudication (CG-6030)**

**Agency:** Coast Guard Investigative Service (GCIS)

**Authority:** COMDINST 5520.5F, "Coast Guard Investigative Service Roles and Responsibilities" (Nov. 30, 2011)

**Principal Purpose:** Used for reporting criminal history information to the Department of Justice and complying with Freedom of Information and Privacy Act requests.

- Coast Guard Investigative Service Report of Adjudication (CG 6030) is a one page form used by Coast Guard commanders to report disposition decisions on all CGIS criminal investigations.
- As a participant in and administrator of the Coast Guard's access to the Department of Justice Criminal Justice Information System (CJIS), CGIS is required to report and maintain criminal history information associated with criminal offenses, to include felony violations of the UCMJ. Towards that end, the CGIS maintains ROIs and other investigative records and reports in accordance with approved retention periods.
- Reporting of offender criminal history data on military suspects is the responsibility of CGIS as part of its criminal investigative and liaison responsibilities. In furtherance of this reporting requirement, the Coast Guard entity responsible for final disposition in a matter investigated by CGIS must complete and return with the ROI provided a Report of Adjudication, form CG-6030.
- A completed Report of Command Action form is required for CGIS to ensure that case disposition is entered into the appropriate CGIS and CJIS records, and that final action has been taken in a matter investigated by CGIS in the event a request for information is filed in accordance with the Freedom of Information and the Privacy Acts

DEPARTMENT OF HOMELAND SECURITY  
U.S. Coast Guard  
**COAST GUARD INVESTIGATIVE SERVICE  
REPORT OF ADJUDICATION**

1. CGIS Use Only – Region	2. CGIS Case Control Number	3. Date ROI Forwarded for Review
4. Full Name of Accused	5. Duty Station/Residence of Accused	
6. USCG: <input type="checkbox"/> Active Duty <input type="checkbox"/> Reserve <input type="checkbox"/> Auxiliary <input type="checkbox"/> Civilian Employee or <input type="checkbox"/> Other Civilian _____		
7. Criminal Proceeding Referral: <input type="checkbox"/> Federal <input type="checkbox"/> State <input type="checkbox"/> Local <input type="checkbox"/> Tribal <input type="checkbox"/> Not Referred <input type="checkbox"/> Other _____		8. Uniform Code of Military Justice Proceeding <input type="checkbox"/> GCM <input type="checkbox"/> SPCM <input type="checkbox"/> SCM <input type="checkbox"/> NJP <input type="checkbox"/> No Punitive Action Taken
9. Details of the Offense ( <i>Recite Article of UCMJ or Federal Statute; Generally describe actions of accused or allegations</i> )		
10. Disposition		
a. Confinement ( <i>days/months</i> )	b. Fines ( <i>dollars</i> )	c. Forfeitures
d. Rate/Rank Reduction	e. Restriction ( <i>days</i> )	f. Extra Duty ( <i>days</i> )
g. Discharge <input type="checkbox"/> BCD <input type="checkbox"/> DD <input type="checkbox"/> OFFICER DISMISSAL	h. Admin Sep	i. Characterization <input type="checkbox"/> OTH <input type="checkbox"/> GEN <input type="checkbox"/> HON
11. Other Administrative Action ( <i>i.e. Reassignment, EAPC Referral, MPO, CG-3307, Letters of Reprimand/Censure</i> )		
12. Reporting Command Use ( <i>To be completed by the Command; or Special Agent-in-Charge for all Non-UCMJ Investigations</i> )		
Signature of Command Official		Rank
Printed Name of Reporting Official		Unit
Date of Adjudication/Action		Date ROI/Report of Adjudication Returned to CGIS
Remarks		
Attachments: (Report of Results of Trial, CG-4910, Additional Documentation)		

## Expedited Transfer Data from FY 2016 DoD SAPRO Report and Coast Guard Report

### Expedited Transfer Requests by Service Member Victims of Sexual Assault in Fiscal Year 2016

(Data from Service Enclosures to the FY 16 SAPRO Report and Coast Guard Reports to Congress for FY 16)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Number of Unit/Duty Expedited Transfer Requests	29	19	13	1	0	62
Number Denied (Unit/Duty transfer)	1	0	1	1	0	3
Number of Installation Expedited Transfer Requests	225	287	86	86	20	704
Number Denied (Installation transfer)	1	7	8	0	1	17
<b>Total Expedited Transfer Requests</b>	<b>254</b>	<b>306</b>	<b>99</b>	<b>87</b>	<b>20</b>	<b>766</b>
Total Denied	2	7	9	1	1	20
% of Requests Approved	99%	98%	91%	99%	95%	97%
<b>Total Number of Unrestricted Sexual Assault Reports (Service Member Victims)</b>	<b>1,591</b>	<b>955</b>	<b>436</b>	<b>738</b>	<b>116</b>	<b>3,836</b>
% of Unrestricted Reports (Service Member Victims) Requesting Expedited Transfer	16%	32%	23%	12%	17%	20%

### Expedited Transfer Requests in Combat Areas of Interest (CAI) in Fiscal Year 2016

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Number of Unit/Duty Expedited Transfer Requests	1	0	0	0	N/A	1
Number Denied	0	0	0	0	N/A	0
Number of Installation Expedited Transfer Requests	4	2	0	3	N/A	9
Number Denied	0	0	0	0	N/A	0
<b>Number of Unrestricted Sexual Assault Reports in CAI</b>	<b>38</b>	<b>12</b>	<b>2</b>	<b>21</b>	<b>N/A</b>	<b>73</b>
% of Unrestr. Reports in CAI Requesting Expedited Transfer	13%	17%	0%	14%	N/A	14%

Army (38): Afghanistan (6), Egypt (1), Iraq (3), Jordan (1), Kuwait (16), Qatar (9), UAE(2)

Navy (12): Bahrain (8), Kuwait (1), UAE (3)

Marine Corps (2): Afghanistan (1), Oman (1)

Air Force (21): Afghanistan (3), Djibouti (2), Iraq (2), Jordan (2), Kuwait (2) Qatar (8), Saudi Arabia (1), UAE (1)

Reasons for Denial of Expedited Transfer Requests	
Army (2)	<ul style="list-style-type: none"> <li>1 - Victim pending separation</li> <li>1 - Alleged sexual assault unfounded</li> </ul>
Navy (7)	<ul style="list-style-type: none"> <li>3 - Not a credible report</li> <li>2 - Pending separation from Navy</li> <li>1 - Latency of report and concern for timing with recent misconduct</li> <li>1 - Insufficient info for the command to make determination</li> </ul>
Marine Corps (9)	<ul style="list-style-type: none"> <li>2 - Command took other action to improve victim's safety</li> <li>2 - PCA in lieu of PCS</li> <li>2 - Pending administrative separation</li> <li>1 - CO determined adequate safety and support measures in place</li> <li>1 - Active Reservist transfer to Inactive Ready Reserve</li> <li>1 - Modified existing orders</li> </ul>
Air Force (1)	<ul style="list-style-type: none"> <li>1 - victim placed in different organization and squadron with victim approval</li> </ul>
Coast Guard (1)	<ul style="list-style-type: none"> <li>1 - No suspect identified</li> </ul>

## Expedited Transfer Data from FY 2017 DoD SAPRO Report

### Expedited Transfer Requests by Service Member Victims of Sexual Assault in Fiscal Year 2017

(Data from Service Enclosures to the FY 17 SAPRO Report)

	Army	Navy	Marine Corps	Air Force	Total
Number of Unit/Duty Expedited Transfer Requests	29	27	17	1	74
Number Denied (Unit/Duty transfer)	0	0	1	0	1
Number of Installation Expedited Transfer Requests	250	278	80	152	760
Number Denied (Installation transfer)	6	8	8	2	24
<b>Total Expedited Transfer Requests</b>	<b>279</b>	<b>305</b>	<b>97</b>	<b>153</b>	<b>834</b>
Total Denied	6	8	9	2	25
% of Requests Approved	98%	97%	91%	99%	97%
<b>Total Number of Unrestricted Sexual Assault Reports (Service Member Victims)</b>	<b>1,699</b>	<b>1,048</b>	<b>553</b>	<b>875</b>	<b>4,175</b>
% of Unrestricted Reports (Service Member Victims) Requesting Expedited Transfer	16%	29%	18%	17%	20%

### Expedited Transfer Requests in Combat Areas of Interest (CAI) in Fiscal Year 2017

	Army	Navy	Marine Corps	Air Force	Total
Number of Unit/Duty Expedited Transfer Requests	0	0	0	0	0
Number Denied	0	0	0	0	0
Number of Installation Expedited Transfer Requests	1	2	0	4	7
Number Denied	0	0	0	0	0
<b>Number of Unrestricted Sexual Assault Reports in CAI</b>	<b>22</b>	<b>7</b>	<b>1</b>	<b>42</b>	<b>72</b>
% of Unrestr. Reports in CAI Requesting Expedited Transfer	5%	29%	0%	10%	10%

Army (22): Afghanistan (11), Djibouti (1), Iraq (2), Jordan (3), Kuwait (2), Qatar (3)

Navy (7): Bahrain (1), Djibouti (4), Iraq (1), Oman (1)

Marine Corps (1): Kuwait (1)

Air Force (42): Afghanistan (3), Djibouti (5), Jordan (4), Kuwait (6) Qatar (9), Saudi Arabia (1), Turkey (11), UAE (3)

Reasons for Denial of Expedited Transfer Requests	
Army (6)	<ul style="list-style-type: none"> <li>3 - Victim pending separation</li> <li>1 - Victim subject of separate criminal investigation</li> <li>1 - Command moved alleged offender instead of victim</li> <li>1 - Alleged sexual assault unfounded</li> </ul>
Navy (8)	<ul style="list-style-type: none"> <li>4 - Not a credible report</li> <li>1 - Pending separation from Navy</li> <li>1 - Pending completion of NCIS investigation to determine credibility</li> <li>1 - Service member sent TAD instead</li> <li>1 - Insuff. reason due to length of time since report / unknown perpetrator</li> </ul>
Marine Corps (9)	<ul style="list-style-type: none"> <li>1 - Victim is subject in separate criminal investigation</li> <li>1 - Victim currently in training and being treated by a medical professional</li> <li>1 - Command took other actions to improve victim's safety</li> <li>3 - PCA approved in lieu of PCS</li> <li>1 - Victim is scheduled for counseling services</li> <li>1 - Victim is pending separation</li> <li>1 - Transfer was not in the best interest of the victim</li> </ul>
Air Force (2)	<ul style="list-style-type: none"> <li>1 - Case did not meet sexual assault criteria</li> <li>1 - Victim pending separation from AF</li> </ul>

## Expedited Transfer Data from FY 2012 - 2017 DoD SAPRO Reports

### Expedited Transfer Requests by Service Member Victims of Sexual Assault (FY 12 - FY 17)

(Data from the FY 12 - 17 DoD SAPRO Reports)

Number of Unit/Duty Expedited Transfer Requests
Number Denied (Unit/Duty transfer)
Number of Installation Expedited Transfer Requests
Number Denied (Installation transfer)

2012	2013	2014	2015	2016	2017
57	99	44	71	62	74
2	3	0	2	3	5
161	480	615	663	684	760
0	11	15	12	18	30

<b>Total Expedited Transfer Requests</b>
Total Denied
% of Requests Approved

<b>218</b>	<b>579</b>	<b>659</b>	<b>734</b>	<b>746</b>	<b>834</b>
2	14	15	14	21	35
99%	98%	98%	98%	97%	96%

<b>Total Number of Unrestricted Sexual Assault Reports (Service Member Victims)</b>
% of Unrestricted Reports (Service Member Victims) Requesting Expedited Transfer

<b>1,985</b>	<b>3,195</b>	<b>3,851</b>	<b>3,775</b>	<b>3,812</b>	<b>4,250</b>
11%	18%	17%	19%	20%	20%

## RFI Set 4: Expedited Transfer Requests by Victims of Sexual Assault in Fiscal Year 2016

<b>Total FY 16 Expedited Transfer Requests</b>
<b>Total FY 16 Expedited Transfers Denied/Withdrawn</b>
<b>% of Total Requests Approved</b>

Army	Navy	Marine Corps	Air Force	Coast Guard	Services Total
276	302	98	206	18	900
12	5	8	3	1	29
96%	98%	92%	99%	94%	97%

<b>FY16 - Service Member Unrestricted Reports (DoD SAPRO Rept)</b>
<b>% of Service Member Unrestricted Repts. Requesting Transfers</b>

1,591	955	436	738	116	3,836
17%	32%	22%	28%	16%	23%

RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

Rank of Member Requesting Expedited Transfer

Army		
C-3	1	0.4%
E-1	22	8%
E-2	40	14%
E-3	84	30%
E-4	98	36%
E-5	15	5%
E-6	10	4%
E-7	2	1%
O-1	1	0.4%
O-2	1	0.4%
O-3	1	0.4%
O-4	1	0.4%
276		100%

Navy		
E-1	15	5%
E-2	44	15%
E-3	100	33%
E-4	77	25%
E-5	52	17%
E-6	7	2%
E-7	2	1%
E-8	2	1%
O-1	2	1%
O-2	1	0.3%
302		100%

Marine Corps		
E-1	3	3%
E-2	20	20%
E-3	47	48%
E-4	18	18%
E-5	8	8%
E-6	2	2%
98		100%

Air Force		
E1	1	0.5%
E2	9	4%
E3	78	38%
E4	61	30%
E5	29	14%
E6	13	6%
E7	7	3%
O1	1	0%
O2	3	1%
O3	2	1%
O4	1	0.5%
O5	1	0.5%
206		100%

Coast Guard		
E-1	0	0%
E-2	1	6%
E-3	5	28%
E-4	10	56%
E-5	1	6%
E-6	1	6%
18		100%

Gender of Member Requesting Expedited Transfer

Army		
Female	239	87%
Male	37	13%
276		100%

Navy		
Female	255	84%
Male	47	16%
302		100%

Marine Corps		
Female	81	83%
Male	17	17%
98		100%

Air Force		
Female	165	80%
Male	41	20%
206		100%

Coast Guard		
Female	13	72%
Male	5	28%
18		100%

## Installations Where the Most Expedited Transfer Requests Originate

Army	
FT Campbell, KY	21
FT Hood, TX	20
FT Bragg, NC	19
FT Bliss, TX	17
FT Riley, KS	16
JBLM, WA	16
FT Drum, NY	13
FT Carson, CO	12
Schofield Barracks, HI	11
Camp Humphreys, Korea	9
FT Polk, LA	7
FT Sill, OK	7
FT Stewart, GA	7
Camp Casey, Korea	6
FT Irwin, CA	5
FT Knox, KY	5
CP Ederle, Italy	4
FT Wainwright, AK	4
FT Sam Houston, TX	4
Camp Hovey, Korea	3
Camp Stanley, Korea	3
Osan AB, Korea	3
Yongsan, Korea	3
Vilseck, GM	3
East Camp Graffen, GM	3
Camp Red Cloud, Korea	2
Grafenwoehr, GM	2
Honolfels, GM	2
Landstuhl, GM	2
Wiesbaden, GM	2
Smith Barracks, GM	2
Smith Barracks	2
FT Shafter, HI	2
FT Belvoir, VA	2
FT Eustis, VA	2
FT Jackson, SC	2

Navy	
USS GEORGE BUSH (CVN 77)	14
USS RONALD REAGAN (CVN 76)	9
USS GUNSTON HALL (LSD-44) HAMPTON RDS VA	7
USS NIMITZ	7
USS EISENHOWER	6
USS PEARL HARBOR (LSD 52)	6
USS BONHOMME RICHARD (LHD-6)	5
USS ANTIETAM (CG-54)	4
USS GEORGE H. W. BUSH	4
USS GEORGE WASHINGTON	4
USS HARRY S TRUMAN CVN-75	4
NAVAL MEDICAL CENTER, PORTSMOUTH VA	3
USS COMSTOCK LSD 45	3
USS FORREST SHERMAN	3
USS LINCOLN	3
USS MAHAN	3
ACU FOUR	2
MARMC NORVA	2
MARMC NORVA FMS	2
NAVIOCOM HAWAII	2
NAVSTA NORFOLK	2
NCHB-1	2
U.S. NAVAL SUPPORT ACTIVITY BAHRAIN	2
USS ABRAHAM LINCOLN CVN-72	2
USS ASHEVILLE (SSN 758)	2
USS ASHLAND	2
USS BAINBRIDGE	2
USS BARRY	2
USS BLUE RIDGE	2
USS CHANCELLORSVILLE	2
USS CURTIS WILBUR (DDG 54)	2
USS DWIGHT D EISENHOWER (CVN 69)	2
USS ENTERPRISE	2
USS FITZGERALD DDG 62	2
USS HARRY S TRUMAN, CVN-75 NORVA	2
USS JOHN C. STENNIS CVN-74	2

Marine Corps	
Okinawa, Japan	24
Camp Lejeune, NC	19
Camp Pendleton, CA	13
Twenty-Nine Palms, CA	5
Cherry Point, NC	3
Quantico, VA	3
San Diego, CA	3
Beaufort, SC	2
Henderson Hall, VA	2
Jacksonville, NC	2
MCAS Miramar, CA	2
Parris Island, SC	2
Yuma, AZ	2
Camp Butler, Japan	1
Fort Dix, NJ	1
Ft Leavenworth, Kansas	1
Joint Base MDL, NJ	1
Kaneohe Bay, HI	1
MCAS Cherry Point, NC	1
MCAS Kaneohe Bay, HI	1
MCBH K Bay, HI	1
MEPS New York	1
New Orleans, LA	1
New River, NC	1
Newburgh, NY	1
North Carolina	1
NY, I&I	1
Pensacola, FL	1
Virginia Beach, Virginia	1
29	98

Air Force	
RAMSTEIN	12
ELLSWORTH	10
DOVER	9
HICKAM	9
MALMSTROM	7
WRIGHT PATTERSON	7
AVIANO	6
MINOT	6
HOLLOMAN	5
LANGLEY	5
LAUGHLIN	5
MOODY	5
MOUNTAIN HOME	5
DAVIS-MONTHAN	4
HURLBURT FIELD	4
LACKLAND	4
OFFUTT	4
OSAN	4
SHAW	4
ANDREWS	3
BARKSDALE	3
F E WARREN	3
GRAND FORKS	3
HILL	3
KADENA	3
KEESLER	3
MACDILL	3
MCGUIRE	3
MISAWA	3
PETERSON	3
ROBINS	3
SHEPPARD	3
TRAVIS	3
VANCE	3
ANDERSEN	2
BEALE	2

Army	
Hunter AAF, GA	2
JBSA, TX	2
Camp Carroll, Korea	1
CP Coiner, Korea	1
Seoul AB, Korea	1
Seoul, Korea	1
Camp Vilseck, GM	1
S Camp Vilsek, GM	1
Clay Kasserne, GM	1
Kaiserslautern, GM	1
Kurecik, Turkey	1
Panzer Kaserne, GM	1
Patch Barracks, GM	1
Miesau Ammo Depot	1
SHAPE, Belgium	1
CP Zama, Japan	1
GITMO, Cuba	1
Wheeler AFB, HI	1
Smith Barracks, HI	1
USAR	1
Coraopolis, PA	1
Dayton, OH	1
Eglin Air Force Base, FL	1
FT Benning, GA	1
FT Gordon, GA	1
FT Huachuca, AZ	1
FT Myer, VA	1
JBER, AL	1
Petersburg, FL	1
Webster, TX	1
West Point, NY	1

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Navy	
USS MINNESOTA	2
USS NIMITZ CVN-68 BREMERTON WA	2
USS RONALD REAGAN CVN-76 YOKOSUKA JA	2
USS SAN ANTONIO LPD-17	2
USS THEODORE ROOSEVELT	2
USS WASP LHD-1	2
WALTER REED NATIONAL MILITARY MEDICAL CE	2
3RD MARINE REGIMENT 3RD MARDIV	1
9TH COMMUNICATION BATTALION, 1 MEF	1
ACU TWO	1
ASSAULT CRAFT UNIT 4 NORVA	1
CARAEWRON ONE TWO ZERO	1
CCSG-8	1
CENTER FOR INFORMATION DOMINANCE	1
CFA SASEBO	1
COM, MARITIME SUPPORT WING	1
COMCARAIRWING FIVE	1
COMCARSTRKGRU THREE	1
COMDESRON FOURTEEN MAYPORT FL	1
COMDESRON SEVEN	1
COMPCRON	1
COMSTRKFIGHTWINGPAC	1
CSCSU GREAT LAKES	1
DIA DT PAC KOREA	1
EODNU FIVE	1
FACSFAC PEARL HARBOR	1
FAIRECON ONE	1
FLEET ACTIVITIES YOKOSUKA	1
FLEET READINESS CENTER SOUTHWEST	1
FLELOGSUPPRON SIX TWO	1
FLTREADCEN MIDATLANTIC SITE OCEANA	1
HARBOR PATROL UNIT NORFOLK, VA	1
HELICOPTER MARITIME STRIKE SQUADRON 71	1
HELSEACOMBATRON FIVE NORVA	1
HPU JP PH HICKA	1
HSC TWO	1
HSC TWO SIX SEA COMP	1
HSC TWO TWO	1
HSC-22 NORVA	1
HSC-28	1
MARMC	1
MID-ATLANTIC REGIONAL MAINTENANCE CENTE	1
NAV HOSP PENSACOLA	1

Marine Corps
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Air Force	
COLUMBUS	2
EDWARDS	2
ELMENDORF	2
FAIRCHILD	2
HANSCOM	2
KUNSAN	2
SCOTT	2
TYNDALL	2
WHITEMAN	2
ALTUS	1
CANNON	1
CHARLESTON	1
CHEYENNE MTN	1
CREECH	1
DARMSTADT GERMANY	1
EGLIN	1
EIELSON	1
EINSIEDLERHOF	1
FT GEORGE MEADE	1
FT. GORDON	1
INCIRLIK	1
LITTLE ROCK	1
LUKE	1
MCCONNELL	1
MILDENHALL	1
NELLIS	1
POPE	1
RANDOLPH	1
SEYMOUR JOHNSON	1
SPANGDAHLEM	1
TINKER	1
USAFA	1
VANDENBERG	1

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**Army**

**Navy**

**Marine Corps**

**Air Force**

NAVAIR NORFOLK	1
NAVAIR TTC PENSACOLA	1
NAVAL BASE HEALTH CLINIC MERIDIAN MS	1
NAVAL HEALTH CLINIC QUANTICO VA	1
NAVAL HOSPITAL PENSACOLA	1
NAVAL HOSPITAL SIGONELLA	1
NAVAL SUPPORT ACTIVITY BAHRAIN	1
NAVAL SUPPORT ACTIVITY NAPLES IT	1
NAVCONSTGRU ONE PORT HUENEME CA	1
NAVHOSP BREMERTON WA	1
NAVHOSP JAX	1
NAVIOCOM BAHRAIN	1
NAVIOCOM FT GEORGE	1
NAVMEDCEN PORTSMOUTH	1
NAVMEDCEN SAN DIEGO CA	1
NAVSECFR BAHRAIN	1
NAVSECGRUACT	1
NAVSHIPYD NORFOLK VA	1
NAVSTA GLAKES	1
NAVSUBBASE NEW LONDON CT	1
NAVSUP FLC BAH	1
NAVSUP FLC CENTER BAHRAIN	1
NAVSUPPACT BAHRAIN	1
NAVY INFORMATION FORCES, FLEET INTEL DET	1
NAVY MEDICINE OPERATIONAL TRAINING CENT	1
NBHCL ATSUGI	1
NCTAMS LANT NORV	1
NCTS BAHRAIN	1
NIOC GEORGIA	1
NMCB 5	1
NMCB ONE GULFPORT MS	1
NMCB THREE PORT HUENEME CA	1
NNMC SAN DIEGO	1
NOSC NEWPORT, RI	1
NOSC SAGINAW MI	1
NSA NORFOLK	1
NTTC LACKLAND	1
NUNWATSC A DWCF	1
PATROL SQUADRON NINE	1
PSD ROTA SPAIN	1
RLSO JAPAN	1
STRIKE FIGHTER WING PAC DET	1
STRK EIGHT THREE	1

Army

Navy

Marine Corps

Air Force

STRKFITRON ONE NINE FIVE	1
STRKFITRON ONE NINE TWO LEMOORE CA	1
STRKFITRON ONE THREE ONE	1
STRKFITRON ONE ZERO THREE OCEANA VA	1
STRKFITRON TWO FIVE	1
SWFPAC	1
SWFPAC BANGOR WA	1
TACRON 22	1
TACRON ELEVEN	1
TRANSIENT to COMFLEACT YOKOSUKA	1
USN CENTRAL CMD DET ISA AIR BASE BAHRAIN	1
USS ARLEIGH BURKE	1
USS BATAAN	1
USS BATAAN LHD 5	1
USS BOXER LHD-4	1
USS CARL VINSON	1
USS CHURCHILL	1
USS CONSTITUTION	1
USS DWIGHT D. EISENHOWER NORVA	1
USS FOREST SHERMAN (DDG 98)	1
USS FORT HENRY	1
USS FORT MCHENRY	1
USS GEORGE H W BUSH CVN-77 NORVA	1
USS GERALD R. FORD CVN-78 NNEWS VA	1
USS GHW BUSH, CVN-77, NORVA	1
USS GONZALEZ	1
USS GREEN BAY	1
USS HARRY S TRUMAN	1
USS IWO JIMA LHD-7 MAYPORT FL	1
USS JAMES E. WILLIAMS (DDG 95)	1
USS JOHN C STENNIS BREMERTON WA	1
USS JOHN S MCCAIN DDG-56	1
USS KEARSARGE	1
USS KIDD	1
USS LABOON	1
USS LABOON (DDG 58)	1
USS LAKE CHAMPLAIN (CG 57)	1
USS LAKE ERIE	1
USS LAWRENCE DDG 110	1
USS LINCOLN(CVN-72)	1
USS MAHAN (DDG 72)	1
USS MAHAN DDG-72, NORVA	1
USS MAKIN ISLAND	1

Army

Navy

Marine Corps

Air Force

USS MANIKIN ISLAND	1
USS MCCAMPBELL DDG 85	1
USS MESA VERDE NORFOLK VA	1
USS MONTEREY CG 61	1
USS MORMANDY CG-60 NORVA	1
USS MUSTIN DDG 89	1
USS NEW YORK	1
USS OSCAR AUSTIN DDG 79	1
USS PINCKNEY DDG 91	1
USS PINICKNEY	1
USS PITTSBURG	1
USS RUSHMORE LSD 47	1
USS SHOUP	1
USS SHOUP DDG 86	1
USS SHOUP DDG-86 EVERETT WA	1
USS STENNIS	1
USS STERETT	1
USS STETHEM	1
USS STOUT (DDG 55)	1
USS TRUXTUN (DDG 103)	1
USS WASP LHD-1 NORVA	1
USS WHIDBEY ISLAND	1
USS WILLIAM P. LAWRENCE (DDG 110)	1
USS WINSTON S CHURCHILL	1
VAQ 130	1
VAQ 140	1
VAQRON 136	1
VAQRON 142	1
VAW 113	1
VAW 121	1
VAW 125	1
VFA 103	1
VFA 106	1
VFA 122, LEMOORE CA	1
VFA 87	1
VFA 97	1
VFA-106	1
VFA-211	1
VP 40	1
VX-9	1
WRMC	1

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RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

### Approval Rate for Expedited Transfer Requests

Army		95%	Navy		97%	Marine Corps		92%	Air Force		99%	Coast Guard		94%
Approved	263		Approved	292		Approved	90		Approved	203		Approved	17	
Approved/Delete	1		Disapproved	10		Denied	5		Disapproved	3		Disapproved	1	
Disapproved	2		302			Rescinded	3		206			18		
RWA/Intra Post Move	2													
RWA/NOT CREDIBLE	6													
RWA/NOT ELIGIBLE	1													
Withdrawal	1													
276														

### SVC/VLC Representation

Army		Navy		99%	Marine Corps		96%	Air Force		206	Coast Guard		18
Y	-	Y	300		Y	-		Y	-		Y	-	
N	-	N	2		N	-		N	-		N	-	
Blank	276	302		1%	Blank	96		Blank	206		Blank	18	
276													

\*Only the Navy provided data on SVC/VLC representation

RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

## Expedited Transfer Approval Decision Maker

### Army

Decision-Maker Rank	
MG	235
COL	1
UNK	40
276	

### Navy

Decision-Maker Rank	
CAPT	289
RDML	10
CDR	3
302	

### Marine Corps

Decision-Maker Rank	
LtCol	4
CDR	2
CG	2
Col	1
Blank	89
94	

### Air Force

Decision-Maker Rank	
O-6	165
CV	19
O-7	15
GS-14	1
GS-15	2
O-8	3
N/A	1
206	

### Coast Guard

Decision-Maker Rank	
O-6	17
O-7	1
18	

### Decision-Maker Job Title

CG, HRC	235
Unit Cdr	41
276	

### Decision-Maker Job Title

CO	292
ISIC	10
302	

### Decision-Maker Job Title

CG	3
CO	83
Acting CO	3
Blank	9
98	

### Decision-Maker Job Title

Vice Commander	121
Wing Commander	79
Vice Director	2
Deputy Director	1
MAJCOM Vice Cdr	1
NAF Commander	1
N/A	1
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### Decision-Maker Job Title

Chief, Enlisted Personnel Mgt.	17
CDR, Personnel Service	1
18	

RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

Percentage of Expedited Transfers Made to Requested Location

**Army**

Approved Requests	263
Requested Location	89%

**Navy**

Approved Requests	292
Requested Location	78%

**Marine Corps**

Approved Requests	90
Requested Location	72%

**Air Force**

Approved Requests	203
Requested Location	90%

**Coast Guard**

Approved Requests	17
Requested Location	76%

# RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

## Installations Receiving The Most Expedited Transfers

Army	
FT Carson, CO	26
FT Hood, TX	22
FT Stewart, GA	20
FT Bragg, NC	15
JBLM, WA	13
FT Campbell, KY	11
FT Eustis, VA	8
FT Gordon, GA	8
FT Lee, VA	8
Hunter AAF, GA	8
FT Riley, KS	7
FT Irwin, CA	6
FT Knox, KY	6
FT Meade, MD	6
Ft Benning, GA	5
FT Bliss, TX	5
FT Belvoir, VA	4
FT Huachuca, AZ	4
FT Jackson, SC	4
FT Sill, OK	4
JBSA, TX	4
FT Shafter, HI	3
FT Drum, NY	3
FT Leonard Wood, MO	3
FT Polk, LA	3
Vilseck, GM	2
FT Rucker, AL	2
Panzer, Kaserne, GM	1
Schofield Barracks, HI	1
Sembach, GM	1
Decatur, IL	1
Edgewood Arsenal, MD	1
Englin, AFB, FL	1
FT Detrick, MD	1
FT Sam Houston, TX	1
Lubbock, TX	1
Madigan General, WA	1
San Antonio, TX	1

Navy	
NAVMEDCEN SAN DIEGO CA	14
NAVMEDCEN PORTSMOUTH	10
NAVSTA NORFOLK VA	9
USS ABRAHAM LINCOLN NORVA	8
USS GEORGE WASHINGTON NORVA	8
MARMC NORFOLK VA	7
NAVBASE SAN DIEGO, CA	7
USS THEODORE ROOSEVELT CA	6
USS HARRY S TRUMAN NORVA	5
NAVBASE CORONADO SAN DIEGO CA	4
NAVHOSP JACKSONVILLE FL	4
USS CARL VINSON SAN DIEGO CA	4
USS RUSHMORE	4
ACU TWO NORVA	3
FLTREADCEN MIDLANT SITE NORVA	3
N/A	3
NAVHOSP BREMERTON WA	3
NMCB ONE MS	3
SOUTHWEST RMC SAN DIEGO CA	3
USS DWIGHT D EISENHOWER NORVA	3
USS ESSEX SAN DIEGO	3
USS GEORGE BUSH VA	3
USS JOHN C STENNIS BREMERTON WASH	3
USS PRINCETON SAN DIEGO	3
BMU ONE	2
COMNA VIDFOR SUFFOLK VA	2
FLTREADCEN WEST LEMOORE CA	2
HELSEACOMBATRON FIVE	2
HELSEACOMBATRON SAN DIEGO	2
HELSEACOMBATRON TWO	2
JAL FHCC GREAT LAKES, IL	2
JNTEXPBASE LITTLE CREEK	2
NAS JRB FORT WORTH TX	2
NAS OCEANA VA	2
NAVBASE KITSAP SILVERDALE WA	2
NAVIOCOM MEDINA TX	2
NAVMECLINIC ANNAPOLIS MD	2
NAVSHIPYD NORFOLK VA	2

Marine Corps	
Camp Pendleton CA	14
Camp Lejeune, NC	11
Cherry Point, NC	8
Miramar, CA	8
Jacksonville, NC	7
Okinawa, Japan	6
New River, NC	5
MCAS Kaneohe Bay, HI	4
Twenty-nine Palms, CA	3
Parris Island, SC	2
Quantico, VA	2
San Diego, Ca	2
South Carolina	2
3RD Recon BN	1
Beaufort, SC	1
Camp Geiger, NC	1
Camp Johnson, NC	1
Fort Lee, VA	1
Fort Worth, TX	1
Futenma, Okinawa	1
Hawaii	1
HQ, 3D MAW, CA	1
Indian Head, Maryland	1
Iwakuni, Japan	1
MCI East, NC	1
MCLB Albany, GA	1
NY, MEPS	1
Pensacola, FL	1
Pentagon, Arlington	1
Tampa, FL	1
Yuma, Az	1
N/A	5
Blank	1

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Air Force	
NELLIS AFB	11
MACDILL AFB	11
TRAVIS AFB	9
SCOTT AFB	9
LACKLAND AFB	9
EGLIN AFB	9
MCCHORD AFB	8
LANGLEY AFB	7
HURLBURT FIELD	7
CHARLESTON AFB	7
TYNDALL AFB	6
SHAW AFB	6
PATRICK AFB	5
EDWARDS AFB	5
BEALE AFB	5
BARKSDALE AFB	5
VANDENBERG AFB	4
SCHRIEVER AFB	4
MOODY AFB	4
LUKE AFB	4
KEESLER AFB	4
DOVER AFB	4
MCCONNELL AFB	3
HANSCOM AFB	3
FAIRCHILD AFB	3
WRIGHT PATTERSON AFB	3
ROBINS AFB	2
POPE AFB	2
OFFUTT AFB	2
MOUNTAIN HOME AFB	2
MCGUIRE AFB	2
LITTLE ROCK AFB	2
JB LANGLEY	2
FORT SAM HOUSTON	2
FORT MEADE	2
FE WARREN AFB	2
DAVIS MONTHAN AFB	2
BUCKLEY AFB	2

Army	
Wheeler, AAF	1
Yong San, Korea	1
Local Move	26
Requested Orders Deletion	1
Req. Redeploy/DEMOB	1
Approved Delete	1
SM Requested Deletion	1
ADVERSE ACTION	3
Not Qualified to Move	1
N/A	11
UNK	2
Space left blank	6

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Navy	
NAVSTA MAYPORT FL	2
PHIBCB ONE CA	2
REMAIN IN PLACE FOR PEB PROCESSING	2
STRKFITRON ELEVEN NORVA	2
USS FORT MCHENRY	2
USS GUNSTON HALL	2
USS IWO JIMA	2
USS LEYTE GULF NORVA	2
USS MAKIN ISLAND SAN DIEGO CA	2
USS NORMANDY NORVA	2
USS PAUL HAMILTON/SAN DIEGO	2
USS PINCKNEY	2
USS SHOUP EVERETT WA	2
USS THE SULLIVANS/MAYPORT FL	2
ACU FIVE CAMP PENDLETON CA	1
ACU ONE DET BRAVO	1
AFDL SIX LITTLE CREEK VA	1
ARDM FIVE ARCO SAN DIEGO	1
BRMEDCLINIC EVERETT WA	1
BRMEDCLINIC GULFPORT	1
CARAEWRON ONE TWO ZERO	1
CBC GULFPORT MS	1
CBMU 303 SAN DIEGO	1
CG FIRST MLG	1
CHARLESTON,SC	1
CMD STRIKE ONE FIVE FOUR	1
CNSS-14 FL	1
COMAFLOATRAGRUPAC SAN DIEGO CA	1
COMDESRON TWO EIGHT/USS FORREST SHERMAN	1
COMMAND MARCMC NORFOLK VA	1
DEMOBILIZED TO HOME	1
DIPRATRECONGRUPAC	1
FAIRECONRON FOUR TINKER AFB OK	1
FLELOGSUPPRON FIVE THREE DC	1
FLELOGSUPPRON FIVE THREE MD	1
FLELOGSUPPRON FOUR ZERO NORVA	1
FLTREADCEN NORTHWEST WIDBAY ISLAND WA	1
FLTREADCEN SOUTHWEST DET NORTH ISLAND	1
FRC MID-LANT, VA BCH VA	1
HELMARSRIKERON SEVEN TWO JAXFL	1
HELMARSTRIKERON FOUR ZERO	1
HELMARSTRIKERON SEVEN THREE	1
HELMINERON FIFTEEN	1
HELMINERON TWELVE NORVA	1
HELSEACOMBATRON SEVEN NORVA	1
HELSEACOMBATRON TWELVE JA	1

Marine Corps
--------------

Air Force	
ANDREWS AFB	2
ALTUS AFB	2
WHITEMAN AFB	1
TINKER AFB	1
SPANGDAHLEM	1
SIGONELLA	1
SEYMOUR JOHNSON AFB	1
PETERSON AFB	1
PENTAGON	1
PENSACOLA NAS	1
MAXWELL AFB	1
JB MCGUIRE	1
Info Not Available (Navy Pe	1
HILL AFB	1
GRAND FORKS AFB	1
ELLSWORTH AFB	1
DYESS AFB	1
CREECH AFB	1
Local Move	1
Withdrew	1
Blank	5

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**Army****Navy****Marine Corps****Air Force**

HOPPER INFOSEVCE WASHINGTON DC	1
HSC TWO NORVA	1
HSM FOUR ONE SDIEGO CA	1
JOINT INTELL OPERATIONS CENTER	1
MAYPORT, FL	1
MIDATLANTIC RMC NORFOLK VA	1
NAS CORPUS CHRISTI TX	1
NAS JRB NEW ORLEANS LA	1
NAS KINGSVILLE TX	1
NAV REG MA RCC NORFOLK VA	1
NAVABASE PT LOMA SAN DIEGO CA	1
NAVAIRWPNSTA CHINA LAKE CA	1
NAVBASE GUAM	1
NAVBASE KITSAP STATION BREMERTON /WA	1
NAVBASE NORFOLK VA	1
NAVCROIDIST JACKSONVILLE FL	1
NAVFAC NORTHWEST SILVERDALE WA	1
NAVHEALTHCLINIC CHERRY PT NC	1
NAVHEALTHCLINIC CORPUS CHRISTI TX	1
NAVHOSP CAMP PENDLETON CA	1
NAVHOSP OAK HARBOR WA	1
NAVHOSP PENSACOLA	1
NAVIMFAC PACNORWEST	1
NAVIOCOM SAN DIEGO CA	1
NAVOPSPETCEN ATL	1
NAVOPSPTCEN ALAMEDA CA	1
NAVOPSPTCEN AUGUSTA GEORGIA	1
NAVOPSPTCEN BALTIMORE MD	1
NAVOPSPTCEN CHARLESTON SC	1
NAVOPSPTCEN FORT WORTH TX	1
NAVOPSPTCEN KANSAS CITY	1
NAVOPSPTCEN NEW ORLEANS	1
NAVOPSPTCEN PORTLAND OR	1
NAVOPSPTCEN SAN ANTONIO, TX	1
NAVOPSPTCEN SCHENECTADY NY	1
NAVREG SE RCC JAX FL	1
NAVSUP FLT LOG CTR MISAWA JA	1
NAVSUP FLT LOG CTR NAS JAX	1
NAVSUPPACT BAHRAIN	1
NIMITZ OP INTEL CTR WASH DC	1
NMCB FOUR PORT HUENEME CA	1
NMCSDBALBOA CA	1
NOSC CHARLESTON	1
NPTU BALLSTON SPA MARF NY	1
NSACSS FT GEORGE G MEADE MD	1
NSSC NEW LONDON CT	1

Army

Navy

Marine Corps

Air Force

NSSC PEARL HARBOR HI	1
PATRON FIVE JACKSONVILLE FL	1
PATRON SIXTEEN JACKSONVILLE FL	1
PATRON THREE ZERO JAX FL	1
PHIBCB TWO VA	1
PUGET SOUND	1
SOUTHEAST RMC MAYPORT FL	1
STRKFITRON 106 VA	1
STRKFITRON ONE FOUR THREE	1
STRKFITRON ONE THREE SEVEN	1
STRKFITRON ONE ZERO SIX	1
STRKFITRON TWO ONE THREE	1
SUBASE NEW LONDON CT	1
TRASUPPCEN SAN DIEGO CA	1
US IANTN DET MAYPORT FL	1
USS ALBANY	1
USS AMERICA	1
USS ASHLAND SASEBO JA	1
USS CAPE ST GEORGE	1
USS CURTIS WILBUR	1
USS DECATUR	1
USS HOWARD DDG 83, SDGO	1
USS JOHN WARNER	1
USS LABOON	1
USS LAKE ERIE	1
USS MARYLAND GOLD	1
USS MCCAMPBELL JA	1
USS MCFAUL	1
USS MOBILE BAY	1
USS MOMSEN	1
USS MUSTIN	1
USS NIMITZ BREMERTON WA	1
USS PEARL HARBOR SDIEGO CA	1
USS RUSSELL	1
USS SAN JACINTO NORVA	1
USS STENNIS	1
USS STERETT SAN DIEGO	1
USS STETHEM, YOKOSUKA JAPAN	1
USS WASP NORVA	1
USS WILLIAM P LAWRENCE CA	1
VAQ 129 WHIDBEY ISLAND	1
W REED NMMC S CAMP FT BELVOIR	1
WALTER REED NATMILMEDCEN BETHESDA	1
Blank	2

173

302

RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

## Expedited Transfer Timelines

Army	Navy	Marine Corps	Air Force	Coast Guard																																																																																				
<table><tr><th colspan="2">Time from Date of SA Report to ET Request</th></tr><tr><td>0 - 3 Days</td><td>24</td></tr><tr><td>4 - 30 Days</td><td>126</td></tr><tr><td>31 - 180 Days</td><td>80</td></tr><tr><td>180 - 365 Days</td><td>22</td></tr><tr><td>366 - 697 Days</td><td>10</td></tr><tr><td>906 - 1178 Days</td><td>2</td></tr><tr><td>Blank/UNK/N/A</td><td>12</td></tr><tr><td colspan="2">276</td></tr></table>	Time from Date of SA Report to ET Request		0 - 3 Days	24	4 - 30 Days	126	31 - 180 Days	80	180 - 365 Days	22	366 - 697 Days	10	906 - 1178 Days	2	Blank/UNK/N/A	12	276		<table><tr><th colspan="2">Time from Date of SA Report to ET Request</th></tr><tr><td>0 - 3 Days</td><td>76</td></tr><tr><td>4 - 30 Days</td><td>85</td></tr><tr><td>31 - 180 Days</td><td>85</td></tr><tr><td>180 - 365 Days</td><td>38</td></tr><tr><td>366 - 578 Days</td><td>9</td></tr><tr><td>712 - 1144 Days</td><td>3</td></tr><tr><td>Blank/UNK/N/A</td><td>6</td></tr><tr><td colspan="2">302</td></tr></table>	Time from Date of SA Report to ET Request		0 - 3 Days	76	4 - 30 Days	85	31 - 180 Days	85	180 - 365 Days	38	366 - 578 Days	9	712 - 1144 Days	3	Blank/UNK/N/A	6	302		<table><tr><th colspan="2">Time from Date of SA Report to ET Request</th></tr><tr><td>0 - 3 Days</td><td>17</td></tr><tr><td>4 - 30 Days</td><td>23</td></tr><tr><td>31 - 180 Days</td><td>32</td></tr><tr><td>180 - 365 Days</td><td>10</td></tr><tr><td>366 - 697 Days</td><td>9</td></tr><tr><td>Blank/UNK/N/A</td><td>7</td></tr><tr><td colspan="2">98</td></tr></table>	Time from Date of SA Report to ET Request		0 - 3 Days	17	4 - 30 Days	23	31 - 180 Days	32	180 - 365 Days	10	366 - 697 Days	9	Blank/UNK/N/A	7	98		<table><tr><th colspan="2">Time from Date of SA Report to ET Request</th></tr><tr><td>0 - 3 Days</td><td>23</td></tr><tr><td>4 - 30 Days</td><td>41</td></tr><tr><td>31 - 180 Days</td><td>38</td></tr><tr><td>180 - 365 Days</td><td>10</td></tr><tr><td>366 - 641 Days</td><td>7</td></tr><tr><td>769 Days</td><td>1</td></tr><tr><td>Blank/UNK/N/A</td><td>86</td></tr><tr><td colspan="2">206</td></tr></table>	Time from Date of SA Report to ET Request		0 - 3 Days	23	4 - 30 Days	41	31 - 180 Days	38	180 - 365 Days	10	366 - 641 Days	7	769 Days	1	Blank/UNK/N/A	86	206		<table><tr><th colspan="2">Time from Date of SA Report to ET Request</th></tr><tr><td>0 - 3 Days</td><td>2</td></tr><tr><td>4 - 30 Days</td><td>5</td></tr><tr><td>31 - 180 Days</td><td>0</td></tr><tr><td>296 - 343 Days</td><td>3</td></tr><tr><td>Blank/UNK/N/A</td><td>8</td></tr><tr><td colspan="2">18</td></tr></table>	Time from Date of SA Report to ET Request		0 - 3 Days	2	4 - 30 Days	5	31 - 180 Days	0	296 - 343 Days	3	Blank/UNK/N/A	8	18	
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## Expedited Transfer Requests - Related Sexual Assault Case Dispositions

Army	Navy	Marine Corps	Air Force	Coast Guard
Dispositions of Approved Requests	Dispositions of Approved Requests	Dispositions of Approved Requests	Dispositions of Approved Requests	Dispositions of Approved Requests
Courts-Martial Charge Preferred	Court-Martial Charges Preferred: Outcome Unknown	Courts-Martial Charge Preferred	Courts-Martial Charge Preferred	Charges Preferred - GCM
Courts-Martial charge preferred for non-sexual assault offense	Court-Martial Charges Preferred: Convicted of SA Offense	Courts-Martial charge preferred for non-sexual assault offense	Courts-Martial charge preferred for non-sexual assault offense	Charges Preferred - SPCM
Non-Judicial Punishment	Court-Martial Charges Preferred: Convicted of Non SA Offense	Non-Judicial Punishment	Non-Judicial Punishment	NJP for non-sexual assault
Non-judicial punishment for non-sexual assault offense	Non-Judicial Punishment - Article 120 Contact Offense	Non-judicial punishment for non-sexual assault offense	Non-judicial punishment for non-sexual assault offense	Administrative Discharge
Administrative Discharge	Non-judicial punishment for non-sexual assault offense	Non-judicial punishment for non-sexual assault offense/Insufficient Evidence of Any Offense	Non-Judicial Punishment; Victim Declined to Participate in Military Justice Action	SA-IDA determined not to prosecute
Administrative discharge for non-sexual assault offense	Administrative Discharge	Administrative discharge	Administrative Discharge	No charges, victim declined to participate
Other Adverse Administrative Action	Other Administrative Action	Administrative discharge for non-sexual assault offense	Other Adverse Administrative Action	Civilian suspect, USAO declined prosecution
Other adverse administrative actions for non-sexual assault offense	Insufficient evidence	Other Adverse Administrative Action	Insufficient Evidence of Any Offense	Pending disposition
Insufficient Evidence to Prosecute Any Offense	Unfounded	Other adverse administrative actions for non-sexual assault offense	Unfounded	
Report was not substantiated	Victim declination	Insufficient Evidence of Any Offense	Victim Declined to Participate in Military Justice Action	
Unfounded by Investigative Agency	Victim declination and Insufficient evidence	Unfounded by Command	Offender is Unknown	
Offender is Unknown	Unknown Subject	Victim declined to participate in military justice action.	Subject Died or Deserted	
Victim Declined to Participate in Military Justice Action	Victim declination and Unknown Subject	No subject identified	Subject is a Civilian or Foreign National	
Subject is a Civilian or Foreign National	Subject was convicted in civilian court of sexual battery	No subject identified/Courts-Martial Charge Preferred	A Civilian/Foreign authority is Prosecuting Service Member	
A Civilian/Foreign authority is Prosecuting Service Member	Local civilian prosecutors declined to take action or charges dismissed.	No Subject Information	Alleged perpetrator not subject to the UCMJ	
Statute of Limitations Expired - No jurisdiction	The Special Assistant U.S. Attorney declined to prosecute	No subject titled	Incident occurred prior to victim's military service	
No investigation: Alleged perpetrator not subject to the UCMJ	Victim previously reported this misconduct and Subject had received NJP three years prior	Offender is Unknown	Case Pending or Information Not Available	
No DSAID Case	Left Blank	Case is not managed by the Marine Corps		
No investigation listed in DSAID: Blank field		Subject is a Civilian or Foreign National		
No investigation: Other		Pending		
Subject from Other Service				
Investigation has not been completed				
Command action pending				
264	292	90	203	17
Disposition of Denied/Withdrawn Requests	Disposition of Denied Requests	Disposition of Denied/Withdrawn Requests	Disposition of Denied Requests	Disposition of Denied Requests
Courts-Martial Charge Preferred	Non-judicial punishment for non-sexual offense	Other adverse administrative action for non-sexual assault offense	Non-judicial punishment for non-sexual assault offense	No Suspect Identified
Non-judicial punishment for non-sexual assault offense	Victim declination and Unknown Subject	No Subject Disposition Information	Offender is Unknown	
	Insufficient evidence	Offender is Unknown	Case Pending or Information Not Available	
	Unknown Subject	Subject is a civilian or foreign national		
	Unfounded	Case is not managed by the Marine Corps		

Army	
Other Adverse Administrative Action	1
Offender is Unknown	5

Navy	
Left Blank	3
10	

Marine Corps	
Pending	1
8	

Air Force
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Coast Guard
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# RFI Set 4 Question 5, Attachment A - Summary of Responses (FY 2016)

## Expedited Transfer Timelines

### Army

Time from Date of SA Report to ET Request	
0 - 30 Days	150
31 - 180 Days	80
180 - 365 Days	22
More Than 365 Days	12
Blank/UNK/N/A	12

276

### Navy

Time from Date of SA Report to ET Request	
0 - 30 Days	161
31 - 180 Days	85
180 - 365 Days	38
More than 365 Days	12
Blank/UNK/N/A	6

302

### Marine Corps

Time from Date of SA Report to ET Request	
0 - 30 Days	40
31 - 180 Days	32
180 - 365 Days	10
More than 365 Days	9
Blank/UNK/N/A	7

98

### Air Force

Time from Date of SA Report to ET Request	
0 - 30 Days	64
31 - 180 Days	38
180 - 365 Days	10
More than 365 Days	8
Blank/UNK/N/A	86

206

### Coast Guard

Time from Date of SA Report to ET Request	
0 - 30 Days	7
31 - 180 Days	0
296 - 343 Days	3
Blank/UNK/N/A	8

18

### Time from ET Request to Approval Decision

0 - 3 Days	106
4 - 6 Days	74
7 - 10 Days	51
11 - 35 Days	43
Blank/UNK/N/A	2

276

### Time from ET Request to Approval Decision

0 - 3 Days	233
4 - 6 Days	30
7 - 10 Days	15
11 - 36 Days	11
Blank/UNK/N/A	13

302

### Time from ET Request to Approval Decision

0 - 3 Days	85
4 - 6 Days	4
7 - 10 Days	1
11 - 35 Days	2
Blank/UNK/N/A	6

98

### Time from ET Request to Approval Decision

0 - 3 Days	190
4 - 6 Days	7
7 - 10 Days	2
11 - 35 Days	7

206

### Time from ET Request to Approval Decision

0 - 3 Days	3
4 - 6 Days	9
7 - 10 Days	1
11 - 19 Days	5

18

### Time from ET Approval Decision to Transfer

0 - 30 Days	6
31 - 60 Days	91
61 - 90 Days	92
91 - 120 Days	3
408 - 456 Days	30
Blank/UNK/N/A	54

276

### Time from ET Approval Decision to Transfer

0 - 30 Days	154
31 - 60 Days	128
61 - 90 Days	10
91 - 120 Days	0
147 - 170 Days	2
Blank/UNK/N/A	8

302

### Time from ET Approval Decision to Transfer

0 - 30 Days	22
31 - 60 Days	56
61 - 90 Days	3
91 - 120 Days	0
121 - 398 days	3
Blank/UNK/N/A	14

98

### Time from ET Approval Decision to Transfer

0 - 30 Days	7
31 - 60 Days	66
61 - 90 Days	113
91 - 120 Days	7
137 - 324 Days	4
Blank	9

206

### Time from ET Approval Decision to Transfer

0 - 30 Days	12
31 - 55 Days	4
Blank/UNK/N/A	2

18

**Combined Service Responses to RFI 4, Question 6**  
**Sexual Assault-Related Transfers of Service Members Accused of Sexual Assault**

**Question 6** (*Services*): Please provide a list of all sexual assault-related transfers of Service members **accused of sexual assault** in FY 16, including an identification number (DSOID number, if available) for each transfer that can be used by DoD and the Services to provide additional information about a specific transfer or the underlying sexual assault case if requested by the DAC-IPAD at a later date.

For each sexual assault-related transfer of an accused, please provide the information listed below. So that the responses are uniform across the Services, please use Attachment B to provide the data. The label of each column in the spreadsheet corresponds to the numbered data points below.

1. Identification number (DSOID number for the underlying sexual assault allegation or other case-identifying number if not in DSOID)
2. Accused rank at time of request
3. Accused gender
4. Accused location/installation at the time of the request
5. Accused job title at the time of the request
6. What was the rank of the decision-maker/approval authority?
7. What was the job title of the decision-maker/approval authority?
8. Location/installation that the accused was transferred to
9. Accused job title at receiving location/installation
10. Date of the underlying unrestricted sexual assault report
11. Date of transfer of accused
12. Was the transfer permanent or temporary?
13. Disposition of the sexual assault allegation if final

**Army Response:**

The Army does not centrally track transfers of Soldiers accused of sexual assault and is unable to provide the requested data. Pursuant to Army policy, only Victims are entitled to request expedited transfers. If a Victim requests an expedited transfer, a commander may consider transferring an accused Soldier instead. Accused Soldiers are typically transferred within the same General Court-Martial Convening Authority to maintain jurisdiction under the Uniform Code of Military Justice. These transfers would occur locally on an installation without notice to Headquarters, Department of the Army.

<p><b>Navy Response:</b>  Navy is not required by higher authority to track sexual assault related transfers of Service members accused of sexual assault, nor does Navy currently have a mechanism for tracking such transfers.</p>
<p><b>Marine Corps Response:</b>  Please find attached the Marine Corps response to Question #6. Please note this is not a SAPR product; SAPR is victim focused and does not track offender data. I would reiterate Mr. Martinson's point that commanders retain the discretion to transfer an accused Service Member within a unit but away from the victim out of safety concerns or to maintain good order and discipline. These moves are usually intra-unit so our people at Manpower would not track these moves.</p> <p>The Military Justice Branch compiled this data by reviewing our SARR Forms. Some of the fields in the form are empty because our form does not track the Accused Job Title, Transfer installation, Accused Job Title at New Location, Date of Transfer, or if transfer was permanent or temporary.</p> <p>[23 transfers of members accused of sexual assault in FY16]</p>
<p><b>Air Force Response:</b>  [7 transfers of members accused of sexual assault in FY16]</p>
<p><b>Coast Guard Response:</b>  [2 transfers of members accused of sexual assault in FY16]</p>

# Collateral Misconduct Study

## Section 547 of the NDAA for Fiscal Year 2019

Public Law 115-232 (Aug 13, 2018)

### SEC. 547. REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS.

- (a) REPORT.—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
  - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
  - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).
- (b) COVERED INDIVIDUAL DEFINED.—In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

**Defense Advisory Committee on  
Investigation, Prosecution, and Defense of  
Sexual Assault in the Armed Forces (DAC-IPAD)**

**October 19, 2018**

**DAC-IPAD Public Meeting**

**Biographies of Presenters**

**Effects of Sexual Assault Investigations on Accused Service Members**

**9:10 a.m. – 10:30 a.m.**

**Ms. Kathleen Coyne** is a 1982 graduate of Temple University School of Law, and is admitted to practice in California, Pennsylvania and Florida. She practiced as a public defender in San Diego, Philadelphia, New York and as a Federal Defender for over 30 years. She is currently the Highly Qualified Expert for the Marine Corps Defense Services Organization where she consults on sexual assault and complex cases, conducts training, and develops resources for the Defense Counsel Assistance Program. She is the recipient of the 1993 Public Defender of the Year by the California Public Defender's Association and was honored as Trial Attorney of the Year by the Criminal Defense Bar Association of San Diego County, as well as being the California Attorneys for Criminal Justice's Skip Glenn Award recipient "for extraordinary accomplishments by a young defense lawyer"; and the winner of the Defender Organizations of San Diego County's E. Stanley Conant Award for "efforts to protect the rights of the indigent accused." She has lectured extensively in the area of defending sexual assault cases, insanity, mental defenses to homicide, use of psychological experts, eyewitness identification issues, ethics, child witness testimony, childhood suggestibility, working effectively with experts, cross examination of prosecution experts, use of syndrome evidence and investigation of complex child abuse cases.

**Perspectives of Civilian Sexual Assault Investigators**

**10:40 a.m. - 12:00 p.m.**

**Sergeant Detective Kelley O'Connell** is a 31 year veteran of the Boston Police Department currently assigned to the Sexual Assault Unit overseeing detectives in investigations of adult and child sexual assaults since 2009. She has been trained and has trained in the areas of trauma informed investigations and the neurobiology of trauma. She is a level three instructor with Massachusetts Municipal Police Training Council in areas of human trafficking, mental health and emotional disturbances and sexual assault investigations.

**Sergeant Amanda Wild** is the Sergeant of the Albuquerque Police Department's Sex Crimes Unit. She started her career in law enforcement in 2008 and as of October 2017, she oversees the Sex Crimes Unit in the Violent Crimes Division. Sergeant Wild holds a bachelor of science degree in criminal justice and a master of science degree in justice and security administration. Throughout her time in law enforcement Sergeant Wild has spent five years as a detective investigating hundreds of criminal sexual penetration cases prior to her promotion to sergeant. As a detective, Sergeant Wild obtained invaluable experience while investigating sexual assaults and she continues participating in numerous trainings in sexual assault, human trafficking, violence against women, domestic violence, interviewing and interrogations techniques and she has become certified as a law enforcement basic instructor. As the nation has experienced a backlog in testing sexual assault evidence kits (SAEK), she has been the main driving force for her department's recent focus and success on testing the SAEK's. In her efforts, Sergeant Wild has successfully established a cold case sex crimes unit directed in investigating the backlog sexual assaults. Among her, many accomplishments she continues to advocate for victims of sexual assaults pursuing these cases throughout the process to completion.

**Major Steve Hohman** is the Commanding Officer of the Special Investigation Section (SIS) of the Baltimore Police Department (BPD). The SIS is within the Criminal Investigation Division and is comprised of 13 separate investigative units, including the Sex Offense Unit. He is a 19 year veteran of the BPD, spending the majority of his career in investigative assignments as a detective, sergeant, lieutenant, captain, and now major. Major Hohman has conducted and supervised thousands of criminal investigations to include homicides, robberies, non-fatal shootings, and sexual assaults. As Commanding Officer, he has overseen many reforms to the way sexual assault investigations are conducted, including the implementation of investigative checklists and the re-writing of the BPD's policy for sexual assault investigations and the Sex Offense Unit's standard operating procedures. During his tenure, the clearance rate for rape has rose from 8% to over 50%, well above the national average of approximately 36%. He holds a B.S. degree in criminal justice from the University of Maryland, University College.



# **Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)**

Case Review Working Group  
Proposed Findings and Recommendations  
for 2019 Report

October 19, 2018

BGen (Ret) James Schwenk and Ms. Kate Tagert



# Agenda

- Project progress and first impressions.
- Present CRWG's initial findings and recommendations to the DAC-IPAD for inclusion in the DAC-IPAD March 2019 annual report.



# Case Review Progress

- Delay in receiving complete case files.
- Creation of comprehensive checklist.
- Database creation.
- Data entry (231 entry points per case).
- Reconciliation of cases to ensure accuracy.
- Criminologist analysis.



# Committee Member Case Review

Service	No Action Taken		Preferred	
	Reported	Reviewed	Reported	Reviewed
Air Force	21	21	10	*12
Army	53	*57	13	*17
Navy	23	*25	6	6
Marines	16	*18	6	6
Coast Guard	2	2	2	2
TOTALS	115	123	37	43

Numbers requested based on random sample computation.



# Case Review Progress

- March 2019 Report:
  - Analyze and discuss the 166 random sample cases within the database.
  - All were reviewed by at least one CRWG member and one staff member.
  - 123 “No Action Taken” and 43 “Preferred” = 166
- March 2020 Report:
  - Complete review of 2,069 cases
  - 1,218 cases reviewed to date
  - 851 cases remaining
  - Includes: no action, preferred, administrative action, and non-judicial punishment.



# Status of Objectives

**Objective 1**: Capture data within investigative case files that may predict disposition outcome.

**Status**: A multi-variate analysis of Service-specific practices will not be available until all cases in the FY17 are completed.

**Projected completion**: Summer of 2019. Analysis will be completed by criminologist for 2020 report.



# Status of Objectives

**Objective 2**: Review and assess Service disposition categorizations to determine the accuracy and consistency of DoD reporting.

**Status**: Results in finding and recommendations. Criminologist analysis for 2019 report of the discrepancies between closure categorizations.

**Objective 3**: Capture demographic information to be used in future Committee reporting.

**Status**: 2019 report will include the demographic and descriptive information from the sample set of cases reviewed. 2020 report will include all FY 17 cases.



# Status of Objectives

**Objective 4**: Review and assess investigations to identify common trends.

**Status**: Results in findings and recommendations.

**Objective 5**: Make an assessment, based on a detailed analysis of the information in the investigative file, of whether the disposition in each case was reasonable.

**Status**: 2019 report will include this assessment from the sample of no action taken cases. 2020 report will include all FY 17 cases regardless of disposition.



# Methodology

Every case from this initial review was reviewed by a committee member and a staff member. If a case was marked unreasonable by any reviewer a third attorney review was conducted.

Preferred cases also included a review of preliminary hearing reports and judge advocate advice if available.



# Testimony Received

CRWG conducted ten hours of deliberations during preparatory sessions in July, August, and October of 2018 and heard from:

- MCIO investigators
- Prosecutors
- Defense Counsel
- FBI analysts
- Assistant United States Attorney



# Assessment of Command Actions

## RANDOM SAMPLE: REASONABLE/UNREASONABLE DETERMINATION

	CATEGORY	# IN DATABASE	% REASONABLE (UNANIMOUS) <sup>1</sup>	% REASONABLE (MAJORITY) <sup>2</sup>	% UNREASONABLE (MAJORITY) <sup>3</sup>	% UNREASONABLE (UNANIMOUS) <sup>4</sup>
DOD	COMBINED	166	86%	8%	2%	4%
	NO ACTION	123	85%	8%	2%	4%
	PREFERRED	43	86%	7%	2%	5%

### Definitions:

<sup>1</sup> **REASONABLE (UNANIMOUS)**: All reviewers of case file agreed that command action was reasonable.

<sup>2</sup> **REASONABLE (MAJORITY)**: Two out of three reviewers of case file agreed that command action was reasonable.

<sup>3</sup> **UNREASONABLE (MAJORITY)**: Two out of three reviewers of case file agreed that command action was unreasonable.

<sup>4</sup> **UNREASONABLE (UNANIMOUS)**: All reviewers of case file agreed that command action was unreasonable.



## ISSUE 1: Investigative Case Closure (Clearance) Classifications

- **CRWG Finding 1**: The case closure (clearance) classifications utilized by military investigators are set forth in DoDM 7730.47-M-V1. The CRWG found during its case reviews that these classifications are confusing and applied inaccurately and inconsistently by investigators.



# ISSUE 1: Investigative Case Closure (Clearance) Classifications

- **CRWG Finding 2**: Investigators use the information from command disposition/action reports to determine appropriate case closure classifications.



## ISSUE 2: Probable Cause Determinations, Unfounding, and Submission of Fingerprints to Federal Databases

- **CRWG Finding 3**: DoDI 5505.11 “Fingerprint Card and Final Disposition Report Submission Requirements,” states that military subjects’ fingerprints are to be submitted electronically to the FBI when a determination is made that probable cause exists (defined as a determination that there are reasonable grounds to believe that an offense has been committed and that the person to be identified as the offender committed it) in coordination with the servicing SJA or legal advisor. In no case is this to be earlier than apprehension (in the military), or the subject interview. DNA submissions, in accordance with DoDI 5505.14 “Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders,” have similar requirements.



## ISSUE 2: Probable Cause Determinations, Unfounding, and Submission of Fingerprints to Federal Databases

- **CRWG Finding 4:** The CRWG received testimony and found during its case reviews that the point during the investigative process at which the subject's fingerprints and DNA are taken, the probable cause determination is made, and the subject's fingerprints and DNA are submitted to federal databases vary widely in the military.



## ISSUE 2: Probable Cause Determinations, Unfounding, and Submission of Fingerprints to Federal Databases

- **CRWG Finding 5**: From the testimony received by the CRWG and its review of case files, the CRWG finds that there is significant confusion among investigators, judge advocates, and commanders as to the meaning of the terms probable cause (reasonable grounds to believe) and unfounded (false or baseless), when and by whom probable cause and unfounded determinations are made, and how they are documented throughout the investigative process.



## ISSUE 3: Investigator Discretion

- **CRWG Finding 6:** Military investigators testified that they are required to follow a checklist of investigative actions regardless of the facts of a particular case and that they have little discretion to determine which investigative actions provide value in a case.



## ISSUE 3: Investigator Discretion

- **CRWG Finding 7**: In the course of conducting case reviews, the CRWG found that nearly all case files include the same series of investigative actions, including photographs of incident locations and extensive interviews of coworkers and other character witnesses whether relevant to the case or not.



## ISSUE 3: Investigator Discretion

- **CRWG Finding 8**: It is problematic that in some cases in which, appropriately, no action is taken against an accused Service member, investigations are taking over six months to complete. Lengthy investigations often have significant negative consequences for accused Service members as well as victims.



## **ISSUE 4: Documentation of Command Disposition Decisions and Action Taken**

Based on its review of penetrative sexual assault investigative case files for cases closed in fiscal year 2017, and testimony received during DAC-IPAD meetings and CRWG preparatory sessions, the CRWG makes the following findings and recommendations related to the military's documentation of command disposition decisions and disciplinary actions taken.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

**CRWG Finding 9**: Accurate and uniform documentation of a commander's disposition decision, the reason for the decision, and any disciplinary action taken for alleged violations of the Uniform Code of Military Justice is essential to:

- a. create complete, reviewable military justice records;
- b. enable military justice federal advisory committees such as the DAC-IPAD and the future Article 146, UCMJ, Military Justice Review Panel to conduct statutory sexual assault and other military justice reviews and assessments;



## **ISSUE 4: Documentation of Command Disposition Decisions and Action Taken**

- c. ensure military criminal investigative agencies accurately report crime data to federal law enforcement agencies and databases; and
- d. ensure that federal criminal databases routinely searched by employers and others required to conduct criminal background checks reflect accurate and timely information about the disposition of allegations made against Service members.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

**CRWG Finding 10**: DoDI 5505.18, which promulgates DoD's sexual assault investigation policy, requires the commander of the Service member who is a reported subject of an investigation to provide the MCIO, in writing, all disposition data within 5 business days of disposition to include: (1) any administrative, non-judicial punishment, or judicial action that occurs as a result of the investigation; or (2) a declination of command action when no action is taken.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

**CRWG Finding 11**: Section 535 of the FY 2019 NDAA requires the Secretary of Defense to establish a uniform command action form, applicable across the Armed Forces, for reporting the final disposition of cases of sexual assault in which (1) the alleged offender is a member of the Armed Forces; and (2) the victim files an unrestricted report on the alleged assault.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

**CRWG Finding 12**: Military investigators and judge advocates testified to the CRWG and DAC-IPAD that documentation of command action is required to officially close a case. Investigators reported that they often have difficulty obtaining this documentation from commanders in a timely manner.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

- **CRWG Finding 13**: The command disposition/action reports that are found in investigative files are often unclear, incomplete, inaccurate, and inconsistent within and across the Services.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

- **CRWG Finding 14**: Command disposition/action reports that are found in investigative files frequently include SAPRO-defined terms such as “command action precluded” which often causes confusion, inconsistencies, and inaccurate reporting by MCIOs and others required to report crime data utilizing standardized legal and investigative terms.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

- **CRWG Finding 15**: It is unclear from the command disposition/action documentation found in investigative case files what source documents or other written information is utilized by commanders in filling out command disposition/action reports. Command disposition/action reports sometimes conflict with source documents reviewed by CRWG members and staff.



## ISSUE 4: Documentation of Command Disposition Decisions and Action Taken

- **CRWG Finding 16**: Staff judge advocates testified that they do not routinely assist commanders in completing command disposition/action reports.



# ISSUE 1: CRWG Recommendations

- **CRWG Recommendation 1**: In developing a uniform command action form in accordance with section 535 of the FY 2019 NDAA, the Secretary of Defense should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.



# ISSUE 1: CRWG Recommendations

- **CRWG Recommendation 2:** [The Secretary of Defense] should ensure that the standard set of options for documenting command disposition decisions are based on recognized legal and investigatory standards that are uniformly defined across the Services and accurately reflect command action source documents.



# ISSUE 1: CRWG Recommendations

- **CRWG Recommendation 3**: [The Secretary of Defense] should ensure judge advocates or equivalent civilian attorneys review and provide advice to commanders in completing command disposition/action reports in order to ensure accuracy and completeness of the documentation.



## CRWG Way Ahead

The CRWG will continue to monitor the important and problematic issues identified with (1) investigative case closure classifications; (2) probable cause and unfounding determinations and submission of fingerprints to Federal databases; (3) investigator discretion; and (4) documentation of command disposition decisions and action taken.



# **Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)**

**Policy Working Group (PWG) Update  
Expedited Transfer**

**October 19, 2018**



## **DAC-IPAD Assessment of the DoD Expedited Transfer Policy**

In its March 2018 Annual Report, the DAC-IPAD provided an overall assessment of the DoD expedited transfer policy, finding that the policy is an important sexual assault response initiative and strongly recommending it be continued and further improved. The Committee also made four recommendations.

The DAC-IPAD made six interim assessments regarding the expedited transfer policy and asked the PWG to continue to review these issues. The PWG also reviewed one additional related issue.



## **PWG Continued Review**

To assess these issues, the PWG heard from panels of the following DoD and Service presenters at the October 2017 DAC-IPAD public meeting and the December 2017 and May 2018 PWG preparatory sessions:

- Mid-level and senior commanders and senior enlisted leaders
- SVCs and VLCs and their program managers
- DoD and Service SAPR program representatives
- Service SARCs
- Service special victim prosecutors and defense organization heads
- Service MCIOs
- Sexual assault victims who received expedited transfers



## **PWG Continued Review, Cont.**

The PWG also received information and data on all expedited transfer requests submitted in fiscal year 2016 as well as sexual assault–related transfers of accused Service members from each of the Services in response to a request for information.



# **PWG Recommendations and Assessments**

**Issue A: The expedited transfer option is not available to Service members who make restricted sexual assault reports.**

## DAC-IPAD March 2018 Interim Assessment

The DAC-IPAD believes that the development of a workable option allowing Service members who make restricted reports to request and receive expedited transfers without triggering an investigation would be beneficial for certain victims. The PWG will continue to explore this issue.



# PWG Recommendations and Assessments

**PWG Recommendation 1:** The Secretary of Defense expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:

1. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.



# PWG Recommendations and Assessments

## **PWG Recommendation 1, cont.:**

2. The victim's commander and senior enlisted leader, both at the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the alleged offender's identity or other facts of the case—enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
  
3. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the alleged perpetrator not being held accountable for his or her actions or the loss of evidence should the victim later decide to unrestrict his or her report.



# **PWG Recommendations and Assessments**

**Issue B: Inadvertent disclosures by victims to their commands of sexual assaults and reports of sexual assault made by third parties deny Service members the opportunity to make a restricted report and protect their privacy, if they so desire.**

## DAC-IPAD March 2018 Interim Assessment

The DAC-IPAD believes that victims who lose the ability to make a restricted report, whether because of third-party reports or because they are unaware of the consequences of reporting to a member of their chain of command, may benefit from being able to restrict further disclosure or investigation of the incident if they wish to protect their privacy. The PWG will continue to explore this issue.



# PWG Recommendations and Assessments

**PWG Recommendation 2:** The Secretary of Defense establish a working group to review whether victims should have the option to request further disclosure or investigation of a sexual assault report be restricted in situations in which the member loses the ability to file a restricted report, whether because a third party has reported the assault or because he or she discloses the assault to a member of the chain of command or military law enforcement. The working group's goal should be to find a workable solution that would, in appropriate circumstances, allow the victim to request the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes and should also consider whether existing safeguards are sufficient to ensure victims are not improperly pressured by the alleged offenders, or others, to request termination of the investigation.



# PWG Recommendations and Assessments

## **PWG Recommendation 2, cont.:**

This working group should consider implementing the following requirements in such a policy:

1. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
2. The investigative agent be required to get supervisory or MCIO headquarters-level approval to close a case in these circumstances.



# PWG Recommendations and Assessments

## **PWG Recommendation 2, cont.:**

3. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place, such as notifying the third-party reporter of the MCIO's decision to honor the victim's request.
4. Cases in which the alleged offender is in a position of authority over the victim be excluded from such a policy.
5. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the alleged offender based solely on the reporting witness' sexual assault allegation.



# **PWG Recommendations and Assessments**

**Issue C: The approval standard and the purpose of DoD's expedited transfer policy are not sufficiently clear or comprehensive.**

## DAC-IPAD March 2018 Interim Assessment

The DAC-IPAD believes the purpose, standards, and criteria outlined in the expedited transfer policy should be further evaluated and clarified. The PWG will continue to explore this issue.



# PWG Recommendations and Assessments

**PWG Recommendation 3:** The Secretary of Defense revise the DoD expedited transfer policy to include or clarify the following points:

1. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should make decisions regarding such requests based upon that goal.



# PWG Recommendations and Assessments

## **PWG Recommendation 3, cont.:**

2. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery. (e.g., proximity to the alleged offender or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).

3. Eliminate the requirement that a commander determine that a report be credible and, instead, add to the criteria commanders must consider in making a decision on an expedited transfer request "any evidence that the victim's report is not credible."



# PWG Recommendations and Assessments

**PWG Recommendation 4:** Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five work days.



# **PWG Recommendations and Assessments**

**Issue D: The expedited transfer policy includes temporary or permanent intra-installation moves as well as moves to new installations or locations.**

## **DAC-IPAD March 2018 Interim Assessment**

The DAC-IPAD is concerned that Service members who initially receive an intra-installation expedited transfer may be penalized if the transfer does not resolve the problems in their situation and they subsequently request a second expedited transfer to leave the installation. The PWG will continue to explore this issue.



# PWG Recommendations and Assessments

## **PWG Assessment:**

Having spoken to numerous presenters from the Services and DoD—SVCs and VLCs, SARCs, SAPR personnel, assignments personnel, prosecutors, and defense counsel—the Committee has determined that the current expedited transfer policy is working for both victims and command.



# **PWG Recommendations and Assessments**

**Issue E: The expedited transfer policy is limited to Service members who are victims of sexual assault and does not include Service members whose civilian spouses or children are sexual assault victims, even though all may face exactly the same difficult situations at the installation or may equally benefit from moves to a new location.**

## **DAC-IPAD March 2018 Interim Assessment**

The DAC-IPAD believes that the expedited transfer policy should be a complete program without gaps in eligibility within the military community, and thus should include family members. The PWG will continue to explore this issue.



# PWG Recommendations and Assessments

## PWG Assessment:

Since the DAC-IPAD's initial review of this issue in the March 2018 Annual Report, Congress enacted a provision in the National Defense Authorization Act (NDAA) for Fiscal Year 2019 which expands the expedited transfer policy to include Service members whose dependents are victims of sexual assault by other Service members, thus effectively resolving this issue. This section states:

The Secretary of Defense shall establish a policy to allow the transfer of a member of the Army, Navy, Air Force, or Marine Corps whose dependent is the victim of sexual assault perpetrated by a member of the Armed Forces who is not related to the victim.



# **PWG Recommendations and Assessments**

**Issue F: The Department of Defense and military Services collect only limited expedited transfer data on victims of sexual assault and collect no data on transfers of alleged offenders.**

Previous DAC-IPAD Recommendation from March 2018 Report

The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it.



# PWG Recommendations and Assessments

**PWG Recommendation 5:** The Military Services track and report the following data in order to best evaluate the expedited transfer program:

- Data on the number of expedited transfer requests by **victims**; the grade and job title of the requester; the gender and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final



# PWG Recommendations and Assessments

## PWG Recommendation 5, cont.:

- Data on the number of **accused** transferred; the grade and job title of the accused; the gender and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final
- Data on victim participation in investigation/prosecution before and after an expedited transfer
- Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers



# PWG Recommendations and Assessments

## PWG Recommendation 5, cont.:

- Data on the type of sexual assault offense (penetrative or contact) alleged by victims requesting expedited transfers
- Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with Service members of similar rank and years of service
- Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with Service members of similar rank and years of service



# PWG Recommendations and Assessments

## PWG Recommendation 5, cont.:

- Data on victim satisfaction with the expedited transfer program
- Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault



# **PWG Recommendations and Assessments**

**Issue G: Some active duty Service members who are sexually assaulted are not able to successfully return to duty even after an expedited transfer, because their need for transitional assistance is not met.**

## DAC-IPAD March 2018 Interim Assessment

The DAC-IPAD believes that some active duty Service members who are sexually assaulted are in need of transitional assistance before they are able to successfully return to duty. The PWG will continue to explore this issue.



# PWG Recommendations and Assessments

**PWG Recommendation 6:** The Secretaries of the Military Departments incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.



**Defense Advisory Committee on Investigation,  
Prosecution, and Defense of Sexual Assault in  
the Armed Forces  
(DAC-IPAD)**

**Staff Presentation and Committee Discussion  
on**

**June 2018 Request from DoD General  
Counsel to Examine Judicial Proceedings  
Panel (JPP) Recommendations**

October 19, 2018

Meghan Peters, Terri Saunders, and Nalini Gupta

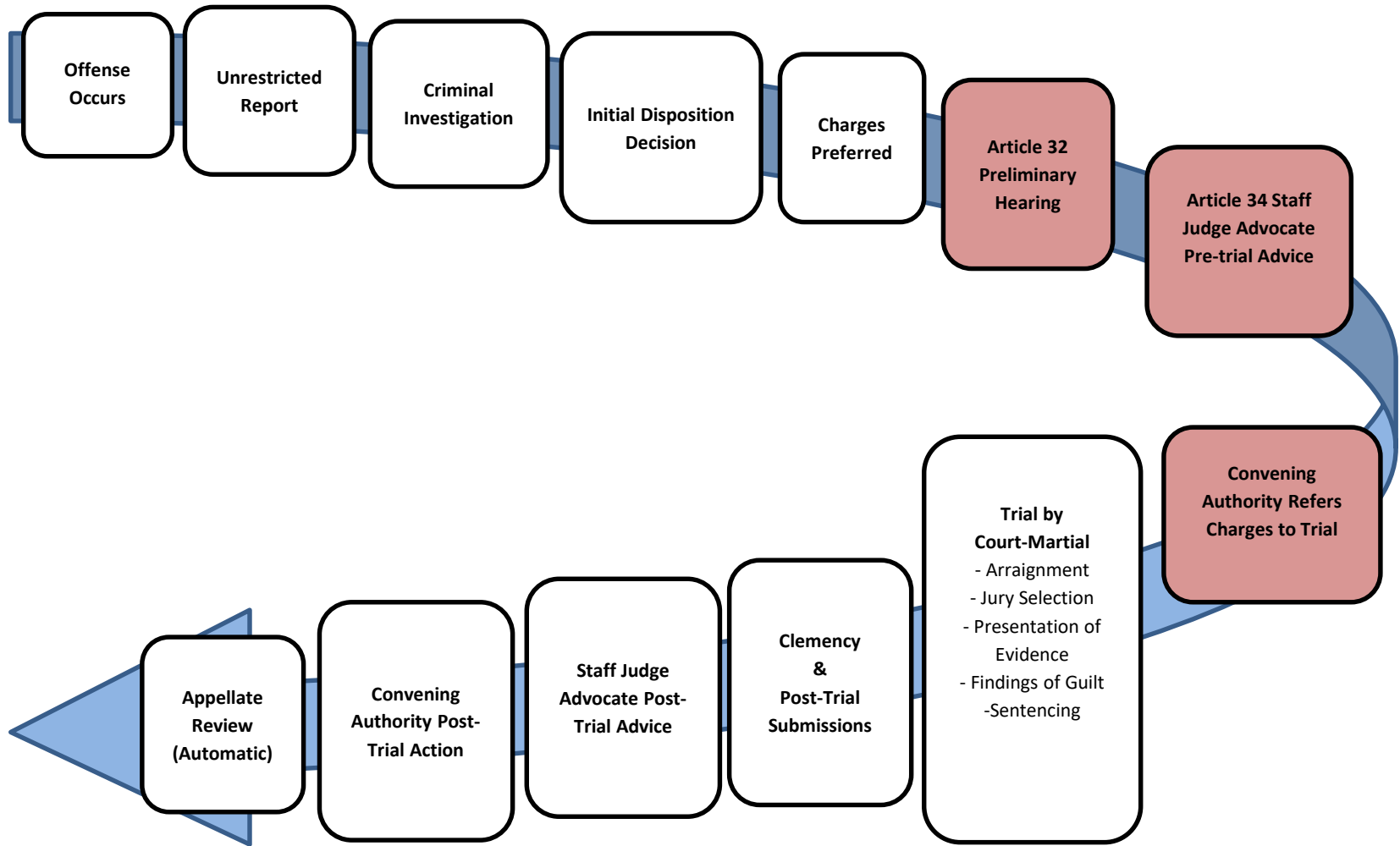


## **Judicial Proceedings Panel (JPP) Recommendations to DAC-IPAD**

- 5 total JPP recommendations forwarded by DoD General Counsel
- 2 of the 5 JPP recommendations ask for analysis of data contained in the DAC-IPAD's court-martial database
- The remaining 3 recommendations address UCMJ provisions concerning how cases are selected for prosecution



# Court-Martial Process





# **JPP Subcommittee: 2016 Site Visits**

Major themes:

- Less robust Article 32 preliminary hearing
- Perceived pressure on convening authorities to refer sexual assault charges to court-martial
- Low standard of probable cause for referring cases to courts-martial
- High acquittal rate for sexual assault offenses



## JPP Recommendation 55: Article 32 Preliminary Hearings

- A. The Secretary of Defense and DAC-IPAD **continue the review of the new Article 32 preliminary hearing process**, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, **no longer serves a useful discovery purpose**.
- B. This review should look at whether **preliminary hearing officers** in sexual assault cases should be **military judges or other senior judge advocates** with military justice experience, and
- C. whether a **recommendation** of such a preliminary hearing officer **against referral**, based on lack of probable cause, **should be given more weight** by the convening authority.



## JPP Recommendation 55: Article 32, Preliminary Hearings (cont.)

- D. This review should **evaluate data** on **how often the recommendations** of preliminary hearing officers regarding case disposition **are followed** by convening authorities and determine whether further analysis of, or changes to, the process are required.
- E. In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the **Military Services provide the defense with independent investigators.**



## JPP Recommendation 57: **Article 33, Disposition Guidance**

- A. After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation **site visits** and **further research**
- B. to determine whether **convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions.**
- C. They should also determine **what effect**, if any, this guidance has had **on the number of** sexual assault **cases** being **referred** to courts-martial and on the **acquittal rate** in such cases.



## JPP Recommendation 58: Article 34, SJA's Pretrial Advice

- A. The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to **remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial.**
- B. This review should determine **whether** any **memo from trial counsel** that is appended **should also be shielded** from disclosure to the defense.



## JPP Recommendation 58: Article 34, SJA's Pretrial Advice (cont.)

- C. This review should also consider whether such a change would encourage the staff judge advocate to provide **more fully developed** and **candid written advice** to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a **better-informed disposition decision**.



## Article 32: Pre-2015 Version

- A “thorough and impartial” investigation into the “truth and form” of the charges
- A military victim could be compelled to testify
- An Article 32 investigation served as a means of discovery



# Article 32: Current Version

- A preliminary hearing--not an investigation
- “Not intended to serve as a means of discovery”
- Limited inquiry into:
  - 1) Whether each specification alleges an offense
  - 2) Whether there is probable cause to believe that the accused committed the offense(s)
  - 3) Whether there is jurisdiction over the accused and over the offense
  - 4) The disposition that should be made of the case



# Article 32: Future Version

The Military Justice Act of 2016, and new implementing rules, change Article 32 by:

- More closely aligning the language of Article 32 with the provisions governing the staff judge advocate's advice to convening authorities as well as the convening authority's decision to refer charges to court-martial
- Calling for a more robust written analysis of the charges and the underlying evidence in the Article 32 report than previously required
- Allowing more evidence to be considered



# **Article 32:**

## **Issues Identified by the JPP**

- Widespread concern among military justice practitioners that the Article 32 hearing no longer serves a useful purpose – it's become a “paper drill”
- PHO recommendations are not followed, even when they find no probable cause exists
- Additional changes to the Article 32 process may be needed to ensure baseless charges do not go to trial
- Defense investigators are needed to restore balance



# Update: Defense Investigators

June 2018 – DoD reports to the House Armed Services Committee:

**(1) Navy has defense investigators; Air Force is in the process of obtaining independent investigative support for defense counsel.**

**Staff Note: The Army is in the process of hiring defense investigators**

(2) Military trial defense services across the Services are appropriately staffed and resourced.

(3) Providing trial defense service offices with their own budgets with which to fund expert assistance would likely create more problems than it would solve, including forcing supervisory defense personnel to assess competing demands for funding.

(4) Each Military Service takes steps to ensure that judge advocates detailed to a particular case have the training, experience, and supervision necessary to provide high-level defense services.



# Referral of Charges / Article 34 Pretrial Advice

- The convening authority may not refer charges to a general court-martial unless the SJA advises in writing that:
  - the specification alleges an offense under the UCMJ,
  - there is probable cause to believe the accused committed the offense, and
  - a court-martial would have jurisdiction over the offense and the accused.
- The staff judge advocate must also provide a disposition recommendation to the convening authority.
- If the convening authority refers charges to a general court-martial, the staff judge advocate's pretrial advice must be provided to the defense.



# **Article 34:**

## **Issue Identified by the JPP**

- Trial counsel can provide prosecution merits memos, or similar documents, to advise staff judge advocates about evidentiary and credibility issues affecting the case, but this information cannot be provided in writing to convening authorities without then being disclosed to the defense if charges are referred to general court-martial.



# Referral of Charges: Issues Identified by the JPP

- Many counsel believe that the standard in the military for referral of charges – probable cause – is too low and that convening authorities should take into account other factors in making disposition decisions, such as likelihood of obtaining a conviction at trial.
- JPP recommended that the following standard be considered for referral to court-martial: **“the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.”** (JPP Recommendation 56)



# New Article 33, Disposition Guidance

The President shall direct the Secretary of Defense to issue . . . non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under . . . articles 30 and 34. Such guidance shall take into account, with appropriate consideration of military requirements, **the principles contained in official guidance of the Attorney General to attorneys for the Government** with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.



# U.S. Attorneys' Manual

The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that **the admissible evidence will probably be sufficient to obtain and sustain a conviction**, unless, in his/her judgment, prosecution should be declined because:

- (1) No substantial Federal interest would be served by prosecution;
- (2) The person is subject to effective prosecution in another jurisdiction; or
- (3) There exists an adequate non-criminal alternative to prosecution.



# Proposed Disposition Guidance: Factors to Consider

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;**



# Proposed Disposition Guidance: Factors to Consider (cont.)

- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.



# Proposed Disposition Guidance: Inappropriate Considerations

- a. The accused's race, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;
- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander or convening authority's military career or other professional or personal circumstances; or
- e. Political pressure to take or not to take specific actions in the case.



# Proposed Plan for Analyzing JPP Recommendations

- Create working group to analyze issues:
  - Working group consists of 2-4 members
  - Working group will first examine Article 32 issues and will later turn to Article 33/34 issues (effect of disposition guidance cannot be assessed until after it goes into effect on January 1, 2019)



# Proposed Plan for Analyzing JPP Recommendations (cont.)

- DAC-IPAD and/or working group determine which presenters to hear from at public and/or working group meetings
- DAC-IPAD and/or working group determine whether to conduct site visits
- Staff prepares request for information to send to DoD and Services
- Staff reviews Article 32 reports and data for sexual assault cases completed in fiscal year 2017 (documents already collected for the court-martial data project)



# **Proposed Plan for DAC-IPAD**

## **March 2019 Report**

- Provide an overview of the JPP Recommendations to be reviewed by DAC-IPAD and Articles 32, 33, and 34, UCMJ
- Identify the key issues of concern
- Provide analysis of available Article 32 documents, and DoD and Service responses to requests for information
- Outline the timeline and plan for the DAC-IPAD's evaluation of the JPP recommendations in 2019 and 2020



# Proposed Plan for Analyzing JPP Recommendation 55

## Proposed Questions for Analysis:

1. Should the Article 32 officer's determination that a charge lacks probable cause be given more weight by the convening authority?
2. Should such a finding bar referral to court-martial?
3. What is the best way to give the PHO's report more weight?
4. Should PHOs be military judges or have a certain level of military justice experience?
5. Should the scope of the Article 32 preliminary hearing be broadened?



**Defense Advisory Committee on Investigation,  
Prosecution, and Defense of Sexual Assault in  
the Armed Forces  
(DAC-IPAD)**

**Staff Presentation and Committee Discussion**

**On**

**FY 2019 NDAA Required Study on  
Collateral Misconduct**

**October 19, 2018**

**Ms. Julie Carson and Ms. Meghan Peters**



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS

(a) REPORT.—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD shall submit to the congressional defense committees a report that includes...the following:



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

(1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.

*In other words:* The number of sexual assault victims accused of collateral misconduct.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

(2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).

*In other words:* The number of sexual assault victims receiving adverse action for collateral misconduct.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

(3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

*In other words:* The percentage of sexual assault victims receiving an accusation or adverse action for collateral misconduct.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## Observations:

- The first report is due in September 2019. This is very soon!!
- Additional DAC-IPAD staffing would be needed to undertake the study unless current projects are paused.
- The study will require access to a substantial volume of personnel and legal documents.
- The DAC-IPAD will no longer be in existence after the first report, but the provision requires a report every two years thereafter.



# **FY 2019 NDAA Section 547**

**Public Law 115-232 (Aug 13, 2018)**

## **So What Can the DAC-IPAD Do?**



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## Step 1: Define Its Role

What does “the Secretary of Defense, **acting through** the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces” mean??



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

**Option**: The DAC-IPAD could develop a detailed plan for how the study should be conducted, clearly define the parameters, and develop a meaningful analytical framework for reviewing the data to present to the Secretary of Defense for execution and preparation of the required reports for Congress.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## Step 2: Define the Terms

Only one term is defined in the NDAA provision itself---but even that definition is somewhat ambiguous:

(b) COVERED INDIVIDUAL DEFINED.—In this section, the term “covered individual” means an individual who is identified as a **victim of a sexual assault** in the **case files** of a military criminal investigative organization.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## 1. Define: Collateral Misconduct

**DoDI 6495.02**: *Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident.* Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders).



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## 2. Define: Victim of a Sexual Assault

**NDAA**: Covered Individual = any individual who is identified as a victim of a sexual assault in the **case files** of a military criminal investigative organization.

**Proposed Parameter**: Define a quantifiable, relevant baseline population, such as the number of **active duty Service members** who made an **unrestricted report** of sexual assault in the timeframe covered by the study.

For FY 2017: **5,110** unrestricted reports. **2,486** unrestricted reports involved allegations by a Service member, against a Service member. (FY 17 SAPRO Report)



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## 3. Define: MCIO Case File

**Proposed Parameter**: an investigation file opened by an MCIO (excludes information files\* not investigated)

**Proposed Parameter**: Limit baseline population to **active duty Service members** accused.

\*an information file may be opened rather than an investigation if the accused is a civilian, if there is no UCMJ jurisdiction, or if the reported incident occurred prior to service.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## 4. Define: Accused of Misconduct

**Option 1**: a victim is read Article 31 rights by an investigator during the sexual assault investigative process for “collateral misconduct.”

**Option 2**: a command or MCIO investigation of victim is opened for “collateral misconduct.”

**Option 3**: the victim, sexual assault suspect, or witnesses report that the victim engaged in “collateral misconduct” in statements to law enforcement or to the command. (This is currently collected by CRWG from FY 17 investigative files)



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## 5. Define: Adverse Action

### Examples:

Charges preferred/referred

Nonjudicial punishment under Article 15, UCMJ

Initiation of separation or elimination proceedings

Administrative reduction in rank

Letter of Reprimand or Letter of Concern

Revocation of privileges (leave/pass)

Suspension from current duties/

Relief from supervisory or leadership roles

Bar to reenlistment



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## Step 3: Procedure for Collecting Data

1. Establish the baseline population: Service member victims who made unrestricted reports against Service member accused during fiscal years 2017 and 2018.
2. Establish the date of the reported sexual assault for each identified Service member victim.
3. Identify Adverse Actions: Search investigative, SAPRO, legal, and personnel files or databases for any investigation or adverse action taken against the individual for misconduct that occurred on the same date (or timeframe) as the reported sexual assault.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## Step 3: Procedure (cont.)

4. Review documentation for each identified adverse action to determine whether it qualifies as discipline for collateral misconduct.
5. Identify Victims “Accused” of Misconduct: Review witness statements from the underlying sexual assault investigations to identify whether victims engaged in collateral misconduct.
6. Calculate the percentage of the baseline population found to have engaged in collateral misconduct and the percentage receiving adverse action for such conduct.



# FY 2019 NDAA Section 547

Public Law 115-232 (Aug 13, 2018)

## Step 4: Analysis

- Evaluate quantitative data collected
- Evaluate qualitative data – testimony from witnesses, site visits to discuss collateral misconduct
- Look for common fact patterns or trends noted by practitioners/soldiers/commanders in the field



# **FY 2019 NDAA Section 547**

**Public Law 115-232 (Aug 13, 2018)**

## **Step 5: Determine Resource Requirements to Conduct Study**



# **FY 2019 NDAA Section 547**

**Public Law 115-232 (Aug 13, 2018)**

**Step 6: Recommend Data Elements to  
Document for Future Recording of  
Victim Collateral Misconduct (and/or  
Accused Collateral Misconduct)**

# **Report on Review of Resourcing of Trial Defense Services**



The estimated cost of this report or study for the Department of Defense is approximately \$4,170 for the 2018 Fiscal Year. This includes \$0 in expenses and \$4,170 in DoD labor.

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**Prepared by the Department of Defense**

**June 2018**

## **Introduction**

In House Report 115-200, page 132, accompanying H.R. 2810, the National Defense Authorization Act for Fiscal Year 2018, the House Armed Services Committee requested that the Secretary of Defense, in coordination with the Secretaries of the Military Departments, conduct a review of trial defense services resourcing, including four specific issues:

- (1) whether military defense counsel require independent investigators in order to adequately defend their clients, and the costs associated with providing such investigators;
- (2) whether trial defense offices are adequately resourced with personnel and equipment;
- (3) the feasibility and advisability of providing independent funding and approval authority to trial defense services for expert witnesses; and
- (4) the programs in place to ensure that lead defense counsel in complex cases, such as murder and sexual assault, have the appropriate experience and training required to effectively defend their clients.

The report requested a briefing by April 1, 2018. On April 4, the Acting General Counsel of the Department of Defense informed the House Armed Services Committee that the Department's analysis was not yet complete. That analysis is now complete and this report is submitted in lieu of a briefing.

## **Summary of Response**

- (1) The Navy Judge Advocate General's Corps now provides independent civilian investigators to augment its trial defense offices. Experience demonstrates that the cost of providing this support is approximately \$100,000 per investigator.

The Navy's experience with independent civilian defense investigators will provide a valuable case study to inform the other Military Services' assessment of the merits of this

approach. The Air Force is already in the process of obtaining similar independent investigative support for its trial defense offices.

(2) Military trial defense services across the Services are appropriately staffed and resourced. The Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps are responsible for ensuring such appropriate staffing and resourcing. They exercise great care in executing that responsibility.

(3) Providing trial defense service offices with their own budgets with which to fund expert assistance would likely create more problems than it would solve, including forcing supervisory defense personnel to assess competing demands for funding – something that does not occur in the present system. Creating a zero-sum budgetary approach in which providing funding to support one accused may make it impossible to fund support for another accused is particularly problematic in the military justice system, which does not apply an imputed disqualification rule. Forcing supervisors of counsel whose clients have conflicting interests to make budgetary assessments for each would likely lead to systemic challenges.

(4) Each Military Service takes steps to ensure that judge advocates detailed to a particular case have the training, experience, and supervision necessary to provide high-level defense services. Additionally, as a result of recent Congressional mandates, all of the Military Services are currently developing additional programs to ensure that they continue to deliver highly competent trial defense services.

## Analysis

### (1) Independent Defense Investigators

The report of the Response Systems to Adult Sexual Assault Crimes Panel (RSP), a Congressionally mandated Federal Advisory Committee, recommended that the “Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.”<sup>1</sup> The report explained:

- Many civilian public defender offices have investigators on their staffs and consider them critical. Military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel stated both convening authorities and military judges routinely deny the requests.
- Military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources.<sup>2</sup>

The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) similarly recommended that, “[i]n order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.”<sup>3</sup> The JPP elaborated:

- In its June 2014 report, the RSP recommended that the Secretary of Defense direct the Services to provide independent, deployable defense investigators. The RSP noted that civilian public defender offices routinely employ investigators and consider them indispensable.

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<sup>1</sup> REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL at 38 (June 2014) [hereinafter RSP REPORT].

<sup>2</sup> *Id.*

<sup>3</sup> JUDICIAL PROCEEDINGS PANEL, REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES at 5 (April 2017) [hereinafter JPP DEFENSE RESOURCES REPORT].

- To date, only the Navy has complied with this recommendation, hiring eight civilian defense investigators. Site visit feedback from Navy defense counsel regarding the employment of defense investigators was overwhelmingly positive.
- The Army and Air Force are monitoring the feasibility of the Navy's defense investigator program, but the Marine Corps feels that current procedures for requesting defense investigative assistance are sufficient.
- Since the RSP made this recommendation, statutory changes have been made to the Article 32 process. Under the new Article 32 pretrial hearing process, witnesses, including the victim, testify at the Article 32 hearing far less frequently and less evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case.<sup>4</sup>

The JPP also found that, while the Manual for Courts-Martial provides procedures for the defense to seek investigative assistance, "in practice, according to presentations made to the JPP by the heads of the Services' defense organizations, as well as information received from numerous trial and defense counsel interviewed during installation site visits, such requests are rarely granted."<sup>5</sup> The JPP also found that "low staffing levels at defense offices often make it impossible for paralegals and legal clerks to provide" investigative assistance.<sup>6</sup>

Acting on the RSP's recommendation, in 2016, the Navy hired eight Defense Litigation Support Specialists (DLSS), who are GS-13 civilian employees. The Navy's experience with its defense investigators provides a test case that the other Military Services can consider as they assess the costs and benefits of such a program.

Under the Navy's program, each of the four Defense Service Offices (DSOs) has one DLSS in its main office and one in a detachment. The program is entering its third year. The Navy has found that its DLSS program has resulted in improved defense investigations, in some

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.* at 13-14.

instances uncovering exculpatory evidence that has contributed directly to acquittals and better dispositions for defense clients. The Navy believes the employment of independent defense investigators is a best practice.

The Navy's program provides data to assess the costs associated with an independent defense investigator program. The annual salary of a GS-13 in 2018 is between \$75,628 and \$98,317. The Navy estimates that in addition to the salary cost, the investigator also incurs travel costs on an average of seven to ten business days per month. Additional costs include the purchase of investigative equipment (including evidence collection kits, mobile computing platforms with associated software, cameras, surveillance tools, and evidence lockers) and training and certification fees. In sum, the annual cost of the Navy's DLSS program is likely less than \$1 million. These costs, however, are offset to some extent by other staffing savings. If the DLSSs were not performing their investigative functions, some of their investigative duties would instead be performed by other personnel, such as judge advocates, legalmen, law enforcement personnel detailed to particular defense teams, or outside contractors. Due to their expertise, the trained and experienced DLSSs probably perform their investigative functions more quickly and efficiently than would judge advocates or legalmen. Accordingly, but for employing DLSSs, the Navy JAG Corps would almost certainly be compelled to assign additional judge advocates and/or legalmen to each of the four DSOs, which would create an opportunity cost. Either some number of judge advocates and legalmen would be unavailable to execute other important legal duties or the Navy would be required to hire or contract with civilians to perform other functions. The Navy JAG Corps continues to evaluate its DLSS program to ensure that the number of investigators is appropriate and they are assigned appropriately throughout the various areas of responsibility.

The Air Force has similarly concluded that independent investigators are appropriate for the proper and full provision of defense services. Independent defense investigators provide specialized and tailored support that cannot be replicated by current Air Force investigative assets. Unlike government investigative entities that are focused on basic culpability, independent defense investigators are specifically trained to develop and discover evidence and witnesses in support of the defense case and explore crucial extenuation and mitigation evidence invaluable during sentencing.

Under the current system, to obtain investigative support, the defense must justify any request for support sufficiently to convince the convening authority (subject to review, post-referral, by a military judge) to provide it. Because it is important for the defense to use investigators at the earliest stages of a case, relying on an approval process similar to that used to approve defense experts limits the defense's ability to investigate and develop its case theory and evidence in extenuation and mitigation at the earliest stages.

The Air Force estimates that providing independent defense investigative capacity for its trial defense division would require seven GS-13/14 investigators. This would produce a 1:12 investigator-to-defense-counsel ratio. In addition to the seven civilian investigators' salaries, costs would include funds for frequent travel, investigative equipment, and training and certification. Accordingly, the cost of the Air Force program would be approximately the same as the Navy's existing program.

Army defense counsel currently rely on Trial Defense Service paralegals and their own investigative skills for investigative needs where appropriate. When more specialized investigative efforts are required, procedures are in place to approve funding as needed, including the appointment of Army investigators to the defense team. The Army is currently

reviewing a proposal from the Chief, U.S. Army Trial Defense Service that would create new civilian authorizations for Defense Litigation Support Specialists (DLSS). These personnel would provide independent investigation support to Army defense counsel worldwide. If approved, the current cost projections per investigator range from \$100,000 to \$130,000 based on locality (inclusive of salary, locality pay, travel, and equipment). That estimated cost is consistent with the Navy JAG Corps' annual funding per investigator. Due to the Army's far greater caseload and geographic dispersion, more investigators would likely be required for the Army than for the Navy.

The Marine Corps has determined there is no need to provide the Marine Corps Defense Services Organization (DSO) with independent and deployable defense investigators. Defense counsel in the Marine Corps may request that the convening authority appoint an investigator to the defense team. Defense counsel whose requests are denied may challenge the denial before a military judge after referral of charges for an independent determination as to whether an investigator is warranted.

## **(2) Personnel and Equipment Resources**

The RSP's report recommended that the "Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case."<sup>7</sup> The report elaborated:

- Maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system.
- Unlike many civilian public defender offices, military defense counsel organizations generally do not maintain their own budget; instead, they

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<sup>7</sup> RSP REPORT, *supra* note 1, at 38.

receive funding from the convening authority, their Service legal commands, and other sources.<sup>8</sup>

The JPP recommended:

The military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations in the long term and authorize temporary details from one Service to another to ensure expeditious disposition of allegations. Organizations that have conducted similar kinds of assessments of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit.<sup>9</sup>

The JPP elaborated:

- In its June 2014 report, the RSP recommended that the Service Secretaries ensure that defense organizations are adequately funded and resourced.
- The Secretary of Defense approved this recommendation and referred it to the Service Secretaries for implementation. In their responses to the JPP's recent request for information, all of the Services stated that their senior-level defense counsel have training and experience comparable to or exceeding that of the prosecutors. They also stated that resourcing of defense offices is comparable to that of the prosecution.
- According to site visit feedback provided to the JPP Subcommittee, not all defense offices are adequately staffed or resourced; one defense counsel noted that his office had only one paralegal assigned to assist ten defense counsel. Testimony to the JPP from Army and Marine Corps defense leadership supports site visit feedback that these organizations are understaffed and under-resourced.<sup>10</sup>

The Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps are responsible for ensuring that military defense counsel offices are adequately staffed. They conscientiously execute that responsibility. In carrying out that task, they are informed by a wealth of data that were not considered by the JPP.

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<sup>8</sup> *Id.*

<sup>9</sup> JPP DEFENSE RESOURCES REPORT, *supra* note 3, at 5.

<sup>10</sup> *Id.* at 6.

For example, while the JPP expressed concern over a 6.5% reduction in the number of authorized Army defense counsel billets from 2014 to 2015, the number of Army general and special courts-martial over that period dropped by 12%. When considered in light of that information, a 6.5% reduction in authorized defense counsel billets is both modest and appropriate.

There is no indication that the Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps are not exercising their responsibility to appropriately staff defense counsel offices in a deliberate and appropriate manner. Rather, the evidence is to the contrary. Each of the Military Services has performed an assessment of its defense counsel office staffing as recommended by the RSP and found that its trial defense offices are sufficiently resourced. There is no need for an outside audit.

The Army Trial Defense Service is currently staffed at 100% of its authorized defense counsel billets, and receives adequate resourcing for equipment through local SJA offices. The Army continually evaluates the staffing of defense offices to ensure appropriate staffing and resourcing.

In the Navy, each Defense Service Office (DSO) is commanded by an O-6 Commanding Officer, and each DSO headquarters has an O-4 or O-5 Senior Defense Counsel (SDC). In addition, a DSO may have one or more detachments, each of which is generally led by an O-5 Officer-in-Charge (OIC). SDCs and OICs are generally qualified as Military Justice Litigation Qualification (MJLQ) officers. MJLQ officers have demonstrated abilities in the areas of military justice knowledge and advocacy skills. Defense counsel are assigned throughout each area of operation (AOR) with varying caseloads. Defense counsel are equipped with mobile technology and are in constant communication with supervisory counsel and the Defense

Counsel Assistance Program. Additionally, the defense has assistance from paralegals, civilian highly qualified experts, and DLSSs. In the past year, the Navy has added billets throughout the various AORs and supplemented defense services with Coast Guard attorneys pursuant to a Memorandum of Understanding. Most complex cases have two detailed military defense counsel, and each complex case usually has either an MJLQ counsel or an experienced defense counsel detailed. The Navy has provided the defense with adequate resources that are comparable to the trial counsel in each AOR and continues to assess the needs of the DSOs to ensure they are properly resourced.

The Marine Corps Defense Services Organization (DSO) is appropriately staffed to carry out its mission. The Marine Corps routinely reviews its staffing levels of judge advocates and legal services support personnel to ensure sufficient personnel are available to accomplish assigned missions. The DSO is supervised by a colonel (O-6). Four lieutenant colonels (O-5) act as regional defense counsel for their respective geographic areas. There is also a senior defense counsel assigned to each major installation. The senior defense counsel are usually majors (O-4). All supervisory personnel have prior military justice experience and most have the additional military occupational specialty of 4409 (military justice specialist). Finally, in situations where the local DSO office requires additional support, Marine Corps defense counsel from another installation or Navy defense counsel may be detailed to represent a Service member in a Marine Corps court-martial.

The Air Force has a military officer assigned to every trial defense counsel billet. Funding and resource support are supplied to the trial defense office through the installation at which the defense counsel operates. There is no evidence that any trial defense office is inadequately resourced or supported by its host installation.

### **(3) Independent Funding and Approval Authority for Defense Expert Witnesses**

The JPP recommended that the “Secretary of Defense direct the Joint Service Committee on Military Justice to draft appropriate rules and measures, as necessary, to vest defense expert approval authority and expenditure funding in the Service defense organizations.”<sup>11</sup> The report explained:

- According to site visit feedback provided to the JPP Subcommittee by defense counsel and prosecutors, defense requests for expert witnesses and consultants in sexual assault cases are often denied or, if the requests are granted, defense counsel are provided a less qualified expert than that provided to the prosecution.
- Current procedures in the Manual for Courts-Martial require defense counsel to request experts from the convening authority and require them to submit a statement of reasons why the expert is necessary. Given that these requests are typically processed through the trial counsel, such statements often force defense counsel to prematurely reveal trial strategy.
- Even when defense requests for experts are granted, the expert often arrives so late in the trial process that his or her ability to assist with defense strategy is curtailed.
- Civilian public defender offices routinely maintain their own funding for experts.<sup>12</sup>

The JPP elaborated:

Defense counsel told Subcommittee members that their requests for experts are frequently denied or, after approval, they are provided with a substitute that is inadequate to the task. This assertion was corroborated by a number of prosecutors interviewed on site visits. Counsel pointed out that when experts are granted, they are often made available shortly before the trial date, too late to help develop a defense theory of the case or prepare the case. In addition, the process of asking the convening authority to approve and fund a defense expert often forces the defense to reveal their trial strategy to the government. In contrast, trial counsel are not similarly disadvantaged: they can consult with and hire experts early in the trial process, without being forced to reveal their theory of the case to the defense.<sup>13</sup>

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<sup>11</sup> JPP DEFENSE RESOURCES REPORT, *supra* note 3, at 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 17 (internal footnotes omitted).

The RSP, on the other hand, noted the difference between funding sources for military defense offices and some civilian public defender offices and concluded that “separate budgets for military defense organizations are not necessary at this time.”<sup>14</sup>

Having carefully examined the issue, each Military Service has declined to vest expert approval and funding authority in its defense counsel organization.

Funding defense expert assistance through a budget controlled by supervisory defense counsel may actually harm the defense in court-martial cases. Currently, almost all defense expert assistance is sought from funding sources outside the control of anyone performing defense counsel duties. Thus, funding can be sought for expert assistance for defense counsel without regard to any budgetary constraints. If such funding is necessary but unavailable, the consequences may include an abatement of court-martial proceedings. If the budgetary authority were located in the defense supervisory chain, on the other hand, a supervisory defense official would have to make decisions concerning the relative prioritization of various defense requests. Thus, a defense supervisory official would likely reject some defense requests because they are not deemed sufficiently important as compared to other defense requests – something that does not currently occur in the military justice system. Moreover, such defense supervisory prioritization would likely prove more problematic in the military justice system compared to civilian public defender systems. Each of the Military Services has rejected “imputed disqualification” – a professional responsibility doctrine under which the disqualification of one member a legal office generally disqualifies every member of that legal office. Under that doctrine, for example, two members of the same legal office may not represent clients with conflicting interests. In the military, on the other hand, the same defense counsel office often

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<sup>14</sup> RSP REPORT, *supra* note 1, at 163-64.

represents clients with conflicting interests. Requiring the supervisor of two defense counsel whose clients have conflicting interests to prioritize expert assistance requests in those two cases would likely lead to extensive litigation. Any defense counsel in that situation whose client does not receive the requested support would likely lodge a due process challenge to the supervisory and funding allocation systems. This would likely result in significantly greater institutional turbulence and delay than under the current system, in which defense counsel for clients with conflicting interests seek expert assistance funding from the convening authority and then file any challenges with the military judge. In discussing whether funding authority should be moved from convening authorities to military judges, the JPP did not appear to consider unique aspects of military defense counsel's supervisory structure. Those unique aspects militate strongly against the recommendation.

#### **(4) Defense Counsel Experience and Training**

The RSP's report recommended:

The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as lead counsel defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel.<sup>15</sup>

The report explained:

- It is difficult to develop defense experience due to the relatively low number of courts-martial and personnel turnover. The Marine Corps faces particular problems with personnel turnover because their attorneys perform line duty mission requirements and may serve in defense counsel tour lengths as short as 12 months.

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<sup>15</sup> RSP REPORT, *supra* note 1, at 39.

- Not all military defense counsel possess trial experience prior to assuming the role of defense counsel.<sup>16</sup>

The JPP revisited the issues of military defense counsel qualifications, experience, and tour length. The JPP recommended:

The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set assignment policies that provide defense counsel two or more consecutive years of experience in the role, to the maximum extent feasible at the same location. Exceptions to this policy should be personally approved, on a case-by-case basis, by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.<sup>17</sup>

The JPP elaborated:

- There is a disparity among the Services regarding defense counsel experience requirements; the Air Force and Navy require defense counsel to have prior litigation experience, while the Army and Marine Corps have no such requirement.
- Several defense counsel on site visits told JPP Subcommittee members of their experiences defending sexual assault cases when they had very little litigation experience. All defense counsel recommended against assigning brand-new attorneys to defense counsel positions.
- In its June 2014 report, the RSP recommended that the Services permit only defense counsel with litigation experience to serve as lead defense counsel in sexual assault cases, and that defense counsel be assigned to that role for at least two years. The Secretary of Defense amended this recommendation to state that only counsel with prior litigation experience could serve as trial counsel and defense counsel in penetrative-type sexual offenses, and the minimum tour length was set at two years, to the extent practicable.
  - In response to the JPP's request for information, the Army stated that it considers litigation experience and the complexity of the case when assigning counsel, with inexperienced defense counsel typically being assigned to handle less complex cases and to assist more experienced counsel. According to the Army, its regional

<sup>16</sup> RSP REPORT, *supra* note 1, at 39.

<sup>17</sup> JPP DEFENSE RESOURCES REPORT, *supra* note 3, at 6.

and senior defense counsel have the experience necessary to litigate complex cases and to help train more junior counsel. The Marine Corps also reported that it takes many factors into account when assigning defense counsel, such as the complexity of the case and the counsel's experience level. For complex cases, the senior defense counsel must consult with the regional defense counsel to ensure that the right counsel is detailed to the case. The Navy and Air Force stated that typically only experienced counsel are assigned to defense counsel billets, with more senior counsel serving as lead defense counsel in penetrative sexual assault cases.

- With the exception of the Marine Corps, the other Services reported that defense counsel assignments are usually two years or more. The Marine Corps stated that defense counsel tour lengths are at least 18 months, which it considers adequate.
- A provision in the National Defense Authorization Act for Fiscal Year 2017 requires the Services to ensure that counsel assigned to a case have sufficient experience to successfully prosecute or defend the case. This provision also requires the Services to use a system of skill identifiers to identify experienced judge advocates so that they can provide oversight to less experienced counsel. This provision calls for a five-year pilot program to assess the feasibility of establishing a professional development program for judge advocates to ensure sufficient experience among counsel to prosecute and defend complex cases.<sup>18</sup>

Each Military Service currently has assignment policies and training regimes in place to ensure that judge advocates assigned to every court-martial case – including sexual assault cases – are qualified to represent their client. Additionally, all of the Military Services are currently conducting pilot programs to enhance the professional development of trial and defense counsel, as mandated by section 542 of the National Defense Authorization Act for Fiscal Year 2017.<sup>19</sup>

Congress recently required that each of these pilot programs shall include, in part:

- (A) A military justice career track for judge advocates that leads to judge advocates with military justice experience in the grade of colonel, or in the grade of captain in the case of judge advocates of the Navy.

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<sup>18</sup> JPP DEFENSE RESOURCES REPORT, *supra* note 3, at 6-7.

<sup>19</sup> Publ. L. No. 114-328 (2016).

(B) The use of skill identifiers to identify judge advocates for participation in the pilot program from among judge advocates having appropriate skill and experience in military justice matters.<sup>20</sup>

Moreover, accused service members have an important right not available to their civilian counterparts that was not mentioned by the JPP. A service member has the right to be represented before a general or special court-martial by “military counsel of his own selection, if reasonably available” under applicable Service regulations.<sup>21</sup> Accordingly, a military accused who is dissatisfied with the experience level of his or her detailed defense counsel has a right to request representation by a specific judge advocate with greater experience.

Specific Service policies to ensure the appropriate qualifications of trial defense counsel include the following:

Army regulations and policies for tracking military justice expertise, training programs, specialized expertise support, and detailing of counsel ensure that defense counsel are capable of effectively defending their clients. Experienced counsel at the Army Trial Defense Service (TDS) headquarters are available to advise defense counsel and the Chief of TDS also has the flexibility to move counsel to different locations to make sure the right experience and skillset is matched with every case. The Office of The Judge Advocate General, Criminal Law Division funds Army TDS for its worldwide training just as it similarly provides funds to TDS’s prosecution counterparts. This provides the resources to provide training on three different continents while also allowing counsel to travel from their assigned duty locations to attend specialized training presented by both military and civilian experts.

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<sup>20</sup> National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 532 (2017).

<sup>21</sup> Uniform Code of Military Justice art. 38(b)(3)(B), 10 U.S.C. § 838; Rule for Courts-Martial 506(a), Manual for Courts-Martial, United States (2016 ed.).

In the Navy, prospective judge advocates first attend the Navy's Basic Lawyer Course followed by certification by the Navy Judge Advocate General. The judge advocates then participate in the two-year-long First Tour Judge Advocate (FTJA) Program, during which they: (1) receive additional professional military education; (2) complete rotations in three core practice areas (Legal Assistance, Command Services, and Military Justice (Trial or Defense)), (3) demonstrate proficiency in each of those practice areas by meeting professional development standards, and (4) receive mentorship. FTJAs assigned to a Defense Service Office (DSO) may provide support to detailed defense counsel (DC), be detailed as DC to administrative separation boards and boards of inquiry, be assigned to represent clients during review hearings for clients in pretrial confinement, or be detailed as assistant defense counsel (ADC) in courts-martial, including both guilty-plea and contested cases, under the supervision of lead DC. FTJAs may be detailed as ADC to a complex or high-visibility case commensurate with the FTJA's experience, demonstrated skills, and workload.

After completing the FTJA program, and possibly after receiving additional experience, either in litigation or other areas of the JAG Corps practice, all Navy defense counsel are assigned to Navy DSOs. Orders to a DSO are normally for a minimum of three years, but in limited circumstances may be curtailed to two years. Each DSO has an MJLQ Senior Defense Counsel and, when available, each command has an MJLQ Commanding Officer (CO) or Executive Officer (XO). Currently, three out of four DSOs have an MJLQ CO or XO. While there is no official policy mandating a certain amount of experience for lead defense counsel on penetrative-type sexual assault cases, standard DSO procedure is to detail only experienced counsel or supervisory counsel to complex cases. Defense counsel receive regular defense-specific training locally and regionally, by attending in-person schools and taking on-line

training. Assistance is readily available from the Navy Defense Counsel Assistance Program, as well. When making detailing decisions, commands consider experience, caseload, and the complexity of the case, among other factors. Although it is possible defense counsel with limited litigation experience may be detailed to a penetrative sexual assault case in remote locations, an out-of-area experienced counsel will also be detailed as lead counsel.

The Navy's FTJA program is designed to ensure judge advocates assigned as defense counsel demonstrate a certain level of proficiency before being assigned as lead defense counsel. The Navy's tour length for judge advocates assigned to DSOs is designed to give defense counsel experience and training to effectively defend clients in more complex cases.

The Marine Corps DSO assigns counsel to cases based on the supervising attorney's determination that the counsel possesses the required ability, training, and experience. The Marine Corps DSO routinely details two attorneys to sexual assault cases unless the client has hired a civilian attorney.

Marine Corps defense counsel serve for a minimum of 18 months, though some serve for longer periods. This assignment policy allows the judge advocate time to develop from a basically trained lawyer to a competent military defense attorney. The Marine Corps DSO has a training program whereby new counsel are provided training in the basics of trial defense work and progress to more complex cases. In addition to being certified by the Judge Advocate General of the Navy as basically competent to practice in courts-martial upon completion of Naval Justice School, defense counsel attend a week-long Defense Counsel Orientation Course, monthly training from their Senior Defense Counsel, quarterly training from their Regional Defense Counsel, an annual week-long training program involving the entire DSO, a week-long

Defending Sexual Assault Cases course, and additional training by civilian defense counsel organizations.

Finally, staffing decisions within the Marine Corps DSO are first made by the Regional Defense Counsel working in conjunction with the officer-in-charge of the regional Legal Services Support Section (LSSS). If these two officers cannot resolve staffing disagreements, the issue is elevated to the Chief Defense Counsel of the Marine Corps (CDC), a colonel (O-6), for resolution. The Staff Judge Advocate to the Commandant of the Marine Corps does not make assignment decisions for defense counsel unless the CDC is unable to resolve the issue.

Air Force trial defense counsel positions are selectively manned with the best-qualified candidates. The positions themselves are commensurate with a Military Justice Experience Tracker (MJET) 2 designation, which reflects the member's prior military justice litigation experience. A "best qualified" candidate is one who possesses good character and fitness, has demonstrated a firm grasp of the military justice process, and has the ability to handle the demands of representing geographically separated clients on highly sensitive matters while responsibly managing an office. This standard requires the candidate to demonstrate strong organization and time management skills, reliability, maturity, civility, professionalism, and leadership while working in an autonomous environment. These trial defense counsel are supervised by Senior Defense Counsel, who have previously served as trial defense counsel and have even more experience and training as defense counsel than the trial defense counsel. These Senior Defense Counsel positions are commensurate with an MJET 3 designation.

The Air Force trial defense division has the authority to detail Senior Defense Counsel to the most complex cases as they arise. The detailed Senior Defense Counsel works directly with the trial defense counsel to zealously and effectively represent the interests of their client, the

accused. This independent detailing authority ensures that every Airman accused of any crime, to include the serious crimes of murder or sexual assault, is defended by defense counsel with appropriate experience and training.

### **Conclusion**

The Military Services are committed to providing high-quality representation to service members accused of violating the UCMJ. All of the Services currently operate appropriately staffed and resourced offices to provide such representation. While the Services are currently providing high-quality defense services, they are not complacent. Rather, they continue to innovate and study other Services' innovations to identify best practices. As a result of the Services' ongoing efforts and recent Congressional mandates, the military justice system's defense services will continue to improve.