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

MEETING AND REFERENCE MATERIALS

PUBLIC MEETING

November 15, 2019

ARLINGTON, VIRGINIA

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
15th Public Meeting

November 15, 2019

Preparatory Materials

Table of Contents

Tab 6 Letter from Department of Defense General Counsel to the DAC-IPAD Chair, dated October 2, 2019

- *Letter received from the Department of Defense (DoD) General Counsel acknowledging and thanking the DAC-IPAD for its input and recommendations regarding the draft DoD report on sexual assault victim collateral misconduct.*

Tab 7 DAC-IPAD Installation Site Visits and Dates Chart

- *Staff prepared chart identifying the installations that Committee members will be visiting, the dates for the trips, and the Committee members planning to attend each site visit.*

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

15th PUBLIC MEETING AGENDA

November 15, 2019

Doubletree by Hilton Crystal City
300 Army Navy Drive, Arlington, Virginia

9:00 a.m. – 9:05 a.m.	**Public Meeting Begins – Welcome and Introduction** – *Designated Federal Officer Opens Meeting* – *Remarks of the Chair*
9:05 a.m. – 9:35 a.m.	**Protect Our Defenders' Perspective on Military Sexual Assault Prosecutions and Sentencing** *(30 minutes)* – *Mr. Don Christensen, President, Protect Our Defenders*
9:35 a.m. – 9:45 a.m.	**Committee Final Deliberations and Vote on the DAC-IPAD's Sexual Assault Case Adjudication Report for Fiscal Years 2015 – 2018** *(10 minutes)* – *Mr. Chuck Mason, DAC-IPAD Attorney Advisor*
9:45 a.m. – 11:45 p.m.	**Case Review Working Group Presentation and Deliberations** *(2 hours)* – *Ms. Theresa Gallagher, DAC-IPAD Attorney Advisor* – *Ms. Kate Tagert, DAC-IPAD Attorney Advisor* – *Mr. Glen Hines DAC-IPAD Attorney Advisor*
11:45 p.m. – 12:45 p.m.	**Lunch**
12:45 p.m. – 1:00 p.m.	**Policy (Referral) Working Group Presentation** *(15 minutes)* – *Ms. Meghan Peters, DAC-IPAD Attorney Advisor* – *Ms. Terri Saunders, DAC-IPAD Attorney Advisor*
1:00 p.m. – 2:45 p.m.	**Committee Deliberations Regarding the Services' Responses to DAC-IPAD Request for Information (RFI) Set 11 and Testimony from the August 23, 2019, DAC-IPAD Public Meeting** *(1 hour 45 minutes)*

– *Ms. Meghan Peters, DAC-IPAD Attorney Advisor*
– *Ms. Terri Saunders, DAC-IPAD Attorney Advisor*

2:45 p.m. – 2:55 p.m. **Break**

2:55 p.m. – 3:00 p.m. **Collateral Misconduct Report Status Update** *(5 minutes)*

– *Colonel Steven Weir, U.S. Army, DAC-IPAD Director*

3:00 p.m. – 3:10 p.m. **2020 Military Installation Site Visit Update** *(10 minutes)*

– *Mr. Glen Hines, DAC-IPAD Attorney Advisor*

3:10 p.m. – 3:20 p.m. **Court-Martial Observations Update** *(10 minutes)*

– *Ms. Theresa Gallagher, DAC-IPAD Attorney Advisor*

3:20 p.m. – 3:30 p.m. **Public Comment and Meeting Wrap-Up**
(10 minutes)

– *Colonel Steven Weir, U.S. Army, DAC-IPAD Director*

3:30 p.m. **Public Meeting Adjourned**

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

MINUTES OF AUGUST 23, 2019 PUBLIC MEETING

AUTHORIZATION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("the Committee" or "DACIPAD") 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.

EVENT

The Committee held its thirteenth public meeting on August 23, 2019, from 9:02 a.m. to 4:28 p.m. The Committee was presented with a summary of the fiscal year 2018 conviction and acquittal rates for sexual assault cases closed during the fiscal year. DAC-IPAD staff provided an overview of the draft Department of Defense (DoD) *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization* submitted to the DAC-IPAD for input by the DoD general counsel in accordance with section 547 of the fiscal National Defense Authorization Act for Fiscal Year 2019. The Committee then received testimony from representatives from each of the Military Services, including the U.S. Coast Guard, that were involved in the data collection for the report. The Committee also heard testimony from three panels composed of the Military Services' criminal law/military justice division chiefs; the special victims' counsel/victims' legal counsel program managers; and the Military Services' trial defense service organization chiefs. The three panels provided insights regarding military sexual assault conviction and acquittal rates, the case adjudication process, and victim declination in the military justice process. Next, the Committee received updates from its Case Review Working Group and Data Working Group. Lastly, the Committee deliberated on the testimony received during the meeting regarding the DoD collateral misconduct report and the Military Services' responses to its questions regarding conviction and acquittal rates, the case adjudication process, and victim declination in the military justice process.

LOCATION

The meeting was held at Doubletree by Hilton Crystal City, 300 Army Navy Drive, Arlington, Virginia.

MATERIALS

A verbatim transcript of the meeting and preparatory materials provided to the Committee members prior to and during the meeting, are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Committee are available on the website at https://dacipad.whs.mil.

PARTICIPANTS

Participating Committee Members
Ms. Martha S. Bashford, Chair
Honorable Leo I. Brisbois
Ms. Kathleen B. Cannon
Ms. Margaret A. Garvin
Mr. A. J. Kramer
Ms. Jennifer G. Long
Mr. James P. Markey
Dr. Jenifer Markowitz
Chief Master Sergeant of the Air Force Rodney J. McKinley, Retired
Brigadier General James R. Schwenk, U.S. Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash

Absent Committee Members
Major General Marcia M. Anderson, U.S. Army, Retired
The Honorable Paul W. Grimm
The Honorable Reggie B. Walton

Committee Staff
Colonel Steven Weir, U.S. Army, Staff Director
Ms. Julie Carson, Deputy Staff Director
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Patricia Ham, Attorney-Advisor
Mr. Glen Hines, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Mr. Chuck Mason, Attorney-Advisor
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Mr. Dale Trexler, Chief of Staff
Dr. William "Bill" Wells, Criminologist

Other Participants
Mr. David Gruber, Alternate Designated Federal Officer (ADFO)

Military Service Representatives

Major Paul Ervasti, U.S. Marine Corps, Judge Advocate, Military Justice Policy and Legislation Officer, Military Justice Branch, Judge Advocate Division
Lieutenant Adam Miller, U.S. Coast Guard, Legal Intern, Office of Military Justice
Ms. Janet K. Mansfield, U.S. Army, Chief, Programs Branch, Criminal Law Division, Office of the Judge Advocate General
Lieutenant Colonel Jane M. Male, U.S. Air Force, Deputy of the Military Justice Division, Air Force Legal Operations Agency
Captain Josephine VanDriel, U.S. Air Force, Chief, Victim and Witness Policy

Presenters

Lieutenant Colonel Adam Kazin, U.S. Army, Policy Branch Chief, Criminal Law Division, Office of the Judge Advocate General
Lieutenant James Kraemer, U.S. Navy, Head of the Sexual Assault Prevention and Response Policy Branch, Criminal Law Division, Office of the Judge Advocate General
Major Paul Ervasti, U.S. Marine Corps, Judge Advocate, Military Justice Policy and Legislation Officer, Military Justice Branch, Judge Advocate Division
Lieutenant Colonel Jane M. Male, U.S. Air Force, Deputy of the Military Justice Division, Air Force Legal Operations Agency
Lieutenant Adam Miller, U.S. Coast Guard, Legal Intern, Office of Military Justice
Colonel Patrick Pflaum, U.S. Army, Chief, Criminal Law Division
Captain Robert P. Monahan Jr., U.S. Navy, Deputy Assistant Judge Advocate General (Criminal Law) and Director, Office of the Judge Advocate General's Criminal Law Policy Division
Lieutenant Colonel Adam M. King, U.S. Marine Corps, Military Justice Branch Head, U.S. Marine Corps Judge Advocate Division
Colonel Julie Pitvorec, U.S. Air Force, Chief, U.S. Air Force Government Trial and Appellate Counsel Division
Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice
Colonel Lance Hamilton, U.S. Army, Program Manager, Special Victims' Counsel Program
Captain Lisa B. Sullivan, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program
Lieutenant Colonel William J. Schrantz, U.S. Marine Corps, Officer-in-Charge, Victims' Legal Counsel Organization, Judge Advocate Division, HQMC
Colonel Jennifer Clay, U.S. Air Force, Chief, Special Victims' Counsel Division
Ms. Christa A. Specht, U.S. Coast Guard, Chief, Office of Member Advocacy Division
Colonel Roseanne Bennett, U.S. Army, Chief, Trial Defense Service
Commander Stuart T. Kirkby, U.S. Navy, Director, Defense Counsel Assistance Program
Colonel Valerie Danyluk, U.S. Marine Corps, Chief Defense Counsel of the Marine Corps
Colonel Christopher Morgan, U.S. Air Force, Chief, Trial Defense Division, Air Force Legal Operations, Joint Base Andrews
Commander Shanell King, U.S. Coast Guard, Chief of Defense Services Division

MEETING MINUTES

The ADFO opened the public meeting at 9:02 a.m. Chair Martha Bashford provided opening remarks welcoming those in attendance and summarized the agenda for the meeting.

DAC-IPAD Data Working Group Presentation of Conviction and Acquittal Rates and Overview of the Department of Defense Draft *Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*

The DAC-IPAD staff director, Colonel Steven Weir, opened the meeting by providing an overview of the Department of Defense draft *Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*. He explained that Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232) requires the Secretary of Defense to submit a biennial report to the congressional defense committees. The

Secretary's reports must include three statistical data elements: (1) the number of instances an individual identified as a victim of a sexual assault in the case files of a military criminal investigation was accused of misconduct or crimes considered collateral to the investigation of sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct or crimes; and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action against those individuals. Colonel Weir explained that the DAC-IPAD received a draft DoD collateral misconduct report that included data collected by each of the Military Services in June 2019 and that the DAC-IPAD's input regarding the report is due to DoD by September 16, 2019. The DAC-IPAD staff met with the Military Service representatives who were involved in the data collection process on July 9, 2019, to better understand how the information in the report was identified and gathered. He explained that it was clear from reviewing the report and the discussion with the Military Service representatives that there were differences in methodology and definitions across the Military Services. He advised the Committee members that they would deliberate on the draft report later in the meeting.

Mr. Chuck Mason, DAC-IPAD attorney-advisor, next presented the Committee with an overview of the sexual assault court-martial case adjudication outcomes based on the Data Working Group's collection of case documents from all military sexual assault cases closed during fiscal year 2018. Mr. Mason presented findings of conviction and acquittal rates for penetrative and contact offenses and provided comparisons of the conviction rate when a case is decided by a panel member jury versus those decided by a military judge noting that acquittal rates are higher for penetrative sexual assault cases adjudicated by a member panel than those decided by a military judge. However, he also highlighted that member panels found defendants in sexual contact cases guilty of the offense more often than military judges, but judges convicted defendants of non-sex offenses more frequently.

The Committee members inquired about an analysis of other charges that might be included in a case, and whether there are similarities in civilian judge or jury case outcomes. Mr. Mason explained that the current SharePoint website used for data collection makes analysis of outcomes by offense difficult. He stated that in order to accomplish a more sophisticated analysis, the data would need to transition to a database system that tracks each individual offense as a unit, and then combines those units into the case.

DAC-IPAD Member Question and Answer Session Regarding the Department of Defense draft *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*

Service representatives involved in the data collection and drafting of the Department of Defense (DoD) collateral misconduct report answered questions from the Committee and provided their perspectives regarding the Military Services' collection of collateral misconduct data, definitions of key terms, and methodologies followed. Noting the variances in methodologies and definitions followed by the Military Services, Chair Bashford asked the panel whether they agreed that they should be using the same definitions for the same terms in the collateral data reports. The Service representatives unanimously agreed that the DoD report would be much more useful if uniform definitions had been used by the Military Services. Lieutenant Colonel

Adam Kazin, U.S. Army, noted that the Military Services did get together and try to coordinate definitions, but that there were differences of opinions and cultural differences that made this difficult.

The Military Service representatives also agreed that the congressional directive to provide collateral misconduct data was a beneficial exercise for their policy development. Major Paul Ervasti, U.S. Marine Corps, specifically noted that pulling the data revealed that in the Marine Corps, 70% of the victims who received adverse action for collateral misconduct had also received disciplinary action for misconduct prior to the sexual assault allegation—a trend of which the Marine Corps was not previously aware. Major Ervasti also highlighted that reviewing the Service member victim cases revealed a high percentage of cases in which Service member victims were being separated six months to a year after the report of sexual assault for a mental health condition or other underlying issue. He felt that this warrants further study.

The Military Services each indicated that they don't currently track the number of victims receiving adverse actions for collateral misconduct, but going forward, for the purpose of the collateral misconduct report requirement and as part of the 140a uniform standards initiative, victim case data will be added to their case management systems.

The Military Services' definitions and criteria also varied in what they classified as a "false report" in the draft collateral misconduct report and whether or not this information was included in the report as collateral misconduct. The Military Services also varied in whether they included the occurrence of cross-claims of sexual assault—a subject in the allegation then reported having him or herself been sexually assaulted by the alleged victim—as collateral misconduct. Further, cases in which a third party reported a sexual assault that turned out to have been a mistake (e.g., the incident was consensual) were treated as false reports by some Military Services. Lieutenant Colonel Jane Male, U.S. Air Force, told the Committee it would be useful for the Military Services to have a uniform definition of and to know whether a false allegation should or should not be included in the collateral misconduct reporting.

Panel 1: Perspectives of Military Services' Military Justice Division Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process

The panel of Military Service Military Justice Division chiefs answered questions from Committee members related to Request for Information (RFI) Set 11 for which written answers were provided to the DAC-IPAD by the Military Services in July 2019. The first question from the Committee was whether the Article 32 statute and its implementing rule (Rule for Courts-Martial 405) as currently drafted provide an effective check against charges for which there is no probable cause. The Military Service representatives for the Army, Navy, Marine Corps, and the Air Force agreed that the FY14 National Defense Authorization Act changes to the Article 32 preliminary hearing have reduced the procedural requirements. The government frequently makes its case now in an abbreviated hearing and only with the paper file. Nevertheless, the Military Service Representatives each agreed that the preliminary hearing still serves a valid function for a "neutral and detached" hearing officer to be presented with the evidence which often includes law enforcement's recorded interviews with the victim and other witnesses. They

also underscored the value of the hearing officer's probable cause determination and disposition recommendation to the staff judge advocate and convening authority.

Colonel Julie Pitvorec, U.S. Air Force, noted, in affirming the value of the Article 32 hearings, that frequently in the Air Force, and other Military Services as well, sitting military judges who understand the probable cause standard very well are the ones who serve as preliminary hearing officers.

Judge Brisbois asked the panel whether a finding of no probable cause by the preliminary hearing officer resulted in dismissal of the charges without prejudice. The military justice chiefs agreed that a finding of no probable cause at the Article 32 hearing does not necessitate a dismissal without prejudice, and that in each Military Service the final determination on probable cause is held at the staff judge advocate (SJA) level. The Military Service representatives unanimously agreed that the Article 32 hearing determination should not be binding. The Marine Corps representative, Lieutenant Colonel Adam King, expressed concern that making the Article 32 binding would negate the role of the staff judge advocate who currently has the responsibility to evaluate probable cause. He stated that such a change would result in the convening authority abdicating his or her role of making the disposition decision to the preliminary hearing officer. He further noted that preliminary hearing officers typically lack the qualifications and experience of the SJA though he conceded that there are some instances in which military judges have served as preliminary hearing officers. The other military justice chiefs largely agreed with Lieutenant Colonel King's assessment. One noted that the Article 32 hearing is beneficial because it provides an opportunity—though one that is rarely taken up—for victim testimony as well as for the defense to present challenges to the charges, giving the preliminary hearing officer useful information to prepare a comprehensive charging analysis for the staff judge advocate and convening authority.

Chair Bashford noted that the Military Services tout how experienced, neutral, and well-trained preliminary hearing officers are, until asked whether their findings of no probable cause should be binding. She added that since few complainants actually elect to testify at the preliminary hearing and since the SJA has access to greater information, why should the military even bother to have a preliminary hearing? The Coast Guard military justice chief responded that it was intended as a check on the "awesome plenary authority of the convening authority." He argued that it would be preferable to go back to the pre-2014 Article 32 process. The other Military Service representatives tended to agree, however all agreed that the PHO's "fresh look" at the charges in a case even under the current, less robust system, is beneficial.

Dr. Markowitz asked the panelists what suggestions they would make to improve the current Article 32 process. Colonel Patrick Pflaum, U.S. Army, suggested that it would be helpful if the powers of the Article 32 officer to seek evidence that he or she believes is missing in the case were broadened. Lieutenant Colonel King suggested that the idea of having military judges serve as Article 32 officers was worth further analysis as well as improving the capability to conduct remote proceedings and improving technology in the courtrooms. Colonel Pitvorec felt that young judge advocates need to be trained that the Article 32 is a floor not a ceiling with respect to the amount of evidence presented. She noted that all of the evidence that would be beneficial to a convening authority in making the disposition decision should be presented by the

government. Captain Robert Monahan, U.S. Navy, cautioned against further radical change to the system after the drastic changes of the Military Justice Act of 2016 noting that every change of significance has second and third order effects that may not be anticipated.

The next issue posed to the military justice chiefs by the Committee was how the Military Services reconciled the desire to allow a victim to have is or her day in court with the non-binding disposition factors such as whether the admissible evidence will likely be sufficient to obtain and sustain a conviction. Colonel Pitvorec confirmed that in the Air Force, if the probable cause standard has been met and there is a credible, cooperating victim, the case goes forward, noting that evidence continues to be accumulated as the case goes forward.

The Coast Guard and Marine Corps military justice chiefs agreed that in their respective Military Services, if a victim wants to participate and there is probable cause, sexual assault cases typically go forward. Captain Tasikas noted that convening authorities are not going to be second guessed if they send a case to court-martial, but they are if they don't send it. Captain Monahan explained that in the Navy, on the other hand, cases that meet the probable cause standard but have a very low probability of a conviction should not be taken to trial and that it does not serve the interests of justice to try such cases. However, he felt strongly that in the hard cases where likelihood of success is unclear, the case should be taken to trial.

Colonel Pflaum explained that in the Army there is not a policy regarding victims' preference, but it is a key factor that is important to convening authorities because in the interest of justice, the victim's views and desires matter and are important, but it also has to be weighed against the other factors, such as the availability of admissible evidence. Colonel Pitvorek noted that one of the benefits of referring a case is that in the Air Force they are seeing the SVC and defense counsel get together and discuss alternate dispositions that both the victim and accused are satisfied with—something that doesn't happen prior to referral. She said these discussions often result in a discharge in lieu of court-martial or other alternative disposition.

Captain Tasikas commented that the probable cause standard allows the Coast Guard to send a case to court-martial with a low probability of conviction for the sex offense but for which there is sufficient evidence for a conviction for other misconduct, such as adultery and fraternization. This, he explained, is the difference in philosophy between the military and civilian justice systems.

Ms. Jennifer Long asked the military justice chiefs about their definition of reasonable likelihood of conviction, noting that determining the strength or weakness of a case can be subjective and varies based on one's experience. The Navy's military justice chief responded that at its core, it is a subjective standard, but that a workable objective standard is to ask, based on experience, whether a reasonable finder of fact should return a guilty verdict based on the evidence. The Marine Corps chief commented that the standard for the SJA's recommendation to the convening authority should be factual and legal sufficiency to obtain and sustain a conviction. He said the Marine Corps relies on experience, but also the case law from appellate factual sufficiency reviews. Colonel Pitvorek added that even though the Air Force does not use the reasonable likelihood of conviction standard, if a victim is clearly not credible—as in contradicted by all the other evidence of the case—the Air Force is not blind to that in making referral decisions.

Ms. Meghan Tokash noted that the panelists had mentioned additional evidence may be presented to the SJA after the Article 32 hearing and asked for some examples of what that evidence might be. Colonel Pflaum gave the example that it might take a long time to get the report back from the digital forensic examiner or witnesses that the defense might find that the government didn't have at the preferral stage. He noted that if the government waits until its case is perfected to prefer charges, it can take too long, indicating that preferral triggers processes that help determine the right answer on a particular case. Captain Monahan agreed, giving electronic evidence as an example that takes a long time to develop.

Colonel Pitvorek noted that MJA 16 has really changed the landscape on this, because previously trial counsel could not issue subpoenas until referral, which greatly delayed the discovery of important evidence—especially that involving social media. Now under the MJA 16 which allows pre-referral subpoenas, this has changed, but since it is not yet fully implemented, the effect of the change on military justice remains unclear.

As a criminal defense attorney, Ms. Kathleen Cannon noted that in state court, preliminary hearings are binding but can be overruled with legal process by the prosecution. She expressed concern with some of the things the military justice chiefs pointed out as problems of proof availability at the Article 32 hearing, noting that if the preliminary hearing were binding, the government would be more inclined to have the evidence it needed or to take continuances. She said that in her jurisdiction they have the social media at the preliminary hearing and suggested that a binding Article 32 hearing would reduce the number of close-call cases that have to be dealt with post-32 as well as the number of suspects having to deal with the consequences of a delayed decision. Colonel Pflaum expressed concern that the binding Article 32 would lead to unnecessary delay. Captain Monahan felt that a binding Article 32 would negate the role of the SJA as the probable cause check in the system and Lieutenant Colonel King added that in his experience he hasn't seen new evidence come in post-32 as the factor that sways a convening authority to move forward. For Lieutenant Colonel King the issue is that a binding Article 32 would require the convening authority to abdicate the role of making the ultimate disposition decision and would cut the SJA's informed decision and advice out of the process. Colonel Pitvorec stated that in her opinion, she would like to see a preliminary hearing officer's decision have more weight, and for those cases with probable cause, the SJA can take into consideration the disposition options and the sufficiency of the evidence that is available.

The next question the Committee asked each panelist to answer was how, in practice, SJAs convey the information contained in the Article 32 report to the convening authority. Colonel Pflaum responded that in the Army, the Article 32 report is in the file, and if there is a negative finding, it is highlighted in the SJA's Article 34 advice. He said it depends on the case and the convening authority whether they read everything or whether the SJA orally summarizes the information for them. Each of the other Military Service representatives agreed. The Air Force and Coast Guard representatives noted that the convening authorities they have worked with read everything and ask a lot of questions in an effort to make the right decision.

Panel 2: Perspectives of Military Services' Special Victims' Counsel/Victims' Legal Counsel Program Managers Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process

The second panel was composed of the Military Services' special victims' counsel (SVC) and victims' legal counsel (VLC) program managers who responded to similar questions from the Committee.

The first question posed to the panel by the Committee concerned the panelists' written RFI responses that, from their perspective, the judge advocates serving as preliminary hearing officers (PHOs) typically lacked extensive experience with sexual assault cases. The SVC program manager from the Army stated his belief that having PHOs with the experience and expertise to adequately assess the evidence was very important. He further emphasized that regardless of the PHO's expertise, the best person for the final determination of probable cause is the SJA because of his or her experience and the additional resources available to him or her, such as the special victim prosecutor, senior trial counsel, and trial counsel to advise on things that may not have been raised at the preliminary hearing. Each of the other Military Services's SVC program managers agreed. Colonel Jennifer Clay, U.S. Air Force, noted that in the Air Force military judges often conduct preliminary hearings but they are not always available to do so. The Navy VLC program manager explained that the Navy recently stood up a reserve unit of preliminary hearing officers who are prior active duty judges who also have litigation experience from the civilian careers. However, he said, the size of the unit does not meet the demand for PHOs at this time. When this group is not available the Navy utilizes its military justice career track judge advocates who have extensive litigation experience to serve as preliminary hearing officers.

Chair Martha Bashford asked the panel whether they have had clients testify at Article 32 hearings since the 2014 change permitting victims to refuse to do so. The SVC/VLC program managers agreed that although some clients opt to participate and provide testimony at the hearing, most choose not to.

Noting the high acquittal rate, and that victim representatives have advised how devastating an acquittal is to a victim, Ms. Bashford asked the program managers whether they thought the referral standard should be higher than probable cause. All of the program managers agreed that the standard should not be changed, and the Army SVC program manager noted that the system has protections built in already to ensure the system works fairly. The Navy VLC program manager reported that Navy clients often express that even though they are disappointed or devastated at an acquittal, they feel that they are treated fairly in the process when given an opportunity to present to a finder of fact what happened to them.

Retired Chief Master Sergeant of the Air Force Rod McKinley asked how many victims separate from the Service after an acquittal. All of the program managers indicated that they did not know or collect this information.

Brigadier General (Retired) Jim Schwenk asked the program managers whether they saw any value to the Article 32 at all from a victim's perspective. The Air Force program manager

responded that the feedback from the field in the Air Force is that it is beneficial to have an independent officer with legal training take a close look at the evidence and make a recommendation and written report. He also noted that expediting the process overall would be very helpful for victims too. The other Military Services program managers agreed.

Dr. Cassia Spohn asked the panelists what, in their experience, have been the reasons victims decline to cooperate in the process after having made an allegation of sexual assault. The Marine Corps program manager responded that feedback from the field indicates that the desire to put the issue behind them and move on with their lives is typically what drives victims to stop participating. The other Military Services' representatives generally agreed, adding that third party reports and victims' desire to protect their privacy were also reasons.

Chair Bashford asked the panel whether they supported the Committee's recommendation to allow victims to make their reports restricted in the event of a third party report or disclosure to the chain of command. All of the program managers supported this proposal, with the caveat of allowing the commander or MCIO to retain the ability to act or respond as needed in the interest of good order and discipline.

Panel 3: Perspectives of Military Services' Trial Defense Service Organization Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process

The Committee next directed questions to a panel composed of trial defense service chiefs from each of the Military Services. In response to the Committee's question regarding the weight that should be given to a victim's wishes, the defense chiefs agreed that some consideration should be given to the victim's wishes, but that it shouldn't overcome the sufficiency of the evidence to obtain and sustain a conviction.

Colonel Christopher Morgan, U.S. Air force, expressed concern over the "profound impact" of a sexual assault allegation and the lengthy military justice process on a Service member. He noted that even if acquitted, the accused Service member is typically eager to administratively separate out of frustration with the process.

In response to a question from Mr. A. J. Kramer asking what kind of additional evidence is provided to the SJA after the Article 32 hearing, Colonel Valerie Danyluk, U.S. Marine Corps, indicated that she found the idea of SJAs considering additional evidence not presented at the Article 32 hearing perplexing and noted that the Marine Corps defense organization would like the finding of no probable cause at the Article 32 to be binding. She also added that the defense chiefs are not opposed to the government being able to bring the case back for another hearing if additional evidence is presented. Commander Stuart Kirkby, U.S. Navy, commented that he finds no military reason to prevent the finding of no probable cause at an Article 32 hearing from being binding. None of the defense chiefs were able to cite statistics as to how many times a convening authority has gone forward with a case after a finding of no probable cause at the Article 32, but all agreed that it does happen. Colonel Morgan noted that it does seem concerning that the an SJA does not have to explain or document why he or she finds probable cause in cases in which the PHO finds probable does not exist..

Ms. Kathleen Cannon asked the defense chiefs what changes, other than making the no probable cause determinations binding, would improve the Article 32 process. The Navy and Air Force defense chiefs both noted that the calling of live witnesses, even if just the investigating agent, would improve the truth-finding process. Colonel Morgan also added that expanding the powers of the PHO to direct the government to produce evidence and to sanction failures to appear would help. Colonel Roseanne Bennett, U.S. Army, noted that making the Article 32 binding would itself bring about the other recommended changes.

Ms. Bashford commented that she has seen several PHO reports in which the PHO finds probable cause, points out serious credibility issues with the victim, but ultimately decides it is up to the court-martial to resolve these witness credibility issues. The Army defense chief stated that she thinks credibility should absolutely be part of the Article 32 determination, especially in the "he said, she said" cases where credibility is the central issue. She noted that an assessment of credibility is always done in an administrative investigations and wondered how a PHO could determine probable cause without a credibility determination. Colonel Bennet also noted that inspector general investigations also involve credibility determinations when there is conflicting testimony and that there is case law as well as a panel instruction for determining credibility. The defense chiefs agreed that guidance on determining credibility should be formalized and included as factors that the PHO is to consider. The Coast Guard defense chief added that it should be a factor, but not be mandated that a PHO consider it, because in some cases it is impossible to determine. She felt it might have the unintended consequence of the government not including the video interviews of the alleged victim.

Judge Leo Brisbois asked the defense chiefs whether they were seeing the same pressure to take non-Article 120 cases to trial that they are seeing for the sexual assault cases. Commander Kirby responded that the pressure isn't there for non-Article 120 cases. He added that the pressure for sexual assault cases is to get to the Article 32 hearing. For example in a simple assault case or a drug case, they may never get to the Article 32 before a deal is made for administrative discharge or other alternative disposition, so there isn't the issue of cases with no probable cause moving forward or with PHOs and SJAs disagreeing.

Case Review Working Group Status Update

Ms. Kate Tagert, DAC-IPAD attorney-advisor and Ms. Theresa Gallagher, DAC-IPAD attorney-provided an update on the case review data project. Ms. Tagert reported that the working group's review of more than 2,000 investigative case files including preliminary hearing reports is complete. She explained that the information collected from each case file is currently being entered into a database by DAC-IPAD staff for analysis with an anticipated completion in early spring 2020. She noted that the working group will also potentially be drafting questions for site visits to answer questions raised by the data once analysis is complete.

Chair Bashford raised the issue of the proposed site visits and asked if there were any members opposed to the idea of members conducting site visits. No members voiced opposition therefore Ms. Bashford stated that the Committee will go ahead and start planning the trips. Chair Bashford also reminded the members about the Committee's approval to form an Article 32

working group and requested that any members interested in serving on the Committee please let Colonel Weir know.

Data Working Group Presentation of 2018 Case Adjudication Data Report Plan

Mr. Chuck Mason, DAC-IPAD attorney advisor and Dr. William Wells, DAC-IPAD criminologist presented the Committee with the sexual assault case adjudication data for fiscal years 2015 through 2018 including the multi-variate analysis completed by Dr. Wells. Mr. Mason noted the steep decline in sexual assault cases from 780 in fiscal year 2015 to 574 cases in fiscal year 2018. He also noted that the Military Services are not able to provide accurate case lists that match the criteria set by the DAC-IPAD. Mr. Mason summarized that most of the results for fiscal year 2018 are consistent with the data from previous years. He advised the Committee that a draft of the 2018 data report will be provided for their review.

Committee Deliberations on: Department of Defense *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization;* Presenter Testimony; Services' Written Responses to DAC-IPAD Questions Regarding Conviction and Acquittal Rates, the Case Adjudication process, and Victim Declination; DAC-IPAD Future Planning

Colonel Weir opened Committee deliberations by recommending that based on the testimony the Committee received at today's meeting regarding the Department of Defense collateral misconduct report, that the staff draft a letter to the Secretary of Defense pointing out some the problems with the report discussed today. He recommended the Committee provide uniform definitions of terms for consistency across the Military Services, and that the Committee determine how reports designated as false by the Military Services should be treated with respect to classification as collateral misconduct. Chair Bashford suggested eliminating that category from the report which was seconded by Dr. Jen Markowitz. Colonel Weir suggested the Committee define what exactly qualifies as collateral misconduct. The Committee deliberated and agreed to acknowledge false reporting in the report, but not include it in the definition of collateral misconduct.

Ms. Bashford suggested the recommendation that the Military Services include both penetrative and contact cases. Colonel Weir raised the issue of the need for uniformity across the Military Services about what stage in the process the case is counted, noting that all collateral misconduct can only be reported after a case has closed and action has been taken on the misconduct. The Committee also discussed the need for a specific definition for "accused of collateral misconduct" and for "adverse action." The Committee discussed a recommendation that the Military Services specify what the collateral misconduct and adverse action, if received was for each incident.

General Schwenk suggested that the Committee address the Article 140a issue regarding the need for a uniform, document-based database up front in the letter to the Secretary of Defense. General Schwenk also cautioned the Committee to carefully consider before asking for more information from the Military Services than what is required by Congress. Chair Bashford

commented that she is a believer in more information and that Congress should understand that there is a range of adverse things that happen to Service members for collateral misconduct, most of which seem to be fairly minor. Colonel Weir highlighted the major finding of the DoD report, which is the small percentage of Service member victims identified as potentially committing collateral misconduct. He advised the Committee that once the Committee votes on the way forward, the staff will draft a letter and provide it to the members for their input and on September 12 the Committee will have a public meeting telephonically to vote whether to approve the letter.

Judge Brisbois made the motion to approve as the way forward that the staff draft a letter including term definitions; clarifying what cases the Military Services should pull; and recommending the inclusion of the adverse actions taken in future reports. Chair Bashford seconded the motion, none opposed, and the motion passed.

Public Comment

There were no requests for public comment.

With no further comments or issues to address, the meeting concluded.

The DFO closed the public meeting at 4:28p.m.

CERTIFICATION

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

Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of August 23, 2019, Committee Public Meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

1. Meeting Agenda, DAC-IPAD Public Meeting, August 23, 2019
2. Biographies of Meeting Presenters
3. DAC-IPAD Staff Prepared: RFI Set 11 Combined Responses MJ
4. DAC-IPAD Staff Prepared: RFI Set 11 Combined Responses SVC
5. DAC-IPAD Staff Prepared: RFI Set 11 Combined Responses TDS
6. Letter and Collateral Misconduct Study from the Department of Defense General Counsel, (June 11, 2019)
7. Memorandum from the Department of Defense General Counsel, Subject: Collateral Misconduct Report (March 12, 2019)
8. DAC-IPAD Staff Prepared: Additional Information Regarding DoD Collateral Misconduct Report
9. DAC-IPAD 2019 Report 03 Excerpt
10. DAC-IPAD Staff Prepared: DAC-IPAD Analysis Charts of DoD Collateral Misconduct Report
11. DAC-IPAD Staff Proposal for 2020 DAC-IPAD Site Visits
12. Article 34, UCMJ
13. Article 32 and 33, UCMJ
14. DAC-IPAD Staff Prepared: August 2019 Case Law Update
15. Non-Binding Disposition Guidance

MEMORANDUM

TO: MEMBERS OF THE DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)
DAC-IPAD STAFF DIRECTOR
DAC-IPAD DESIGNATED FEDERAL OFFICER

FROM: Martha S. Bashford, Chair, DAC-IPAD MSB 10/31/2019

DATE: November 1, 2019

SUBJECT: Fiscal Year 2020 Guidance from the Chair for the DAC-IPAD's Working Groups and the Committee

---

Purpose: To provide written guidance to the DAC-IPAD Working Groups and the Committee for fiscal year 2020 (FY20).

Guidance:

(1) Policy Working Group (PWG) – To date, the PWG has produced assessments and recommendations to the Committee related to expedited transfers for Service member victims of sexual assault, Article 140a of the Uniform Code of Military Justice (UCMJ) regarding data collection and access, and the legal and sexual assault training received by commanders. These topics were assigned to the PWG by the Committee at the DAC-IPAD's July 21, 2017, public meeting and were addressed in the DAC-IPAD's March 2018 Annual Report. The PWG has not examined new issues or been assigned additional tasks since the March 2018 report was published.

At the DAC-IPAD's October 19, 2018, public meeting, the Committee unanimously agreed to form a working group to look at the issues related to Articles 32, 33, and 34 of the Uniform Code of Military Justice (UCMJ) recommended to the DAC-IPAD by the Judicial Proceedings Panel (JPP) and the Department of Defense (DoD) General Counsel in a June 2019 letter to the Committee Chair. The Chair requested volunteers to serve on this working group at the August 22 and 23, 2019 meetings.

While nine Committee members initially volunteered for this project, DAC-IPAD working groups may have a maximum of seven members from the parent Committee to remain under a quorum and to be in compliance with the Federal Advisory Committee Act (FACA). The seven members who have agreed to serve on the working group are: Brigadier General (Ret.) James Schwenk; Judge Paul Grimm; Ms. Kathleen Cannon; Ms. Meg Garvin; Dr. Jen Markowitz; Ms. Jennifer Long, and Mr. A. J. Kramer. This group held a preliminary administrative teleconference on October 7, 2019, with DAC-IPAD staff to discuss the priorities and way ahead for the working group.

Due to the FACA requirements for establishing a new working group, the DoD FACA office has advised the Committee that the preferred course administratively is to have the PWG take on the new tasks and membership rather than creating a fourth working group. Therefore, I request that the PWG

examine the JPP recommendations related to Articles 32, 33, and 34 of the UCMJ and any additional issues it identifies related to the court-martial referral process for military sexual assault cases. I also request that the Committee members who volunteered to examine these issues be appointed as PWG members.

In order to add the three additional Committee members to the PWG who volunteered to examine the court-martial referral process (four of the members already serve on the PWG), I regret that I must also request that two original PWG members, Chief Master Sergeant of the Air Force (Ret.) Rod McKinley and Major General (Ret.) Marcia Anderson, step down from the working group after two years of excellent service in order to keep the membership under quorum. In 2020 the Committee will heavily rely on the military leadership expertise of General Anderson and Chief McKinley as active participants in the upcoming installation site visits.

The existing Terms of Reference for the PWG require no change since they already include the following objectives: "a review of the Article 32 process; and other issues within the scope of the DAC-IPAD as assigned in writing by the Chair." This memorandum shall serve as the Chair's written assignment to the PWG of the JPP recommendations related to Articles 32, 33, and 34 of the UCMJ and any additional issues related to the military sexual assault court-martial referral process deemed appropriate by the PWG members.

I request the PWG strive to complete its analysis and report to the Committee on its findings and recommendations related to the court-martial referral process by November 2020 for inclusion in the March 2021 Annual Report. The PWG will provide the Committee with a status update on its plan for the next year at the November 15, 2019 public meeting for deliberation and publication in the March 2020 Annual Report.

(2) <u>Data Working Group (DWG)</u> – To date, the DWG has collected court-martial case documents, recorded and updated case data, and produced reports including bivariate and multivariate analysis of the case adjudication and demographic information for over 2,000 penetrative and contact sexual assault cases completed in fiscal years 2014 through 2018 in which charges were preferred.

The most recent data analysis results were presented by DAC-IPAD staff and deliberated on by the Committee at the August 23, 2019 DAC-IPAD public meeting; approval of a stand-alone report containing these results is pending the Committee's vote at its November 15, 2019 public meeting.

Because of the sweeping changes to the UCMJ brought about by the Military Justice Act of 2016—many of which took effect in January of 2019—the DWG's Sharepoint database for recording case information can no longer accurately reflect many of the statutory changes, including the new segmented sentencing framework. Consequently, I request that the DWG continue to issue its annual request to the Military Services for a list of cases completed in the most recent fiscal year (beginning with FY19) and to continue to collect case documents as available. However, the DWG will no longer enter case information into its Sharepoint database for analysis, pending the development of a more robust database for this purpose.

Further, to allow the DWG to independently make the determination of which cases meet its criteria for sexual assault offenses tracked by the DAC-IPAD—rather than relying on the Military Services for this function, which has proven to be problematic—and to allow the DWG to track the proportion of the military justice caseload that comprises sexual assault cases, the DWG should, in its FY19 Request for Information submitted to the Military Services, and for all fiscal years thereafter, request the names of ***ALL*** military justice cases closed during the fiscal year for any offenses for which charges were preferred. For each closed case the Military Services should identify (1) all charges for which the subject was investigated that are listed on the charge sheet; and (2) whether the case involved an Article 120 offense (including attempts, solicitation, or conspiracy to commit the offense).

In addition, to allow the DWG to track the complete universe of cases for which final dispositions will eventually occur, the DWG should request that the Military Services also provide a separate list of ***ALL*** military justice cases in which charges were *preferred* during the most recent fiscal year (beginning with FY19). For each preferred case, the Military Services should identify (1) all charges for which the subject was investigated that are listed on the initial charge sheet; and (2) whether the case involved an Article 120 offense (including attempts, solicitation, or conspiracy to commit the offense).

To meet the data collection and analysis needs of the Committee as well as the statutory reporting requirements of the Article 146, UCMJ, Military Justice Review Panel, I request that the Staff Director work with DoD to acquire a cloud-based database adequate for this purpose and to have the FY19 and future years' military justice case data and documents entered into the new system for reporting and analysis.

(3) **Case Review Working Group (CRWG)** – To date, the CRWG members and staff have reviewed over 2,000 investigative case files for penetrative sexual assault allegations investigated by an MCIO that were completed in fiscal year 2017 (FY17). In the DAC-IPAD's Third Annual Report (March 2019), the CRWG reported on the results of an initial random sample of the investigative files. Data entry and analysis is still ongoing for the complete universe of cases that have now been reviewed and will continue in 2020 until complete. Once complete, a stand-alone CRWG report on the data, analysis, and associated findings and recommendations will be presented by the CRWG to the full Committee for deliberations. At its February 22, 2019, public meeting, the Committee approved the next assignment for CRWG—to review penetrative sexual assault cases that resulted in acquittals—to be undertaken after the working group has completed its FY17 investigative case file review and published its findings.

Currently, the CRWG is assessing the FY17 case review process and preparing its findings and observations from studying the investigative case files. The CRWG will provide the Committee with its findings at the November 15, 2019 public meeting for Committee deliberations and publication in the March 2020 Annual Report.

(4) **Installation Site Visits** – DAC-IPAD members have frequently discussed the value of installation site visits to follow up on the issues the Committee has identified and investigated over the past two

and a half years. The major issues of concern arising out of the DAC-IPAD's assessments involve commander legal training and force-wide sexual assault training, the sexual assault conviction and acquittal rates, sexual assault victim declination to participate in the military justice process, and the court-martial referral process in sexual assault cases.

In April through July of 2020, I encourage DAC-IPAD members to participate in one or more of the eight planned installation site visits. With input from the working groups and Committee members, the DAC-IPAD staff will develop a uniform list of topical questions to be asked of military justice practitioners, commanders, convening authorities, and other groups in the field that Committee members meet with during the visits. The site visits will be conducted on a not-for-attribution basis and only the rank, job type, and the Military Service of individuals will be discussed publicly or in written reports that are made public.

To further inform Committee members about the military justice process, I encourage all members who have not seen one to attend at least one sexual assault court-martial in person over the next year. DAC-IPAD staff are arranging these observations for any member who is interested in attending a contested military trial.

cc: Senior Deputy General Counsel/
Deputy General Counsel (Personnel and
Health Policy)

Protect Our Defenders

Chairwoman Martha Brashford
ATTN: DAC-IPAD
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA 22203

31 January 2019

Madam Chair,

I am writing to request the DAC-IPAD consider looking into several areas the committee has not yet explored. By way of introduction, I am currently the President of Protect Our Defenders (POD), a human rights organization dedicated to fighting for survivors of military sexual assault and harassment. Prior to assuming my current position, I served 23 ½ years as an Air Force judge advocate. During that time, I was fortunate to serve almost exclusively in litigation positions, which is almost unheard of for a JAG. I have served as an area defense counsel, a circuit defense counsel, multiple base level prosecution positions, as the chief prosecutor for Europe and Southwest Asia and as a military judge. The last four years of my career I served as the chief prosecutor of the Air Force and as head of the government appellate division.

Since coming to POD, I have met with dozens of survivors, and as of last year I have started representing survivors pro bono as part of POD's Law Center. Based on these interactions, I can unequivocally state that survivors are facing incredible hurdles with regard to gaining access to relevant information necessary to advocate for their case being prosecuted or preparing for trial in the extremely rare event their offender is actually court-martialed. As a civilian SVC, I have requested to be furnished copies of my clients' statements, the results of sex assault examinations, the names of trial counsel, and the names and contact information for the convening authorities. These requests usually go answered with an eventual refusal to provide the information. Instead, the government directs us to the cumbersome and slow FOIA process.

FOIA simply is ineffective as a discovery tool. POD has been in litigation in federal court for 14 months pursing information through FOIA. Clearly, this is unacceptable. I have also been told by the Air Force that because I am a civilian SVC, they will not release documents to me because of the Privacy Act. This simply cannot stand. An attorney cannot advocate for his or her client without knowing basic information such as what she said in her witness interview. I have spoken with many SVCs, VLCs, and civilian SVCs who share my frustration. It should be clear that a victim and her counsel are entitled to certain relevant information. As a result, I would ask the DAC-IPAD take a more in-depth look at this issue in order to develop potential solutions.

Additionally, I would request the DAC-IPAD hold a hearing on the military sentencing process. Court-martial sentencing is an archaic process devoid of any of the tools of the modern jurisprudence. For example, a court-martial has no access to a presentencing report such as is used in the federal system. As a result, the court-martial is left to guess as to future dangerousness of an accused convicted of a violent or sexual offense. A court-martial has no ability to order mental health treatment, to order an offender to surrender weapons, to order restitution, to order an offender to stay away from a victim, or to order post confinement probation to name a few. In reality, the sentencing options are virtually

unchanged from when George Washington commanded the Continental Army. Additionally, there are no sentencing guidelines, which has resulted in massive sentencing disparity. It is past time for the court-martial system to be updated to reflect the realities that sentencing offenders requires more than 18th century options and that the consequences of failing to properly sentence offenders can have serious ramifications for the offender and society.

Finally, I attended the last DAC-IPAD hearing concerning prosecution and conviction rates. I was heartened to hear you acknowledge that the conviction rates were "god-awful." The military has been in denial about the abysmal conviction rates and your words needed to be said. As someone who has been working in this area for over 27 years, I would appreciate the opportunity to discuss with the panel my views on why the conviction rate is so low and how it can be improved.

In closing, I wish to thank you and the panel for the many hours you have already dedicated to addressing the military justice process. I look forward to assisting the panel in any way possible.

Sincerely,

Don Christensen, Colonel
President, Protect Our Defenders

Protect Our Defenders

Chairwoman Martha Bashford
ATTN: DAC-IPAD
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA 22203

15 November 2019

Madam Chair,

Thank you for allowing me the opportunity to provide this statement as part of my testimony before the panel. For the record, I am currently the President of Protect Our Defenders (POD), a human rights organization dedicated to fighting for survivors of military sexual assault and harassment. Prior to assuming my current position, I served 23 ½ years as an Air Force judge advocate. During that time, I was fortunate to serve almost exclusively in litigation positions, which is almost unheard of for a JAG. I have served as an area defense counsel, a circuit defense counsel, multiple base level prosecution positions, as the chief prosecutor for Europe and Southwest Asia and as a military judge. The last four years of my career I served as the chief prosecutor of the Air Force and as head of the government appellate division.

I appreciate the opportunity to address the panel about three areas that are negatively impacting the fair administration of justice in the military. In particular, I want to discuss the need for sentencing reform, solutions to the military's dismal conviction rate and the need to strengthen victim discovery rights. I have previously talked at some length about these areas in a January letter to the panel and am thankful you have given me the time to expound them.

Sentencing Reform

The need for sentencing reform is obvious, and it is shameful that military leadership repeatedly thwarts efforts to modernize the practice. The current process is archaic, ineffective and remains virtually unchanged from when Washington was leading the Continental Army. Most notably, sentencing options are nearly identical to those created when Congress enacted the Articles of War in 1806. Punishment options are limited to confinement, restrictions, hard labor without confinement, forfeitures of pay, reduction of rank (but only for enlisted members), fines to a limited degree, a reprimand and a punitive discharge. Modern sentencing tools such as those that exist in the federal system simply do not exist in the military. To compound these limitations, sentencing in the military may be done by court members who are simply not qualified to make these weighty decisions.

Sentencing is conducted immediately after a verdict on guilt is reached. There is no ability to assess the future dangerousness of the accused. The government is severely limited on the types of evidence that may be introduced and operates under the restrictions of the rules of evidence, including hearsay. The sentencing authority has no ability to order conditions on supervised

release such as mental health or sex offender treatment. Except for a select few offenses, the sentencing authority is at liberty to sentence the offender to a wide range of sanctions from no punishment to the current maximum. There are no sentencing guidelines. As a result and particularly with members, the sentencing authority is left to guess what an appropriate sentence is.

Regardless of the adjudged sentence, when the offender is released from a sentence of confinement or if no confinement from active duty, the offender is under no supervision. His movements are not restricted and he is under no obligation to seek any type of treatment. In other words, violent offenders and sex offenders are simply released into the civilian community with nothing more than the hope that they will not reoffend.

The foolishness of this process culminated in an attack on a church in Texas two years ago this month. Prior to Devin Kelley slaughtering 26 people in Sutherland Springs, Texas, he had been sentenced by court members in a court-martial for vicious assaults on his young stepson and his wife. As part of plea deal, he was sentenced by court members rather than a judge. These court members had no true understanding of how violent Kelley was or the true nature of his misconduct. Because of the limits of the military sentencing process, the court members had no way to assess his likelihood to reoffend or any understanding of his serious mental health issues. With his pretrial confinement credit, the members' sentence of only a year ensured Kelley would be released from confinement in just a few months. Of course after he was released, he was under no supervision and had received no treatment. In other words, a violent offender was freed into the civilian community with no effort to ensure he was being treated or society was being protected from his violent tendencies.

There has been significant media coverage surrounding the Air Force's failure to properly enter his conviction into a civilian database which enabled him to buy the assault weapon used in the massacre. However, little has been said about how the military's sentencing process allowed him to return to civilian society far too soon and with no measures in place to rehabilitate or monitor him.

Beyond the Kelley incident, media coverage of a few civilian sex offender sentences has so shocked the nation's conscience that in some instances calls for a judge's removal are immediately made. The Stanford case obviously comes to mind. In the military, such sentences sadly are the norm, not the exception. For instance, I reviewed the most recent available summaries of courts-martial released by the Air Force. Looking at the six months of results from December 2018 until May 2019, the sentences would be quite shocking for the casual observer. Below are some of the sentences that stand out as particularly light:

An airman was convicted of sexual assault and his sentence did not include a single day of confinement.

A senior airman was convicted of abusive sexual contact and his sentence did not include a single day of confinement.

A staff sergeant was convicted of sexual abuse of a child and his sentence did not include a single day of confinement.

A staff sergeant was convicted sexual assault and his sentence did not include a single day of confinement.

A lieutenant colonel was convicted of abusive sexual contact and his sentence did not include a single day of confinement.

A staff sergeant was convicted of abusive sexual contact and his sentence did not include any confinement or a discharge.

A captain was convicted of attempted sexual abuse of a child and his sentence did not include a single day of confinement.

A first lieutenant was convicted of abusive sexual contact among other offenses and his sentence did not include a single day of confinement.

In all of these cases, sentences were determined by court members. However an additional two sex assault sentences handed down by military judges within this period also did not include any amount of confinement. By my count, over this six-month period of time there were 33 nonconsensual sex assault convictions in the Air Force and ten (30%) did not include any period of confinement. An equal number included a sentence of five years or more, but most lengthy confinement sentences were from a judge. Of the remaining 14, most sentences measured in days or months, not significant years.

For survivors of sexual assault, it can be devastating to see their convicted offender walk out of a court a free man. A sentence without confinement conveys to these survivors that the court placed no value on the sanctity of their own body and the extent of their suffering. The unwillingness of court members to sentence convicted offenders to confinement also sends a particularly bad message to the rest of the military; if they report an assault, that perpetrator might simply walk free even if convicted. To perpetrators, this conveys the message that they can commit violent offenses and even if found guilty, they may never be incarcerated.

I have heard military leaders opposed to sentencing reform claim maintaining member sentencing is important because it gives a "sense of the community." I truly hope these sentences are not reflective of how the Air Force community views the seriousness of sexual assault. I actually believe the lack of sentences involving confinement in nonconsensual sex offenses are the result of asking military members to do something they are not qualified to do. I can say as a former military judge that sentencing someone is usually not a pleasant experience, nor is it easy. Court members are asked to do this with almost zero exposure to the court-martial process. Under the law they are given very little concrete guidance on how to carry out their task. This lack of knowledge is compounded by a range of sentencing that can be from no confinement to confinement for life on top of a multitude of military unique punishments.

The result of the current sentencing structure is a system that produces wildly disparate sentences that fluctuate from shockingly light to absurdly harsh. Moreover, I firmly believe when it comes

to offenses such as sex assault, rape and child pornography offenses, military sentences skew significantly lighter than their civilian counterparts.

The Sentencing Reform Act (SRA) of 1984 went into effect on 1 November 1987. Congress passed the act because it recognized "every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." The SRA looked to solve this issue. Sentencing guidelines have certainly been a part of that process, and although the guidelines have not been without controversy they have been used for over 32 years. We can debate whether civilian sentencing guidelines need to be adjusted, and some have been. But what should not be lost in this is the fact that Congress believed that even federal judges with lifetime appointments and years of experience needed help in determining an appropriate sentence. Yet, the military still insists that court-members can craft appropriate sentences with no such guidance. It is an absurdity.

Beyond guidelines, a federal judge operates in a system that gives the judge the tools to best serve societal interests in protection from wrongdoers and nurturing the rehabilitation of offenders. The presentencing report is a critical part of the sentencing procedure and sadly unavailable in courts-martial. I have no doubt that a presentencing report would have gone a long way to ensuring Devin Kelley's violent tendencies would have been known by the sentencing authority. Another equally valuable part of the judge's authority is the ability to order a period of post confinement supervision and to place special conditions of supervision during this period. Thus an offender can be required to under go evaluations, attend treatment, prevented from owning or using a computer, barred from accessing the internet and restricted from certain places. (a complete list may be found here: https://www.uscourts.gov/services-forms/overview-probation-supervised-release-conditions).

This is contrasted by the military judicial process when a military sex offender leaves the military after serving a sentence of no or minimal confinement. Perpetrators leave with no restrictions on their liberty, no monitoring of their activities and no requirement that they obtain treatment. The minute a child pornography offender is released from confinement, they have unfettered access to the internet. They likely have received no treatment to reduce the likelihood of re-offense, nor will they receive post-confinement sex offender treatment. Any type of post confinement supervision in the military is limited to those few whose sentences are long enough to qualify for parole, and only then if they accept parole.

The military needs to stop viewing the sentencing process as only a discipline process and recognize that reprimands, extra duties and restrictions simply are not appropriate sentences for serious crimes. Devin Kelley should have been a wakeup call for the military to not only support sentencing reform but to demand it. Instead the military has been silent. I will say what they have not: the federal system has a 32-year track record that should serve as the model for the military including judge-alone sentencing, sentencing guidelines and appropriate rehabilitation and protective tools. I urge the panel to support a modern military sentencing system.

Conviction Rates

The panel is well aware of the abysmal conviction rates for sex offenses in the military. The military loses about 75% of the very few cases it takes to court, and I know of no other mission the military has where that failure rate would be acceptable. In fact, it does not seem the military is bothered at all by its lack of success. To the degree leadership even acknowledges its failure rate, they attribute it to taking "tough cases to court." But when the vast majority of cases never actually go to court, this claim rings hallow. For example last year there were over 6000 unrestricted reports of sexual assault but barely 300 actually went to court-martial. The military appears to be highly selective of what cases make it to court. In other words, there is likely more to this dismal success rate than the cases being "tough."

Based on my experience I believe there are three areas were reforms could significantly alter the success rate for convictions. Two have to do with experience and the other is a structural reform to the system.

Many prosecutors tend to believe they are the key to success in the courtroom; however, I believe that 90 to 95% of a case is won or lost by the law enforcement investigation. A prosecutor can only do so much to overcome a poor investigation and a good investigation sets up the prosecutor for success. The problem I have seen from military investigations most often comes from the lack of experience of investigators, and this is particularly true with sex assault cases. I do not believe the military has ensured that investigators receive proper training and amass enough experience to conduct thorough investigations.

I want to make two things clear. Most investigators I have worked with are hard working, competent and dedicated. Second, each service's investigative agencies are run differently, and I am most familiar with the Air Force Office of Special Investigations (OSI). As such, I will focus on the OSI. When I entered active duty in 1991, most OSI agents I dealt with had many years of experience in criminal investigation, however, that changed dramatically after 9-11. Understandably, agents were needed in a counter intelligence (CI) role, and consequently CI drained experienced investigators out of criminal investigations. Criminal matters seemed limited to new agents fresh out of the academy. In fact, most of the cases I prosecuted after 9-11 appeared to be led by agents in their first assignment. Moreover, agents frequently deployed during or after the investigation and were often difficult to have available for trial. Defense counsel often appropriately exploited OSI availability to their client's benefit, or cases were delayed for lengthy periods awaiting a key agent's return. Simply put, there were not and appears still are not enough highly experienced OSI agents.

The result of the inexperience of investigators are many, from mistakes in search authorizations, violations of an accused's Article 31 rights, failure to seize evidence, chain of custody issues, failure to follow up on leads and ineffective witness and subject interviews. All of these are areas that take time to master, and failures can be devastating. Losing evidence to a suppression motion can kill even the strongest case. Evidence not seized can be the difference between

winning and losing a case. If we truly care about winning cases that should be won or clearing someone wrongly suspected of an offense, we need experienced investigators.

When I speak of experience, I do not mean a few years before the agent is moved on to another position. I mean that agents with a decade or more of experience should be the norm, not the exception. Our agents are asked to handle incredibly complex investigations. Leadership needs to commit to ensuring they have the training and sustained experience to do so.

The second area of experience has to do with actual litigation experience of our prosecutors. I prosecuted my first case in 1991 and my last 23 years later in 2014. I learned something every time I prosecuted a case, but this is especially true regarding sex assault and rape cases. I am still learning five years later. The career model in the Air Force JAGC values generalists over specialists. Congress has twice passed legislation making it clear they expect the military to have a career track system that develops experienced career defense and trial counsel. I know Congress' intent is that there be a system were JAGs are able to spend their career trying cases, but that has not been done.

While I was serving, I was told multiple times at multiple stages of my career that I had spent too much time in military justice. I was a captain the first time I heard this from a senior leader. As a colonel I was an anomaly in that I was still prosecuting cases at that rank, and it was clear many JAG leaders were actually angry I was still prosecuting cases. For whatever reason, the JAGC was uneasy that a colonel was still practicing law in a courtroom. This is the antithesis of the rest of the professions in the Air Force. Pilots still fly even at the most senior ranks including four-star generals, colonels who are doctors still see patients, and colonels who are clergy still give sermons and tend to their flock. But the JAGC discourages the practice of law beyond the first few years of a career that most defines the profession: litigation.

As with investigators, this approach is short sighted. Experience matters in the courtroom; it can be the difference between winning and losing. Experience matters when protecting the record from errors that can lead to reversal on appeal. Experience matters when working with survivors to a degree I cannot emphasize enough. I know without a doubt, I was a better litigator at year 23 then I was at year 15 or 10 or 5. I was better because of experience. I was better because I bucked the system and had stayed in the courtroom every year of my career.

Rather than focus on a cadre of JAGs who serve as prosecutors and defense counsel for their careers, the Air Force model is that every first assignment captain must do trials whether they have the talent or the desire to be in court. Some of those captains will serve a follow-on additional assignment as a defense counsel or a senior trial or defense counsel. Most will never try a case again after making major. Begrudgingly, the Air Force will allow a couple of lieutenant colonels back to the courtroom typically after a long time away and only for a short duration. No colonels will prosecute or defend cases.

To compound the matter, there are an ever fewer number of cases being prosecuted. Thirty years ago the military prosecuted over 10,000 general and special courts a year. That has dropped to around 2,000 a year, if not below that number. There has been no such corresponding reduction in JAGs during this time, meaning much fewer opportunities for JAGs to actually try cases. For

example, in the Air Force there are approximately 600 JAG captains, yet the Air Force did less than 500 courts last year. There are simply too few courts to sustain more than a core group of experienced prosecutors and defense counsel. The old career model is not working in the new paradigm of fewer but more complex cases.

Added to this mixture is that an accused may hire a civilian defense counsel to represent him. Many of these civilian counsel are highly skilled and have decades of court-martial experience. It can be difficult for even the best captain to match up with a civilian counsel doing their 500th case. I believe that many of the acquittals are being obtained by these civilian counsels who are up against much less experienced military prosecutors. This issue again speaks to the need for more senior prosecutors to handle our most complex cases.

The structural reform I believe is necessary is to create randomly selected juries of 12 who reach a verdict whether guilty or not guilty by a unanimous consensus. The current system allows for a verdict without the court members reaching an agreement on whether the accused is guilty or not guilty. A single vote is taken and if at least ¾ vote guilty, then the accused is guilty. If less than ¾ vote guilty, then the accused is found not guilty. From the perspective of the accused, the process appears unfair because he knows some members may have voted not guilty and the verdict may not be unanimous. From the perspective of a victim who has just seen the offender acquitted, the process seems unfair because she or he knows that a small minority might have set him free despite the majority being convinced beyond any doubt he was guilty. It's a process that garners faith on neither side.

From my prospective the single vote and minority acquittal is a major factor in the low conviction rates. I know I have lost cases where we had the majority and those members would never have agreed to a not guilty. I know I won cases as a defense counsel where the same was true; a unanimous vote of not guilty would never have happened. It is also possible a unanimous vote of guilty might never have happened. At worst this scenario results in a hung jury, but for me, I would take that any day over an acquittal. I would still have another chance for conviction, and I believe the government is in a stronger position than the defense after a hung jury, especially if the accused testified in his own defense.

Regardless, I believe a 12-person jury reaching a unanimous verdict is the best way to achieve justice. The military court member process does not engender confidence in a verdict and is contrary to American values. I have full faith that experienced investigators and prosecutors operating under such a system will have a better chance of delivering justice to victims while diminishing the chance of wrongful convictions.

Victim Discovery Rights

In my letter I laid out the issues facing victims and their counsel in getting access to certain documents. I propose at a minimum that victims should be provided unredacted copies of any statement they make whether in writing or recorded. Victims also must have access to any

forensic analysis of their property or person. A victim must be provided notice and a copy of any motion by either party concerning any privilege the victim may have and specifically including MRE 412, 513, 514 and 615. A victim should be provided a copy of any witness statement or statement by the accused that implicates 412, 513 and 514. Civilian counsel serving as victim's counsel should have the same access to evidence as military victim's counsel.

In closing, I wish to thank you and the panel for the opportunity to address you.

Sincerely,

Don Christensen, Colonel
President, Protect Our Defenders

Military Service Policies and Rules for Courts-Martial Pertaining to Issues Referenced in the January 31, 2019, Letter from Protect Our Defenders to the DAC-IPAD Chair

1. Military Service policies regarding disclosure of case information to sexual assault victims (6 pages);

2. Sentencing procedures for courts-martial, contained in Rule for Courts-Martial (R.C.M.) 1001, *Presentencing Procedure* (excerpt, 1 page) (Manual for Courts-Martial, 2019 ed.)

3. Punishments authorized at courts-martial, found in R.C.M. 1003, *Punishments* (5 pages) (Manual for Courts-Martial, 2019 ed.)

Prepared by DAC-IPAD Staff

POLICIES ON VICTIM AND VICTIM COUNSEL ACCESS TO MATERIALS

Service	Policy on Victim and SVC/VLC Access to Materials
U.S. Army	4. Implementation. To safeguard the rights of crime victims and provide notice as required by Article 6b(2), UCMJ, the prosecution will provide the victim, Special Victim Counsel, if applicable, with the information listed below without request by the victim. *a. Upon preferral of charges:* (1) A copy of all statements and documentary evidence produced or provided by the victim; (2) An excerpt of the charge sheet setting forth the preferred specifications pertaining to that victim; and (3) The date, time, and location of any pretrial confinement review pursuant to Rule for Courts-Martial 305, and the preliminary hearing pursuant to Article 32, UCMJ. *b. Upon receipt or filing by the government:* (1) A summarized transcript of the victim's testimony at the preliminary hearing; (2) An excerpt of the charge sheet setting forth the referred specifications pertaining to that victim; (3) Any docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial; (4) A copy of any motion or responsive pleadings that may limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or private medical information, or involve the victim's right to be heard; and (5) Any request to interview the victim received from defense counsel. *Source*: Department of the Army Policy Memorandum 14-09, Subject: Disclosure of Information to Crime Victims (1 Oct 2014).

U.S. Navy	4. Implementation. Victims are entitled to receive the materials listed below from the Trial Counsel, Staff Judge Advocate, and Command Services Attorney, as applicable. Victims, or their VLC if applicable, may elect which materials they wish to receive using enclosure (1). *a. During the investigative stage prior to preferral of charges:* (1) A copy of all statements and documentary evidence adopted, produced, or provided by the victim that are in possession of the Trial Counsel, the Staff Judge Advocate, and Command Services Attorney; (2) Copies of any official requests, subpoenas, search authorizations, or search warrants issued by military authorities to any third party custodian for documents or records in which the victim maintains a privacy interest. This includes but is not limited to requests for the victim's medical or behavioral health records from a military treatment facility or subpoenas issued to a telecommunications carrier for a victim's telephone records. Copies should be provided prior to execution when possible. (3) The date, time, and location of any pretrial confinement review hearing pursuant to R.C.M 305. *b. Following preferral of charges:* (1) A copy of any statements and documentary evidence adopted, produced, or provided by the victim that are in possession of Trial Counsel, Staff Judge Advocate, and Command Services Attorney that have not previously been provided; (2) The charge sheet setting forth the preferred charges and specifications pertaining to that victim; (3) A copy of any appointing order directing a preliminary hearing under Article 32, UCMJ and any requests fora continuance of such preliminary hearing; and (4) Copies of any official requests, subpoenas, search authorizations, or search warrants issued by military authorities to any third party custodian for documents or records in which the victim maintains a privacy interest which have not previously been provided. Copies should be provided prior to execution when possible. *c. Following referral of charges to court-martial, if not previously provided:* (1) The charge sheet setting forth the referred charges and specifications pertaining to that victim; (2) All docket requests, scheduling orders, and motions for any continuance; (3) A copy of any motion or responsive pleadings that implicates the victim's rights, privileges, or protections. Such motions and pleadings include those that seek to limit the victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or personal health information, involve the victim's right to be heard, seek to admit evidence of the victim's past sexual behavior or sexual predisposition, or seek to obtain information from a third party custodian for documents or records in which the victim may maintain a privacy interest;

	(4) Notice of pretrial agreement negotiations and an opportunity to express the views of the victim regarding proposed terms of the agreement; and (5) A copy of any approved pretrial agreement. d. Additional materials: Trial Counsel, Staff Judge Advocates, and Command Services Attorneys will ensure that requests by a victim or his or her VLC for other case-related documents, including Results of Investigations or other investigative materials, are processed without delay under applicable Rules for Courts-Martial, the Freedom of Information Act (FOIA), and/or the Privacy Act. e. Pursuant to reference (g), a victim may request access to, or a copy of, the recording of Article 32 preliminary hearing proceedings. Upon request, counsel for the government shall provide the requested access to, or a copy of, the recording to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. A victim is not entitled to classified information or closed sessions in which the victim did not have the right to attend at the preliminary hearing. *Source*: Department of the Navy Notice 5810.1, Subject: Disclosure of Information to Crime Victims (30 Jan 15).

U.S. Marine Corps	Documents Provided to Victims' Legal Counsel (VLC) Trial counsel shall provide the following material to the detailed VLC unless otherwise directed by a court: *A. Upon Notification of Representation* 1. A copy of all statements and documentary evidence, in possession of the trial counsel, produced or provided by the victim. 2. The date, time, and location of any pretrial confinement review pursuant to R.C.M. 305. *B. Upon Referral of Charges* 1. A copy of the charge sheet, redacted for PII, setting forth the preferred specifications pertaining to that victim. 2. The date, time, and location of any preliminary hearing pursuant to Article 32, UCMJ, and any request for continuance. *C. Upon Receipt or Filing by the Government* 1. A transcript or summarized transcript of the victim's testimony at the preliminary hearing. 2. A copy of the charge sheet, redacted for PII, setting forth the referred specifications pertaining to that victim. 3. Any docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial. 4. A copy of any filing, including attachments, that may limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or private medical information, or involve the victim's right to be heard. 5. Any request to interview the victim received from defense counsel. 6. Notice of pretrial agreement negotiations, and an opportunity to express the views of the victim regarding all proposed terms of the agreement relevant to that victim. 7. A copy of any approved pretrial agreement. 8. Upon request, counsel for the government shall provide the victim access to, or a copy of, the recording of the Article 32, Preliminary Hearing. Such access or copy shall be provided to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. Nothing in this Volume shall be construed to create an obligation to retain records beyond the period specified by SECNAV M-5210.1 or other applicable authority. *Source*: Legal Support and Administration Manual, Volume 4: Marine Corps Victims' Legal Counsel Organization (20 Feb 2018).

U.S. Air Force	*5.13. Release of Information to Special Victims' Counsel.* Requests from SVCs for records pertaining to a court-martial proceeding involving their clients are properly addressed as "official use" requests under the Privacy Act and Freedom of Information Act. See SORN F051 AFJA I; 5 U.S.C. § 552a(b)(1). SJAs may release those records that are minimally required to accomplish the SVC's intended use as articulated in the request. See DoD 5400.11-R, Department of Defense Privacy Program, paragraph C4.2.1.* When Privacy Act material or other personal information is not redacted from records released to an SVC, the SVC is responsible for protecting the information and taking steps to guard against its improper release. *Note: DoD 5400.11-R, paragraph C4.2.1, states that: Records pertaining to an individual may be disclosed *to a DoD official or employee* provided (1) The requester has a need for the record in the performance of his or her assigned duties. The requester shall articulate in sufficient detail why the records are required so that the custodian of the records may make an informed decision regarding their release; (2) The intended use of the record generally relates to the purpose for which the record is maintained; and (3) Only those records as are minimally required to accomplish the intended use are disclosed. The entire record is not released if only a part of the record will be responsive to the request. *16.16. SJA Responsibilities.* 16.16.1. Notification. The SJA or designee ensures the victim is provided with the earliest possible notification of their rights under paragraph 16.11. This includes: 16.16.1.1. The availability of an SVC, if applicable; 16.16.1.2. The accused's pretrial status and any subsequent changes in that status, including but not limited to, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement; 16.16.1.3. Preferral and referral of charges or a decision not to pursue prosecution; 16.16.1.4. A pretrial confinement hearing and/or Article 32 preliminary hearing, including the intent to introduce any evidence implicating M.R.E. 412, 513 or 514; 16.16.1.5. The scheduling, including changes and delays, of each court-martial proceeding the alleged victim is entitled or required to attend. In cases involving an alleged victim of a qualifying offense, as defined in paragraph 16.11.3, the servicing SJA or designee shall ensure any counsel of the victim, including a SVC, is provided reasonable, accurate, and timely notice of proceedings as required in paragraph 16.11.3.3. A template for this notification is included at Figure A10.2. 16.16.1.6. The disposition of the case, to include the acceptance of a guilty plea, the rendering of a verdict, or the withdrawal or dismissal of charges; 16.16.1.7. If named in a specification being considered in an Article 32 preliminary hearing, the right to submit supplemental materials for consideration by the PHO and convening authority within 24 hours after the PHO closes the hearing. 16.16.1.8. The right, upon request, to receive a copy of the recording of all open sessions of the court-martial, subject to the limitations in paragraph 13.14.1.

	16.16.1.9. The right, upon request, to receive a copy of the ROT, provided the victim was named in a specification of which the accused was charged. Note: Redactions may be required to protect the privacy interests of third parties. 16.16.1.10. The right to receive a copy of the ROT if the victim testified, regardless of the findings. Note: Redactions may be required to protect the privacy interests of third parties. 16.16.1.11. The right to receive a copy of any action taken by the convening authority, if applicable. 16.16.1.12. The right to receive a copy of the Entry of Judgment. 16.16.1.13. The opportunity to present to the court at sentencing, in compliance with applicable law and regulations, a statement of the impact of the crime on the victim, including financial, social, psychological, and physical harm suffered by the victim; 16.16.1.14. The sentence imposed, including the date on which the accused becomes eligible for release from confinement or parole, if applicable; and 16.16.1.15. In a general or special court-martial in which charges were referred prior to 1 January 2019 that involve victims of crimes punishable under Articles 120, 120b, 120c, 125, or any attempt to commit such offenses in violation of Article 80, the right to receive a copy of the ROT free of charge as soon as the records are certified. See R.C.M. 1103(g)(3) (MCM 2016 ed.). In special or general courts-martial in which charges were referred on or after 1 January 2019, the right of testifying victims to receive a copy of the certified ROT and the right of non-testifying victims who were named in a specification to receive a copy of the certified ROT upon request. See R.C.M. 1112(e)(1). The SJA or 178 AFI51-201 18 JANUARY 2019 designee ensures any declination of the ROT is documented in writing and attached to the original record. (T-0) 16.16.1.16. If the offense was tried by a court-martial and the accused was found guilty of the offense, the opportunity to submit a written statement to the convening authority after the sentence is adjudged. See R.C.M. 1106A. Section 13C provides additional guidance on victim impact statements. *Source*: Air Force Instruction 15-201, Administration of Military Justice (18 Jan 2019).

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, and the accused has had the opportunity to make a sentencing forum election under R.C.M. 1002(b), the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.*

(A) *Crime victim*. At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

Discussion

In capital cases, the right to be reasonably heard does not include the right to make an unsworn statement. *See* R.C.M. 1001(c)(2)(D)(i).

(B) *Accused*. The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matters to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are forfeited.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes any

records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.

Discussion

Defense counsel may also, subject to the Military Rules of Evidence and this rule, present personnel records of the accused not introduced by trial counsel in accordance with R.C.M. 1001(b). A forfeited matter may be subject to review for plain error.

(f) *Imposition of sentence.* In sentencing an accused under this rule, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(1) the nature and circumstances of the offense and the history and characteristics of the accused;

(2) the impact of the offense on—

(A) the financial, social, psychological, or medical well-being of any victim of the offense; and

(B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(3) the need for the sentence to—

(A) reflect the seriousness of the offense;

(B) promote respect for the law;

(C) provide just punishment for the offense;

(D) promote adequate deterrence of misconduct;

(E) protect others from further crimes by the accused;

(F) rehabilitate the accused; and

(G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

(4) the sentences available under these rules.

(g) *Information that may be considered*. The court-martial, in applying the factors listed in subsection (f) to the facts of a particular case, may consider—

(1) Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001; and

(2) Any evidence admitted by the military judge during the findings proceeding.

Rule 1003. Punishments

(a) *In general*. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of one or more charges and specifications by a court-martial.

Discussion

"Any person" includes officers, enlisted persons, person in custody of the armed forces serving a sentence imposed by a court-martial, and, insofar as the punishments are applicable, any other person subject to the UCMJ. *See* R.C.M. 202.

(b) *Authorized punishments.* Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) *Reprimand.* A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority.

Discussion

A reprimand adjudged by a court-martial is a punitive censure. Only the convening authority may specify the terms of the reprimand. When a court-martial adjudges a reprimand, the convening authority shall issue the reprimand in writing or may disapprove, reduce, commute, or suspend the reprimand in accordance with R.C.M. 1109 or R.C.M. 1110.

---

(2) *Forfeiture of pay and allowances.* Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced. In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.

Discussion

A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues. Forfeitures accrue to the United States.

Forfeitures of pay and allowances adjudged as part of a court-martial sentence, or occurring by operation of Article 58b, are effective 14 days after the sentence is adjudged or when the sentence of a summary court-martial is approved by the convening authority, whichever is earlier.

"Basic pay" does not include pay for special qualifications, such as diving pay, or incentive pay such as flying, parachuting, or duty on board a submarine.

Forfeiture of pay and allowances under Article 58b is not a part of the sentence, but is an administrative result thereof.

At a general court-martial, if both a punitive discharge and confinement are adjudged, then the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only confinement is adjudged, and that confinement exceeds six months, the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only a punitive discharge is adjudged, Article 58b has no effect on pay and allowances. A death sentence results in total forfeiture of pay and allowances.

At a special court-martial, if a bad-conduct discharge and confinement are adjudged, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during that period of confinement. If only confinement is adjudged, and that confinement exceeds six months, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during the period of confinement. If only a bad-conduct discharge is adjudged, Article 58b has no effect on pay.

If the sentence does not result in forfeitures by the operation of Article 58b, then only adjudged forfeitures are effective.

Article 58b has no effect on summary courts-martial.

---

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not adjudge a fine in excess of two-thirds of one year of the highest rate of officer pay. To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

Discussion

A fine is in the nature of a judgment and, upon entry of judgment, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. In the case of a civilian subject to military law, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged, regardless of whether unjust enrichment is present.

---

(4) *Reduction in pay grade.* Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

Discussion

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

---

(5) *Restriction to specified limits.* Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

Discussion

Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. *See* R.C.M. 1003(c)(1)(A)(ii). The sentence adjudged should specify the limits of the restriction.

---

(6) *Hard labor without confinement.* Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

Discussion

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

---

(7) *Confinement.* The place of confinement shall not be designated by the court-martial. When confinement for life is authorized, it may be with or without eligibility for parole. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

Discussion

The authority executing a sentence to confinement may require hard labor whether or not the words "at hard labor" are included in the sentence. *See* Article 58(b). To promote uniformity, the words "at hard labor" should be omitted in a sentence to confinement.

---

(8) *Punitive separation.* A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) *Dismissal.* Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

(B) *Dishonorable discharge.* A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

Discussion

See also R.C.M. 1003(d)(1) regarding when a dishonorable discharge is authorized as an additional punishment.

(C) *Bad-conduct discharge.* A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

Discussion

See also R.C.M. 1003(d)(2) and (3) regarding when a bad-conduct discharge is authorized as an additional punishment.

---

(9) *Death.* Death may be adjudged only in accordance with R.C.M. 1004; and

(10) *Punishments under the law of war.* In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) *Limits on punishments.*

(1) *Based on offenses.*

(A) *Offenses listed in Part IV.*

(i) *Maximum punishment.* The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) *Other punishments.* Except as otherwise specifically provided in this Manual, the types of punishments listed in paragraphs (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) *Offenses not listed in Part IV.*

(i) *Included or related offenses.* For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) *Not included or related offenses.* An offense not listed in Part IV and not included in or closely

related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) *Multiple Offenses.* When the accused is found guilty of two or more specifications, the maximum authorized punishment may be imposed for each separate specification, unless the military judge finds that the specifications are unreasonably multiplied.

Discussion

R.C.M. 906(b)(12) provides the available remedies for cases in which a military judge finds an unreasonable multiplication of charges.

---

(2) *Based on rank of accused.*

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the UCMJ, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall by dishonorable discharge.

(B) *Enlisted persons.* See paragraph (b)(9) of this rule and R.C.M. 1301(d).

(3) *Based on reserve status in certain circumstances*.

(A) *Restriction on liberty.* A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) be sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) *Forfeiture.* A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

Discussion

See R.C.M. 204. At the conclusion of nonjudicial punishment proceedings or final adjournment of the court-martial, the reserve component member who was ordered to active duty for the purpose of conducting disciplinary proceedings should be released from active duty within one working day unless the order to active duty was approved by the Secretary concerned and confinement or other restriction on liberty was adjudged. Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty.

---

(4) *Based on status as a person serving with or accompanying an armed force in the field.* In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation.

(5) *Based on other rules.* The maximum limits on punishments in this rule may be further limited by other Rules for Courts-Martial.

Discussion

The maximum punishment may be limited by: the jurisdictional limits of the court-martial (*see* R.C.M. 201(f) and 1301(d)); the

nature of the proceedings (*see* R.C.M. 810(d) (sentence limitations in rehearings, new trials, and other trials)); and by instructions by a convening authority (*see* R.C.M. 601(e)(1)).

(d) *Circumstances permitting increased punishments.*

(1) *Three or more convictions.* If an accused is found guilty of a specification or specifications for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) *Two or more convictions.* If an accused is found guilty of a specification or specifications for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) *Two or more specifications.* If an accused is found guilty of two or more specifications for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Discussion

All of these increased punishments are subject to all other limitations on punishments set forth elsewhere in this rule. Convictions by summary court-martial may not be used to increase the maximum punishment under this rule. However they may be admitted and considered under R.C.M. 1001.

Rule 1004. Capital cases

(a) *In general.* Death may be adjudged only when—

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by either—

(A) the unanimous vote of all twelve members of the court-martial; or

(B) the military judge pursuant to the accused's plea of guilty to such an offense; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) *Notice.*

(A) *Referral.* The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction on the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided that—

(i) the convening authority has otherwise complied with the notice requirement of subparagraph (B); and

(ii) if the accused demonstrates specific prejudice from such failure to include the special instruction, the military judge determines that a continuance or a recess is an adequate remedy.

(B) *Arraignment.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

Disposition of Penetrative Sexual Assault Offenses when an Article 32 Preliminary Hearing Officer (PHO) Found No Probable Cause or Recommended Dismissal of Charges

TABLE 1a. Fiscal Year 2018 Article 32 preliminary hearings

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total	Victim Testified
# Art. 32s held (all SA cases)	150	53	37	126	7	373*	11 (2.9%)
# Art. 32s held (penetrative cases)	**126**	**46**	**27**	**116**	**3**	**318**	7 (2.2%)
# Cases Art. 32 PHO determined no probable cause for 1 or more penetrative SA offenses	**13** (10.3%)	**10** (21.7%)	**7** (25.9%)	**20** (17.2%)	**2** (66.7%)	**52** (16.4%)	
# Cases Art. 32 PHO determined probable cause but recommended dismissal of 1 or more penetrative SA offenses	**0**	**3** (2 overlap with no PC cases)	**1**	**5**	**2** (1 overlap with no PC cases)	**11** (3 overlap with no PC cases)	

* 104 Article 32 preliminary hearings were waived: 85 waived in penetrative cases and 19 waived in contact cases.

TABLE 1b. Fiscal Year 2018 Article 32 PHO determinations of "no probable cause"

	# Cases Art. 32 PHO determined no probable cause for 1 or more penetrative SA offenses	# Cases GCMCA or SPCMCA dismissed no-probable cause offenses	# Cases GCMCA referred no-probable-cause offense(s)	Results of cases where penetrative SA offenses referred to GCM despite Art. 32 PHO determination of no probable cause
Army	**13**	2 2 GCMCA / 0 SPCMCA	11	2: guilty 5: not guilty 1: dismissed per PTA 3: dismissed after referral
Navy	**10**	9 0 GCMCA / 9 SPCMCA	1	1: dismissed per PTA
Marine Corps	**7**	4 1 GCMCA / 3 SPCMCA	3	1: guilty on 2 charges 1: not guilty 1: dismissed after referral
Air Force	**20**	17 3 GCMCA / 14 SPCMCA	3	2: not guilty 1: discharged in lieu of trial
Coast Guard	**2**	2 0 GCMCA / 2 SPCMCA	0	N/A
Total	**52**	**34** 6 GCMCA / 28 SPCMCA	**18**	3: guilty 8: not guilty 2: dismissed per PTA 1: discharged in lieu of trial 4: dismissed after referral

TABLE 1c. Fiscal Year 2018 Article 32 PHO "no probable cause" determinations, by PHO grade (rank)

	# Cases Art. 32 PHO determined no probable cause for 1 or more penetrative SA offenses, by PHO grade	**# Cases GCMCA or SPCMCA dismissed no-probable cause offenses (did not refer)**	**# Cases GCMCA referred no-probable cause offense(s)**	**Results of cases where penetrative SA offenses referred to GCM despite Art. 32 PHO determination of no probable cause (and grade of PHO)**
Army	**O-3: 2** **O-4: 10** **O-5: 1**	O-3: 0 O-4: 2 O-5: 0	O-3: 2 O-4: 8 O-5: 1	2: guilty (1 O-3, 1 O-4) 5: not guilty (1 O-3, 4 O-4) 1: dismissed per PTA 3: dismissed after referral
Navy	**O-3: 3** **O-4: 3** **O-5: 2** **O-6: 2**	O-3: 3 O-4: 2 O-5: 2 O-6: 2	O-3: 0 O-4: 1 O-5: 0 O-6: 0	1: dismissed per PTA
Marine Corps	**O-4: 5** **O-5: 2**	O-4: 2 O-5: 2	O-4: 3 O-5: 0	1: guilty on 2 charges (O-4) 1: not guilty (O-4) 1: dismissed after referral
Air Force	**O-4: 5** **O-5: 13 (5 MJ)** **O-6: 2**	O-4: 4 O-5: 11 (5 MJ) O-6: 2	O-4: 1 O-5: 2	2: not guilty (2 O-5) 1: discharged in lieu of trial
Coast Guard	**O-4: 2**	O-4: 2	O-4: 0	N/A
Total	**O-3: 5** **O-4: 25** **O-5: 18** **O-6: 4**	O-3: 3 O-4: 12 O-5: 15 O-6: 4	O-3: 2 O-4: 13 O-5: 3 O-6: 0	3: guilty (1 O-3, 2 O-4) 8: not guilty (1 O-3, 5 O-4, 2 O-5) 2: dismissed per PTA 1: discharged in lieu of trial 4: dismissed after referral

TABLE 1d. Fiscal Year 2018 cases in which the Article 32 PHO found probable cause, but recommended dismissal

	# Cases Art. 32 PHO determined probable cause, but recommended dismissal of 1 or more penetrative SA offenses	**# Cases GCMCA or SPCMCA dismissed penetrative SA offenses IAW Art. 32 PHO recommendation (did not refer)**	**# Cases GCMCA referred offense(s) for which PHO recommended dismissal**	**Results of cases where penetrative SA offenses referred to GCM despite Art. 32 PHO recommending against referral**
Army	**0**	0	0	
Navy	**3** (2 overlap with no PC cases)	2 0 GCMCA / 2 SPCMCA	1	1: dismissed per PTA
Marine Corps	**1**	1 0 GCMCA / 1 SPCMCA	0	
Air Force	**5**	2 0 GCMCA / 2 SPCMCA	3	2: not guilty 1: dismissed after referral
Coast Guard	**2** (1 overlap with no PC cases)	2 0 GCMCA / 2 SPCMCA	0	
Total	**11** (3 overlap with no PC cases)	**7** 0 GCMCA / 7 SPCMCA	**4**	2: not guilty 1: dismissed per PTA 1: dismissed after referral

TABLE 2a. Fiscal Year 2017 Article 32 preliminary hearings

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total	Victim testified
# Art. 32s held (all SA cases)	169	56	46	145	9	425*	30 (7.1%)
# Art. 32s held (penetrative cases)	**146**	**46**	**36**	**133**	**7**	**368**	27 (7.3%)
# Cases Art. 32 PHO determined no probable cause for 1 or more penetrative SA offenses	**27** (18.5%)	**7** (15.2%)	**7** (19.4%)	**37** (27.8%)	**2** (28.6%)	**80** (21.7%)	
# Cases Art. 32 PHO determined probable cause, but recommend dismissal of 1 or more penetrative SA offenses	**4**	**4** (2 overlap with no PC cases)	**0**	**8** (4 overlap with no PC cases)	**1** (1 overlap with no PC cases)	**17** (7 overlap with no PC cases)	

* 117 Article 32 preliminary hearings were waived: 98 waived in penetrative cases and 19 waived in contact cases.

TABLE 2b. Fiscal Year 2017 Article 32 PHO determinations of "no probable cause"

	# Cases Art. 32 PHO determined no probable cause for 1 or more penetrative SA offenses	# Cases GCMCA or SPCMCA dismissed no-probable cause offenses	# Cases GCMCA referred no-probable cause offense(s)	Results of cases where penetrative SA offenses referred to GCM despite Art. 32 PHO determination of no probable cause
Army	**27**	11 2 GCMCA / 9 SPCMCA	16	2: guilty 7: not guilty 1: dismissed per PTA 3: discharged in lieu of trial 3: dismissed after referral
Navy	**7**	5 3 GCMCA / 2 SPCMCA	2	1: not guilty 1: discharged after adverse appeal ruling
Marine Corps	**7**	4 1 GCMCA / 3 SPCMCA	3	1: not guilty 2: dismissed per PTA
Air Force	**37**	28 6 GCMCA / 22 SPCMCA	9	2: guilty** 4: not guilty 1: dismissed per PTA 1: alternate disposition 1: dismissed after referral
Coast Guard	**2**	0	2	1: dismissed per PTA 1: dismissed after referral
Total	**80**	**48** 12 GCMCA / 36 SPCMCA	**32**	4: guilty** 13: not guilty 5: dismissed per PTA 3: discharged in lieu of trial 7: dismissed after referral

** In one of these two cases, the Air Force Court of Criminal Appeals found the evidence factually insufficient to sustain the conviction for a penetrative SA offense and dismissed the specification with prejudice.

TABLE 2c. Fiscal Year 2017 Article 32 PHO "no probable cause" determinations, by PHO grade (rank)

	# Cases Art. 32 PHO determined no probable cause for 1 or more penetrative SA offenses, by PHO grade	**# Cases GCMCA or SPCMCA dismissed no-probable cause offenses (did not refer)**	**# Cases GCMCA referred no-probable cause offense(s)**	**Results of cases where penetrative SA offenses referred to GCM despite Art. 32 PHO determination of no probable cause (and grade of PHO)**
Army	**O-3: 4** **O-4: 18** **O-5: 5**	O-3: 2 O-4: 7 O-5: 2	O-3: 2 O-4: 11 O-5: 3	2: guilty (1 O-4, 1 O-5) 7: not guilty (2 O-3, 5 O-4) 1: dismissed per PTA 3: discharged in lieu of trial 3: dismissed after referral
Navy	**O-3: 2** **O-4: 2** **O-5: 1** **O-6: 2**	O-3: 1 O-4: 2 O-5: 1 O-6: 1	O-3: 1 O-4: 0 O-5: 0 O-6: 1	1: not guilty (O-6) 1: discharged following adverse interlocutory appeal ruling
Marine Corps	**O-4: 4** **O-5: 2** **Rank not listed: 1**	O-4: 2 O-5: 1 Rank not listed: 1	O-4: 2 O-5: 1	1: not guilty (O-5) 2: dismissed per PTA
Air Force	**O-3: 1** **O-4: 13** **O-5: 15 (11 MJ)** **O-6: 8 (7 MJ)**	O-3: 0 O-4: 10 O-5: 11 (8 MJ) O-6: 7 (6 MJ)	O-3: 1 O-4: 3 O-5: 4 (3 MJ) O-6: 1 (1 MJ)	2: guilty** (2 O-5 MJ) 4: not guilty (1 O-4, 2 O-5 [1 MJ], 1 O-6 MJ) 1: dismissed per PTA 1: alternate disposition 1: dismissed after referral
Coast Guard	**O-4: 2**	O-4: 0	O-4: 2	1: dismissed per PTA 1: dismissed after referral
Total	**O-3: 7** **O-4: 39** **O-5: 23** **O-6: 10** **Rank not listed: 1**	O-3: 3 O-4: 21 O-5: 15 O-6: 8 Rank not listed: 1	O-3: 4 O-4: 18 O-5: 8 O-6: 2	4: guilty** (1 O-4, 3 O-5) 13: not guilty (2 O-3, 6 O-4, 3 O-5, 2 O-6) 5: dismissed per PTA 3: discharged in lieu of trial 7: dismissed after referral

TABLE 2d. Fiscal Year 2017 cases in which the Article 32 PHO found probable cause, but recommended dismissal

	# Cases Art. 32 PHO determined probable cause, but recommended dismissal of 1 or more penetrative SA offenses	**# Cases GCMCA or SPCMCA dismissed penetrative SA offenses IAW Art. 32 PHO recommendation (did not refer)**	**# Cases GCMCA referred offense(s) for which PHO recommended dismissal**	**Results of cases where penetrative SA offenses referred to GCM despite Art. 32 PHO recommending against referral**
Army	**4**	0	4	2: mixed findings 1: discharge ILO court-martial 1: dismissed after referral
Navy	**4** (2 overlap with no PC cases)	3 1 GCMCA / 2 SPCMCA	1	1: discharge ILO court-martial
Marine Corps	**0**	0	0	
Air Force	**8** (4 overlap with no PC cases)	4 1 GCMCA / 3 SPCMCA	4	2: not guilty 1: discharge ILO court-martial 1: dismissed after referral
Coast Guard	**1** (1 overlap with no PC cases)	0	1	1: dismissed after referral
Total	**17** (7 overlap with no PC cases)	**7** 2 GCMCA / 5 SPCMCA	**10**	2: not guilty 2: mixed findings 3: discharge ILO court-martial 3: dismissed after referral

Methodology:

For fiscal years 2017 and 2018, the staff reviewed all cases in which—

- The most serious offense charged was a penetrative sexual assault;
- An Article 32 preliminary hearing was held; and
- The Article 32 preliminary hearing officer (PHO) found no probable cause for one or more penetrative offenses

The staff then followed these cases to their ultimate dispositions. For cases in which the PHO found probable cause for some penetrative offenses, but no probable cause for others, the staff followed only the no-probable cause offenses. Each penetrative offense was for a different penetrative act, even when occurring with the same victim during the same sexual encounter. For example, a case may involve separate charged specifications of digital, vaginal, and anal penetration of the same victim. In these cases, the staff reviewed each specification separately and followed those for which the PHO found no probable cause, even if the PHO found probable cause for one or more of the other penetrative offenses.

The staff disregarded cases in which the no-probable cause offense was charged in the alternative and the PHO found probable cause under a different legal theory. In other words, if the accused was charged with a sexual assault under two theories of liability (for example, both by causing bodily harm and when the alleged victim was incapable of consent), and the PHO found probable cause for one theory of liability but not the other, the staff disregarded the case, as the PHO found probable cause that the sexual assault occurred.

For the cases in Tables 1d and 2d, the staff followed the offenses for which the PHO determined there was probable cause, but recommended against referral, and the ultimate disposition of those offenses. As noted in the charts, some of the cases in which the PHO determined there was probable cause but recommended against referral also involve penetrative offenses for which the PHO determined there was no probable cause.

Abbreviations:
Art. 32 PHO – Article 32 preliminary hearing officer
PC – probable cause
MJ – military judge
GCMCA – general court-martial convening authority
SPCMCA – special court-martial convening authority
PTA – pretrial agreement

Staff Notes:

No-Probable Cause Determinations by the PHO:

- In more than 15% of the Article 32 hearings involving at least one penetrative offense (16% in FY18 and 22% in FY17), the PHO determined there was no probable cause for at least one penetrative offense.
    - The data raises the question—would the PHO have found probable cause if the government had put on more evidence or called more witnesses? Some PHOs noted in their findings of no probable cause that this finding was based on the evidence presented to them, implying or stating explicitly that additional evidence may be available but had not been presented at the Article 32.
- Staff judge advocates and convening authorities appear to be in accord with PHO findings as to probable cause in a majority of the cases, with the exception of the Army.
    - In FY18, convening authorities dismissed the penetrative sexual offenses in 34 out of 52 cases (65.4%) in which the PHO found no probable cause for those offenses. When Army cases are excluded, convening authorities dismissed the penetrative sexual offenses in 32 out of 39 cases (82.1%).
    - In FY17, convening authorities dismissed the penetrative sexual offenses in 48 out of 80 cases (60%) in which the PHO found no probable cause for those offense. When Army cases are excluded, convening authorities dismissed the penetrative sexual offenses in 37 out of 53 cases (70%).
- Of those cases in which a convening authority referred an offense to trial following a PHO finding of no probable cause for that offense, a number of those cases resulted in dismissal or alternate disposition prior to trial.
    - In FY18, 11 out of 18 cases resulted in a trial on the merits for the no-probable cause offenses; 3 resulted in guilty verdicts for the no-probable cause offenses, and 8 resulted in not guilty verdicts.
    - In FY17, 17 out of 32 cases resulted in a trial on the merits for the no-probable cause offenses; 4 resulted in guilty verdicts for the no-probable cause offenses, and 13 resulted in not guilty verdicts. For one of the 4 guilty verdicts (Air Force), the Service appellate court found the offense in question to be factually insufficient.
    - Of the 3 Army cases in which the member was discharged in lieu of trial following referral, all 3 were charged with offenses in addition to the sexual assault offenses (assault, fraternization, violation of a lawful order).

Probable Cause Determinations / Dismissal Recommendations by the PHO:

- There was a relatively small number of cases in which the Article 32 PHO determined there was probable cause for a penetrative sexual assault offense, but recommended the offense not be referred to court-martial.
    - FY18: 11 cases (3 of these cases are also counted in the no-probable cause cases, meaning the Article 32 PHO determined no probable cause for some penetrative offenses and probable cause for others, but recommended dismissal / non referral of all penetrative offenses in question)
    - FY17: 17 cases (7 of these cases are also counted in the no-probable cause cases, meaning the Article 32 PHO determined no probable cause for some penetrative offenses and probable cause for others, but recommended dismissal / non referral of all penetrative offenses in question)

Other Observations:

- There does not seem to be a great disparity among the Services in the rank of judge advocates serving as Art 32 PHOs, with most PHOs being O-4s and O-5s.
    - In Army sexual assault cases, the rank of the PHO does not seem to be a factor in whether the convening authority took action (dismissal of charges or referral) consistent with the PHOs' probable cause determinations.
- With few exceptions, the PHOs in the Navy, Marine Corps, Air Force, and Coast Guard provided multi-page factual summaries and analysis for each alleged offense to support their probable cause or no-probable cause determinations. The PHO reports in the Army are mixed, with some containing factual summaries and analysis and others containing little or no analysis to support the PHO's probable cause determinations. In some instances, the PHOs simply filled out the Article 32 report form (DD Form 457) with no additional narrative.
    - Under the amendments applicable to Article 32 preliminary hearings that occur on or after January 1, 2019, the PHO is required to provide analysis.
- In the majority of cases in which sexual assault charges were dismissed, the charges were dismissed by the special court-martial convening authority.
- Considering that the Air Force and Navy have similar active duty population sizes, the Air Force held Article 32 hearings in significantly more penetrative sexual assault cases than the Navy.
    - FY18: 116 cases (Air Force) v. 46 cases (Navy)
    - FY17: 133 cases (Air Force) v. 46 cases (Navy)

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

OCT - 2 2019

Ms. Martha Bashford
Chair
Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA 22203

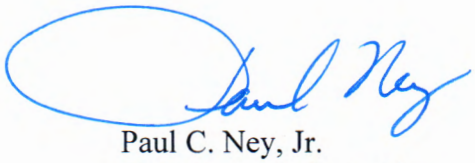
Dear Ms. Bashford:

Thank you for the report of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) on alleged collateral misconduct by individuals identified as a victim of sexual assault in case files of a Military Criminal Investigative Organization. The care with which the DAC-IPAD studied the relevant issues is apparent.

The email forwarding the DAC-IPAD's analysis to my office included a request that the Secretary of Defense provide a written response to the DAC-IPAD of his approval or disapproval of the DAC-IPAD's recommendations or other comments by November 1, 2019. It will not be possible to provide the DAC-IPAD with a response by that date. I have forwarded the DAC-IPAD's recommendations to the Joint Service Committee on Military Justice (JSC) for its analysis, including determining which recommendations could be executed under the existing statutory framework and which recommendations could not be implemented absent statutory amendment. Given the considerable existing workload of the JSC – including the completion of this year's annual review of the Uniform Code of Military Justice and Manual for Courts-Martial as well as drafting a specific "sexual harassment" criminal offense for the military, considering a Government Accountability Office recommendation concerning inclusion of certain demographic information in annual military justice reports, and drafting a report requested by the House Armed Services Committee concerning access by special victims' counsel to certain court filings and investigative materials, in addition to the heavy workload of the JSC's members in their individual Service capacities – it would not be possible to complete the detailed analysis the collateral misconduct issues deserves within the timeframe suggested by the email. Given the JSC's many commitments, I have asked for its recommendations by March 13, 2020. Because the next collateral misconduct report is not due to Congress until September 30, 2021, that will still provide ample opportunity to implement appropriate changes.

Thank you again for the DAC-IPAD's outstanding work on the collateral misconduct issue and your ongoing work evaluating other aspects of the military's investigation and litigation of sexual assault cases.

Sincerely,



Paul C. Ney, Jr.
DoD General Counsel

DRAFT – As of 16 Oct 19

Locations, Dates, and DAC-IPAD Members Attending 2020 Installation Site Visits

Locations for Installation Site Visits *(meeting locations in bold)*				**Members Attending**
Locations	**Proposed Dates**	**Installations / Bases**	**Military Service**	**Members**
Texas	April 19–23	**Fort Hood** **Joint Base San Antonio-Lackland** (Air Force basic training)	Army Air Force	Bashford Garvin Tokash McKinley Anderson
Washington	May 3–5	**Joint Base Lewis-McChord** Naval Station Whidbey Island Naval Station Kitsap-Bangor	Army Air Force Navy	Bashford Spohn Garvin Cannon
Hawaii	May 26–28	**Joint Base Pearl Harbor-Hickam** Schofield Barracks Marine Corps Base Hawaii	All Military Services	Spohn Kramer Garvin Grimm McKinley
Virginia	May 31– June 2	Joint Base Langley-Eustis **Naval Station Norfolk** Camp Allen	Army Air Force Navy Marine Corps	Bashford McKinley Anderson Schwenk
Korea	June 14–17	**Camp Humphreys** Osan AB	Army Air Force	Bashford McKinley Markowitz

North Carolina	June 28–July 1	**Fort Bragg** **Camp Lejeune**	Army Marine Corps	Bashford Grimm Schwenk
California	July 12–15	**Naval Base San Diego** Marine Corps Recruit Depot San Diego (Marine Corps basic training) Marine Corps Air Station Miramar **Camp Pendleton**	Navy Marine Corps	Kramer Cannon Garvin Tokash
Germany Italy	July 26–30	**Kaiserslautern Military Community** (*includes Landstuhl Regional Medical Center, Ramstein Air Base*) ---------- **Army Garrison Vicenza** Aviano Air Base Naval Support Activity Naples	All Military Services	Garvin Spohn Kramer ---------- Bashford McKinley Anderson

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

November 15, 2019
DAC-IPAD Public Meeting
Biographies of Presenters

Protect Our Defenders' Perspective on Military Sexual Assault Prosecutions and Sentencing
9:05a.m. – 9:35a.m.

Mr. Don Christensen, President, Protect Our Defenders - Colonel Don Christensen, USAF (ret.) served as chief prosecutor for the United States Air Force between 2010 and 2014. He served as a trial counsel, defense counsel or military judge for every year of his 23-year career in the United States Air Force.

Col Christensen has served as an Assistant Staff Judge Advocate, Area Defense Counsel, Circuit Defense Counsel, Deputy Chief Circuit Defense Counsel, and Deputy Staff Judge Advocate, as a deployed Staff Judge Advocate, Chief Circuit Trial Counsel, and Staff Judge Advocate and as a Military Judge. He has tried over 150 courts-martial as a trial and defense counsel and has presided over 100 trials as a military judge.

He was born in Sturgis, South Dakota and received his law degree from Marquette University Law School. A third generation Air Force officer, he received his commission as a second lieutenant through ROTC and entered active service on 15 July 1991. Col Christensen is licensed to practice law before the Supreme Court of Wisconsin.

Col Christensen has received numerous awards and decorations including the Legion of Merit, the Meritorious Service Medal, the Air Force Commendation Medal, and the Air Force Achievement Medal.

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

Case Review Working Group

November 15, 2019

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

PROPOSED FINDING 1: Statements of sexual assault victims taken by military criminal investigators often lacked sufficient detail and appropriate follow-up questioning by the investigator. The lack of detail and follow-up questioning in these statements made it difficult to properly assess an appropriate disposition for the case.

RECOMMENDATION: With the Committee's approval, the Case Review Working Group will continue to explore this issue by reviewing and assessing additional information obtained through, but not limited to, site visits.

Briefer: Mr. Markey

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

PROPOSED FINDING 2: Investigators need more discretion to tailor the investigation to the specific facts of the complaint and there needs to be a mechanism early in the investigation for assessing complaints for closure, where appropriate.

a. Investigation and resolution of sexual assault complaints frequently take longer than the facts necessitate.

b. All complaints receive the same level of investigation without the investigation being tailored to the allegation.

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

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

(Proposed Finding 2, cont.)

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

RECOMMENDATION: With the Committee's approval, the Case Review Working Group will continue to explore this issue by reviewing and assessing additional information obtained through, but not limited to, site visits.

MARCH 2019 FINDING: Military investigators testified they feel obligated to perform the same series of investigative tasks regardless of the facts of a particular case and that they have little discretion to determine which specific investigative actions would provide the most value.

Briefer: Ms. Tokash

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

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

RECOMMENDATION: With the Committee's approval, the Case Review Working Group will continue to explore this issue by reviewing and assessing additional information obtained through, but not limited to, site visits.

Briefer: Ms. Cannon

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 1: Article 30, U.C.M.J., directs that commanders and convening authorities determine what disposition should be made of charges "in the interest of justice and discipline." Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found, in cases where there was an indication of the rationale for the disposition decision, consideration primarily of the following factors: probable cause, sufficiency of the evidence, multiple victims, victim preference, and the declination of other jurisdictions to prosecute. These factors seem to be considerations concerning "the interest of justice." We did not observe considerations concerning "the interest of discipline."

Briefer: Ms. Bashford

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 2: In many cases, the victim's preference as to disposition seems to receive more weight by convening authorities than the consideration of whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial. The Article 33 non-binding disposition guidance may not give appropriate weight to the sufficiency of the evidence factor.

Briefer: Ms. Bashford

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 3: While judge advocates often provided investigators advice on probable cause for submission of fingerprints and DNA to federal databases, it is unclear what, if any, advice on appropriate disposition factors, including advice on probable cause, judge advocates provided to the initial disposition authority.

Briefer: Ms. Tokash

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 4: The initial disposition authority often did not identify which factors were considered significant in the disposition decision and currently is not required to do so.

Briefer: Mr. Markey

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 5: Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's analysis and conclusions are useful to SVCs/VLCs and defense counsel in advising their clients and to SJAs and convening authorities in rendering advice and making decisions on the charges, probable cause, jurisdiction and dispositions.

Briefer: BGen (Ret.) Schwenk

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 6: Based on reviews of investigative files and Article 32 reports, the CRWG noted that sufficient evidence for a probable cause determination is not always presented at the Article 32 hearing. The Article 32 preliminary hearing officer should be presented with sufficient evidence to support a probable cause determination at the Article 32 hearing where it is subject to challenge by the defense.

Briefer: Ms. Cannon

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 7: The lack of a binding probable cause determination by the preliminary hearing officer, allowing the SJA to come to a different conclusion on probable cause without explanation, reduces the usefulness of the Article 32.

Briefer: Ms. Tokash

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 8: Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction.

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

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

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

(Observation 8, cont.)

c. Staff judge advocates rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice and they are not required to do so. Including such an analysis as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial would be helpful to convening authorities. (See Observation 9).

d. Many cases did not seem to afford consideration of "the sufficiency of evidence to obtain and sustain a conviction" the same deference accorded in the U.S. Attorney's Manual.

Briefer: Ms. Bashford

FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

OBSERVATION 9: Currently Article 34 prohibits convening authorities from referring charges to a general court-martial unless the SJA provides written advice that the specification alleges an offense, there is probable cause to believe that the accused committed the offense, and jurisdiction exists. Additionally, the SJA must provide a written recommendation as to the disposition to be made in the interest of justice and discipline. The SJA's Article 34 advice to the convening authority often consists of conclusions, without explanation. These unexplained conclusions are not useful in assessing factors relevant to a referral determination. The Article 34 pretrial advice would be more helpful to convening authorities if they included detailed explanations for the SJA's conclusions.

RECOMMENDATION: With the Chair's approval, the Policy Working Group should continue to explore the issues associated with Observations 1-9.

Briefer: BGen (Ret.) Schwenk

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

Policy Working Group Update

November 15, 2019

Policy Working Group (PWG) Update

- The DAC-IPAD voted to form a working group to look at issues related to Articles 32, 33, and 34, UCMJ, as requested by the DoD General Counsel

- The seven DAC-IPAD members who have agreed to serve on the working group looking at these issues are: Brigadier General (Ret.) James Schwenk, Judge Paul Grimm, Ms. Kathleen Cannon, Ms. Meg Garvin, Dr. Jen Markowitz, Ms. Jennifer Long, and Mr. A.J. Kramer

- Due to FACA requirements, the DAC-IPAD Chair requested that the Policy Working Group take on these tasks and new membership, rather than forming a new working group

Policy Working Group (PWG) Update

- The PWG held a preliminary administrative teleconference on October 7, 2019 to discuss the way ahead for the working group

- The PWG members decided to begin by examining Article 32 proceedings first, and then conduct a review of the pretrial process from preferral to referral, to include—
  - Article 33 disposition factors
  - Article 34 pretrial advice

Policy Working Group (PWG) Update

- In 2019 and 2020, the PWG plans to gather additional information on Article 32 and the referral process—
  - The staff provided the working group members with data from FY 18 and FY 17 regarding no probable cause determinations by the preliminary hearing officers (PHOs) at Article 32 hearings
  - The PWG plans to draft questions related to Article 32 and the referral process in preparation for military installation site visits in 2020
  - The working group will consider what additional information or witnesses would be helpful to the Committee on these topics
- The PWG aims to provide their analysis on these topics for DAC-IPAD consideration and inclusion in the 2021 annual report

Article 32 Data Methodology

- Using the DAC-IPAD court-martial database, for fiscal years 2017 and 2018, the staff reviewed all cases in which—
  - The most serious offense charged was a penetrative sexual assault;
  - An Article 32 preliminary hearing was held; and
  - The Article 32 preliminary hearing officer (PHO) found no probable cause for one or more penetrative offenses
- The staff then followed these cases to their ultimate dispositions.
- Each penetrative offense was for a separate sexual act, even when occurring with the same victim during the same sexual encounter.
- The staff disregarded cases in which the no-probable cause offense was charged in the alternative and the PHO found probable cause under a different legal theory.

Article 32 Data

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY 18 - # Art. 32s held (penetrative cases)	126	46	27	116	3	**318**
FY 18 - # Cases Art. 32 PHO found no-PC (penetrative offenses)	13 (10.3%)	10 (21.7%)	7 (25.9%)	20 (17.2%)	2 (66.7%)	**52 (16.4%)**
FY 17 - # Art. 32s held (penetrative cases)	146	46	36	133	7	**368**
FY 17 - # Cases Art. 32 PHO found no-PC (penetrative offenses)	27 (18.5%)	7 (15.2%)	7 (19.4%)	37 (27.8%)	2 (28.6%)	**80 (21.7%)**

Article 32 Data

Dispositions of Article 32 PHO determinations of no probable cause

	FY 18 - # Cases PHO found no-PC	FY 18 - # Cases no-PC offenses dismissed	FY 17 - # Cases PHO found no-PC	FY 17 - # Cases no-PC offenses dismissed
Army	13	2 2 GCMCA / 0 SPCMCA	27	11 2 GCMCA / 9 SPCMCA
Navy	10	9 0 GCMCA / 9 SPCMCA	7	5 3 GCMCA / 2 SPCMCA
Marine Corps	7	4 1 GCMCA / 3 SPCMCA	7	4 1 GCMCA / 3 SPCMCA
Air Force	20	17 3 GCMCA / 14 SPCMCA	37	28 6 GCMCA / 22 SPCMCA
Coast Guard	2	2 0 GCMCA / 2 SPCMCA	2	0
Total	**52**	**34** **6 GCMCA / 28 SPCMCA**	**80**	**48** **12 GCMCA / 36 SPCMCA**

Article 32 Data

Dispositions of Article 32 PHO determinations of no probable cause

	FY 18 - # Cases no-PC offenses referred	Results of referred cases		FY 17 - # Cases no-PC offenses referred	Results of referred cases	
Army	11	2: guilty 5: not guilty	4: dismissed*	16	2: guilty 7: not guilty	7: dismissed
Navy	1		1: dismissed	2	1: not guilty	1: dismissed
Marine Corps	3	1: guilty 1: not guilty	1: dismissed	3	1: not guilty	2: dismissed
Air Force	3	2: not guilty	1: dismissed	9	2: guilty 4: not guilty	5: dismissed
Coast Guard	0	N/A		2		2: dismissed
Total	**18**	**3: guilty 8: not guilty**	**7: dismissed**	**32**	**4: guilty 13: not guilty**	**15: dismissed**

*** dismissal may be as a result of a pretrial agreement, discharge in lieu of court-martial, or other reason.**

Article 32 Data—Observations

- Article 32 PHOs determined there was no probable cause for at least one penetrative offense in 16% of cases in FY 18 and 22% in FY 17

- Staff judge advocates and convening authorities act consistent with PHO no-probable cause determinations in a majority of cases, with the exception of the Army

Article 32 Data—Observations

- Convening authorities dismissed penetrative sexual offenses in which the PHO found no probable cause—
  - FY 18: 34 out of 52 cases (65.4%)
    32 out of 39 (82.1%) when excluding Army
  - FY 17: 48 out of 80 cases (60%)
    37 out of 53 (70%) when excluding Army

- Charges were dismissed by the special court-martial convening authority in the majority of cases

Article 32 Data—Observations

- Of those cases in which the convening authority referred an offense to trial following a PHO determination of no probable cause—
  - In FY 18, 11 of 18 cases went to a court-martial; 3 resulted in guilty verdicts for the no-probable cause offenses and 8 resulted in not guilty verdicts
  - In FY 17, 17 of 32 cases went to a court-martial; 4 resulted in guilty verdicts for the no-probable cause offenses and 13 resulted in not guilty verdicts

- Most judge advocates serving as PHOs are O-4s and O-5s; the PHO's rank doesn't seem to affect convening authority disposition decisions

Article 32 Data—Observations

- Most Article 32 reports provide factual summaries and analysis to support the PHOs' probable cause determinations
  - The Army's Article 32 reports are mixed, with some providing factual summaries and analysis and others containing little or no analysis

- While the Air Force and Navy have similar active duty populations, the Air Force held Article 32 hearings in significantly more penetrative sexual assault cases.
  - FY18: 116 cases (Air Force) v. 46 cases (Navy)
  - FY17: 133 cases (Air Force) v. 46 cases (Navy)

DAC-IPAD Deliberations:

Written Responses to Requests for Information

and

Information Received during the August 23, 2019 Public Meeting

November 15, 2019

Purpose

To share the Committee members' thoughts and impressions regarding information received from the Services on the following topics:

- Article 32 Preliminary hearings
- Article 33 Non-binding disposition factors
- Article 34 Advice to convening authority before referral
- The DAC-IPAD's conviction and acquittal data
- Victims' decisions to decline participation in the investigation and/or prosecution of sexual assault offenses

Purpose

- Refine research questions
- Identify specific questions for the Policy Working Group
- Identify issues or questions to raise during 2020 military installation site visits
- Make observations

What You've Heard

- As a result of Congress's changes to Art. 32 in the FY14 NDAA, Art. 32 hearings are no longer a comprehensive review of available evidence
- More preliminary hearings are waived
- Victims rarely testify
- Often no witnesses testify during the hearing
- The preliminary hearing officer (PHO) cannot compel evidence

Is any of this a problem?

What You've Heard

- Service Military Justice Divisions did not think Art. 32 determinations as to probable cause should be binding on convening authorities
- Trial Defense Organization Chiefs favored making Art. 32 determinations binding
- Experience level of the PHO varies, depending on the case and the perspective of the person asked
- Many witnesses favored strengthening the power of the PHO to compel evidence

What changes should the Committee consider?

What You've Heard

- The SJA knows more about the case than the PHO
- Examples given:
  - Trial Counsel's interview(s) with the victim
  - Results of the digital forensic examination
  - Anything raised by the Defense

- Victims and victims' counsel communicate the preference as to disposition to the SJA through the prosecution team

- The Military Justice Divisions did not support requiring the SJA to explain in writing any disagreements with the PHO as to probable cause

What do you think of the information and advice that the convening authority receives at referral?

What You've Heard

- The ability to obtain and sustain a conviction at trial is not the referral standard; it is one factor considered among many
- The Air Force refers cases with probable cause and a credible, cooperating victim
- Why refer a case to court-martial when the chance of conviction is low:
  - Interests of good order and discipline
  - Victim's preference / day in court
  - Accused held a position of seniority or special trust
  - Safety of the community

Is the disposition guidance clear and effective?

What You've Heard

- Conviction and acquittal rates alone are not helpful in assessing the health of the military justice system
- Too many convictions or acquittals could be a sign of a problem (too many preferrals/referrals)
- It is difficult to compare the conviction rate for sexual assault with the conviction rate for non-sex offenses
- Although acquittals can devastate a victim, in general victims place greater value on how they are treated throughout the process

What is the value of conviction and acquittal rates for sexual assault offenses?

What You've Heard

- Victims typically decline to participate during the investigative phase of a case
- Potential reasons why a victim may decline to participate:
  - The victim reported the crime to obtain services rather than seek a conviction
  - Third party report
  - Desire to move on with life
  - Fear of ostracism or retaliation (actual retaliation is rare)
  - Desire for privacy

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

2020 Military Installation Site Visit Update

November 15, 2019

Purpose

- To gather information in a non-attribution environment from Military Service personnel in the field regarding sexual assault case adjudication practices, sexual assault prevention training at the unit level, victim services and care.

- Military installation site visits provide an opportunity for Committee members to have open, frank communication with installation-level practitioners which may not otherwise be possible at a public meeting and to learn first-hand about the practices, procedures, initiatives, and challenges at a variety of installations.

Potential topics to address during site visits

- Article 32, UCMJ, preliminary hearings.
- Article 33, UCMJ, disposition guidance for commanders, convening authorities, and staff judge advocates handling sexual assault cases.
- Article 34, UCMJ, pretrial advice to convening authorities concerning sexual assault cases.
- Court-martial conviction and acquittal rates for sexual assault offenses.
- Victims' decisions to decline participation the investigation and/or prosecution of sexual assault offenses.
- Training conducted by the Services' sexual assault prevention and response programs, or by command leadership teams, regarding the conduct that constitutes sexual assault.

Participants

- Special and general courts-martial convening authorities.
- Special Victims' Counsel/Victims' Legal Counsel (SVCs/VLCs), Sexual Assault Response Coordinators, Victim Advocates.
- Trial Counsel, Special Victim Prosecutors, and/or Senior Trial Counsel.
- Trial Defense Counsel and Senior Defense Counsel.
- Military Criminal Investigative Organization (MCIO) Investigators from Special Victims Units.
- Sexual assault victims (staff can coordinate with victim services personnel at the installation to inquire whether any victims are willing to speak with DAC-IPAD members).
- Junior enlisted Service members and non-commissioned officers.

Dates and locations of site visits

Locations for Installation Site Visits *(meeting locations in bold)*				Members and Staff Attending	
Locations	**Proposed Dates**	**Installations / Bases**	**Military Service**	**Members**	**Staff**
Texas	April 19–23	**Fort Hood** **Joint Base San Antonio-Lackland** (Air Force basic training)	Army Air Force	Bashford Garvin Tokash McKinley Anderson	
Washington	May 3–5	**Joint Base Lewis-McChord** Naval Station Whidbey Island Naval Station Kitsap-Bangor	Army Air Force Navy	Bashford Spohn Garvin Cannon	
Hawaii	May 26–28	**Joint Base Pearl Harbor-Hickam** Schofield Barracks Marine Corps Base Hawaii	All Military Services	Spohn Kramer Garvin Grimm McKinley	
Virginia	May 31– June 2	Joint Base Langley-Eustis **Naval Station Norfolk** Camp Allen	Army Air Force Navy Marine Corps	Bashford McKinley Anderson Schwenk	
Korea	June 14–17	**Camp Humphreys** Osan AB	Army Air Force	Bashford McKinley Markowitz	

Dates and locations of site visits

North Carolina	June 28–July 1	**Fort Bragg** **Camp Lejeune**	Army Marine Corps	Bashford Grimm Schwenk	
California	July 12–15	**Naval Base San Diego** Marine Corps Recruit Depot San Diego (Marine Corps basic training) Marine Corps Air Station Miramar **Camp Pendleton**	Navy Marine Corps	Kramer Cannon Garvin Tokash	
Germany Italy	July 26–30	**Kaiserslautern Military Community** (*includes Landstuhl Regional Medical Center, Ramstein Air Base*) ---------- **Army Garrison Vicenza** Aviano Air Base Naval Support Activity Naples	All Military Services	Garvin Spohn Kramer ---------- Bashford McKinley Anderson	---------

Questions?

PROPOSED FINDING 1: Statements of sexual assault victims taken by military criminal investigators often lacked sufficient detail and appropriate follow-up questioning by the investigator. The lack of detail and follow-up questioning in these statements made it difficult to properly assess an appropriate disposition for the case.

RECOMMENDATION: With the Committee's approval, the Case Review Working Group will continue to explore this issue by reviewing and assessing additional information obtained through, but not limited to, site visits.

Relevant Data: In just over half of the "no action" cases reviewed by members the victim either did not make a statement or the statement itself did not establish probable cause for a penetrative sexual assault violation.

- Much more detail could be documented from the victims. Follow-ups are hard because of the SVC/VLCs. I saw some cases where the victim's counsel wanted written questions submitted, others where they refused follow-up interviews.

- The original statements of the victim should be included in the ROI and/or available for review because investigator summaries were too general and brief. The summaries made it difficult to determine what follow-up questioning or additional investigation was needed.

- There should be a follow-up interview (perhaps more than one) with the victim and the narrative should contain sufficient details about the offense.

- Generally, the statements by the victims seemed to be a summary of their report of events. I don't recall in-depth questions and answers that followed up on any aspect of the report.

- Investigators did not ask victims enough "why" questions to develop the context of the victim's actions and the victim's statements to the suspect and other witnesses. This failure to fully develop the context results in an incomplete picture of events. Additionally, there were not enough follow-up interviews to ask for the victim's reply to the suspect's version of events, including why the victim thinks the suspect and other witnesses said what they said. In most cases, it should be automatic to give the victim a chance to respond to what the investigation uncovers.

- I did not see follow up interviews of the victim. Having access to select victim interview recordings would be beneficial to an evaluation of the case.

- The victim interview summaries are very general and very brief and don't provide enough information.

- There is a lack of focus in obtaining the facts necessary to determine whether there is probable cause that a crime was committed.

- Civilian police reports often have detailed summaries of the victim's factual statement.

PROPOSED FINDING 2: Investigators need more discretion to tailor the investigation to the specific facts of the complaint and there needs to be a mechanism early in the investigation for assessing complaints for closure, where appropriate.

a. Investigation and resolution of sexual assault complaints frequently take longer than the facts necessitate.

b. All complaints receive the same level of investigation without the investigation being tailored to the allegation.

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

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

RECOMMENDATION: With the Committee's approval, the Case Review Working Group will continue to explore this issue by reviewing and assessing additional information obtained through, but not limited to, site visits.

MARCH 2019 FINDING: Military investigators testified they feel obligated to perform the same series of investigative tasks regardless of the facts of a particular case and that they have little discretion to determine which specific investigative actions would provide the most value.

- The investigation needs to be more tailored to the crime, and the investigators need more discretion. While some late report pictures might be useful (two couples in two beds in the same hotel room - a delayed picture showed how close the beds were too each other), many are not (it happened on the couch in my living room; no one else was home).

- There needs to be a way to wrap some cases up in days – victim declination, no crime, etc. Some will take longer. The checklist adds to the length of the investigation. Questioning ex-wives and girlfriends rarely leads to anything and probably would not be admissible anyway.

- Some of the investigations I reviewed did not meet an element of an offense of any crime, yet the MCIO continued forward with an investigation. This does not seem like a good use of time and resources. In many instances, the case should have been closed earlier.

- The lack of investigator discretion to tailor the investigative steps and closure is a major problem with the investigative process. I reviewed cases in which a third party made the report and the victim, when contacted, indicated that he/she did not want to cooperate with the investigation. Despite this, the investigators went through the checklist and conducted a thorough

investigation, only to conclude in the end that charges were not supported by probable cause due to the victim's lack of cooperation. Similarly photographing crime scenes relative to alleged crimes that occurred months (or even years) ago is a waste of resources (as is talking to everyone who might possibly have information about the victim or the suspect or the incident).

- Our review of investigative files supported the initial observation of the CRWG and the previous recommendations of other advisory committees that MCIO's need the ability to manage sex assault cases as they do non-sex assault cases, tailoring scope and extent of an investigation to the facts of that case, including closing investigations early when appropriate.

- A threshold assessment of a case would be appropriate to develop strategy as to what steps should be taken.

- Even when victims said they weren't victims, full blown investigations continued to completion. A victim-centered approach does not routinely proceed irrespective of what the victim wants.

- Investigators rely too much on Cellebrite phone extraction, as opposed to taking pictures of the relevant material on a phone - texts, FB post, etc.

- These investigations take much too long, especially given the fact that the majority (over 60%) will end in a "no action" decision. This is unfair to all parties and, again, is a waste of time and resources.

- More supervision and guidance by a seasoned lawyer should be given to investigations so that only those investigations requiring a more thorough approach are pursued.

- Length of the investigation is important and needs to be addressed. It would be good to develop reasonable guidelines regarding time frames. Further assessment should be done on why this is occurring; is it caseload, getting reviews completed, waiting for evidence, spending too much time trying to track down inconsequential witnesses?

- I don't think it is ever appropriate to canvass friends of the suspect or the complaining witness for statements about their relative character. I recall the basic formula seemed to elevate the suspect as awesome, respectful and reliable and smear the complaining witness as a mess, unreliable, sexually promiscuous, and not credible. When we think of canvassing for other witnesses for 404b character evidence, we think of identifying other individuals to speak who might be relevant; such as an ex-wife or ex-girlfriend in a domestic violence case. It is hard to think of a rule here because you want the evidence to take you where it leads you—it requires judgment that comes from the experience of thoroughly investigating sexual assault reports. I guess the takeaway here is that checklists, etc. are helpful tools to help one (especially a relatively new investigator) be thoughtful about the possible sources of evidence but they should not be used like a grocery list to make sure everything is checked off. Same thought with photos. Photos of the room/place where the incident took place are obviously more relevant the closer in time they are taken to the event. But, I would refrain from making any blanket rules about whether or when pictures should be taken. Experienced investigators or even the prosecutor may

want to understand the layout (assuming it hasn't changed, even if the furniture has) and it may help them in establishing certain facts, like why the victim felt as though they couldn't leave, or why an assault could have happened without anyone seeing it. Basically you should recruit investigators with experience and allow them to use their discretion and/or conduct follow-up as requested by the prosecution.

- Where the file involved a history of domestic violence, or took place within a domestic violence incident, I often did not see in the investigation evidence that reflected the severity of the domestic violence aspect of the complaint. When the victim didn't want to participate there was no indication that anyone considered the impact of witness intimidation, which is often subtle, or other tactics used to prevent or hinder future testimony.

- There should be a review mechanism for deciding not to move a case forward prior to the Article 32 preliminary hearing; such as an SJA/investigator process.

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

RECOMMENDATION: With the Committee's approval, the Case Review Working Group will continue to explore this issue by reviewing and assessing additional information obtained through, but not limited to, site visits.

Relevant Data:

1) In the Air Force, 63% of sexual assault complaints resulted in no action being taken.

2) In the Navy, 71% of sexual assault complaints resulted in no action being taken.

3) In the Marine Corps, 72% of sexual assault complaints resulted in no action being taken.

4) On average it took 175 days, almost 6 months, to complete an investigation resulting in "no action" based on the random sample of investigations discussed in the DAC-IPAD March 2019 Report.

- Because administrative actions against a suspect carry such a negative impact on a suspect, imposing such actions at the time of a complaint is premature. There should be distinctions made as to what cases might require immediate action. Perhaps in the most serious kinds of offenses certain actions are necessary. But these cases should be carefully scrutinized. In any event there should be uniform guidelines for each specific adverse action taken. Other cases should await the outcome of the Art. 32 before action is taken against a suspect. If the PHO finds no probable cause - no action against the suspect should be taken even if a GCM is set.

- The military might want to consider flagging a suspect after the constitutional threshold of probable cause is met—not at the opening of a criminal file.

- The timing of administrative actions is a tough but important issue. The system in effect presumes the accused is guilty and flags accordingly.

- Administrative actions can include, among other things, the suspension of security clearances, suspension from carrying a weapon which places limitations on permissible duties, and the suspension from favorable administrative actions such as promotions and testing for promotions, educational opportunities, moves, and nominations for awards.

- Even when there is no administrative action taken by the command, if a suspect is titled for a sexual assault by investigators on a standard less than probable cause, they are perceived to have a criminal record with associated repercussions.

- The mere allegation of a sexual assault is causing good people to leave the military because they feel they do not have a future.

OBSERVATION 1: Article 30, U.C.M.J., directs that commanders and convening authorities determine what disposition should be made of charges "in the interest of justice and discipline." Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found, in cases where there was an indication of the rationale for the disposition decision, consideration primarily of the following factors: probable cause, sufficiency of the evidence, multiple victims, victim preference, and the declination of other jurisdictions to prosecute. These factors seem to be considerations concerning "the interest of justice." We did not observe considerations concerning "the interest of discipline."

- "In the interest of justice and discipline" is a subjective and vague standard that should not be used.

- If the military wants to keep jurisdiction over serious crimes then they need to make charging decisions based on the evidence presented and factors that civilian prosecutors consider. To me this standard demonstrates that decision makers have a conflict of interest because they are making determinations based on something other than justice. It's like an organization investigating itself which would be fine if the consequences were administrative (perhaps) but these are felony cases being adjudicated and resulting in a felony conviction or acquittal.

- Sounds right to me. What other standard would be used?

- "In the interest of justice and discipline" is vague and up for discretion. If there is a standard for defining these terms, let's use it.

- I guess what we're trying to say is when they say, "in the best interest of justice and discipline" that there has to be probable cause and an assessment that there is sufficient admissible evidence to sustain a conviction.

-What we are trying to address is if they are using "in the best interest of justice and discipline," and not what is generally accepted as legal standards to refer a case.

OBSERVATION 2: In many cases, the victim's preference as to disposition seems to receive more weight by convening authorities than the consideration of whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial. The Article 33 non-binding disposition guidance may not give appropriate weight to the sufficiency of the evidence factor.

Briefer: Ms. Bashford

- It seems as though everyone treats the complaining witness' preference as binding. I have no problem when it's a declination, but wanting to have a trial should not override assessing the evidence.

- Non-binding factors would be appropriate to consider for disposition since they do affect whether a case would likely result in a conviction.

- If you do not have enough to obtain and sustain a conviction, you shouldn't pass go. But since they don't weight any of the factors, it's kind of hard.

- We have the Article 33 non-binding disposition factors that they should consider, but they don't have to consider. Somebody needs to look at Article 33 and figure out how to give sufficient weight to the evidence factor, and make it mandatory perhaps.

- Based on various testimony, specifically from the Air Force, the victim's view seems to be dispositive. And we're saying that the admissible evidence should be weighted highly as well.

OBSERVATION 3: While judge advocates often provide investigators advice on probable cause for submission of fingerprints and DNA to federal databases, it is unclear what, if any, advice on appropriate disposition factors, including advice on probable cause, judge advocates are providing to the initial disposition authority.

Briefer: Ms. Tokash

2019 Finding 21: There is significant confusion among investigators, judge advocates, and commanders as to what the terms "probable cause" (reasonable grounds to believe) and "unfounded" (false or baseless) mean, when and by whom probable cause and unfounded determinations are made, and how they are documented throughout the investigative process.

2019 Finding 22: The standards, timing, and authority for collecting and submitting fingerprints to the federal database, making probable cause determinations, and submitting final disposition information to the federal database are unclear and not uniform across the Services.

2019 Finding 23: MCIO coordination with judge advocates on a probable cause determination for the submission of fingerprints often is not documented in the investigative file

2019 Recommendation 6: The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should require that judge advocates or civilian attorneys employed by the Services in a similar capacity provide advice to commanders in completing command disposition/action reports in order to make certain that the documentation of that decision is accurate and complete.

- There is a lack of transparency as to how and why disposition decisions are made.

- The lack of probable cause should be documented, while the determination that there is probable cause is more of a conversation that results in the continuation of investigative or prosecutorial steps.

- If there exists more careful scrutiny by the judge advocate prior to the Art 32 hearing there should be fewer instances where inappropriate charges are pursued.

- Judge advocates--trained lawyers--should make a written probable cause determination at the end of the investigation. If there is no probable cause, the investigation should be closed.

- Judge advocates should make written probable cause determinations at the end of the investigation. The Commander should not make probable cause determinations, as probable cause is a legal determination.

- There should be a written probable cause determination by those investigating the crime and by commanders. The individual making the determination should document (in detail) the justification for making the probable cause determination.

- To me, probable cause is and should remain a legal determination, so judge advocates should make it. They are independent of the MCIO and become the commander's legal advisor if the allegation goes forward in some fashion. The system should not ask non-lawyers to make probable cause determinations.

- A form should be used to develop a consistent template for documenting the probable cause determination and consideration should be given to having set options to assist in this documentation.

- DoDI 5505.11, Fingerprint Reporting Requirements, dated October 31, 2019 removed the requirement for judge advocates to be involved in a probable cause determination prior to submission of fingerprints to the federal database.

OBSERVATION 4: The initial disposition authority often did not identify which factors were considered significant in the disposition decision and currently is not required to do so.

2019 Recommendation 5: In developing a uniform command action form in accordance with section 535 of the FY19 NDAA, the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should ensure that the standard set of options for documenting command disposition decisions is based on recognized legal and investigatory terminology and standards that are uniformly defined across the Services and accurately reflect command action source documents.

- The perception of bias by the convening authority is a concern and providing documentation of the reasons underlying a disposition decision can go a long way towards combatting that perception. The rationale for why this decision was made should be set forth, other than I like this person, or this person is a good person. When making these important decisions, they need to ensure the decisions are supported by factual data and information justifying why this decision was made.

- Identifying which disposition factors were considered significant seems like a minimal standard that should be followed.

- There is a lack of transparency as to how and why disposition decisions are made.

- Some disposition authorities identified which factors were considered, others did not.

- I think the Article 33 non-binding factors should be binding. The UCMJ should mirror the DoJ Justice Manual in terms of Initiating and Declining Prosecution (9-27.200) and Grounds for Commencing or Declining Prosecution (9-27-220).

- The Article 33, non-binding disposition factors are legitimate considerations in making the initial disposition decision, as many of them speak to the issue of whether there is sufficient evidence to prefer charges. If, for example, the availability and admissibility of evidence is in question or if the victim refuses to cooperate there may not be evidence that meets the standard of probable cause.

- In evaluating victim preference, trained advice on subtle intimidation must be provided, particularly in intimate partner violence cases.

- Consideration of all non-binding factors should be mandated, not optional and the law should specify which factors have legal underpinnings and JAs should be required to advise the disposition authority on those factors. That way, they stay non-binding, they are considered, and lawyers advise on those uniquely legal (e.g. enough evidence for conviction, admissible evidence, availability of other jurisdictions).

- If the non-binding factors are being administered consistently across all services, they are appropriate in most cases.

OBSERVATION 5: Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's analysis and conclusions are useful to SVCs/VLCs and defense counsel in advising their clients and to SJAs and convening authorities in rendering advice and making decisions on the charges, probable cause, jurisdiction and dispositions.

- Since this is largely a paper chase, and since the MCIOs can't opine, having someone review the investigation and give a report is good.

- Detailed reports of Article 32 hearings are very useful in determining further action. Such reports would provide accountability and maintain the integrity of the process for all involved. Such reports would be important in cases of appeal as well.

- Detailed Art. 32 reports can be helpful in identifying cases that should not be referred. However, at present their helpfulness is limited because they are not required to address whether there is sufficient admissible evidence for conviction. Requiring PHOs to include that analysis in their reports would be even more helpful than the current situation.

- Detailed Art. 32 reports with thoughtful analyses of the strengths and weaknesses of a case are always helpful to SJAs and commanders; they can be helpful to SVC/VLCs, DCs, and TCs.

- The data supports most of the 32 hearing officer's decisions. If Article 32 hearings are properly administered they are helpful.

- Prosecutors should be required to call live witnesses unless good cause is shown so the PHO has more import and impact in getting rid of weak or questionable cases.

- Article 32 hearings should be useful but I suspect that they do not fully serve their purpose, given that either the suspect waives the right to a hearing or the victim refuses to testify.

- I see an Art 32 like a preliminary hearing. I think there can be limitations on cross-examination (i.e., it isn't and shouldn't be discovery or an event to discredit the victim because its purpose is probable cause). In the civilian world we could and did limit cross-examination somewhat but I think it is useful. Given that it is paper only, it seems less useful but at least it is/should be a check on meritless cases going forward.

- If the victim does not testify and if the hearing only includes the evidence gathered during the investigation, what is the point of the hearing? The usefulness could depend on how thorough the "detailed" report is.

- Article 32 hearings are not being utilized as intended; there seems to be a lot of "gamesmanship."

- I am not sure of the usefulness of Article 32 hearings for SA cases. Both prosecution and defense are manipulating how they treat the Article 32, so is it really an effective 32?

OBSERVATION 6: Based on reviews of investigative files and Article 32 reports, the CRWG noted that sufficient evidence for a probable cause determination is not always presented at the Article 32 hearing. The Article 32 preliminary hearing officer should be presented with sufficient evidence to support a probable cause determination at the Article 32 hearing where it is subject to challenge by the defense.

- The SJA's ability to override the PHO probable cause determination based on evidence not presented to the PHO amounts to one-sided influence with the convening authority and appears unfair, biased, and lacking in due process.

- Consideration of additional evidence not provided at the preliminary hearing and not subjected to challenge by the defense at the preliminary hearing is unfair. Any evidence used in determining probable cause should be presented at the hearing and if discovered later should result in another hearing.

- If SJA are making probable cause determinations on evidence not provided to the PHO, then there really doesn't need to be a probable cause determination by the PHO since it ultimately will be made by the SJA on other evidence.

- Unless we have a rule prohibiting the defense, victim, and trial counsel from providing additional info to the SJA, it's going to come on occasion. We'd also need a rule requiring the PHO to get everything going to the SJA (meaning the entire investigation, the prosecution merits memo, any input from victim/defense, etc.). Not a problem as is.

- It seemed from our last meeting that the idea that the SJA develops further evidence is not borne out in reality. If the decision of the PHO is not binding, I don't see the rationale.

OBSERVATION 7: The lack of a binding probable cause determination by the preliminary hearing officer, allowing the SJA to come to a different conclusion on probable cause without explanation, reduces the usefulness of the Article 32.

Relevant Data:

1) In FY 18, convening authorities referred charges to a court-martial in 20 out of 52 cases in which the PHO determined there was no probable cause to support the charges.

2) In FY 17, convening authorities referred charges to a court-martial in 32 out of 78 cases in which the PHO determined there was no probable cause to support the charges.

- It seemed from our last meeting that the idea that the SJA develops further evidence is not borne out in reality. If the decision of the PHO is not binding, I don't see the rationale for the Article 32 hearing and the PHO probable cause determination.

- Right now you really don't have any idea, for the most part, of why SJAs made their decision. The PHO provides reasoning and conclusions for their decisions.

- If the PHO probable cause determination is not binding, then there needs to be articulated information as to why the SJA decides otherwise.

- The SJA's ability to overrule the PHO renders the preliminary hearing a paper-shuffling event with little impact or import.

- The adversarial process is better at producing an objective determination of probable cause as both sides are actively involved but only if the preliminary hearing is determinative and only if adequately trained professionals are in place.

- It's okay for the SJA to disagree with the PHO on any legal determination or on the disposition recommendation. The SJA, not the PHO, is the commander's legal advisor and is the one who provides legal and policy advice to the commander.

OBSERVATION 8 (old observation 2): Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction.

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

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

c. Staff judge advocates rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice and they are not required to do so Including such an analysis as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial would be helpful to convening authorities. (See Observation 9).

d. Many cases did not seem to afford consideration of "the sufficiency of evidence to obtain and sustain a conviction" the same deference accorded in the U.S. Attorney's Manual.

Briefer: Ms. Bashford

Relevant Data: In the case files that result in a contested courts-martial, for the cases members have analyzed:

1) For cases that resulted in conviction, committee members overwhelmingly found that the ability to obtain and sustain a conviction was possible based on the file analyzed.
2) For cases that resulted in an acquittal, committee members found there was evidence sufficient to obtain and sustain a conviction in approximately one-half of the files analyzed.

Sufficiency of the Evidence Evaluation in PHO reports:

- Detailed Art. 32 reports can be helpful in identifying cases that should not be referred. However, at present their helpfulness is limited because they are not required to address whether there is sufficient admissible evidence for conviction. Requiring PHOs to include that analysis in their reports would be even more helpful than the current situation.

Probable Cause as the Referral Standard

- The referral standard should not be probable cause which is the bare minimum.

- Probable cause is a low standard of proof - too low for trial purposes. In order to avoid the high number of acquittals and dismissals it would seem adding the requirement of "likelihood of conviction" would be more appropriate and fair.

- Probable cause is a very easy standard to meet, especially where you are not making credibility decisions.

- Requiring probable cause to refer the case is a minimum standard, but one cannot exclude the possibility that additional evidence will be developed as the case moves toward trial (of course the opposite can happen as well—the case may fall apart either because the victim decides to withdraw cooperation or because questions are raised about the admissibility of evidence). That said, I do worry about the consequences of labeling the accused a "sex offender" and proceeding to court-martial if the evidence is not sufficient to sustain a conviction.

- Currently the minimal referral standard is probable cause but I think it should be "probable cause plus what should a jury do based on all reasonably available evidence." The civilian world is struggling right now with this as illustrated by the high attrition rates. There is a high level of speculation based on what juries like or don't like in a jurisdiction couched as the reasonable likelihood of conviction.

- Probable cause is the standard in the civilian world. If probable cause is the same everywhere then this should be the standard.

- Many PHO's do not feel they can take the victim's credibility into account in making probable cause determinations even though they find serious credibility issues.

Article 34 advice:

- If a convening authority is relying on the SJA advice in deciding to refer a case to trial when there is probable cause but not sufficient admissible evidence upon which to convict, I don't think that's ever a legitimate decision.

- Based on the large number of acquittals, one would have to conclude that SJAs are not correctly advising convening authorities. It appears that too many weak cases are going forward to court-martial.

- Generally, SJA determinations of probable cause seem correct but with no discussion accompanying the decision, it's hard to know if they are aware of, or considering, all legal options available to them, etc.

- I did disagree on some determinations of probable cause by the SJA, but there are meetings and conversations occurring that are not documented in the files.

- Everyone is worried about tipping their hand if required to provide details in Article 34 advice. Such concerns are baseless.

- There is a legitimate concern in providing a written sufficiency of the evidence determination if it is discoverable.

- The SJA should be required in the 34 advice memo to address all Art. 33 legal factors including likelihood of conviction with an explanation for each conclusion/recommendation.

- Requiring the SJA to provide a written determination of sufficiency of evidence can be critical to ensuring fairness in the process and will guard against weak cases going ahead for wrong reasons (the victim wants it.). This may help provide clarity for the victims whose cases are not moved forward.

- Our concern is that SJAs are basing recommendations on PC, and not necessarily looking to whether there's sufficient admissible evidence. Some of them might be, it is hard to know.

- None of us saw a consideration of obtaining and sustaining a conviction. We know what we did see, but that's what we didn't see.

- Based on our review of the investigative files, the presence of evidence admissible to obtain and sustain a conviction was not a factor considered by Staff Judge Advocates. Or at least a written factor on the Staff Judge Advocate's advice.

Treatment of sufficiency of the evidence under the U.S. Attorney guidance:

- Article 33, U.C.M.J. directs that the non-binding disposition guidance factors "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 federal civilian system allows, in rare cases, a prosecution when there isn't likely to be a conviction. Some cases need to be prosecuted despite the long odds (senior officer/enlisted, war crime in combat area).

- I think the Article 33 non-binding factors should be binding. The UCMJ should mirror the DoJ Justice Manual in terms of Initiating and Declining Prosecution (9-27.200) and Grounds for Commencing or Declining Prosecution (9-27-220).

OBSERVATION 9: Currently Article 34 prohibits convening authorities from referring charges to a general court-martial unless the SJA provides written advice that the specification alleges an offense, there is probable cause to believe that the accused committed the offense, and jurisdiction exists. Additionally, the SJA must provide a written recommendation as to the disposition to be made in the interest of justice and discipline. The SJA's Article 34 pretrial advice to the convening authority often consists of conclusions, without explanation. These unexplained conclusions are not useful in assessing factors relevant to a referral determination. The Article 34 pretrial advice would be more helpful to convening authorities if they included detailed explanations for the SJA's conclusions.

RECOMMENDATION: With the Chair's approval, the Policy Working Group should continue to explore the issues associated with Observation's 1-9.

- The Article 34 advice seems to have evolved into a check the box form. Not useful.

- If the SJA is going to provide a written conclusion about whether the case should or should not be referred, the SJA should provide an explanation for the decision. And the explanation should be substantive and detailed – not just "insufficient evidence" or "victim problems."

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

- I hate the bare bones, check the box Art. 34 advice letter. It should explain why and include sufficiency of the evidence.

- Everyone is worried about tipping their hand. Such concerns are baseless.

- I believe this is good documentation that should be completed as a standard.

-These unexplained conclusions are not useful in assessing factors relevant to a referral determination.