UNITED STATES DEPARTMENT OF DEFENSE

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

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13TH PUBLIC MEETING

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FRIDAY
AUGUST 23, 2019

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

PRESENT:

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

STAFF:

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

ALSO PRESENT:

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

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

***Present by telephone**

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

9:02 a.m.

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

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

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

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

Members of the Armed Forces.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

case files of a military criminal investigative organization.

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

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

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

Mr. Ney has requested that the DAC-

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

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

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

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

initiated.

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

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

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

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

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

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

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

CHAIR BASHFORD: Anybody have any questions for Colonel Weir?

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

MR. MASON: Good morning, ma'am.

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

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

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

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

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

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

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

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

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

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

penetrative than you are realizing with the contact offenses.

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

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

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

acquittal.

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

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

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

Thank you, ma'am.

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

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

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

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

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

MR. MASON: Not necessarily.

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

MR. MASON: Yes, ma'am.

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

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

CHAIR BASHFORD: Acquittal or conviction?

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

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

MR. MASON: Yes.

CHAIR BASHFORD: -- even if you're

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

MR. MASON: Yes.

CHAIR BASHFORD: Thank you.

MR. MASON: Yes, ma'am.

Are there any other questions for Mr. Mason?

MS. LONG: I have a question.

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

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

MS. LONG: Right.

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

direct correlation to what we have.

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

MR. MASON: It does not.

MS. LONG: So that would involve further analysis.

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

each of those.

MS. LONG: Okay.

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

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

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

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

MS. LONG: Okay, thank you.

MR. MASON: Yes, ma'am.

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

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

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

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

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

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

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

CHAIR BASHFORD: Thank you.

MR. MASON: Yes, ma'am.

SGT. MARKEY: Chair Bashford?

CHAIR BASHFORD: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lieutenant Male?

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

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

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

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

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

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

for the future, to get better data pulls.

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

MAJ. ERVASTI: Yes, sir, Ervasti.

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

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

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

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

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

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

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

MR. KRAMER: Thank you.

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

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

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

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

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

CHAIR BASHFORD: Please go across and everybody answer.

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

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

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

are on that.

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

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

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

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

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

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

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

MS. GARVIN: Chair, thank you.

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

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

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

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

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

bit of judgment there.

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

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

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

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

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

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

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

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

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

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

separate would be very useful and beneficial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KRAMER: Thank you, Chair.

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

about misconduct.

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

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

Sometimes it comes to light during the disciplinary proceedings. So, someone is being disciplined for fraternization and, during that disciplinary proceeding, they find they make an allegation during it of sexual assault. Sometimes it comes from third parties. It's just it can come -- which is why we threw a fairly broad net on the term accused.

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

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

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

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

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

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

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

CHAIR BASHFORD: Since the number of

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

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

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

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

considering whether to take action.

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

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

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

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

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

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

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

happens.

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

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

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

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

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

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

So that is something that we're doing

as a result of the 140a Initiative.

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

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

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

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

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

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

UNIDENTIFIED SPEAKER: Microphone.

LTC KAZIN: I apologize.

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

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

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

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

Okay, great. Thank you so much.

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

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

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

Meghan -- Ms. Peters.

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

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

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

Does 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?

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

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

the Government's most significant evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessary to get to PC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COL. PITVOREC: That's correct.

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

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

HON. BRISBOIS: Is that consistent throughout the Services?

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

COL. PITVOREC: That's correct for the

Air Force, absolutely.

CAPT TASIKAS: As well as the Coast Guard.

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

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

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

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

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

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

different than the civilian context.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CAPT MONAHAN: I echo that. But I

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

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

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

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

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

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

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

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

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

HON. BRISBOIS: Thank you.

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

(Laughter.)

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

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

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

Let me start with you, Captain Tasikas.

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

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

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

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

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

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

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

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

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

And I do believe that it still

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

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

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

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

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

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

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

informed decision.

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

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

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

iteration.

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

convening authority.

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

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

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

So, I do believe there's value. There

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

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

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

And we can start with whomever.

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

CAPT MONAHAN: And at the risk of

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

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

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

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

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

(Laughter.)

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

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

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

BRIG. GEN. SCHWENK: Okay.

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

(Laughter.)

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

(Laughter.)

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

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

And, it has gotten much better to hold

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

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

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

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

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

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

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

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

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

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

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

there's no perfect, I think, system.

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

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

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

just the reality of how it is.

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

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

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

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

How does this approach incorporate the

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

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

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

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

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

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

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

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

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

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

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

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

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

And I also agree with Captain Tasikas

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

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

CAPT MONAHAN: So, I believe that the

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

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

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

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

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

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

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

COL PFLAUM: So, to start, first-off

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR BASHFORD: Starting with Colonel Pflaum.

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

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

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

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

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

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

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

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

case.

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

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

(Laughter.)

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

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

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

MS. LONG: Thank you.

CAPT MONAHAN: And I would agree that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

present at the time of preferral from our perspective.

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

CAPT MONAHAN: Yes, certainly.

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

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

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

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

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

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

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

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

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

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

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

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

referral decision?

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

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

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

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

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

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

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

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

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

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

that differs between probable cause and beyond a reasonable doubt.

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

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

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

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

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

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

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

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

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

So, your thoughts.

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

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

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

MS. CANNON: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. TOKASH: I think it was

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

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

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

preliminary hearing?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let's start with you. I realize

they're completely unrelated, but.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

authority did not go forward.

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

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

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

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

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

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

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

CHAIR BASHFORD: And we have time for

one staff question.

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

So, they are I think very, very

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

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

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

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

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

Thank you so much for coming.

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

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

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

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

begin by talking about the Article 32 process.

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

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

The overall assessment was that the staff judge advocate, who is more -- a lot more experienced, is in a better position to advise the convening authority on probable cause. Should a judge advocate -- and I have sat in as a hearing officer or served in that role -- have significant litigation experience on sexual assault?

CHAIR BASHFORD: Colonel Hamilton.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

someone with extensive military justice experience.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

through the process is what's most important.

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

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

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

So, the idea that by making the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COL. HAMILTON: I concur with what my colleagues have said. And I think the benefit to the way we're structured right now is the fact that there's an opportunity for some who choose to leave will go ahead and leave. Others will ask for a permanent change of station to get a fresh start somewhere else following it. Throughout the process or early in the process some have automatically requested an expedited transfer to be in a location that is divorced and separate from the horrors of where the incident occurred and the accused at that point.

So, those options are available to the

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

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

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

(Laughter.)

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

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

research it for you.

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

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

(Laughter.)

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

CHAIR BASHFORD: Sure.

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

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

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

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

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

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

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

work.

LT. COL. SCHRANTZ: Yes, sir, I agree. I think there's value as the line VLCs are sitting and working and explaining the process to the victim. The feedback from the field has been, the trust in the system, the thoroughness, despite the conversation earlier about it being a 15 minute paper drill, it is an additional step in the process where you can convey to your client that an independent officer with legal training is going to take a good close look at the evidence and make a recommendation and write a report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Simultaneous speaking.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LT. COL. SCHRANTZ: Yes.

MS. TOKASH: -- they still can have an

audience with the SJA, correct?

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. TOKASH: Thanks.

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

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

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

CAPT. SULLIVAN: And I think, as far

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

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

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

COL. CLAY: Again, yes, the victims

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

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

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

before becoming SVC.

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

CHAIR BASHFORD: Dr. Spohn?

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

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

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

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

supporting them through the process.

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

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

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

individual as the people involved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

from the assault.

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

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

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

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

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

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

But I think, given the limited

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

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

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

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

However, when you look at it in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I'm sorry, what was the second part of your question?

MS. GARVIN: Just whether it was sufficient standing that they have right now to protect the rights in a 32.

COL. CLAY: As a 32, yes. We believe that it is sufficient.

And that we haven't really had any issues that have risen to the point where we have to actually file an appeal through that avenue. So we haven't actually tried to do that or exceed what happens to the courts if that type of issue has risen.

MS. GARVIN: Do you have concerns, if you had a case, that you would be well received

at the appellate court or do you think you could move forward?

COL. CLAY: I think we could move forward --

MS. GARVIN: Okay.

COL. CLAY: -- if we had the right case, with the right facts and aligned with what the law says.

MS. GARVIN: Okay. I'd like to hear from others too about this.

LT. COL. SCHRANTZ: Similar for us, ma'am. I don't have anything to add to that.

CAPT SULLIVAN: Ma'am, the process is the same.

COL HAMILTON: I'm tracking the process to be the same for us. I think the standing piece is a larger issue the closer you move to trial and the control being more in the judge's as far as whether or not, how, just speaking to some of the Military judges, the judge's course, and the role of the SVC is not, you know, under case law and statute, the actual

party in interest there for the SVC to stand and make an objection from behind the bar. So that is an issue that's still being resolved.

And through case law or statutory change then maybe there would be more of an opportunity for SVC to object and interject at trial. But as far as a 32, I think we're okay right now.

MS. SPECHT: Very similar in the Coast Guard. I think practically speaking, some of it is dependent on the experience level of the PHO as to how comfortable they feel with the SVC standing up and making argument extemporaneously. It may come after the fact and potentially appended to the PHO's report.

MS. GARVIN: Thank you.

MR. MARKEY: Well, thank you for being here, thank you for your service, taking time out of your day to really give us some great information to help this, can we kind of look, are there areas and gaps that we can improve the process. Kind of along the same vein of victim

participation, Article 32.

We heard about collateral misconduct. And I guess I was looking for some clarity on when that comes up it usually, probably I would assume comes up in the investigative process initially, so I'm wondering, what is your experience with how that's managed, what does that look like and is that considered a factor, or have you seen that considered as a factor for victims who don't want to move forward or don't want to participate?

And I know there's a lot of things wrapped up in there, but basically I'm looking to see some clarity about the collateral misconduct and how is that, what does that look like, you know, is it a formal identification of an investigation, is it running up the chain of command that we're going to have to report this and what impact does that have on your clients?

LT. COL. SCHRANTZ: Sir, thank you. And in the case of where a line VLC will meet with and consult with and have the initial

meeting with the victim, if information is presented that there could be collateral misconduct, that VLC will arrange for representation from the defense counsel there in the region locally.

And the communication and interaction for the line VLCs that are out there representing their clients doesn't exist just between them and the government and the trial counsel, but with the defense bar as well.

And so, in the case where there would be a potential exposure for that individual, it's not for the victim's legal counsel to represent and advise on potential collateral misconduct, it's going to be for that victim's defense counsel if one is ultimately made available.

MR. MARKEY: Sure.

CAPT SULLIVAN: To answer, the process is similar in the Navy. And as far as your question regarding how that's dealt with, it really depends on the victim on the collateral misconduct and the duty.

Sometimes the convening authorities, as you heard earlier, will dispose of it prior to the court-martial. Some will hold it until after the court-martial.

Some victim's prefer to have it adjudicated prior if they're going to captain's mast or if they're going to begin some type of formal reprimand, have it taken care of ahead of the time that they're going to testify. The potential to be cross examined on it. It's just really dependent on the victim and the misconduct that's involved.

And the same thing with the factor as far as whether it's determined for whether they move forward or not. It depends on the victim, the type of, kind of misconduct.

Their, just their, I guess their job, right, because they're looking at the job. If they have this misconduct that's adjudicated that's their future in the Military.

But again, we do have them consult with defense counsel on those issues if there is

anything under the military justice misconduct system that they're going to be facing charges for.

COL HAMILTON: Similarly, TDS, Trial Defense Services, will take in for the collateral misconduct. And the SVC will refer the client over to trial defense services.

But the protections that I think you're alluding to also are built in, in the sense that if the offense was something along the line of underage drinking but there was a serious aggravated sexual assault in addition to the underage drinking, we'll deal with the collateral misconduct so that the strength for the victim, if he or she chooses to go forward, will then be able to say yes, that was dealt with.

So, at the time of trial, during the cross examination, you know, oh, you're only here because you were involved in some other offense and you're not getting prosecuted or charged with that. Now, I've already made, received my reprimand or my Article 15 for the under aged

drinking, but what happened to me is even more egregious and that provides some of the protections in there.

But yes, we do separate the special victim's counsel advice to when there's collateral misconduct and send them over to trial defense services.

MR. MARKEY: And I'll just interrupt real quick, is that automatic?

As soon as there is information that's received of collateral misconduct, they're automatically giving that information to TDS for them to manage that?

COL HAMILTON: Well, I mean, that would be, depending on how, once we, the special victim's counsel gets information about collateral misconduct or the victim starts raising other collateral misconduct to the special victim's counsel, the victim's counsel are trained, go through the training so that they understand, when you hear information of another UCMJ, uniform code of military justice violation

or something else that the victim may have done, you say, okay, it is best for you to seek trial defense services in the event the chain of command choose to come after you or to prosecute or move to some other adverse administrative action for the victim because of the collateral misconduct.

So it's up to the SVC to then look at that. From the SJA side, if we hear of the collateral misconduct then we're going to look to the chain of command and say, what are you recommending for this person who, although a victim, also engaged in some other type of violation. Did I answer your question, sir?

MR. MARKEY: What kind of impact does SVC have in your relationship with your client?

COL HAMILTON: I think if the SVC is doing his or her job, I don't think it impacts it. It's like, hey, I need to protect you. I'm going to protect the, what your result of the sexual assault, but hey, now to look at added protection for you, let's go over and meet with

trial defense services because they're going to discuss things with you that are outside of my scope of representation for the sexual assault.

COL. CLAY: And very similar in the Air Force. Often it comes up during the investigation, but it could be, come from other sources, including the victim in their protected conversation with their SVC.

If the SVC becomes aware of collateral misconduct, they will talk to their client. And with the client's consent, make a referral to the area defense counsel so they can be represented for those matters by defense counsel.

MS. SPECHT: Similar in the Coast Guard to the Air Force. It's more of a conversation with the client and the SVC because generally, when we're talking about collateral misconduct in the Coast Guard, at least it's going to be underage drinking.

So it's a fairly low-level offense and it's going to come out because everybody was at the party, everybody saw everybody drinking. So

it's not something that necessarily needs to be referred to the defense counsel at that stage.

However, if it's something more serious, if it's something that we think is potentially a court-martial offense, they're definitely going to be referring over to our defense counsel. We have a --

MR. MARKEY: It sounds like it's a low-level offense you may not.

MS. SPECHT: I mean, that would be with the client's consent if they saw --

MR. MARKEY: Is there any guidance on that?

MS. SPECHT: No, it's within our instruction itself.

CAPT SULLIVAN: And it's with the client's consent because to seek advice of defense counsel, that is the client's decision whether they wanted to seek the advice of defense counsel. We can't force them to speak with defense counsel.

CHAIR BASHFORD: Apart from collateral

misconduct, have you personally seen or have you, just more broadly seen, any instances of retaliation in the chain of command against somebody or, I supposed what a client perceived as retaliation, apart from social consequences which I don't think people can really control all that well, but have you seen retaliation?

MS. SPECHT: I'm wracking my brain because I would say we see retaliation frequently. Or not frequently, what the victim perceives as retaliation.

And I think it's difficult because they're in a situation where they don't feel super connected with a command, so everything feels like retaliation. Like anything that might have been just normal in the normal course of business.

But I would say, yes, we've seen retaliation in the sense that if they don't have a supportive command, I'll use the cadet at the academy, maybe they don't get to go on their first, second, third order of where they wanted

to go over the summer, they may feel like that's retaliation in and of itself.

I'm trying to think, we had one very, very formal retaliation claim and that ended up getting investigated by CGIS and was substantiated and was acted upon by the command at that time.

COL. CLAY: Similar, as far as official chain of command, professional retaliation is extremely rare. In fact, nothing is coming to mind as an example, but I'm sure it has come up, I'm just not aware of it. But it is extremely rare to have actual professional retaliation through the chain of command.

LT. COL. SCHRANTZ: I'm not aware of any at this time, ma'am.

CAPT SULLIVAN: My answer is similar to the Air Force, where it's very rare to see the senior level professional retaliation. Sometimes what we've seen is members of the command think they're doing something good for the victim that then the victim perceives as retaliation.

Changing a work schedule or something that really isn't necessary from the victim's perspective and the victim thinks that that's retaliation or punishment whereas the command was trying to do something to help without communicating effectively. So we always encourage our VLCs and our victims talk with the VLCs and work with the command on that as far as working out those issues.

Sometimes in the mid-level senior enlisted arena, again, not to the level of retaliation but sometimes with the idea that they're protecting the victim or their assisting the victim, they do certain things that may be perceived as retaliation. And then with communication and education, our VLC have been able to resolve those issues.

COL HAMILTON: Very similar to what Captain Sullivan is saying, I've not been a party to or experienced any professional retaliation but the perceived retaliation usually gets dealt with, with a phone call or two. And once you

hear that information, you talk to the chain of command or send the trial team back to make sure that it's taken care of.

And I've yet to hear anything further from it.

MS. LONG: Hi, thank you for being here. I wanted to go back to the Article 32 and the usefulness of it.

And thinking about some of the comments this morning and your very unique position, I'm wondering if you think that, understanding it's been changed, that it is stronger when the victim testifies and that it's useful for preparing the victim for trial when victim testimony is involved in that process?

And Colonel Hamilton, I guess I would start with you.

COL HAMILTON: Ma'am, I must apologize, could you rephrase the question --

MS. LONG: Sure. Whether at the Article 32, having a victim testify, I know it's their choice, but having that testimony, does it

make the Article 32 hearing stronger, the evidence that goes in stronger, and is it useful for the victim to get experience testifying?

From your perspectives now as an SVC and others.

COL HAMILTON: Ma'am, from the SJA perspective, I'll answer that first, I would prefer more information. We're learning more about the SVC program and victims and the trauma they go through. I think we're doing the best thing by leaving it up to the victim to go forward.

The experience of, yes, everyone wants a little bit more experience, but it's one thing when you're putting your personal trauma out there for that experience. I don't know that you learn from having said it multiple times at the 32 or through the investigation and then the 32 and then at trial and subject to cross examination.

I'm not sure that's beneficial. So what we train and we teach is, leave it up to the

victim, discuss the process. The SVC needs to discuss the process with the victim and let it be the victim's decision at that point so long as they fully understand and appreciate what the process is about, and if the SVC are doing their job, the victims, I believe, are making informed decisions on that.

CAPT SULLIVAN: And I have the same concern regarding the, having the victim tell the story again, yet again and again.

And the parameters of the 32 previously where we had the instances where the victims were on the stands for days. And I think procedures and processes would need to be changed to ensure that there are protections of the victim during that process.

Again, I was chief of defense for a while and so from that perspective, from the accused, definitely like to have that opportunity to talk to the victim prior to the court-martial, as well as the trial counsel. You can get an idea of how the victim is going to react or hold

up on the stand.

But I don't think testing the victim in that capacity is really useful for the purposes of the ultimate trier of fact at a court-martial. And the dangers and just everything that's involved with re-victimizing the client.

Re-victimizing the victim in that setting with the, what we've seen in the past, I do not think it's a good idea.

LT. COL. SCHRANTZ: Agree, ma'am. I would like to continue to allow it to be what the victim would prefer to do.

One, as part of our training a few weeks ago, one instance that really stuck with me from hearing from an actual victim of a case that was successfully prosecuted, she flat out said that the actual act of testifying at the trial was worse, felt worst to her and that the anxiety and pain and suffering of having to retell it was worse than the assault. And it just stuck with me for hearing her.

So having that type of action imposed again on them to add in Article 32, I would not want to see that in terms of victims.

As far as getting them ready, I think the victim's legal counsel and the trial counsel, you can only do the best that they can in preparing that victim to testify through preparation and assurances and education and just trying as best they can to support that victim through the process so that they are as ready as they can possibly be during such a difficult event, as testifying is.

COL. CLAY: And to really kind of echo what was already said, it should be a victim's choice and a case-by-case basis. They will have an opportunity to have the advice of their SVC or VLC, an opportunity to consult with trial counsel ahead of time.

So the victim, in consultation with their SVC, is in the best position to make a decision whether they should or should not testify at an Article 32.

And, again, depending on the victim and the nature of the alleged assault, it may be more emotionally damaging to them to testify twice versus just at the trial itself.

MS. SPECHT: Just pretty much the same as what everybody else has said. It's going to be a conversation between the SVC and the client. And it will depend on the specifics of the case.

MS. TOKASH: So --

MS. GARVIN: Oh, I'm sorry, I didn't see you Meg.

So, we've talked a little bit about collateral misconduct. And then, I don't know if everyone was here this morning when we had the panel talking about it, but one of the things that we discussed was the definitional differences in the reports that came from each of the services as they were trying to collect the data. And as we were unpacking that a little bit we talked a little bit about the definitional differences in adverse action.

And so, I'm just curious what your

opinions, if you have them, it might be something you need to think about, about if we're going to try and help folks come up with definitions in order to respond to those types of queries, and maybe even encourage Congress to be a little more specific when they give certain things.

Would you all from the SVC, VLC perspective, have a recommended definition of adverse action that a survivor might suffer in response to collateral misconduct?

And because what we were talking about this morning is formal adverse action and informal adverse action. I'm seeing lots of furrowed brows --

(Laughter.)

MS. GARVIN: -- which probably means that either my question was inarticulate or you'll be graceful and say you need time to think about it.

LT. COL. SCHRANTZ: Ma'am, an excellent question and --

(Laughter.)

LT. COL. SCHRANTZ: -- I was here this morning and --

BRIG. GEN. SCHWENK: You weren't paying attention.

(Laughter.)

LT. COL. SCHRANTZ: Sir, I was, I promise. But it is something, ma'am, honestly that I'd like to think a little bit more about. Thank you.

CAPT SULLIVAN: Yes, ma'am, the same, to think about it. Because it could be very broad so we would need time to think about it.

BRIG. GEN. SCHWENK: Let me help a little bit. So, this morning, it seemed like there was a general consensus, a court-martial is adverse.

(Laughter.)

MS. GARVIN: Correct.

BRIG. GEN. SCHWENK: And NJP is adverse and an administrative discharge is adverse. And so then, you get to other measures that could be labeled non-punitive measures.

MS. GARVIN: Yes.

BRIG. GEN. SCHWENK: So, I'm going to give you a letter.

MS. GARVIN: Right.

BRIG. GEN. SCHWENK: Okay. If I'm going to give you a letter and send you a copy for your official file, that might look awfully adverse.

If I'm going to give you a fitness report or whatever you call it, and in it I'm going to be less than glowing, I haven't said anything bad but I just haven't glowed very much like we normally lie and, oh, I mean embellish, some people might perceive that as adverse, others might not.

If I'm going to give you a letter and stick it in my drawer, because it's a non-punitive letter and it's more a corrective measure, maybe you don't consider that adverse. Although, as a recipient of two of those, I considered them adverse at the time.

(Laughter.)

BRIG. GEN. SCHWENK: So, I think we're really looking at the low end of things. At the top end of things probably pretty easy but we're getting towards the low end of any thoughts you have on that. Right?

COL HAMILTON: Yes. So, that's exactly where I jump to looking at the reprimand --

BRIG. GEN. SCHWENK: Well, then you're screwed up. If you're at my level, we've got problems.

COL HAMILTON: I'm sorry, sir. The reprimand, whether it be an official file, a local file, which is basically in the drawer as far as where adverse and for, especially for the victim as a form of the collateral misconduct.

But what I'm hesitant to do, which I would ask for more time to really look at is having something directed put out regarding that. I'm always fearful of when you take that option away from commanders to figure out what is best for good order and discipline within the unit at

that time. And also considering the victim and the trauma that he or she has already endured, what is the best way to ensure and enforce good order discipline across the formation as to what degree.

Because, some would say that if you're junior enough in rank even an Article 15 may be survivable as a, because it's non-judicial punishment. However, like you said, sir, it's adverse. An official reprimand is adverse.

In a drawer, it's a reprimand so it adverse, but it may be able to survive so that he or she may have a successful career thereafter.

CAPT SULLIVAN: And, sir, I'm thinking of even other things like deeper into the weeds as far as possible, if you're up for a certain school and because you were found guilty of drinking under, underage drinking, you lose that school so that then affects your whole career path.

Or not extra Military instruction as much, but the other thing I'm thinking is deeper

into the weeds as far as losing some opportunity that you may have had to progress on your career path because of that collateral misconduct.

BRIG. GEN. SCHWENK: Thrown out of the special whatever program --

CAPT SULLIVAN: Yes, sir.

BRIG. GEN. SCHWENK: -- that you have.

CAPT SULLIVAN: Yes, sir. Or even being set back for a couple of months or so, so that you're not on the same track now as your peers.

BRIG. GEN. SCHWENK: So like what happens to the accused?

CAPT SULLIVAN: Absolutely, sir.

BRIG. GEN. SCHWENK: -- record.

CAPT SULLIVAN: Absolutely, sir.

LT. COL. SCHRANTZ: That's right, sir. And so, like Captain Sullivan mentioned, regardless of the outcome of the military justice proceedings there is the potential of certain hang-up and delay and awkwardness that a Service Member's record will look like.

Even with no adverse material in it at all formally. If someone on a promotion board or a school board is looking at that individual's record, there may be consequences because the board member doesn't have the benefit of knowing what happened but it just looks odd. It's the odd career progression. And it could just potentially be due to delay.

It could also be that that individual victim felt that in addition to an expedited transfer just to avoid this local geographic area that they were in a particular MOS or field of practice that really required them to get out of that field. It's too small.

Everyone knows so they do a lateral move into an additional MOS. Well then you get into the situation to where, as career advisors would recommend is, you know, how would you get that victim with a new MOS into a position to get MOS job credibility in a completely new and different job.

And so, those are the type of

challenging adverse actions that aren't adverse in terms of formal written counselings that's in someone's record, but in terms of a victim's career progression and overall standing over a 20 year career, it could be a one to two year blip that looks very odd that could have negative impacts on them.

Just something that until this morning hadn't thought about much, sir.

MS. TOKASH: In the responses by SVCs and VLCs to the request for information for this particular speaker group, there was an indication that even though the reaction of victims vary case-by-case, many of them expressed devastation at an acquittal.

So, my question is, do you think, based on the very high acquittal rate in the Military that we're seeing as a group through the case review working group and the actual raw data that we're seeing from analyzing cases in the field, do you think given the very high acquittal rate in the Military coupled with the

devastation, the feelings of devastation from the victim, that there should be a higher standard for referral of cases to trial?

If so, what do you think that should be?

BRIG. GEN. SCHWENK: We almost had somebody down here, but if you had just waited you could have gone last.

(Laughter.)

BRIG. GEN. SCHWENK: But too late, the red light is on.

COL HAMILTON: Sir, like you said, we're similar in some ways.

(Laughter.)

COL HAMILTON: Ma'am, I do not think it should be a higher standard. I obviously feel for, empathize with victims who feel devastated. And who wouldn't?

However, I think the process there, I think some victims, although devastated, at least feel through the process, if the SVC was doing their job, the chain of command and everyone, the

resources, the treatment to care was there for the victim, at least I think there is some healing in the fact that they, their story was heard, their trauma was heard.

And while it may not have reached to the level of beyond a reasonable doubt for a conviction, there was some empathy through the process for the victims. So while they're disappointed with the result, I think that they have taken a giant step toward healing by having had the opportunity to tell their story.

And I think if we just look at conviction rates for these victims as a means of success or making it more of a challenge to get them to the opportunity to have that healing, I think we're missing the boat on the trauma that these victims experience through the sexual assault.

CAPT SULLIVAN: And, ma'am, I'm thinking back to, I read through the responses from our military justice folks and as far as the acquittal rate really is difficult to judge on

because every case is different and the reason for the acquittal is different.

And these cases are tough. I mean, these many times are two people in a room, something happens and there are different reports of what happened. So I think it would be very, changing the standard I don't know would fix that.

And I don't think that basing the decision on the acquittal rate would just really help the system. But again, I defer to the, think back to the answers that I read to this question from our military justice folks, I would defer to them.

MS. TOKASH: Because in theory, changing the standard to prove beyond a reasonable doubt at referral, could kill a lot of cases right there.

CAPT SULLIVAN: Yes.

MS. TOKASH: True?

CAPT SULLIVAN: It could, yes.

MS. TOKASH: It could, right.

CAPT SULLIVAN: Yes.

LT. COL. SCHRANTZ: That's right, ma'am, it could. And you would, although it might not be to the same level, and I agree Colonel Hamilton's feedback up to this point, or comments to this point, but you raise the standard, you use the term kill it would sort of expedite the devastation from the victim at that point rather than having them wait till the trial after, saw all the factors were considered by the Article 32 officer at the same standard and then the SJA and the trial counsel and then the convening authority made that determination of which sustaining the conviction is one of the factors to consider.

And so, I think if you made it a higher standard and it precluded it from moving forward at all, much of the benefit that our field VLCs have communicated to us about willing participants who want to go forward, who have the opportunity with their VLC to work through the case, that would be gone at that point.

COL. CLAY: And I would agree that there is a value from the victim's perspective of going through the process, having an opportunity to tell the juror or the judge what they experienced.

It does come back to managing expectations of the client. And as you all know, oftentimes it's not a result that our client wants at the end of the day, but I do believe there is a value to that victim to publicly state that I was wronged and have that made known.

MS. SPECHT: Just to expound on what everybody else has said, and what I was saying to the Chair earlier, there is value in the process itself to victims.

I don't think that, I think they want to have it heard by a panel member. And if the SVC is working well, especially with the TC, they will be aware of the potential problem, you know, consequences of moving forward.

CHAIR BASHFORD: Staff? All right, then thank you so much for coming. And we'll

adjourn for lunch and come back at 2 o'clock. If anybody is going out, out to the courtyard.

(Whereupon, the above-entitled matter went off the record at 1:18 p.m. and resumed at 2:03 p.m.)

CHAIR BASHFORD: We're continuing this afternoon with Panel 3, so we're going to get the Perspectives of Services' Trial Defense Service Organization Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination.

I suspect we might hear something slightly different than we've heard this morning. But, Staff, can you tee this up please?

MS. SAUNDERS: This is, based on the response to the RFIs we've been putting together, and I'm going to read the first one. It's referred to as the referral process.

The defense RFI responses indicate the victim preference may play an outside role whether or not a sexual assault case is referred to trial. What consideration or weight should be

given to the convening authority given the victim's wishes regarding the disposition of the sexual assault case?

CHAIR BASHFORD: Colonel Bennett, could you start us off?

(Laughter.)

COL BENNETT: So, obviously the voice of the victim is something that should be considered, but when we give too much weight to it, when the wishes or the desires of a victim are going to overwhelm what the evidence should support, if you have a no PC but, hey, the victim wants to go and the SJA is looking at what the victim wants and deciding, no, there really is PC, I think that's problematic.

If you have PC but you're looking at it and saying, you know, the chances of a conviction are either slim or, you know what, the evidence really doesn't even support a conviction but still the thought that we should go forward because a victim wants their day in court, absolutely raises the rights of a victim above

and beyond that of the rights of the accused.

And at the end of the day, there is one person who potentially is facing confinement, loss of liberty. And that's the accused in the case.

So while there's a place to understand what the victim wants, there should be some consideration. At the end of the day, the evidence and the analysis by whether it's the PHO, this morning they said the SJA is the right person, the analysis of the evidence, in and of itself, should actually carry the day not the request or the wishes of the victim.

CDR KIRKBY: Thank you. I would agree. I believe the standard we should use is, can we obtain and sustain the conviction at court-martial.

If we, cannot based upon the evidence, then there should be no, nothing else should make us go forward. The desire of a victim to have their, quote, day in court, should be a consideration.

But really I believe it should be a consideration if they don't want to participate. Then no matter what the other evidence, then maybe the commander needs to take that into mind and say, without the participation of a victim, under policy, we don't go forward because if a victim doesn't want to participate, we're not going to force them to come in and testify and go through that process.

But to say, well, they want their day in court therefore regardless of the evidence, the state of the evidence, the best interest of the PHO, the best judgment of the PHO, the best judgement of everybody else, the legal process to say, we should go forward anyway I think is the wrong decision.

So, I think it has some weight, but it shouldn't overcome the obtain to same standard that we should be using.

CDR KING: I agree with my colleagues. What really matters is whether or not the victim is willing to participate. And past that point

the evidence and the rest of the military justice process should lead on the charging decision and whether we go forward after a 32.

So, again, I think it's, we really have to pay attention to whether or not the victim is willing to participate, because without the victim it's going to be very hard to get a conviction without lots of independent evidence.

But after that question is answered then I think that we need to rely on the rest of the process.

COL. MORGAN: Good afternoon again. I agree with my colleagues. I believe that the desire of the victim should be fully and fairly considered but should not necessarily override legal standards.

The PHO's determination of probable cause, the Article 33 guidance as to the likelihood of conviction. And I would also just like to take a moment to discuss the fairly profound impact that a Military member goes facing a type sexual assault allegation.

There's the stress associated with a fairly lengthy process. I believe the last number I had for the average general court-martial for 120 offense was something like 508 days.

During this time frame --

BGEN SCHWENK: From what to what?

COL. MORGAN: I believe from the beginning of the investigation until --

BGEN SCHWENK: Yes, from the allegation to the --

COL. MORGAN: Yes.

BGEN SCHWENK: -- until the MCIO till a final decision at the court-martial?

COL. MORGAN: Yes, sir. During this time period, frequently, not always, but typically, the member is removed from their normal duties. Oftentimes has their security clearance pulled, may have access to certain areas restricted, be subject to a protective or restraining order further limiting their access.

They're placed on a control roster,

they can't test, they can't PCS. Or, sometimes they're actually transferred to another installation during the pending trial.

We've seen that even if they're acquitted at that point they're typically eager to administratively separate, which parallels oftentimes what we see when there is a conviction with respect to the victim. They're both eager and frustrated with the process to separate.

(Off microphone comment.)

COL. DANYLUK: -- about the victim's desires to go to a consideration, to the convening authority about whether or not perhaps they desire the Military to be involved at all or if it's possible that the civilians take it if there's a civilian jurisdiction.

And then as it is to the weight, it's really, I agree with all my colleagues, about whether or not they are going to be a willing participant in the process.

I'm sure the prosecutors would all agree that having a willing victim that wants to

participate makes their job a little bit easier as they go through the process.

And we haven't always respected the rights or the voice of the victim in that decision making. We've, in my Marine Corps career, ordered sexual assault victims to testify. We don't do that anymore I'm happy to say.

But I am aware of how important it is that people feel heard in the process. And so, I think having the voice in the process, having their desires made known to the convening authority whether or not at the end of the day they follow that choice that's being advocated for, is the convening authority's decision.

MR. KRAMER: Thank you. I have a question that by the time I get through may have eight or ten parts to it --

(Laughter.)

MR. KRAMER: -- but I hope you can keep track.

So, we heard --

(Laughter.)

MR. KRAMER: I'm just winding up here. We've heard testimony about how, that if there is a recommendation of probable cause that's essentially never overturned or extremely rare.

But what I don't know is if there is statistics or at least anecdotal -- of how often, how often is a finding of no probable cause at the Article 32.

And then the second step is, how often that's overturned if there's statistics about that or anecdotal information about that.

And then the second part of that question is, if it's overturned is it done, we've heard about a process where additional evidence can be submitted and we also heard, I think that defense counsel can do that also.

So I'm curious again how often that the SJA recommends overturning it just on the basis of the evidence, disagreement with the Article 32 with the PHO based on just disagreement or based on new evidence, how often

it occurs that there's new evidence and they disagree with the finding of no probable cause?

And how often, and the bigger question I guess is, how often is defense counsel, do you participant in this procedure to funnel information to the SJA after the Article 32 proceeding?

COL. DANYLUK: I think the Marine Corps is a little different just based on the responses that I, I was saying that the Marine Corps, I think, is a little bit different based on the responses provided from all the services in that we see a higher degree of cases maybe that don't go to court because of the prosecutorial merits memo recommends to the SJA that they not go forward on a case.

Or if at the Article 32 hearing the PHO recommends that it not go forward. Whether or not they find that there's no, they say there's no probable cause or if they say there is probable cause but there is like zero chance of success on the merits at a court-martial.

Some cases are successfully then dismissed. And I think that that's reflected probably by the conviction rates.

Based on just my conversations with my colleagues, are higher in the Marine Corps. So I think they're taking less of the very weakest cases to trial.

The idea that the SJA is providing to the convening authority all this additional information that's not presented at the 32 is a little perplexing to me. We would like the PHO's recommendation, if there is no probable cause for that to be binding.

We feel like the government should present their evidence. I don't understand why they would be hiding that from anybody. And I don't know why they would be funneling it through the SJA to then overturn the PHO's recommendation that there is no probable cause.

I don't think any of us opposed the ability for the government to go back for another hearing, subsequent if there was a finding of no

probable cause. But I think we all agree that it should be binding.

CHAIR BASHFORD: Go ahead.

CDR KIRKBY: I don't think we have statistics to answer Parts 1, 2 and 4.

(Laughter.)

MR. KRAMER: I don't even remember what those were.

CDR KIRKBY: But I think by analogy, we do have some cases where we find, where the PHO finds no probable cause. And those cases are not continued, those are killed at that stage.

We also have cases where we know that the PHO has recommended no, who has found no probable cause, those cases have gone forward. And we've challenged that finding through motions saying, hey, wait a second, there is no probable cause, how did we even get to the court.

Judges have, based upon the recommendation nature of the 32, simply not allowed those motions to succeed.

How many have been overturned, again,

I don't know. The concept of the defense putting in evidence to try and convince the convening authority of a position, the SJA has now weighed in on.

I can't think of a case where the defense would ever want to play that game. Unless there is such overwhelming evidence that was clearly prohibited at the 32.

Now, there are rules that prohibit what we can do. There is certain things that the convening authority should know and the complaining witness should know that defense knows about. So we put that stuff forward.

But usually, that's not a good strategic decision to go and put, play all your cards and say, well look, we know you've got this and we know your SJA is disagreeing with us, but what about all this stuff.

Now, we'll hold that back and we'll go to trial and that may contribute to the acquittal rate where we obviously look at a different standard.

The binding nature of this I agree. And I'm trying to think of a Military reason why the 32 is not binding, and I simply cannot come up with one as I've thought about this process over the last few years.

To your question earlier on, should there be a difference in our systems between the federal system, I don't think so. I can't think of a Military reason.

And that should be the standard we're looking at. Is there a Military reason. Difference in members, conviction, you know, two-thirds or three-quarters versus a unanimous verdict. That may be a Military thing.

Twelve versus eight versus four. That may be a Military thing. There's arguments for those.

But to not have this binding at this stage where we simple have one person. And I heard a lot of arguments during the other panel saying, well, some of the PHOs are not well trained.

The government gets to pick the PHO.(Laughter.)

CDR KIRKBY: That's not a great argument for them. We pick somebody who doesn't like the standard.

If this is the floor, the government should be required to reach the floor. Or they should be able to go back down, start again. And maybe explain to their bosses how you didn't reach it.

I know in the U.S. Attorney's Office, if they don't find a, if they get a no true bill, they have to go and explain how this happened.

MS. TOKASH: We did hear this morning though that there may be a difference between Military due process and constitutional due process.

CDR KIRKBY: Yes.

MS. TOKASH: So, there's that.

(Laughter.)

CDR KIRKBY: That was a fairly scary answer. I think due process. And now of course

due process is, how much due process do we want to give people. Military, maybe just a little bit.

But the standard we've set is probable cause. Let's at least hold them to that and say, hey, if you think you can go forward to trial. This isn't a game. There's no gamesmanship here.

So, that should answer Part 3, 7 and 9.

(Laughter.)

CDR KING: Just so I can jump in, I'm going to take a step back and explain why the Coast Guard has decided to move themselves for this panel.

(Laughter.)

CDR KING: So, for defense counsel, we have a memorandum of agreement with the Navy and the Navy handles most of our defense matters. So, for a lot of these questions we will be echoing what the Navy says because they have better first-hand knowledge.

But in this situation, there is a

couple of pieces that I think are slightly different for the Coast Guard. Especially when it comes to whether or not it should be binding.

I think we agree with that, but I can also understand, from the government's perspective, why there are times that they may go against the probable cause ruling because the Coast Guard's military justice bench is not as deep.

So we may have to assign a PHO who doesn't have the experience necessary to actually give a thorough determination. And so, with further information or further discussion, they may decide that even though they found that it wasn't probable cause maybe there was enough to go forward.

As far as, are there statistics out there as far as how many times the Coast Guard does a different finding than what the PHO found, I don't have statistics, but I know that it happens. There are times that we will say there is no probable cause.

But the SJA will recommend that they go forward. And again, I think that has something to do, a little bit to do with just -- how we're still growing when it comes to military justice. Yes, thank you.

COL BENNETT: So, again, no stats, no numbers but there are absolutely times where a PHO has said no PC and the SJA has changed it, said PC and gone forward to the court-martial. Overwhelmingly they end up in acquittal. Eighteen plus months later in many cases.

Does the defense counsel have an opportunity? There is that right, but I am going to go with Commander Kirkby and why would we. Very unique specific cases do we afford.

Right now we have a capital case and I know my lead counsel has afforded himself that opportunity to present directly to the convening authority, not just the SJA. But it's a very unique case. A very different case.

In most cases, the thought that defense is going to get a full hearing, that you

have that neutral detached that will look at the defense evidence and take it into consideration and make a different determination that can be, you'll have the ability to sway.

I don't think we have a lot of confidence in that so we're going to hold it. We're going to wait until trial rather than that information being given to the government and the government find a way then to counter that while we'll hold our cards.

It kind of goes to why we don't avail ourselves with the Article 32. Without the binding recommendation of a PHO, there is little or no reason defense would ever put a case on.

Now, in the past it hasn't been binding and defense would pick those cases and we would try it at the 32, but we had a little bit more faith that all of that evidence would be taken into consideration and we could win a case at the 32.

There is not the sense within the defense bar, at least in the Army, that we can

win a case at the 32. It is an absolute paper case without that binding recommendation. It's just not worth it.

Going to whether it should be binding or not, the arguments of the government this morning is a little bit disingenuous. They pick the time to prefer the charges.

If you look at from the time an investigation starts to when we actually prefer charges in the Military, it is a substantial length of time. Yes, the preferral of charges triggers a 120 day clock.

Other than the pretrial confinement will also do it, I understand that piece. But they control everything about that 32. They control when it's preferred, they control the investigators, they control the amount of resources that are provided to the case, they have more paralegal support in order to be ready and prepared.

So at the preferral of charges, it doesn't have to be perfected, I get it. I've

been an SJA, but they should be ready to go to court in a very quick time.

What if defense comes in and demands a speedy trial, when you have those cases the government unbearably says, oh no, no, not quite ready. Then why did you trigger a court-martial.

And all of that entails for a soldier, an airman, a sailor, a Coast, whatever.

(Laughter.)

COL BENNETT: Why are you, as the government, with that incredible prosecutorial power, triggering something when you're not ready. And we keep forgetting the accused. We keep forgetting what they, and our length of time is 500. Sometimes it's longer.

We are talking about life altering events for what, when you can look at it, the experienced counsel, the ones who have it look at the fact pattern and say, that's going to be an acquittal. And yet we have to go through an 18 to 24 month process to get that result.

Meanwhile, the accused, the family,

the victims, everyone else is going along in this process simply to go through the process for what we know the end result is going to be. I think it's problematic.

COL. MORGAN: Thank you, ma'am. We, to my knowledge, we do not retain these statics as well. The trial defense division does not. If those statistics were maintained it would be by the military justice policy division, JM.

Anecdotally, we do see cases more frequently than not where the PHO recommends, or determines rather, that there's no probable cause and yet, the government proceeds despite that recommendation.

I do concur with everything my colleagues have said. I would add that the process whereby an SJA can present all of this unexamined evidence ex parte to the convening authority, does seem somewhat peculiar.

And it doesn't require that this be memorialized anywhere. At least the Air Force, pursuant to its administration military justice

instruction, AFI-51201, simply has a template that answers in a conclusory fashion the four questions.

There is probable cause, there is jurisdiction, there is a basis to go forward. I've gotten the fourth one.

CHAIR BASHFORD: The charges are in the appropriate form.

COL. MORGAN: The charges are in the appropriate form. Thank you.

(Laughter.)

COL. MORGAN: Thank you. But again, these are highly complex, difficult decisions. And it seems a little strange that none of this has memorialized anywhere.

Convening authorities are highly intelligent individuals. They read everything. And why this somehow wouldn't be captured somewhere, for the purposes of transparency and to make a better-informed decision, is a little unusual.

With respect to whether the PHOs

determination should be binding, again, I concur with my colleagues, yes. What I would add is that it would be binding but without prejudice.

So there would be a mechanism whereby the government could reopen or re-prefer charges and hold a new 32 if in fact there is new evidence. Or arguably, even if the PHO committed some legal error, applied the wrong standard, perhaps there could be an appeal to a Military judge or take it to the next higher level convening authority, which would leave it in command channels as to make a determination whether charges should in fact be re-preferred.

But a PHO's determination of probable cause should be a condition precedent for referral of charges.

CHAIR BASHFORD: I have a question for you. Several of you have said that although you have the option, at least on paper to bring evidence to the SJA before the commander's decision, you don't, you'd rather hold it. In my practice I call that the Perry Mason option.

And I regularly encourage defense attorneys, both pre and post arrest to, if you think we have it wrong please come in and tell us, don't wait 18 months down the road and do an ah-ha you got it wrong. If we have it wrong, we have it wrong, we can deal with this up front.

So is it that you don't believe you're going to get a fair, if you bring in this evidence that you believe shows they have it wrong, do you think it's not going to get a fair hearing?

COL BENNETT: I think it may be a difference of what type of evidence. Is it truly exculpatory.

It's like, nope, here is a text message that says, after the fact that, yes, it was all consensual, right? I mean, that's a little bit of a difference. You would then bring it over to the trial counsel, to the SJA, have that taken in and hopefully be dispositive of the case.

But I think there's other types of

evidence that maybe you're going to hold the inconsistent statements, some of the character evidence that you're going to kind of withhold that a little bit. You're not going to bring it, again, it depends on the weight of the evidence and that you think it's going to be given.

So the truly exculpatory, I would encourage my counsel, give it over so we can end this system. But the ones where is doesn't quite get us completely on the side of, it just didn't happen to, it makes it more questionable, whether you're going to conviction.

Then I don't know that there's value of giving that over to the government earlier in the process versus waiting.

CDR KIRKBY: No, I would agree. I think there is, in every case the counsel on the case has to decide, is this dispositive, is this the text message that clears my client or is something that the government is going to be surprised by it at trial and if they got it beforehand they can remedy it, they can come up

with something different.

A lot of our cases we do, if we have the evidence, if our investigators, we have DLSS, defense investigators, if they come up with information that is exculpatory, we will put that forward at any stage of, we don't really care if it's 32, post-32, the day before trial, whatever, we will try and get that in. Because, obviously, the best outcome for our clients is, don't go to trial.

Acquittal is not as good as don't go to trial if you're innocent. It's not worth the risk.

So, I think in those cases we would absolutely go forward. But a lot of the times, as the Colonel said, it's evidence that calls into question the accused, the complaining witness' behavior.

Her history, her reaction afterwards. There may be messages that the government is not aware of that call into question the entire story that they're giving.

If we don't think it's going to be dispositive, we're not going to turn it over, we're going to wait and do that in cross examination.

CDR KING: I would agree with what my colleagues have said. And I don't think that I have anything additional to add as to why we wouldn't other than its strategy. Like it's trial strategy.

And if we can't walk in knowing that it's going to make the case go away, then we have to decide when is the best time to bring that forward and when would we have the best results.

COL. MORGAN: So, I agree with the question. The premise of the question in theory. If we were in a position to present evidence which would paint the case in an entirely different light and perhaps cause the government to rethink its prosecution.

Our general default position would be to do so, but you heard from the Air Force this morning that the likelihood of a conviction does

not factor into their analysis.

So, at least for our service there is very little point in presenting this evidence. If the government is going to go forward regardless, it merely gives the government an opportunity to perfect its case.

COL. DANYLUK: As I mentioned, I think the Marines handle it a little bit differently. We're more likely to participate in the 32 and not waive it. And we do participate in the post-32 document submission.

We have realized some degree of success. Maybe we're naive in that. But I think as a group we have determined that winning the case at a dismissal is obviously, as we've all said, better than winning it at the court-martial process, if we can do that.

And so far, we have faith that that system is working with some degree of success.

MS. CANNON: Speaking of the 32, I'd like to understand better what it looks like, because we're hearing that it's just a bunch of

paper, 15 minutes. And now that there may be a different experience across the different services.

So, I'm wondering, what occurs at a 32 now, what would make it better?

I get the sense unanimously binding decisions would make it better. So, assuming short of that, or in addition to that, what else would make it better and what's happening over in the Marine Corps that might be different than the experiences over here.

So, if we could hear all the experiences of what's going on in the 32 hearings, what would you like to see that's different that we haven't discussed as binding?

CDR KIRKBY: I think what we're seeing is many times, especially in sexual assault cases. Now, sexual assault cases are unique and I know this panel is here to discuss sexual assault cases, but changes we make to the Article 32 effect every case not just these.

We recently had a case where the

Article 32 was two and a half days. It was not a sexual assault case. In the sexual assault case it's usually a paper case.

I think if we wanted to make a change we say that can't happen. You can't simply come in and put down a bunch of papers and say, here's your 15 minutes. It takes eight minutes to read the script, it takes, you know, to read the rights and to go through everything that's going on.

So really, what are we talking about? The government presents exhibits 1 through 27. Thank you for your consideration, we think this should go forward to a general court martial.

That's next to useless. In fact, that may be on the same parallel as useless.

What we'd like to see, put the witnesses on the stand. Put some. If you still want to maintain that the victim has a right not to testify, and if that's Congress' position, there are some problems with that but let's just say that is it, put the NCIS agents on, put other

people on to say, this is really what happened.

Rather than simply here is a report of investigation, just put the agent on the stand. The government should have to produce a living person to allow some kind of cross examination. To allow some kind cross examination, to allow some kind of involvement by the defense.

Rather than simply saying, defense, so you can put anybody you want on but we're not going to give you anybody to put on. Which essentially means, you can put the accused on if you really want to.

And no defense counsel in their right mind is going to do that. So, I think if we were looking at a change, that would be one.

The other thing I think we probably, as we go through this process and we see the equivalent rates and we see everything else that's playing into this, we need to consider whether the complaining witness not testifying is a good idea.

In many cases, we used to do it in the

old system, we would have the complaining witness come in, they would testify and you would turn to your client and say, that went really badly for us. That was terrible.

We need a deal. We need to never make that happen again. If she gets up there up or he gets up there and testifies, you are going down. So let's make a deal.

So I think what we've given up is that demonstration to the defense, this is how strong the government's case is.

MS. CANNON: Well, and just to interrupt for a moment, in the private sector there is, at least where I come from in California, there is Prop 1, whatever, 114. And they come in through testimony of investigators.

CDR KIRKBY: Yes.

MS. CANNON: Not bring in the victims. But there is still prelims. There is still hearings. And is that what, that is also what you're talking about?

CDR KIRKBY: I do. And I think,

earlier I mentioned, is there a Military necessity to the reason we have a 32 as not being binding.

I think there are lots of things that we can take from state court proceedings and federal proceedings that we can box into what we term the Article 32 process without going through these additional steps.

Because really in the Military process there is a reason not to keep doing all these other steps. But if we could have the same foundational issues resolve at this Article 32, I think that's beneficial for everybody,

Looking at the black and white on the paper you may say, oh, well, we don't want this thing to happen. We don't want an investigation is what Congress has said.

But at some stage everybody does an investigation. Every state, every federal entity does an investigation. We've simply obliterated that and now our conviction rates have tanked.

MS. CANNON: Okay. Can I hear from

the other services.

CDR KING: I think I agree with everything that the Navy said because they do our cases.

(Laughter.)

CDR KING: But one of the things that I think would help the Coast Guard specifically is, to work on a system to increase, or to get PHOs qualified.

Whether that's some type of training before they're allowed to be a PHO or you have to have a certain amount of experience. Because that's part of the investigation.

So they're going to ask the informed questions and they're going to help draw out some of the information. And if they don't have the background knowledge to ask those right questions, then it's, I think, worse than just a paper case. So, that's the additional piece for the Coast Guard.

CHAIR BASHFORD: Okay.

COL. MORGAN: We're largely seeing the

same thing in the Air Force that Commander Kirkby described. We're largely seeing perfunctory Article 32s where select pieces of the report of investigation are offered for the 32 PHO, along with perhaps video recordings. And no live witnesses are called.

So, to answer your question, the calling of live witnesses would certainly be beneficial to the truth finding process. Expanded powers of the preliminary hearing officer to direct that the government actually produce evidence and perhaps empower the PHO to issue some sort of sanctions if the government fails to comply.

The binding determination of course. And I would echo the comments with respect to some sort of robust training, perhaps certification process for preliminary hearing officers. That's what I would add.

I'm not sure that our actual 32 process is any different than the other services. It's mostly paper. They don't call live

witnesses.

I think the outcomes, it sounds like the outcomes are just sometimes different in the Marine Corps.

We would like to have live witnesses too and we would like to have better trained PHOs. If that's what's holding the SJAs back from relying more on the PHOs then we feel like, then maybe they should be better trained or have different qualifications. Maybe they should be magistrates or judges.

But other than that, I don't think the actual execution of it is any different for us.

COL BENNETT: Your question was, what other than making it a binding recommendation, and I hesitate because I think really if you make it binding, a lot of the changes that we would advocate for would happen because the government would have to put thought, care and preparation into the 32.

They're not going to sit there and put, unless it's an incredibly strong, here is

the victim's statement, here is the accused confession, right? Oh, by the way, those generally don't go with 32.

But everything we're talking about, right, if I was the government trial counsel and this is going to be, this was going to make or break my case, I'm going to either go forward or not, I'm going to put the live witnesses on. I'm going to assess my case.

I'm going to make sure that I am providing that PHO with all the information. And if that PHO says I have this question and I need this, this and this, the government is going to get it to them.

So, a lot of the changes that are made I think would almost be taken care of by making it binding, enforcing the government to resource the article 32 the way it should be so they can't say, well, the PHOs aren't all that experienced.

Well, give us your experienced individuals to your PHOs then. Train them.

You know, probable cause, we had the

conversation that's law school 101. That's your first year of law school, you get what probable cause is.

So to say, typically for sexual assaults for the Army, our PHOs are majors. So to say a major judge advocate in the Army cannot make a probable cause determination, which would be binding, that's kind of questionable.

But if we make it binding, the government then has all of the reasons to do what we're saying to make it more of a true preliminary hearing and really put in that constitutional protection for the accused.

CHAIR BASHFORD: Given the increased number of waivers of the 32 that we are seeing, and if it were to stay in its current posture of a lack of a PC not being binding and no live witnesses, it seems like the Marine Corps at least thinks there still is some utility to it. What about the rest of the services?

CDR KIRKBY: I would say there's still some utility to it. We still would like to see

what the government is going to present.

It gives us another opportunity to file a motion with the court. And hopefully one day the court listens and says, we agree, this was misleading, they didn't put in the entire ROI even though it was a 200 page paper case that they put in, they did not put in this exculpatory things that the convening authority should have, should have done.

So, I think there is still utility in it, I just, I think it's the exception rather than the rule. If the rule is there should be a hearing that has some benefit across the board, then I think we need to change it. We need to modify it. I'm not sure how much we need to change it.

I echo Captain Monahan's comments from earlier. We've had a lot of changes over the last ten years. I would be reticent to suggest we need wholesale change.

But there are some certain modifications that would benefit the system,

benefit the victims, the accused and the system as a whole.

MS. TOKASH: I'm curious about your motions that you talked about before, Commander Kirkby.

So, in a case where there was a no probable cause determination made by the preliminary hearing officer yet the staff judge advocate recommends to the CG to refer and the CG does so, now you're sitting at defense counsel table representing a service member accused of a crime, in a general court-martial. And you filed a motion to dismiss with the Military judge.

Is your dismissal motion based on the threshold constitutional issue that is that probable cause has already been determined and the SJA and convening authority are summarily ignoring that constitutional issue, and might that be one of the differences that was alluded to between Military due process and constitutional due process?

CDR KIRKBY: I hate to agree that

there is a difference. I think due process is due process. We still have some constitutional rights.

But I think that's -- because of the language used in the statute for the Article 32, it is a recommendation. It is not binding. Therefore, we lose the motion fairly, almost every time.

We win on the fringes of some other misconduct or other happenings by the government. But generally speaking, we lose the motion based upon our argument that the PHO, the neutral and impartial person hearing this determined there was no probable cause and the judges say, that's great, your absolutely right, move on. Because it's just not binding.

MS. TOKASH: And if you think it were binding, then maybe the military judges might view the issue differently and rule on your motions differently?

CDR KIRKBY: Oh, I believe so. I think, but I think also the SJAs and the

convening authorities would understand more. And I think this goes back to the whole argument that Colonel Bennett was making.

If you make this binding, I think everybody's game is upped. I think everybody steps up.

A lot of the issues we're talking about, that we need to improve this and we need to do this.

I think all of those have to follow suit in order to meet that threshold, in order to avoid the risk of, no, we're going to do this again if you think you've got more evidence.

MS. TOKASH: And do you think that making that binding would have an impact on, what I think Judge Grimm might have characterized it before as the abysmal conviction rate that the military has currently?

CDR KIRKBY: I think fewer cases would go forward. I think therefore if the good cases, government version of the good case is one, I think the conviction rate goes up, right?

The acquittal rate goes down because the terrible cases for the government are simply not being prosecuted, they are dying an appropriate death out in 32. There's no PC and we're not going forward.

MS. TOKASH: Can I hear from the other services please?

COL BENNETT: I would agree that it would have an impact of being able, one, as an SJA, having served as an SJA twice now, if I had that no PC, I would not go forward.

But if it's a binding decision, it really takes some pressure from the victim of we can't go forward. You refused to testify, your statement had inconsistencies.

That ability then to fairly easily dispose of cases based on the binding recommendation of a 32 officer would be crucial in order to get rid of the really bad cases.

Even on the ones where it says, hey, you have PC but recommendation, disposition not going forward, that wouldn't be binding.

However, once you invite the 32 with the authority in the PC, say this is a binding recommendation, this is someone who we trust to make this very basic, that even would allow me to go back to an SVC saying, we're not going forward, this is where it's going to end up.

You're providing more information to the SJA, to the convening authority to help them make proper disposition of the really hard cases rather than saying, we're going to take all these cases to trial regardless and we'll let the court figure it out.

And then we'll also go back, if it's a binding, then from a defense point of view do we offer more information. Do we go to a little bit more of a trust, that if we bring out all these prior inconsistent statements of the victim at the 32 and they really look at what that case is about versus just what the victim statement says, then maybe defense brings more information sooner in the process and we can now get rid of this case and then look at using all of our

resources at the other cases that are going to go forward.

COL. MORGAN: So we have had defense counsel motion the court to dismiss the charges. Looking at the historical and legislative history behind Articles 32 and Article 34, that Article 32 was principally designed to function as a protection against baseless charges, that Article 34 is an additional protection that's designed to, again, screen out merit-less cases, even despite a probable cause determination.

And then the other piece is based on the statutory construction of Article 32 itself. It actually uses the term determination.

So the PHO makes a probable cause determination whereas in other places in the statute it uses the term recommendation, and that utilization of the term determination actually is a legal term of art. Which requires that it be honored as a final, the finality, given finality to the action.

And we have had no luck with this

motion.

COL. DANYLUK: I would just add that if we're not going to get there where it's binding, we would like to know why the SJA is finding that there's probable cause when a PHO has already determined that there's not probable cause.

So we think that that is something that should be part of the Article 34 advice letter when they are finding probable cause when there's been a determination about probable cause.

MS. TOKASH: Well, your colleagues in the military justice division chiefs panel referenced that one of the factors might be this additional evidence. And I'm not talking about the additional evidence that's noted in the R.C.M. 405.

It sounds like they're talking about even further additional evidence that's almost like ex parte with the, I mean, that's what I was left, the impression I was left with that it's

this ex parte presentation of evidence to the convening authority without defense counsel there to overwhelm the prior no PC determination made by the PHO.

Do you have any comment on that and would you recommend maybe adding a rule for court-martial between the preliminary hearing rule and 405 and Rule 406 pretrial advice that talks about this mysterious additional evidence procedure that we've heard about today?

COL. DANYLUK: So, Colonel King, I think, disavowed this finding of new evidence in the interim. I think that you had asked him about.

But instead, the SJA was providing, not new information to the government, but information that wasn't contained in the, maybe presented at the 32. I mean, I guess I don't really know exactly what it is because we don't get a copy of it and we don't know what they've told them.

So if it's part of this prosecutorial

merits memo system or something like that, that's not provided to us so I'm not sure.

CHAIR BASHFORD: I think that I have a question on -- we've seen several reports from the 32 officer that says, sort of the equivalent of, well, there is probable cause but there is serious credibility issues. On the other hand, that's not for me to determine, that's for the court-martial.

Obviously, it's hard to make determinations on credibility based on papers, but sometimes it's not. Do you think that the 32, to the limited extent they're able to, do you think credibility should be a consideration or should that be something referred downstream to a court-martial?

COL BENNETT: I think it should absolutely be part of a 32 determination. Especially when you look at the sexual assault and when you look at those classic he said, she said, which is so many of our cases, it comes down to the credibility. And to have a 32

officer being able to look and make that determination.

We do it for 15-6 investigating officers. One of the things we want them to do is a credibility of the witnesses that they've interviewed.

And if there's a change --

CHAIR BASHFORD: I'm sorry, what's a 15-6?

COL BENNETT: I'm sorry, that's our administrative investigation. So non-criminal typically.

But we require that if there's a difference between two witnesses, that the IO really take a look at those two statements and come up with a determination where he thinks is truth or where is the credibility issues between those witnesses.

So to have an Article 32, we're at the probable cause determination, not, to be able to just defer credibility down to the court-martial, we are, again, missing an opportunity to

foreclose proceedings.

And the time between a 32 and a trial, I don't know the average time. But it can go up to 12, 18 months from a 32 actually getting into a court-martial and not being able to have a truly neutral detached party look at the credibility issues when they're evident.

When there's inconsistent statements within the victims primary, we're not even talking any consistent statements outside of the primary statement but within the statement itself and yet we're not having credibility determinations by all the PHOs.

I don't know how you can get to a probable cause without thinking about the credibility of those witnesses and those statements.

CDR KIRKBY: Ma'am, that's a very interesting question because I think if we made it binding, if we said, if we said you have to make a credibility determination and we didn't change anything else, so that was the only in a

vacuum thing we changed, my fear would be the government would simply be able to put in statements that were from NCIS or CGIS or whatever, investigative service that had none of that information in there. So they would simply be able to avoid the credibility issue.

The onus would then fall to the defense to say, wait, there are these other inconsistent things which would essentially mean we would be forced to show our hand.

And I don't know that the consequence of that is what we would want to see. That's an interesting question I think we need to think further on how we would specifically do it and what the governments, you know, what's the fourth order of effect of what that change would do without any other changes.

CDR KING: I think one of the difficult things with the question is, is to create a blanket rule. Credibility issues are not all created equally.

So, if it's a clear situation where we

have a piece of evidence that says one thing and another that says exactly the opposite, well maybe they can make a determination and present that to the convening authority so that they can make a final determination.

But some of the other credibility issues, it's not as easy to say, absolutely, this person doesn't have credibility or absolutely they do. So, I would probably resist the urge to give a blanket rule but to work in some kind of guidance so that the PHO is thinking about it and presenting evidence that would help the convening authority see what happened during that hearing.

Because they were the eyes and the ears. So help make sure that you are detailing it in such a way that when the convening authority is making a decision, they have all of the evidence and all of the information so that in the end it's the best decision for the military justice process.

And I think sometimes we lose sight of the military justice process and we really are

trying to figure out how to serve justice, right? And sometimes justice is not a conviction. We do the best that we can.

And the convening authority needs the information so that they can do the best they can to make the best decision for the service as a whole.

COL. MORGAN: So, credibility in these situations is often times the central issue where alcohol is involved and there is the absence of physical evidence, sometimes there is a prior relationship between the accused and the victim.

Collateral misconduct, as we know often times comes into play, which may provide the motive. And so, these things are often times critical to a determination.

So, I would certainly empower the PHO to consider these factors in making a recommendation.

But to Colonel Bennett's point, our IG investigations as well, often times perform a credibility determination when there is

conflicting testimony. So we have case law, we have guidance, we have a panel instruction for determining credibility.

So, I would also second the recommendation that perhaps this be formalized and actually included as factors that the PHO is to consider.

CDR KING: Agreed. I think it should be a factor the PHO can consider. I'm not sure it should be mandated that he consider it. Because, as you mentioned, maybe it's impossible for them to determine.

My only concern is that it might have the unintended consequence of now they are often times putting in the video interviews of the alleged victims and it could be then that they stop putting the videos in. And so then the SJA and the convening authority have less information then they're having now if the PHO is making a credibility determination based on a video tape.

CHAIR BASHFORD: I don't actually know if this is a question as much as an observation,

but you have -- obviously, it's an adversarial process, but we see and hear from the prosecutors that if they write down their advice to the convening authority and then have to give that over, that's like a roadmap of possible weaknesses to their case.

In my experience, defense attorneys know very well the weaknesses of my case. You on the other hand are saying if we show our cards, that's a roadmap to the prosecutors to fix the weaknesses of their case.

I know the weaknesses of my case, I don't need defense attorneys usually to tell me about something unless there's really something outlying there.

And I guess this is why this is more of an observation. Despite it being an adversarial process, it would be nice if people came to it more in an atmosphere of trust. That you don't think the prosecution is hiding the information or the parts of the interviews that make the witnesses subject to, you know, raised

eyebrows and the, so I guess that's really more of an observation.

If that were a goal, that would be where I would like to see everybody get to. Despite recognizing it as an adversarial process. So, I don't actually have a question.

MS. LONG: I have a -- maybe this is also an observation/question. Because I have heard over and over again, and as a prosecutor doing these cases, it's something I've probably heard for over 20 years, credibility, it's all about victim credibility, alcohol matters.

Prior relationship, collateral misconduct, inconsistent statements. All of the things that exist in sexual violence cases.

You've all been trial counsel you know, as well as anyone else. And so, if you are trying to make credibility, so, I'm going to take, at this point knowing you're sitting in the defense seat, I understand that you're not going to acquiesce to a lot of these things.

And there certainly is a difference

between a material or an immaterial inconsistency, but to have then a credibility assessment made based on those things when we know that this is what offenders can exploit, it seems a little early in the system with total and complete information of the 32.

But it does make me wonder perhaps, and I also think it's too early to draw any conclusions about conviction rates, besides the fact that it's somewhat misleading when you say there's a 20 percent conviction rate when you're just looking at the lead charge and you're not understanding what's happening.

I also wonder if maybe this is why the military judges are giving a better conviction rate on the bench trials, depending on wherever we look versus the panel. Because there's more of an understanding.

And so, I guess what I would just caution against is that knowing how complex these cases are and knowing how, for decades these cases, there are --- and we never want to see an

innocent person being dragged through them, I mean, I think we're all on the same page, but there are guilty people that their cases will not progress because of all the barriers.

Finding an area where we're protecting defendants' rights but remembering fairness to the accused is due the accuser also.

And really trying to keep the balance, to plagiarize a justice. But to keep the balance true when we're trying to figure out a system that does both of those things.

That certainly allows for defendant or an accused not to have their life derailed inappropriately, but not to try and make pretend right now that a conviction or an acquittal rate is a representation of innocent people being brought to the system when we know that there is so much misunderstanding and gaps in the practice.

So, that was more of an observation I think.

MR. KRAMER: So, I have an observation

but a question too.

(Laughter.)

MR. KRAMER: I share Chair Bashford's wish that there would be more trust in the system, but believe me, the civilian system has plenty of mistrust in it as well, so, it would be nice for all systems to have more trust.

But my question is, now I want to move way beyond the Article 32. And Jennifer, Ms. Long talked about it.

We saw what I would call striking difference in conviction and acquittal rights between a judge trial and a member's trial. And I don't think we have the stats to show whether why it went to the judge trial.

Was there some very prejudicial fact that they didn't want the members to know, was there a racial component, was there -- so, the question is, finally, why would, given those numbers, why would defense counsel ever agree to a judge trial?

And is it similar to the civilian

world where a judge can kick the case before it ever gets to the members?

In other words, in the civilian world a judge can grant a judgement of acquittal and the jury will never get the case. Is there a procedure for that in the military, if so, or even if not, why would, given the numbers we saw, why are defense, why would a defendant or the accused agree to a judge trial?

COL DANYLUK: I'm glad you asked the question, I've been waiting all day to speak to this.

(Laughter.)

COL DANYLUK: And I have been a judge a couple times, but I'm here as a defense counsel. But what I didn't hear in the stats was a distinction between a contested case and a guilty plea case.

All of the guilty plea cases are going judge alone. So when you see a higher conviction rate, especially in those middle cases where it's not the contact but it's some other assault type

of allegation and charge that is a conviction, I suspect if they broke those statistics down more you would find that the higher rate is not necessarily because they went judge alone, it's because it's a guilty plea and so they had to go judge alone.

CDR KIRKBY: And so, we do have the equivalent of a, it's called 917 motion in the military. Basically the judge, if he finds a lack of evidence by the government on a specific element, can kick the case before it ever gets to all the charge. Can kick the entire case, but usually the charge, before it ever gets to the member. So we do have the equivalent.

COL BENNETT: I would also, I was curious on, they just gave me the numbers. Quite honestly, from our perspective, whether our counsel are recommending to their client to go judge alone or to the panel is very jurisdiction specific. It's specific on who are your judges, who are your panels, what's the composition of the panels, what have the panels done in the

past.

So there are so many different variables. One, it would be interesting to take out the actual guilty plea.

We have any number of acquittals from our military judges. And I have a number of jurisdictions that pretty much we don't do panel cases and we are very, still very successful at either getting an acquittal or getting the sentence that we think is appropriate from the military judge.

So, again, very specific to the facts, very specific to the jurisdiction, very specific to who the military judge is.

COL. MORGAN: And it's generally a requirement. At least in the Air Force, that a term in the plea agreement include that the member go before a military judge alone. With respect to a guilty plea.

I would just echo the comments that, right, our litigators are expected to know their installations, know the local conditions and to

know their military judges. But additionally, there very well may be an instance where a defense may turn on a particular point of law that may be better received by the military judge than the members.

CDR KING: For the Coast Guard cases, there's a little bit of trust, or an issue of trust for us, I think without panels as well, but we've had some cases recently where the advice that went out to the convening authority to pick their panels was less than transparent and probably less than legal, if I should say.

(Laughter.)

CDR KING: So then there is that trust factor too. So are we getting a fair panel if we select a panel or should we just go with the judge that we already know.

CHAIR BASHFORD: It's been suggested in several of the answers to the RFIs that an acquittal is a demonstration of a process that is fair and just and that acquittals aid in the maintenance of good order and discipline.

At the levels we're seeing here, do you agree with those statements or disagree?

COL. DANYLUK: It seems to be an unfair burden on an accused person to prove that the system works just by putting them through the process. Does that make sense?

Like, if we all know that it's going to be an acquittal at the end of the day, but we feel like we need to send it to the members just to show that the system works, that seems to not really be justice to me.

COL. MORGAN: I --

COL BENNETT: I, oh, I'm sorry. A certain level of acquittals, right? I mean, because if you had a hundred percent conviction rate, then we're absolutely going to question the fairness of our system.

So a certain level of acquittals I think does. It really shows the system works, you're getting that chance, at the court-martial, to put on the full case. And the panel or the judges, the final trier of fact, are really

looking at the evidence.

But when you're looking at the acquittal rates and the sexual assaults going over 50 percent, I think we really then have to say, what is the process. You know, as an SJA I looked really hard at -- what I told my counsel is I don't really care about the end state, I care about the process, how did we get there.

So, if I had ten cases and nine acquittals, I need to be looking at, what is wrong in the process, how we are not evaluating these cases, did we just luck out and we just really had nine really hard cases that had a go?

I kind of think we're missing some steps to really look, analyze. I think one of the panel members earlier this morning said, speculation is taking over analysis. When we don't know what we have.

You know, we had the government up here this morning saying, well, we're not ready at the 32, we shouldn't be bound by the evidence we're able to present because we're continuing to

investigate. Well, how did you prefer charges?

You're having your commanders, you were signing charges and saying, these, the evidence support the charges. How are we getting there if you don't know what's out there.

So, it is problematic where we're sitting. But if we're accepting this over 50 percent acquittal rate of, well, that's just the system and it really shows the system works, we're missing an opportunity to go back and look at our process and look at individuals who are in charge of it saying, where did we miss, how can we get better, how can we keep this 18 to 24 month process of this accused not to happen.

So, some acquittals, right, we've always had them. But the level of acquittals we're having.

And the other thing, I think it has the opposite effect on good order and discipline. So if you have that commander who has had the soldier in his command for 24 months and they've gone through this process and it ends in an

acquittal or you have soldiers sitting in the court-martial saying, it should end in an acquittal, I can't believe this happened, we're losing faith. We're losing faith.

If you have an acquittal rate of 59.4 percent by panel members, how do those panel members take a look at the cases the government are presenting and acquittal after acquittal, we're not taking the right cases so why should we trust the system? How does that truly support good order and discipline in the military.

So some yes. I think the numbers that we have, we need to be doing a really hard look at what we're doing, what our processes are and why we, why we are where we are at.

COL. MORGAN: So, Colonel Bennett made a number of my points, but --

(Laughter.)

COL. MORGAN: -- thank you. But I think it's a confluence of events looking at the entire system, beginning with investigations that are oftentimes incomplete.

We heard that sometimes charges are preferred, they go to the 32 without the evidence, hoping that at some point before trial the evidence will materialize and often times it doesn't.

This is followed by an often times perfunctory, Article 32, with a determination that there is no probable cause which is then disregarded by the convening authority resulting in a foreseeable acquittal, which then has the effect, I think, of hardening some of the members to the process.

CDR KIRKBY: I think in addition, we've got to look at, I mean, other, other victims looking at the process saying, well, that case happened, the government said it had a good case, it moved forward through all of these steps.

As a victim, if I were saying I have a good case, this actually has really happened to me, but why would I go through that process because if it's a good case and they lost 58.2

percent of the last time, why would I go through this.

And so, I think good order and discipline has a number of different issues. The accused themselves, I don't think they see this as good order and discipline.

It is very difficult to convince somebody, hey, you're facing 20 plus years in jail, but don't worry, it's good order and discipline. That's a difficult sell for a defense counsel.

For a victim, future victim saying, oh, don't worry, the government has lost 50 to 80 percent of the last cases, but yours is a really strong case, don't worry, I don't see how that is beneficial to that victim in the future.

So, I think there is an effect of the acquittal rate. I think it's detrimental, the good order and discipline across the board.

CDR KING: And I hope I don't sound cynical, but our court-martials are usually not happening where the offenses are. So, folks

aren't following it.

So, you will hear that something happened to a member and then that member has disappeared. If you follow back in a year or two when the process is over, they have no idea what happened.

They don't know if they got discharged, they went to a court-martial, were found guilty. And if the crew aren't following the results, I can't image it's having any impact on good order and discipline.

MR. KRAMER: So, is there a sense in the high acquittal rate you talked about, is there a sense that, because of the times or whatever, maybe the publicity going on, that there's pressure, and I don't mean improper pressure, but there's pressure to proceed with the cases that maybe ten years ago would not have proceeded?

Does it seem like there's more, I don't know if pressure is, you know what I'm trying to say, I think, that cases may be now

because of the publicity or proceeding that may not have in the past?

CDR KIRKBY: Sure. And, sir, somebody said earlier in a sidebar, no convening authority has ever been removed for referring a case to court-martial.

I mean, is there a pressure? Is there improper command, I don't know, unlawful command influence, that's not what we're talking about.

MR. KRAMER: Right.

CDR KIRKBY: There is a pressure from above. The existence of this panel is a pressure. Everybody who knows about the review by Congress, by all the changes, suggested to the military justice process, the changes over the last ten years.

Yes, there's a pressure, there has to be. I mean, if, it's naive to think there's not.

To what extent does that go forward, I don't know. I'm sure there's some science, there's some algorithm out there that would tell us exactly what the answer is, but there has to

be. I mean, there is that pressure, it exists.

COL BENNETT: And going back to Ms. Long's comment about the years that we really haven't given the victims a voice, right, and now we're more of a voice for the victims.

A real concern, I think the military system is generally considered with the SVC program and where we put victims in the process to be ahead of most of our civilian counterparts. But then you also have the #metoo movement.

All of the other movements that are out there, that pressure of, no, we have to provide these, the due process and the rights to the victim in order -- to some extent, it's almost we have to make up for our past, but we're doing it at the expense of a Soldier or a Service Member in order to make sure that that victim has all of the rights that, and is heard. Fully heard.

This morning they talked about the, having their day in court. Even a couple of the panel members this morning said, even if they

don't think it's going forward, if the victim wants to, we're going to go forward.

And that's problematic. And I think that goes to the pressure, right?

It's not necessarily a new command influence, but it's societal pressure. It's all around us and we can ignore the elephant in the room, but that is absolutely driving some of the decisions.

And it goes back to, maybe some of the trust or maybe the lack of trust. How can the defense bar overcome some of those societal pressures?

And we'll leave it at societal versus systematic within the military justice system. Victims are our priority. Victims have to be heard.

And again, some of it is simply, we haven't, your comment earlier, ma'am is we haven't given them that voice, we haven't listened to them for 20 years. You're right.

I cannot deny that it crossed our

jurisdiction. Not just in the military jurisdiction, across our jurisdictions, sexual assault, domestic violence has gotten short thrift in our justice systems.

But I think we always have to be careful of raising the rights of the alleged victims. And when you had the SVCs up here and talking about the acquittals, there was an absolute guarantee they were all victims. Right?

Maybe not every acquittal is the acquittal of an innocent man, but there are acquittals out there, when you're looking at it, looking at all the facts, I can look at it and say, he didn't do it or that wasn't a crime.

So, yes, there is absolute pressure, yes, that is driving our system. And we can ignore it or we can try to continue to balance what is right for the victims, what is right for society in order to take care of the sexual assaults and domestic violence.

Let's not go back 20 years. We need to take the hard cases. But we're not just

taking the hard cases, we're taking the unwinnable cases. And we're doing it at the cost and the expense of the accused, their families.

And in some cases, the military itself, because we're taking really good soldiers out of our formation. So there's a lot of different issues that are at play, but there is pressure and it's driving our system.

CHAIR BASHFORD: Did we hear from everybody on that?

COL. MORGAN: No, ma'am. So, years ago you may recall we had an issue with sexual assault at BMT, at Lackland Air Force Base. There were commanders that years after they had PCS'd, years after they had left their squadron commander positions, were then subjected to adverse actions.

I believe some letters of reprimand and promotions withheld for the manner in which they dealt with the sexual assault atmosphere within their squadrons.

So, I believe that eventually perhaps

some collateral relief was granted, these commanders. But this is not unknown within the Air Force and this definitely has an impact on the way commanders will view whether they should take a care forward.

As Commander Kirkby mentioned, it's much easier to weather an acquittal as a commander than it is the scrutiny of not referring a case.

COL DANYLUK: I think our experience, as I have spoken all day, is a little bit different. I think that, and I don't want to speak for the prosecutors, but they seem to be trying to provide, I don't want to call it top cover, but a very detailed analysis that gives the convening authority the support that they might feel that they need if they do decide to not refer a case.

We still take weak cases to court, we still get lots of acquittals. But I think we are just a little bit more successful in providing the convening authority the support that they

need. Both through the prosecution and the prosecutorial merit memos, the PHO report and also the SJA's advice.

CHAIR BASHFORD: I saw questions over here.

HON. BRISBOIS: So, just to follow-up on this a little bit. By way of comparators, in non-Article 120 cases, you've been front line trial defense lawyers, you've been chiefs of justice for an SJA, you've been SJAs, you're now back in trial defenders.

When you go through the Article 32 process as it exists now, get a non-probable cause determination/recommendation, depending on your point of view I guess, do you anecdotally see the same sort of response and pressures to take non-probable cases to trial like as you do in the 120 area?

CDR KIRKBY: Sir, I don't. I think there is, I think in the non-120 arena the pressure isn't there. I think if the convening authority doesn't have to report up to his boss

or his bosses' boss or the secretary of the Navy, there is less pressure on it they say.

The juice just isn't worth the squeeze. At the end of the day, in this single spec drug case, it's just not worth it to go forward, we've got other remedies here.

I think there are lots of binding effects once we get to a general court-martial, it's difficult to back out of it. So there is people that are reticent to do that.

Once their case is going forward and once we go through the 32, I don't think in a 120 case there is the same desire to find another resolution. Especially from the accused.

I mean, it's difficult to say, I'm going to plead guilty to a 120 case. The long-term effects of that, which have questions.

So, from both sides there is a different aspect of the pressure that comes in. In a fraud case, it depends on the money amount.

If you're taking money from the government, if it's $1,000, maybe we can find a

way to end somebody's career and get the $1,000 back. Difficult to do that with a victim centric concept like 120. So, there is a difference, sir.

HON. BRISBOIS: Well, what you've been describing though is a difference where there is probable cause and the ability to negotiate a resolution different than court-martial.

My question was, one way to get a handle on whether there is pressure, properly or improperly, but political pressure, as to making decisions is, what is the behavior like in other areas under the punitive articles.

When in the non-probable cause area, do you see if there's no probable cause in a robbery or an assault of a fight nature, not sexual nature, do they refer them, overrule the non-probable cause determination and refer them to the court-martial anyway or do they generally say that sounds good and we'll go on for --

CDR KIRKBY: Well, I think there's two issues. One, the pressure I think comes in in a

much greater -- that would suggest it's only, the pressure is only on the Article 32. I think getting to the Article 32 there is pressure.

So, in the simple assault case, we may not get to a 32. Or a drug case, we may never get there.

So we don't even need to make that. People can say, hey, these are the results, we have other avenues that we're very happy to take. We can administratively discharge people for drugs, we can do all those things.

So, if there is an Article 32 finding of probable cause --

COL DANYLUK: Finding them.

CDR KIRKBY: No probable --

HON. BRISBOIS: No probable cause.

CDR KIRKBY: -- cause. I think, I can't think of cases where there is no probable cause in a non-sexual assault case. It's kind of unique to the 120 charge because it's so subjective.

HON. BRISBOIS: So it sounds like that

lack of creative resolution then, all the tools to resolve at the lowest level misconduct just do not apply in Article 120. They will find their way to, once the charges are preferred, they will find their way to an Article 32 hearing and then regardless of the recommendation, likely end up in courts-martial.

CDR KIRKBY: Sir, I have no statistics on that, but my anecdotal experience is, that's exactly what happens is, people are reticent to take an alleged rape case to a non-judicial punishment.

COL BENNETT: I would just say, one other area we're starting to see more pressure and that's the domestic violence. So, that would be a caveat but otherwise if you have a case for going forward, if you don't think you're going to make PC, you're not taking it to the 32.

And you can dispose of that case, whether it's alternate disposition or we're just not going to go forward. But I would just caveat as, I think we're seeing a little bit more in the

domestic violence arena and a little bit more pressure there going forward without the victim cooperation, things like that, would be the only other area that I see. Not the same level of pressure, but more pressure.

CHAIR BASHFORD: We're pretty much out of time but I did see a hand over --

DR. MARKOWITZ: If we have time, great, if not, that's fine.

CHAIR BASHFORD: We have time for your question.

DR. MARKOWITZ: Sorry, as brief as possible. I know both the Air Force and the Marine Corps mentioned the issue of sexual assault training as being one aspect of their concern related to the conviction rates. I don't know if the other services share that concern.

We see the whole concept of one drink means you cannot consent often dealt with at voir dire. For all of the members of this panel, do you feel like voir dire is the best place to address that issue, is there another way that you

all would prefer to be able to deal with it and what would that be? Or does voir dire take care of it, in your estimation?

CDR KIRKBY: I think as a final result, voir dire is the appropriate place to take care of it. But I think the training needs to be correct.

And Navy has done a fairly good job of dispelling the concept that one drink means you can't consent. I mean, logically that's irrational.

But we've done a good job of getting away from that training. But training as a whole, I mean, it's good in one respect. The saturation of sexual assault training puts everybody on the defense, on the defense side in the panel.

They're just saturated with this. Oh my God, another sexual assault issue. But the training has to be correct. So I think first up, the training needs to be correct. Second up, if we need to get there, then voir dire is the place

to fix it.

DR. MARKOWITZ: And, sir, does the defense have a look at the training? Are you getting the opportunity to look at training or --

CDR KIRKBY: Actually, Code 20. So, Captain Monahan's team looks at the training from a neutral perspective and says, this is good or bad. I don't, sorry, I just got in the seat on Monday, so I haven't had a look at training recently.

BRIG. GEN. SCHWENK: And you're leaving today?

(Laughter.)

CDR KIRKBY: My boss is at the back, so maybe, sir.

(Laughter.)

COL BENNETT: I'll say just real quick, one of the things that we do, we don't get to look at the overall training, but quite honestly I'm not really concerned that the training from the headquarters is the translation at the local level.

CDR KIRKBY: Right.

COL BENNETT: That is problematic. So, many of our counsel and our senior defense counsel will actually make sure that they attend the training. Even if that's sending a paralegal over, so we know actually what is being said in that jurisdiction, in that training.

And there have been times when we've been able to go back and said, no, they stated this, that's not correct and that's going to lead to problems. And then it's also been absolute fodder for us at voir dire.

So, there is some proactive nature of us actually going and see what the training is. At the local level. It's not at the higher headquarters level that I'm most concerned.

CDR KING: My training piece I think would be with the convening authorities and the SJAs and CGIS. Because they're the ones that's going to drill down and make sure that as their investigating and deciding which ones to bring forward as cases, if they understand the

questions to ask the victims, then the end product works.

So, whether or not one of our young folks feel like that, hey, I had one drink so now I can't, well, hopefully that makes them a little safer. But it's, how does it translate when we get ready to bring forth a charge.

COL. MORGAN: Our division is not consulted on the substance of the training. But I agree that the training is, it has some utility perhaps as using social standards, but it does not, to my knowledge, include appropriate legal standards.

COL. DANYLUK: The way it trickles down, sometimes even when the accused is interviewed, because of the training he received, one and done type training, he will be confessing to a rape allegation because his understanding of SAPR training was that, well, she had something to drink, I shouldn't have touched her. So that's somewhat problematic.

And then also I've seen records of

trial where the trial counsel is saying, she was too drunk to sign a recruiting contract so she is too drunk to consent to have sex, and making those kind of analogies which then the judge has to then try to undo.

DR. MARKOWITZ: Okay, thank you.

COL. DANYLUK: Thank you.

CHAIR BASHFORD: Thank you all very much for appearing as a lively discussion. Thank you so much.

I don't know how much, do people need break? Okay.

(Whereupon, the above-entitled matter went off the record at 3:27 p.m. and resumed at 3:30 p.m.)

CHAIR BASHFORD: Ms. Tagert, Ms. Gallagher, take it away.

MS. TAGERT: Good afternoon. The purpose for us being here this afternoon is just to give a very brief and quick update on the case review progress to the DAC-IPAD and the public. We have now completed the review of the 2,000

investigative case files including the preliminary hearing reports that were available for cases where 32 was held. And we have begun the inputting process of the information that was gleaned from those investigations.

We have completed the analysis of the Air Force data, and we will continue to work on the other services to have the data produced so that we can answer the questions that were raised here today about probable cause and whether or not there was an acquittal or further appellate overturn.

And we hope to have the data completed for you by late spring and then for analysis. And then if you vote to go on site visits later today, potentially we'll be drafting questions for those site visits to answer any of the questions that the data has raised for your review.

Pending any questions, that is the update from the case review today.

CHAIR BASHFORD: Thank you. Well put.

Before we start our next which is the data working group presentation, is there anybody -- it's been proposed that members of the DAC-IPAD do site visits. Is there anybody who is opposed to that general idea? Seeing no opposition, then we can go ahead and start planning for those.

It's also been proposed at an earlier meeting that we form an Article 32 working group. I think we already voted in favor of that. So I know Judge Grimm who couldn't be here was interested in that. If other people are interested, please let Colonel Weir or Ms. Carson know that they're interested in participating in that group.

MS. CARSON: By Monday, please, because we'll just start with --

CHAIR BASHFORD: Great.

MS. CARSON: -- contacting you.

CHAIR BASHFORD: Mr. Mason, Dr. Wells, the floor is yours.

MR. MASON: When they get the presentation up, we'll move on to that. But I

did want to just clarify. The question was raised whether we are actually looking at the conviction acquittal rates for contested cases versus those that were just preferred and referred.

We have, and they are in the appendix. We've done it for the past three years. We have data for 15 through 18 breaking it out. Those slides for the report, we've had them actually in the data report body itself. And they're going to go back in.

So we will have them. I apologize. We did a little different by this time around saying that we wanted to look at the referred so that you were looking at the big picture. But just off the top, I can tell you that with a military judge on a contested trial, so they did not plead guilty to the sex offense, convicted of a non-sex offense or acquitted of all charges with 77.6 percent of the time. And the actual flat out acquittal rate was 21.6. And that's very similar to what we were seeing when the plea

deals are included as well.

The presentation is just spinning, so we will continue on. I can tell you about the data without having to show you a pretty chart. One thing that we've been discussing is the rate of cases, how they have fallen year over year.

In FY15, we received 780 cases that were added to the database. This most recent year, we have 574 cases. So that is a rather steep decline over the past four years. And that is for penetrative and contact sexual assault that were preferred. So 574 cases in the database.

We talked this morning about the fact of how many cases we're actually receiving when we do the RFI and what they tell us they believe are the cases. And 75 percent of the cases that they have given to us for this past year were valid. The other 25 percent were because they were the wrong fiscal year or it was a child sex case or there was some other reason of why we could not add it to our database.

So the takeaway from that is that we rely on the services that tell us which cases exist. And the information that we're getting from them is not 100 percent accurate.

BRIG. GEN. SCHWENK: So the 574 -- pardon me for interrupting, but I'm interrupting. So the 574 is the 75 percent or is it 75 percent of 574?

MR. MASON: It's 75 percent of 774. And so the actual cases that are in our database for this year is 574.

BRIG. GEN. SCHWENK: So those are the valid cases?

MR. MASON: Yes sir.

CMSAF McKINLEY: So the 774, we don't know exactly how many of those are real cases?

MR. MASON: Well, I can tell you. I mean, we track, and I have a tracking sheet for each service when they give us the RFI. I can tell you down to the line whether it was a child case, if it was a duplicate case, if it was the wrong fiscal year. Or we have 90 percent of the

documents but we can't get enough to get it into the database.

I can tell you down to the line and number how it breaks out. There is -- with respect to one service, there were quite a few that there was just no documents to support. So we don't know what happened, how that name got on the list. But we didn't see that with the other services.

CMSAF McKINLEY: With that significant drop from last year to this year, there'll be two questions. Number one, do we have less sexual assaults in the military? And number two, or are there less victims coming forward?

MR. MASON: And unfortunately what the data is going to tell you is how many cases were seen go through the system. It doesn't tell us if there's less happening, if there are less victims, if there are victims that are not coming forward. It doesn't tell us any of that.

One of the conclusions that we can draw, though, is that the distribution of

penetrative versus contact offenses has remained consistent over the past three years. So even though the number of cases are falling, your distribution is the same.

So we can reasonable say, and Dr. Wells can correct me if I'm wrong, that we're not focusing our attention just on penetrative cases because contact cases are still 25 percent of what's going forward. Or we're not just focusing on contact because penetrative is still 75 percent. So you can see that there is a decline, but your distribution hasn't changed.

And again, I apologize. For the two of you, the presentation is behind you. What this slide tells you is that the percentage of cases within our database for each service. So if you look at the fourth column or the second from the left, FY 2018, you can see that that the Army had 40.4 percent of the cases in our database for FY18.

The column next to that tells you that their percentage of the active duty force is

actually 35 percent. So the Army's cases in our database are an over-representation when compared to what their service is. You can look by looking across the years. You can see how the different services bounce back and forth.

The Coast Guard is fairly consistent. We generally see the same basic number of cases. And just as an aside, last year in FY18, the Coast Guard had 15 cases. So it is a much smaller sample that we're working with.

So we discussed this yesterday a bit, but the charts have changed this year from what we did in the past. We changed the way that we represent it. You look top to bottom. So FY 2018 will be on the top of our tables. And we've included raw numbers as well as percentages so that depending on how you visually receive things, you can get the answers you're looking for.

So for sex of the accused in FY 2018, males were 99.7 percent of the accused, 0.3 percent were female which works out to there are

two females accused of sexual assault in the services that had a preferred penetrative or contact offense last year. And that number has varied always right in that same category. So you're always looking at 99 percent are male and less than one percent are female.

So this chart here represents what the pay grade of the accused was for each case where it was preferred in FY18. In the chart -- or I'm sorry. In the report, you will see that this chart has been replicated four times, one for each fiscal year from '15 to now. And why it's an interesting chart this year compared to the others is previously the peak for the enlisted would've been an E-4 and the peak for officers would've been the O-3 pay grade.

But in FY18 -- and we don't know why this has happened. But in both instances, it shifted to the left. So the peak this year you have is E-3 for enlisted and O-2 for officers. It's something that as the data working group we will look at when we do the FY19 data and see if

this is a new trend that maybe we're getting.

That might've been something with training. We have younger people, though, that are getting in more trouble. Whatever the issue might be, it will be a data point that we can try to track down going forward. But again, we can't tell you right now why that is the case.

CHAIR BASHFORD: And just so I'm clear, the E-3, E-4 as a proportion of the service are very high?

MR. MASON: Yes, E-3, E-4, E-5 are roughly 80 percent of the service for the enlisted. So you're going to see that peak should be in that area. However this year, it's just shifting to the left.

CMSAF McKINLEY: Would it be good in the future possibly to go with what the chair said is when you have the number, you can correlate below it what percentage of the force it is.

MR. MASON: And we can absolutely do that now.

CMSAF McKINLEY: That would be real easy? It'd be very --

MR. MASON: In the text of the report underneath this, it does have a breakout explaining the 80 percent component. But it would not be a problem to add in additional detail.

So the next slide is a representation of the sex of the victims of the cases that we have documented. Nine percent of the victims were male and 91 percent were female. This number has again been very close over the past few years. There isn't a massive variation in the number.

HON. BRISBOIS: With the number of total cases is --

MR. MASON: It's 574.

HON. BRISBOIS: And the number of victims for fiscal year. That means cases with multiple victims.

MR. MASON: Yes sir. We categorize and I took out of the presentation for today but

it's actually in the report. We do know how many cases were one victim, how many cases were two victims, and how many cases were three or more as a percentage.

And in the last fiscal year, I think the highest victim count that we have in a case is 13 or 15 victims. And they were -- it was a male with all female victims.

Stayce just provided to me. So in fiscal year '18, 4 percent of the cases has three or more victims, 10 percent of the cases had two victims, and 86 percent had one victim. But that will be in the actual published report.

So the next slide is status of the victim. This is something we've always been tracking but we didn't put it into a graphical representation. And I'm not sure why I hadn't done it in the past, so I wanted to include it this year to show that 60.5 percent -- 61 percent in FY 18 were all military victims, 36 percent were all civilian, and 3 and a half percent were military and civilian.

And if you look at the previous years, and again this is another issue or instance of that, the number of cases are falling. But that percentage is staying fairly consistent that 61 percent are all military. So you see you would think again that there might be a shift someplace but it's not happening. We're seeing the number across the same way.

And then victim relationship to accused, why this is interesting and why it's important is we've talked about with the fact that in the past we used SAPRO, their report as a basis for getting information. And then we realized that SAPRO is not reporting all of the cases because they have a different mandate.

Well, in this case when you look, there are 82 cases in FY18 that were spouse or intimate partner. That means those cases would not make it into the SAPRO report because that would fall under FAP. So our project is unique in that we talk about all the sexual assaults that we know of.

This is something I've mentioned already. The penetrative versus contact distribution, 75 percent of the cases last year were penetrative, 25 percent were contact. And that is the same percentage for '18, '17, and '16. So again, cases dropping, percentages staying the same.

Chair, you brought up Article 32 hearings earlier today. Once again, you can see the number of 32 hearings that were held was 373 last year compared to 422 the year before. The number where they were waived, 104 last year versus 117 the year before. But when you look at the percentages, it's 78 percent and 21 percent or 22 percent.

So once again, they're declining. But what are the chances that they're declining at the same exact percentages?

MS. LONG: Can you remind me when were the changes to the 32?

MR. MASON: 2015, and you can see --

MS. LONG: Okay.

MR. MASON: -- where, 2015. It then jumps to '16 and the numbers skew. That's when we started tracking. And this is a new version of an older chart dealing with conviction rate to give you an idea that when a 32 was waived, what was the ultimate conviction rate? If they were found guilty of something, what were we looking at?

And in the last year, 32 percent, almost 33 percent were found guilty of a non-SA offense. A contact offense was only in four cases which was 3.8 percent. And then they were found guilty of a penetrative offense 32 times which is 30.8 percent.

So it just gives you an idea of how the distribution is, where they're getting convicted of something, what is it. And this again is only after they waive the 32. So they decided it wasn't worth going to a 32 for whatever reason and these are the conviction rates you're seeing.

BRIG. GEN. SCHWENK: These are all

contested?

MR. MASON: Some. It's possible they're contested.

BRIG. GEN. SCHWENK: So we don't know whether these are pleas or contested cases?

MR. MASON: Right. We're looking at the fact that the 32 was waived and then there was an ultimate conviction for a non-SA offense. We can tell you. It's just not a way that we've looked at the numbers. We were looking at just what is there a conviction.

BRIG. GEN. SCHWENK: That's fine. I just wondered.

MR. MASON: Yes sir. So this chart will tell you how are cases being resolved. So a case -- a penetrative offense is preferred and ultimately resolved at court martial. So we have removed alternative dispositions from this chart. We've removed the dismissals. It's going to trial at some level.

And we ran into this issue with the report last year, and that's why I'm drawing your

attention to it now. By law, we should not be seeing a penetrative offense being resolved at a summary court martial. And on this chart, you'll see that there are two cases where that is allegedly or possibly the case.

In reality, what has happened in those two cases is that charges were preferred for a penetrative offense. What was ultimately resolved at a summary was not a penetrative offense. It might've been an assault and battery. It could've been anything.

The penetrative offense fell off and it was not resolved at the summary. But they had preferred the charge. Now in order to avoid any miscommunication, any problems, misinterpretation in the future, we've included an appendix to the report that specifically lays out these cases and tells you these were the charges that were preferred. This is what the SJA advice to the convening authority was.

This is what the pretrial agreement was that tells you what happened to the charges

or what deal they were making. And then it tells you what was referred, the pleas, and the findings. So we have done that for all these special and summary cases that were penetrative so that if somebody wants to see what's going on, they can look and see. And it shows that the services are not resolving these cases at a summary in violation of the law.

BRIG. GEN. SCHWENK: I guess my problem is the heading. I would read that penetrative offenses resolved at court martial. So I would think that there were two penetrative offenses that were resolved at a summary court martial.

So I would recommend that we just think about if they weren't penetrative when they got resolved at the summary court martial because the penetrative offenses were dismissed and it was something else that ended up at the summary court. Maybe they shouldn't be on the chart. I don't know.

MR. MASON: And sir, we had that

conversation. We've tried to go back and forth and we changed the language. And it changed actually in the report last year. And we haven't found the right way to word it. And I will go back and revisit it. It might be the penetrative offense initially preferred and then charges resolved.

I'll find a new way. And when you get the report in a couple weeks for review, I'll draw your attention to where I put it and you can tell me if it works.

BRIG. GEN. SCHWENK: Thank you.

MR. MASON: Absolutely. And that will be the case on the next chart as well, sir, where it says contact offenses resolved at court martial. Because here you have a case where the charge ultimately was a contact offense. And then whether the contact went forward or not, this is how the case ultimately was resolved. And I will figure out the wording for there as well, sir.

That is the snapshot view of the data.

As I said, I want to clarify the earlier point. The appendix to the report is going to be roughly 100 pages, 100-plus pages. And it's every data point you could want and interpretation of it. So we provide that to the services so that they can see all the information that's out there and how we got from A to B.

That is the basis of the next part which is all the data point which we then give to Dr. Wells who does the multi-variate. And he's got a few slides now to explain the multi-variate results for FY18.

MS. GARVIN: Mr. Mason and Dr. Wells, sorry. Before you transition, I believe you have showed this before and I'm sorry for forgetting. Is one of the data points whether the victim had an SVC or VLC? Is that in the data?

MR. MASON: We can tell if they are on record at some point. If we have some sort of a document saying that victim's counsel was involved, we will notate it. And that's just by looking at the record of trial.

When Stayce goes and takes the record apart, if she comes across that, we scan it and add it. But that isn't -- we're not saying that we're 100 percent confident on that. But we do have it as a data point that's in our --

MS. GARVIN: So it could be part of an analysis to see what happened to a case when they did or did not --

MR. MASON: Yes.

MS. GARVIN: -- have one.

MS. ROZELL: Fortunately, the new format for the Air Force is really great at outlining the SVC portion of whether or not they have an SVC available to them or not.

MS. GARVIN: Thank you.

MS. LONG: I have a question. Just I don't know if it was before or not. Of the 574 cases, do we have data comparing that with all of the reports for penetrative or all of the reports that came in that year?

MR. MASON: No, we don't. With the case review, they've been looking at the

investigations for FY17. We can take their numbers for FY17 and look at them compared to our numbers of cases that were resolved in FY17. The problem is they are saying a case that it was closed -- the investigation was closed in '17. And we're looking at a court martial. So we can try to put those together, but we don't have --

MS. LONG: I didn't mean that.

MR. MASON: Oh, I'm sorry.

MS. LONG: I meant reports across this -- across this service, do we know, let's say, that there were -- I'm making up a number -- 2,000 reports and then 574 cases? Or do we not -- are we not able to do that?

MR. MASON: We can try to give an idea based on the SAPRO report. But again because they don't report FAP, we can't pull that across. So we have to say that we can give you statistics based on what we say in a court martial.

MS. LONG: The cases. Okay. Thank you.

DR. WELLS: So the multi-variate

results that we have to summarize today are very similar to the models that we estimated with the FY16 and '17 data. And it's similar to the models that Dr. Spohn estimated with the FY15 data.

So we built models to understand the relationship between case characteristics and a set of outcomes in that case. So we looked at dismissals, acquittals, conviction on a penetrative offense, any conviction. And then we looked at sanctioning outcomes given that there was some convictions.

So we looked at punitive separation, confinement length, and then a combined sentencing severity scale that combined both of those sanctions together. So what I have for you today is a summary of some of the key results from those multi-variate models.

To cut to the chase, a lot of the results we see here in the FY18 data are very, very similar to what we observed in the '16 and '17 data. So nothing new jumps out here.

We see that four predictor variables are important across several of these models. So service branch, number of charges that were filed in the case, the conviction offense, and then we see two victim variables that jumped out as being important.

So the first thing I note, acquittals have been a part of the discussion of the committee. And we don't find any differences in these multi-variate models between the service branches in terms of the likelihood of an acquittal compared to any other outcome in the case. So no differences between the service branches.

In the FY16 data, we did see that the Air Force differed from the Marines. And in the FY17 data, we saw that the Air Force differed from the Army. But those were the only differences that have emerged over the past three years with acquittals.

The likelihood of being convicted on a penetrative offense was a little bit higher in

the Army and the Marines when we compared them to the Air Force and we saw the same thing or similar patterns in '16 and '17.

And then in terms of the likelihood of being convicted on any charge, it was greater -- it was highest in the Army, the Marines, and the Navy. And this was statistically different from the rate in the Air Force and in the Coast Guard. So we see that.

And then last with regard to a sanction, the chances of a punitive separation, they were highest in the Army and in the Air Force when we compared those two service branches to the Navy.

The second predictor variable is the number of charges. And we see here that the likelihood of any conviction and conviction on a penetrative offense goes up as the number of charges increases. And then the chances of an acquittal or a dismissal are reduced as the number of charges increase. So an inverse relationship there.

CHAIR BASHFORD: And just to clarify again, the number of charges doesn't mean number of sexual assault charges. It means number of charges for anything. Is that correct?

DR. WELLS: That's correct.

CHAIR BASHFORD: So adultery, false statement, leaving the base, something like that?

DR. WELLS: Correct. And we see that in the data. We didn't separate out those qualitative -- the qualitative nature of all those different charges. It's just a summary count.

And then last as the number of charges increase, we see an increased chance of a more severe sanction being levied given that there was some conviction in the case.

Next, conviction offense. The highest chances of a confinement sentence stemmed from convictions on a penetrative sexual assault conviction. And there's no difference in the chances of a confinement between contact offenses and non-sexual assault offense convictions.

Punitive separation chances were greatest for penetrative and contact offenses than for non-sex assault convictions. And then the sentencing severity scale that we created is related to the type of conviction offense. So it's highest for penetrative, next for contact offenses, and then lowest for non-sexual assault offenses. And all three of those were statistically significant in terms of their differences.

Last, we see a couple of victim characteristics, and these also were observed in our '16 and '17 data. So the likelihood of case dismissal was higher when the parties involved were intimate or intimate partners, either current or former. And the chances of punitive separation were lower in cases that involved victims who were military Servicemembers compared to those other categories.

MR. KRAMER: Sorry. The first one, dismissal at what stage?

DR. WELLS: Post-preferral. And then

the chances of punitive separation were lower in cases that only involved victims who were military Servicemembers as opposed to civilians and cases with a combination of military and civilian victims. So those are the multi-variate results for the FY18 data.

CHAIR BASHFORD: Thank you.

DR. WELLS: You're welcome.

MS. LONG: I have a question. I'm sorry. When you said that there's no statistically significant difference between military services and acquittals. So before when we heard the Marines saying that they have a different level of screening that's harsher, but their acquittal rate is the same as the other services.

DR. WELLS: That's correct.

MS. LONG: And the second --

CHAIR BASHFORD: But their conviction rate was higher, I believe, right? Marines conviction rate was --

DR. WELLS: Yes, that's correct.

MS. LONG: So how does that happen? Can you describe that?

DR. WELLS: Yeah, so --

MS. LONG: Because that might be my next -- okay.

DR. WELLS: Yeah, exactly. So when we make these comparisons, we are lumping together a whole variety of outcomes together into one category and comparing it to a single other category.

So for instance, the acquittal comparison is the likelihood of an acquittal compared to everything else. Dismissal, conviction on a penetrative offense, conviction on a contact offense, and conviction on a non-sexual assault. So we're combining things together. Now when we go to the conviction on the penetrative offense, it's that category versus everything else.

MS. LONG: Okay. So --

DR. WELLS: So that might explain kind of how they don't always line up.

MS. LONG: Okay. And this is somewhat related which is then when you talk about the conviction rates being higher, likelihood is higher when you have greater charges, are we able to know which service? Is there a difference in how many charges are happening across the services?

DR. WELLS: Right. What we do in that sort of model is we control for the service branch. So it's parsing out the effect of the service branch on that outcome and then isolating the number of charges. So it's just the number of charges.

We could do that analysis where we compare the number of charges across the service branches and then see how that may have differential impacts. I don't know the numbers off the top of my head to know if we would have enough different kinds of combinations to do any meaningful analyses. But if you're interested, that's something we could do.

MR. MASON: And ma'am, I would just

add that in the appendix for last year's report which these numbers have been updated because we received more cases for FY17 in this data pool. But for penetrative, the accused charge for the penetrative offense in the Marine Corps, they were acquitted of all charges 18.2 percent of the time. But then convicted of a non-sex offense was 43.2 percent, and the other services were at 21.5, 23.3, and 9.

So they were not -- they're convicted of a penetrative, convicted of a contact was slightly lower than the other services. But they were much higher on the non-sex offense they found guilty of. So they have a higher guilt rate in that sense or a conviction rate. But yet the acquittal rate is a little bit lower. And that could be looked at, and we have that for '15, '16, '17 as well.

CMSAF McKINLEY: Do you know what the female population in the Marines is?

MR. MASON: I do not, sir, but I could find out. Absolutely.

CMSAF McKINLEY: The comparison, I think, in the Air Force, 20 percent of the Air Force population is female. And I would guess Marines probably well under 10 percent.

MR. MASON: And it's a great point. These are the types of things we can -- because we have the data, we can show what we have in our database. But then we can also go back to DoD, get the official numbers, and include it in the appendix. But I will get an answer for you.

CMSAF McKINLEY: What do you think, General? Do you think that's about right?

BRIG. GEN. SCHWENK: I don't know.

MR. MASON: Unless you have any other questions, that's all we have for data for you.

CHAIR BASHFORD: Thank you very much, and keep up the good work with a better system. We're now scheduled for deliberations on the collateral misconduct report. Colonel Weir, are you going to lead that?

COL. WEIR: What I recommend is that based upon the guidance we get here today that we

draft a draft letter back to the Secretary of Defense and pointing out some of the problems that we saw today in the report.

And I would recommend that based upon the draft reports -- and I keep saying they're draft reports to us so they're not finalized. So we have an opportunity -- the committee has the opportunity to have input into the Secretary of Defense on how those final reports perhaps are done and before they're sent over to the armed services committees.

So one of my recommendations, and you all discuss whether that makes sense to define some of these terms in a way that across the services will get more consistent information. And that way in the future when the DAC-IPAD is requested to review and analyze the reports, we'll have consistent information across the services.

One of the areas -- and you just heard from Dr. Wells and Chuck -- is you can make comparisons between services that more likely you

get acquitted here in the Army on this or the Marines. But you have to be coming from the same basic information.

And right now, we can't tell if you're more likely to be -- if you've committed collateral misconduct, are you more likely to be punished in the Navy, the Marine Corps, the Army? Because the numbers are different. They didn't use the same thing.

So one of the areas I think you all need to discuss and deliberate on right off the bat is what you would like to do with the false reporting information that you receive because that seemed to be an area that was a topic of conversation. And I think part of this deliberation on how we kind of draft the report, we need to cover that area so we know from a staff where you all stand on that.

CHAIR BASHFORD: It seemed to me that they were struggling with that, with the definition of it, with how they came up, with cross complaints. I think it would be much

easier if they simply -- if we recommend that they eliminate that category from any analysis of collateral misconduct.

If it's a truly false report, the misconduct isn't collateral. It is the misconduct. And it was impossible to tell. Some people left it out. Some people put it in. I think it would be much easier if they all left it out if that's --

DR. MARKOWITZ: I would like to say that I agree that it's not collateral misconduct. I do want to make sure that it doesn't appear that this committee is somehow hiding the idea that there may be false reports by having it taken out.

I think we need to address the fact that they were brought up. It doesn't appear to be a collateral misconduct. Because of that, it wasn't -- I think we need to acknowledge the existence of that category in some way, shape, or form and not just pretend we never got that information so that it doesn't look like we just

pretended we never --

COL. WEIR: Would it be beneficial to get to where you want to be is that the definition of collateral misconduct lays out what they mean by collateral misconduct? Because I think I don't know if we would be hiding the fact that there was a -- and we're not really sure as a committee because we don't have the statement made by the people whether or not it was actually false.

DR. MARKOWITZ: Correct. I mean, I think there are a number of issues related to how people were defining it. Who exactly was being -- where the false allegation was actually falling. Was it the subject as part of a cross complaint? Was it the victim coming forward? I think there were a number of issues related to the false allegation component. So I think there are a number of reasons not to necessarily include it.

My only caution in all of this is I don't want it to seem as though we are just

running away from the notion that false allegations may exist at all. And so I would prefer to not just pretend like it never existed whatsoever, if that make sense.

And it's possible I'm being completely inartful here after a long day. So if I'm not making sense, I'm happy to --

BRIG. GEN. SCHWENK: I agree with Jen, but I think that maybe your concern -- Jen's concern is satisfied by the fact that we're expressly going to address false reporting as a category in our letter which is a public letter and everybody can read it. So it'll be clear we're not --

DR. MARKOWITZ: Yes.

BRIG. GEN. SCHWENK: -- sweeping it under the rug. We're saying, there's inconsistencies in all these areas. One area will say false reporting. Here's the inconsistency. Here's our recommendation.

Now my approach to the false reporting is as I understand it -- and I'm usually wrong.

But as I understand it, collateral misconduct concerns stemmed years and years ago from the deterrent effect on reporting sexual assaults.

COL. WEIR: Yes sir.

BRIG. GEN. SCHWENK: Because if I say I got sexually assaulted, I'm going to get hammered for collateral misconduct. If that's true, all the definitions should be focused on identifying that kind of collateral misconduct and clearly filing a false report is not one of those things.

COL. WEIR: Yes sir.

BRIG. GEN. SCHWENK: And so it's not collateral misconduct. So I think maybe we can solve that by --

DR. MARKOWITZ: Yeah.

HON. BRISBOIS: So the basic problem from the morning's opening panel is the inconsistency of definitions. And the area where they had the greatest inconsistency was in this false reporting.

So since that's the tone and tenor of

the likely proposed response, that should be extra highlight that Congress, the committees should not rely on that data at all because they were completely -- I think the point was made, was it the initial victim reporting or was it a cross claim by the initial suspect?

I mean, we don't -- there's absolutely zero consistency. And so that's the sort of most egregious example of the lack of uniform definitions.

COL. WEIR: Yes sir, I agree. Even after listening to the panel, I still don't really have a firm grasp on what they meant by a false report.

DR. MARKOWITZ: And I think that's part of the problem here is that I don't know that we ever got a firm definition of what false report actually is defined as in any given service which is potentially another topic altogether. Well, I'll just leave it at that.

MS. LONG: But I think something significant happened, and I don't want to

misstate which service that was. But one of them counts somebody who sees something that they perceive as an assault. So it wasn't what we would normally think of as a false allegation. And that, because of how loaded this word is, that definitely needs to be taken out of that.

COL. WEIR: As I recall --

MS. LONG: It may be an incorrect report.

COL. WEIR: -- it was a third-party report that the witness saw what he or she perceived to be a sexual assault and reported it. And then when the alleged victim was questioned about that assault, and we don't know whether it was a he or a she, the victim said, no, I wasn't assaulted. That was consensual. They counted that report by the witness as a false report.

Now I think a way to handle this would be to come up with -- for us as a staff when we were talking about collateral misconduct and the case review working group, and some of you have sat on that, have a pretty good idea what

collateral misconduct is which is some conduct that results or was just prior to or after or during the sexual assault.

So for example, underage drinking. The victim is underage drinking and then there's a sexual assault, and that's collateral to that misconduct. Or there's a fraternization, the disparity in ranks between the two individuals. Adultery is another one. The violation of an Article 92 where the victim didn't sign the suspect into the barracks and therefore she's guilty of a barracks violation.

Those were the kinds of offenses. If they were smoking marijuana right before they had sex, I guess. The sexual assault occurred. That could be considered collateral misconduct because it occurred a time very close to the incident.

I don't know how many weeks went by before the subject in these false official statement cases made that allegation. So I think what we could do is draft the definition of collateral misconduct. Point out in the letter

to the SECDEF about the false swearing cases that were received, and make a recommendation that those not be included in a report to Congress because the services themselves have not defined and it opens up to more questions than they have answers to.

And we can draft it. And obviously when it gets out to you all, you can track change and comment on it. But I think you're absolutely right. I think it needs to be addressed and it needs to be addressed in a way that we know it's there.

As the DAC-IPAD committee, you know it's there. But you also don't think it should be included in the collateral misconduct because it doesn't meet what the definition that you all will eventually approve. I think we can handle it that way to alleviate any concerns.

CHAIR BASHFORD: So although I'm not sure they're the decision makers, they certainly all agree that they are going to, the next report, pull the same types of cases, whether

it'd be only penetrative or penetrative and sexual abuse, the years of cases and have the same definition.

So I think we could really help by suggesting whether they pull just penetrative or penetrative and sexual contact. I think the latter. And if we could provide to them suggested definitions of the terms that they then all use.

COL. WEIR: And it's up to you, but -- I don't want to misstate what you said, ma'am. But you think it should be penetrative and contact offenses, they count all of those?

CHAIR BASHFORD: If you're looking at collateral consequences, I think you should look at the big universe of what does reporting something mean to me.

COL. WEIR: Sure, and I agree. So what we can do is put together the recommendation that these should be the definitions that the services follow across the board. And one is collateral misconduct.

Now another question is some of the services used a closed case. Some used open and closed cases. And I think that's another definition. You can only -- this is up for debate. You can only count those collateral misconduct cases where the case has been closed or action has been taken on the collateral misconduct.

There needs to be some uniformity across the services. And as it was, each counted their misconduct a different way. I believe it was the Air Force that didn't count anything that wasn't a completed case. But that's just something for your consideration.

CHAIR BASHFORD: It gets complicated, I think, because as we heard, some victims want the collateral consequences adjudicated close in time to the report and some want to wait till after the termination of the case.

So what we don't want to do is have something where the collateral consequence comes way after determination of a case and we don't

see it because it wasn't pulled. Because then you would just lose it forever. I don't know how you would attach it to anything. I don't know what the solution is.

MS. MANSFIELD: Yeah, can I just speak for a minute? So as somebody who had to take a part of this, the first pool of cases in order to identify the victims that we were going to look at is we had to define which subject cases. Because everything is going to be by subject in investigative files.

So FY17 closed. Law enforcement investigations was kind of the starting point. And then you identified all the victims in those offenses. And then you went out to the field to say, for these victims, what happened? So I think the first place we have to be consistent is the initial pull of what cases where we're even identifying the pool of victims.

CHAIR BASHFORD: And I think everybody agreed that they would be consistent in what they pulled. But we can give guidance on that too.

COL. WEIR: The legislation in my mind is pretty clear on what the services were required to report. And I think that when the committee -- when you all looked at the draft report, it all looks like one percent, one percent, one percent.

But when you actually compare what the legislation required which was the number of victims who committed collateral misconduct. And then of those victims, the number who received adverse punishment for that collateral misconduct. And then third, what was that percentage?

And clearly, there wasn't specific guidance from Congress on the specificity of that. But when we looked at those numbers, it changed from one percent to the various -- and you saw in the draft, the various percentages. I think the Marine Corps was the highest at 90 percent. If a victim committed collateral misconduct, she was punished 90 percent of the time.

MR. KRAMER: What's it mean, committed collateral misconduct?

COL. WEIR: Well --

MR. KRAMER: There's some adjudication? Because somebody said the -- I forget the exact words. I asked a question and he said --

COL. WEIR: Right, and I'm glad you brought that up, sir, because that's another definition, accused. Us in the military justice system have a specific word for accused. That means a charge sheet has been preferred, and there's charges that that individual has committed. An officer has signed off on that charge sheet, and that starts the process.

So suspect, suspected of committing collateral misconduct. The Army's, potentially. I don't know what -- it's either evidence in the case file that she admitted that I was underage and I was drinking. That's not potential. I mean, she's admitted it. She's suspected of it because she's admitted it. So I think we can do

a better job of the definition of accused because that means --

MR. KRAMER: Or committed, I guess, is the -- yeah.

COL. WEIR: Yeah, I mean, we can wordsmith, the suspect may have committed this collateral misconduct. But accused to me was confusing because I'm thinking if you've accused some way there's an investigation, there's a charge sheet, and it's going down that path to some end result.

And the other issue, I think, that we can help them out is you could -- I mean, me not making general is an adverse -- I mean, you can say adverse to anything. But really what adverse is general court martial, non-judicial punishment, administrative separation for the misconduct.

A letter of reprimand whether it goes in your file or not. I mean, I drafted too many to count which says, you have embarrassed the United States Army, this, blah, blah, blah.

You're hereby reprimanded. Now if it gets filed in the local file, it's still adverse. It stays in that file for a period of time till you leave the command. A non-punitive letter is still a reprimand.

Now because I didn't get to go to a school eight months from now that I -- I mean, you can pull the string on this and everything can become adverse to me if I don't think I got what I should get.

So I would recommend that we define adverse to those things I mentioned. Now depending upon what service you're in, a non-punitive letter, a letter of reprimand. We give adverse counseling statements. You have failed to do this. You were underage drinking. You're told not -- don't do it again. If you do it again, there's going to be adverse consequences to you.

That's not a good counseling statements. You get good -- hey, Steve, you did a great job digging this foxhole. Keep up the

good work. That's a different kind of counseling statement than, you screwed up. Don't screw up again.

Because they use those counseling statements to build a packet for the administrative separation. And so you pull out the ten bad counseling statements. You throw out a packet for misconduct and off you go. The person is out of the military.

So I think we can help them narrow their definition. And I don't believe in my experience with being purple that there's a lot of difference between what an adverse action is across the services. So we can help them help themselves to make it clear what the adverse action is.

And I'd recommend that we request that the services specifically say of the ten victims who receive adverse punishment, this is what it was, two Article 15s for adultery or letters of reprimand, and spell it out.

I don't know if we need to get into

the punishment, what they received. But a field grade Article 15 for underage drinking. A company grade Article 15 for violation of a barracks policy.

But we want to fully inform those people who have requested that this committee look at this and analyze it and make recommendations back to the armed services committee. And that's not a heavy lift for the services because there's really few numbers.

And if they can't readily pull those numbers from their systems, then maybe that's a recommendation that we have a centralized system where we can pull information.

CHAIR BASHFORD: Document based.

COL. WEIR: Yeah, document based. But I think that would be important for people to know what the punishment was. So it may help inform. You don't know what -- they may think they all received court martials, they all got administrative separations. If some of that happened, well, that's fine. But it needs to be

documented. Do you all have any questions of --

BRIG. GEN. SCHWENK: I think we ought to, right up front, address the 140a issues because that's the overriding issue. And we right up front ought to say, this highlights what we were concerned about in our memorandum to the Secretary of Defense on whatever date, copy attached. And if that gets taken care of, we will not have these kinds of inconsistencies in the future. Meanwhile, let us help you with your immediate tasking.

The other thing when you're working on it, Congress asked for certain things. And it's sort of unusual for DoD to give more than they ask for. But sometimes we do. And they don't ask for much. They ask for numbers.

So when we start providing more, the numbers, especially if the DAC-IPAD is going to ask the services to go spend more time and effort beyond what Congress asked for, we need to be real careful if that's really what we want to do.

COL. WEIR: Yes sir. They've provided

us the adverse action information. But basically the draft report from the services contain more information than -- I mean, they didn't ask for the total number of sexual assault investigations during this time period. They only asked for the number of victims in this time period that committed collateral misconduct.

So we can -- you all can deliberate over how much or how little information that should go over back to the Secretary of Defense.

CHAIR BASHFORD: I'm a great believer that more information is more information. And if it's susceptible to misinterpretation that somebody has to choose between reporting a sexual assault with the understanding they're going to be kicked out of the service. And really what it is, is a letter of reprimand.

I think Congress should understand that there's a whole variety of adverse things that happen. And most of them seem to be fairly on the lower end.

BRIG. GEN. SCHWENK: If they already

have the information provided, which they do in their reports, that's fine. But if we're asking them, I thought you were talking about asking to go back out and look for more stuff.

COL. WEIR: I think the good news story for the services' perspective which we'll highlight is the percentage of victims who aren't committing any collateral misconduct. And that kind of got lost in the shuffle in the draft report from the services. But that should be something.

I want to say it's in the 90 percent that that's a good news story that we don't have a lot of victims. Because that clouds the whole prosecution investigation issue. But if you don't have that issue involved in the overwhelming majority of cases, that's good news that we ought to make sure that is projected out to the armed services committees through the Secretary of Defense.

CHAIR BASHFORD: So Colonel, do you need this committee to approve the path forward

of definitions, what to pull, asking about and recommending that they include what the adverse consequence was?

COL. WEIR: And then once -- if that's the way you'd like to go and you vote on that, then what we'll do is put together a draft letter and then provide that to you all. And then on the 12th of September, we will have a public meeting telephonically.

Prior to that, obviously, you'll all be sent the draft that you can -- you cannot discuss it amongst yourselves. But you can send it back to our office and we can compile it. And then on the 12th, we will have all the changes that you've recommended. And then we'll deliberate at that point and vote on the final product.

CHAIR BASHFORD: Does anybody --

HON. BRISBOIS: That's the way forward.

CHAIR BASHFORD: I second that. Anybody opposed? Seeing no opposition.

COL. WEIR: Okay. Thank you very much. And I think --

CHAIR BASHFORD: Mr. Gruber?

MR. GRUBER: Madam Chair, I'm unaware of anybody requesting to appear before the panel. The Federal Register notice did notify the public of their opportunity to do so. Colonel, are you aware of anyone?

COL. WEIR: No.

MR. GRUBER: With that, ma'am, unless you have other matters, it would appear you can conclude the meeting at your discretion.

CHAIR BASHFORD: This meeting is now concluded. Thank you.

(Whereupon, the above-entitled matter went off the record at 4:28 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: DAC-IPAD Public Meeting

Before: US DOD

Date: 08-23-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

Court Reporter