

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



FOURTH ANNUAL REPORT

March 2020

Defense Advisory Committee

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Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces



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

March 30, 2020

The Honorable James Inhofe
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Adam Smith
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Mac Thornberry
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Mark T. Esper
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with the *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces [DAC-IPAD] March 2020 Fourth Annual Report* in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended, describing the Committee's activities over the previous 12 months.

The report first sets forth the Committee's three findings and nine observations from the culmination of the DAC-IPAD Case Review Working Group's examination of over 2,000 military investigative case files for investigations closed in fiscal year 2017 involving an active duty Service member alleged to have committed a penetrative sexual offense against an adult victim. The Committee's findings are related to victims' statements to military investigators, investigator discretion in tailoring an investigation to the specific facts of an alleged sexual offense, and the frequency of adverse administrative actions taken against subjects prior to the determination of whether charges will be preferred against the subject.

The report also provides an update regarding the DAC-IPAD Policy Working Group's in-depth study of reforms to the preliminary hearing and court-martial referral processes under Articles 32, 33, and 34 of the Uniform Code of Military Justice, as requested by the Acting General Counsel for the Department of Defense. Further, the report includes an overview of the Committee's analysis of and six recommendations related to the Department of Defense's initial *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*, in accordance

with section 547 of the FY19 NDAA (Public Law 115-232), originally submitted to the Secretary of Defense by the Committee Chair in September 2019.

In November 2019, the DAC-IPAD issued its *Court-Martial Adjudication Data Report*, which provided case characteristics and adjudication outcomes for sexual offense cases closed in fiscal years 2015 through 2018, including a multivariate statistical analysis prepared by a professional criminologist that identified patterns in the data. The present report also includes a summary of that data and a description of planned military installation site visits.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

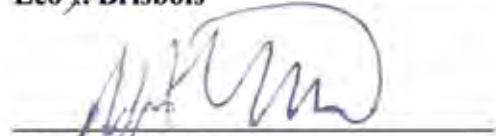
Respectfully submitted,

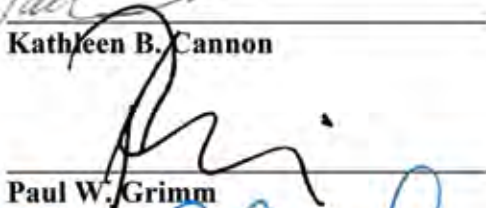

Martha S. Bashford, Chair


Marcia M. Anderson



Leo J. Brisbois

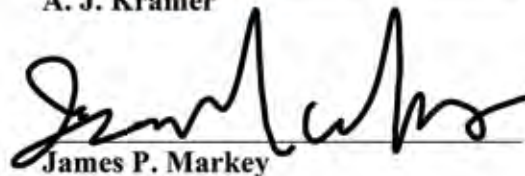

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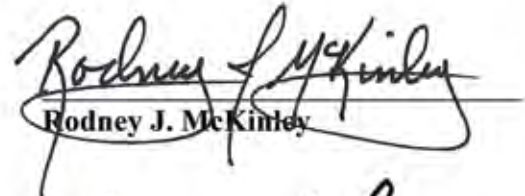

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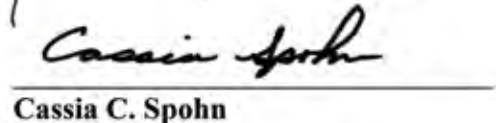

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EXECUTIVE SUMMARY

In section 546 of the National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA), enacted on December 23, 2014, Congress directed the Secretary of Defense to establish the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) or Committee. Its authorizing legislation, as amended in 2019, charges the Committee to execute three tasks over a 10-year term:

1. To advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces;
2. To review, on an ongoing basis, cases involving allegations of sexual misconduct for purposes of providing advice to the Secretary of Defense; and
3. To submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives describing the results of its activities during the preceding year no later than March 30 of each year.

This is the fourth annual report of the DAC-IPAD; it describes the Committee's activities and the topics examined over the previous 12 months. Between April 2019 and February 2020, the Committee held four public meetings during which it heard from 25 military justice experts, including four retired military judges, on topics including the acquittal and conviction rates for sexual offenses in the military; the Article 32, Uniform Code of Military Justice (UCMJ), preliminary hearing process; the Article 34, UCMJ, advice to convening authorities before referral to trial; the court-martial referral process; victim declination to participate in the military justice process; and the incidence of collateral misconduct by victims of sexual misconduct in the military. In addition to public meetings, the Committee and its three working groups held 13 administrative and preparatory sessions, and the seven members of the DAC-IPAD's Case Review Working Group made a combined 42 trips to the DAC-IPAD office in Arlington, Virginia, to individually review investigative case files.

The first chapter of this report sets forth the Committee's findings and observations from the culmination of the examination by the DAC-IPAD Case Review Working Group of over 2,000 military investigative case files for investigations closed in fiscal year 2017 involving an active duty Service member alleged to have committed a penetrative sexual offense against an adult victim. By February 2020, working group members had individually reviewed 322 investigative case files and attorney-advisors from the DAC-IPAD's professional staff had completed their review of all 2,055 of the cases provided by the military criminal investigative organizations. For each case, reviewers recorded more than 200 data elements that were encoded into an electronic database for analysis. The comprehensive statistical analysis of this extensive data set will be completed and published in a separate DAC-IPAD report. As a precursor to that statistical data analysis, in this report the Committee provides the members' overall impressions after having completed the two-year investigative case review project. The Committee describes the most notable of its impressions in three findings as well as nine observations identified for further study in Chapter 1.

First, the Committee found, based on the case files reviewed, that the statements of sexual assault victims taken by military criminal investigators often lacked sufficient detail and follow-up questioning to adequately assess the disposition of a case. While the limits in the content of these statements may have resulted from efforts by military investigators to implement more victim-centered investigation techniques, the Committee found that the lack

of victim-provided details or of victims' responses to contradictions in the evidence leaves unresolved important questions whose answers could affect a convening authority's disposition decision.

The cases reviewed also affirmed an earlier finding—from the DAC-IPAD's third annual report—that military investigators need discretion to pursue the specific investigatory steps relevant to each case, rather than follow the one-size-fits-all investigative approach typically observed in the case files reviewed. The Committee observed that the military investigations in general were extremely comprehensive; however, valuable time and resources were frequently expended to gather information irrelevant to the case at hand, including extensive interviews of co-workers, previous chains of command, family, and friends of both the victim and subject who were neither involved in the alleged incident nor otherwise aware of it.

In addition, the Committee found that the length of time devoted to investigations that ultimately did not result in prosecution highlighted the need for a mechanism to determine when it is appropriate for a complaint to be closed. For example, in numerous cases reviewed, investigations continued for months following an alleged victim's assertion, after a third-party report, that the incident in question was consensual or following a determination that the complaint itself did not meet the elements of a sexual offense.

Finally, the Committee discovered during case reviews that adverse administrative actions and legal holds were routinely imposed on subjects by their commands immediately after an allegation of a sexual offense—often permanently and negatively affecting the subject's career and personal life—irrespective of whether the allegation was ultimately determined to warrant preferral of criminal charges against the subject. The Committee was concerned that in light of the finding in its third annual report that the majority of penetrative sexual offense allegations do not result in the preferral of charges—an outcome that members who reviewed case files found to be reasonable in the great majority of cases—taking such administrative actions immediately may be premature and may often do permanent harm.

In addition to its findings, the Committee identified nine issues during its case reviews that it plans to study further in the following months: the Article 30, UCMJ, direction that the convening authority's disposition of charges should be made in the interest of "justice and discipline"; the weight given by convening authorities to victims' preference as to the disposition of the case; the nature of the legal advice provided to initial disposition authorities; identification of the factors most significant to convening authorities in the Article 33, UCMJ, disposition guidance; the usefulness of the Article 32, UCMJ, preliminary hearing officer's report; the effect of a determination of insufficient evidence to establish probable cause at the Article 32 preliminary hearing; the sufficiency of probable cause as a standard for referral of a case to trial; the usefulness of documentation by legal advisors of the sufficiency of the evidence in a case to obtain and sustain a conviction; and the usefulness to convening authorities of requiring staff judge advocates to provide the reasoning supporting their legal conclusions in their written Article 34, UCMJ, advice.

Chapter 2 discusses the DAC-IPAD Policy Working Group's plan for an in-depth study of the three recommendations made by the DAC-IPAD's predecessor, the Judicial Proceedings Panel (JPP), and assigned to the Committee for review by the Acting General Counsel for the Department of Defense. Specifically, the JPP recommended that the DAC-IPAD continue to assess the effects of reforms to Articles 32, 33, and 34 of the UCMJ involving the preliminary hearing process, command disposition guidance, and the advice to convening authorities before referral to trial, gauging their current efficacy. This chapter provides a brief overview of those articles as well as a summary of the perspectives of various stakeholders within the Military Services' legal organizations regarding the implementation of statutory reforms and related policies. Their perspectives were solicited by the Committee in

a request for written responses to questions submitted to each Service as well as through public testimony received from the Military Services' chiefs of military justice, trial defense services chiefs, and victims' counsel program managers.

As part of its research, the Policy Working Group also used data compiled from the DAC-IPAD's court-martial database to conduct an initial independent analysis of the Article 32, UCMJ, preliminary hearings held in cases completed in fiscal years 2017 and 2018. Specifically, the Committee reviewed the outcomes of cases in which a preliminary hearing officer did not find probable cause that one or more penetrative sexual offenses occurred—a combined total of 132 cases for both fiscal years. According to the working group's analysis of the data, in nearly 20% of those penetrative sexual offense cases for which a preliminary hearing was held, preliminary hearing officers determined that there was no probable cause to believe that one or more specifications of a penetrative sexual offense occurred. The data further indicated that convening authorities ultimately dismissed the penetrative sexual offenses in 66% of the Navy, Marine Corps, Air Force and Coast Guard's combined cases for which the preliminary hearing officer determined there was no probable cause. For the Army, however, convening authorities dismissed just 33% of the cases of penetrative sexual offenses determined by a preliminary hearing officer to lack probable cause.

Chapter 3 provides a brief overview of the Committee's annual collection and analysis of military case adjudication statistical data for adult-victim sexual offense cases in which charges were preferred for either penetrative or contact sexual offenses and in which final action on the case is complete. In November 2019 the DAC-IPAD issued its comprehensive *Court-Martial Adjudication Data Report* and detailed appendix, which provided case characteristics, disposition outcomes, and adjudication outcomes for these cases, including the sex, Service branch, and pay grade of the subject; relationship of the victim to the subject; nature of the charges; forum; and a multivariate statistical analysis prepared by a professional criminologist that identified patterns in the data for fiscal years 2015 through 2018. Since the publication of that report, the Committee has collected and recorded additional case documents, including charge sheets, Article 32 reports, and Results of Trial forms, resulting in updated totals of 576 cases completed in fiscal year 2018, 698 cases completed in fiscal year 2017, 770 cases completed in fiscal year 2016, and 781 cases completed in fiscal year 2015. This chapter also includes Military Service-level data such as conviction rates, acquittal rates, post-preferral case attrition rates, and alternative dispositions imposed for cases completed in fiscal year 2018. The Committee concludes the chapter by noting that it currently lacks the resources necessary to continue this annual court-martial data analysis going forward.

Chapter 4 provides the Committee's analysis and recommendations in response to a provision in the National Defense Authorization Act for Fiscal Year 2019 that requires the Secretary of Defense, "acting through" the DAC-IPAD, to prepare and submit biennial reports to Congress detailing the number of instances in which an individual who reports an incident of sexual assault is either "accused of" or receives adverse action as a result of misconduct engaged in that is collateral to the investigation of the sex offense, such as underage drinking, fraternization, or curfew violations. The data provided to the DAC-IPAD by the Department of Defense (DoD) for analysis indicated that between April 1, 2018, and March 31, 2019, there were 5,733 Service member victims of an alleged sexual offense, 331 (6%) of whom were "accused" of collateral misconduct. Eighty-one (24%) of the alleged victims accused of collateral misconduct received adverse action for it.

In attempting to analyze the collateral misconduct information provided by DoD, the Committee noted that the Military Services varied—in some cases, widely—in the definitions and methodologies each employed to collect its data for the report. The inconsistencies across the Services rendered the data impossible to meaningfully analyze. The DAC-IPAD submitted a letter to the Secretary of Defense in September 2019 that described its concerns about inconsistencies in the collection of data and provided six recommendations intended to improve

the usefulness of the information concerning instances of collateral misconduct reported to Congress in the future. The recommendations included specific definitions for the terms “collateral misconduct,” “adverse action,” and “suspected of,” among others; a standard methodology for the collection of data; additional relevant data elements; and also the implementation by DoD of standardized internal documentation for sexual offense cases involving Service member victims accused of engaging in collateral misconduct as defined for purposes of the required reporting to Congress.

Finally, Chapter 5 provides an overview of planned military installation site visits. The purpose of these visits is to seek the perspectives of military legal practitioners, commanders, and criminal investigators in the field on issues identified by the Committee for further study regarding the investigatory, pretrial, and court-martial processes for sexual offense cases. The Committee has also decided to encourage members to attend and observe courts-martial involving charges of a penetrative sexual offense. The in-person observation of courts-martial will provide members with a critical firsthand perspective on current military trial practice in each of the Military Services.

Having now completed three years of intensive study and analysis of the critically important and complex issue of sexual assault in the Armed Forces, the DAC-IPAD members would like to express their sincerest appreciation and deepest gratitude to the extremely gracious Service members and civilian presenters as well as to the members of the public who have shared their experiences and perspectives with the Committee over that time. The Committee also offers a special note of thanks to its dedicated Military Service representatives, who attended all of the public meetings, quickly and efficiently guided information requests through their Services, and provided excellent support to the Committee. The Committee members are forever grateful for the service, expertise, and professionalism of these exceptional individuals.

SUMMARY OF FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS

SUMMARY OF DAC-IPAD INVESTIGATIVE CASE REVIEW FINDINGS AND OBSERVATIONS*

Victim Interviews by Military Investigators

- **Finding 44:** Statements of sexual assault victims taken by military criminal investigators often lacked sufficient detail and appropriate follow-up questioning by the investigator. The lack of detail and follow-up questioning in these statements made it difficult to properly assess an appropriate disposition for the case.
- **Assessment:** The Case Review Working Group will continue to explore this issue by reviewing and assessing additional information, including that obtained through site visits.

Investigator Discretion and Case Closure Procedures

- **Finding 45:** Investigators need discretion to tailor an investigation to the specific facts of the complaint, and there needs to be a mechanism early in the investigation for assessing whether it is appropriate for a complaint to be closed.
 - a. Investigation and resolution of sexual assault complaints frequently take longer than the facts necessitate.
 - b. All complaints receive the same level of investigation, and thus the investigation is not tailored to the allegation.
 - c. In some cases, investigations continue irrespective of the victim's preference, even when the victim asserts there was no sexual assault, or when the elements of a sexual assault were not established.
 - d. The Case Review Working Group review of investigative case files leads the Committee to conclude that this practice of untailored investigations is not an effective use of time and resources; it confirms the Committee's previous finding from March 2019, which was based on testimony from military investigators.
- **Assessment:** The Case Review Working Group will continue to explore this issue by reviewing and assessing additional information.

Adverse Administrative Actions Taken Against Subjects Following Sexual Offense Allegations

- **Finding 46:** Immediately following an allegation of sexual assault, the subject's command routinely imposes some form of administrative action, including, but not limited to, suspension of security clearances and administrative holds prohibiting favorable personnel actions such as promotions, educational opportunities, moves, and awards. These actions have a negative personal and professional impact on the subject.

* Findings 1–43 were included in previous DAC-IPAD reports.

- **Assessment:** The Case Review Working Group will continue to explore this issue by reviewing and assessing additional information, including that obtained through site visits.

The Convening Authority's Disposition of Charges and Specifications "in the Interest of Justice and Discipline"

- **Observation 1:** Article 30, UCMJ, directs that commanders and convening authorities determine what disposition should be made of charges "in the interest of justice and discipline." Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found that in cases in which the rationale for the disposition decision was indicated, the following factors were primary: probable cause, sufficiency of the evidence, multiple victims, victim preference, and the declination of other jurisdictions to prosecute. These factors seem to be considerations related to "the interest of justice." We did not observe separate considerations related to "the interest of discipline."

Disposition Guidance

- **Observation 2:** In many cases, the victim's preference as to disposition seems to be given more weight by convening authorities than the consideration of whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial. The Article 33 (non-binding) Disposition Guidance may not give appropriate weight to the sufficiency-of-the-evidence factor.
- **Observation 3:** While judge advocates often provided investigators advice on probable cause for submission of fingerprints and DNA to federal databases, it is unclear what, if any, advice on appropriate disposition factors, including advice on probable cause, judge advocates provided to the initial disposition authority.
- **Observation 4:** The initial disposition authority often did not identify which factors were considered significant in the disposition decision and currently is not required to do so.

Preliminary Hearing Determination of Probable Cause

- **Observation 5:** Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's analysis and conclusions are useful both to special victims' counsel or victims' legal counsel and to defense counsel in advising their clients, as well as to staff judge advocates and convening authorities in rendering advice and making decisions on the charges, probable cause, jurisdiction, and dispositions.
- **Observation 6:** On the basis of its reviews of investigative files and Article 32 preliminary hearing reports, the Case Review Working Group noted that sufficient evidence for a probable cause determination is not always presented at the Article 32 hearing. The Article 32 preliminary hearing officer should be presented with sufficient evidence to support a probable cause determination at that hearing, where it is subject to challenge by the defense.
- **Observation 7:** The lack of a binding probable cause determination by the preliminary hearing officer, which allows the staff judge advocate—without explanation—to come to a different conclusion on probable cause, reduces the usefulness of the Article 32 hearing.

Staff Judge Advocate Pretrial Advice

- **Observation 8:** Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction.
 - a. Article 32 preliminary hearing officers do not consistently include in their reports an evaluation of whether there is sufficient admissible evidence to support a conviction. Such an evaluation would be helpful to subordinate commanders, convening authorities, and staff judge advocates (SJAs).
 - b. SJAs rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice, and they are not required to do so. Including such an analysis as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial would be helpful to convening authorities. (See Observation 9.)
 - c. Article 34 requires SJAs to provide convening authorities a binding determination of probable cause as the standard for referring a case to trial. However, probable cause may not be the appropriate standard for referring a case to trial.
 - d. In many cases, consideration of "the sufficiency of evidence to obtain and sustain a conviction" did not seem to be afforded the same deference as in the Justice Manual (formerly the U.S. Attorneys' Manual).
- **Observation 9:** Currently Article 34, UCMJ, prohibits convening authorities from referring charges to a general court-martial unless the staff judge advocate provides written advice that the specification alleges an offense, there is probable cause to believe that the accused committed the offense, and jurisdiction exists. In addition, the staff judge advocate must provide a written recommendation as to the disposition to be made in the interest of justice and discipline. In the files reviewed, the staff judge advocate's Article 34 pretrial advice to the general court-martial convening authority often consisted of conclusions without explanation. These unexplained conclusions are not useful in assessing factors relevant to a referral determination. The Article 34 pretrial advice could be more helpful to convening authorities if it included detailed explanations of the staff judge advocate's conclusions.

SUMMARY OF DAC-IPAD RECOMMENDATIONS RELATED TO THE DEPARTMENT OF DEFENSE INITIAL SEXUAL ASSAULT VICTIM COLLATERAL MISCONDUCT REPORT**

DAC-IPAD Recommendation 19: The Department of Defense should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Military Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles:

a. Definition of "sexual offense":

- The definition of "sexual offense" for purposes of reporting collateral misconduct should include

** Recommendations 1–18 were included in previous DAC-IPAD reports. The complete list of all of the DAC-IPAD's previous recommendations is available at Appendix E.

- Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
- Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
- Attempts, conspiracies, and solicitations of all of the above.
- The definition of sexual offense should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child); Article 120c, UCMJ (Other sexual misconduct); Article 130, UCMJ (Stalking); or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual offense incident.”¹
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should read as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual offense, and directly related to the incident that formed the basis of the sexual offense allegation. The collateral misconduct must have been discovered as a direct result of the report of the sexual offense and/or the ensuing investigation into the sexual offense.”
- Collateral misconduct includes (but is not limited to) the following situations:
 - The victim was in an unprofessional or adulterous relationship with the accused at the time of the assault.²
 - The victim was drinking underage or using illicit substances at the time of the assault.
 - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
- To ensure consistency across the Military Services, collateral misconduct, for purposes of this report, should *not* include the following situations (the list is not exhaustive):
 - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of a sexual offense.
 - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
 - The victim engaged in misconduct after reporting the sexual offense.
 - The victim had previously engaged in an unprofessional or adulterous relationship with the subject, but had terminated the relationship prior to the assault.

1 Dep’t of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Glossary (March 28, 2013, Incorporating Change 3, May 24, 2017), 117.

2 For purposes of this report, an “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.

- The victim engaged in misconduct that is not close in time to the sexual offense, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
- The victim is suspected of making a false allegation of a sexual offense.
- The victim engaged in misconduct during the reporting or investigation of the sexual offense (such as making false official statements during the course of the investigation).

c. Methodology for identifying sexual offense cases and victims:

- To identify sexual offense cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the military criminal investigative organizations (MCIOs).
- A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.³
- Each Military Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Military Service’s MCIO.

d. Time frame for collection of data:

- The Military Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and should include only closed cases as defined above. For example, the Department’s report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.

e. Definition of “covered individual”:

- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual offense in the case files of a military criminal investigative organization.” This definition should be clarified as follows: “an individual identified in the case files of an MCIO as a victim of a sexual offense while in title 10 status.”
- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

f. Replacement of the term “accused”:

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term “suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.⁴

³ This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group.

⁴ Cf. *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article 31(b) prior to interrogation “is an objective question that is answered by considering all the facts and circumstances at the time of the interview to

- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:
 - The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - Another witness in the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - In the course of the sexual offense investigation, an analysis of the victim's phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- This definition of "suspected of" does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions has occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
 - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

g. Definition of "adverse action":

- The term "adverse action" applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.
- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
 - Letter of reprimand (or Military Service equivalent) or written record of individual counseling in official personnel file;
 - Imposition of nonjudicial punishment;
 - Preferral of charges; or
 - Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Military Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Military Service equivalent), or reclassification.

determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense") (internal citations omitted).

h. Methodology for counting “number of instances”:

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse action, under the most serious collateral misconduct identified in the adverse action.
- For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

DAC-IPAD Recommendation 20: Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.

DAC-IPAD Recommendation 21: For purposes of the third statistical data element required by section 547, the Department of Defense should report not only the percentage of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are suspected of collateral misconduct and then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim’s receiving an adverse action for collateral misconduct once they are suspected of such misconduct.

DAC-IPAD Recommendation 22: The Department of Defense should include in its report data on the number of collateral offenses that victims were suspected of by type of offense (using the methodology specified in section h of Recommendation 19) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.

DAC-IPAD Recommendation 23: To facilitate production of the future collateral misconduct reports required by section 547, the Military Services should employ standardized internal documentation of sexual offense cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.

INTRODUCTION

I. COMMITTEE ESTABLISHMENT AND MISSION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) was established by the Secretary of Defense in February 2016 pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA), as amended.⁵ The statutory mission of the DAC-IPAD is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.⁶ In order to provide that advice, the Committee is directed to review, on an ongoing basis, cases involving allegations of sexual misconduct.⁷

The swearing-in of 16 DAC-IPAD members appointed by the Secretary of Defense occurred at the Committee's first meeting on January 19, 2017, in Arlington, Virginia. The DAC-IPAD is required by its authorizing legislation to submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives, no later than March 30 of each year, describing the results of its activities.⁸

II. COMPOSITION OF THE COMMITTEE

The Committee's authorizing legislation required the Secretary of Defense to select Committee members with experience in investigating, prosecuting, and defending against allegations of sexual offenses.⁹ In January 2017 the Secretary of Defense appointed to the DAC-IPAD 16 members, including its Chair, Martha S. Bashford, a distinguished 40-year prosecutor and Chief of the Sex Crimes Unit for the New York County District Attorney's Office.¹⁰ The members represent a wide range of perspectives and experience related to sexual offenses both within and outside the military.¹¹ They have spent decades in their fields of expertise, which include

- Civilian sexual offense investigation and forensics
- Civilian and military sexual offense prosecution
- Civilian and military sexual offense defense
- Federal and state court systems

5 Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [FY15 NDAA], § 546, 128 Stat. 3292 (2014). In accordance with the authorizing statute and the Federal Advisory Committee Act of 1972 (FACA), the Department of Defense (DoD) filed the charter for the DAC-IPAD with the General Services Administration on February 18, 2016. Note that the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 [FY20 NDAA], § 535, Enacted S. 1790 (2019), amended FY15 NDAA § 546 to extend the term of the Committee from 5 to 10 years.

6 FY15 NDAA, *supra* note 5, § 546(c)(1).

7 *Id.* at § 546(c)(2).

8 *Id.* at § 546(d).

9 *Id.* at § 546(b).

10 Keith Harrison, Associate Dean and Professor of Law, Savannah Law School, and a beloved member of the DAC-IPAD, passed away unexpectedly in 2018. Dean Harrison's position on the DAC-IPAD has not been filled since his death.

11 See Appendix C for a list and short biographies of the DAC-IPAD members.

- Military command
- Criminology
- Academic disciplines and legal policy
- Crime victims' rights

Four members of the Committee retired from the military and two more served previously as judge advocates. Three of the members are sitting federal judges.

III. WORKING GROUPS

In 2017 the DAC-IPAD established three working groups to support its mission: the Case Review Working Group, the Data Working Group, and the Policy Working Group.

The mission of the Case Review Working Group (CRWG) is to make recommendations to the Committee based on its review of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct. The Case Review Working Group is chaired by retired Brigadier General James R. Schwenk, and comprises six additional members: Ms. Martha S. Bashford, Ms. Kathleen B. Cannon, Ms. Jennifer Gentile Long, Mr. James P. Markey, Dr. Cassia C. Spohn, and Ms. Meghan A. Tokash.

The mission of the Data Working Group (DWG) is to make recommendations to the Committee based on its collection and analysis of case adjudication data from completed cases involving allegations of penetrative (rape, forcible sodomy, and sexual assault) and contact (aggravated sexual contact, abusive sexual contact) sex offenses for which charges were preferred. The Data Working Group is chaired by Dr. Cassia C. Spohn, and comprises two additional members: Mr. James P. Markey and retired Chief Master Sergeant of the Air Force Rodney J. McKinley.

Finally, the mission of the Policy Working Group (PWG) is to make recommendations to the Committee based on its review of Department of Defense (DoD) policies, Military Department policies, and Uniform Code of Military Justice (UCMJ) provisions applicable to allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct. The Policy Working Group was initially chaired by Chief Rodney J. McKinley and comprised four additional members: retired Army Major General Marcia M. Anderson, Ms. Margaret A. Garvin, Dr. Jenifer Markowitz, and retired Marine Corps Brigadier General James R. Schwenk. In the fall of 2019, Chief McKinley and General Anderson stepped down from the working group, while Ms. Kathleen B. Cannon joined and took over as chair of the group, and the Honorable Paul W. Grimm, Mr. A. J. Kramer, and Ms. Jennifer G. Long also joined the working group.

IV. PREVIOUS COMMITTEE REPORTS

A. Initial Report – March 2017

The DAC-IPAD held its first meeting on January 19, 2017—approximately two months before the Committee's statutory due date for its annual report, March 30. In this first report, the Committee reflected on its initial discussions, emphasizing the need for and importance of accurate, relevant data so that members can fully understand the issues and make sound policy recommendations to the Secretary of Defense. The members expressed

interest in analyzing key data points such as the impact of rank, race, and sexual orientation on charging decisions, conviction rates, and sentencing and agreed to continue the important data collection project developed by its predecessor panel, the Judicial Proceedings Since Fiscal Year 2012 Panel (Judicial Proceedings Panel or JPP).¹² The Committee outlined the development of its strategic plan in its initial report, which was released on March 30, 2017.¹³

B. Second Annual Report – March 2018

The Committee held six public meetings in the 12 months preceding the release of its second annual report on March 30, 2018. During that time, the Committee received informational briefings on the mechanics of sexual offense investigation and prosecution in the military, the sexual offense case adjudication statistics collected and reported on by the JPP, and the sexual offense data collected and published annually by DoD's Sexual Assault Prevention and Response Office (SAPRO).¹⁴ The Committee studied the topics of expedited transfers and of the legal and sexual assault training received by convening authorities.¹⁵

In its second annual report, the Committee made 11 findings and 4 recommendations related to the Department's expedited transfer policy.¹⁶ The Committee's overall assessment was that the expedited transfer policy for sexual offense victims is an important sexual offense response initiative offered by the military and it strongly recommended the continuation and further improvement of the policy. It also recommended expanding the expedited transfer policy to include sexual offense victims who are active duty Service members covered by the Family Advocacy Program.

Congress followed and expanded on this recommendation when it enacted a provision in the National Defense Authorization Act for Fiscal Year 2019 requiring the Secretary of Defense to extend the expedited transfer policy to Service members who are victims of sexual offenses regardless of whether the case is handled by the Sexual Assault Prevention and Response Program or the Family Advocacy Program. The law also extends the expedited transfer policy to members who are victims of physical domestic violence committed by the spouse or intimate partner of the member regardless of whether that spouse or intimate partner is a member of the Armed Forces.¹⁷ In addition, the law extends the policy to include Service members whose dependent is sexually assaulted by a Service member not related to the victim.¹⁸

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- 12 *Transcript of DAC-IPAD Public Meeting* 238 (Jan. 19, 2017) (comment by the Honorable Reggie B. Walton, Committee member); 238 (comment by Ms. Kathleen B. Cannon, Committee member); 225–26 (comment by Major General (Ret.) Marcia M. Anderson, Committee member); 230–31 (comment by Ms. Martha S. Bashford, Committee chair); 231 (comment by Dean Keith M. Harrison, Committee member). All transcripts of the DAC-IPAD Public Meetings are available at the DAC-IPAD website: <https://dacipad.whs.mil/>.
 - 13 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES INITIAL REPORT (March 2017) [DAC-IPAD INITIAL REPORT], available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Initial_Report_20170330_Final_Web.pdf.
 - 14 See generally *Transcript of DAC-IPAD Public Meeting* (Apr. 28, 2017); *Transcript of DAC-IPAD Public Meeting* (July 21, 2017).
 - 15 See generally *Transcript of DAC-IPAD Public Meeting* (Oct. 19, 2017); *Transcript of DAC-IPAD Public Meeting* (Oct. 20, 2017).
 - 16 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES ANNUAL REPORT (March 2018) [DAC-IPAD SECOND ANNUAL REPORT], available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_02_Final_20180330_Web_Amended.pdf.
 - 17 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 [FY19 NDAA], § 536, 132 Stat. 1636 (2018).
 - 18 *Id.*

C. Third Annual Report – March 2019

Between April 2018 and February 2019, prior to the release of its third annual report, the Committee held six public meetings. During this time, the Committee heard from 21 presenters and three members of the public on topics including sexual offense data collection and management, sexual offense investigation practices, and the effects of sexual offense investigations on accused Service members and victims. In addition, the Committee's three working groups held 13 preparatory sessions during which members heard testimony from more than 50 presenters, including military prosecutors, defense counsel, investigators, victims' counsel, program managers, victim services personnel, and an assistant United States Attorney on topics including sexual offense investigation practices, the DoD expedited transfer policy, and sexual offense prosecution standards in civilian and military jurisdictions.

In its third annual report, the Committee made 33 findings and 13 recommendations in the areas of commanders' disposition decisions with respect to penetrative sexual offense complaints, documentation of command disposition decisions, unfounded determinations, subject fingerprint collection and submission to federal criminal databases, Article 140a of the UCMJ regarding military justice data collection and management,¹⁹ and the DoD expedited transfer policy.²⁰ In addition, the report discussed the outcome of the Committee members' review of a random sample of 164 of the 2,055 penetrative sexual offense investigative case files closed in FY17 involving Service member subjects and adult victims. The members of the CRWG recorded descriptive data from each case and assessed the reasonableness of the command disposition decisions based on the evidence available in the files and the members' professional experience.

D. Court-Martial Adjudication Data Report – November 2019

In November 2019 the Committee released a stand-alone court-martial data report, which described its annual collection and analysis of military case adjudication statistical data for adult-victim sexual offense cases in which charges were preferred for penetrative or contact sexual offense offenses and in which final action on the case is complete.²¹ The Committee collected and recorded data from case documents, including charge sheets, Article 32 preliminary hearing officer's reports, and Results of Trial forms, in a total of 574 cases completed in fiscal year 2018, 691 cases completed in fiscal year 2017, 769 cases completed in fiscal year 2016, and 780 cases completed in fiscal year 2015. The report and a detailed appendix provided case characteristics, disposition outcomes, and adjudication outcomes for these cases, including sex, Military Service branch, and pay grade of the subject; relationship of the victim to the subject; nature of the charges; forum; and case outcome. The report also included a multivariate statistical analysis prepared by a professional criminologist that identified patterns in the data. The Committee made no findings or recommendations in the report; its intent was to provide policymakers with the most up-to-date,

19 The DAC-IPAD's analysis and recommendations regarding implementation of Article 140a of the Uniform Code of Military Justice were initially submitted to the Secretary of Defense in a letter from the DAC-IPAD Chair, Ms. Martha S. Bashford. *See* Letter from DAC-IPAD Chair Martha S. Bashford to the Secretary of Defense Regarding Article 140a, Uniform Code of Military Justice (Sept. 13, 2018) [2018 DAC-IPAD Letter to Secretary of Defense Regarding Article 140a], *available at* https://dacipad.whs.mil/images/Public/08-Reports/03_DACIPAD_InterimReport_Article140a_20180913_Final.pdf.

20 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES THIRD ANNUAL REPORT (March 2019) [DAC-IPAD THIRD ANNUAL REPORT], *available at* https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

21 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES COURT-MARTIAL ADJUDICATION DATA REPORT (Nov. 2019) [DAC-IPAD 2019 DATA REPORT], *available at* https://dacipad.whs.mil/images/Public/08-Reports/05_DACIPAD_Data_Report_20191125_Final_Web.pdf.

accurate, and reliable information available on the outcomes of adult sexual offense allegations in which charges were preferred against a military subject under the UCMJ.

V. FOURTH ANNUAL REPORT – MARCH 2020

This fourth annual report of the DAC-IPAD describes the Committee's activities and the topics examined over the previous 12 months. The Committee held five public meetings between March 2019 and February 2020 during which it heard from over 20 presenters and one member of the public on topics including sexual offense victim collateral misconduct, the conviction and acquittal rates for sexual offenses in the military, the military case adjudication process, and victim declination to participate in the military justice process.²² The Committee makes three findings and five recommendations in this report related to its investigative case file reviews of penetrative sexual offense allegations and its analysis of the Department of Defense's initial report on victim collateral misconduct.

The first chapter of this report focuses on the Committee's initial findings and observations based on the CRWG's review of over 2,000 penetrative sexual offense investigative case files closed in FY17 involving Service member subjects and adult victims. The chapter also discusses the Committee's plan to issue a stand-alone report in 2020 containing a complete set of data developed during this review and both bivariate and multivariate analyses of that data by the DAC-IPAD's professional criminologist.

Chapter 2 discusses the PWG's work to date and its way ahead on issues relating to Article 32 preliminary hearings, Article 33 disposition guidance for judge advocates and commanders, and Article 34 staff judge advocate pretrial advice for convening authorities. These issues were recommended to the Committee for review both by its predecessor, the Judicial Proceedings Panel, and by the Department of Defense General Counsel. The Committee Chair referred the issues to the PWG for review.

Chapter 3 discusses highlights from the Committee's November 2019 case adjudication data report, and provides an update on the case adjudication database project.

Chapter 4 provides the Committee's analysis and recommendations regarding the Department of Defense's collateral misconduct study, as required by section 547 of the FY19 NDAA, which directs the Secretary of Defense to work with the DAC-IPAD in submitting to the congressional defense committees a biennial report on the number of instances of collateral misconduct committed by alleged sexual offense victims. The Committee's recommendations were initially submitted to the Secretary of Defense in a letter dated September 16, 2019.²³

Finally, Chapter 5 provides an overview of the DAC-IPAD's site visit plan and the DAC-IPAD members' plan to attend and observe sexual offense courts-martial.

²² See Appendix I for a complete listing of DAC-IPAD meetings, preparatory sessions, and presenters.

²³ Letter from Ms. Martha S. Bashford, Chair, DAC-IPAD, to the Secretary of Defense Regarding Collateral Misconduct Study (Sept. 16, 2019), *available at* https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Letter_DoD_Victim_Collateral_Misconduct_20190916.pdf; *see also* Appendix G.

CHAPTER 1. FINDINGS AND OBSERVATIONS BASED ON THE REVIEW OF MCIO PENETRATIVE SEXUAL OFFENSE INVESTIGATIVE CASE FILES CLOSED IN FISCAL YEAR 2017

I. INTRODUCTION

In the Committee's authorizing legislation, Congress directed the DAC-IPAD to review, on an ongoing basis, cases involving allegations of sexual misconduct, including allegations of rape, forcible sodomy, and sexual assault, involving members of the Armed Forces, in order to advise the Secretary of Defense regarding the handling of such cases in the military justice system.²⁴ To comply with this mandate, in 2017 the DAC-IPAD formed a Case Review Working Group (CRWG) composed of seven Committee members, and tasked it to review individual cases involving sexual offenses.²⁵

As described in the DAC-IPAD's March 2019 Third Annual Report, in the absence of statutory or other guidance upon which to rely for its case reviews, the Committee chose to focus its attention on the investigative stage—the period from the initial report of an alleged sexual offense to military law enforcement officials through the initial disposition decision. The initial disposition decision may be to prefer charges for the offense, thereby initiating a criminal justice proceeding, or not to prefer charges and instead take some type of administrative action, or to take no action at all.²⁶ Further, in order to focus on the most serious offenses, the Committee limited its review to penetrative sexual offenses only.²⁷ The Committee then requested and received from the military criminal investigative organizations (MCIOs) of each of the Military Services, including the Coast Guard, all investigative case files closed in fiscal year 2017 that involved an allegation by an adult victim of a penetrative sexual offense against a Service member.²⁸

In its March 2019 Third Annual Report, the DAC-IPAD set forth the objectives, methodology, and process on which the Case Review Working Group would rely to complete its review of the more than 2,000 penetrative sexual offense investigative case files closed in fiscal year 2017.²⁹ The Committee identified the following objectives for its groundbreaking case review project:

- Assess the reasonableness of case disposition decisions in the military;
- Compile descriptive case data regarding the facts of the cases reviewed;

24 FY15 NDAA, *supra* note 5, § 546(c)(2) (subsequent amendments not included).

25 DAC-IPAD SECOND ANNUAL REPORT, *supra* note 16, at 15.

26 DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 21.

27 *Id.* For purposes of the case review project, “penetrative sexual offense” is defined as rape and sexual assault, in violation of Article 120, UCMJ; forcible sodomy, in violation of Article 125, UCMJ; and any attempt to commit such offenses, in violation of Article 80, UCMJ; *see also* DAC-IPAD SECOND ANNUAL REPORT, *supra* note 16, at 16–17.

28 DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 21–22.

29 *Id.* at 22–26, 29. “During their examination of the available documents from case files and the DAC-IPAD’s sexual assault case adjudication database, reviewers recorded relevant factual and evidentiary details, including their independent assessment of any comments regarding the investigation of the case and its disposition. To guide the reviews, the Committee developed a 21-page standardized data collection form with 231 data elements that reviewers filled in by hand with data and comments for each case reviewed.” *Id.* at 26; *see also id.* at Appendix F, *Investigative Case Review Data Form*, for the complete list of items documented for every MCIO case file reviewed by the Committee and staff.

- Examine investigative files for issues involving the discretion afforded to military investigators and the duration of investigations;
- Review practices for documenting a commander's disposition decision in penetrative sexual offense cases in which a Service member is the subject under investigation;
- Review MCIO practices for submitting fingerprints and case disposition information to federal databases and for documenting cases as unfounded—that is, false or baseless; and
- Examine predictive factors for case outcomes.³⁰

The Committee issued its initial assessments, findings, and recommendations in the March 2019 Third Annual Report. The report is based on the CRWG members' review of 164 penetrative sexual offense investigations randomly selected from the total of 2,055 penetrative sexual offense investigations closed in fiscal year 2017, as well as the testimony of civilian and military investigators, military prosecutors, military defense counsel, and numerous other subject matter experts. The Committee made 31 findings and 13 recommendations related to the reasonableness of commanders' disposition decisions, disposition decisions in cases involving penetrative sexual offense complaints, victim participation in the military justice process, investigator discretion, documentation of command disposition decisions, determinations of cases as unfounded, and subject fingerprint collection and submission to federal criminal databases.

The majority of penetrative sexual offenses for which the MCIOs closed investigations in fiscal year 2017 did not lead to charges being preferred against the subject.³¹ As a result, the CRWG members sought to evaluate whether commanders and convening authorities were making appropriate decisions in the cases with respect to initiating or declining prosecution for the penetrative sexual offense.

After considerable discussion about how to evaluate such a subjective question, the CRWG members determined that each reviewer would draw on their individual expertise to determine whether, based on the evidence provided in the investigative case files and other available pretrial documents, the disposition decisions made by the commanders and convening authorities in each case were "reasonable." To place a check on potential variances across reviewers, the CRWG assigned at least two reviewers to evaluate each case—three if the first two reviewers reached opposite conclusions in their assessments.

The CRWG found the commander's initial disposition decision to be reasonable in 155 of 164 cases (95%).³² In 42 of the 164 cases (26%), the command preferred charges for a penetrative sexual offense; in the remaining 122 cases (74%), the command did not prefer charges against the subject for the penetrative sexual offense.³³

³⁰ *Id.* at 22.

³¹ *Id.* at 24.

³² *Id.* at 31.

³³ *Id.* at 30. Specifically, the Committee found the command's decision to prefer charges reasonable in 40 of 42 cases (95%) and it found the command's decision not to prefer charges reasonable in 115 of 122 cases (94%). *Id.*

II. CURRENT STATUS OF CASE REVIEW PROJECT

In the 12 months following publication of the March 2019 Third Annual Report, CRWG members and staff continued to review investigative case files. As a result, the CRWG reported to the Committee that after two years of continuous effort, the CRWG had completed its review of all 2,055 penetrative sexual offense investigative case files closed in fiscal year 2017. As of February 14, 2020, CRWG members had reviewed a total of 322 of the cases, including those in the initial random sample; CRWG staff attorneys reviewed all 2,055 cases.

After the case reviews were completed, the data entry and quality assurance process for the more than 200 data elements recorded for each case continued. At the time of publication of this report, the CRWG staff had finished entering the data from all of the cases reviewed. The CRWG intends to present its comprehensive statistical data report for the case review project, including the staff criminologist's bivariate and multivariate analysis, to the full Committee when complete. The Committee will deliberate upon the CRWG's data and analysis and publish a stand-alone case review data report. The report will

- Provide descriptive data by Military Service collected from penetrative sexual offense investigations closed in fiscal year 2017;
- Provide statistical analyses of case factors that may be predictive of whether charges are preferred or no action is taken on a penetrative sexual offense investigation;
- Provide statistical analyses of case factors for preferred charges that result in a finding of not guilty of the penetrative sexual offense charge; and
- Provide additional subjective determinations, based on the Committee members' expertise, on command and convening authority decisions.³⁴

The Committee notes that data alone do not capture all of the valuable information gleaned from the CRWG's completion of its in-depth review of the investigative case files. Members of the CRWG, which is composed of civilian, military, federal, and state prosecutors, defense attorneys, investigators, and criminologists, presented to the DAC-IPAD their overall impressions of their review of military investigative case files and related case documents from the perspective of their areas of expertise.

After deliberating on the CRWG's work, the DAC-IPAD made three findings and nine observations related to the investigative case review project. The DAC-IPAD's *findings* are factual determinations that the Committee directed the CRWG to continue to assess in order to assist the Committee in formulating recommendations to address the issues raised by the findings. The DAC-IPAD's *observations* describe issues routinely reflected in the case files that the Committee directed the Policy Working Group to further examine in order to assist the Committee in developing findings and recommendations, as appropriate, to address the topics identified by the observations. Both the findings and observations will assist the Committee in its preparation for upcoming military installation site visits, and merit further study.

³⁴ *Transcript of DAC-IPAD Public Meeting 37–38* (Nov. 15, 2019) (comments of Brigadier General (Ret.) James R. Schwenk, U.S. Marine Corps, Committee member).

III. FINDINGS BASED ON THE REVIEW OF MCIO PENETRATIVE SEXUAL OFFENSE INVESTIGATIVE CASE FILES CLOSED IN FISCAL YEAR 2017

A. Victim Interviews by MCIO Investigators

1. Background

The investigative case files reviewed by the CRWG members each contained a complete Report of Investigation (ROI), which included, in those cases in which a victim agreed to an MCIO interview, an investigator's summary of the victim's statement. Some files contained copies of sworn written statements that the victim prepared or signed in addition to the investigator's summary, and most ROIs documented that investigators made digital recordings of both the victim's interview and the subject's interrogation. However, in the majority of cases the MCIOs did not provide either a copy of the digital recordings or transcripts of the victim's interview or subject's interrogation for CRWG review. In recognition of time limitations in reviewing more than 2,000 cases, the CRWG elected, as a general matter, not to additionally request or review the recordings. Instead, the CRWG decided to rely on the investigators' including all key information about the cases in their summaries of the victims' statements and subjects' interrogations.

As part of their review of the investigative files and determination of the reasonableness of the command's disposition decision with respect to the allegation of a penetrative sexual offense, reviewers determined in each case whether the victim's statements to law enforcement, on their own, established probable cause to believe that the subject committed a penetrative sexual offense. In about half of the cases reviewed by members that resulted in no action against the subject for the penetrative sexual offense, the reviewer determined that the victim's statements to law enforcement authorities were insufficient to establish probable cause to believe that the subject committed the offense.

2. Discussion

In the cases they reviewed, CRWG members often found that investigators' summaries of the victims' statements were very general and lacked sufficient details about the offense.³⁵ Further, investigators frequently did not elicit sufficient details about the incident from the victim to adequately describe the context of the victim's actions and statements to the subject and to other witnesses.³⁶ These accounts—in contrast to civilian police reports, which often include detailed summaries of the victim's factual statements to aid in assessing the prosecutorial merit of the complaint—frequently gave reviewers an incomplete picture of the alleged penetrative sexual offense and the circumstances surrounding it.³⁷

In the absence of sufficient details obtained by investigators about the penetrative sexual offense allegation in the victim's statement, reviewers found it difficult to determine whether there was probable cause to believe that a crime occurred and to evaluate the prosecutorial merit of a case, including whether there was sufficient evidence to prefer charges.³⁸ The lack of detail included in investigators' summaries of victims' statements also impaired the

35 See *CRWG Proposed Findings, Observations, and Recommendations 1* [CRWG Proposals] attached at end of *Meeting and Reference Materials, Public Meeting, November 15, 2019*, available at https://dacipad.whs.mil/images/Public/10-Reading_Room/02_DACIPAD_Mtg_Materials/DACIPAD_Meeting_Materials_20191115_Final.pdf.

36 *Id.*

37 *Id.*

38 *Id.*; see also *Transcript of DAC-IPAD Public Meeting 42–43* (Nov. 15, 2019) (comment of Mr. James P. Markey, Committee member).

reviewers' ability to determine whether it was necessary to take additional investigative steps or to conduct follow-up interviews of the victim.³⁹

For example, despite the evolving nature of investigations, reviewers did not see any indication of follow-up interviews with the victim in most cases—even those in which the subject, a witness, or other evidence contradicted essential facts in the victim's statement.⁴⁰ In the occasional case in which the MCIO did seek to follow up on the initial victim interview, the victim had usually obtained counsel by the time of the subsequent interview.⁴¹ While some victims' counsel agreed to the follow-up interview, other counsel requested that the MCIO send written questions for the victim to answer, which from a law enforcement perspective is often a less-than-ideal method for developing information.⁴²

Investigative shortcomings in documenting victim statements and in obtaining details of the incident from the victim's interview could hinder the initial disposition authority's ability to make well-informed decisions as to what action, if any, to take on an allegation of a penetrative sexual offense.⁴³ Follow-up interviews that provide an opportunity for victims to respond to some of the information developed after the initial interview could resolve questions about conflicts in the evidence.

Digital recordings of the victim's interview, which were not reviewed by the CRWG, may constitute an important source of information for decision-making authorities. It is unclear, however, whether decision makers routinely have access to the recordings. It is also unclear whether the recordings contain information not documented in the investigators' summaries that would be material to a more informed initial disposition decision.

The CRWG's review of investigative files did not include an assessment of MCIO training, experience, or policy directives applicable to sexual offense investigations,⁴⁴ although the Committee is aware that previous sexual offense advisory committees have examined how the MCIOs conduct investigations of sexual offenses.⁴⁵ Most recently, the Judicial Proceedings Panel (JPP) specifically recommended that "[t]he Secretary of Defense identify and remove barriers to thorough questioning of a sexual offense victim by the MCIOs or other law enforcement agencies."⁴⁶

39 See generally *CRWG Proposals*, *supra* note 35 at 1; see also *Transcript of DAC-IPAD Public Meeting* 43–44 (Nov. 15, 2019) (comment of Mr. Markey).

40 See *Transcript of DAC-IPAD Public Meeting* 42–43 (Nov. 15, 2019) (comment of Mr. Markey).

41 *Id.* at 44–45 (comment of Ms. Martha S. Bashford, Committee chair).

42 *Id.* at 45; see also *Transcript of DAC-IPAD Public Meeting* (Feb. 14, 2020) (Committee deliberations).

43 See *Transcript of DAC-IPAD Public Meeting* 42–43 (Nov. 15, 2019) (comment of Mr. Markey).

44 *Id.* at 46.

45 See REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 117–25, 153–55, 165 (June 2014) [RSP REPORT], available at https://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf; see also JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (Sept. 2017) [JPP REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY], available at https://jpp.whs.mil/Public/docs/08-Panel_Reports/08_JPP_Report_Investigations_Final_20170907.pdf.

46 JPP REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY, *supra* note 45, at 6. The JPP Report listed the following considerations in support of its recommendation:

- Current MCIO policies and practices discourage or prohibit investigators from asking any question that could be perceived as “confrontational” during either the initial or the follow-up interview of a sexual assault victim, even when, in their professional judgment, such questions are vital to address conflicting statements given by the victim or other evidence contradicting the victim's account.
- MCIO policies and/or practices require a supervisor's approval before an investigator can conduct a subsequent interview of a sexual assault victim, which is perceived by investigators as a barrier to questioning a victim after the initial interview.
- Some SVCs/VLCs who attend investigative interviews limit the scope of questioning, and sometimes object to investigators' request for any follow-up interviews of the victim.

Finding 44: Statements of sexual assault victims taken by military criminal investigators often lacked sufficient detail and appropriate follow-up questioning by the investigator. The lack of detail and follow-up questioning in these statements made it difficult to properly assess an appropriate disposition for the case.

Assessment: The Case Review Working Group will continue to explore this issue by reviewing and assessing additional information, including that obtained through site visits.

B. Investigator Discretion and Case Closure Procedures

1. Background

In its March 2019 Third Annual Report, the DAC-IPAD examined the degree of discretion that criminal investigators exercise over individual investigations into allegations of penetrative sexual offenses. The DAC-IPAD based its examination on testimony received from military and civilian investigators and its initial assessment of 164 penetrative sexual offense investigation case files reviewed to that point.⁴⁷ At that time, the Committee expressed concerns about investigators' lack of discretion in investigations of sexual offenses. Investigators testified that they feel obligated to perform the same series of tasks regardless of the facts of a particular case and that they have little discretion to determine which specific investigative actions would provide the most value.⁴⁸

2. Discussion

After publication of the Committee's March 2019 Third Annual Report describing its review of the initial random sample of 164 penetrative sexual offense investigative files, CRWG members examined an additional 158 investigative files. This further review affirmed the Committee's previous concern regarding lack of investigator discretion with respect to these allegations. Most case files revealed that investigators did not have discretion to pursue investigative steps that they deemed appropriate based on the facts of a particular allegation. Investigators need the ability to tailor the scope of an investigation to the facts of that case, including the ability to close investigations in a timely and appropriate fashion.⁴⁹

Investigators are taking specific investigative steps not because they believe that the actions are warranted by the facts; instead, they are following a standard checklist and feel that they are required to do so. In contrast, while civilian system investigators also use checklists as a guide, they pursue only the actions relevant in the specific case.⁵⁰

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- As a result of the barriers to thorough questioning by MCIOs, investigators lose rapport-building opportunities, as well as important details about the reported offense, since details about an incident are commonly gathered over time after a traumatic event such as sexual assault.

Id.

⁴⁷ DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 41–42.

⁴⁸ *Id.* at 42 (Finding 13).

⁴⁹ See CRWG Proposals, *supra* note 35, at 2–3.

⁵⁰ See Transcript of DAC-IPAD Public Meeting 55–56 (Nov. 15, 2019) (comment of Ms. Bashford) (“We did not ever have the impression that the investigators thought . . . taking pictures of a . . . house sometimes seven, eight, nine years later was very terribly [valuable]. And we saw many cases where the current occupants wouldn’t let them in. And so, there’s pictures of the front door of the house and the outside of the house.”); see also *id.* at 54–55 (member deliberations).

Lack of discretion results in wasted time and resources.⁵¹ For example, one reviewer described a particular case in which a period of years elapsed between the alleged incident and the victim's report to law enforcement. The reviewer explained that nearly half of one investigative file consisted of very detailed photos of the crime scene, which was, by then, three and a half years old, with new residents living in the facility.⁵² While there may be situations in which photographs taken following a lengthy delay between the incident and reporting to law enforcement are useful, investigator discretion is necessary in order to determine under what circumstances such steps will meaningfully contribute to the investigation.

The investigative case files reviewed also revealed that investigators routinely conducted "canvass" interviews, which involved attempting to interview neighbors and co-workers of the victim and the subject to determine whether they have any information relevant to the investigation. The Committee found this practice as conducted by the MCIOs to be problematic because, in addition to being very time-consuming, it typically did not advance the investigation or lead to admissible evidence. Instead, the practice unnecessarily broadcasts the pending sexual offense investigation to other Service members, friends, and colleagues.⁵³ Moreover, the canvass interviews documented in these investigative files often went well beyond the reasonable range of questioning witnesses and extended to questioning the victim and subject's co-workers and neighbors about whether they were "nice" and "well-behaved."⁵⁴

The Committee is particularly concerned when a third party reports a suspected penetrative sexual offense that the alleged victim explains to the MCIO investigator was a consensual act or is an allegation that they feel strongly the MCIO should not pursue. Because the MCIO received a report of the incident, the investigator currently has no option other than to open and complete a full investigation, which may last many months, even contrary to the victim's preference or to the needs of the investigation.

Finding 45: Investigators need discretion to tailor an investigation to the specific facts of the complaint, and there needs to be a mechanism early in the investigation for assessing whether it is appropriate for a complaint to be closed.

- a. Investigation and resolution of sexual assault complaints frequently take longer than the facts necessitate.
- b. All complaints receive the same level of investigation, and thus the investigation is not tailored to the allegation.
- c. In some cases, investigations continue irrespective of the victim's preference, even when the victim asserts there was no sexual assault, or when the elements of a sexual assault were not established.
- d. The Case Review Working Group review of investigative case files leads the Committee to conclude that this practice of untailored investigations is not an effective use of time and resources; it confirms the Committee's previous finding from March 2019, which was based on testimony from military investigators.

51 See generally *CRWG Proposals*, *supra* note 35, at 2–3; see also *Transcript of DAC-IPAD Public Meeting* 50–51 (Nov. 15, 2019) (comments of Ms. Meghan A. Tokash, Committee member).

52 *Transcript of DAC-IPAD Public Meeting* 50 (Nov. 15, 2019) (comment of Ms. Tokash).

53 *Id.* at 53 (comment of Ms. Bashford).

54 *Id.* at 56 (comment of Mr. Markey).

Assessment: The Case Review Working Group will continue to explore this issue by reviewing and assessing additional information.

C. Command Adverse Administrative Actions Against Subjects of Penetrative Sexual Offense Allegations

1. Background

Adverse administrative actions or legal holds are placed on the subject of a penetrative sexual offense investigation in most cases as soon as an allegation is made. While the timing and extent of the administrative actions vary somewhat among the Military Services, the actions can include a prohibition on reassignments, deployments, promotions, awards, educational opportunities, and separation from service; placement in a “do-not-arm” status, removal from primary jobs, and temporary placement into miscellaneous or menial jobs that often lack professional or leadership responsibility; and suspension of security clearances. Once imposed, these actions often last until final disposition of the penetrative sexual offense allegation, which can take a significant amount of time.⁵⁵ These actions may occur before any assessment or investigation of the complaint begins.

Ms. Kathleen Coyne, a Marine Corps Highly Qualified Expert (HQE) who provides training, advice, and consultation for Marine Corps defense counsel, expressed to the Committee her deep concern about the routine imposition of immediate adverse administrative actions.⁵⁶ Ms. Coyne emphasized that in the military, a sex crime accusation alone causes irreparable harm to a Service member.⁵⁷ She explained that at a minimum, Service member subjects are put on a legal hold for months—frequently for more than six months.⁵⁸

The Committee also heard from three retired officers who were accused of a sexual offense while in service.⁵⁹ These individuals each reported that from the time of the allegation forward they were subjected to adverse administrative actions, which had profound impacts on their prospects for promotion, their daily duties, and, ultimately, their ability to continue serving, even when no charges resulted.⁶⁰ One Service member recounted that despite a determination that there was no probable cause to believe he had committed a sexual offense, he faced insurmountable obstacles to continuing his service, and ultimately decided to retire.⁶¹ On the same day he submitted his retirement request, the Service member told the Committee, he successfully brought suit for defamation against his accuser. The jury ultimately awarded him \$8.4 million in damages, “an extraordinary amount for a defamation case between two private citizens. The jury ordered [the woman who made the allegation] to

55 See *Transcript of CRWG Preparatory Session* 9 119–280 (March 6, 2018), on file at the DAC-IPAD offices.

56 See *Transcript of DAC-IPAD Public Meeting* 10–13 (Oct. 19, 2018) (testimony of Ms. Kathleen Coyne, U.S. Marine Corps Defense Highly Qualified Expert).

57 *Id.* at 10; see also RSP REPORT, *supra* note 45, at 8 (“An allegation of sexual assault against a Service member has profound impacts even absent a prosecution and conviction.”)

58 *Transcript of DAC-IPAD Public Meeting* 10 (Oct. 19, 2018) (testimony of Ms. Coyne).

59 *Transcript of DAC-IPAD Public Meeting* 7–125 (Jan. 25, 2019).

60 See, e.g., *id.* at 13–17 (testimony of Lieutenant Colonel (Ret.) Joseph “Jay” Morse, U.S. Army).

61 *Id.* at 43–48 (testimony of Colonel (Ret.) David “Wil” Riggins, U.S. Army).

pay \$3.4 million in compensatory damages for injury to his reputation and lost wages, and \$5 million in punitive damages ‘to make sure nothing like this will ever happen again.’”⁶²

2. Discussion

The Committee determined, as a result of its review of investigative files, that many allegations of penetrative sexual offenses against Service members reasonably result in the initial disposition authority taking no action against the subject of the investigation for the penetrative offense. However, the reviewers confirmed that upon receipt of an allegation of penetrative sexual offense—prior to any analysis of its merit or any investigative activity—the command quickly took adverse administrative actions against the subject.⁶³ Because adverse administrative actions often have such long-term and negative impacts on a subject, the Committee is concerned that imposing them at the time an allegation is made is premature.⁶⁴

The military’s practice of subjecting service members to early adverse actions stands in marked contrast to what is customary in state and federal jurisdictions. If an investigation is ongoing but there is not yet a formal complaint or no legal process has yet begun, a person’s life is not derailed.⁶⁵ Many times, nothing happens in the civilian system before a suspect’s arrest, based on probable cause to believe that they committed an offense. Often, if no charges are brought a person may have no idea they were even investigated.⁶⁶ In fact, in order to obtain DNA and fingerprints prior to arrest in the civilian world, judicial approval is necessary.⁶⁷

Even after a commander decides to take no action against a subject for an allegation of a penetrative sexual offense, Service members continue to experience negative consequences, because often they have lost the opportunity for promotion.⁶⁸ This lost opportunity translates to a loss of earnings and eventual retirement pay, and that prospect can affect the ability of the military to retain the Service member.⁶⁹ The Military Services invest millions of dollars in recruiting and training Service members, yet the adverse administrative actions taken during the investigative process in cases in which ultimately no charges are preferred, or no action is taken, often result in the departure of valuable Service members.⁷⁰

Finding 46: Immediately following an allegation of sexual assault, the subject’s command routinely imposes some form of administrative action, including, but not limited to, suspension of security clearances and administrative holds prohibiting favorable personnel actions such as promotions, educational opportunities, moves, and awards. These actions have a negative personal and professional impact on the subject.

62 Tom Jackman, *Jury Orders Blogger to Pay \$8.4 Million to Ex-Army Colonel She Accused of Rape*, WASH. POST, Aug. 11, 2017, available at <https://www.washingtonpost.com/news/true-crime/wp/2017/08/11/jury-orders-blogger-to-pay-8-4-million-to-ex-army-colonel-she-accused-of-rape/>; see also *Transcript of DAC-IPAD Public Meeting* 47–48 (Jan. 25, 2019) (testimony of Colonel (Ret.) Wiggins).

63 See *Transcript of DAC-IPAD Public Meeting* 57–58 (Nov. 15, 2019) (comment of Ms. Cannon).

64 See generally *CRWG Proposals*, *supra* note 35, at 5–6.

65 See *Transcript of DAC-IPAD Public Meeting* 58 (Nov. 15, 2019) (comment of Ms. Cannon).

66 *Id.* at 60 (comment of Ms. Bashford).

67 See *id.*

68 *Id.* at 59, 61 (comments of Ms. Cannon and Ms. Bashford).

69 *Id.* at 59 (comment of Ms. Cannon).

70 *Id.* at 61–62 (comment of Chief Master Sergeant of the Air Force (Ret.) Rodney J. McKinley, Committee member).

Assessment: The Case Review Working Group will continue to explore this issue by reviewing and assessing additional information, including that obtained through site visits.

IV. OBSERVATIONS BASED ON THE REVIEW OF MCIO PENETRATIVE SEXUAL OFFENSE INVESTIGATIVE CASE FILES CLOSED IN FISCAL YEAR 2017

A. Article 30, UCMJ, and the Convening Authority's Disposition of Charges and Specifications "in the Interest of Justice and Discipline"

1. Background

Article 30(c), Uniform Code of Military Justice, contains the basic statutory requirement "for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over those subject to the Code."⁷¹ It directs that when charges are preferred against an accused, "the proper authority shall, as soon as practicable—(1) inform the person accused of the charges and specifications; and (2) determine what disposition should be made of charges and specifications in the interest of justice and discipline."⁷²

The historical development of the phrase "in the interest of justice and discipline" dates to the 1920 Articles of War, which, the Military Justice Review Group noted, first introduced it "in connection with the commander's duty to dispose of charges and specifications that have been preferred against a military accused."⁷³ The phrase initially appeared "in the paragraph concerning pre-referral 'investigations,' which would later become the basis for Article 32 pretrial investigations."⁷⁴ Previously, under the Articles of War applicable to the Army in effect since 1775 (with periodic amendments), "military commanders were given little guidance concerning their disposition duties[.]"⁷⁵

The Department of Defense recently described the complementary relationship of Articles 30, 32, and 34, UCMJ, with respect to disposing of charges in the "interest of justice and discipline":

When Congress enacted the UCMJ [in 1950], it sought to provide consistent statutory guidance to commanders and convening authorities in the exercise of their initial disposition and referral responsibilities, so it included the "interest of justice and discipline standard" in Article [30] as well as Article [32]. . . . Congress

71 REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 291 (Dec. 22, 2015) [MJRG REPORT], *available at* <https://ogc.osd.mil/mjrg.html>.

72 10 U.S.C. § 830(c) (Article 30(c), UCMJ) (2019). Although the DAC-IPAD reviewed cases under the version of Article 30 in effect in 2016, the Military Justice Act of 2016 amended Article 30 to clarify "the language and organization of Article 30 in the context of current practice and related statutory provisions, with no substantive changes." MJRG REPORT, *supra* note 71, at 291. Compare 10 U.S.C. § 830 (2016) with 10 U.S.C. § 830 (2019). Article 30(a) and (b) set forth who may prefer charges against a Service member (any person subject to the UCMJ), how charges are preferred (in writing, under oath before a commissioned officer authorized to administer oaths), and the required content of the oath (the signer has personal knowledge of or has investigated the matters set forth in the charges and they are true, to the best of the signer's knowledge and belief).

73 MJRG REPORT, *supra* note 71, at 292.

74 *Id.* at 292–93.

75 *Id.* at 292. "The 1891 Manual, for example, advised commanders simply to ensure 'that there are good grounds for sustaining the charges' before acting upon them[.] . . . [William] Winthrop advised that '[o]nly such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial,' and that '[a]ll charges should be substantial and made in good faith.'" *Id.* (citations omitted).

bound together the interests of justice and discipline in Article 34, requiring the convening authority to obtain the advice of [their] staff judge advocate—with respect to both the threshold legal questions of probable cause, proper charging, and jurisdiction, and the disposition decision itself—before referring charges and specifications to general court-martial for trial.

. . . Article 30, in conjunction with Article 34, codifies both the commander-judge advocate partnership and the dual-purpose of the military justice system: to promote justice while maintaining discipline within the ranks. Throughout the history of the Code, legislators, servicemembers, and the public have regarded the dual-purpose nature of military law and the commander's role in charging decisions with both admiration and skepticism.⁷⁶

Once a convening authority exercises their discretion—in the interest of justice and discipline—to dispose of charges and specifications by referring them to trial by court-martial, the function of the trial is to seek justice. “Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.”⁷⁷

2. Observation and Discussion

Observation 1: Article 30, UCMJ, directs that commanders and convening authorities determine what disposition should be made of charges “in the interest of justice and discipline.” Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found that in cases in which the rationale for the disposition decision was indicated, the following factors were primary: probable cause, sufficiency of the evidence, multiple victims, victim preference, and the declination of other jurisdictions to prosecute. These factors seem to be considerations related to “the interest of justice.” We did not observe separate considerations related to “the interest of discipline.”

76 *Id.* at 293, n.15 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) Part I, ¶3 (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”); *see also United States v. Littrice*, 13 C.M.R. 43, 47 (C.M.A. 1953) (“It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven. . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws.”); AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HON. [WILBER M.] BRUCKER, SECRETARY OF THE ARMY 11–12 (18 Jan. 1960) [commonly known as the POWELL REPORT, available at https://www.loc.gov/rr/frd/Military_Law/Powell-report.html] (“In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable”); DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 14 (1972) (“[N]o need is seen to consider the sacrifice of justice for the sake of discipline. The two are, for American servicemen, inextricable, and the latter cannot exist without the former.”)).

77 *Id.* at 16 (quoting the POWELL REPORT, *supra* note 76, at 11).

The Committee appreciates that the purpose of military justice is not solely to seek justice but also to maintain good order and discipline in the Armed Forces.⁷⁸ However, when documents containing the convening authority's rationale for its disposition decisions were available to reviewers, the reasons provided reflected legal concerns—the “interests of justice”—rather than the consideration of some adverse effect on the command or other concerns that fall squarely under the maintenance of good order and discipline. It was therefore difficult to assess how the disposition decisions advanced the interests of discipline.

In addition, it was difficult to understand fully what “the interest of justice and discipline” standard means from a practical standpoint,⁷⁹ and the Committee members differed in their assessments of its actual utility. In practice, it did not appear that either the standardized forms used in some Military Services to capture disposition decisions or the more informal methods of documenting case dispositions in investigative files reflected factors such as the effect of the offense on the health, safety, and good order and discipline of the command. Accordingly, some Committee members viewed the “interest of justice and discipline” standard as too subjective, while others viewed it as an appropriate consideration for military commanders charged with the responsibility of determining the appropriate disposition of cases.⁸⁰

Still other members pointed out that if the military wants to retain jurisdiction over serious crimes that could result in a felony conviction, then a commander's primary focus should be the evidentiary considerations that guide the exercise of prosecutorial discretion in federal and state jurisdictions.⁸¹ Another member cautioned that she did not observe a great appetite from civilian prosecutors for prosecuting military members in dual-jurisdiction cases.⁸² As she noted, sometimes the civilian authorities would take the case for a couple of days, and then hand it back to the military; in other instances, the civilian authorities would hand the case off to the military immediately upon receipt of the complaint.⁸³

B. Article 33, UCMJ, Disposition Guidance

1. Background

Prior to January 1, 2019, “the President's core policy guidance with respect to disposition of offenses under the Code” in accordance with the direction in Article 30, UCMJ, to dispose of charges and specifications “in the interest of justice and discipline” was found in Rule for Courts-Martial 306(b).⁸⁴ The Discussion to the Rule set forth a nonexclusive and nonweighted list of factors that commanders should consider when determining how to dispose of criminal allegations against a Service member.⁸⁵ These factors included both the views of the victim as to disposition and the availability and admissibility of evidence.

78 See *Transcript of DAC-IPAD Public Meeting 66* (Nov. 15, 2019) (comment of Brigadier General (Ret.) Schwenk).

79 *Id.* at 67.

80 *Id.* at 66 (comment of Ms. Bashford).

81 See *CRWG Proposals*, *supra* note 35, at 7.

82 See *Transcript of DAC-IPAD Public Meeting 70* (Nov. 15, 2019) (comment of Ms. Bashford).

83 *Id.*

84 MJRG REPORT, *supra* note 71, at 295; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [2016 MCM], Rule for Courts-Martial (R.C.M.) 306(b) (Discussion).

85 2016 MCM, *supra* note 84, R.C.M. 306(b) (Discussion).

In 2015 the Department of Defense observed that the guidance contained in Rule for Courts-Martial 306(b) and its Discussion “omits the explicit ‘quantum of evidence’ calculus which guides the charging decision of civilian prosecutors and United States Attorneys.”⁸⁶ In other words, the Discussion did not include as a specific factor whether the admissible evidence in the case is probably sufficient to prove the accused’s guilt beyond a reasonable doubt. As a result, DoD proposed that Congress help “‘fill the gap’ that [existed] in military practice between the probable cause standard for referral of charges to court-martial and the ‘beyond a reasonable doubt’ standard for conviction.”⁸⁷ DoD noted, “In civilian practice, this gap has been filled with structured decisional principles and charging standards to help guide prosecutors in the prudent and effective exercise of prosecutorial discretion. In military practice, the disposition decision-making guidance under [the UCMJ and Rules for Courts-Martial] is relatively unstructured.”⁸⁸

Accordingly, DoD proposed, and Congress in the Military Justice Act of 2016 required in Article 33, UCMJ, that the President direct the Secretary of Defense to issue

non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.⁸⁹

86 MJRG REPORT, *supra* note 71, at 296, n.25 (citations omitted).

87 *Id.* at 338.

88 *Id.* The Principles of Federal Prosecution contained in the United States Attorneys’ Manual (now Justice Manual) provide:

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

- (1) No substantial Federal interest would be served by prosecution;
- (2) The person is subject to effective prosecution in another jurisdiction; or
- (3) There exists an adequate non-criminal alternative to prosecution.

Id. at 337 (citing U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9–27.220 (Grounds for Commencing or Declining Prosecution)). The MJRG Report stated:

Most state jurisdictions employ similar charging standards, with some form of the “sufficient admissible evidence” criterion. *See, e.g.* Denver District Attorney Policies, The Charging Decision (“If a determination is made that the facts do not support a reasonable belief that the charge can be proven beyond a reasonable doubt, there is a legal and ethical duty to decline to file charges.”); WASH. REV. CODE ANN. § 9.94A.411 (“Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.”).

Id. at 337, n.8.

89 10 U.S.C. § 833 (2019) (Article 33, UCMJ).

The Article 33, UCMJ, Disposition Guidance, found at Appendix 2.1 of the Manual for Courts-Martial, went into effect on January 1, 2019.⁹⁰ The Disposition Guidance thus was not in effect when the investigative files that the CRWG reviewed were created, since all were closed in fiscal year 2017.

The Disposition Guidance identifies an unweighted list of 14 factors that the commander or convening authority “should consider, in consultation with a judge advocate,” in order to determine whether the “interests of justice and discipline are served by trial by court-martial or other disposition in a case.”⁹¹ Particularly applicable to allegations of penetrative sexual offenses are 3 of the 14 factors: “the views of the victim as to disposition,” “[t]he availability and willingness of the victim . . . to testify,” and “[w]hether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.”⁹²

In addition to encouraging consultation with a judge advocate when considering disposition decision factors, the Disposition Guidance specifies that commanders should seek advice from a judge advocate regarding disposition options and the advice should “include a discussion of the advantages and disadvantages of each of the available dispositions.”⁹³ The guidance does not address the form of the advice—for example, whether it should be written or oral.

Under current military justice practice, the staff judge advocate is not required to opine in the pretrial advice as to whether there is sufficient admissible evidence to obtain a conviction. As one Committee member observed, “[T]he answer, of course, from the panels we had is it’s discussed in private with the convening authority, but it’s not written down.”⁹⁴ In addition, in response to a request for information submitted to each of the Military Services in 2019, several responded that they did not expect much change to their referral practice based on the Disposition Guidance, as they were already considering many of the same factors.⁹⁵

90 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) [2019 MCM] at App. 2.1.

91 *Id.* at App. 2.1, Sec. 2.1.

92 *Id.* at App. 2.1, Sec. 2.1 e, g, and h.

93 *Id.* at App. 2.1, Sec. 2.2.

94 *See Transcript of DAC-IPAD Public Meeting 74* (Nov. 15, 2019) (comment of Brigadier General (Ret.) Schwenk).

95 Service Criminal Law/Military Justice Division Combined Responses to DAC-IPAD Request for Information Set 11 (May 15, 2019) [RFI 11], *Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, at 25, available at https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_Set11_20190515_Questions_Answers_20191204.pdf.

A comparison of the factors in R.C.M. 306(b) (Discussion) and those included in the Article 33, UCMJ, Disposition Guidance, is set forth below.

| R.C.M. 306(b) (Discussion) Factors | Article 33, UCMJ, Disposition Guidance Factors |
|---|---|
| <p>In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:</p> <p>(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;</p> <p>(B) when applicable, the views of the victim as to disposition;</p> <p>(C) existence of jurisdiction over the accused and the offense;</p> <p>(D) availability and admissibility of evidence;</p> <p>(E) the willingness of the victim and others to testify;</p> <p>(F) cooperation of the accused in the apprehension or prosecution of another accused;</p> <p>(G) possible improper motives or biases of the person(s) making the allegation(s);</p> <p>(H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;</p> <p>(I) appropriateness of the authorized punishment to the particular accused or offense.⁹⁶</p> | <p>The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander's duty to use it appropriately. In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, a command or convening authority should consider, in consultation with a judge advocate, the following:</p> <p>a. The mission-related responsibilities of the command;</p> <p>b. Whether the offense occurred during wartime, combat, or contingency operations;</p> <p>c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command.</p> <p>d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;</p> <p>e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;</p> <p>f. The extent of the harm caused to any victim of the offense;</p> <p>g. The availability and willingness of the victim and other witnesses to testify;</p> <p>h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;</p> <p>i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;</p> <p>j. The truth-seeking function of trial by court-martial;</p> <p>k. The accused's willingness to cooperate in the investigation or prosecution of others;</p> <p>l. The accused's criminal history or history of misconduct, whether military or civilian, if any;</p> <p>m. The probable sentence or other consequences to the accused of a conviction;</p> <p>n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.⁹⁷</p> |

96 2016 MCM, *supra* note 84, at R.C.M. 306(b). Until 2014, the list of factors also included "the character and military service of the accused," and "other likely issues." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [2012 MCM], R.C.M. 306(b) (Discussion). Congress directed that the Manual for Courts-Martial delete "the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [FY14 NDAA], § 1708, 127 Stat. 672 (2013).

97 2019 MCM, *supra* note 90, at App. 2.1, Sec. 2.1.

2. *Observations and Discussion*

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

Case reviewers observed that in many cases, convening authorities apparently treated the victim's preference with respect to referral of penetrative sexual offenses to trial by general court-martial as dispositive.⁹⁸ The Air Force's Military Justice Division Chief underscored this impression by testifying to the Committee that in the Air Force if the victim was cooperating in the accused's prosecution, and there was probable cause to believe that the accused had committed a sexual offense, the case would be referred to trial.⁹⁹

The DAC-IPAD acknowledges that declining to prosecute is typically appropriate when the decision accords with a victim's preference. The Committee further notes that the bulk of reviewed cases that contained evidence of a victim's preference reflected their desire not to proceed to trial.¹⁰⁰ The Committee is interested in further analyzing those cases reviewed in which the victim's preference to go forward to trial prevailed even though there was insufficient admissible evidence to obtain and sustain a conviction. Such cases are distinguishable from those in which obtaining a conviction may be difficult but sufficient evidence nonetheless exists to prove the elements of the offense beyond a reasonable doubt.¹⁰¹

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

In its March 2019 Third Annual Report, the DAC-IPAD discussed issues pertaining to the investigative files' documentation of whether there is probable cause to believe that the subject committed a penetrative sexual offense.¹⁰² Specifically, the DAC-IPAD's findings and recommendations responded to a lack of clarity in investigative files as to how—or whether—such a determination of probable cause is made or documented prior to the initial disposition authority's decision.¹⁰³

98 See *Transcript of DAC-IPAD Public Meeting* 71–72 (Nov. 15, 2019) (comment of Ms. Bashford).

99 See *Transcript of DAC-IPAD Public Meeting* 105 (Aug. 23, 2019) (testimony of Colonel Julie Pitvorec, U.S. Air Force, Chief, U.S. Air Force Government Trial and Appellate Counsel Division).

100 See *Transcript of DAC-IPAD Public Meeting* 71–73 (Nov. 15, 2019) (comment of Ms. Bashford).

101 *Id.* at 76–77.

102 DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 54–56.

103 After reviewing the investigative files, the DAC-IPAD made the following findings and recommendation regarding “probable cause” in its March 2019 Third Annual Report:

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

Finding 22: The standards, timing, and authority for collecting and submitting fingerprints to the federal database, making probable cause determinations, and submitting final disposition information to the federal database are unclear

Many of the investigative files reviewed by the CRWG reflected a trial counsel's opinion as to probable cause for the sole purpose of determining whether investigators could submit the subject's DNA and fingerprints to national databases. Reviewers observed that the trial counsel routinely provided such an opinion upon or shortly after the conclusion of the subject's interrogation; the subject's interrogation, in turn, occurred in many cases shortly after the MCIO received a report containing an allegation of a penetrative sexual offense. Revised investigative policy guidance recently removed the requirement that a judge advocate be involved in determining probable cause prior to submitting fingerprints to the federal database,¹⁰⁴ although Service regulations may retain that requirement. In contrast to military practice, there exists no analogous procedure in civilian jurisdictions, by which a subject's fingerprints or DNA are obtained without judicial authorization for submission to a federal database prior to arrest.¹⁰⁵

In some cases reviewed by the CRWG, the trial counsel determined that probable cause existed to submit DNA and fingerprints, and then later concluded, for the same investigation, that probable cause did not exist to believe that the subject had committed a penetrative sexual offense.¹⁰⁶ One reviewer observed this questionable pattern unfold when the complainant's statement to law enforcement did not articulate a crime.¹⁰⁷ The same reviewer noted a case in which there was a determination that probable cause existed to submit the subject's fingerprints to a national database, but no probable cause existed to submit the subject's DNA.¹⁰⁸ The only explanation for such occurrences, surmised the CRWG member, was that practitioners apply different definitions of probable cause in different situations.¹⁰⁹

Even though reviewers noted judge advocate involvement in some probable cause determinations documented in the investigative file, it was unclear from the material reviewed whether initial disposition authorities received advice on probable cause and the disposition factors from their judge advocates and, if so, when and how they received that advice.¹¹⁰ The Committee should follow up on implementation of the new Disposition Guidance's provisions regarding judge advocate consultation and advice through site visits to assess whether judge advocates' advice is being conveyed to the initial disposition authority at a time and in an appropriate manner to inform the decision about what action, if any, to take on an allegation.

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

and not uniform across the Services.

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

Id. at 52, 59.

¹⁰⁴ See Dep't of Def. Instr. 5505.11, FINGERPRINT REPORTING REQUIREMENTS (October 31, 2019).

¹⁰⁵ See *Transcript of DAC-IPAD Public Meeting* 60, 80 (Nov. 15, 2019) (comment of Ms. Bashford).

¹⁰⁶ See *id.* at 80.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 80–81.

¹⁰⁹ *Id.* at 80.

¹¹⁰ See *id.* at 78–79 (comment of Ms. Tokash).

As part of their review of investigative files, CRWG members assessed the reasonableness of the initial disposition authority's decision on disposition of allegations of a penetrative sexual offense. Reviewers observed that some disposition authorities stated what factors were significant to their determinations, but many did not.¹¹¹ While members found the disposition decisions reasonable in the overwhelming majority of cases, they also determined that having access to the commander's contemporaneous written rationale for the prosecutorial decision enhanced the members' confidence in their own assessment.¹¹² Irrespective of whether the reviewers agreed or disagreed with the rationale for the prosecutorial decision, it enabled them to understand the reason for that decision.¹¹³

The CRWG reviewers observed, after careful and time-consuming review, that the disposition decisions were supported by sound legal principles;¹¹⁴ however, others assessing a given disposition decision will not have the ability or time to review the entire investigative file.¹¹⁵ The initial disposition authority could greatly enhance transparency of disposition decisions by (1) identifying those factors from the Article 33 Disposition Guidance that they considered important to the decision and (2) including a concise factual narrative of the allegation.¹¹⁶ Adequately documenting the factors considered by the disposition authority in reaching their disposition decision could instill additional confidence in the military justice system and combat the perception of convening authority bias.¹¹⁷

C. Article 32, UCMJ, Preliminary Hearing Determination of Probable Cause

1. Background

Article 32, UCMJ, requires a preliminary hearing before a general court-martial convening authority may refer a case to trial by general court-martial.¹¹⁸ One of the purposes of the Article 32 hearing is to determine whether there is probable cause to believe that the accused committed the charged offense.¹¹⁹ Indeed, the preliminary hearing officer's report to the convening authority who directed the hearing must include a determination of whether the government presented sufficient evidence to establish probable cause to believe that the accused committed an offense under the UCMJ.¹²⁰ However, if the preliminary hearing officer determines that the government failed to establish probable cause, the general court-martial convening authority may nonetheless refer the charges and specifications to a general court-martial so long as the staff judge advocate opines that probable cause does exist

111 See *CRWG Proposals*, *supra* note 35, at 11.

112 See *Transcript of DAC-IPAD Public Meeting* 83–84 (Nov. 15, 2019) (comment of Brigadier General (Ret.) Schwenk).

113 *Id.* at 84.

114 *Id.* at 81–82 (comment of Mr. Markey).

115 *Id.* at 85 (comment of Ms. Bashford).

116 See DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 5–6, 42–47 (Recommendations 5–6 and Findings 14–20).

117 See *CRWG Proposals*, *supra* note 35, at 11; see also *Transcript of DAC-IPAD Public Meeting* 81–83 (Nov. 15, 2019) (comment of Mr. Markey).

118 10 U.S.C. § 832 (2019) (Article 32, UCMJ); see also 10 U.S.C. § 832 (2014), the version of the statute in effect during the time period of the investigative files reviewed. The amended provision left unchanged both the requirement for a preliminary hearing prior to referral to general court-martial and the essential purposes of the hearing.

119 10 U.S.C. § 832(a)(2)(B) (2019) (Article 32(a)(2)(B), UCMJ); see also 10 U.S.C. § 832(a)(2)(A) (2014), the version of the statute in effect during the time period of the investigative files reviewed.

120 10 U.S.C. § 832(c) (2019) (Article 32(c), UCMJ); see also 10 U.S.C. § 832(c) (2014), the version of the statute in effect during the time period of the investigative files reviewed.

(among other requirements).¹²¹ The staff judge advocate's opinion may be based on evidence in addition to that presented during the preliminary hearing.¹²²

As part of its review of investigative files that resulted in charges being preferred against an accused for a penetrative sexual offense, the CRWG examined the preliminary hearing officers' reports, which were present unless the accused had waived the hearing. Some of the reports contained only conclusions to the questions that Article 32, UCMJ, requires the preliminary hearing officer to answer, with little or no analysis; others contained a detailed rationale supporting the preliminary hearing officer's determination of whether the government submitted sufficient evidence to establish probable cause to believe that the accused had committed one or more penetrative sexual offenses.

The Military Justice Act of 2016 amended Article 32, UCMJ, to require that for preliminary hearings held on or after January 1, 2019,¹²³ the preliminary hearing officer's report must contain

[f]or each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations [of form of the charges, probable cause, and jurisdiction], including a summary of relevant witness testimony and documentary evidence presented . . . and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.¹²⁴

2. Observations and Discussion

Observation 5: Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's analysis and conclusions are useful both to special victims' counsel or victims' legal counsel and to defense counsel in advising their clients, as well as to staff judge advocates and convening authorities in rendering advice and making decisions on the charges, probable cause, jurisdiction, and dispositions.

Detailed analytical explanations of the rationale underlying the Article 32 preliminary hearing officer's conclusions are helpful in understanding and evaluating those conclusions in light of the evidence contained in the investigative files. Their assessment of the strengths and weaknesses of the case, including the credibility of witnesses and evidence, can assist staff judge advocates and convening authorities in determining further action on the charges, including whether referral to court-martial is appropriate. Such reports provide accountability and maintain the integrity of the process.¹²⁵

The Committee supports the requirement, enacted as part of the Military Justice Act of 2016, to include additional detail and analysis in the preliminary hearing officer's report. However, it has yet to be determined whether the

121 See 10 U.S.C. § 834(a)(1)(B) (2019) (Article 34(a)(1)(B), UCMJ); see also 10 U.S.C. § 832(a)(2) (2014) and 2016 MCM, *supra* note 84, at R.C.M. 406(b)(2) (Discussion), in effect during the time period covered by the investigative files reviewed ("The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause.").

122 Article 34(a)(1)(B), UCMJ; compare Article 34(a)(2) (2014) (" . . . the specification is warranted by the evidence indicated in the report of a preliminary hearing under section 832 of this title (article 32) (if there is such a report) . . .").

123 Exec. Order 13825, 83 Fed. Reg. 9889 (March 1, 2018) at Sec. 8.

124 Article 32(c)(1), UCMJ.

125 See CRWG Proposals, *supra* note 35, at 13; see also Transcript of DAC-IPAD Public Meeting 87–88 (Nov. 15, 2019) (comment of Ms. Bashford).

additional required detail is sufficient. One member stated that he hoped the preliminary hearing officer considered all the factors contained in the Article 33, UCMJ, Disposition Guidance when making a recommendation for disposition, affording appropriate weight to factors such as the availability of sufficient admissible evidence to support a conviction.¹²⁶

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

The DAC-IPAD has concerns regarding cases in which charges and specifications for a penetrative sexual offense were preferred that the preliminary hearing officer determined were not supported by evidence establishing probable cause to believe that the accused had committed the offense.¹²⁷ The majority of such charges and specifications were not ultimately referred to court-martial.¹²⁸ However, upon the advice of the staff judge advocate that there was probable cause to believe that the accused committed a penetrative sexual offense, general court-martial convening authorities in cases completed in fiscal year 2017 referred 32 cases out of a total of 80 cases (40%) in which the preliminary hearing officer—a trained judge advocate in all cases—had determined lacked probable cause.¹²⁹ Forty-seven percent of those cases referred to trial against the preliminary hearing officer's recommendation resulted in dismissal of the affected charge either before trial or prior to a verdict; of those cases tried to verdict, 76% resulted in acquittal, and 24% resulted in conviction on the penetrative sexual offense.¹³⁰ CRWG reviewers expressed concern about cases referred to trial by general court-martial that the preliminary hearing officer determined lacked probable cause to believe the accused had committed a penetrative sexual offense. If such referrals were based on evidence not presented at the preliminary hearing, the benefits of the hearing's adversarial process were lost.¹³¹ The DAC-IPAD will continue to investigate these issues.

Observation 7: The lack of a binding probable cause determination by the preliminary hearing officer, which allows the staff judge advocate—without explanation—to come to a different conclusion on probable cause, reduces the usefulness of the Article 32 hearing.

Military justice practitioners told the DAC-IPAD that the staff judge advocate, when formulating the Article 34, UCMJ, pretrial advice for the general court-martial convening authority, had access to evidence in addition to that

126 See *Transcript of DAC-IPAD Public Meeting* 86–87 (Nov. 15, 2019) (comment of Brigadier General (Ret.) Schwenk).

127 *Id.* at 89–91, 95–99 (member deliberations); the DAC-IPAD's concerns arise from the CRWG's review of investigative case files closed in fiscal year 2017 as well as the Committee's analysis of the Article 32, UCMJ, preliminary hearing statistical data presented and discussed in Chapter 2. See *infra* pp. 49–50 and Table 2.1, "Fiscal Years 2017 and 2018 Article 32 Preliminary Hearings Involving Penetrative Sexual Offenses That Resulted in a 'No Probable Cause' Determination for One or More Penetrative Sexual Offenses."

128 See *infra* pp. 51–52 and Figure 2.1, "Fiscal Years 2017 and 2018 'No Probable Cause' Determinations According to the Grade of the Preliminary Hearing Officer and the Convening Authority's Decision to Either Dismiss or Refer the Penetrative Sexual Offense."

129 See *infra* pp. 52–53 and Figure 2.2, "Fiscal Year 2017 Article 32 Preliminary Hearing Officer 'No Probable Cause' Determinations and the Ultimate Disposition of the Penetrative Sexual Offense."

130 *Id.*

131 See *Transcript of DAC-IPAD Public Meeting* 99–109 (Nov. 15, 2019) (member deliberations); see also *infra* pp. 51–52.

presented to the preliminary hearing officer.¹³² Military trial defense practitioners stated that taking into account evidence not presented by the government counsel at the preliminary hearing undermines the value of the hearing's adversarial process and the preliminary hearing officer's resulting recommendations.¹³³

In addition, though preliminary hearing officers often provided detailed analyses to support their probable cause determinations, for the most part staff judge advocates do not include any rationale for their opinions in the Article 34, UCMJ, pretrial advice, including grounds for disagreement with the preliminary hearing officer. In one exception to the norm, in a case that the general court-martial convening authority initially referred to general court-martial, the staff judge advocate who recommended withdrawal and dismissal of the charges and specifications also provided to the general court-martial convening authority a list of evidentiary concerns, in addition to the victim's decision not to participate further in the case.¹³⁴

The current preliminary hearing system, which allows the staff judge advocate to override the preliminary hearing officer's determination on probable cause with no explanation, is not operating effectively as a shield against referring unsupported charges to general court-martial.¹³⁵ The question of what best practices should be adopted to modify current Article 32, UCMJ, practices in order to avoid such referrals remains open, however.

D. Article 34, UCMJ, Staff Judge Advocate Pretrial Advice

1. Background

Pursuant to Article 34, UCMJ, a convening authority may not refer a case to a general court-martial without the staff judge advocate's written opinion that the specification alleges an offense under the UCMJ, that there is probable cause to believe that the accused committed the offense charged, and that a court-martial would have jurisdiction over the accused and the offense.¹³⁶ The staff judge advocate is also required to provide a written recommendation as to the disposition that should be made of the charges and specifications "in the interest of justice and discipline."¹³⁷ Staff judge advocates are not required to include in their pretrial advice any legal or factual

132 See, e.g., *Transcript of DAC-IPAD Public Meeting* 81 (Aug. 23, 2019) (testimony of Colonel Pitvorec); see also *id.* at 126–20 (testimony of 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; and Lieutenant Colonel Adam M. King, U.S. Marine Corps, Military Justice Branch Head, U.S. Marine Corps Judge Advocate Division).

133 *Id.* at 250–52, 288–89 (testimony of Colonel Valerie Danyluk, U.S. Marine Corps, Chief Defense Counsel); see also *id.* at 255–56, 270–73 (testimony of Commander Stuart T. Kirkby, U.S. Navy, Director, Defense Counsel Assistance Program); 275–77 (testimony of Colonel Christopher Morgan, U.S. Air Force, Chief, Trial Defense Division, Air Force Legal Operations); and 277–79 (Colonel Roseanne Bennett, U.S. Army, Chief, Trial Defense Service).

134 *Transcript of DAC-IPAD Public Meeting* 107–08 (Nov. 15, 2019) (comment of Ms. Tokash).

135 See *id.* at 204 (comment of the Honorable Leo I. Brisbois, Committee member); cf. WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, & ORIN KERR, CRIMINAL PROCEDURE § 14.1(a) (Screening) (4th ed. 2019 update) (The preliminary hearing screening process serves to "prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to . . . [ensure that] there are substantial grounds upon which a prosecution may be based.") (citation omitted); see also MJRG REPORT, *supra* note 71, at 316 (The goal of the pretrial investigation "was to ensure adequate preparation of cases; to guard against hasty, ill-considered charges; to save innocent persons from the stigma of unfounded charges; and to prevent trial cases from going before general courts-martial.") (citation omitted).

136 Article 34, UCMJ; see also 10 U.S.C. § 834 (2016).

137 Article 34(a)(2), UCMJ; see also 10 U.S.C. § 834(b)(2) (2016).

analysis or rationale for their conclusions or recommendation.¹³⁸ The trial counsel is required to provide the staff judge advocate's written pretrial advice to the defense if the case is referred to general court-martial.¹³⁹

The Military Justice Act of 2016 amended Article 34, UCMJ, "to clarify ambiguities in the language of the [prior version of the provision] and to expressly tie the staff judge advocate's pre-referral disposition recommendation to the 'in the interest of justice and discipline' standard for disposition of charges and specifications under Article 30[(c)]."¹⁴⁰ The amendments to Article 34 took effect on January 1, 2019.¹⁴¹

2. Observations and Discussion

Observation 8: Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction.¹⁴²

- a. Article 32 preliminary hearing officers do not consistently include in their reports an evaluation of whether there is sufficient admissible evidence to support a conviction. Such an evaluation would be helpful to subordinate commanders, convening authorities, and staff judge advocates (SJAs).
- b. SJAs rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice, and they are not required to do so. Including such an analysis as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial would be helpful to convening authorities. (See Observation 9.)
- c. Article 34 requires SJAs to provide convening authorities a binding determination of probable cause as the standard for referring a case to trial. However, probable cause may not be the appropriate standard for referring a case to trial.
- d. In many cases, consideration of "the sufficiency of evidence to obtain and sustain a conviction" did not seem to be afforded the same deference as in the Justice Manual (formerly the U.S. Attorneys' Manual).

As part of their assessment of cases in which one or more charges of a penetrative sexual offense were preferred against an accused, CRWG members determined whether, in their opinion, the evidence in the investigative file established probable cause to believe that the accused committed the charged offenses.¹⁴³ CRWG members also determined whether, in their opinion, there was sufficient admissible evidence to prove the accused's guilt of the penetrative sexual offense beyond a reasonable doubt.¹⁴⁴

138 2016 MCM, *supra* note 84, at R.C.M. 406 (Discussion) ("The advice need not set forth the underlying analysis or rationale for its conclusions.").

139 2016 MCM, *supra* note 84, at R.C.M. 701(a)(1)(A) (2016).

140 MJRG REPORT, *supra* note 71, at 341.

141 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 [FY17 NDAA], § 5203, 130 Stat. 2000 (2016) (subsequent amendments not included).

142 The Committee's observations are based on investigative and case materials provided to the CRWG for review and do not encompass evidence developed by either the prosecution or defense that was not available to CRWG members. In addition, because of time constraints the CRWG did not review videotapes of interviews included in some case files. See *supra* p. 22, for discussion of materials routinely provided for CRWG review.

143 See DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at Appendix F, Question 69.

144 *Id.*

CRWG members reviewed files of courts-martial in which the accused pled not guilty to a penetrative sexual offense:

- (1) For cases that resulted in a conviction for the penetrative sexual offense, CRWG members overwhelmingly determined that evidence in the case files they reviewed was sufficient to obtain and sustain a conviction on the offense.
- (2) For cases that resulted in acquittal for the penetrative sexual offense, CRWG members determined that the evidence contained in the case files they reviewed was sufficient to obtain and sustain a conviction on the penetrative sexual offense in approximately half of the cases; the evidence was insufficient to obtain and sustain a conviction on the penetrative sexual offense in the other half of the cases.¹⁴⁵

Reviewers determined that many penetrative sexual offenses are referred to courts-martial when there is insufficient admissible evidence in the investigative file to obtain and sustain a conviction.¹⁴⁶ Given the lack of transparency in the pretrial advice, it is hard to know why staff judge advocates are recommending the referral to general court-martial of such cases. Possible explanations include the minimum referral standard of probable cause, the failure of preliminary hearing officers to take credibility into account when making their probable cause determinations, inaccurate legal appraisal of the sufficiency of admissible evidence, and the lack of candid written assessments by the staff judge advocate in the pretrial advice to the general court-martial convening authority due to concern that such assessments would somehow “tip their hands for the defense.”¹⁴⁷

Reviewers observed that some of the Article 32, UCMJ, preliminary hearing officers’ reports explain that they do not take credibility into account when determining whether there is probable cause to believe that an accused committed a penetrative sexual offense. In those cases, the preliminary hearing officers find probable cause, even though their reports express serious doubts as to the credibility of key witnesses or evidence, thereby leaving the resolution of questions of credibility to the panel at trial.¹⁴⁸

Even though the evidence may establish probable cause to believe that the accused committed a penetrative sexual offense, there is a “chasm between probable cause and beyond a reasonable doubt.”¹⁴⁹ The review of investigative files, referral decisions, and results of trial leading to acquittal of the penetrative sexual offense or offenses suggests that the issue may be broader than the experience level of investigators and prosecutors. Instead, counsel and convening authorities may not be giving sufficient consideration to the likelihood of conviction for a penetrative sexual offense.¹⁵⁰

Most preliminary hearing officers’ reports did not analyze whether the government presented sufficient admissible evidence to obtain and sustain a conviction for a penetrative sexual offense, and staff judge advocates rarely included such discussion in their Article 34, UCMJ, pretrial advice. The Article 33, UCMJ, Disposition Guidance now

145 *Transcript of DAC-IPAD Public Meeting* 115–16 (Nov. 15, 2019) (comment of Ms. Bashford).

146 *See, e.g., id.* at 114.

147 *See id.* at 116–18; quotation, 117.

148 *See id.* at 117.

149 *Id.* at 120 (comment of Brigadier General (Ret.) Schwenk); *see also supra* pp. 31–32 for a discussion on assessing the sufficiency of admissible evidence in charging decisions.

150 *Id.*; *see also* MJRG REPORT, *supra* note 71, at 338.

provides that preliminary hearing officers, staff judge advocates, and convening authorities should consider the sufficiency of admissible evidence in making disposition recommendations and decisions. However, they are not required to consider the sufficiency of the evidence, or to give it any more weight than any other factor. There is also no current requirement to provide the convening authority with a written assessment of the disposition guidance factors.

Observation 9: Currently Article 34, UCMJ, prohibits convening authorities from referring charges to a general court-martial unless the staff judge advocate provides written advice that the specification alleges an offense, there is probable cause to believe that the accused committed the offense, and jurisdiction exists. In addition, the staff judge advocate must provide a written recommendation as to the disposition to be made in the interest of justice and discipline. In the files reviewed, the staff judge advocate's Article 34 pretrial advice to the general court-martial convening authority often consisted of conclusions without explanation. These unexplained conclusions are not useful in assessing factors relevant to a referral determination. The Article 34 pretrial advice could be more helpful to convening authorities if it included detailed explanations of the staff judge advocates' conclusions.

Staff judge advocates are generally not offering analysis or a rationale for either their probable cause determination or their referral recommendation in the written Article 34, UCMJ, pretrial advice to the general court-martial convening authority. Overall, the pretrial advice documents appear to be basic, "check-the-box" forms that, while enabling a convening authority to refer charges to a general court-martial and providing discoverable documentation of the advice, furnish no insights into what information or factors a staff judge advocate is relying on for their conclusions and recommendations.¹⁵¹ In contrast, detailed, written explanations of their conclusions and recommendation provided by preliminary hearing officers to the convening authority are a useful tool for understanding probable cause determinations and assessing factors relevant to a referral decision.

Concerns that providing written evidentiary and disposition analysis to defense counsel would give them an unfair advantage at trial seem to be misplaced. Since defense counsel are licensed attorneys with access to the evidence and are already aware of the issues involved in the case, there is no real need to continue to provide the convening authority only private, oral explanations.¹⁵² The better practice is to provide written explanations, with further oral explanation as necessary. A written legal analysis and rationale could enhance fairness, due process, and transparency in the military justice system.

V. CONCLUSION

As directed by the DAC-IPAD, the Policy Working Group will analyze the issues in Observations 1–9, and the CRWG will continue to explore the issues in Findings 44–46, including through site visits.

¹⁵¹ See generally *Transcript of DAC-IPAD Public Meeting* 123–24 (Nov. 15, 2019) (comment of Brigadier General (Ret.) Schwenk).

¹⁵² See generally *id.* at 117–18 (comment of Ms. Bashford).

CHAPTER 2. ARTICLE 32, UCMJ, PRELIMINARY HEARINGS AND THE COURT-MARTIAL REFERRAL PROCESS

I. INTRODUCTION

As discussed in Chapter 1, the Case Review Working Group members and staff reviewed more than 2,000 investigative and charging documents from individual military sexual offense case files, producing observations concerning the pretrial phase of the military justice process. The Committee has decided to analyze further the systemic issues that it observed during this review. These issues concern the substantive law and policies applicable to initial disposition decisions, the Article 32 preliminary hearing process, and the legal advice and other factors considered by convening authorities charged with determining the disposition of penetrative sexual offense charges under the Uniform Code of Military Justice.

The Acting General Counsel for the Department of Defense also requested that the DAC-IPAD examine pretrial events in the military justice system.¹⁵³ The request arose from recommendations issued by the Committee's predecessor panel, the Judicial Proceedings Panel (JPP or Panel). The JPP, in its *Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (September 2017),¹⁵⁴ noted issues similar to those identified by this Committee in its review of cases involving penetrative sexual offenses; as a result, the JPP recommended further study of several of them: preliminary hearings conducted under Article 32, UCMJ; the disposition guidance for judge advocates and commanders that the Secretary of Defense promulgated in compliance with Article 33, UCMJ, found in Appendix 2.1 of the Manual for Courts-Martial (2019 edition); and the staff judge advocate's pretrial advice for convening authorities, required before referral to trial by general court-martial, under Article 34, UCMJ.¹⁵⁵

The JPP recommendation related to Article 32, UCMJ, states:

JPP Recommendation 55: The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual offense cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable

153 See Memorandum from Mr. William S. Castle, Acting General Counsel for the Department of Defense, to Ms. Martha S. Bashford, DAC-IPAD Chair (June 7, 2018), *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/02_DACIPAD_Mtg_Materials/DACIPAD_Meeting_Materials_20181019_Final.pdf.

154 See JUDICIAL PROCEEDINGS PANEL REPORT ON PANEL CONCERNS REGARDING THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (Sept. 2017) [JPP REPORT ON FAIR ADMINISTRATION OF MILITARY JUSTICE], *available at* https://jpp.whs.mil/public/docs/08-Panel_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf.

155 The DAC-IPAD's third annual report, released March 2019, contains an initial discussion of the Committee's review of these issues. See DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 121–26.

cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.¹⁵⁶

The JPP recommendations related to Article 33 and Article 34, UCMJ, state:

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

JPP Recommendation 58: The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.¹⁵⁷

These JPP recommendations resulted from the Panel's analysis of issues highlighted by JPP Subcommittee members who conducted military installation site visits from July through September of 2016. The JPP Subcommittee members heard concerns, raised by base-level practitioners at virtually all installations visited, that frequently sexual offense charges were referred to court-martial without sufficient evidence to obtain and sustain a conviction. The JPP's analysis identified three factors that, in combination, could possibly contribute to this widespread perception: (1) the implementation, in December 2014, of an Article 32 preliminary hearing more limited in scope than the pretrial investigation historically required prior to a general court-martial; (2) the perceived pressure on general courts-martial convening authorities to refer sexual offense charges to court-martial, regardless of the likelihood of conviction; and (3) the military's probable cause standard for referral, a threshold easily met without relying on all available evidence of a criminal offense.¹⁵⁸

¹⁵⁶ JPP REPORT ON FAIR ADMINISTRATION OF MILITARY JUSTICE, *supra* note 154, at 7. This excerpt from Recommendation 55 does not include the portion of the recommendation related to defense investigators.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *Id.* at 47.

II. THE WAY AHEAD

The DAC-IPAD Chair requested that the Policy Working Group assist the Committee in analyzing the JPP recommendations.¹⁵⁹ The Policy Working Group—composed of DAC-IPAD members Ms. Kathleen Cannon (Chair), Brigadier General (Ret.) James Schwenk, Judge Paul Grimm, Ms. Margaret Garvin, Dr. Jenifer Markowitz, Ms. Jennifer Long, and Mr. A. J. Kramer—began its initial review in May 2019.

In 2020 the Policy Working Group will continue to research and gather stakeholder perspectives regarding the processes for preferring charges, holding Article 32 preliminary hearings, and referring charges to courts-martial. On the basis of the Committee's extensive review of penetrative sexual offense investigative and court-martial documents, the Policy Working Group will also incorporate into its analysis the observations discussed in Chapter 1 regarding the investigative and accusatory phase of the military justice process.

In addition, Committee members plan to visit military installations in order to speak with military justice practitioners about the military justice process, focusing on how recent statutory changes that took effect on January 1, 2019, have affected these processes. The Committee anticipates that the site visits will, among other goals, provide valuable information for the Policy Working Group's analysis.

The remainder of this chapter provides a brief historical overview of the issues before the Policy Working Group and the information gathered to date regarding Article 32, UCMJ. Future reports will thoroughly analyze Articles 32, 33, and 34, UCMJ.

III. OVERVIEW OF INFORMATION COLLECTED TO DATE BY THE DAC-IPAD REGARDING ARTICLE 32, UCMJ, PRELIMINARY HEARINGS

A. Background

Historically, before a criminal charge under the UCMJ could be tried by a general court-martial, an impartial officer had to conduct a thorough pretrial investigation into the truth and form of the charges, as well as any other matters necessary to make a recommendation as to the disposition of the charges.¹⁶⁰ Pursuant to Article 32, UCMJ, the court-martial convening authority appointed a neutral and detached officer to conduct the investigation.¹⁶¹ However, the investigating officer did not have to be a judge advocate or possess any legal training, and the Rules for Courts-Martial did not require, though it recommended, that the officer consult with a judge advocate in the course of their investigation.¹⁶² The investigating officer typically called witnesses to provide in-person sworn testimony

159 Memorandum from Ms. Martha S. Bashford, DAC-IPAD Chair, to DAC-IPAD members, *Fiscal Year 2020 Guidance from the Chair for the DAC-IPAD's Working Groups and the Committee* (Nov. 15, 2019), available at https://dacipad.whs.mil/images/Public/10-Reading_Room/02_DACIPAD_Mtg_Materials/DACIPAD_Meeting_Materials_20191115_Final.pdf.

160 10 U.S.C. § 832 (2012) (UCMJ, Article 32); 2012 MCM, *supra* note 96, R.C.M. 405(e).

161 2012 MCM, *supra* note 96, R.C.M. 405(d)(1) (providing that the commander who directs the investigation “shall detail a commissioned officer not the accuser, as investigating officer”).

162 *Id.*; see also 2012 MCM, *supra* note 96, R.C.M. 405(d)(1), Discussion (“The investigating officer *may* seek legal advice concerning the investigating officer's responsibilities from an impartial source . . .”) (emphasis added). Note, however, that the DAC-IPAD's review of Article 32 proceedings reflected the requirement enacted in the FY14 NDAA, *supra* note 96, § 1702 (subsequent amendments not included), that all Article 32 preliminary hearing officers be judge advocates, whenever practicable. In reviewing the FY17 and FY18 cases, members found that the preliminary hearing officers were all judge advocates.

and compelled the production of certain documentary evidence—such as statements to law enforcement—only if the witness who made the statement was unavailable to testify at the investigative hearing.¹⁶³ In addition, the accused had the right to be present, be represented by counsel, call witnesses, and present evidence in defense and mitigation.¹⁶⁴ The military rules of evidence did not apply to the investigation.¹⁶⁵ After receiving testimony and other evidence, the investigating officer produced a report for the convening authority first stating their conclusion regarding whether reasonable grounds exist to believe that the accused committed an offense and whether the charges are in proper form, and then recommending an appropriate disposition of the charges.¹⁶⁶ The Article 32 investigating officer's conclusions and recommendations were advisory in nature, meaning that the convening authority could act contrary to the stated recommendation.¹⁶⁷

These procedures remained essentially unchanged from the time of the UCMJ's adoption in 1950 until Congress amended Article 32, UCMJ, in the Fiscal Year 2014 National Defense Authorization Act (FY14 NDAA).¹⁶⁸ The FY14 NDAA amendments substantially reduced the scope of the proceeding from a searching investigation to a probable cause hearing conducted by a preliminary hearing officer.¹⁶⁹ These changes also eliminated the preliminary hearing officer's ability to compel witness testimony, including the testimony of military members who are victims of a sexual offense. In lieu of live testimony from sexual offense victims and other witnesses, a prosecutor may submit alternate forms of evidence—such as recorded or written statements to law enforcement—for the hearing officer's consideration.¹⁷⁰ In addition, the FY14 NDAA, as amended, limits the scope of the evidence that an accused may present in their own defense to matters relevant to the preliminary hearing officer's probable cause determination and recommendation as to disposition. These changes took effect for Article 32 hearings conducted on or after December 26, 2014.¹⁷¹

The Military Justice Act of 2016, which was passed as part of the Fiscal Year 2017 National Defense Authorization Act, further modified Article 32 preliminary hearings conducted on or after January 1, 2019.¹⁷² This new version of Article 32, UCMJ, uses the same standard and terminology—probable cause—as is required by the staff judge advocate's pretrial advice to the convening authority and the standard for referral of charges to court-martial. In addition, it allows the parties and the victim to submit written matters to the preliminary hearing officer after the hearing that are relevant to the hearing officer's recommendation as to the disposition that should be made of the case. These amendments call for the preliminary hearing officer to provide a more robust written analysis of the evidence underlying the charged offenses than previously required.¹⁷³

163 2012 MCM, *supra* note 96, R.C.M. 405(g).

164 2012 MCM, *supra* note 96, R.C.M. 405(f).

165 2012 MCM, *supra* note 96, R.C.M. 405(i) ("The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412 and [M.R.E.] Section V [privileges]—shall not apply in pretrial investigations under this rule.").

166 2012 MCM, *supra* note 96, R.C.M. 405(j)(2) (prescribing the contents of the investigating officer's report, among them the substance of the testimony taken on both sides, including any stipulated testimony.).

167 2012 MCM, *supra* note 96, R.C.M. 601(d)(1) and (2).

168 FY14 NDAA, *supra* note 96.

169 *Id.*

170 *Id.*

171 *Id.*

172 FY17 NDAA, *supra* note 141, § 5203 (subsequent amendments not included).

173 *Id.*; see also MJRG REPORT, *supra* note 71, at 324 (providing that the MJRG's proposed reforms to Article 32, UCMJ, were designed to require the preliminary hearing officer to (1) analyze, not merely conclude, whether the evidence establishes probable cause; (2) specify the evidence supporting the elements of each offense; and (3) discuss any additional information relevant to the convening authority's disposition decision under Articles 30 and 34,

During JPP military installation site visits in the summer of 2016—which took place about a year and a half after the Article 32 investigation was transformed into a preliminary hearing—JPP Subcommittee members heard repeatedly from military prosecutors and defense attorneys that the recently modified Article 32 preliminary hearing is no longer a meaningful process for evaluating the strength of a case.¹⁷⁴ According to the prosecutors and defense counsel interviewed, frequently there is no live testimony at the hearing and the prosecutor presents only documentary evidence to the hearing officer, who has no authority to compel the production of witnesses or additional evidence. Counsel also informed JPP Subcommittee members that convening authorities routinely disregard the recommendations of preliminary hearing officers not to refer charges to court-martial, even when the preliminary hearing officer finds no probable cause for the offenses.¹⁷⁵ Some trial practitioners who spoke to the JPP at a public meeting echoed their observations.¹⁷⁶

Based on this information, the JPP issued its September 2017 *Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases*, identifying concerns regarding the modified Article 32 hearing and submitting JPP Recommendation 55 proposing further review of these issues by the Department of Defense and the DAC-IPAD.¹⁷⁷

B. Information Provided to the DAC-IPAD

The DAC-IPAD submitted a request for information (RFI) to the Military Services seeking narrative responses and analysis in response to several questions regarding the Article 32, UCMJ, preliminary hearing; the referral process under Article 34, UCMJ; and the disposition guidance required by Article 33, UCMJ.¹⁷⁸ The Military Services' criminal law/military justice policy chiefs, trial defense services organization chiefs, and special victims' counsel and victims' legal counsel program managers provided their organizations' responses to the RFI and also testified at the August 23, 2019, DAC-IPAD public meeting on these and other topics.¹⁷⁹

There follows a synopsis of viewpoints and analysis from the Military Services regarding Article 32 preliminary hearings and the questions posed in the RFI to the various organizations—most notably, whether Article 32 preliminary hearing officers' determinations of no probable cause should preclude referral of such offenses to court-martial.

Military Justice Policy Chiefs

Service military justice policy chiefs agreed overall that Article 32 preliminary hearings still perform a useful function, though most granted that there is little benefit to the prosecution or defense when no witnesses testify

UCMJ.).

174 SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES 6 (May 2017), available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/JPP_SubcommReport_Barriers_Final_20170512.pdf.

175 *Id.* at 7.

176 See generally *Transcript of JPP Public Meeting* (Jan. 6, 2017), available at https://jpp.whs.mil/Public/docs/05-Transcripts/20170106_Transcript_Final.pdf.

177 JPP REPORT ON FAIR ADMINISTRATION OF MILITARY JUSTICE, *supra* note 154, at 7.

178 See RFI 11, *supra* note 95.

179 *Id.*

at the hearing.¹⁸⁰ In their explanations, they expressed the view that the Article 32 preliminary hearing officer's perspective on the merits of a case can be helpful to staff judge advocates and convening authorities in their duties with respect to deciding whether to refer the case to trial.

Presenters unanimously agreed that a preliminary hearing officer's determination of no probable cause should remain advisory.¹⁸¹ Representatives from each of the Military Services suggested that prohibiting referral of charges that a preliminary hearing officer found not to be supported by probable cause would, in effect, eliminate the staff judge advocate's statutory obligation to determine and provide an opinion to the convening authority as to whether the charges are supported by probable cause. Furthermore, it would unnecessarily constrain the convening authority's responsibility to determine the appropriate disposition of cases initiated under the UCMJ, a decision that remains integral to a commander's ability to maintain good order and discipline.¹⁸² Finally, they opined that it would be inappropriate because the Article 32 preliminary hearing does not require a comprehensive review of all available evidence—just the evidence needed to establish probable cause.¹⁸³

While some presenters cautioned against making additional large-scale changes to the UCMJ, they all stated that preliminary hearing officers should have greater authority to compel the production of witnesses and evidence.¹⁸⁴ The Marine Corps representative recommended that only military judges or magistrates serve as Article 32 preliminary hearing officers.¹⁸⁵ Another presenter suggested that rather than changing the law or rules governing preliminary hearings, the Military Services should train and encourage trial counsel to present more than the bare minimum of evidence that they believe establishes probable cause. This approach would have the added benefit of encouraging trial counsel to be more transparent about their case.¹⁸⁶

Trial Defense Services Organizations

The chiefs of the Military Services' trial defense services organizations told the DAC-IPAD that the 2014 changes to Article 32 reduced the utility of these hearings for the defense and for the convening authority. In addition, they opined that the preliminary hearing officer's determination that an offense lacks probable cause should prohibit referral of charges to court-martial.¹⁸⁷ They explained that if staff judge advocates and convening authorities decide to proceed

180 See Service Criminal Law/Military Justice Division Combined Responses to RFI 11, *supra* note 95; see also *Transcript of DAC-IPAD Public Meeting* 66–67 (Aug. 23, 2019) (testimony of Colonel Patrick Pflaum, U.S. Army, Chief, Criminal Law Division); 72 (testimony of Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice), available at https://dacipad.whs.mil/images/Public/05-Transcripts/20190823_DACIPAD_Transcript_Final.pdf.

181 *Transcript of DAC-IPAD Public Meeting* 81–82 (Aug. 23, 2019) (testimony of Lieutenant Colonel King); 82–83 (testimony of Captain Monahan); 83–84 (testimony of Colonel Pflaum); see also Service Criminal Law/Military Justice Division Combined Responses to RFI 11, *supra* note 95.

182 See Service Criminal Law/Military Justice Division Combined Responses to RFI 11, *supra* note 95; see also *Transcript of DAC-IPAD Public Meeting* 81 (Aug. 23, 2019) (testimony of Lieutenant Colonel King); 84 (testimony of Colonel Pflaum).

183 See Service Criminal Law/Military Justice Division Combined Responses to RFI 11, *supra* note 95.

184 *Transcript of DAC-IPAD Public Meeting* 89, 101 (Aug. 23, 2019) (testimony of Colonel Julie Pitvorec, U.S. Air Force, Chief, Air Force Government Trial and Appellate Counsel Division); 96 (testimony of Colonel Pflaum); 98 (testimony of Captain Robert Monahan, U.S. Navy, Deputy Assistant Judge Advocate General (Criminal Law) and Director, Office of the Judge Advocate General's Criminal Law Policy Division).

185 U.S. Marine Corps Criminal Law/Military Justice Division Response to RFI 11, *supra* note 95; *Transcript of DAC-IPAD Public Meeting* 91, 99 (Aug. 23, 2019) (testimony of Lieutenant Colonel King).

186 *Transcript of DAC-IPAD Public Meeting* 97 (Aug. 23, 2019) (testimony of Captain Monahan); 100 (testimony of Colonel Pitvorec).

187 See Service Trial Defense Services Organizations Combined Responses to RFI 11, *supra* note 95; *Transcript of DAC-IPAD Public Meeting* 251 (Aug. 23, 2019) (testimony of Colonel Valerie Danyluk, U.S. Marine Corps, Chief Defense Counsel); 254 (testimony of Commander Stuart Kirkby, U.S. Navy, Director, Defense Counsel Assistance Program); 259–60 (testimony of Colonel Roseanne Bennett, U.S. Army, Chief, Trial Defense Service); 264

with the case when a preliminary hearing officer determines that one or more charges lack probable cause, then the Article 32 preliminary hearings provide an accused with no meaningful protection against baseless charges.¹⁸⁸

The defense presenters agreed that if the Article 32 preliminary hearing officer's determination of no probable cause bound the convening authority, the government would put more thought, care, and preparation into the Article 32 hearing. They elaborated by noting that the subsequent hearing would be a more meaningful process, likely resulting in fewer cases being referred to trial that lack sufficient evidence to obtain a conviction and thus resulting in fewer acquittals.¹⁸⁹ They also believed that the government should be required to call witnesses to establish probable cause, rather than rely solely on documentary evidence. Finally, the defense presenters concurred with the military justice chiefs that the preliminary hearing officer should have the authority to compel the production of witnesses and evidence.¹⁹⁰

Special Victims' Counsel and Victims' Legal Counsel Program Managers

The special victims' counsel and victims' legal counsel program managers all agreed that the Article 32 preliminary hearing officer's determination that a specification under a charge lacks probable cause should not prohibit referral of the specification(s) to trial. Several of the program managers stated that they did not think all judge advocates serving as preliminary hearing officers possessed the necessary background, training, and experience to make a proper determination of "no probable cause."¹⁹¹

C. The DAC-IPAD's Review of Article 32 Preliminary Hearing Officers' Reports

To aid the Committee's review and analysis of Article 32 preliminary hearings, the DAC-IPAD staff compiled information from the DAC-IPAD court-martial document database. The review included the charge sheets, Article 32 preliminary hearing officer reports, Article 34 pretrial advice, and results of trial, as applicable, for all cases completed¹⁹² in fiscal years 2017 and 2018 in which (1) the most serious offense charged was a penetrative sexual offense; (2) an Article 32 preliminary hearing was held; and (3) the Article 32 preliminary hearing officer found that probable cause did not exist for one or more distinct penetrative sexual offenses—in total, 132 cases.¹⁹³

The Committee focused its inquiry on issues raised by the Judicial Proceedings Panel in its recommendations, by the Military Services' written responses to the DAC-IPAD requests for information, and by public meeting discussions with military justice experts. The specific information sought included

- The grade of the judge advocates serving as preliminary hearing officers within each Military Service;
- How often sexual offense victims testified at Article 32 preliminary hearings;

(testimony of Colonel Christopher Morgan, U.S. Air Force, Chief, Trial Defense Division).

188 See Service Trial Defense Service Combined Responses to RFI 11, *supra* note 95.

189 *Id.*; see also *Transcript of DAC-IPAD Public Meeting* (Aug. 23, 2019) 277 (testimony of Colonel Bennett); 283 (testimony of Commander Kirkby).

190 *Transcript of DAC-IPAD Public Meeting* 271–72 (Aug. 23, 2019), (testimony of Commander Kirkby); 276–79 (testimony of Colonel Morgan).

191 See Service Special Victims' Counsel / Victims' Legal Counsel Program Managers Combined Responses to RFI 11, *supra* note 95.

192 A "completed" case for purposes of this analysis is any case tried to verdict, dismissed without further action, or dismissed and then resolved by nonjudicial or administrative proceedings.

193 The FY19 NDAA amendments to Article 32 went into effect for Article 32 preliminary hearings conducted on or after January 1, 2019, and so were not in effect for the Article 32 preliminary hearings in FY17 and FY18 cases reviewed as part of this project.

- How often preliminary hearing officers determined that probable cause did not exist to believe a penetrative sexual offense had occurred; and
- Whether those charges for which the evidence did not establish probable cause were referred to a court-martial. In addition, the Committee sought to ascertain the ultimate disposition of those offenses.

The following observations and data are drawn from the Committee’s review of the 132 cases completed in FY17 and FY18 in which an Article 32 preliminary hearing officer determined that one or more penetrative sexual offense specifications lacked probable cause to believe that a penetrative sexual offense occurred. The Committee will discuss in future reports how these data and observations inform the Committee’s analysis of Articles 32, 33, and 34, UCMJ.

Preliminary hearing officers’ “no probable cause” determinations for penetrative sexual offenses for cases completed in FY17 and FY18

- On average, 19% of the penetrative sexual offense cases in which an Article 32 preliminary hearing was held included a determination that one or more charged penetrative sexual offenses lacked probable cause.
- Sexual offense victims testified in an average of 5% of Article 32 preliminary hearings involving penetrative sexual offenses.

TABLE 2.1. FISCAL YEARS 2017 AND 2018 ARTICLE 32, UCMJ, PRELIMINARY HEARINGS INVOLVING PENETRATIVE SEXUAL OFFENSES THAT RESULTED IN A “NO PROBABLE CAUSE” DETERMINATION FOR ONE OR MORE PENETRATIVE SEXUAL OFFENSES

| | 2017 | | 2018 | |
|-------------------------|----------------------------|-------------------------------------|-----------------------------|-------------------------------------|
| | Preliminary hearings held* | Determinations of no probable cause | Preliminary hearings held** | Determinations of no probable cause |
| Army | 146 | 27 (19%) | 126 | 13 (10%) |
| Marine Corps | 36 | 7 (19%) | 27 | 7 (26%) |
| Navy | 46 | 7 (15%) | 46 | 10 (22%) |
| Air Force | 133 | 37 (28%) | 116 | 20 (17%) |
| Coast Guard | 7 | 2 (29%) | 3 | 2 (67%) |
| Total | 368*** | 80 (22%) | 318*** | 52 (16%) |
| Victim Testified | 27 | | 7 | |

* In an additional 98 cases in FY17 (21% of all 466 preferred penetrative sexual offense cases), the accused waived the Article 32 preliminary hearing.

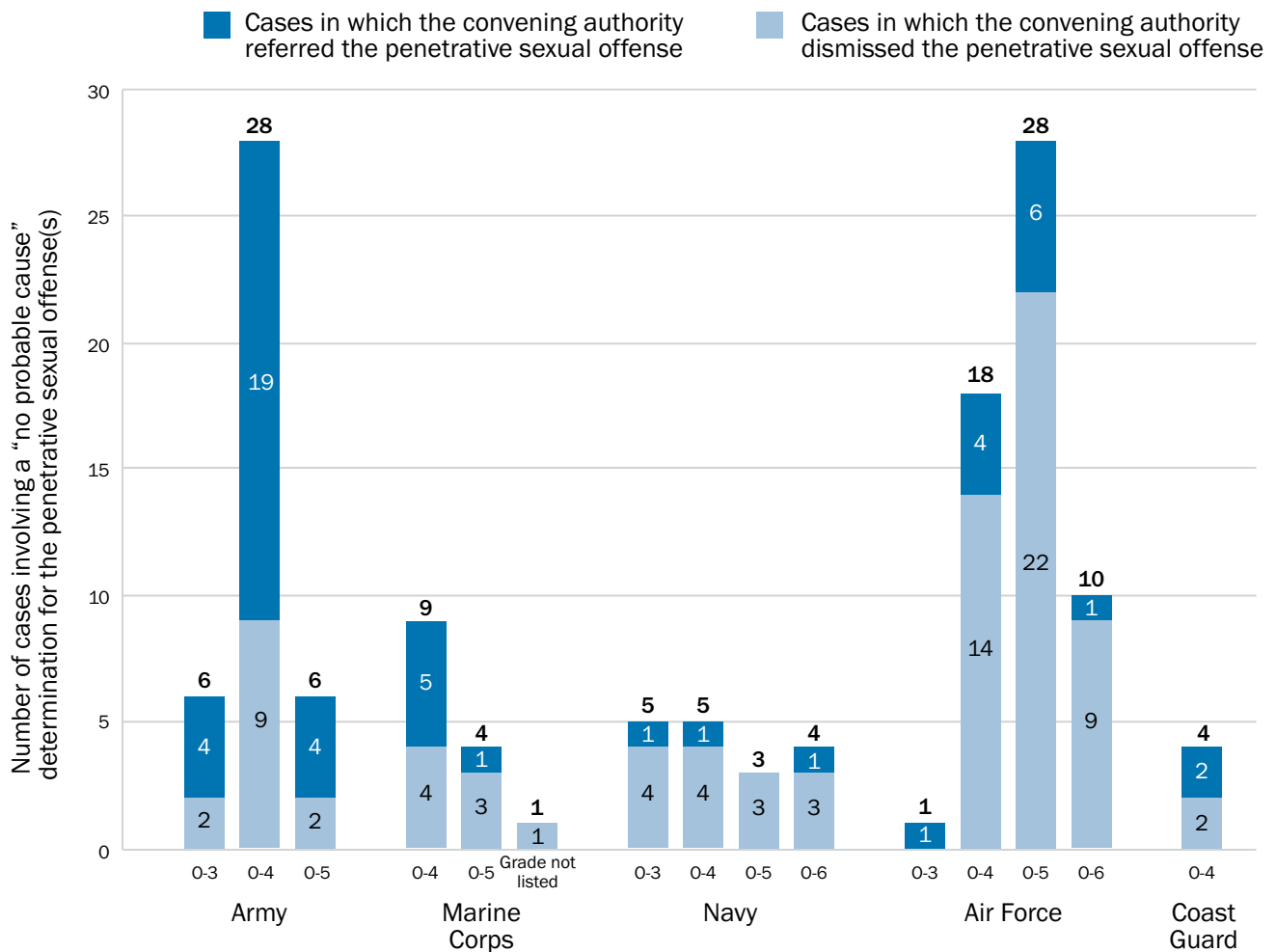
** In an additional 85 cases in FY18 (21% of all 403 preferred penetrative sexual offense cases), the accused waived the Article 32 preliminary hearing.

*** In FY17 a total of 425 preliminary hearings were held involving either an adult-victim penetrative or contact sexual offense, and in FY18 a total of 373 preliminary hearings involved either an adult-victim penetrative or contact sexual offense.

Grade of preliminary hearing officers

- Most of the judge advocates serving as Article 32 preliminary hearing officers held the grade of O-4 or O-5.
- The preliminary hearing officer's military grade did not appear to influence whether convening authorities dismissed or referred to trial the penetrative sexual offense specifications at issue.

FIGURE 2.1. FISCAL YEARS 2017 AND 2018 “NO PROBABLE CAUSE” DETERMINATIONS ACCORDING TO THE GRADE OF THE PRELIMINARY HEARING OFFICER AND THE CONVENING AUTHORITY’S DECISION TO EITHER DISMISS OR REFER THE PENETRATIVE SEXUAL OFFENSE



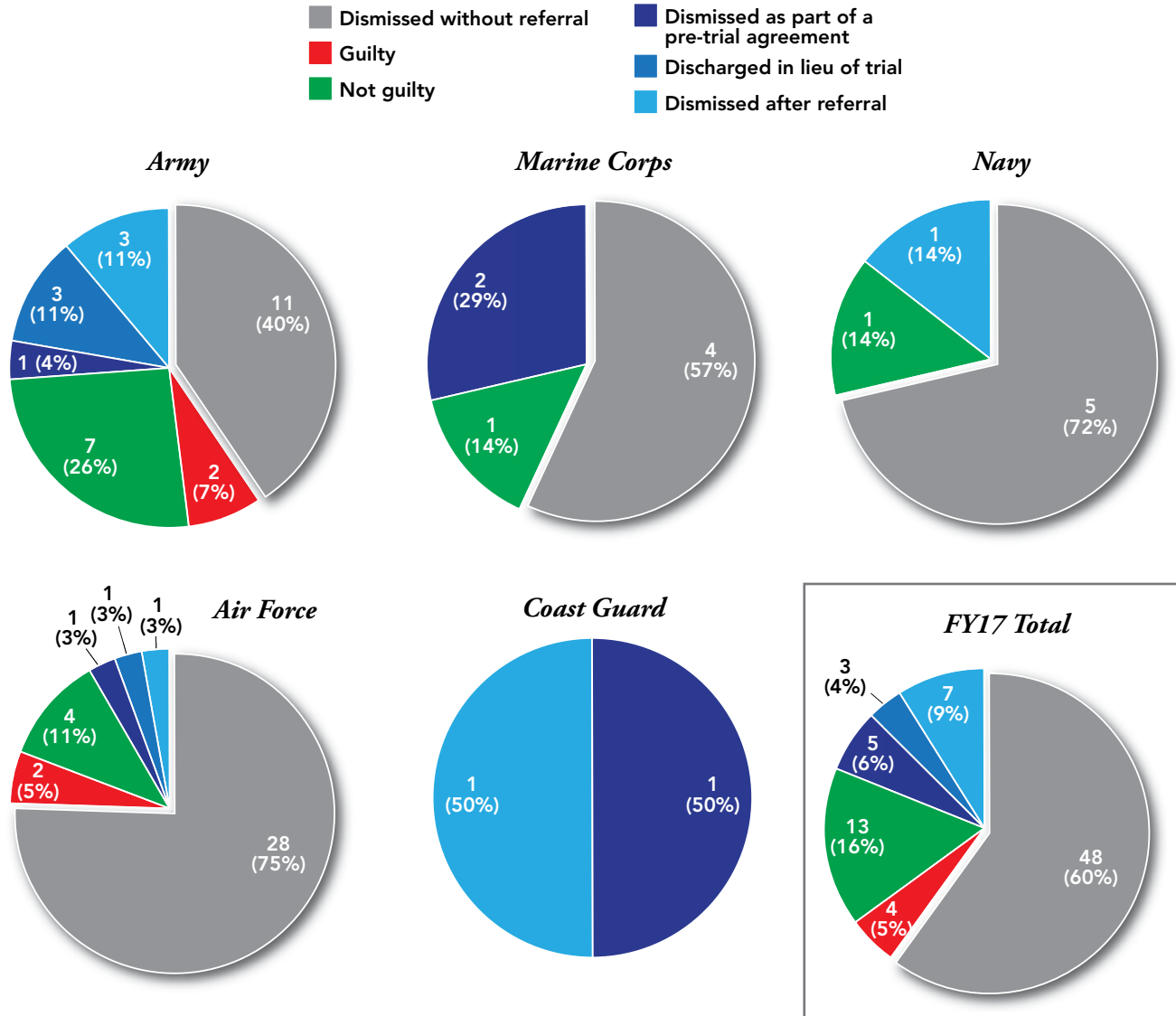
Disposition of penetrative sexual offenses following a finding of “no probable cause” by the preliminary hearing officer

- On average, convening authorities took action consistent with the Article 32 preliminary hearing officer’s determination(s) of no probable cause—i.e., dismissed the charges lacking probable cause—in a majority (66%) of the Navy, Marine Corps, Air Force, and Coast Guard cases.¹⁹⁴
- In the Army, on average, convening authorities took action consistent with the Article 32 preliminary hearing officer’s determination(s) of no probable cause in a minority (33%) of cases.
- In FY17, 32 cases were referred to court-martial after an Article 32 preliminary hearing officer determined that there was no probable cause to believe a penetrative sexual offense occurred. Fifteen of the 32 referred cases (47%) resulted in dismissal of the penetrative sexual offense(s).¹⁹⁵ In 17 of the 32 cases (53%), the penetrative sexual offenses were tried by court-martial. Of those penetrative sexual offense cases that were tried by court-martial, more than three-fourths (76%) resulted in verdicts of not guilty. Notably, one of the guilty verdicts was overturned on appeal due to lack of evidence.

¹⁹⁴ It was the special court-martial convening authority—as opposed to the general court-martial convening authority—who dismissed the relevant charges and specifications in the majority of cases. The special court-martial convening authority is typically a commander in the grade of O-6, who receives preferred charges and has the authority to direct an Article 32 preliminary hearing before making a disposition decision or forwarding the charges, along with their disposition recommendation, to a higher command echelon. The special court-martial convening authority reviews the report of the preliminary hearing officer and consults with their judge advocate before taking action. *See generally* 10 U.S.C. § 823(a)(5) (Article 23(a)(5), UCMJ).

¹⁹⁵ Of the penetrative sexual offenses dismissed following referral to court-martial, some were dismissed according to the provisions of a pretrial agreement, as part of an alternate resolution such as an administrative discharge or resignation in lieu of court-martial, or for other reasons.

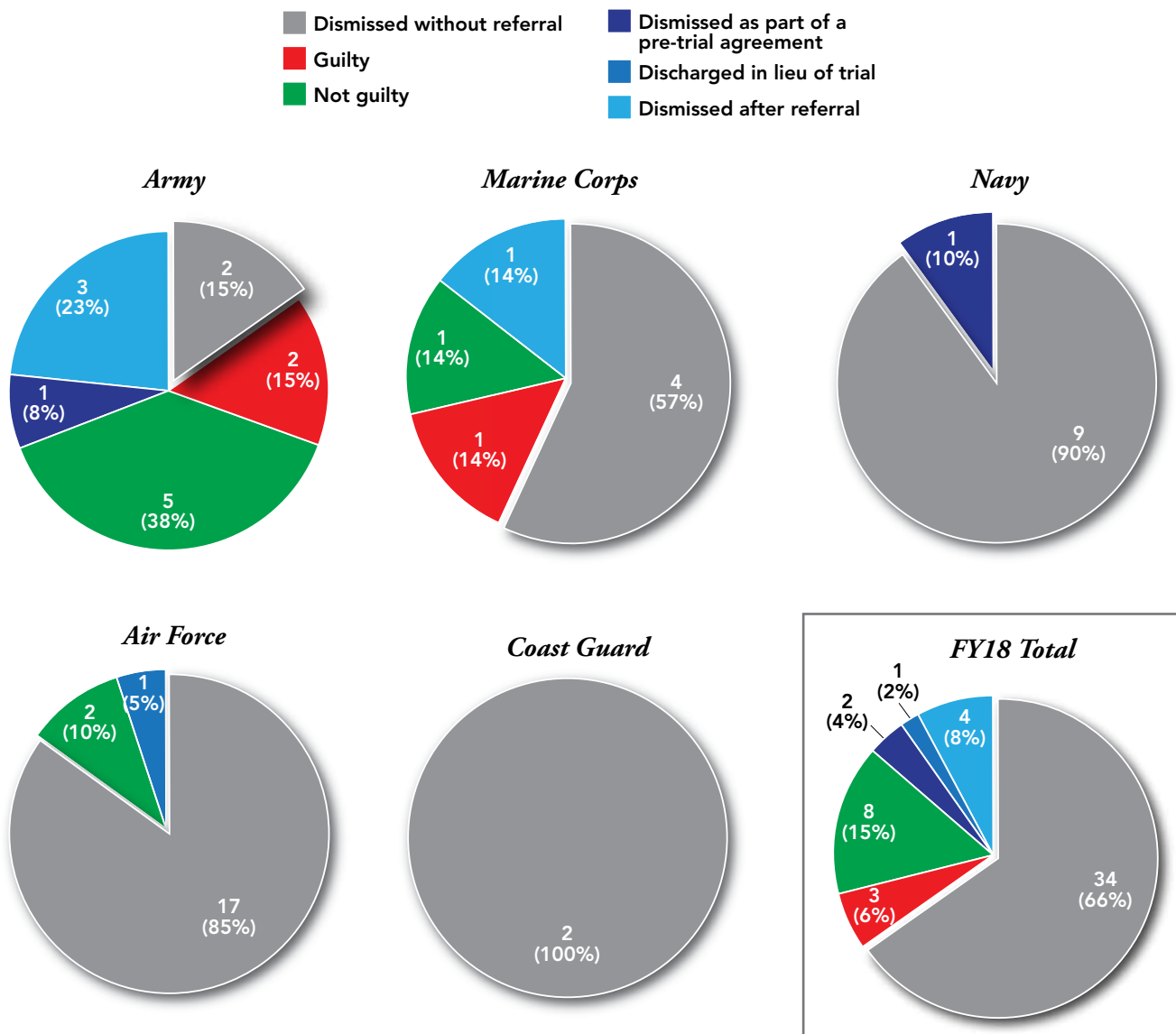
FIGURE 2.2. FISCAL YEAR 2017 ARTICLE 32, UCMJ, PRELIMINARY HEARING OFFICER “NO PROBABLE CAUSE” DETERMINATIONS AND THE ULTIMATE DISPOSITION OF THE PENETRATIVE SEXUAL OFFENSE*



* Owing to rounding, percentages in this figure may not total 100.

- In FY18, 18 cases were referred to court-martial after an Article 32 preliminary hearing officer determined that there was no probable cause to believe a penetrative sex offense occurred. Seven of the 18 referred cases (39%) resulted in dismissal of the penetrative sexual offense(s). In 11 of the 18 cases (61%), the penetrative sexual offenses were tried by court-martial. Of those penetrative sexual offense cases that were tried by court-martial, nearly three-fourths (73%) resulted in verdicts of not guilty.

FIGURE 2.3. FISCAL YEAR 2018 ARTICLE 32, UCMJ, PRELIMINARY HEARING OFFICER “NO PROBABLE CAUSE” DETERMINATIONS AND THE ULTIMATE DISPOSITION OF THE PENETRATIVE SEXUAL OFFENSE*



* Owing to rounding, percentages in this figure may not total 100.

IV. OVERVIEW OF INFORMATION COLLECTED TO DATE BY THE DAC-IPAD REGARDING THE REFERRAL PROCESS

A. Background

In the Military Justice Act of 2016, Congress amended Article 33, UCMJ, to direct the Secretary of Defense to issue guidance that commanders, judge advocates, and convening authorities should consider when deciding an appropriate disposition for an offense.¹⁹⁶ In the 2019 edition of the Manual for Courts-Martial, the Secretary of Defense published Appendix 2.1, which contains the non-binding disposition guidance.¹⁹⁷

Article 34(a), UCMJ, provides that the convening authority must obtain the advice of their staff judge advocate prior to referring charges to a general court-martial.¹⁹⁸ The convening authority is prohibited from referring a specification to general court-martial unless the staff judge advocate advises them in writing that (1) the specification alleges an offense under the UCMJ; (2) there is probable cause to believe that the accused committed the offense; and (3) there is jurisdiction over the accused and the offense. The pretrial advice must also contain the staff judge advocate's recommended disposition for the offense(s).¹⁹⁹ Beginning January 1, 2019, the staff judge advocate and convening authority should consider the non-binding disposition guidance promulgated under Article 33, UCMJ, when making recommendations or decisions regarding the disposition of charges.²⁰⁰ If the convening authority refers the charges to a general court-martial, the written pretrial advice must be provided to the defense.²⁰¹

B. Information Provided to the DAC-IPAD

The DAC-IPAD requested from the Military Services a thorough written analysis of issues related to Article 32, UCMJ, preliminary hearings; the pretrial advice required by Article 34, UCMJ; and the disposition guidance promulgated pursuant to Article 33, UCMJ.²⁰² The Military Services' criminal law/military justice policy chiefs and the trial defense services organization chiefs provided responses to the RFI and also spoke with the Committee at the August 23, 2019, DAC-IPAD public meeting on these and other topics.²⁰³

There follows a synopsis of positions and opinions related to the court-martial referral process outlined in Articles 33 and 34, UCMJ.

1. Military Justice Policy Chiefs

Most of the presenters agreed that the strength of the evidence is an important factor in the referral decision, as is the victim's willingness to participate in the court-martial process.²⁰⁴ The common approach in the Air Force is to

¹⁹⁶ 10 U.S.C. § 833 (2019) (Art. 33, UCMJ).

¹⁹⁷ 2019 MCM, *supra* note 90, Appendix 2.1, Non-Binding Disposition Guidance.

¹⁹⁸ 10 U.S.C. § 834(a) (2019) (Art. 34(a), UCMJ).

¹⁹⁹ *Id.*

²⁰⁰ 10 U.S.C. § 833 (2019) (Art. 33, UCMJ); 2019 MCM, *supra* note 90, Appendix 2.1, Non-Binding Disposition Guidance.

²⁰¹ 2019 MCM, *supra* note 90, R.C.M. 701.

²⁰² See Service responses to RFI 11, *supra* note 95.

²⁰³ *Id.*

²⁰⁴ *Id.* at para. B, Questions 1, 4; see also *Transcript of DAC-IPAD Public Meeting* 107 (Aug. 23, 2019) (testimony of Captain Tasikas); 108 (testimony of

refer sexual offense charges to court-martial so long as the staff judge advocate finds that there is probable cause the accused committed the offense and the victim is willing to participate in the trial by court-martial.²⁰⁵ Most agreed that the weight given to factors such as the victim's availability and willingness to participate in the trial and the likelihood of conviction varies with individual cases. The Air Force military justice policy chief explained that in the Air Force, judge advocates and convening authorities do not consider the likelihood of conviction as a factor at either preferral or referral.²⁰⁶

2. Trial Defense Services Organizations

The Military Services' trial defense services organization chiefs agreed that too often weak cases are referred to court-martial because the victim wants the case to be prosecuted or because of systemic or societal pressure on convening authorities to refer cases.²⁰⁷ They argued that the victim's preference should not outweigh the strength of the evidence, because the accused is facing a potential loss of liberty and the victim is not.²⁰⁸ They also agreed that the staff judge advocate should be required to explain in the Article 34, UCMJ, pretrial advice why they determined that there was probable cause for an offense when the Article 32 preliminary hearing officer did not.²⁰⁹

V. CONCLUSION

In 2020 the Policy Working Group will continue analyzing issues related to Article 32 preliminary hearings and the court-martial referral process. The members will begin with a thorough examination of Article 32, which will include a comparison with federal pretrial processes, and a review of the purposes of the Article 32 preliminary hearing and the mechanisms needed to ensure that these purposes are effectively realized. The Policy Working Group will also examine elements of the court-martial referral process—such as disposition guidance for judge advocates and convening authorities and the staff judge advocate's pretrial advice—looking at whether convening authorities are receiving the information they need to make effective disposition decisions and whether disposition guidance, promulgated under Article 33, UCMJ, is an effective tool for judge advocates and convening authorities.

Lieutenant Colonel King); 109–10 (testimony of Captain Monahan); 111–12 (testimony of Colonel Pflaum).

205 See Air Force Military Justice Division Chief Response to RFI 11, para. B, Question 1, *supra* note 95; see also *Transcript of DAC-IPAD Public Meeting* 106 (Aug. 23, 2019) (testimony of Colonel Pitvorec).

206 See Service Criminal Law/Military Justice Division Combined Responses to RFI 11, para. B, Questions 1, 4, *supra* note 95; see also *Transcript of DAC-IPAD Public Meeting* 106 (Aug. 23, 2019) (testimony of Colonel Pitvorec); 107 (testimony of Captain Tasikas); 108 (testimony of Lieutenant Colonel King); 112 (testimony of Colonel Pflaum); 123 (testimony of Colonel Pitvorec).

207 See Service Trial Defense Services Combined Responses to RFI 11, para. B, Question 2b, *supra* note 95; see also *Transcript of DAC-IPAD Public Meeting* 312 (Aug. 23, 2019) (testimony of Commander Kirkby); 313–16 (testimony of Colonel Bennett); 317 (testimony of Colonel Morgan).

208 *Transcript of DAC-IPAD Public Meeting* 242–43 (Aug. 23, 2019) (testimony of Colonel Bennett); 243–44 (testimony of Commander Kirkby); 245 (testimony of Commander King); 245–46 (testimony of Colonel Morgan).

209 See Service Trial Defense Services Combined Responses to RFI 11, para. A, Question 1b, *supra* note 95; see also *Transcript of DAC-IPAD Public Meeting* 287 (Aug. 23, 2019) (testimony of Colonel Danyluk).

CHAPTER 3. SEXUAL OFFENSE COURT-MARTIAL CASE ADJUDICATION TRENDS AND ANALYSIS

I. INTRODUCTION

This chapter provides a brief overview of the Committee's annual collection and analysis of military case adjudication statistical data for adult-victim sexual offense cases in which charges were preferred for penetrative or contact sexual offense offenses and in which final action on the case is complete.²¹⁰ The Committee published a comprehensive case adjudication report and detailed appendix in November 2019 containing data from fiscal years 2015 through 2018.²¹¹ Since publication of the report, the Committee has collected and recorded additional case documents, including charge sheets, Article 32 reports, and Results of Trial forms, resulting in updated totals of 576 cases completed in fiscal year 2018, 698 cases completed in fiscal year 2017, 770 cases completed in fiscal year 2016, and 781 cases completed in fiscal year 2015. This chapter briefly examines penetrative and contact sexual offense dispositions by Military Service in fiscal year 2018.

II. METHODOLOGY OF THE DATA WORKING GROUP

In September 2018, the DAC-IPAD staff, at the direction of Chair Martha S. Bashford, requested that the Military Services provide documents, utilizing their individual case tracking databases, for cases involving a preferred charge of a sexual offense completed in fiscal year 2018.²¹² The staff screened the case records provided by the Services to identify duplicate cases, cases with incomplete documentation, cases of sexual offenses that did not involve an adult victim, cases that did not involve a sex offense, and cases whose reported year of case completion was not correct. The resulting 576 cases from fiscal year 2018 were then added to the DAC-IPAD's electronic database.²¹³

The DAC-IPAD database includes cases encompassing fiscal years 2012 through 2018, all of which involve at least one charge of a penetrative sexual offense (i.e., rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses) or a contact sexual offense (i.e., aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses). The statistical data for fiscal years 2012 through 2014 were collected by the Judicial Proceedings Panel (JPP), which relied on the Department of Defense (DoD) Sexual Assault Prevention Office (SAPRO) annual reports to Congress to identify the total number of sexual offense cases adjudicated. Because DoD SAPRO does not count or collect information on the legal outcome of cases in which the victim is the spouse or an intimate partner, the data for those years are not complete and are therefore not included in the historical discussion that follows.

210 For purposes of the DAC-IPAD's case review and data collection, the term "sexual offense" includes the following offenses under the Uniform Code of Military Justice: rape (Article 120(a)), sexual assault (Article 120(b)), aggravated sexual contact (Article 120(c)), abusive sexual contact (Article 120(d)), forcible sodomy (Article 125), and attempts to commit these offenses (Article 80).

211 See DAC-IPAD 2019 DATA REPORT, *supra* note 21.

212 A "completed" case for purposes of this analysis is any case tried to verdict, dismissed without further action, or dismissed and then resolved by nonjudicial or administrative proceedings.

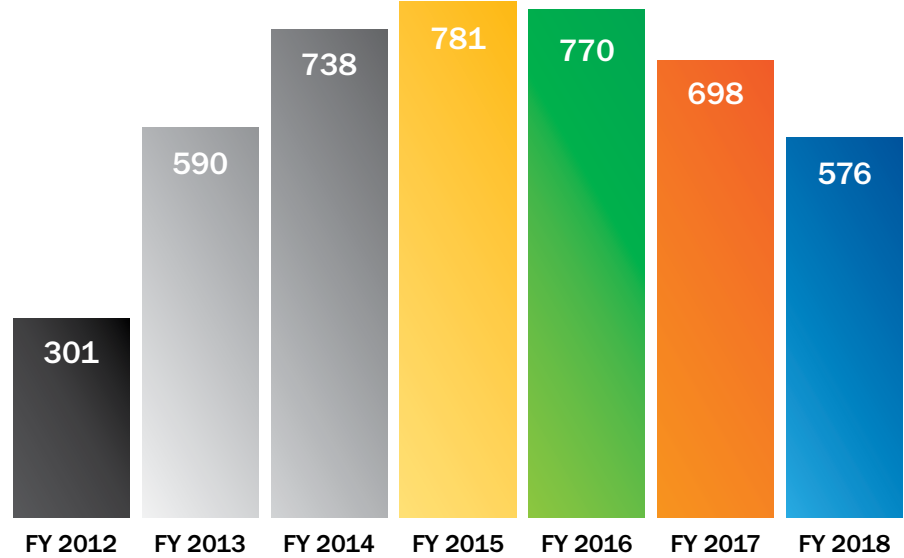
213 All data reported in this chapter are as reflected in the DAC-IPAD database as of December 4, 2019.

III. MILITARY JUSTICE INFORMATION FOR SEXUAL OFFENSE CASES COLLECTED BY THE DAC-IPAD

The DAC-IPAD relies on the Services to report cases meeting the criteria specified. The Committee therefore does not assert that it has the complete universe of cases throughout the Armed Forces in which a sexual offense charge was filed. The data were also limited to cases in which a complete set of disposition records could be identified and retrieved for analysis. In the following tables and charts, percentages may not total 100, owing to rounding errors or missing data.

The DAC-IPAD case adjudication database includes cases encompassing fiscal years 2012 through 2018, as described above. Because the DAC-IPAD staff is continuously identifying additional cases and receiving case documentation from the Military Services, it should be noted that since sexual offense case adjudication data was last reported in the November 2019 DAC-IPAD Court-Martial Adjudication Data Report, the total number of cases in which charges were preferred in fiscal year 2015 has increased by 1 case; in fiscal year 2016, by 1 case; in fiscal year 2017, by 7 cases; and in fiscal year 2018, by 2 cases.²¹⁴

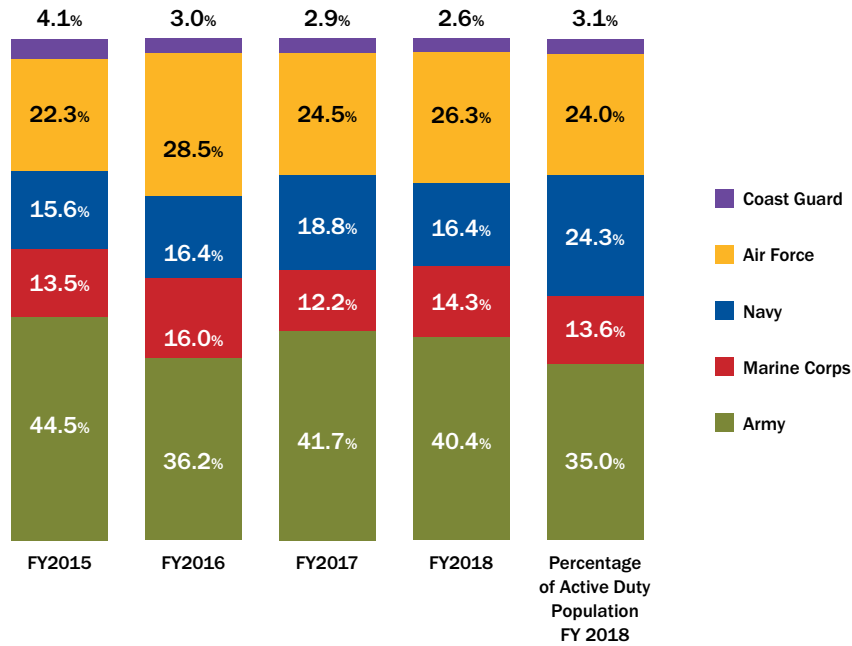
FIGURE 3.1. CASES DOCUMENTED BY THE DAC-IPAD



214 See DAC-IPAD 2019 DATA REPORT, *supra* note 21.

Of the 576 cases received by the DAC-IPAD for FY18, the Army generated the most cases (40%), followed by the Air Force (26%), Navy (16%), Marine Corps (14%), and Coast Guard (3%).

FIGURE 3.2. MILITARY SERVICE OF THE ACCUSED



The following tables provide an overview of the cases involving penetrative sexual offenses (PSOs) and contact sexual offenses (CSOs) completed by the Military Services in fiscal year 2018.

**TABLE 3.1. PENETRATIVE SEXUAL OFFENSE (PSO) OFFENSE DISPOSITIONS BY SERVICE OF THE ACCUSED
FOR CASES COMPLETED IN FISCAL YEAR 2018***

| | Judicial Disposition of Penetrative Sexual Offense (PSO) Allegations | | | | | | Alternate Disposition for PSO Allegations | | | No Action for PSO Allegations | |
|--------------|--|------------------------------|-----------------------|---------------------|--|---------------------------------|---|--|--|--|---------------------------|
| | Cases with Preferred PSO(s) | Cases with Referred PSO(s)** | Guilty Plea to PSO(s) | Convicted of PSO(s) | Convicted of Contact Sexual Offense(s) | Convicted of Non-Sex Offense(s) | Discharge or Resignation in Lieu of Court-Martial | Article 15 Nonjudicial Punishment (NJP) for PSO(s) | Other Admin. Action for PSO Offense(s) | Action Taken for Non-PSO(s) Only (CM, NJP, Admin. Action, discharge) | No Action for Any Offense |
| Army | 183 | 132 | 17 | 29 | 5 | 42 | 39 | 0 | 0 | 1 | 22 |
| Marine Corps | 50 | 36 | 9 | 6 | 0 | 13 | 8 | 0 | 0 | 8 | 6 |
| Navy | 67 | 42 | 5 | 6 | 1 | 15 | 15 | 0 | 0 | 8 | 13 |
| Air Force | 128 | 68 | 0 | 16 | 1 | 6 | 45 | 0 | 0 | 4 | 33 |
| Coast Guard | 5 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 3 |
| Total | 433 | 279 | 31 | 57 | 7 | 77 | 107 | 0 | 0 | 22 | 77 |

**TABLE 3.2. PENETRATIVE SEXUAL OFFENSE (PSO) CONVICTION RATES BY SERVICE OF THE ACCUSED
FOR CASES COMPLETED IN FISCAL YEAR 2018***

| | Conviction Rates | | | | | | Attrition Rate from Referral to Referral for PSO(s) | Percentage of Referred Cases with Guilty Plea to PSO(s) | Percentage of Preferred Cases with Action Taken for Non-PSO(s) Only | Percentage of Preferred Cases with Dismissal/No Action Taken for Any Offense |
|--------------|--|---|---|----------------------------|-----------------------------------|------------------------------------|---|---|---|--|
| | Conviction Rate for PSO(s) in Cases with Charges Preferred** | Conviction Rate for PSO(s) in Cases with Charges Referred** | Acquittal Rate for All Offenses in Cases with PSO(s) Referred | Conviction Rate for PSO(s) | Conviction Rate for Non-PSO(s)*** | Conviction Rate for Courts-Martial | | | | |
| Army | 25.1% | 34.8% | 29.5% | 25.2% | 40.9% | 66.1% | 27.9% | 12.9% | 0.5% | 12.0% |
| Marine Corps | 30.0% | 41.7% | 22.2% | 22.2% | 48.1% | 70.4% | 28.0% | 25.0% | 16.0% | 12.0% |
| Navy | 16.4% | 26.2% | 35.7% | 16.2% | 43.2% | 59.5% | 37.3% | 11.9% | 11.9% | 19.4% |
| Air Force | 12.5% | 23.5% | 66.2% | 23.5% | 10.3% | 33.8% | 46.9% | 0.0% | 3.1% | 25.8% |
| Coast Guard | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% | 80.0% | 0.0% | 20.0% | 60.0% |
| Total | 20.3% | 31.5% | 38.4% | 23.0% | 33.9% | 56.9% | 35.6% | 11.1% | 5.1% | 17.8% |

* A completed case is a case with a preferred penetrative sexual offense that is tried to verdict, dismissed without further action, or resolved by nonjudicial or administrative proceedings during the fiscal year being reported.

** Includes only cases in which the accused either contested or pled guilty to the PSO.

*** Includes conviction for contact sexual assault and/or non-sex offense(s).

TABLE 3.3. CONTACT SEXUAL OFFENSE (CSO) DISPOSITIONS BY SERVICE OF THE ACCUSED
FOR CASES COMPLETED IN FISCAL YEAR 2018*

| Judicial Disposition of Contact Sexual Offense (CSO) Allegations | | | | | | | Alternate Dispositions for CSO Allegations | | | No Action for CSO Allegations | |
|--|-----------------------------|----------------------------|-----------------------|--------------------------|---------------------------------|---------------------------|---|--|--------------------------------|--|---------------------------|
| | Cases with Preferred CSO(s) | Cases with Referred CSO(s) | Guilty Plea to CSO(s) | Contested Courts-Martial | | | Discharge or Resignation in Lieu of Court-Martial | Article 15 Nonjudicial Punishment (NJP) for CSO(s) | Other Admin. Action for CSO(s) | Action Taken for Non-CSO(s) Only (CM, NJP, Admin. Action, discharge) | No Action for Any Offense |
| | | | | Convicted of CSO(s) | Convicted of Non-Sex Offense(s) | Acquitted of All Offenses | | | | | |
| Army | 51 | 34 | 2 | 4 | 20 | 8 | 8 | 1 | 0 | 2 | 6 |
| Marine Corps | 32 | 16 | 2 | 1 | 12 | 1 | 4 | 6 | 1 | 2 | 3 |
| Navy | 27 | 15 | 1 | 0 | 13 | 1 | 5 | 1 | 0 | 4 | 2 |
| Air Force | 23 | 15 | 2 | 1 | 6 | 6 | 3 | 1 | 0 | 0 | 4 |
| Coast Guard | 10 | 2 | 0 | 0 | 2 | 0 | 2 | 1 | 0 | 1 | 4 |
| Total | 143 | 82 | 7 | 6 | 53 | 16 | 22 | 10 | 1 | 9 | 19 |

TABLE 3.4. CONTACT SEXUAL OFFENSE (CSO) CONVICTION RATES BY SERVICE OF THE ACCUSED
FOR CASES COMPLETED IN FISCAL YEAR 2018*

| | Conviction Rates | | | | | | Attrition Rate from Referral to Referral for CSO(s) | Percentage of Referred Cases with Guilty Plea to CSO(s) | Percentage of Preferred Cases with Action Taken for Non-CSO(s) Only | Percentage of Preferred Cases with Dismissal/ No Action Taken for Any Offense |
|--------------|--|---|---|----------------------------|--------------------------------|---------------------------------|---|---|---|---|
| | Conviction Rate for CSO(s) in Cases with Charges Preferred** | Conviction Rate for CSO(s) in Cases with Charges Referred** | Acquittal Rate for All Offenses in Cases with CSO(s) Referred | Contested Courts-Martial | | | | | | |
| | | | | Conviction Rate for CSO(s) | Conviction Rate for Non-CSO(s) | Conviction Rate for Any Offense | | | | |
| Army | 11.8% | 17.6% | 23.5% | 12.5% | 62.5% | 75.0% | 33.3% | 5.9% | 3.9% | 11.8% |
| Marine Corps | 9.4% | 18.8% | 6.3% | 7.1% | 85.7% | 92.9% | 50.0% | 12.5% | 6.3% | 9.4% |
| Navy | 3.7% | 6.7% | 6.7% | 0.0% | 92.9% | 92.9% | 44.4% | 6.7% | 14.8% | 7.4% |
| Air Force | 13.0% | 20.0% | 40.0% | 7.7% | 46.2% | 53.8% | 34.8% | 13.3% | 0.0% | 17.4% |
| Coast Guard | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% | 100.0% | 80.0% | 0.0% | 10.0% | 40.0% |
| Total | 9.1% | 15.9% | 19.5% | 8.0% | 70.7% | 78.7% | 42.7% | 8.5% | 6.3% | 13.3% |

* A completed case is a case with a preferred contact sexual offense that is tried to verdict, dismissed without further action, or resolved by nonjudicial or administrative proceedings during the fiscal year being reported.

** Includes only cases in which the accused either pled guilty or contested the CSO.

IV. CASE ADJUDICATION DATABASE WAY AHEAD

The JPP, the predecessor organization to the DAC-IPAD, created a system for the identification and analysis of sexual offense cases in the Armed Forces, and the DAC-IPAD, in accordance with its authorizing legislation, has continued to utilize and expand the system. As currently designed the system includes over 4,000 records in which a penetrative and/or contact sexual offense charge was preferred against a Service member from fiscal years 2012 to 2018.

The DAC-IPAD, in order to continue meeting its mandate and provide timely advice to the Secretary of Defense, requires a dedicated database for the collection and analysis of case documents. Going forward, however, current technical limitations will prevent the DAC-IPAD from providing a useful analysis of how the military justice system resolves allegations of sexual offense.

Because the DAC-IPAD utilizes a document-based methodology, the current system is based on SharePoint, a program designed for document sharing within a closed system, rather than a traditional database architecture. In the current system DAC-IPAD legal staff enter data into a form created in SharePoint and attach source documents to the record. All analysis requires exporting the data into Microsoft Excel and then sorting and counting results to answer a given query. Advanced statistical analysis requires extensive recoding of data fields and analysis by statistical software separate from SharePoint and Excel.

The DAC-IPAD requires a database that enables 4,000+ case records per fiscal year to be entered and analyzed. Each of these case records will include 250+ data fields for demographic and statistical analysis. In addition, with a document-based methodology, each record will include attachment of 10+ multiple-page PDF documents. One comprehensive database, able to pull required information from the Military Services upon creation of a charge sheet against a service member, can be utilized by DAC-IPAD, as well as by other stakeholders, without the need to create duplicate systems.

Substantial changes to the Manual for Courts-Martial, implemented in 2019, not only affect individual articles under the Uniform Code of Military Justice but also change the sentencing scheme for convictions at court-martial in arguably more important ways. Prior to 2019, upon a finding of guilt, the panel of Service members or military judge awarded a sentence based on overall guilt (unitary sentencing); however, in the new scheme, under some circumstances the accused will receive a discrete sentence for each offense to run consecutively or concurrently with other sentences. This change requires a database that is able to track not only each case but each charge and specification independently, from preferral to referral to finding and then to sentencing under the different schemes. For the results to be accurate and useful for further analysis, a robust database requires not simply data points existing independently but multiple decision points within each record with internal automatic quality control checks to identify records that are missing required information.

The DAC-IPAD is unable to enter cases from fiscal year 2019 and future years in the current SharePoint-based system. Therefore, the DAC-IPAD will not be able to provide further comprehensive demographic and statistical analysis going forward.

The DAC-IPAD staff has met with individuals from various Department of Defense agencies and outside organizations to explore solutions that can meet the database requirements. The DAC-IPAD will report updates as the project proceeds.

CHAPTER 4. ANALYSIS OF THE DRAFT DEPARTMENT OF DEFENSE INITIAL SEXUAL ASSAULT VICTIM COLLATERAL MISCONDUCT REPORT

I. INTRODUCTION

Section 547 of the Fiscal Year 2019 National Defense Authorization Act directs the Secretary of Defense to work “through” the DAC-IPAD in submitting to the congressional defense committees a biennial report on the number of instances of collateral misconduct, such as underage drinking, fraternization, or curfew violations, committed by alleged victims of sexual offenses. This section requires that the reports include three statistical data elements: (1) the number of instances in which an individual identified as a victim of a sexual offense in the case files of a military criminal investigation was accused of misconduct or crimes considered collateral to the investigation of the sexual offense, (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct or crimes, and (3) the percentage of sexual offense investigations that involved such an accusation or adverse action against those individuals. Each report is to cover the two years preceding the report’s due date.²¹⁵ The FY19 NDAA did not include a termination date for the biennial reports.

The first report on victim collateral misconduct was due, by statutory requirement, to the congressional defense committees by September 30, 2019. The DoD General Counsel provided the DAC-IPAD with DoD’s draft, *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*, and a request for the Committee’s input and comments in accordance with section 547 of the FY19 NDAA.²¹⁶ Though provided as one document, the DoD submission consisted of four separate reports, each individually prepared and submitted to DoD by the Army, Navy, Marine Corps, and Air Force as directed by the DoD General Counsel.²¹⁷ The Coast Guard also prepared its own report and provided it to the DAC-IPAD.

To better understand how the information in the reports was identified and gathered by each Military Service, the Committee requested Service representatives who were involved in the data collection process to meet with the DAC-IPAD staff and discuss the data reported and methodologies employed in collecting data for the respective Military Service reports. Following this meeting and at the request of the Committee, the Military Services provided additional details to the DAC-IPAD regarding the types of collateral misconduct reported and the adverse actions taken.²¹⁸ Service representatives were then invited to appear at the August 23, 2019, DAC-IPAD public meeting to respond directly to Committee members’ questions about the draft reports.

²¹⁵ See FY19 NDAA, *supra* note 17, § 547.

²¹⁶ See Appendix G, Enclosure 1, which includes the Department of Defense’s draft collateral misconduct report provided to the DAC-IPAD, the Coast Guard’s collateral misconduct report, and a supplemental report provided to the DAC-IPAD by the Air Force on August 22, 2019.

²¹⁷ See Memorandum from the Department of Defense General Counsel to the Secretaries of the Military Departments re: Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault (March 12, 2019).

²¹⁸ See Appendix G, Enclosure 4, which is a compilation of the supplemental information received by the DAC-IPAD from each Military Service, providing details on the types of collateral misconduct reported and adverse actions taken.

On September 16, 2019, drawing on the Committee's review of the draft reports, the additional information provided by the Military Services, and the testimony received at the public meeting, the DAC-IPAD submitted a letter to the Secretary of Defense containing both its analysis of DoD's draft collateral misconduct report and five recommendations for improving the uniformity and usefulness of the data collected. The Committee's letter and its enclosures are provided at Appendix G. This chapter provides a restatement of the analysis and recommendations previously made to the Secretary of Defense, together with a discussion of dissenting views on the definition of collateral misconduct voiced by some members of the Committee. The chapter's conclusion summarizes the response the Committee received from the DoD General Counsel regarding its recommendations; the response is provided in its entirety at Appendix H.

II. ANALYSIS OF AND RECOMMENDATIONS REGARDING DOD'S INITIAL SEXUAL ASSAULT VICTIM COLLATERAL MISCONDUCT REPORT

A. Analysis of the Military Services' Definitions and Methodologies

In reviewing the draft reports and the additional information provided by the Military Services, the Committee identified a number of inconsistencies both in the methodologies employed by the Military Services in collecting data and in their definitions of terms. These inconsistencies can be attributed, in large part, to the failure of the relevant statute to define some of its key terms. That the Military Services, in the absence of uniform guidance from Congress or DoD, employed nonstandard and inconsistent definitions to collect collateral misconduct data underscores the critical need for, and difficulty in obtaining, uniform, accurate, and complete information on sexual offense cases across the military. The Committee noted in an earlier letter to the Secretary of Defense that this difficulty was the driving force behind the Committee's recommendation—regarding Article 140a of the Uniform Code of Military Justice (UCMJ)—that DoD develop a single electronic database for the uniform collection, storage, and analysis of standardized military justice documents across the Military Services.²¹⁹

1. Inconsistencies in Data Collection

One example of the significant differences in the Military Services' collection of collateral misconduct data was in the approach taken by each Military Service to determining its total number of sexual offense investigations and victims. One Military Service included only investigations of penetrative sexual offenses in its data, while the other Military Services included investigations for both penetrative and contact sexual offenses—a significant disparity. Further, some Military Services included cases in which investigations were complete but command action was pending as well as cases in which command action was complete. Others included only cases with completed command action. In addition, the Military Services differed in whether they included reservists and members of the National Guard in federal status who were victims of sexual offenses, and whether they included victims from their Military Service if the case was investigated by another Military Service's military criminal investigative organization (MCIO).²²⁰

219 See 2018 DAC-IPAD Letter to Secretary of Defense Regarding Article 140a, *supra* note 19.

220 See Appendix G, Enclosures 2 and 3, which contain charts comparing the Military Services' varied definitions and methodologies utilized in calculating the percentage of victims who were accused of collateral misconduct in each Military Service and the percentage of victims who received adverse action in each Military Service.

Another critical difference across Military Services in their reporting criteria was in how each defined the term “accused” when determining the number of instances in which a victim of a sexual offense was accused of collateral misconduct, as required by the statute. Under the definition used by some Military Services, a victim was considered to be accused of collateral misconduct if the MCIO’s sexual offense investigation revealed circumstances that could potentially support the taking of adverse action against the victim for misconduct such as underage drinking. Other Military Services employed more restrictive criteria, considering a victim to be accused of collateral misconduct only if an inquiry into the collateral misconduct was actually initiated. The Committee noted that in the context of the collateral misconduct report, the statutory language describing a victim as “accused” of collateral misconduct was extremely confusing. In the military justice system, that term is typically used of a Service member only after charges have been preferred against them; during the investigative stage, a person suspected of engaging in misconduct is typically referred to as a “suspect” or “subject.” Consequently, the lack of clear guidance on what Congress meant for a victim to be “accused” of collateral misconduct was a significant obstacle to drafting a meaningful report.

2. Inconsistencies in Defining “False Allegations of Sexual Assault”

The Military Services were also inconsistent in how they treated what they considered to be false allegations of a sexual offense; some Military Services included false allegations in their data as collateral misconduct, while others did not. To clarify whether a Military Service included false allegations in the reported number of cases involving collateral misconduct, the DAC-IPAD asked all the Military Services to provide data specifically concerning false allegations and adverse actions taken.²²¹ None of the Military Services provided a written definition of what they classified as a “false allegation of sexual assault” or specified the evidentiary threshold necessary to classify an allegation as false.

During its August 23, 2019, public meeting, the Committee members questioned the Service representatives on this issue and learned that at least one Military Service classified cases in which a mistaken report was made by a third party as a false report. The Service representatives also mentioned instances in which a suspect makes a “cross-claim” of a sexual offense, meaning that one person reported the sexual offense and the suspect in that case then countered by accusing the reporter of a sexual offense. Several Service representatives noted that they had difficulty determining how to classify these reports.²²²

The Committee observed in its letter to the Secretary of Defense that a factually false allegation of a sexual offense constitutes its own category of misconduct, distinct from misconduct collateral to a sexual offense, and therefore should not be counted as an instance of collateral misconduct.

221 Though the issue of false allegations is important and may be considered by the Committee in a future study, for this report—given its limited scope—the Committee did not further assess the Military Services’ classifications or definitions of a false allegation of sexual assault other than to note the information reported by each. Out of a total of 5,733 Service member victims reported by all Services for the period evaluated, the Army reported 8 cases involving false allegations of sexual assault; the Navy, Marine Corps, and Air Force each reported 5 cases involving false allegations of sexual assault; and the Coast Guard reported 2 cases involving false allegations of sexual assault (the Services submitted these numbers using their own definitions of the term “false allegation”).

222 See *Transcript of DAC-IPAD Public Meeting* 46–49 (Aug. 23, 2019) (testimony of Lieutenant Adam Miller, U.S. Coast Guard, Legal Intern, Office of Military Justice; testimony of Lieutenant Colonel Jane M. Male, U.S. Air Force, Deputy of the Military Justice Division, Air Force Legal Operations Agency).

B. Comparison of Military Service–Provided Collateral Misconduct Data

In the individual Military Service reports reviewed by the DAC-IPAD, each Service presented its data differently.²²³ To conduct its analysis the Committee created the following tables comparing the data as reported by each Military Service. In these tables, percentages may not total 100, owing to rounding errors.

**TABLE 4.1. INCIDENCE OF COLLATERAL MISCONDUCT IN SEXUAL OFFENSE CASES CLOSED BETWEEN
APRIL 1, 2018, AND MARCH 31, 2019 – BY MILITARY SERVICE**

| Collateral Misconduct and Service Member Victims | Army | Marine Corps | Navy | Air Force | Coast Guard | Total |
|--|-------|--------------|-------|-----------|-------------|-------|
| Number of Service member victims | 1,206 | 826 | 1,686 | 1,753 | 262 | 5,733 |
| Number of Service member victims “accused” of collateral misconduct | 146 | 11 | 21 | 100* | 53 | 331 |
| Number of instances when adverse action was taken against a Service member victim “accused” of collateral misconduct | 15 | 10 | 12 | 38 | 6 | 81 |
| Percentage of Service member victims <u>accused</u> of collateral misconduct | 12% | 1% | 1% | 6% | 20% | 6% |
| Percentage of <u>accused</u> Service member victims who <u>received adverse action</u> for collateral misconduct | 10% | 91% | 57% | 38% | 11% | 24% |
| Percentage of (all) Service member victim(s) who received adverse action for collateral misconduct | 1% | 1% | 1% | 2% | 2% | 1% |

* The Air Force reported 105 Service member victims “accused” of collateral misconduct to the DAC-IPAD; however, in 5 of those cases the misconduct reported by the Air Force was a false allegation of a sexual offense.

223 See Appendix G, Enclosure 1.

Although not required to do so by the FY19 NDAA provision, the DAC-IPAD determined that in order to meaningfully assess the issue of collateral misconduct, it is also important to review the types of collateral misconduct occurring as well as the types of adverse action that victims are receiving for such misconduct. Therefore, the Committee requested supplemental information from the Military Services. The supplemental data were used by the staff to create Tables 4.2 and 4.3.²²⁴

TABLE 4.2. TYPE OF ALLEGED COLLATERAL MISCONDUCT – BY MILITARY SERVICE

| Type of Alleged Collateral Misconduct | Army (n=146) | Marine Corps (n=11) | Navy (n=21) | Air Force (n=105) | Coast Guard (n=53) |
|--|-----------------|------------------------|----------------|----------------------|-----------------------|
| Underage Drinking | 55 (38%) | 3 (27%) | 4 (19%) | 25 (24%) | 8 (15%) |
| Violation of Order or Policy (e.g., missing curfew, drinking) | 21 (14%) | 4 (36%) | 3 (13%) | 20 (19%) | 1 (2%) |
| Adultery | 20 (14%) | – | 2 (10%) | 15 (14%)* | 1 (2%) |
| Fraternization | 19 (13%) | – | 6 (29%) | – | 4 (8%) |
| Sexual Assault Counterclaim or Other Sex Offense | 7 (5%) | – | 1 (<1%) | 10 (10%) | 1 (2%) |
| Inappropriate/Prohibited Relationship | 5 (3%) | – | – | – | 27 (51%) |
| False Statements (not including false reports) | 5 (3%) | – | – | 6 (6%) | 2 (4%) |
| Drug Use | 4 (3%) | 1 (10%) | 2 (10%) | 10 (10%) | 1 (2%) |
| Prostitution | – | – | – | – | 1 (2%) |
| Sex in the Barracks | – | – | – | – | 7 (13%) |
| Drunk and Disorderly Conduct | – | – | 2 (10%) | – | – |
| Indirect Collateral Misconduct (future misconduct attributed to sexual trauma) | 3 (2%) | – | – | – | – |
| Unknown | 3 (2%) | – | – | – | – |
| Assault | 2 (1%) | – | – | 8 (8%) | – |
| Driving Under the Influence (DUI)/ Drunk Driving | 1 (1%) | 1 (<1%) | 1 (10%) | 4 (4%) | – |
| Absence Without Leave (AWOL) | 1 (1%) | – | – | 1 (1%) | – |
| Article 133, Conduct Unbecoming | – | 1 (10%) | – | – | – |
| Insubordination | – | – | – | 1 (1%) | – |

* Air Force—provided data combined adultery, fraternization, and inappropriate relationships into one category.

²²⁴ The complete supplemental information provided to the DAC-IPAD by each of the Military Services is available at Appendix G, Enclosure 4.

TABLE 4.3. TYPE OF ADVERSE ACTION TAKEN FOR COLLATERAL MISCONDUCT – BY MILITARY SERVICE

| Type of Adverse Action Taken for Collateral Misconduct | Army (n=15) | Marine Corps (n=10) | Navy (n=12) | Air Force (n=38) | Coast Guard (n=6) |
|--|----------------|------------------------|----------------|---------------------|----------------------|
| Verbal Counseling | 4 (27%) | – | – | – | – |
| Letter of Reprimand (LOR) (or Service equivalent) | 4 (27%) | 3 (30%) | 1 (8%) | 17 (45%) | 2 (33%) |
| Article 15 Nonjudicial Punishment | 6 (40%) | 5 (50%) | 8 (67%) | 12 (32%) | 3 (50%) |
| Discharge/Separation | 1 (7%) | – | 2 (17%) | – | – |
| Court-Martial (CM) / CM + Discharge | – | – | – | 2 (5%) | 1 (17%) |
| Liberty Restrictions | – | – | 1 (8%) | – | – |
| LOR/Article 15 + Discharge | – | 1 (10%) | – | 7 (18%) | – |
| Retirement | – | 1 (10%) | – | – | – |

C. Analysis of Collateral Misconduct Data Provided by the Military Services

Incidence of Collateral Misconduct

Congress requested that the Secretary of Defense report the percentage of Service members who are victims of sexual offenses and are accused of collateral misconduct. Notwithstanding the inconsistencies in the Military Services’ methodologies and definitions, the data made clear that the incidence of victim collateral misconduct in MCIO-investigated sexual offense cases is fairly low, ranging from 1% of the Service members who were victims of a sexual offense in the Navy and Marine Corps to a high of 20% in the Coast Guard. In the largest Military Service—the Army—12% of Service member victims were accused of collateral misconduct in penetrative cases. According to the Committee’s calculations, which are based on the combined DoD and Coast Guard reports, as well as the Military Services’ varying definitions of “accused of collateral misconduct,” 6% of Service member victims overall were accused of collateral misconduct in the two-year period studied.

Likelihood of Adverse Action

Congress also requested that the percentage of Service members who are victims of a sexual offense *and* receive adverse action for collateral misconduct be reported. The Military Services provided the percentage of *all* Service member victims who received adverse action for collateral misconduct, regardless of whether a victim was accused of such misconduct. However, the figure that may be particularly helpful to policymakers is more narrowly defined: the percentage of those Service members who were accused of collateral misconduct and also received some form of adverse action for it. According to the Committee’s calculations, the incidence of Service member victims receiving adverse action when accused of collateral misconduct varied widely across the Military Services, ranging from 10% of accused Service members in the Army receiving adverse action to 91% in the Marine Corps. Importantly, this statistic does not provide a basis for reliable comparisons across the Military Services in the draft DoD report,

because the Military Services did not have uniform interpretations of the term “accused.” As would be expected, the Military Services that defined “accused” more broadly showed less likelihood of adverse action than the Military Services that defined the term more restrictively.

Types of Collateral Misconduct and of Adverse Action Received

In the data initially provided to the DAC-IPAD, the Military Services did not include the type of collateral misconduct each victim was accused of or the type of adverse action received; however, several Military Services mentioned in their reports that they did collect this information, which the Committee subsequently requested from all the Military Services for analysis. The frequency of each type of collateral misconduct differed by Military Service. In the Army, the most common collateral misconduct offenses were underage drinking (38%), adultery (14%), violation of an order or policy (14%), and fraternization (13%). In the Navy, the most common collateral misconduct offenses were fraternization (29%), underage drinking (19%), and liberty policy violations (14%). In the Marine Corps, the most common collateral misconduct offenses were orders violations (36%) and underage drinking (27%). In the Air Force, the most common collateral misconduct offenses were underage drinking (24%), orders or policy violations (19%), and adultery, fraternization, or unprofessional relationships (14%). Finally, in the Coast Guard, the most common collateral misconduct offenses were prohibited relationship (51%), underage drinking (15%), and sex in the barracks (13%). The type of adverse action received for these offenses also varied across the Military Services.

D. Recommendations

Because all the Military Services did not use the same methodology to collect data, the DAC-IPAD was unable to base substantive recommendations regarding collateral misconduct on the information contained in the reports. The Committee found that before meaningful analysis can take place, the Military Services must adopt a thorough and consistent methodology for collecting the relevant data. If the inconsistencies in the Military Services’ definitions and methodologies for data collection are not resolved promptly, future reports on collateral misconduct will have the same shortcomings as are discussed in this chapter.

Drawing on the experience of collecting the data required for this initial 2019 collateral misconduct report, the Military Services provided the DAC-IPAD with valuable input to help clarify and standardize definitions and the collection methodology in the reports going forward. Based on this input, on the testimony received from Service representatives at the August 23, 2019, public meeting, and on the Committee’s deliberations, the DAC-IPAD offered the following recommendations to the Secretary of Defense to improve the uniformity, accuracy, and utility of victim collateral misconduct data in future reports.²²⁵

DAC-IPAD Recommendation 19: The Department of Defense should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Military Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles:

²²⁵ The collateral misconduct–related recommendations in this report have been renumbered so that they follow consecutively the recommendations (1–18) that were published in previous DAC-IPAD reports. See Appendix E.

a. Definition of “sexual offense”:

- The definition of “sexual offense” for purposes of reporting collateral misconduct should include
 - Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
 - Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
 - Attempts, conspiracies, and solicitations of all of the above.
- The definition of sexual offense should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child); Article 120c, UCMJ (Other sexual misconduct); Article 130, UCMJ (Stalking); or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual offense incident.”²²⁶
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should read as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual offense, and directly related to the incident that formed the basis of the sexual offense allegation. The collateral misconduct must have been discovered as a direct result of the report of the sexual offense and/or the ensuing investigation into the sexual offense.”
- Collateral misconduct includes (but is not limited to) the following situations:
 - The victim was in an unprofessional or adulterous relationship with the accused at the time of the assault.²²⁷
 - The victim was drinking underage or using illicit substances at the time of the assault.
 - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
- To ensure consistency across the Military Services, collateral misconduct, for purposes of this report, should *not* include the following situations (the list is not exhaustive):
 - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of a sexual offense.
 - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
 - The victim engaged in misconduct after reporting the sexual offense.
 - The victim had previously engaged in an unprofessional or adulterous relationship with the subject, but had terminated the relationship prior to the assault.

226 Dep’t of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Glossary (March 28, 2013, Incorporating Change 3, May 24, 2017), 117.

227 For purposes of this report, an “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.

- The victim engaged in misconduct that is not close in time to the sexual offense, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
- The victim is suspected of making a false allegation of a sexual offense.
- The victim engaged in misconduct during the reporting or investigation of the sexual offense (such as making false official statements during the course of the investigation).

c. Methodology for identifying sexual offense cases and victims:

- To identify sexual offense cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the MCIOs.
- A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.²²⁸
- Each Military Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Military Service’s MCIO.

d. Time frame for collection of data:

- The Military Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and should include only closed cases as defined above. For example, the Department’s report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.

e. Definition of “covered individual”:

- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual offense in the case files of a military criminal investigative organization.” This definition should be clarified as follows: “an individual identified in the case files of an MCIO as a victim of a sexual offense while in title 10 status.”
- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

f. Replacement of the term “accused”:

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term “suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.²²⁹

228 This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group. See DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 21 n.28.

229 *Cf. United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article

- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:
 - The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - Another witness in the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - In the course of the sexual offense investigation, an analysis of the victim's phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- This definition of "suspected of" does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions has occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
 - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

g. Definition of "adverse action":

- The term "adverse action" applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.
- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
 - Letter of reprimand (or Military Service equivalent) or written record of individual counseling in official personnel file;
 - Imposition of nonjudicial punishment;
 - Preferral of charges; or
 - Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Military Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Military Service equivalent), or reclassification.

31(b) prior to interrogation "is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense") (internal citations omitted).

h. Methodology for counting “number of instances”:

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse action, under the most serious collateral misconduct identified in the adverse action.
- For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

DAC-IPAD Recommendation 20: Victims suspected of making false allegations of a sexual offense should not be counted as suspected of collateral misconduct.

DAC-IPAD Recommendation 21: For purposes of the third statistical data element required by section 547, the Department of Defense should report not only the percentage of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are suspected of collateral misconduct and then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim’s receiving an adverse action for collateral misconduct once they are suspected of such misconduct.

DAC-IPAD Recommendation 22: The Department of Defense should include in its report data on the number of collateral offenses that victims were suspected of by type of offense (using the methodology specified in section h of Recommendation 19) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.

DAC-IPAD Recommendation 23: To facilitate production of the future collateral misconduct reports required by section 547, the Military Services should employ standardized internal documentation of sexual offense cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.

III. DISSENTING OPINIONS ON THE DEFINITION OF COLLATERAL MISCONDUCT

During final deliberations regarding the DAC-IPAD's response to DoD's draft collateral misconduct report, some Committee members expressed concerns about the definition of collateral misconduct that was ultimately adopted by majority vote of the Committee. General Schwenk noted that the reason people care about collateral misconduct is that it might deter the reporting of a sexual offense.²³⁰ He felt that any misconduct by the victim that might come to light during the course of an investigation, not just the narrowly defined instances contained in the Committee's recommended definition, would be a deterrent to reporting. After a roll call vote of the participating Committee members, eight members voted in favor of the definition of collateral misconduct as set forth in DAC-IPAD Recommendation 19 and three members—General Schwenk, Ms. Garvin, and Judge Walton—voted in opposition. The Committee notes these members' dissenting views for consideration by the Secretary of Defense and Congress.

IV. DEPARTMENT OF DEFENSE RESPONSE TO THE DAC-IPAD'S LETTER

On October 2, 2019, Chair Bashford received a letter from Mr. Paul C. Ney, Jr., the DoD General Counsel, regarding the DAC-IPAD's analysis and recommendations concerning the DoD draft collateral misconduct report.²³¹ Mr. Ney informed the Chair that he forwarded the DAC-IPAD's recommendations to the Joint Service Committee on Military Justice (JSC) for its analysis, including determining which recommendations could be executed under the existing statutory framework and which recommendations could not be implemented absent statutory amendment. Mr. Ney asked the JSC to provide its recommendations by March 13, 2020, to allow sufficient time to implement appropriate changes before the next collateral misconduct report is due to Congress. The DAC-IPAD looks forward to receiving the JSC's input regarding its recommendations.

230 See *Transcript of DAC-IPAD Public Meeting 23* (Sept. 14, 2019) (comment of Brigadier General (Ret.) Schwenk).

231 See Appendix H for the DoD General Counsel's letter to Ms. Bashford regarding the DAC-IPAD's collateral misconduct analysis and recommendations.

CHAPTER 5. MILITARY INSTALLATION SITE VISITS AND MEMBER OBSERVATION OF PENETRATIVE SEXUAL OFFENSE COURTS-MARTIAL

I. BACKGROUND

As discussed in Chapters 1 and 2 of this report, the Committee has identified a number of issues regarding the investigatory, pretrial, and court-martial processes of sexual offense cases that it wants to review further. Several of these issues are associated with recommendations made by the DAC-IPAD's predecessor panel, the Judicial Proceedings Panel (JPP). In order to gain additional perspectives on these issues from practitioners in the military justice system, the Committee has elected to conduct military installation site visits. The Committee has also decided to have members attend courts-martial involving charges of a sexual offense in order to gain a firsthand perspective on current military trial practice.

II. MILITARY INSTALLATION SITE VISITS

Members of the Judicial Proceedings Panel conducted military installation site visits in the summer of 2016, speaking with investigators, trial practitioners, and others involved in the military justice system on a non-attribution basis in order to gain candid assessments of the effects of recent statutory and policy changes on the prosecution of sexual offense cases. In 2017, drawing in part on the information received during these site visits, the JPP produced three reports on the issues of defense resources, sexual offense investigations, and concerns regarding the fair administration of military justice.²³²

In several recommendations in those reports, the JPP suggested that the DAC-IPAD conduct military installation site visits or otherwise continue to review the following topics: what the effects are of allowing Service law enforcement agencies to assist the military criminal investigative organizations with sexual offense investigations (JPP Recommendation 47); how the Article 32 preliminary hearing framework is functioning after the implementation of major statutory changes in 2014 (JPP Recommendation 55); whether convening authorities and staff judge advocates are making effective use of the Article 33 Disposition Guidance for judge advocates, commanders, and convening authorities (since promulgated in the 2019 Manual for Courts-Martial at Appendix 2.1) in deciding case dispositions, and what effect, if any, this guidance has had on the number of sexual offense cases being referred to court-martial and on the acquittal rate in such cases (JPP Recommendation 57); whether Article 34 should be amended in ways that would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision (JPP Recommendation 58); and whether misperceptions regarding alcohol consumption and consent affect court-martial panel members (Recommendation 62).²³³

232 See JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES (April 2017); JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (Sept. 2017); JPP REPORT ON FAIR ADMINISTRATION OF MILITARY JUSTICE, *supra* note 154, available at <https://dacipad.whs.mil/reading>.

233 DAC-IPAD THIRD ANNUAL REPORT, *supra* note 20, at 124.

In addition to these subject areas, the DAC-IPAD has identified additional issues through the Case Review Working Group's analysis of sexual offense investigations that require further review, including victims' decisions to decline participation in the investigation or prosecution of sexual offense cases, as well as the training provided to Service members at all levels regarding sexual offenses.

The DAC-IPAD has determined that military installation site visits will benefit the Committee's analysis of the issues and will enable the members to better assess the effects of recent statutory and policy changes to sexual offense investigations and prosecutions. Accordingly, at its August 2019 public meeting the Committee approved a proposal to conduct site visits.²³⁴

The Committee members will meet with some or all of the following groups: investigators, prosecutors, defense counsel, victims' legal counsel/special victims' counsel, commanders, convening authorities, military trainees, junior enlisted Service members, and victims. The Committee Chair approved the following site visits to be conducted:

Fort Hood/Joint Base San Antonio–Lackland, Texas

Joint Base Lewis-McChord, Washington

Joint Base Pearl Harbor–Hickam, Hawaii

Naval Station Norfolk, Virginia

Camp Humphreys, Republic of Korea

Fort Bragg/Camp Lejeune, North Carolina

Naval Base San Diego/Camp Pendleton, California

Kaiserslautern Military Community/Army Garrison Vicenza (Europe)

III. DAC-IPAD MEMBER OBSERVATION OF SEXUAL OFFENSE COURTS-MARTIAL

During the November 15, 2019, public meeting, the Committee also approved a proposal for members to attend and observe courts-martial involving charges of penetrative sexual offenses.²³⁵ From November 2019 through January 2020, several Committee members attended general courts-martial involving charges of a penetrative sexual offense at Marine Corps Air Station Miramar in San Diego, California, and Joint Base Lewis-McChord near Tacoma, Washington. Committee members will continue to attend penetrative sexual offense courts-martial across all of the Military Services, and will report back to the full Committee on their observations of the court-martial process.

²³⁴ *Transcript of DAC-IPAD Public Meeting 330* (Aug. 23, 2019) (comments of Ms. Bashford).

²³⁵ *Transcript of DAC-IPAD Public Meeting 293–304* (Nov. 15, 2019).

APPENDIX A. COMMITTEE AUTHORIZING STATUTE, AMENDMENTS, AND DUTIES

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SECTION 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES. (Public Law 113–291; 128 Stat. 3374; 10 U.S.C. 1561 note)

(a) ESTABLISHMENT REQUIRED.—

- (1) IN GENERAL.—The Secretary of Defense shall establish and maintain within the Department of Defense an advisory committee to be known as the “Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces” (in this section referred to as the “Advisory Committee”).
- (2) DEADLINE FOR ESTABLISHMENT.—The Secretary shall establish the Advisory Committee not later than 30 days before the termination date of the independent panel established by the Secretary under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1758), known as the “judicial proceedings panel”.

(b) MEMBERSHIP.—The Advisory Committee shall consist of not more than 20 members, to be appointed by the Secretary of Defense, who have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Advisory Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as a member of the Advisory Committee.

(c) DUTIES.—

- (1) IN GENERAL.—The Advisory Committee shall advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- (2) BASIS FOR PROVISION OF ADVICE.—For purposes of providing advice to the Secretary pursuant to this subsection, the Advisory Committee shall review, on an ongoing basis, cases involving allegations of sexual misconduct described in paragraph (1).

(d) ANNUAL REPORTS.—Not later than March 30 each year, the Advisory Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives a report describing the results of the activities of the Advisory Committee pursuant to this section during the preceding year.

(e) TERMINATION.—

- (1) IN GENERAL.—Except as provided in paragraph (2), the Advisory Committee shall terminate on the date that is five years after the date of the establishment of the Advisory Committee pursuant to subsection (a).

(2) CONTINUATION.—The Secretary of Defense may continue the Advisory Committee after the termination date applicable under paragraph (1) if the Secretary determines that continuation of the Advisory Committee after that date is advisable and appropriate. If the Secretary determines to continue the Advisory Committee after that date, the Secretary shall submit to the President and the congressional committees specified in subsection (d) a report describing the reasons for that determination and specifying the new termination date for the Advisory Committee.

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL.—Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually thereafter” after “reports”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

SECTION 537. MODIFICATION OF DEADLINE FOR ESTABLISHMENT OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546(a)(2) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374; 10 U.S.C. 1561 note) is amended by striking “not later than” and all that follows and inserting “not later than 90 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2016.”.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019

SEC. 533. AUTHORITIES OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended—

(1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

“(d) AUTHORITIES.—

“(1) HEARINGS.—The Advisory Committee may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the committee considers appropriate to carry out its duties under this section.

“(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of the Advisory Committee, a department or agency of the Federal Government shall provide information that the Advisory Committee considers necessary to carry out its duties under this section. In carrying out this paragraph, the department or agency shall take steps to prevent the unauthorized disclosure of personally identifiable information.”.

SEC. 547. REPORT ON VICTIMS OF SEXUAL ASSAULT IN REPORTS OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS.

- (a) **REPORT.**—Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:
- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
 - (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
 - (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).
- (b) **COVERED INDIVIDUAL DEFINED.**—In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

SEC. 535. EXTENSION OF DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

Section 546(f)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 1561 note) is amended by striking “five” and inserting “ten”.

Joint Explanatory Statement:

The conferees request the DAC-IPAD review, as appropriate, whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim’s case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.

Further, the conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.

SEC. 540I. ASSESSMENT OF RACIAL, ETHNIC, AND GENDER DISPARITIES IN THE MILITARY JUSTICE SYSTEM.

- (a) **IN GENERAL.**—The Secretary of Defense shall provide for the carrying out of the activities described in subsections (b) and (c) in order to improve the ability of the Department of Defense to detect and address racial, ethnic, and gender disparities in the military justice system.
- (b) **SECRETARY OF DEFENSE AND RELATED ACTIVITIES.**—The activities described in this subsection are the following, to be commenced or carried out (as applicable) by not later than 180 days after the date of the enactment of this Act:
 - (1) For each court-martial carried out by an Armed Force after the date of the enactment of this Act, the Secretary of Defense shall require the head of the Armed Force concerned—
 - (A) to record the race, ethnicity, and gender of the victim and the accused, and such other demographic information about the victim and the accused as the Secretary considers appropriate;
 - (B) to include data based on the information described in subparagraph (A) in the annual military justice reports of the Armed Force.
 - (2) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall issue guidance that—
 - (A) establishes criteria to determine when data indicating possible racial, ethnic, or gender disparities in the military justice process should be further reviewed; and
 - (B) describes how such a review should be conducted.
 - (3) The Secretary of Defense, in consultation with the Secretaries of the military departments and the Secretary of Homeland Security, shall—
 - (A) conduct an evaluation to identify the causes of any racial, ethnic, or gender disparities in the military justice system;
 - (B) take steps to address the causes of such disparities, as appropriate.
- (c) **DAC-IPAD ACTIVITIES.**—
 - (1) **IN GENERAL.**—The activities described in this subsection are the following, to be conducted by the independent committee DAC-IPAD:
 - (A) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year addressed.
 - (B) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

- (C) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

(2) INFORMATION FROM FEDERAL AGENCIES.—

- (A) IN GENERAL.—Upon request by the chair of the committee, a department or agency of the Federal Government shall provide information that the committee considers necessary to conduct reviews and assessments required by paragraph (1), including military criminal investigative files, charge sheets, records of trial, and personnel records.

- (B) HANDLING, STORAGE, AND RETURN.—The committee shall handle and store all records received and reviewed under this subsection in accordance with applicable privacy laws and Department of Defense policy, and shall return all records so received in a timely manner.

- (3) REPORT.—Not later than one year after the date of the enactment of this Act, the committee shall submit to the Secretary of Defense, and to the Committees on Armed Services of the Senate and the House of representatives, a report setting forth the results of the reviews and assessments required by paragraph (1). The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

(4) DEFINITIONS.—In this subsection:

- (A) The term “independent committee DAC-IPAD” means the independent committee established by the Secretary of Defense under section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 128 Stat. 3374), commonly known as the “DAC-IPAD”.
- (B) The term “case” means an unrestricted report of any penetrative sexual assault offense or contact sexual assault offense made against a member of the Armed Forces pursuant to Department of Defense Instruction 6495.02, including any unrestricted report involving a spouse or intimate partner for which an investigation has been opened by a criminal investigative organization.
- (C) The term “completed”, with respect to a case, means that the case was tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.
- (D) The term “contact sexual assault offense” means aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit such offenses under the Uniform Code of Military Justice.
- (E) The term “penetrative sexual assault offense” means rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit such offenses under the Uniform Code of Military Justice.

H. Rept. 116-120 on H.R. 2500

***TITLE V—MILITARY PERSONNEL POLICY
ITEMS OF SPECIAL INTEREST***

Appointment of Guardian ad Litem for Minor Victims

The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

APPENDIX B. COMMITTEE CHARTER AND BALANCE PLAN

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Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

1. Committee's Official Designation: The committee shall be known as the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("the Committee").
2. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("the FY 2015 NDAA") (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 C.F.R. § 102-3.50(a), established this non-discretionary advisory committee.
3. Objectives and Scope of Activities: Pursuant to section 546(c)(1) of the FY 2015 NDAA, will advise the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
4. Description of Duties: Pursuant to section 546(c)(2) and (d) of the FY 2015 NDAA, the Committee, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel for the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and House of Representatives, a report describing the results of the activities of the Committee pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The Committee will review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

Pursuant to Section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Committee, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

The term "covered individual" means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

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Pursuant to section 540I(c) of the of the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92), not later than December 20, 2020, the Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives a report setting forth:

- (1) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed.
- (2) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.
- (3) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

The report shall include such recommendations for legislative or administrative action as the committee considers appropriate in light of such results.

Pursuant to section 540K(d) of the FY 2020 NDAA, the Secretary of Defense shall consult with the Committee on a report to be submitted by the Secretary to the Committees on Armed Services of the Senate and House of Representatives not later than June 17, 2020, making findings and recommendations on the feasibility and advisability of a policy for the Department of Defense that would permit a victim of a sexual assault, that is or may be investigated as a result of a communication described in 540K(b), which victim is a member of the Armed Forces or an adult dependent of a member of the Armed Forces, to have the reporting on the sexual assault be treated as a restricted report without regard to the party initiating or receiving such communication.

5. Agency or Official to Whom the Committee Reports: The Committee will report to the Secretary and Deputy Secretary of Defense, through the GC DoD.
6. Support: The DoD, through the GC DoD, the Washington Headquarters Services, and the DoD Components, provides support for the Committee and ensures compliance with requirements of the FACA, the Government in the Sunshine Act of 1976 (“the Sunshine Act”) (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.
7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating costs, to include travel, meetings, and contract support, are approximately \$2,810,500. The estimated annual personnel cost to the DoD is 15.0 full-time equivalents.

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8. Designated Federal Officer: The Committee's Designated Federal Officer (DFO) shall be a full-time or permanent part-time DoD civilian officer or employee or member of the Armed Forces, designated in accordance with established DoD policy and procedures.

The Committee's DFO is required to attend all Committee and subcommittee meetings for the entire duration of each and every meeting. However, in the absence of the Committee's DFO, a properly approved Alternate DFO, duly designated to the Committee in accordance with DoD policy and procedures, shall attend the entire duration of all of the Committee or subcommittee meetings.

The DFO, or the Alternate DFO, approves and calls all Committee and subcommittee meetings; prepares and approves all meeting agendas; and adjourns any meeting when the DFO, or the Alternate DFO, determines adjournment to be in the public's interest or required by governing regulations or DoD policy and procedures.

9. Estimated Number and Frequency of Meetings: The Committee shall meet at the call of the Committee's DFO, in consultation with the Committee's Chair and the GC DoD. The Committee will meet at a minimum of once per year.
10. Duration The need for this advisory function is on a continuing basis; however, this charter is subject to renewal every two years.
11. Termination: In accordance with sections 546(e)(1) and (2) of the FY 2015 NDAA, as modified by section 535 of the FY 2020 NDAA, the Committee will terminate on February 28, 2026, ten years after the Committee was established, unless the Secretary of Defense determines that continuation of the Committee after that date is advisable and appropriate. If the Secretary of Defense determines to continue the Committee after that date, the Secretary of Defense will submit to the President and the Committees on Armed Services of the Senate and House of Representatives a report describing the reasons for that determination and specifying the new termination date for the Committee.
12. Membership and Designation: Pursuant to section 546(b) of the FY 2015 NDAA, the Committee will be composed of no more than 20 members. Committee members selected will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as members of the Committee.

The appointment of Committee members will be approved by the Secretary of Defense, the Deputy Secretary of Defense, or the Chief Management Office of the Department of Defense (CMO) ("the DoD Appointing Authorities"), for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authorities, may serve more than two consecutive terms of service on the Committee, to include its subcommittees, or serve on more than two DoD Federal advisory committees at one time.

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Committee members who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. Committee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members.

Committee members are appointed to provide advice on the basis of his or her best judgment without representing any particular points of view and in a manner that is free from conflict of interest.

The DoD Appointing Authorities shall appoint the Committee's Chair from among the membership previously approved, in accordance with DoD policy and procedures, for a one-to-two year term of service, with annual renewal, which shall not exceed the member's approved Committee appointment.

Except for reimbursement of official Committee-related travel and per diem, Committee members serve without compensation.

13. Subcommittees: The DoD, when necessary and consistent with the Committee's mission and DoD policy and procedures, may establish subcommittees, task forces, or working groups to support the Committee. Establishment of subcommittees shall be based upon a written determination, to include terms of reference, by the DoD Appointing Authorities or the GC DoD, as the DoD Sponsor. All subcommittees operate under the provisions of the FACA, the Sunshine Act, governing Federal statutes and regulations, and DoD policy and procedures.

Subcommittees shall not work independently of the Committee and shall report all their advice and recommendations solely to the Committee for its thorough discussion and deliberation at a properly noticed and open meeting, subject to the Sunshine Act. Subcommittees have no authority to make decisions or recommendations, verbally or in writing, on behalf of the Committee. No subcommittee nor any of its members may provide updates or report, verbally or in writing, directly to the DoD or to any Federal officers or employees. If a majority of Committee members are appointed to a particular subcommittee, then that subcommittee may be required to operate pursuant to the same FACA notice and openness requirements governing the Committee's operations.

Individual appointments to serve on these subcommittees shall be approved by the DoD Appointing Authorities for a term of service of one-to-four years, subject to annual renewals, in accordance with DoD policy and procedures. No member shall serve more than two consecutive terms of service on the subcommittee without prior approval from the DoD Appointing Authorities. Subcommittee members, who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or

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members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as RGE members.

The DoD Appointing Authorities shall appoint the subcommittee leadership from among the membership previously appointed to serve on the subcommittee in accordance with DoD policy and procedures, for a one-to-two year term of service, with annual renewal, which shall not exceed the member's approved term of service.

Each subcommittee member is appointed to provide advice on behalf of his or her best judgment without representing any particular point of view and in a manner that is free from conflicts of interest.

With the exception of reimbursement for travel and per diem as it pertains to official travel related to the Committee or its subcommittees, subcommittee members shall serve without compensation.

Currently, the GC DoD has approved three subcommittees to the Committee. All work performed by these subcommittee will be sent to the Committee for its thorough deliberation and discussion at a properly noticed and open meeting, subject to the Sunshine Act.

- 1) Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.
 - 2) Data Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its collection and analysis of data from cases involving such allegations.
 - 3) Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of Department of Defense policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to such allegations.
14. Recordkeeping: The records of the Committee and its subcommittees will be handled in accordance with Section 2, General Record Schedule 6.2, and governing DoD policies and

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procedures. These records will be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: February 16, 2020

Membership Balance Plan
 Defense Advisory Committee on Investigation, Prosecution, and Defense of
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Agency: Department of Defense (DoD)

1. Authority: The Secretary of Defense, pursuant to section 546 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (“the FY 2015 NDAA”) (Public Law 113-291), as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 C.F.R. § 102-3.50(a), established the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee”), a non-discretionary advisory committee.
2. Mission/Function: The Committee, pursuant to section 546(c)(1) of the FY 2015 NDAA, will advise the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

Pursuant to section 546(c)(2) and (d) of the FY 2015 NDAA, the Committee, not later than March 30 of each year, will submit to the Secretary of Defense through the General Counsel for the Department of Defense (GC DoD), and the Committees on Armed Services of the Senate and House of Representatives, a report describing the results of the activities of the Committee pursuant to section 546 of the FY 2015 NDAA, as amended, during the preceding year. The Committee will review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

Pursuant to Section 547 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Committee, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

- (1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.
- (2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).
- (3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

The term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

Pursuant to section 540I(c) of the of the National Defense Authorization Act for Fiscal Year 2020 (“the FY 2020 NDAA”) (Public Law 116-92), not later than December 20, 2020, the Committee shall submit to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives a report setting forth:

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- (1) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces accused of a penetrative sexual assault offense or contact sexual assault offense in an unrestricted report made pursuant to Department of Defense Instruction 6495.02, including an unrestricted report involving a spouse or intimate partner, in all cases completed in each fiscal year assessed.
- (2) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces against whom charges were preferred pursuant to Rule for Courts-Martial 307 for a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.
- (3) A review and assessment, by fiscal year, of the race and ethnicity of members of the Armed Forces who were convicted of a penetrative sexual assault offense or contact sexual assault offense in all cases completed in each fiscal year assessed.

The report shall include such recommendations for legislative or administrative action as the Committee considers appropriate in light of such results.

Pursuant to section 540K(d) of the FY 2020 NDAA, the Committee shall be consulted by the Secretary of Defense on a report to be submitted by the Secretary to the Committees on Armed Services of the Senate and House of Representatives not later than June 17, 2020, making findings and recommendations on the feasibility and advisability of a policy for the Department of Defense that would permit a victim of a sexual assault, that is or may be investigated as a result of a communication described in 540k(b), which victim is a member of the Armed Forces or an adult dependent of a member of the Armed Forces, to have the reporting on the sexual assault be treated as a restricted report without regard to the party initiating or receiving such communication.

3. Points of View: Pursuant to section 546(b) of the FY 2015 NDAA, the Committee will be composed of no more than 20 members. Committee members selected will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses. Members of the Committee may include Federal and State prosecutors, judges, law professors, and private attorneys. Members of the Armed Forces serving on active duty may not serve as members of the Committee.

Committee members, who are not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109, to serve as special government employee (SGE) members. Committee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) to serve as regular government employee (RGE) members.

All Committee members are appointed to provide advice on the basis of their best judgment without representing any particular points of view and in a manner that is free from conflict of interest.

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4. Other Balance Factors: N/A
5. Candidate Identification Process: The DoD, in selecting potential candidates for the Committee, reviews the educational and professional credentials of individuals with extensive professional experience in the points of view described above. Potential candidates may be gathered and identified by the General Council of the Department of Defense (GC DoD) and the Committee's staff.

Once potential candidates are identified, the Committee's Designated Federal Officer (DFO), working with the various stakeholders to include senior DoD officers and employees, reviews the credentials of each individual and narrows the list of potential candidates before forwarding the list to the GC DoD for review. During his or her review, the GC DoD strives to achieve a balance between the professional credentials of the individuals and the near-term subject matters that shall be reviewed by the Committee to achieve expertise in points of view regarding anticipated topics.

Once the GC DoD has narrowed the list of candidates and before formal nomination to the DoD Appointing Authorities, the list of potential candidates undergoes a review by the DoD Office of General Counsel and the Office of the Advisory Committee Management Officer (ACMO) to ensure compliance with federal and DoD governance requirements, including compliance with the Committee's statute, charter, and membership balance plan. Following this review, the GC DoD forwards to the list of nominees to the ACMO for approval by the DoD Appointing Authorities.

Following approval by the DoD Appointing Authorities, the candidates are required to complete the necessary appointment paperwork, to include meeting ethics requirements stipulated by the Office of Government Ethics for advisory committee members.

All Committee appointments are for a one-to-four year term of service, with annual renewals. No member, unless approved in a policy deviation by the DoD Appointing Authorities, may serve more than two consecutive terms of service on the Committee, including its subcommittees, or serve on more than two DoD Federal Advisory committees at one time.

Committee membership vacancies will be filled in the same manner as described above. Individuals being considered for appointment to the Committee, or any subcommittee, may not participate in any Committee or subcommittee work until his or her appointment has been approved by the DoD Appointment Authorities and the individual concerned is on-boarded in accordance with DoD policy and procedures.

6. Subcommittee Balance: The DoD, when necessary and consistent with the Committee's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Committee.

Currently, the DoD has approved three subcommittees to the Committee. Subcommittee members must will have experience with the investigation, prosecution, and defense of allegations of sexual assault offenses.

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- 1) Case Review Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.
- 2) Data Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its collection and analysis of data from cases involving such allegations.
- 3) Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces—composed of not more than 15 members to assess and make recommendations related to the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of Department of Defense policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to such allegations.

Individuals considered for appointment to any subcommittee of the Committee may come from members of the Committee or from new nominees, as recommended by the GC DoD and based upon the subject matters under consideration. Pursuant to DoD policy and procedures, the GC DoD shall follow the same procedures used for selecting and nominating individuals for appointment consideration by the DoD Appointing Authorities. Individuals being considered for appointment to any subcommittee of the Committee cannot participate in any Committee or subcommittee work until his or her appointment has been approved by the DoD Appointment Authorities, and the individual concerned is on-boarded according to DoD policy and procedures.

Subcommittee members shall be appointed for a term of service of one-to-four years, subject to annual renewals; however, no member shall serve more than two consecutive terms of service on the subcommittee, without prior approval by the Appointing Authorities. Subcommittee members, if not full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Subcommittee members who are full-time or permanent part-time Federal civilian officers or employees, or members of the Armed Forces, shall be appointed pursuant to 41 C.F.R. § 10-3.130(a) to serve as RGE members.

7. Other: As nominees are considered for appointment to the Committee, the DoD adheres to the Office of Management and Budget's Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions (79 FR 47482; August 13, 2014) and the rules and regulations issued by the Office of Government Ethics.
8. Date Prepared: February 16, 2020

APPENDIX C. COMMITTEE MEMBERS

MS. MARTHA S. BASHFORD, CHAIR



Martha Bashford was for 40 years the chief of the New York County District Attorney's Office Sex Crimes Unit, which was the first of its kind in the country. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI's Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (*summa cum laude*) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.

MAJOR GENERAL MARCIA M. ANDERSON, U.S. ARMY, RETIRED



Marcia Anderson was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin from 1998 to 2019, where she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy Commanding General of the Army's Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of \$8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.

THE HONORABLE LEO I. BRISBOIS



Leo I. Brisbois has been a U.S. Magistrate Judge for the District of Minnesota chambered in Duluth, Minnesota, since 2010. Prior to his appointment to the bench, Judge Brisbois served as an Assistant Staff Judge Advocate, U.S. Army, from 1987 through 1998, both on active duty and then in the reserves; his active duty service included work as a trial counsel and as an administrative law officer, both while serving in Germany. From 1991 to 2010, Judge Brisbois was in private practice with the Minneapolis, Minnesota, firm of Stich, Angell, Kreidler, Dodge & Unke, where his practice included all aspects of litigation and appeals involving the defense of civil claims in state and federal courts. Judge Brisbois has also previously served on the Civil Rules and Racial Fairness in the Courts advisory committees established by the Minnesota State Supreme Court, and he has served on the Minnesota Commission on Judicial Selection. From 2009 to 2010, Judge Brisbois was the first person of known Native American heritage to serve as President of the more than 16,000–member Minnesota State Bar Association.

MS. KATHLEEN B. CANNON



Kathleen Cannon is a criminal defense attorney in Vista, California, specializing in serious felony and high-profile cases. Prior to entering private practice in 2011, Ms. Cannon was a public defender for over 30 years, in Los Angeles and San Diego Counties. Over the course of her career, Ms. Cannon supervised branch operations and training programs within the offices and handled thousands of criminal cases. She has completed hundreds of jury trials, including those involving violent sexual assault and capital murder with special circumstances. Since 1994, Ms. Cannon has taught trial advocacy as an adjunct professor of law at California Western School of Law in San Diego, and has been on the faculty of the National Institute of Trial Advocacy as a team leader and teacher. She is past-President and current Training Coordinator for the California Public Defenders' Association, providing educational seminars for criminal defense attorneys throughout the state of California. Ms. Cannon has lectured on battered women syndrome evidence at the Marine Corps World Wide Training Conference at Marine Corps Recruit Depot (MCRD), San Diego, and was a small-group facilitator for the Naval Justice School course "Defending Sexual Assault Cases" in San Diego. Ms. Cannon has received numerous awards, including Top Ten Criminal Defense Attorney in San Diego, Lawyer of the Year from the North County Bar Association, and Attorney of the Year from the San Diego County Public Defender's Office.

MS. MARGARET A. GARVIN



Margaret "Meg" Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar Association's Criminal Justice Section Victims Committee, as co-chair of the Oregon Attorney General's Crime Victims' Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General's Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.

THE HONORABLE PAUL W. GRIMM



Paul W. Grimm serves as a U.S. District Judge for the District of Maryland. Previously, he served as a U.S. Magistrate Judge and as Chief Magistrate Judge for the District of Maryland. In 2009, the Chief Justice of the United States appointed Judge Grimm to serve as a member of the Civil Rules Advisory Committee, where he served for six years and chaired the Discovery Subcommittee. Before his appointment to the court, Judge Grimm was in private practice for 13 years, handling commercial litigation. Prior to that, he served as an Assistant Attorney General for Maryland, an Assistant States Attorney for Baltimore County, Maryland, and an active duty and Reserve Army Judge Advocate General's Corps officer, retiring as a lieutenant colonel in 2001. Judge Grimm has served as an adjunct professor of law at the University of Maryland School of Law and at the University of Baltimore School of Law, and has published many articles on evidence and civil procedure.

MR. A. J. KRAMER

A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr.

Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers and a member of the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement. He was a member of the Courts of the Judicial Conference of the United States' Advisory Committee on Evidence Rules from 2013 to 2019. In July 2019, he received the American Inns of Court Award for Professionalism for the D.C. Circuit. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.

MS. JENNIFER GENTILE LONG

Jennifer Gentile Long (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of

the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.

MR. JAMES P. MARKEY

Jim Markey has over 30 years of law enforcement experience with the Phoenix Police Department. Serving in a variety of positions, Mr. Markey was recognized with more than 30 commendations and awards. For over 14 years he directly supervised the sexual assault unit, which is part of a multidisciplinary sexual assault response team co-located in the City of Phoenix Family Advocacy Center. Mr. Markey oversaw the investigation of more than 7,000 sexual assaults, including more than 150 serial rape cases. In 2000, he was able to secure Violence Against Women grant funding to design, develop, and supervise a first-of-its-kind sexual assault

cold case team with the City of Phoenix. This team has been successful in reviewing nearly 4,000 unsolved sexual assault cases dating back over 25 years. For the past 15 years Mr. Markey has been a certified and nationally recognized trainer, delivering in-person and online webinar training for numerous criminal justice organizations on sexual assault investigations and response. Currently, he is employed with the Research Triangle Institute (RTI) located in Durham North as a Senior Law Enforcement Specialist. His work in the Applied Justice Research Unit includes assistance for the DOJ Bureau of Justice Assistance Sexual Assault Kit Initiative (SAKI), providing technical assistance and training to 54 SAKI grantees across the United States. He also developed and directs the SAKI

– Sexual Assault Unit Assessment (SAUA) Team; this team has conducted independent and comprehensive reviews for four major police agencies, assessing a range of areas in their response to sexual assault. In addition to the DACI-PAD, Mr. Markey currently serves as a member of the National Institute of Justice (NIJ) Sexual Assault Forensic Evidence Reporting (SAFER) Working Group and Editorial Team, NIJ Cold Case Working Group, Arizona Commission on Victims in the Courts (COVIC), Arizona Forensic Science Advisory Committee, and Massage Envy Franchising's Safety Advisory Council. Jim continues to work as a trainer and facilitator in the area of sexual violence for the International Association of Chiefs of Police (IACP) and the International Association of College Law Enforcement Administrators (IACLEA).

DR. JENIFER MARKOWITZ



Jenifer Markowitz is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast

Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a national protocol and training standards for sexual assault medical-forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.

CHIEF MASTER SERGEANT OF THE AIR FORCE RODNEY J. MCKINLEY, U.S. AIR FORCE, RETIRED



Chief Master Sergeant of the Air Force Rodney J. McKinley represented the highest enlisted level of leadership and, as such, provided direction for the enlisted corps and represented their interests, as appropriate, to the American public and to those in all levels of government. He served as the personal advisor to the Chief of Staff and the Secretary of the Air Force on all issues regarding the welfare, readiness, morale, and proper utilization and progress of the enlisted force. Chief McKinley is the 15th chief master sergeant appointed to the highest noncommissioned officer position. His background includes various duties in medical and aircraft maintenance, and

he served 10 years as a first sergeant. He also served as a command chief master sergeant at wing, numbered Air Force, and major command levels. He is currently the co-chair of the Air Force Retiree Council and frequently is a guest speaker at bases across the Air Force. He is an honors graduate of St. Leo College, Florida, and received his master's degree in human relations from the University of Oklahoma.

BRIGADIER GENERAL JAMES A. SCHWENK, U.S. MARINE CORPS, RETIRED



BGen Schwenk was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of “don’t ask, don’t tell,” for the provision of benefits to same-sex spouses of military personnel, in the review of the murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.

DR. CASSIA C. SPOHN



Cassia Spohn is a Regents Professor and Director of the School of Criminology and Criminal Justice at Arizona State University. She received a Ph.D. in political science from the University of Nebraska–Lincoln. Prior to joining the ASU faculty in 2006, she was a faculty member in the School of Criminology and Criminal Justice at the University of Nebraska at Omaha for 28 years. She is the author or co-author of eight books, including *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System* and *How Do Judges Decide? The Search for Fairness and Equity in Sentencing*. Her research interests include prosecutorial and judicial decision making; the intersections of race, ethnicity, crime, and justice; and sexual assault case processing decisions. In 2013, she received ASU’s Award for Leading Edge Research in the Social Sciences and was selected as a Fellow of the American Society of Criminology.

MS. MEGHAN A. TOKASH



Meghan Tokash is an Assistant United States Attorney (AUSA) at the U.S. Department of Justice serving the Western District of New York in the violent crimes unit. For eight years she served as a judge advocate in the U.S. Army Judge Advocate General's Corps, where she prosecuted a wide range of cases relating to homicide, rape, sexual assault, domestic violence, and child abuse. AUSA Tokash was selected by the Judge Advocate General of the U.S. Army to serve as one of 15 Special Victim Prosecutors; she worked in the Army's first Special Victim Unit at the Fort Hood Criminal Investigation Division Office and U.S. Army Europe/Central Command. Previously,

AUSA Tokash served as an Army trial defense counsel and as a civilian victim-witness liaison officer for the Department of the Army. AUSA Tokash clerked for the United States Court of Appeals for the Armed Forces. She is a graduate of the Catholic University Columbus School of Law. She earned her master of laws degree in trial advocacy from the Beasley School of Law at Temple University, where at graduation she received the program's Faculty Award.

THE HONORABLE REGGIE B. WALTON



Judge Walton was born in Donora, Pennsylvania. In 1971 he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission's recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary's Criminal Law Committee, on which he served until 2011. In 2007 Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

APPENDIX D. COMMITTEE PROFESSIONAL STAFF

COMMITTEE STAFF

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Staff Director

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Mr. Dale Trexler, Chief of Staff

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

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Mr. Glen Hines, Attorney-Advisor

Mr. R. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst

Ms. Meghan Peters, Attorney-Advisor

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Ms. Kate Tagert, Attorney-Advisor

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COMMITTEE CONSULTANTS

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Ms. Laurel Prucha Moran, Graphic Designer

Dr. William “Bill” Wells, Criminologist

APPENDIX E. COMMITTEE RECOMMENDATIONS TO DATE

DAC-IPAD Recommendation 1 – (Mar 2018) The Secretary of Defense, the Secretary of Homeland Security, and the Services take action to dispel the misperception of widespread abuse of the expedited transfer policy, including addressing the issue in the training of all military personnel.

DAC-IPAD Recommendation 2 – (Mar 2018) The Secretary of Defense and the Secretary of Homeland Security identify and track appropriate metrics to monitor the expedited transfer policy and any abuses of it.

DAC-IPAD Recommendation 3 – (Mar 2018) The DoD-level and Coast Guard equivalent Family Advocacy Program (FAP) policy include provisions for expedited transfer of active duty Service members who are victims of sexual assault similar to the expedited transfer provisions in the DoD Sexual Assault Prevention and Response (SAPR) policy and consistent with 10 U.S.C. § 673.

DAC-IPAD Recommendation 4 – (Mar 2018) The DoD-level military personnel assignments policy (DoD Instruction 1315.18) and Coast Guard equivalent include a requirement that assignments personnel or commanders coordinate with and keep SAPR and FAP personnel informed throughout the expedited transfer, safety transfer, and humanitarian/compassionate transfer assignment process when the transfer involves an allegation of sexual assault.

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

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

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

DAC-IPAD Recommendation 7 – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should provide uniform guidance to the Services regarding the submission of final disposition information to federal databases for sexual assault cases in which, after fingerprints have been submitted, the command took no action, or took action only for an offense other than sexual assault.

DAC-IPAD Recommendation 8 – (Mar 2019) The uniform standards and criteria developed to implement Article 140a, UCMJ, should reflect the following best practices for case data collection:

- a. Collect all case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process, such as the initial report of investigation, the commander's report of disciplinary or administrative action, the charge sheet, the Article 32 report, and the Report of Result of Trial.
- b. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD.
- c. Develop one electronic database for the storage and analysis of standardized source documents, and locate that database in the centralized military justice data office/organization within DoD.
- d. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible.
- e. Have data entered from source documents into the electronic database by one independent team of trained professionals whose full-time occupation is document analysis and data entry. This team should have expertise in the military justice process and in social science research methods, and should ensure that the data are audited at regular intervals.

DAC-IPAD Recommendation 9 – (Mar 2019) The source documents referenced in DAC-IPAD Recommendation 8 should contain uniformly defined content covering all data elements that DoD decides to collect to meet the requirements of Articles 140a and 146, UCMJ.

DAC-IPAD Recommendation 10 – (Mar 2019) The data produced pursuant to Article 140a, UCMJ, should serve as the primary source for the Military Justice Review Panel's periodic assessments of the military justice system, which are required by Article 146, UCMJ, and as the sole source of military justice data for all other organizations in DoD and for external entities.

DAC-IPAD Recommendation 11 – (Mar 2019) Article 140a, UCMJ, should be implemented so as to require collection of the following information with respect to allegations of both adult-victim and child-victim sexual offenses, within the meaning of Articles 120, 120b, and 125, UCMJ (10 U.S.C. §§ 920, 920b, and 925 (2016)):

- a. A summary of the initial complaint giving rise to a criminal investigation by a military criminal investigative organization concerning a military member who is subject to the UCMJ, and how the complaint became known to law enforcement;
- b. Whether an unrestricted report of sexual assault originated as a restricted report;
- c. Demographic data pertaining to each victim and accused, including race and sex;
- d. The nature of any relationship between the accused and the victim(s);
- e. The initial disposition decision under Rule for Court-Martial 306, including the decision to take no action, and the outcome of any administrative action, any disciplinary action, or any case in which one or more charges of sexual assault were preferred, through the completion of court-martial and appellate review;
- f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;
- g. Whether a victim declined to participate at any point in the military justice process;

- h. Whether a defense counsel requested expert assistance on behalf of a military accused, whether those requests were approved by a convening authority or military judge, and whether the government availed itself of expert assistance; and
- i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.

DAC-IPAD Recommendation 12 – (Mar 2019) The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that

- a. The Services use the same uniform standards and definitions to refer to common procedures and substantive offenses in the Manual for Courts-Martial, as required by Article 140a; and
- b. The Services develop a plan to transition toward operating one uniform case management system across all of the Services, similar to the federal judiciary's Case Management / Electronic Court Filing (CM/ECF) system.

DAC-IPAD Recommendation 13 – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:

- a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.
- b. The victim's commander and senior enlisted leader, at both the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the subject's identity or other facts of the case—thereby enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
- c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the subject not being held accountable for his or her actions and the absence of evidence should the victim later decide to unrestrict his or her report.

DAC-IPAD Recommendation 14 – (Mar 2019) The Secretary of Defense (in consultation with the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) establish a working group to review whether victims should have the option to request that further disclosure or investigation of a sexual assault report be restricted in situations in which the member has lost the ability to file a restricted report, whether because a third party has reported the sexual assault or because the member has disclosed the assault to a member of the chain of command or to military law enforcement. The working group's goal should be to find a feasible solution that would, in appropriate circumstances, allow the victim to request that the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes; it should also consider whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This working group should consider developing such a policy with the following requirements:

- a. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
- b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.
- c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request.
- d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.
- e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault.

DAC-IPAD Recommendation 15 – (Mar 2019) The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) revise the DoD expedited transfer policy (and the policy governing the Coast Guard with respect to expedited transfers) to include the following points:

- a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should focus on that goal when they make decisions regarding such requests.
- b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery (e.g., proximity to the subject or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).
- c. The requirement that a commander determine that a report be credible is not aligned with the core purpose of the expedited transfer policy. It should be eliminated, and instead an addition should be made to the criteria that commanders must consider in making a decision on an expedited transfer request: "any evidence that the victim's report is not credible."

DAC-IPAD Recommendation 16 – (Mar 2019) Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five workdays.

DAC-IPAD Recommendation 17 – (Mar 2019) The Services track and report the following data in order to best evaluate the expedited transfer program:

- a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final.

- b. Data on the number of accused transferred; the grade and job title of the accused; the sex and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final.
- c. Data on victim participation in investigation/prosecution before and after an expedited transfer.
- d. Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers and accused Service members who are transferred under this program.
- e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.
- f. Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- g. Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- h. Data on victim satisfaction with the expedited transfer program.
- i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.

DAC-IPAD Recommendation 18 – (Mar 2019) The Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.

APPENDIX F. COMMITTEE REQUESTS FOR INFORMATION (SETS 11–15)

DAC-IPAD REQUESTS FOR INFORMATION SUBMITTED TO ORGANIZATIONS WITHIN THE DEPARTMENT OF DEFENSE AND THE MILITARY SERVICES

- RFI Set 11:** Request for Information and Request for Presenters from the Judge Advocates General of the Military Services Regarding Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates (May 15, 2019)
- RFI Set 12:** Request for Information from the Judge Advocates General of the Military Services for the Number of Cases Referred to General Courts-Martial and the Number of Article 32, Uniform Code of Military Justice (UCMJ), Preliminary Hearings Held or Waived in Fiscal Years 2016, 2017, and 2018; and the Number of Military Magistrates and Judges in Each Military Service (September 10, 2019)
- RFI Set 13:** Request for Information from the Judge Advocates General of the Military Services for All Cases from Fiscal Year 2019 That Involve a Preferred Charge Under Any of the Punitive Articles of the UCMJ (November 21, 2019)
- RFI Set 14:** Request for Information from the Military Services' Sexual Assault Prevention and Response Directors for Current Sexual Assault Training Materials (January 22, 2020)
- RFI Set 15:** Request for Information from the Judge Advocates General of the Military Services Regarding the Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses (January 28, 2020)

Digital versions of the DAC-IPAD RFIs are available online at <https://dacipad.whs.mil/>. In accordance with the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act of 1972 (FACA), the Department of Defense is the release authority for agency documents provided to the DAC-IPAD in response to the Committee's information requests.

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

Request for Information and Request for Presenters

RFI Set 11, Narrative Questions

Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates

Date of Request: May 15, 2019

**Aggregated RFI Set 11 Responses are available at
[https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_
Set11_20190515_Questions_Answers_20191204.pdf](https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_Set11_20190515_Questions_Answers_20191204.pdf)**

I. Purpose

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- C. The DAC-IPAD requests the below information to facilitate its required review of cases involving allegations of sexual misconduct on an ongoing basis for purposes of providing advice to the Secretary of Defense.

II. Summary of Requested Response Dates

| Suspense | Question(s) | Proponent |
|------------------|--------------------------------------|---|
| 21 Jun 19 | Speakers Section III | Military Services – Provide names and contact information for nominated speakers for each panel. |
| 21 Jun 19 | Narrative Questions Section IV | Military Services – The identified group provide narrative responses to the identified questions in Section IV of this RFI. |

III. Request for Speakers at the August 23, 2019, DAC-IPAD Public Meeting

The DAC-IPAD requests that each of the Military Services make available the following speakers within their respective organizations to answer questions from Committee members at the DAC-IPAD public meeting scheduled for August 23, 2019 in Arlington, Virginia, regarding the topics addressed in Section IV of this RFI:

Panel 1: Chief, Criminal Law/Military Justice Division

Panel 2: Program Manager, Special Victims' Counsel and Victims' Legal Counsel Program

Panel 3: Chief, Trial Defense Services Organization

IV. Narrative Questions

Purpose: The Judicial Proceedings Panel (JPP or Panel) recommended that the DAC-IPAD explore a number of issues raised throughout the course of the Panel’s military installation site visits in 2016.¹ Further, the DoD General Counsel has requested that the DAC-IPAD examine these issues. To this end, the Committee begins its review by requesting written responses from stakeholders involved in the process on these as well as additional issues of interest to the Committee. Please consider each issue separately, and not as it relates to any of the other policy issues.

Responses to the questions in section A are requested from all RFI recipients. Responses to the questions in section B are requested only from the criminal law/military justice organizations. Responses to the section C questions are requested only from the SVC/VLC Program Managers. Responses to the section D questions are requested only from the defense service organizations.

A. Policy Questions for Service Criminal Law/Military Justice Divisions, Special Victims’ Counsel Program Managers, and Trial Defense Service Organizations

Policy Question 1: Article 32 Preliminary Hearing.

JPP Recommendation 55² requested that the DAC-IPAD continue to review the usefulness of the Article 32 preliminary hearing process, including the weight given to preliminary hearing officers’ (PHOs) recommendations. DAC-IPAD members reviewing penetrative sexual assault investigative case files have found instances in which a PHO indicated, typically in a very thorough report, that no probable cause existed for a penetrative sexual assault offense, the staff judge advocate disagreed, the case was referred to court-martial, and an acquittal resulted. To begin its evaluation of the Article 32, UCMJ, process, the Committee requests narrative responses to the following questions:

- a. Should the recommendations of PHOs against referral of sexual assault charges to court-martial, based on a lack of probable cause, be binding on convening authorities?
 - What are the most compelling arguments for and against this proposition from your organization’s perspective?
 - Does your organization support or oppose the proposition? Why or why not?

¹ See JUDICIAL PROCEEDINGS PANEL REPORT ON PANEL CONCERNS REGARDING THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (Sept. 2017), *available at* https://jpp.whs.mil/public/docs/08-Panel_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf.

² JPP Recommendation 55: The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

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

- b. Alternatively, should Article 34, UCMJ, and/or R.C.M. 406 be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause?
 - What are the most compelling arguments for and against this proposition from your organization's perspective?
 - Does your organization agree or disagree with instituting such a requirement? Why or why not?
- c. Could there be a benefit in having a preliminary hearing akin to the function of a federal grand jury proceeding PRIOR to the preferral of charges?
 - What are the most compelling arguments for and against this proposition from your organization's perspective?
 - Does your organization agree or disagree with this proposition? Why or why not?

Policy Question 2: Non-Disclosure of Article 34 Pretrial Advice.

In JPP Recommendation 58,³ the Panel requested that the DAC-IPAD review whether Article 34 of the UCMJ and R.C.M. 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority be released to the defense upon referral of charges to court-martial. The Panel was concerned that this requirement inhibited the convening authority's legal staff from providing a fully developed, candid analysis of the evidence in the case. To begin its evaluation of Article 34, UCMJ, the Committee requests narrative responses to the following questions:

Should the UCMJ and/or Manual for Courts-Martial be amended to protect a staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel (sometimes referred to as a "prosecution merits memorandum"), from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges?

- a. What are the most compelling arguments for and against this proposition from your organization's perspective?
- b. Does your organization support or oppose the proposition? Why or why not?

B. Operational Questions for Service Criminal Law/Military Justice Divisions

Question 1: Prosecution Initiation/Declination.

- a. Is the ability to obtain and sustain a conviction being considered in decisions to prefer charges in sexual assault cases? If so, what weight is it given? What weight is given to the victim's preferences at this stage?
- b. Do your prosecutors recommend that certain sexual assault prosecutions should be declined because the accused is subject to effective prosecution in another jurisdiction? If so, what factors do they consider?

³ JPP Recommendation 58: The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

- c. How do you ensure there is appropriate consistency across jurisdictions (GCMCAs) within your Service with regard to the decision whether to prefer charges or decline prosecution, in order to prevent unwarranted disparity in prosecution initiation or declination decisions?

Question 2: Article 32 Preliminary Hearing Practice.

- a. Do the judge advocates available to serve as PHOs in sexual assault cases possess sufficient training and experience?
- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the prosecution realize a benefit from the hearing? Does the defense realize a benefit?
- c. Have the Military Justice Act of 2016 requirements for a more detailed analysis of the evidence by the PHO, and the post-hearing submission of supplementary information relevant to disposition pursuant to R.C.M. 405(k), assisted SJAs and convening authorities in making a referral decision?

Question 3: Effect of the New Article 33 Disposition Guidance.

JPP Recommendation 57⁴ requests that the DAC-IPAD determine what effect, if any, the Article 33 disposition guidance has on the number of sexual assault cases being referred to courts-martial.

In practice, since the non-binding disposition guidance codified in Article 33 and Appendix 2.1 of the Manual for Courts-Martial went into effect on January 1, 2019, what effect, if any, has this guidance had on the number of sexual assault cases referred to courts-martial?

Question 4: Article 33 Disposition Guidance, in Practice.

- a. How important is the ability to obtain and sustain a conviction to the decision to refer a sexual assault charge to trial?
- b. What considerations are SJAs incorporating into their recommendation as to disposition of the charges and specifications “in the interest of justice and discipline?” How are these considerations used in cases in which the SJA recommends referral contrary to the recommendation of the Article 32 PHO? Are these other considerations discussed in writing in the Article 34 advice or being briefed orally (and by whom), or both?⁵

⁴ JPP Recommendation 57: After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

⁵ Rule for Court-Martial (R.C.M.) 601 provides, “If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it.”

Article 34, UCMJ, and R.C.M. 406 prohibit the convening authority from referring a case to court-martial unless the staff judge advocate advises that there is probable cause to believe the accused committed the offense charged; in addition, Article 34, UCMJ, and R.C.M. 406 require the staff judge advocate to provide a recommendation as to the disposition that should be made of the charges in the interest of justice and discipline.

Appendix 2.1, which implements Article 33, UCMJ, provides additional guidance regarding factors the convening authorities and staff judge advocates should consider when exercising their duties with respect to the disposition of charges, including “[w]hether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial”

- c. In a sexual assault case pending referral, if the SJA determines there is probable cause to believe that the accused committed a sexual assault offense, but conviction is not likely, under what circumstances should the SJA advise the convening authority to refer the case to court-martial?
- d. In such cases, do acquittals help or hinder the maintenance of good order and discipline, and why?

Question 5: Conviction and Acquittal Rates for Sexual Assault Offenses.

The DAC-IPAD's Third Annual Report (March 2019)⁶ contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in the questions that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
- 35% of contested cases result in a full acquittal

The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To begin its evaluation, the Committee requests narrative responses to the following questions:

- a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?
- b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within each Military Service? Please describe.
- c. In your Service, are the conviction and acquittal rates for other offenses similar to those for sexual assault? Is this information routinely tracked by your Service?

Question 6: Prosecutor and Defense Counsel Training.

Do military prosecutors and defense counsel in your Service have sufficient training to ensure just convictions and acquittals in sexual assault cases?

Question 7: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.

The DAC-IPAD's Third Annual Report (March 2019) indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases contained a record of the victim declining to participate at some stage in the process.

- a. Does your organization collect or track any information regarding victim participation/declination in sexual assault cases? If so, please explain.

⁶ See DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES THIRD ANNUAL REPORT (March 2019), App. I, pp. 8, 12–13 (Table 1C, *Case Characteristics (FY2017)*; Table 2C, *Case Dispositions and Case Outcomes (FY 2017)*), available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

- b. What, either anecdotally or based on your organization's analysis, are the most frequent reasons victims give for declining to participate? Do these reasons differ when comparing civilian and military victims?

C. Operational Questions for Program Managers for the Special Victims' Counsel and Victims' Legal Counsel Programs

Question 1: Managing Victim Expectations.

- a. Do you and your SVCs/VLCs manage expectations with victims regarding court-martial results, or does the trial counsel do this? Please explain.
- b. What effect does a full acquittal in a sexual assault case have on victims' perceptions of the military justice process?

Question 2: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.

The DAC-IPAD's Third Annual Report (March 2019) indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases had a record of the victim declining to participate or to participate further at some stage in the military justice process, meaning the victims declined to be interviewed by investigators or trial counsel or declined to testify at an Article 32 hearing or at trial.

- a. From a program management perspective, do you think it's helpful to identify and understand the reasons why victims are not willing to participate in the military justice process?
- b. At what stage of the military justice process—investigation, preferral of charges, Article 32 hearing, or up until trial—are victims most likely to decline to participate in the process? Why do you believe this is so?
- c. What are the most common reasons why victims decline to participate in the investigative or court-martial process? Do these reasons differ when comparing civilian and military victims?
- d. In reviewing investigative and court-martial case files, the DAC-IPAD has found that many cases take more than a year from the offense being reported until the court-martial takes place. Does the length of time it takes for a case to proceed to court-martial have an effect on victim participation in the military justice process?
- e. Has the SVC/VLC program had an effect on victim declinations to participate in the investigative and court-martial process?

D. Operational Questions for Trial Defense Services Organizations

Question 1: Article 32 Preliminary Hearings.

- a. Have the changes to Article 32, UCMJ, and R.C.M. 405—in particular the addition of the post-hearing submission of information relevant to the disposition of the charges—made Article 32 preliminary hearings more beneficial to the defense? Why or why not?
- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the defense realize a benefit from the hearing?
- c. Do the judge advocates serving as PHOs in sexual assault cases possess sufficient training and experience?
- d. Prosecutorial discretion exists by virtue of the prosecutor's status as a member of the executive branch, and the President's responsibility under the U.S. Constitution to ensure that the laws of the United States be "faithfully executed." Have you filed any motions to dismiss arguing the government has breached this principle (U.S. Constitution Article 2, Section 3) when charges are referred contrary to the advice of a PHO? If so, what was the outcome?

Question 2: Conviction and Acquittal Rates.

The DAC-IPAD's Third Annual Report (March 2019)⁷ contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in Questions a through d that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
- 35% of contested cases result in a full acquittal

The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To this end, the Committee requests written responses to the following questions.

- a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?
- b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within your Service? Please describe.
- c. Are the conviction and acquittal rates for other offenses similar to those for sexual assault?
- d. Do military prosecutors and defense counsel possess sufficient training and experience to ensure just convictions and acquittals in sexual assault cases?

⁷ See DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES THIRD ANNUAL REPORT (March 2019), App. I, pp. 8, 12–13 (Table 1C, *Case Characteristics (FY2017)*; Table 2C, *Case Dispositions and Case Outcomes (FY 2017)*), available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

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

Request for Information
RFI Set 12, Questions 1–2
Date of Request: September 10, 2019

I. Purpose

See page F-2.

II. Requested Response Date

| Suspense | Question(s) | Proponent |
|----------|-------------|--|
| 3 Oct 19 | 1–2 | Services – Provide information requested in Section III of this RFI. |

III. Courts-Martial Information

Question 1: The DAC-IPAD requests that the Services provide the following information, broken out by fiscal year, for **fiscal years 2016, 2017, and 2018** [*note: this information is requested for all UCMJ offenses and is not specific to sexual assault offenses*]:

- a. Total number of cases referred to general courts-martial [*please provide all cases referred to GCM, regardless of ultimate disposition of the case*]
- b. Total number of Article 32 preliminary hearings conducted
- c. Total number of Article 32 preliminary hearing waivers
- d. Total number of Article 32 preliminary hearings conducted, but which did not result in a general court-martial, and the disposition of those cases (*i.e., dismissal of charges, alternate disposition*)

Question 2: The DAC-IPAD requests the total number of judge advocates currently serving as military magistrates and/or military judges in each Service.

Please provide any Service regulations, policies, or procedures that pertain to military magistrates.

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

Request for Information
RFI Set 13, Questions 1-2
Date of Request: November 21, 2019

I. Purpose

See page F-2.

II. Requested Response Date

| Suspense | Question(s) | Proponent |
|-----------|-------------|---|
| 20 Dec 19 | 1 | Services – Provide list of cases meeting RFI criteria to the DAC-IPAD using the format in Attachment 1. |
| 1 Feb 20 | 2 | Services – Provide specified case documents (PDFs) for all cases to the DAC-IPAD. |

III. Court-Martial Cases in Fiscal Year 2019 (FY19)

Question 1: The DAC-IPAD requests that the Military Services use the information from the Services' case management systems to identify *all* cases in fiscal year 2019 that involve a preferred charge under the punitive articles of the UCMJ. In an attempt to mitigate under-reporting and non-responsive submissions, this information is requested for *all* UCMJ offenses and is not specific to sexual assault offenses. The DAC-IPAD requests that the Services identify the cases by Service and Accused (Service | Last Name | First Name) in an Excel file; *see* Attachment 1.

Please provide completed list to the DAC-IPAD by December 20, 2019.

Question 2: For cases identified in Question 1, provide copies of the following documents, as applicable to individual case. If your Service does not use the specified DD form, please provide Service-equivalent documents:

1. DD Form 458, *Charge Sheet*
2. DD Form 2707-1, *Report of Result of Trial* (if applicable)
3. *Statement of Trial Results* (if applicable)
4. *Promulgation Order* (if applicable)
5. *Entry of Judgment* (if applicable)

Please provide requested documents to the DAC-IPAD by February 1, 2020.

ATTACHMENT 1 – Service Responses to DAC-IPAD RFI Set 13, Question 1

[Military Service] – FY19:

| Service | Last Name | First Name |
|-----------------------------------|-----------|------------|
| USA / USMC / USN / USAF / USCG | Doe | John |
| | | |
| | | |
| | | |
| | | |

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

Request for Information**RFI Set 14, Question 1****Topic: Sexual Assault Training Materials****Date of Request: January 22, 2020****I Purpose**

See page F-2.

II. Requested Response Date

| Suspense | Question(s) | Proponent |
|-----------------|-------------|---|
| 1 Mar 20 | 1 | Services – Provide copies of training materials meeting RFI criteria to the DAC-IPAD. |

III. Sexual Assault Training Materials

Question 1: The DAC-IPAD requests that the services provide copies of all current training materials used when conducting sexual assault training for the following: (1) entry-level training or “boot camp”; (2) Officer Candidates School; (3) the service academies; (4) commanders; and (5) service-wide, annual sexual assault training. The DAC-IPAD requests that the Services separately identify each set of training materials in the response.

Please provide completed list to the DAC-IPAD by March 1, 2020.

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

Request for Information

RFI Set 15, Questions 1–5, Documents 1–3

Topic: Appointment of Guardians ad Litem for Minor Victims of Sex-Related Offenses

Date of Request: January 28, 2020

I. Purpose

See page F-2.

II. Summary of Requested Response Dates

| Suspense | Question(s) | Proponent |
|--------------------------|---------------------------------------|---|
| March 1, 2020 | Questions 1–5 and Documents 1–3 | Services – Provide narrative responses regarding SVC/VLC, Article 6b representatives, and guardians ad litem for minor victims and the requested policies, regulations, and guidance. |

**III. Narrative Questions for Special Victims' Counsel and Victims' Legal Counsel (SVC/VLC) Programs
Regarding Guardians ad Litem for Minor Victims**

Background:

U.S. House of Representatives Report 116-120, part 1 (2019), accompanying H.R. 2500, contains a request for the DAC-IPAD to evaluate the need for, and feasibility of, the appointment of guardians ad litem for minor victims of sex-related offenses. Specifically, Section 421 of the House Report states the following:

Appointment of Guardian ad Litem for Minor Victims

The committee is concerned for the welfare of minor, military dependents who are victims of an alleged sex-related offense. The committee acknowledges the Department of Defense's continued efforts to implement services in support of service members who are victims of sexual assault and further, to expand some of these services to dependents who are victims. However, the committee remains concerned that there is not an adequate mechanism within the military court-martial process to represent the best interests of minor victims following an alleged sex-related offense.

Therefore, not later than 180 days after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the Committees on the Armed Services of the Senate and the House of Representatives a report that evaluates the need for, and the feasibility of, establishing a process under which a guardian ad litem may be appointed to represent the interests of a victim of an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code) who has not attained the age of 18 years.

Questions:

Question 1: For all military investigations involving an alleged sex-related offense (as that term is defined in section 1044e(g) of title 10, United States Code), against a minor victim, and closed in the last two calendar years (2018, 2019): please provide a list, by year, of all alleged victims (represent each victim by a number, starting with 1) who were under the age of 18 at the time of the sex-related offense and for which the alleged offender was a Service member subject to the UCMJ.

For each victim identified, please document:

- a. The age of the victim at the time of the offense;
- b. Whether the victim was represented by a SVC/VLC;
- c. Whether the victim's legal interests were represented by an Article 6b, UCMJ, representative, and if so, the basis for requesting the representative;
- d. If there was an Article 6b representative appointed, the nature of the representative's relationship to the victim (e.g., mother, aunt);
- e. Whether there were conflicts in the case between the victim's, or victim's representative's, expressed wishes and the best interests of the victim;
- f. Whether a guardian ad litem was appointed, and if so, how and by whom.

Question 2: Does your Service believe it would be beneficial to establish, or has your Service already established, a process under which a guardian ad litem may be appointed to represent the interests of a minor victim of an alleged sex-related offense described above (or any other offenses)?

Question 3: Are SVCs/VLCs in your Service specifically authorized to represent a victim's best interest in the event the victim lacks the capacity or maturity to make a decision regarding a specific issue involved in the case? If, so, please reference the specific policy or regulation providing for this representation.

Question 4: If SVCs/VLCs in your Service are authorized to represent the best interests of a minor victim in certain instances of incapacity, please identify any of the victims listed in Question 1 for whom this occurred. If SVCs/VLCs are not allowed to represent the best interests of a minor victim in your Service, what happens when a victim lacks capacity due to his or her young age and there is not a suitable Article 6b representative available? Please identify any of the victims listed in Question 1 for whom this was the case and provide a brief description of the case and how the issue was addressed.

Question 5: Please provide any additional comments or feedback regarding the congressional proposal to establish a guardian ad litem appointment process for the military that would be helpful for the DAC-IPAD to consider in its evaluation and report to Congress on this issue.

IV. Request for Service Policies, Regulations, and Other Written Documents Related to SVCs/VLCs or Guardians ad Litem Appointed for Minor Victims

Requested documents:

1. All Service policies, regulations, or guidance that address SVC/VLC representation of victims under the age of 18.
2. All Service policies, regulations, or guidance that address guardians ad litem.
3. MOAs/MOUs between the Services and State/Local Child Protection Service organizations or other organizations that address the appointment of guardians ad litem for victims under the age of 18 in criminal cases involving Service member subjects. If there are more than five such MOAs/MOUs in your Service, please provide five as a representative sample. If there are fewer than five, please provide all relevant MOA/MOUs.

**APPENDIX G. SEPTEMBER 16, 2019, LETTER FROM
DAC-IPAD CHAIR MARTHA S. BASHFORD TO THE
SECRETARY OF DEFENSE SUBMITTING THE COMMITTEE'S
ANALYSIS OF AND RECOMMENDATIONS RELATED TO
THE DEPARTMENT OF DEFENSE INITIAL SEXUAL ASSAULT
VICTIM COLLATERAL MISCONDUCT REPORT**



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

September 16, 2019

The Honorable Mark T. Esper
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Mr. Secretary:

As the Chair of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (the Committee or DAC-IPAD), a federal advisory committee established by section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law No. 113-291), I respectfully submit the analysis and recommendations of the DAC-IPAD regarding the Department of Defense's (DoD's) draft *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*. This analysis is offered pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232) (hereinafter FY19 NDAA), which directs the Secretary of Defense to work with the DAC-IPAD in submitting to the congressional defense committees a biennial report on the number of instances of collateral misconduct committed by alleged sexual assault victims.

Section 547 requires the Secretary's reports to include three statistical data elements: (1) the number of instances in which an individual identified as a victim of a sexual assault in the case files of a military criminal investigation was accused of misconduct or crimes considered collateral to the investigation of sexual assault, (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct or crimes, and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action against those individuals. Each report is to cover the two years preceding the report due date. The first report is to be submitted to the congressional defense committees by September 30, 2019.

The Committee received a draft DoD collateral misconduct report and a request for its input regarding the report from the DoD General Counsel on June 11, 2019; that report included the collateral misconduct data collected by the Army, Navy, Marine Corps, and Air Force. The Coast Guard provided its report on allegations of collateral misconduct to the DAC-IPAD on August 16, 2019.¹ To better understand how the information in the reports was identified and gathered in each Service, the Committee requested representatives from the Services who were involved in the data collection process to meet with the DAC-IPAD staff and provide additional

¹ See Enclosure 1 for the Department of Defense's draft report and the Coast Guard report. The Air Force provided a supplemental report to the DAC-IPAD on August 22, 2019, and it is also included in Enclosure 1.

information regarding the data reported and methodologies employed. Following this meeting and at the request of the DAC-IPAD, the Services provided additional details to the Committee regarding the types of collateral misconduct reported and adverse actions taken. Service representatives were then invited to appear at the August 23, 2019, DAC-IPAD public meeting to respond directly to Committee members' questions regarding the draft reports. Based on the Committee's review of the draft reports, the additional information provided by the Services, and the testimony received at the public meeting, the Committee offers the following observations and analysis.

Analysis of the Services' Definitions and Methodologies

In reviewing the draft reports and additional information provided by the Services, the Committee identified inconsistencies in the methodologies for data collection and the definitions of terms applied by the Services.² These inconsistencies can be attributed, in substantial part, to the relevant statute's use of key terms without defining them. That the Services, in the absence of uniform guidance, employed nonstandard and inconsistent definitions to collect collateral misconduct data underscores the critical need for, and difficulty in obtaining, uniform, accurate, and complete information on sexual assault cases across the military. The DAC-IPAD notes that this difficulty was the driving force behind the Committee's recommendation in its September 13, 2018, letter to the Secretary of Defense—regarding Article 140a of the Uniform Code of Military Justice (UCMJ)—that DoD develop a single electronic database for the uniform collection, storage, and analysis of standardized military justice documents across the Services.³

Inconsistencies in Data Collection

One example of the significant differences in the Services' collection of collateral misconduct data was in how each Service determined its total number of sexual assault investigations and victims. One Service included only investigations of penetrative sexual offenses in its data, while the other Services included investigations for both penetrative and contact sexual offenses. Some Services included both cases in which investigations were complete but command action was pending and cases in which command action was complete. Others included only cases with completed command action. In addition, the Services differed in whether they included reservists and members of the National Guard in federal status who were victims of sexual assault, and whether they included victims from their Service if the case was investigated by another Service's military criminal investigative organization (MCIO).

Another critical difference across Services in their reporting criteria was in the definition each assigned to the term "accused" when determining the number of instances in which a victim of sexual assault was accused of collateral misconduct. Under the definition used by some Services, a victim was considered to be accused of collateral misconduct if the MCIO's sexual assault investigation revealed circumstances that could potentially support the taking of adverse

² See Enclosure 2 for more details on the variances in the Services' definitions and methodologies.

³ See Letter from DAC-IPAD to the Secretary of Defense Regarding Article 140a, Uniform Code of Military Justice (Sept. 13, 2018), available at https://dacipad.whs.mil/images/Public/08-Reports/03_DACIPAD_InterimReport_Article140a_20180913_Final.pdf.

action against the victim. Other Services employed more restrictive criteria, considering a victim to be accused of collateral misconduct only if an inquiry into the collateral misconduct was actually initiated. The Committee finds that in the context of this report, the statutory language describing a victim as “accused” of collateral misconduct is extremely confusing. In the military justice system, that term is typically used of a Service member only after charges have been preferred against him or her; during the investigative stage, a person suspected of engaging in misconduct is typically referred to as a “suspect.” Consequently, the lack of clear guidance on what Congress meant for a victim to be accused of collateral misconduct was a significant obstacle to drafting a meaningful report.

False Allegations of Sexual Assault

The Services were also inconsistent in how they treated what they considered to be false allegations of sexual assault; some Services included false allegations in their data as collateral misconduct, while others did not. To clarify whether a Service included false allegations in the reported number of cases involving collateral misconduct, the DAC-IPAD asked all of the Services to separately provide data concerning false allegations and adverse actions taken.⁴ None of the Services provided a written definition of what they classified as a “false allegation of sexual assault” or specified the evidentiary threshold necessary to classify an allegation as false.

During the August 23, 2019, public meeting, the Committee members questioned the Service representatives on this issue and learned that at least one Service classified cases in which a mistaken report was made by a third party as a false report. The Service representatives also mentioned instances in which a suspect makes a “cross-claim” of sexual assault, meaning that one person reported the sexual assault and the suspect in that case then countered by accusing the reporter of sexual assault. Several Service representatives noted that they had difficulty determining how to classify these reports.⁵

The Committee finds that a factually false allegation of sexual assault constitutes its own category of misconduct, rather than being misconduct collateral to a sexual assault, and therefore should not be counted as an instance of collateral misconduct.

Analysis of Collateral Misconduct Data Provided by the Services

Incidence of Collateral Misconduct

Congress requested the percentage of Service members who are sexual assault victims and are accused of collateral misconduct. Notwithstanding the inconsistencies in the Services’

⁴ There were a total of 5,733 reported Service member victims: of this number, the Army reported 8 cases involving false allegations of sexual assault; the Navy, Marine Corps, and Air Force each reported 5 cases involving false allegations of sexual assault; and the Coast Guard reported 2 cases involving false allegations of sexual assault (the Services reported these numbers using their own definitions of the term “false allegation”).

⁵ See *Transcript of DAC-IPAD Public Meeting* 46–49 (Aug. 23, 2019) (testimony of Lieutenant Adam Miller, U.S. Coast Guard, Legal Intern, Office of Military Justice; testimony of Lieutenant Colonel Jane M. Male, U.S. Air Force, Deputy of the Military Justice Division, Air Force Legal Operations Agency).

methodologies and definitions, the Services' data made clear that whatever criteria each employed, the incidence of victim collateral misconduct in criminally investigated sexual assault cases is fairly low, ranging from 1% of the Service members who are sexual assault victims in the Navy and Marine Corps to a high of 20% in the Coast Guard.⁶ In the largest Service, the Army, 12% of Service member victims were accused of collateral misconduct in penetrative cases. Based on the combined DoD and Coast Guard reports, as well as the Services' varying definitions of "accused of collateral misconduct," an average of 6% of Service member victims were accused of collateral misconduct in the two-year period studied.

Likelihood of Adverse Action

Congress also requested the percentage of Service members who are sexual assault victims and receive adverse action for collateral misconduct. The Services provided the percentage of *all* Service member victims who received adverse action for collateral misconduct, regardless of whether they were even accused of such misconduct. However, the figure that may also be helpful to policymakers is the likelihood of adverse action for those who are accused of collateral misconduct. The Committee's calculations show that the likelihood of a Service member victim receiving adverse action when accused of collateral misconduct varied widely across the Services, ranging from a 10% likelihood of adverse action in the Army to a 91% likelihood of adverse action in the Marine Corps. But this statistic provides no basis for reliable comparisons between the Services, because they did not have a single interpretation of the term "accused." As would be expected, the Services that defined "accused" more broadly showed less likelihood of adverse action than the Services that defined the term more restrictively.

Types of Collateral Misconduct and of Adverse Action Received

In the data initially provided, the Services did not include the type of collateral misconduct each victim was accused of or the type of adverse action received, though several Services mentioned in their reports that they did collect this information. The Committee subsequently requested this information from the Services for analysis.⁷ The frequency of each type of collateral misconduct differed depending on the Service. In the Army, the most common collateral misconduct offenses were underage drinking (38%), adultery (14%), violation of an order or policy (14%), and fraternization (13%). In the Navy, the most common collateral misconduct offenses were fraternization (29%), underage drinking (19%), and liberty policy violations (14%). In the Marine Corps, the most common collateral misconduct offenses were orders violations (36%) and underage drinking (27%). In the Air Force, the most common collateral misconduct offenses were underage drinking (24%), orders or policy violations (19%), and adultery, fraternization, or unprofessional relationships (14%). Finally, in the Coast Guard, the most common collateral misconduct offenses were prohibited relationship (51%), underage drinking (15%), and sex in the barracks (13%). The type of adverse action received for these offenses also varies across the Services.

⁶ See Enclosure 3 for a detailed breakdown on the percentage of victims who were accused of collateral misconduct in each Service and the percentage of victims who received adverse action in each Service.

⁷ See Enclosure 4 for supplemental information from each Service on the type of collateral misconduct and adverse action taken.

Recommendations

Because the Services did not use the same methodology to collect data, the DAC-IPAD is unable to base substantive recommendations regarding collateral misconduct on the information contained in the reports and supplemental information received. The Committee believes that before meaningful substantive analysis can take place, a thorough and consistent methodology must be applied across the Services in collecting the relevant data. If the inconsistencies in the Services' definitions and methodologies for data collection are not resolved promptly, future reports on collateral misconduct will face the same obstacles as those discussed in this letter.

Drawing on their experiences in collecting the data required for this year's initial collateral misconduct report, the Services provided the DAC-IPAD with helpful input to clarify and standardize definitions and the collection methodology in reports going forward. Based on this input, the testimony at the August 23 public meeting, and the Committee's deliberations, the DAC-IPAD offers the following recommendations to the Secretary of Defense to improve the uniformity, accuracy, and utility of the collateral misconduct data in future reports.

Recommendation 1: The Department should publish a memorandum outlining sufficiently specific data collection requirements to ensure that the Services use uniform methods, definitions, and timelines when reporting data on collateral misconduct (or, where appropriate, the Department should submit a legislative proposal to Congress to amend section 547 by clarifying certain methods, definitions, and timelines). The methodology and definitions should incorporate the following principles:

a. Definition of "sexual assault":

- The definition of "sexual assault" for purposes of reporting collateral misconduct should include:
 - Both penetrative and non-penetrative violations of Article 120, UCMJ (either the current or a prior version, whichever is applicable at the time of the offense);
 - Violations of Article 125, UCMJ, for allegations of sodomy occurring prior to the 2019 version of the UCMJ; and
 - Attempts, conspiracies, and solicitations of all of the above.
- The definition of sexual assault should not include violations of Article 120b, UCMJ (Rape and sexual assault of a child), Article 120c, UCMJ (Other sexual misconduct), Article 130, UCMJ (Stalking), or previous versions of those statutory provisions.

b. Definition of “collateral misconduct”:

- Current DoD policy defines “collateral misconduct” as “[v]ictim misconduct that might be in time, place, or circumstance associated with the victim’s sexual assault incident.”⁸
- However, a more specific definition of collateral misconduct is necessary for purposes of the section 547 reporting requirement. That recommended definition should be as follows: “Any misconduct by the victim that is potentially punishable under the UCMJ, committed close in time to or during the sexual assault, and directly related to the incident that formed the basis of the sexual assault allegation. The collateral misconduct must have been discovered as a direct result of the report of sexual assault and/or the ensuing investigation into the sexual assault.”
- Collateral misconduct includes (but is not limited to) the following situations:
 - The victim was in an unprofessional relationship with the accused at the time of the assault.⁹
 - The victim was drinking underage or using illicit substances at the time of the assault.
 - The victim was out past curfew, was at an off-limits establishment, or was violating barracks/dormitory/berthing policy at the time of the assault.
- To ensure consistency across the Services, collateral misconduct, for purposes of this report, should *not* include the following situations (the list is not exhaustive):
 - The victim is under investigation or receiving disciplinary action for misconduct and subsequently makes a report of sexual assault.
 - The victim used illicit substances at some time after the assault, even if the use may be attributed to coping with trauma.
 - The victim engaged in misconduct after reporting the sexual assault.
 - The victim had previously engaged in an unprofessional relationship with the subject, but had terminated the relationship prior to the assault.
 - The victim engaged in misconduct that is not close in time to the sexual assault, even if it was reasonably foreseeable that such misconduct would be discovered during the course of the investigation (such as the victim engaging in an adulterous relationship with an individual other than the subject).
 - The victim is suspected of making a false allegation of sexual assault.

⁸ Dep’t of Def. Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, Glossary (Mar. 28, 2013, Incorporating Change 3, May 24, 2017), 117.

⁹ An “unprofessional relationship” is a relationship between the victim and accused that violated law, regulation, or policy in place at the time of the assault.

- The victim engages in misconduct during the reporting or investigation of the sexual assault (such as making false official statements during the course of the investigation).

c. Methodology for identifying sexual assault cases and victims:

- To identify sexual assault cases and victims, all closed cases from the relevant time frame that list at least one of the above included sexual offenses as a crime that was investigated should be collected from the MCIOs.
- A case is labeled “closed” after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision, any action taken by the commander has been completed, and documentation of the outcome has been provided to the MCIO.¹⁰
- Each Service should identify all of its Service member victims from all closed cases from the relevant time frame, even if the case was investigated by another Service’s MCIO.

d. Time frame for collection of data:

- The Services should report collateral misconduct data for the two most recent fiscal years preceding the report due date for which data are available. The data should be provided separately for each fiscal year and should include only closed cases as defined above. For example, the Department’s report due September 30, 2021, should include data for closed cases from fiscal years 2019 and 2020.

e. Definition of “covered individual”:

- Section 547 of the FY19 NDAA defines “covered individual” as “an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.” This definition should be clarified as follows: “an individual identified in the case files of a MCIO as a victim of sexual assault while in title 10 status.”
- For the purposes of this study, victims are those identified in cases closed during the applicable time frame.

f. Replacement of the term “accused”:

- Section 547 of the FY19 NDAA uses the phrase “accused of collateral misconduct.” To more accurately capture the frequency with which collateral misconduct is occurring, the term “accused of” should be replaced with the term

¹⁰ This definition of “closed case” mirrors the definition used by the DAC-IPAD’s Case Review Working Group. See DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES THIRD ANNUAL REPORT 21 n.28 (Mar. 2019), available at https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf.

“suspected of,” defined as follows: instances in which the MCIO’s investigation reveals facts and circumstances that would lead a reasonable person to believe that the victim committed an offense under the UCMJ.¹¹

- Examples of a victim suspected of collateral misconduct include (but are not limited to) the following situations:
 - The victim disclosed engaging in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - Another witness in the sexual assault investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - The subject of the investigation stated that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
 - In the course of the sexual assault investigation, an analysis of the victim’s phone, urine, or blood reveals evidence that the victim engaged in conduct that could be a violation of the UCMJ (and was collateral to the offense).
- This definition of “suspected of” does not require preferral of charges, a formal investigation, or disciplinary action against the victim for the collateral misconduct. However, if any of those actions have occurred regarding collateral misconduct, or if there is evidence of collateral misconduct from other sources available, such victims should also be categorized as suspected of collateral misconduct even if the MCIO case file does not contain the evidence of such misconduct.
 - For example, if in pretrial interviews the victim disclosed collateral misconduct, such a victim would be counted as suspected of collateral misconduct.

g. Definition of “adverse action”:

- The term “adverse action” applies to an officially documented command action that has been initiated against the victim in response to the collateral misconduct.
- Adverse actions required to be documented in collateral misconduct reports are limited to the following:
 - Letter of reprimand (or Service equivalent) or written record of individual counseling in official personnel file;
 - Imposition of nonjudicial punishment;
 - Preferral of charges; or

¹¹ Cf. *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006) (stating that determining whether a person is a “suspect” entitled to warnings under Article 31(b) prior to interrogation “is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense”) (internal citations omitted).

- Initiation of an involuntary administrative separation proceeding.
- The Committee recommends limiting the definition of adverse action to the above list for purposes of this reporting requirement to ensure consistency and accuracy across the Services in reporting and to avoid excessive infringement on victim privacy. The Committee recognizes the existence of other adverse administrative proceedings or actions that could lead to loss of special or incentive pay, administrative reduction of grade, loss of security clearance, bar to reenlistment, adverse performance evaluation (or Service equivalent), or reclassification.

h. Methodology for counting “number of instances”:

- Cases in which a victim is suspected of more than one type of collateral misconduct should be counted only once; where collateral misconduct is reported by type, it should be counted under the most serious type of potential misconduct (determined by UCMJ maximum punishment) or, if the victim received adverse action, under the most serious collateral misconduct identified in the adverse action.
- For cases in which a victim received more than one type of adverse action identified above, such as nonjudicial punishment and administrative separation, reporting should include both types of adverse action.

Recommendation 2: Victims suspected of making false allegations of sexual assault should not be counted as suspected of collateral misconduct.

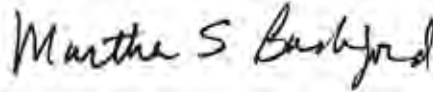
Recommendation 3: For purposes of the third statistical data element required by section 547, the Department should report not only the percentage of all Service member victims who are suspected of collateral misconduct but also the percentage of the Service member victims who are suspected of collateral misconduct and then receive an adverse action for the misconduct. These two sets of statistics would better inform policymakers about the frequency with which collateral misconduct is occurring and the likelihood of a victim receiving an adverse action for collateral misconduct once he or she is suspected of such misconduct.

Recommendation 4: The Department should include in its report data on the number of collateral offenses that victims were suspected of by type of offense (using the methodology specified in section h of Recommendation 1) and the number and type of adverse actions taken for each of the offenses, if any. This additional information would aid policymakers in fully understanding and analyzing the issue of collateral misconduct and in preparing training and prevention programs.

Recommendation 5: To facilitate production of the future collateral misconduct reports required by section 547, the Services should employ standardized internal documentation of sexual assault cases involving Service member victims suspected of engaging in collateral misconduct as defined for purposes of this reporting requirement.

The Committee would like to express its sincere appreciation to the Services for their collaboration and feedback on how to improve this reporting requirement, and to the Department for the opportunity to provide input on this important matter.

Sincerely,

A handwritten signature in black ink that reads "Martha S. Bashford". The signature is written in a cursive, flowing style.

Martha S. Bashford
Chair

Enclosures:

1. Department of Defense's draft *Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization*; *U.S. Coast Guard Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault*; and *Department of the Air Force Supplemental Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault*
2. Comparison of Service Collateral Misconduct Definitions and Methodologies
3. Comparison of Service Collateral Misconduct Data
4. Supplemental Information from the Services Related to the June 2019 Department of Defense Draft Report on Collateral Misconduct

ENCLOSURE 1

ENCLOSURE 1 – Draft DoD Report Reviewed by DAC-IPAD and Supplemental Service Information



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

JUN 11 2019

GENERAL COUNSEL

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

Dear Ms. Bashford:

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, the Secretary of Defense is required to submit biennial reports, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), addressing allegations of collateral misconduct against individuals identified as the victim of sexual assault in the case files of a military criminal investigative organization. Responsibility for that report has been delegated to me. The first report is due to the Congressional defense committees by September 30, 2019.

Consistent with the letter I sent to you on March 12, 2019, enclosed is a draft report including the information sought by section 547. That report is attached. I am providing the draft report to you to give the DAC-IPAD an opportunity to offer any additional information or analysis it deems appropriate. To facilitate submitting the report to Congress by the September 30, 2019, statutory deadline, please provide me with any input from the DAC-IPAD no later than September 16, 2019.

If you have any questions concerning this request, please contact Dwight Sullivan of my office. You can reach him at 703-695-1055 or dwight.h.sullivan.civ@mail.mil.

Please accept and convey to the other DAC-IPAD members my thanks for your dedication, selfless service, and high-quality analyses.

Sincerely,

A handwritten signature in blue ink, reading "Paul C. Ney, Jr.", is positioned above the typed name.

Paul C. Ney, Jr.
DoD General Counsel

Enclosure:
As stated

Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization



The estimated cost of this report or study for the Department of Defense is approximately \$_____ for the 2019 Fiscal Year. This includes \$0 in expenses and \$_____ in DoD labor.

Prepared by the Department of Defense

[Date Submitted]

Report on Allegations of Collateral Misconduct against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Organization

Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2019), provides:

(a) Report. Not later than September 30, 2019, and not less frequently than once every two years thereafter, the Secretary of Defense, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

(1) The number of instances in which a covered individual was accused of misconduct or crimes considered collateral to the investigation of a sexual assault committed against the individual.

(2) The number of instances in which adverse action was taken against a covered individual who was accused of collateral misconduct or crimes as described in paragraph (1).

(3) The percentage of investigations of sexual assaults that involved an accusation or adverse action against a covered individual as described in paragraphs (1) and (2).

(b) Covered individual defined. In this section, the term “covered individual” means an individual who is identified as a victim of a sexual assault in the case files of a military criminal investigative organization.

This report includes relevant data from each of the Military Departments for the two-year period from April 1, 2017, to March 31, 2019. It is being provided to the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces for such input as that Committee deems appropriate.



DEPARTMENT OF THE ARMY
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**THE DEPARTMENT OF ARMY REPORT ON ALLEGATIONS OF COLLATERAL MISCONDUCT
AGAINST VICTIMS OF SEXUAL ASSAULT**

I. INTRODUCTION

On 12 March 2019, pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA FY19), each Service is required to report the following information pertaining to victims of sexual assault for the period of April 1, 2017 to March 31¹, 2019: (1) the number of instances an identified victim of sexual assault in a military criminal investigation was accused of misconduct or crimes collateral to the sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct; and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action.

II. RELEVANT DEFINITIONS

In order to ensure accuracy of the data and consistency across the Services, the Joint Service Committee reviewed the request and defined the following terms:

a. **Sexual Assault Investigation**: Investigation into an alleged violation of Article 120 or Article 125 (forcible sodomy) of the Uniform Code of Military Justice, conducted by the Service's Military Criminal Investigative Organization (MCIO). These investigations are conducted into allegations of sexual assault that have a Department of Defense nexus, regardless of the identity or status of the victim. The number of investigations was determined by the number of subjects and not how many victims because a victim could have multiple allegations against different subjects.

b. **Victim of Sexual Assault**: Victim is defined as any Army member on active duty or in a reserve component at the time of the alleged sexual assault. Only service members per the UCMJ can be subject to adverse actions for collateral misconduct.

c. **Collateral Misconduct**: This includes any allegation of misconduct that is punishable under the UCMJ and is directly related to the incident which formed the basis of the sexual assault allegation. Additionally, the collateral misconduct must have been discovered as a direct result of the investigation into the sexual assault. Examples include, but are not limited to: underage drinking, fraternization, adultery, illegal drug use or possession, etc. Adverse actions against a person who filed a completely false allegation of sexual assault were not included.

d. **Accused**: ARMY definition: A qualifying victim is considered accused of collateral misconduct if the MCIO's sexual assault investigation revealed a potential UCMJ violation by the victim, directly related to the sexual assault that could support the taking of adverse action against the victim (e.g. underage drinking). Accused does not imply charges were preferred.

¹ The Memorandum from the DoD Office of General Counsel requested data from April 1, 2017 to March 30, 2019. Because the month of March has 31 days, the Services included March 31st into the reporting period.

c. **Adverse Action:** This includes any documented disciplinary action taken in response to the collateral misconduct, including: written counseling, letter of reprimand, Article 15 punishment, administrative separation proceedings, and court-martial.

III. METHODOLOGY

In coordination with the Army Criminal Investigative Division (CID), a list was generated of all sexual assault investigations closed or placed in a Final Investigation status between 1 April 2017 to 31 March 2019. From this list, CID was able to identify the named victims in each investigation. This information was provided to the U.S. Army Office of the Judge Advocate General (OTJAG) for review.

The Army initially reviewed the list to determine the number of Army victims (RA & USAR). The CID list of investigations with named victims was then separated by jurisdiction and sent to Judge Advocates at the field offices to perform an independent review of the identified CID investigations and any subsequent inquiry, investigation or adverse action to answer the following questions for each victim: (1) was the victim involved in misconduct collateral to their report of sexual assault; (2) if yes, did the command take adverse action against the victim for that collateral misconduct; and (3) if yes, what type of adverse action did the command take? The information received during this review is the basis for the data below.

IV. DATA

The data below pertains to the period of April 1, 2017 to March 31, 2019:

| Total Number of Sexual Assault Investigations Closed or in Final Investigation Status | Total Number of Sexual Assault Investigations Involving an Army victim | Total Number of instances where victim was accused of collateral misconduct | Total Number of instances where adverse action was taken as a result of collateral misconduct |
|---|--|---|---|
| 1586 | 1206 | 154 | 15 |

Based on the data received above, the following calculations were determined:

| Percentage of investigations where victim was accused of collateral misconduct | Percentage of investigations where victim received adverse action. |
|--|--|
| 13% | 1% |



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**THE DEPARTMENT OF THE NAVY REPORT ON ALLEGATIONS OF COLLATERAL MISCONDUCT
AGAINST VICTIMS OF SEXUAL ASSAULT**

I. INTRODUCTION

The Department of the Navy submits the following report pursuant to Public Law 115-23, the National Defense Authorization Act for Fiscal Year 2019. The report contains the following information: (1) the number of instances in the Navy and Marine Corps where an identified victim of sexual assault in a military criminal investigation was accused of misconduct or crimes collateral to the sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct; and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action.

II. DEFINITIONS

The following definitions were used in compiling this report:

- a. **Sexual Assault Investigation**: Investigation into an alleged violation of Article 120 or Article 125 (forcible sodomy) of the Uniform Code of Military Justice (UCMJ), where a Navy or Marine Corps victim is identified. Only completed sexual assault investigations were reviewed. A completed investigation is one where the Naval Criminal Investigative Service (NCIS) has submitted its report to the command for action.
- b. **Victim of Sexual Assault**: Victim, for purposes of this report, is an active or reserve member of the Navy or Marine Corps who is listed as a sexual assault victim in an NCIS report. Only service members per the UCMJ can be subject to adverse actions for collateral misconduct.
- c. **Collateral Misconduct**: Misconduct that is punishable under the UCMJ and is directly related to the incident that was the basis of the sexual assault allegation. Additionally, the collateral misconduct must have been discovered as a direct result of the investigation into the sexual assault. Examples include, but are not limited to: underage drinking, fraternization, adultery, illegal drug use or possession, etc.
- d. **Accused**: For purposes of this report, an identified sexual assault victim is considered to be "accused" of collateral misconduct if an inquiry into the collateral misconduct was actually initiated.
- e. **Adverse Action**: Any documented formal action taken in response to substantiated collateral misconduct, including: formal written counseling, letter of reprimand, nonjudicial punishment, administrative separation proceedings, and/or court-martial.

f. **Date Range:** The DoD OGC requested data for the period between 1 April 2017, through 31 March 2019.

III. METHODOLOGY

NCIS provided to the Navy and Marine Corps a list of completed sexual assault investigations for the period between 1 April 2017 and 31 March 2019 where the identified victim was a Navy or Marine Corps service member. In addition to the names provided by NCIS, the Navy and Marine Corps collected victim names from the other Services in cases where a victim affiliated with the Navy or Marine Corps reported a sexual assault to the Military Criminal Investigative Organization of another Service. Those victims are included in the numbers reported by the Navy and Marine Corps.

A team of judge advocates organized the list of victims provided by NCIS and forwarded those names to the commands responsible for each individual case for a determination of whether (1) the victim was accused of (an inquiry was initiated into) misconduct collateral to their report of sexual assault; (2) if so, whether the command took adverse action against the victim for that collateral misconduct; and (3) if so, the type of adverse action taken.

The information received during this review is reflected in section IV on the following page.

IV. DATA

During the period of April 1, 2017 to March 31, 2019:

| Total number of sexual assault investigations involving Navy or Marine Corps victims | | Total number of instances where a Navy or Marine Corps victim was accused of collateral misconduct | | Total number of instances where adverse action was taken as a result of collateral misconduct | |
|--|------|--|------|---|------|
| Navy | USMC | Navy | USMC | Navy | USMC |
| 1,686 | 826 | *52 | **12 | 22 | 11 |
| Total USN/USMC | | Total USN/USMC | | Total USN/USMC | |
| 2,512 | | 64 | | 33 | |

Based on the data received above, the following calculations were determined:

| Percentage of total sexual assault investigations where a Navy or Marine Corps victim was accused of collateral misconduct | | Percentage of investigations where victim received adverse action. | |
|--|------|--|------|
| Navy | USMC | Navy | USMC |
| 3.0% | 1.4% | 1.3% | 1.3% |
| Total USN/USMC | | Total USN/USMC | |
| 2.5% | | 1.3% | |

* In the Navy, three service members who were initially identified as victims were subject to adverse action for making false allegations of sexual assault. This is in addition to the 52 victims who were accused of collateral misconduct and represents .2% of all victims.

** In the Marine Corps, five service members who were initially identified as victims were subject to adverse action for making false allegations of sexual assault. This is in addition to the 12 victims who were accused of collateral misconduct and represents .6% of all victims.



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC 20330

**THE DEPARTMENT OF THE AIR FORCE REPORT ON ALLEGATIONS OF COLLATERAL
MISCONDUCT AGAINST VICTIMS OF SEXUAL ASSAULT**

I. INTRODUCTION

On 12 March 2019, pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA FY19), each Service was required to report the following information pertaining to victims of sexual assault for the period of April 1, 2017 to March 31¹, 2019: (1) the number of instances an identified victim of sexual assault in a military criminal investigation was accused of misconduct or crimes collateral to the sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct; and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action.

II. RELEVANT DEFINITIONS

In order to ensure accuracy of the data and consistency across the Services, the Air Force adopted the following definitions from the Joint Service Committee for purposes of this report:

- a. **Sexual Assault Investigation**: Investigation into an alleged violation of Article 120 or Article 125 conducted by the Service's Military Criminal Investigative Organization (MCIO). These investigations are conducted into allegations of sexual assault that have a Department of Defense nexus, regardless of the identity or status of the victim.
- b. **Victim of Sexual Assault**: Victim is defined as any Air Force member on active duty or in a reserve component at the time of the alleged sexual assault. Only Air Force members are subject to disciplinary action for collateral misconduct.
- c. **Collateral Misconduct**: This includes any allegation of misconduct that is punishable under the Uniform Code of Military Justice (UCMJ) and is directly related to the incident which formed the basis of the sexual assault allegation. Additionally, the collateral misconduct must have been discovered as a direct result of the investigation into the sexual assault and during the criminal investigation. Examples include, but are not limited to: underage drinking, fraternization, adultery, illegal drug use or possession, etc.
- d. **Accused**: A qualifying victim is considered accused of collateral misconduct if the MCIO's sexual assault investigation revealed circumstances that could potentially support the taking of adverse action against the victim (e.g. underage drinking). Accused in this context is

¹ The Memorandum from the DoD Office of General Counsel requested data from April 1, 2017 to March 30, 2019. Because the month of March has 31 days, the Services included March 31st in the reporting period.

not triggered by the referral of court-martial charges and does not necessarily mean that a separate investigation was opened against a qualifying sexual assault victim.

e. **Adverse Action:** This includes any documented disciplinary action taken in response to the collateral misconduct, including: written counseling; Article 15 punishment; administrative separation; and court-martial.

III. METHODOLOGY

In coordination with the Air Force Office of Investigation (AFOSI), a list of all sexual assault investigations that were investigatively closed (completed) between 1 April 2017 and 31 March 2019 was obtained. This data was further filtered to focus on those cases specifically involving an active duty victim. From this list, AFOSI was able to identify the named victims in each investigation; some investigations contained more than one victim. This information was provided to a team of judge advocates to review. In addition to the names provided by AFOSI, the Army provided names of Air Force victims that reported a sexual assault to their MCIO.

Because the Air Force does not maintain the requested information in a central database or case management system, a team of judge advocates performed an independent review of the identified investigations to answer the following questions for each victim: (1) was the victim investigated for misconduct collateral to their report of sexual assault; (2) if yes, did the command take adverse action against the victim for that collateral misconduct; and (3) if yes, what type of adverse action did the command take? The information received during this review is the basis for the data below.

IV. DATA

The data below pertains to the period of April 1, 2017 to March 31, 2019:

| Total Number of SA Investigations Completed ¹ | Total Number of SA Investigations Involving Air Force Victims | Total Number of Instances in SA Investigations Where Victim Was Accused of Collateral Misconduct | Total Number of Instances in SA Investigations Where Adverse Action Was Taken as a Result of Collateral Misconduct |
|--|---|--|--|
| 2,895 | 1,753 | 130** | 45** |

Based on the data received above, the following calculations were determined:

| Overall % of SA Investigations Where Victim Was Accused of Collateral Misconduct ¹ | % of SA Investigations Involving Air Force Victims Where Victim Was Accused of Collateral Misconduct | Overall % of SA Investigations Where Victim Received Adverse Action ² | % of SA Investigations Involving Air Force Victims Where Victim Received Adverse Action |
|---|--|--|---|
| 4.49% | 7.42% | 1.55% | 2.57% |

¹ A "completed" or "investigatively closed" investigation refers to those cases where the Air Force Office of Special Investigation (AFOSI) report of investigation is published and disseminated for command action.

² Includes all sexual assault allegations, regardless of whether victim was an Air Force member.

**** Of the total number of victims who were accused of and received adverse action, two of those victims received adverse action for making false allegations of sexual assault.**



**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC 20330**

**THE DEPARTMENT OF THE AIR FORCE SUPPLEMENTAL REPORT ON ALLEGATIONS OF
COLLATERAL MISCONDUCT AGAINST VICTIMS OF SEXUAL ASSAULT**

I. INTRODUCTION

On 12 March 2019, pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA FY19), each Service was required to report the following information pertaining to victims of sexual assault for the period of April 1, 2017 to March 31¹, 2019: (1) the number of instances an identified victim of sexual assault in a military criminal investigation was accused of misconduct or crimes collateral to the sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct; and (3) the percentage of sexual assault investigations that involved such an accusation or adverse action.

II. RELEVANT DEFINITIONS

In order to ensure accuracy of the data and consistency across the Services, the Air Force adopted the following definitions from the Joint Service Committee for purposes of this report:

- a. **Sexual Assault Investigation**: Investigation into an alleged violation of Article 120 or Article 125 conducted by the Service's Military Criminal Investigative Organization (MCIO). These investigations are conducted into allegations of sexual assault that have a Department of Defense nexus, regardless of the identity of the alleged victim.
- b. **Victim of Sexual Assault**: Victim is defined as any Air Force member on active duty or in a reserve component at the time of the alleged sexual assault. Only Air Force members are subject to disciplinary action for collateral misconduct.
- c. **Collateral Misconduct**: This includes any allegation of misconduct that is punishable under the Uniform Code of Military Justice (UCMJ) and is directly related to the incident which formed the basis of the sexual assault allegation. Additionally, the collateral misconduct must have been discovered as a direct result of the investigation into the sexual assault and during the criminal investigation. Examples include, but are not limited to: underage drinking, fraternization, adultery, illegal drug use or possession, etc.
- d. **Accused**: A qualifying victim is considered accused of collateral misconduct if the MCIO's sexual assault investigation revealed circumstances that could potentially support the taking of adverse action against the victim (e.g. underage drinking). Accused in this context is

¹ The Memorandum from the DoD Office of General Counsel requested data from April 1, 2017 to March 30, 2019. Because the month of March has 31 days, the Services included March 31st in the reporting period.

not triggered by the preferral of court-martial charges and does not necessarily mean that a separate investigation was opened against a qualifying sexual assault victim.

e. **Adverse Action:** This includes any documented disciplinary action taken in response to the collateral misconduct, including: written counseling; Article 15 punishment; administrative separation; and court-martial.

III. METHODOLOGY

In coordination with the Air Force Office of Investigation (AFOSI), a list of all sexual assault investigations that were investigatively closed (completed) between 1 April 2017 and 31 March 2019 was obtained. This data was further filtered to focus on those cases specifically involving an active duty victim. From this list, AFOSI was able to identify the named victims in each investigation; some investigations contained more than one victim. This information was provided to a team of judge advocates to review. In addition to the names provided by AFOSI, the Army provided names of Air Force victims that reported a sexual assault to their MCIO.

Because the Air Force does not maintain the requested information in a central database or case management system, a team of judge advocates performed an independent review of the identified investigations to answer the following questions for each victim: (1) was the victim investigated for misconduct collateral to their report of sexual assault; (2) if yes, did the command take adverse action against the victim for that collateral misconduct; and (3) if yes, what type of adverse action did the command take? The information received during this review was the basis for the data initially provided in the prior report. The information received did not include the details of the alleged misconduct, except to specify cases where Air Force victims were identified as having been accused of making false allegations.

Subsequent to the prior report, the DAC-IPAD requested “a list of the collateral misconduct that each accused victim in the report was accused of and the adverse action taken, if any,” and “the number of cases in which a victim was investigated for a false allegation of sexual assault and the adverse action taken, if any in each case.”

In order to compile this information, base-level judge advocates reviewed each case file and any other information available to provide the nature of the misconduct the victim was accused of and the type of action, if any. In reviewing this information, a number of cases previously included in the data set in error were excluded², and a number of cases that had not previously been identified as containing accusations of false allegations were also identified.

IV. DATA

The data below pertains to the period of April 1, 2017 to March 31, 2019:

² The cases excluded either (1) did not in fact contain evidence that the victim was accused of or disciplined for misconduct, (2) did not contain evidence of misconduct that met the above definition of collateral misconduct, (3) were duplicate cases where the same victim and same alleged misconduct were reported multiple times or as both an alleged false allegations and as collateral misconduct, or (4) were not Air Force victims.

| Total Number of SA Investigations Completed ³ | Total Number of SA Investigations Involving Air Force victim | Total Number of Instances in SA Investigations Where Victim Was Accused of Collateral Misconduct | Total Number of Instances in SA Investigations Where Adverse Action Was Taken as a Result of Collateral Misconduct |
|--|--|--|--|
| 2,895 | 1,753 | 105** | 40** |

Of the collateral misconduct reported, 5 cases involved an allegation that the victim's report of sexual assault was falsified. Two of those cases resulted in adverse action. The affected numbers are marked with asterisks (**). Based on the data received above, the following calculations were determined:

| Over % of SA Investigations Where Victim Was Accused of Collateral Misconduct ⁴ | % of SA Investigations Involving Air Force Victims Where Victim Was Accused of Collateral Misconduct | Over % of SA Investigations Where Victim Received Adverse Action for Collateral Misconduct | % of SA Investigations Involving Air Force Victims Where Victim Received Adverse Action for Collateral Misconduct |
|--|--|--|---|
| 3.63% | 5.99% | 1.38% | 2.28% |

Based on the additional details of the collateral misconduct reviewed, the following allegations and adverse actions were totaled:

| Primary Allegation of Collateral Misconduct** | Number of Victims Accused | % | LOC/LOA /LOR | Article 15 NJP | LOR & Discharge | NJP & Discharge | Court-martial & Discharge |
|---|---------------------------|--------|--------------|----------------|-----------------|-----------------|---------------------------|
| | 105 | | 19 | 12 | 2 | 5 | 2 |
| Underage Drinking | 25 | 23.81% | 1 | 2 | | | |
| Orders or Policy Violations (Other than Underage Drinking or Unprofessional Relationship) | 20 | 19.05% | 2 | 2 | 1 | 1 | |
| Adultery, Fraternization, or Unprofessional Relationship | 15 | 14.29% | 5 | 2 | | | |
| Drug Use | 10 | 9.52% | 1 | 2 | 1 | 1 | 1 |
| Sexual Assault or Abusive Sexual Contact | 10 | 9.52% | 2 | 1 | | | |
| Assault & Battery | 8 | 7.62% | 5 | 1 | | 1 | 1 |
| False Official Statement (Other than False Allegation) | 6 | 5.71% | 2 | 1 | | 1 | |

³ A "completed" or "investigatively closed" investigation refers to those cases where the Air Force Office of Special Investigations (AFOSI) report of investigation is published and disseminated for command action.

⁴ Includes all sexual assault allegations, regardless of whether victim was an Air Force member.

| | | | | | | | |
|------------------------------------|---|-------|---|---|--|---|--|
| False Allegation of Sexual Assault | 5 | 4.76% | 1 | | | 1 | |
| Drunk Driving | 4 | 3.81% | | | | | |
| Absent Without Leave | 1 | 0.95% | | | | | |
| Insubordination | 1 | 0.95% | | 1 | | | |

** Cases where the victim was accused of multiple types of collateral misconduct are listed under the most serious alleged misconduct. Cases where the victim was accused of making a false allegation as well as other misconduct are listed under alleged false allegations.



Commandant
United States Coast Guard

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Washington, DC 20593-7213
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5800
AUG 16 2019

The Honorable Martha Bashford, Chair
Defense Advisory Committee on Investigation,
Prosecution and Defense of Sexual Assault in
The Armed Forces (DACIPAD)
One Liberty Center
875 North Randolph Street
Arlington, Virginia 22203-1995

Dear Madam Chair:

Enclosed please find the Coast Guard report addressing allegations of collateral misconduct against individuals identified as the victim of sexual assault in the case files of a Coast Guard criminal investigation.

Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, requires the Secretary of Defense to submit this report to Congress, acting through the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. As written, the law applies to only those military services within the Department of Defense. Nevertheless, I believe it is practical to submit the information sought in this particular request to allow the appropriate congressional defense committees to assess those obstacles that may inhibit victims' cooperation in sexual assault cases within the Armed Forces.

If your staff needs anything further with regard to these responses, please have them contact CAPT Vasilios Tasikas, Chief, Office of Military Justice, at Vasilios.Tasikas@uscg.mil, or (202) 372-3806.

Thank you for the opportunity to provide input on the matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "S. J. Andersen".

S. J. ANDERSEN
Rear Admiral, U.S. Coast Guard
Judge Advocate General

Enclosure



Commandant
United States Coast Guard

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U.S. COAST GUARD REPORT ON ALLEGATIONS OF COLLATERAL MISCONDUCT AGAINST VICTIMS OF SEXUAL ASSAULT

I. INTRODUCTION.

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA FY19), each Service was required to report the following information pertaining to victims of sexual assault for the period of April 1, 2017 to March 31, 2019: (1) the number of instances an identified victim of sexual assault in a military criminal investigation was accused of misconduct or crimes collateral to the sexual assault; (2) the number of instances in which adverse action was taken against those individuals for collateral misconduct; and, (3) the percentage of sexual assault investigations that involved such an accusation or adverse action.

II. RELEVANT DEFINITIONS.

In order to ensure accuracy of the data and consistency across the Services, the Coast Guard adopted the following definitions from the Joint Service Committee for purposes of this report:

- a. **Sexual Assault Investigation:** Investigation into an alleged violation of Article 120 or Article 125 conducted by the Service's Military Criminal Investigative Organization (MCIO). These investigations are conducted into allegations of sexual assault that have a nexus to the Armed Forces, regardless of the identity or status of the victim.
- b. **Victim of Sexual Assault:** Victim is defined as any Coast Guard member on active duty at the time of the alleged sexual assault. Only Coast Guard members are subject to disciplinary action under the Uniform Code of Military Justice (UCMJ) for collateral misconduct. This does include Coast Guard Reservists on active duty orders.
- c. **Collateral Misconduct:** This includes any allegation of misconduct that is directly related to the incident that is the basis of the sexual assault allegation and that was revealed during the investigation. Examples include, but are not limited to: Failure to obey order or regulation (prohibited relationship), underage drinking, fraternization, adultery, illegal drug use or possession, etc.
- d. **Accused of Collateral Misconduct:** A qualifying victim is considered accused of collateral misconduct if the MCIO's sexual assault investigation revealed circumstances that could *potentially* support the taking of adverse action against the victim (e.g., underage drinking, prohibited relationship, etc.). Accused in this context is *not* triggered by the preferral of court-martial charges.

e. **Adverse Action:** This includes any *documented* disciplinary action taken in response to the collateral misconduct, including: written counseling; Article 15 punishment; administrative separation; and court-martial.

III. METHODOLOGY.

The Coast Guard Investigative Service (CGIS) provided a list of all sexual assault investigations between 1 April 2017 and 31 March 2019 including victim names, victims' civil or military status, case status, and a summary of investigation to the Office of Military Justice (CG-LMJ). This data was filtered to include only completed cases. The cases were further filtered by removing cases with civilian victims (including dependents) and unknown victims, leaving cases specifically involving an active duty victim. From this list, CG-LMJ requested the personnel files of those listed from the Coast Guard Personnel Service Center, Military Records Section.

Each victim's personnel file was reviewed for adverse action. Any adverse action was checked against the investigation summary. If adverse action documented actions uncovered during the investigation, the victim was determined to have received an adverse action for collateral misconduct. Further information was requested from CGIS and local units when apparent collateral misconduct could not be verified. The information received during this review is the basis for the data below.

IV. DATA.

The data below pertains to the period of April 1, 2017 to March 31, 2019:

| Total Number of SA Investigations Completed by Subject | Total Number of SA Investigations Involving Coast Guard Victims | Total Number of Instances in SA Investigations Where There was Potential Misconduct by the Victim | Total Number of Instances in SA Investigations Where Adverse Action Was Taken as a Result of Misconduct |
|--|---|---|---|
| 465 | 262 | 53 | 6 |

Based on the data received above, the following calculations were determined:

| % of Instances in SA Investigations Where There was Potential Misconduct by the Victim | % of SA Investigations Involving Coast Guard Victims Where Victim Received Adverse Action |
|--|---|
| 20% | 2% |

ENCLOSURE 2

DAC-IPAD Analysis of Draft DoD Collateral Misconduct Report

ENCLOSURE 2 – Comparison of Service Collateral Misconduct Definitions and Methodologies

| | Definition of "accused" of collateral misconduct | Service Data Collection Methodology | Collateral Misconduct Criteria |
|-------------------|--|---|---|
| Army Study | accused = MCIO's SA investigation revealed a potential UCMJ violation by the victim, directly related to the sexual assault that could support the taking of adverse action against the victim (e.g., underage drinking). "Accused" does not imply charges were preferred. | CID generated list of all SA investigations closed or placed in final investigation status . CID identified named Army victims (RA & USAR). OTIAG separated CID list by jurisdiction and sent to trial counsel at field offices to review CID investigations and any subsequent inquiry, investigation, or adverse action to answer the following questions: | (1) was the victim involved in misconduct collateral to their report of sexual assault; (2) if yes, did command take adverse action against victim for the misconduct; (3) if yes, what type of adverse action did command take? |
| Navy/MC Study | accused = inquiry into the collateral misconduct was actually initiated . | NCIS provided list of completed SA investigations with Navy or MC victim. Navy also collected names of Navy and MC victims in SAs reported to other Services. Names of victims forwarded to commands responsible for each individual case for determination of whether: | (1) the victim was accused of (an inquiry was initiated into) misconduct collateral to their report of SA; (2) if so, whether command took adverse action for that misconduct; (3) if so, the type of adverse action taken. |
| Air Force Study | accused = MCIO's SA investigation revealed circumstances that could potentially support the taking of adverse action against the victim (e.g., underage drinking). Does not require a separate investigation to be opened against victim or the referral of charges. | AFOSI provided list of all SA investigations investigatively closed (completed). Data filtered to focus on active duty victims. AFOSI identified victim names. Info provided to JA team to review . Army provided names of AF victims in CID investigations. Team of JA performed independent review of identified investigations to answer following questions: | (1) was the victim investigated for misconduct collateral to their report of SA; (2) if yes, did command take adverse action for that misconduct; (3) if yes, what kind of adverse action did command take? |
| Coast Guard Study | accused = MCIO's SA investigation revealed circumstances that could potentially support the taking of adverse action against the victim (e.g., underage drinking, prohibited relationship, etc.). "Accused" in this context is not triggered by the referral of court-martial charges. | CGIS provided a list of all SA investigations including victim names, military or civilian status, case status, and a summary of the investigation. Data filtered to include only completed cases and removing civilian and unknown victims. CG-LMJ requested the personnel files of those listed. Any adverse action in the personnel file was reviewed against the investigation summary. | If the adverse action documented that the actions were uncovered during the investigation, the victim was determined to have received an adverse action for collateral misconduct. Further information was requested from CGIS and local units when apparent collateral misconduct couldn't be verified. |

Variances Across the Services:

- Definition of "accused":** Army, AF, and CG had JAs look at investigative files to identify potential collateral misconduct. Navy and MC went to victim commanders to request information.
- Investigative status of cases reviewed:** Army included both cases with complete investigations pending command action and cases with completed command action. AF looked at cases with complete investigations with either pending or completed command action. Navy and MC looked only at cases with completed command action. CG didn't specify.
- Inclusion of Reservists and National Guard:** Army included reservists in federal status but not NG. AF and CG included only active duty members. It is unclear whether Navy, MC, or CG included reservists.
- Inclusion of victims from cases investigated by other Service MCIOs:** Army did not include any Army victims if case investigated by other Service MCIO. Navy and MC included all Navy and MC victims from other Service MCIO investigations. AF included AF victims from MCIO investigations conducted by other Services, where known. CG doesn't specify.
- Treatment of false SA reports by victims:** Navy and MC did not include these victims in study but did indicate their numbers.
The Army, AF, and CG did include these Service members in study.
- Definition of sexual assault investigation:** The Army included only penetrative sexual assault investigations in its data collection. The other Services included both penetrative and contact offenses and possibly additional Article 120 offenses.

ENCLOSURE 3

DAC-IPAD Analysis of Draft DoD Collateral Misconduct Report (September 2019)

ENCLOSURE 3 – Comparison of Service-Provided Collateral Misconduct Data

| Collateral Misconduct and Service Member Victims | U.S. Army* | U.S. Navy** | U.S. Marine Corps*** | U.S. Air Force**** | U.S. Coast Guard | Total for All Services |
|---|------------|-------------|----------------------|--------------------|------------------|------------------------|
| Number of Service member victims in cases closed between Apr 1, 2018, and Mar 31, 2019 | 1,206 | 1,686 | 826 | 1,753 | 262 | 5,733 |
| Number of Service member victims "accused" of collateral misconduct in cases closed between Apr 1, 2018, and Mar 31, 2019 | 146 | 21 | 11 | 105 | 53 | 336 |
| Number of instances when adverse action was taken against a Service member victim "accused" of collateral misconduct | 15 | 12 | 10 | 40 | 6 | 83 |
| Percentage of Service member victims <u>accused</u> of collateral misconduct | 12% | 1% | 1% | 6% | 20% | 6% |
| Percentage of <u>accused</u> Service member victims who <u>receive adverse action</u> for collateral misconduct | 10% | 57% | 91% | 38% | 11% | 25% |
| Percentage of (all) Service member victims who receive adverse action for collateral misconduct | 1% | 1% | 1% | 2% | 2% | 1% |

* U.S. Army originally reported 154 accused of collateral misconduct.

** U.S. Navy: originally reported 52 accused of collateral misconduct; 22 received adverse action.

*** U.S. Marine Corps originally reported 12 accused of collateral misconduct; 11 received adverse action.

**** U.S. Air Force originally reported 130 accused of collateral misconduct; 45 received adverse action.

| Type of Alleged Collateral Misconduct | U.S. Army (n=146) | U.S. Navy (n=21) | U.S. Marine Corps (n=11) | U.S. Air Force (n=105) | U.S. Coast Guard (n=53) |
|---|-------------------|------------------|--------------------------|------------------------|-------------------------|
| Underage Drinking | 38% | 19% | 27% | 24% | 15% |
| Adultery/Fraternization/ Inappropriate Relationship | 30% | 38% | 9% | 14% | 60% |
| Drug Use | 3% | 10% | 9% | 10% | 2% |
| Violation of Order or Policy | 14% | 24% | 36% | 19% | 15% |
| False Report* | 0% | 0% | 0% | 5% | 0% |
| Other (i.e., DUI, Assault, AWOL, Art. 133, etc.) | 15% | 10% | 18% | 29% | 8% |
| | 100% | 100% | 100% | 100% | 100% |

*A false report as defined by each Service.

| Adverse Action Taken for Collateral Misconduct | U.S. Army (n=15) | U.S. Navy (n=12) | U.S. Marine Corps (n=10) | U.S. Air Force (n=40) | U.S. Coast Guard (n=6) |
|---|------------------|------------------|--------------------------|-----------------------|------------------------|
| Verbal Counseling | 27% | 0% | 0% | 0% | 0% |
| Letter of Reprimand (LOR) (or Service equivalent) | 27% | 8% | 30% | 48% | 33% |
| Article 15 Nonjudicial Punishment | 40% | 67% | 50% | 30% | 50% |
| Discharge/Separation | 7% | 17% | 0% | 0% | 0% |
| Court Martial/CM & Discharge | 0% | 0% | 0% | 5% | 17% |
| Liberty Restriction | 0% | 8% | 0% | 0% | 0% |
| LOR/Article 15 + Discharge | 0% | 0% | 10% | 18% | 0% |
| Retirement | 0% | 0% | 10% | 0% | 0% |
| | 100% | 100% | 100% | 100% | 100% |

ENCLOSURE 4

ENCLOSURE 4 – Supplemental Information from the Services Related to the June 2019 Department of Defense Draft Report on Collateral Misconduct

| TYPE OF COLLATERAL MISCONDUCT | The DAC-IPAD requested from each Service a list of the collateral misconduct that each accused victim in the report was accused of and the adverse action taken, if any. Adverse action information was also requested for the cases identified by the Services as false allegations of sexual assault. |
|-------------------------------|---|
| U.S. Army | <p>Of the 146 cases involving a victim “accused” of collateral misconduct:</p> <ul style="list-style-type: none"> • 37.7% (55) involved underage drinking: 4 received Article 15 nonjudicial punishment (NJP), 1 received a counseling. • 13.7% (20) involved adultery: 1 received a general officer memorandum of reprimand (GOMOR). • 14.4% (21) involved violation of an order or policy: 1 received a GOMOR, and 1 received an administrative separation (ADSEP). • 13% (19) involved fraternization: 2 received NJP, 2 received a counseling, and 1 received a GOMOR. • 4.8% (7) involved sexual assault. • 3.4% (5) involved false statements [not including false reports]. • 3.4% (5) involved inappropriate/prohibited relationship: 1 received a Battalion-level letter of reprimand (LOR), and 1 received a counseling. • 2.7% (4) involved drug use. • 2.1% (3) involved indirect collateral misconduct (future misconduct attributed to sexual trauma). • 2.1% (3) were reported by unit as “unknown.” • (2) involved assault. • (1) involved DUI [driving under the influence]. • (1) involved AWOL [absent without leave]. <p>8 cases involved an investigation or allegation of false reporting by the victim. Of those, 3 resulted in an Article 15, 2 resulted in separation, 2 resulted in no adverse action, and 1 is still pending.</p> <p>One final note concerning the disparity between the number of investigations by the Army and those by other Services: when running the initial data call, CID included only investigations of sexual assault, per the legal definition. Therefore, only penetrative offenses or attempted offenses—rape, sexual assault, forcible sodomy—were included.</p> <p>(Email from LTC Stephanie Cooper, USA, to COL Steven Weir et al., July 15, 2019, 3:58 p.m.; email from LTC Stephanie Cooper, USA, to COL Steven Weir, August 15, 2019, 4:00 p.m.; email from Janet Mansfield to Julie Carson et al, Sept. 9, 2019, 10:11 a.m., on file with the DAC-IPAD)</p> |

ENCLOSURE 4 – Supplemental Information from the Services Related to the June 2019 Department of Defense Draft Report on Collateral Misconduct

| | |
|------------------|---|
| U.S. Navy | <p>The Navy originally reported 55 victims accused of collateral misconduct, with adverse action taken in 22 cases. Further review of the misconduct reported by commands revealed that only 21 victims had been accused of collateral misconduct, with only 12 of those cases resulting in adverse action. The original error in reporting was due to a misunderstanding by commands of what constituted “collateral” misconduct.</p> <p>Out of the revised number of cases involving collateral misconduct, there were:</p> <ul style="list-style-type: none"> • 6 cases of fraternization: 3 resulted in NJP, 1 resulted in written counseling. • 4 cases of underage drinking: 1 resulted in NJP. • 3 cases of liberty policy violation (drinking or missing curfew): 2 resulted in NJP, 1 resulted in imposition of liberty restriction. • 2 cases of adultery: 1 resulted in NJP. • 2 cases of drug use (cocaine in both cases): 1 resulted in administrative separation (ADSEP). • 2 cases of being “drunk and disorderly” (onboard ship): neither resulted in adverse action. • 1 case of drunk driving: resulted in NJP. • 1 case of “sexual imprisonment” (civilian conviction): resulted in ADSEP for commission of serious offense (the sexual imprisonment perpetrated by the subject as part of a group occurred in same timeframe that the subject was himself sexually assaulted by another member of that same group). <p>Upon further review, there were 5 cases involving false allegations of sexual assault during the reporting period [not included in report as collateral misconduct]. Of those 5 cases, 2 resulted in adverse action by the Navy (NJP) while 1 is the subject of federal prosecution that is still ongoing at this time.</p> <p>Summary: Of the 1,686 cases involving sexual assault during the reporting period, 1.2% involved an accusation against the victim of collateral misconduct. Of the accusations of collateral misconduct, 57.1% resulted in adverse action against the victim (0.7% of the total number of cases).</p> <p>(Email from LT James Kraemer, USN, to COL Steven Weir et al., August 9, 2019, 12:03 p.m., on file with the DAC-IPAD.)</p> |
|------------------|---|

ENCLOSURE 4 – Supplemental Information from the Services Related to the June 2019 Department of Defense Draft Report on Collateral Misconduct

| | |
|---------------------------------|---|
| <p>U.S. Marine Corps</p> | <p>The Marine Corps reported 12 victims accused of collateral misconduct and adverse action taken in 11 cases. Further review revealed that 1 case was included by mistake, and adverse action was actually taken in 10 cases.</p> <ul style="list-style-type: none"> • Orders violation: 4 cases (all received NJP) • Underage drinking: 3 cases (all received formal counseling) • 1 case each of DUI, 112a [drug use], and 133 [conduct unbecoming]: (10% each) (NJP for DUI, NJP and ADSEP for 112a, retirement in grade for 133). • 1 case of adultery (not with the accused, no adverse action) <p>In more than 98% of the sexual assault cases, the victim was neither accused of nor punished for collateral misconduct. In the small number of cases in which commanders did investigate the victim's alleged misconduct, 70% involved prior misconduct by the victim (underage drinking that received prior counseling, for example). In the remaining 3 cases (DUI, 112a, conduct unbecoming) out of a total of 826 cases, the timing and nature of the sexual assault allegation together with the nature of the misconduct, caused the commander to believe that punishment for the victim's misconduct was appropriate, notwithstanding the report of sexual assault.</p> <ul style="list-style-type: none"> • The Marine Corps had 5 cases [not included in the report as collateral misconduct] in which the person reporting the sexual assault was investigated for a false allegation. In 4 of the 5 cases, the person received nonjudicial punishment for making a false allegation. In the 5th case, the person pled guilty at summary court-martial and was administratively separated for commission of a serious offense (making a false statement) and for extortion (receiving money by threatening to make a false report). <p>(Email from Maj Paul Ervasti, USMC, to COL Steven Weir et al., July 31, 2019, 4:59 p.m.; email from Maj Paul Ervasti, USMC, to Julie Carson, Sept. 4, 2019, 3:49 p.m.; email from Maj Paul Ervasti, USMC, to Julie Carson, Sept. 4, 2019, 5:02 p.m., on file with the DAC-IPAD.)</p> |
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ENCLOSURE 4 – Supplemental Information from the Services Related to the June 2019 Department of Defense Draft Report on Collateral Misconduct

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| U.S. Air Force | <p>Of the 105 cases* involving a victim “accused” of collateral misconduct:</p> <ul style="list-style-type: none"> • 23.8% (25) involved underage drinking: 1 received a letter of counseling/letter of admonishment/letter of reprimand (LOC/LOA/LOR), 2 received NJP. • 19.0% (20) involved orders or policy violations (other than underage drinking, fraternization or unprofessional relationship): 2 received LOC/LOA/LOR, 2 received NJP, 1 received LOR & discharge, and 1 received NJP & discharge. • 14.3% (15) involved adultery, fraternization, or unprofessional relationship: 5 received LOC/LOA/LOR, and 2 received NJP. • 9.5% (10) involved drug use: 1 received LOC/LOA/LOR, 2 received NJP, 1 received LOR & discharge, 1 received NJP & discharge, and 1 was court-martialed and discharged. • 9.5% (10) involved sexual assault (counterclaim that was not a false allegation): 2 received LOC/LOA/LOR and 1 received NJP. • 7.6% (8) involved assault: 5 received LOC/LOA/LOR, 1 received NJP, 1 received NJP & discharge, and 1 was court-martialed and discharged. • 5.7% (6) involved false official statement (not related to a false allegation): 2 received LOC/LOA/LOR, 1 received NJP, and 1 received NJP & discharge. • 3.8% (4) involved drunk driving: no adverse action taken. • 1% (1) involved AWOL [absent without leave]: no adverse action taken. • 1% (1) involved insubordination: received NJP. • 4.8% (5) involved a false allegation of sexual assault: 1 received LOC/LOA/LOR, and 1 received NJP & discharge. <p>In cases in which there were multiple allegations of collateral misconduct, the most serious allegation was counted for this purpose.</p> <p>There were 5 cases investigated for a false allegation, as noted above, but only 2 resulted in adverse action: an LOC/LOA/LOR in 1 case, and Article 15 and discharge in 1 case.</p> <p>* The Air Force will provide a supplemental report. After further review of the cases, we determined that there were cases previously reported as collateral misconduct that did not meet the definition.</p> <p>(Email from Lt Col Jane Male, USAF, to COL Steven Weir et al., August 9, 2019, 11:16 a.m., on file with the DAC-IPAD, and <i>The Department of the Air Force Supplemental Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault</i> (2019), pp. 3–4.)</p> |
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ENCLOSURE 4 – Supplemental Information from the Services Related to the June 2019 Department of Defense Draft Report on Collateral Misconduct

U.S. Coast Guard

Cases were counted only for 1 offense, although some cases had multiple offenses (e.g., underage drinking and prohibited relationship).

“Accused” (Potential) Collateral Misconduct by Charge

| | | |
|--|----|------|
| underage drinking | 8 | 15% |
| prohibited relationship (Art. 92) | 27 | 51% |
| fraternization | 4 | 8% |
| adultery | 1 | 2% |
| false official statement (not false reports) | 2 | 4% |
| drug use | 1 | 2% |
| sex in the barracks (Art. 92) | 7 | 13% |
| rape | 1 | 2% |
| prostitution (Art. 134) | 1 | 2% |
| failure to obey | 1 | 2% |
| | | |
| | 53 | 100% |

Six (6) Cases with Adverse Action

1. Prohibited relationship—negative administrative comment

2. Prohibited relationship—nonjudicial punishment

3. Prostitution—nonjudicial punishment

4. Rape—general court-martial (scheduled for August 2019)

5. Prohibited relationship—negative administrative comment

6. False official statement—nonjudicial punishment

There were only 2 cases of false official statements and only 1 ended in NJP (Art. 15) for a violation of Art. 107.

(Email from LT Adam Miller, USCG, to Ms. Julie Carson, July 16, 2019, 5:00 p.m., on file with the DAC-IPAD.)

**APPENDIX H. OCTOBER 2, 2019, LETTER FROM THE
DEPARTMENT OF DEFENSE GENERAL COUNSEL TO
DAC-IPAD CHAIR MARTHA S. BASHFORD RESPONDING
TO THE COMMITTEE'S ANALYSIS OF AND
RECOMMENDATIONS RELATED TO THE DEPARTMENT OF
DEFENSE INITIAL SEXUAL ASSAULT VICTIM COLLATERAL
MISCONDUCT REPORT**



GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

OCT - 2 2019

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

Dear Ms. Bashford:

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

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

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul Ney", with a large, loopy initial "P" and "N".

Paul C. Ney, Jr.
DoD General Counsel

APPENDIX I. COMMITTEE PUBLIC MEETINGS, PREPARATORY SESSIONS, AND PRESENTERS

| DAC-IPAD PUBLIC MEETINGS | |
|---|---|
| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>DAC-IPAD PUBLIC MEETING 13</p> <p>August 23, 2019</p> <p>Doubletree by Hilton Crystal City 300 Army Navy Drive Arlington, Virginia</p> | <p>DAC-IPAD Data Working Group Presentation of Conviction and Acquittal Rates and Overview of the Draft Department of Defense <i>Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization</i></p> <p>DAC-IPAD Member Question-and-Answer Session Regarding the Draft Department of Defense <i>Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization</i></p> <ul style="list-style-type: none"> • 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 <p>Perspectives of Services' Military Justice Division Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process</p> <ul style="list-style-type: none"> • 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 |

| DAC-IPAD PUBLIC MEETINGS | |
|--|--|
| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>DAC-IPAD PUBLIC MEETING 13</p> <p>(Continued)</p> | <p>Perspectives of Services' Special Victims' Counsel / Victims' Legal Counsel Program Managers Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process</p> <ul style="list-style-type: none"> • 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 <p>Perspectives of Services' Trial Defense Service Organization Chiefs Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination in the Military Justice Process</p> <ul style="list-style-type: none"> • 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 <p>Case Review Working Group Status Update</p> <p>Data Working Group Presentation of 2018 Case Adjudication Data Report Plan</p> <p>Committee Deliberations on Department of Defense <i>Report on Allegations of Collateral Misconduct Against Individuals Identified as the Victim of Sexual Assault in the Case Files of a Military Criminal Investigative Organization</i>; Presenter Testimony; Services' Written Responses to DAC-IPAD Questions Regarding Conviction and Acquittal Rates, the Case Adjudication Process, and Victim Declination; DAC-IPAD Future Planning</p> |

| DAC-IPAD PUBLIC MEETINGS | |
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| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>DAC-IPAD PUBLIC MEETING 14</p> <p>September 14, 2019</p> <p>Telephonic Meeting Public Access: One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Committee Deliberations on the Draft DAC-IPAD Analysis of and Recommendations Regarding the Department of Defense’s 2019 Sexual Assault–Related Collateral Misconduct Report and Future Report Requirements</p> |
| <p>DAC-IPAD PUBLIC MEETING 15</p> <p>November 15, 2019</p> <p>Doubletree by Hilton Crystal City 300 Army Navy Drive Arlington, Virginia</p> | <p>Protect Our Defenders’ Perspective on Military Sexual Assault Prosecutions and Sentencing</p> <ul style="list-style-type: none"> • Mr. Don Christensen, President, Protect Our Defenders <p>Committee Final Deliberations and Vote on the DAC-IPAD’s Sexual Assault Case Adjudication Report for Fiscal Years 2015–2018</p> <p>Case Review Working Group Presentation and Deliberations</p> <p>Article 32/Referral Working Group Presentation</p> <p>Committee Deliberations Regarding the Service’s Responses to DAC-IPAD Request for Information (RFI) Set 11 and Testimony from the August 23, 2019, DAC-IPAD Public Meeting</p> <p>Collateral Misconduct Report Status Update</p> <p>2020 Military Installation Site Visit Update</p> <p>Court-Martial Observations Update</p> |

| DAC-IPAD PUBLIC MEETINGS | |
|---|--|
| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>DAC-IPAD PUBLIC MEETING 16</p> <p>February 14, 2020</p> <p>The Westin Arlington Gateway Hotel 801 North Glebe Road Arlington, Virginia 22203</p> | <p>Military Judges’ Perspectives Regarding the Military Justice System and Military Sexual Assault Cases—including Conviction and Acquittal Rates</p> <ul style="list-style-type: none"> • Colonel (Ret.) J. Wesley (Wes) Moore, U.S. Air Force • Colonel (Ret.) Jeffery Nance, U.S. Army • Captain (Ret.) Bethany L. Payton-O’Brien, U.S. Navy • Colonel (Ret.) Andrew Glass, U.S. Army <p>Committee Deliberations Regarding the Military Judge’s Testimony</p> <p>Committee Final Deliberations on the DAC-IPAD’s Draft Fourth Annual Report Chapters 1–5 and Committee Vote on Complete Report</p> <p>Updates for the Committee Regarding 2020 Military Installation Site Visits and Court-Martial Observations</p> <p>2020 National Defense Authorization Act Presentation and Discussion</p> <ul style="list-style-type: none"> • Colonel Patrick Pflaum, U.S. Army, Chief, Criminal Law Division, Office of the Trial Judge Advocate General |

| CASE REVIEW WORKING GROUP PREPARATORY SESSIONS | |
|---|--|
| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>Case Review Working Group Preparatory Session 14</p> <p>August 22, 2019</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Briefing from the staff and the DAC-IPAD criminologist on data results from the Air Force investigative case file reviews.</p> <p>Case Review Working Group discussion on data presentation and next phase planning.</p> <p>Discussion on questions for the August 23, 2019, DAC-IPAD meeting speakers.</p> |
| <p>Case Review Working Group Preparatory Session 15</p> <p>October 15, 2019</p> <p>Telephonic Session: One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Case Review Working Group deliberations on proposed observations from case reviews.</p> |
| <p>Case Review Working Group Preparatory Session 16</p> <p>October 30, 2019</p> <p>Telephonic Session: One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Case Review Working Group deliberations on proposed findings, observations, and recommendations from case reviews.</p> |

| CASE REVIEW WORKING GROUP PREPARATORY SESSIONS | |
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| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>Case Review Working Group Preparatory Session 17</p> <p>November 14, 2019</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Case Review Working Group final deliberations on proposed findings, observations, and recommendations from case reviews.</p> <p>Status update from the staff on the data processing from the case reviews.</p> |
| <p>Case Review Working Group Preparatory Session 18</p> <p>February 13, 2020</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Briefing from the staff and the DAC-IPAD criminologist on data results from the Air Force, Navy, and Marine Corps investigative file reviews.</p> <p>Case Review Working Group discussion on various data analyses for inclusion in the data report and a timeline for completing the data report.</p> |

| POLICY WORKING GROUP PREPARATORY SESSIONS | |
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| SESSION DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>Policy Working Group Preparatory Session 11</p> <p>January 24, 2019</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Review of the Expedited Transfer Presentation to the DAC-IPAD at the Public Meeting on January 25, 2019.</p> |
| <p>Policy Working Group Articles 32, 33 and 34 Preparatory Session 1</p> <p>October 7, 2019</p> <p>Telephonic Session: One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Working Group Membership and Consideration of Topics:</p> <ul style="list-style-type: none"> • DoD Office of General Counsel Request for Review of Judicial Proceedings Panel Recommendations and Related Issues • Related Topics Identified by DAC-IPAD Members • Related Topics Identified by the Services or DAC-IPAD Staff |
| <p>Policy Working Group Articles 32, 33 and 34 Preparatory Session 2</p> <p>November 14, 2019</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Policy Working Group Strategic Planning.</p> |

| POLICY WORKING GROUP PREPARATORY SESSIONS | |
|---|--|
| SESSION DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>Policy Working Group Articles 32, 33 and 34 Preparatory Session 3</p> <p>February 13, 2020</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Policy Working Group Strategic Planning.</p> |

| DATA WORKING GROUP PREPARATORY SESSION | |
|---|--|
| SESSION DATE AND LOCATION | TOPICS AND PRESENTERS |
| <p>Data Working Group Preparatory Session</p> <p>January 24, 2019</p> <p>One Liberty Center 875 N. Randolph St. Arlington, Virginia</p> | <p>Status of Criminologist's Appointment to the DAC-IPAD Staff.</p> <p>Overview of RFI Process and Data Collection Topics of Interest.</p> <p>Strategic Planning.</p> |

| DAC-IPAD PREPARATORY SESSION | |
|--|---|
| MEETING DATE AND LOCATION | TOPICS AND PRESENTERS |
| Committee Preparatory Session August 22, 2019 One Liberty Center 875 N. Randolph St. Arlington, Virginia | Annual Ethics Training for Members <ul style="list-style-type: none"> • Ms. Danica Irvine Kobylski, DoD Office of the General Counsel, Standards of Conduct Office Review of DoD Collateral Misconduct Study and Meeting Preparation Review of Service Responses to RFI Set 11 and Meeting Preparation; Site Visits Discussion; Next Study Topics and Working Groups Member Review of Read-Ahead Materials Case Review Working Group Status Update and Recent Case Law Update 2018 Court Martial Case Adjudication Data Presentation |
| Committee Preparatory Session November 14, 2019 One Liberty Center 875 N. Randolph St. Arlington, Virginia | Updates from the Case Review Working Group; Policy Working Group; and Information Briefing to Case Review and Policy Working Group Members on Military Sentencing Initiatives from 2013 to the Present. |
| Committee Preparatory Session February 13, 2020 One Liberty Center 875 N. Randolph St. Arlington, Virginia | Updates from the Case Review Working and Policy Working Group. Annual Ethics Training for Committee Members. <ul style="list-style-type: none"> • Mr. Dean Raab, DoD Office of the General Counsel, Standards of Conduct Office Committee Review of Member Edits to Draft Fourth Annual Report. |

APPENDIX J. ACRONYMS AND ABBREVIATIONS

| | |
|------------------|---|
| ACMO | Advisory Committee Management Officer |
| ADSEP | administrative separation |
| AFOSI | Air Force Office of Special Investigations |
| AWOL | absent without leave |
| C.A.A.F. | Court of Appeals for the Armed Forces |
| CGIS | Coast Guard Investigative Service |
| CG-LMJ | Coast Guard, Office of Military Justice |
| CM | court-martial |
| C.M.A. | Court of Military Appeals |
| C.M.R. | Court-Martial Reports |
| CID | U.S. Army Criminal Investigation Command |
| CRWG | Case Review Working Group |
| CSO | contact sexual offense |
| DAC-IPAD | Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces |
| DFO | Designated Federal Officer |
| DNA | deoxyribonucleic acid |
| DoD | Department of Defense |
| DoDI | Department of Defense Instruction |
| DoD SAPRO | Department of Defense Sexual Assault Prevention and Response Office |
| DUI | driving under the influence (drunk driving) |
| DWG | Data Working Group |
| ET | expedited transfer |
| FACA | Federal Advisory Committee Act |
| FAP | Family Advocacy Program |

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| FY | fiscal year |
| GC DoD | General Counsel for the Department of Defense |
| GCM | general court-martial |
| GCMCA | general court-martial convening authority |
| GOMOR | general officer memorandum of reprimand |
| HQE | highly qualified expert |
| IO | investigating officer |
| JA | Judge Advocate |
| JAG | judge advocate general |
| JPP | Judicial Proceedings Panel (Judicial Proceedings Since 2012 Amendments Panel) |
| JSC | Joint Service Committee |
| LOA | letter of admonishment |
| LOC | letter of counseling |
| LOR | letter of reprimand |
| MCIO | military criminal investigative organization |
| MCM | Manual for Courts-Martial |
| MOA | memorandum of agreement |
| MOU | memorandum of understanding |
| MRE | Military Rules of Evidence |
| MJ | military judge |
| MJRG | Military Justice Review Group |
| NG | National Guard |
| N/n | number |
| NCIS | Naval Criminal Investigative Service |
| NDAA | National Defense Authorization Act |
| NJP | nonjudicial punishment |

| | |
|---------------|--|
| OJTAG | Office of the Judge Advocate General |
| PHO | preliminary hearing officer |
| PSO | penetrative sexual offense |
| PTA | pretrial agreement |
| PWG | Policy Working Group |
| R.C.M. | Rule or Rules for Courts-Martial |
| RFI | request for information |
| RGE | regular government employee |
| ROI | Report of Investigation |
| RSP | Response Systems Panel (Response Systems to Adult Sexual Assault Crimes Panel) |
| SA | sexual assault |
| SAPR | Sexual Assault Prevention and Response |
| SAPRO | Sexual Assault Prevention and Response Office |
| SGE | special government employee |
| SJA | staff judge advocate |
| SPCM | special court-martial |
| SPCMCA | special court-martial convening authority |
| SVC | special victims' counsel |
| UCMJ | Uniform Code of Military Justice |
| USA | United States Army |
| USAF | United States Air Force |
| U.S.C. | United States Code |
| USCG | United States Coast Guard |
| USMC | United States Marine Corps |
| USN | United States Navy |
| VLC | victims' legal counsel |

APPENDIX K. SOURCES CONSULTED

1. Legislative Sources

a. Enacted Statutes

5 U.S.C. App. §§ 1–16 (Federal Advisory Committee Act)

10 U.S.C. § 832 (Uniform Code of Military Justice) (2012)

10 U.S.C. § 832 (Uniform Code of Military Justice) (2014)

10 U.S.C. §§ 830, 832, 834 (Uniform Code of Military Justice) (2016)

10 U.S.C. §§ 823, 830, 832–834 (Uniform Code of Military Justice) (2019)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3374 (2014)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017)

John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018)

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, Enacted S. 1790 (2019)

2. Judicial Decisions

U.S. Court of Appeals for the Armed Forces

United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953)

United States v. Cohen, 63 M.J. 45, 50 (C.A.A.F. 2006)

3. Rules and Regulations

a. Executive Orders

Manual for Courts-Martial, United States (2012 edition)

Manual for Courts-Martial, United States (2016 edition)

Executive Order 13825, 83 Federal Register 9889 (March 18, 2018)

Manual for Courts-Martial, United States (2019 edition)

b. Department of Defense

Department of Defense Instruction 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (March 28, 2013) (Incorporating Change 3, May 24, 2017)

Department of Defense Instruction 5505.11, *Fingerprint Reporting Requirements* (October 31, 2019)

4. Meetings and Hearings

a. Public Meetings of the DAC-IPAD

Transcript of DAC-IPAD Public Meeting (January 19, 2017)

Transcript of DAC-IPAD Public Meeting (April 28, 2017)

Transcript of DAC-IPAD Public Meeting (July 21, 2017)

Transcript of DAC-IPAD Public Meeting (October 19, 2018)

Transcript of DAC-IPAD Public Meeting (January 25, 2019)

Transcript of DAC-IPAD Public Meeting (August 23, 2019)

Transcript of DAC-IPAD Public Meeting (September 14, 2019)

Transcript of DAC-IPAD Public Meeting (November 15, 2019)

Transcript of DAC-IPAD Public Meeting (February 14, 2020)

b. Public Meetings of the Judicial Proceedings Panel (JPP)

Transcript of Judicial Proceedings Panel Public Meeting (January 6, 2017)

c. Preparatory Sessions of the DAC-IPAD Working Groups

Transcript of the DAC-IPAD Case Review Working Group Preparatory Session (March 6, 2018)

5. Military and Civilian Federal Policy

a. Department of Defense

Memorandum from the Department of Defense General Counsel to the Secretaries of the Military Departments, subject: Report on Allegations of Collateral Misconduct Against Victims of Sexual Assault (March 12, 2019)

b. Department of Justice

U.S. Department of Justice, *Justice Manual*

6. Official Reports

a. DoD and DoD Agency Reports

Committee on The Uniform Code of Military Justice, Good Order and Discipline in the Army, *Report to Honorable Wilber M. Brucker* (January 18, 1960)

Department of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (1972)

Military Justice Review Group, *Report of the Military Justice Review Group, Part I: UCMJ Recommendations* (December 22, 2015)

b. Response Systems to Adult Sexual Assault Crimes Panel Report

Response Systems Panel, *Report of the Response Systems to Adult Sexual Assault Crimes Panel* (June 2014)

c. Judicial Proceedings Panel Reports

Judicial Proceedings Panel, *Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases* (April 2017)

Subcommittee of the Judicial Proceedings Panel, *Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases* (May 2017)

Judicial Proceedings Panel, *Report on Sexual Assault Investigations in the Military* (September 2017)

Judicial Proceedings Panel, *Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (September 2017)

d. Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces Reports

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Initial Report* (March 2017)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Annual Report* (March 2018)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Third Annual Report* (March 2019)

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Court-Martial Adjudication Data Report* (November 2019)

7. DAC-IPAD Requests for Information and Responses

Military Services' Responses to DAC-IPAD Request for Information Set 11 (November 2019)

8. Books

Wayne LaFare, Jerold Israel, Nancy King, & Orin Kerr, *Criminal Procedure* (4th ed. 2019 update)

9. News Articles

Tom Jackman, "Jury Orders Blogger to Pay \$8.4 Million to Ex-Army Colonel She Accused of Rape," *Washington Post* (August 11, 2017)

10. Letters, Emails, and Other Media

Letter from Mr. William Castle, Acting General Counsel for the Department of Defense, to the DAC-IPAD Chair Martha Bashford (June 7, 2018)

Letter from Ms. Martha S. Bashford, Chair, DAC-IPAD, to the Secretary of Defense Regarding Article 140a, Uniform Code of Military Justice (September 13, 2018)

Letter from Ms. Martha S. Bashford, Chair, DAC-IPAD, to the Secretary of Defense Regarding Collateral Misconduct Study. (September 16, 2019)

Letter from the Department of Defense General Counsel to DAC-IPAD Chair, Martha Bashford, Regarding the DAC-IPAD's Analysis of the Department of Defense's Draft Collateral Misconduct Report (October 2, 2019)

Memorandum from Ms. Martha Bashford, DAC-IPAD Chair, to DAC-IPAD members, *Fiscal Year 2020 Guidance from the Chair for the DAC-IPAD's Working Groups and the Committee* (November 1, 2019)

CRWG Proposed Findings, Observations, and Recommendations attached at end of Meeting and Reference Materials, Public Meeting (November 15, 2019)

