

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



MEETING AND REFERENCE MATERIALS

PUBLIC MEETING
JULY 21, 2017
ARLINGTON, VIRGINIA

**Defense Advisory Committee on Investigation, Prosecution, and Defense of
Sexual Assault in the Armed Forces (DAC-IPAD) Public Meeting
July 21, 2017**

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- *Summary of the Department of Defense (DoD) and U.S. Coast Guard regulations related to sexual assault investigations and the most recent reports published by the DoD Inspector General (DoD IG) and the Government Accountability Office (GAO) related to military sexual assault investigations. This document was prepared by the DAC-IPAD staff.*

Tab 5 DoD INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (March 22, 2017)

- *This instruction establishes policies and procedures and assigns responsibilities for the investigation of adult sexual assault within the Department of Defense.*

Tab 6 DAC-IPAD Request for Information from the DoD Inspector General (DoD IG), RFI Set 2, Question 1

- *Request for information submitted to the DoD IG on June 22, 2017, regarding the protocols for oversight and evaluation of Military Criminal Investigation Organization (MCIO) sexual assault investigations. The response is requested from DoD IG by July 12, 2017.*

Tab 7 DAC-IPAD Request for Information from Military Criminal Investigation Organizations (MCIOs), RFI Set 3, Questions 1–18

- *Request for information submitted to the Service MCIOs on June 29, 2017, seeking specified data related to adult sexual assault investigations closed during fiscal year 2016 (FY 16). Responses are requested from the MCIOs by July 12, 2017.*

Materials for DAC-IPAD Strategic Planning Session

Tab 8 Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) Committee Planning Session Outline

- *Overview of key issues and questions for the Committee members to discuss during the planning session. This document was prepared by the DAC-IPAD staff.*

Tab 9 DAC-IPAD Request for Information from DoD SAPRO and Service Judge Advocates General (TJAGs), RFI Set 1, Questions 1–3

- *Request for information submitted to the Under Secretary of Defense for Personnel and Readiness, the Service TJAGs, and the Staff Judge Advocate to the Commandant of the Marine Corps seeking adult sexual assault case adjudication data for FY 16. This is the same information requested by and provided to the Judicial Proceedings Panel for fiscal years 2012–2015. Responses are requested in three phases from July to September 2017.*

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

July 21, 2017

**One Liberty Center, 875 North Randolph Street, Suite 1432
Arlington, Virginia 22203**

- | | |
|--------------------------------|---|
| 8:30 a.m. - 8:45 a.m. | Welcome and Introduction <ul style="list-style-type: none">- <i>Designated Federal Officer Opens Meeting</i>- <i>Remarks of the Chair</i> |
| 8:45 a.m. - 10:45 a.m. | Presentation on the Mechanics of a Military Sexual Assault Investigation <ul style="list-style-type: none">- <i>Mr. Guy Surian, Deputy Chief of Investigative Operations, Investigative Policy, and Criminal Intelligence, U.S. Army Criminal Investigation Command</i>- <i>Mr. Kevin Poorman, Associate Director, Criminal Investigations, U.S. Air Force Office of Special Investigations</i>- <i>Mr. Michael J. Defamio, Division Chief, Family and Sexual Violence Division, U.S. Naval Criminal Investigative Service</i>- <i>Ms. Beverly A. Vogel, Senior Special Agent and Sex Crimes Program Manager, U.S. Coast Guard Criminal Investigative Service</i> |
| 10:45 a.m. - 12:45 p.m. | DAC-IPAD Strategic Planning Session |
| 12:45 p.m. - 1:30 p.m. | Lunch |
| 1:30 p.m. - 4:30 p.m. | DAC-IPAD Strategic Planning Session (Continued) |
| 4:30 p.m. - 4:45 p.m. | Public Comment |
| 4:45 p.m. | Meeting Adjourned |



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

MINUTES OF APRIL 28, 2017 PUBLIC MEETING

AUTHORIZATION

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

EVENT

The Committee held a public meeting on April 28, 2017 from 10:00 a.m. to 5:17 p.m. The Committee received informational presentations on the mechanics of a sexual assault case, military sexual assault case adjudication data for fiscal year 2015, and an overview of the Department of Defense Sexual Assault Prevention and Response Office and annual reporting data. Following the presentations, the Committee held a planning session.

LOCATION

The meeting was held at One Liberty Center, Suite 1432, 875 North Randolph Street, Arlington, Virginia 22203.

MATERIALS

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

PARTICIPANTS

Participating Committee Members

Ms. Martha Bashford, Chair
Major General Marcia Anderson, U.S.
Army, Retired
The Honorable Leo Brisbois
Ms. Margaret Garvin
The Honorable Paul Grimm
Dean Keith Harrison
Mr. A.J. Kramer

Mr. James Markey
Chief Master Sergeant of the Air Force
Rodney McKinley, U.S. Air Force, Retired
Dr. Cassia Spohn
Brigadier General James Schwenk, U.S.
Marine Corps, Retired
Ms. Meghan Tokash

Absent Committee Members

Ms. Kathleen Cannon
Ms. Jennifer Long
Dr. Jenifer Markowitz
The Honorable Reggie Walton

Committee Staff

Captain Tammy Tideswell, JAGC, U.S. Navy, Staff Director
Lieutenant Colonel Patricia Lewis, U.S. Army, Deputy Staff Director
Mr. Dale Trexler, Chief of Staff
Ms. Julie Carson, Attorney-Advisor
Dr. Janice Chayt, Investigator
Dr. Alice Falk, Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Meghan Peters, Attorney-Advisor
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Tiffany Williams, Supervising Paralegal

Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

Presenters

Colonel Christopher Kennebeck, U.S. Army, Chair, Criminal Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS)
Ms. Patricia Sudendorf, Professor and Special Victims' Litigation Expert, Criminal Law Department, TJAGLCS
Major Kristen Fricchione, U.S. Army, Associate Professor and Special Victims' Counsel Course Manager, Criminal Law Department, TJAGLCS
Major Iain Pedden, U.S. Marine Corps, Associate Professor, Criminal Law Department, TJAGLCS

Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice
Ms. Meghan Peters, Attorney-Advisor, Judicial Proceedings Panel and DAC-IPAD, U.S. Department of Defense
Dr. Nathan Galbreath, Deputy Director, Sexual Assault Prevention and Response Office (SAPRO), U.S. Department of Defense

MEETING MINUTES

The DFO opened the public meeting at 10:00 a.m. Chair Martha Bashford provided opening remarks and summarized the agenda for the meeting.

Mechanics of a Sexual Assault Case

Colonel Christopher Kennebeck, the chair of the Criminal Law Department at the U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS), accompanied by three criminal law professors from the TJAGLCS, Ms. Patricia Sudendorf, Major Kristen Fricchione, and Major Iain Pedden, provided a presentation to the Committee on the court-martial process for sexual assault allegations. The instruction included a sample sexual assault fact pattern utilized by the school and examples of the forms and documentation involved in a sexual assault case.

Colonel Kennebeck provided an overview of the military justice case disposition process, beginning with the relationship between judge advocates and commanders at the various levels of command. Colonel Kennebeck explained that in the Army, each brigade, which typically comprises 3,000 to 5,000 soldiers, is led by a colonel (O-6). The brigade will have a prosecutor who is a captain (O-3), and possibly a brigade judge advocate, who is a major (O-4), giving legal advice to the commander about how a case should be disposed of—whether it should be administratively handled or go to a court-martial. He also noted that the brigade commander is a special court-martial convening authority (SPCMCA) and is the lowest level commander who can make a disposition decision about a sexual assault case.

The next level of legal authority, Colonel Kennebeck explained, is the staff judge advocate (SJA), usually a colonel (O-6), who gives advice to the general court-martial convening authority (GCMCA). The GCMCA is typically a two-star general (or flag officer) leading a division or equivalent unit. He continued that the SJA runs the installation legal office, which for the Army includes the legal assistance, administrative law, operational law, special victims' counsel (SVC), and criminal law organizations. Committee member Brigadier General James Schwenk, a retired Marine Corps judge advocate, added that defense counsel have their own organizations and chain of command separate from the SJA to protect their independence on behalf of their clients, as do special victims' counsel in all of the Services except the Army.

Major Kristen Fricchione explained the Army's Special Victims' Counsel Program (SVC). She informed the Committee that the Army houses its special victims' counsel organization within the installation legal office due to the size of the Army and the force multiplying effect of having both full and part-time SVCs locally available through legal assistance to handle fluctuating

caseloads. She also noted that the SVC Program itself is authorized within the military legal assistance statute (10 U.S.C. § 1044(e)).

Next, Colonel Kennebeck explained the restricted and unrestricted reporting process, noting that a victim making a restricted report will have access to care and may have evidence collected, however the report will not go to their commander or to law enforcement. He added that it is required in all Services that as soon as someone makes an unrestricted report of a sexual assault, whether penetrative or contact only, the military criminal investigation office (MCIO) must be notified and open an investigation.

While the investigation is ongoing, Colonel Kennebeck explained, trial counsel work with special victim prosecutors (in the Army, there are 22 or 23 of these senior litigators with experience trying sexual assault cases), and SJAs, who then advise the GCMCA as they evaluate the evidence. The next step, he said, is that the lawyers prepare a legal opinion about what the options are for the case that is then shared with the brigade commander to make his or her disposition decision. The brigade commander can then either dispose of the case by sending it to a special court-martial; dispose of it alternatively with nonjudicial punishment, administrative action or no action; send it back down to the company commander for action at a lower level; or forward it to the GCMCA to decide.

Chair Bashford asked about the assignment of defense counsel, and when in the process this takes place. Colonel Kennebeck responded that as soon as the accused has been called in to give a statement, he or she will typically go to trial defense services (TDS), and that sometimes they seek counsel before that.

Committee member and retired Chief Master Sergeant of the Air Force Rodney McKinley asked what administratively happens to an accused once the MCIO opens an investigation, and whether it includes actions such as suspension of any security clearance and becoming ineligible for promotion, change of duty station, or re-enlistment. Colonel Kennebeck confirmed that everything stops for an individual once “flagged,” which is the Army term for the status when an investigation is opened. He added that the individual must be kept in a job commensurate with his or her grade during the course of the investigation.

Dean Harrison asked whether there is an effort to coordinate investigation efforts with civilian prosecutors when an alleged offense takes place in a civilian jurisdiction, and whether civilian prosecutors are notified when a convening authority decides to prosecute a case so they can decide if they wish to prosecute the case. Colonel Kennebeck replied yes to both but noted that the military generally tries to maximize its jurisdiction. He also referenced a new Rule for Courts-Martial (R.C.M.) 306(e) which requires a convening authority to consider a victim’s preference for military or civilian court and to provide certain notifications to civilian authorities.

Dr. Spohn asked whether the process differs when the victim is a civilian making an accusation against a member of the military. Colonel Kennebeck replied that the investigation and prosecution process is no different, though a civilian’s access to counsel may be an issue. He added that if the perpetrator was a soldier, then the case could be tried either by the military or civilian court, however, if the crime happens on a military installation that has exclusive federal

jurisdiction, the state court would not have jurisdiction to prosecute. Colonel Kennebeck also noted that a case can be tried by both the military and state courts if there is concurrent jurisdiction.

In response to a question from Committee member Judge Leo Brisbois, Colonel Kennebeck also added that if the allegation is of a violent offense or if there is a chance an accused might flee, the military has the option to put that person in pre-trial confinement or to otherwise lawfully restrict them—although the military does not have bail and pre-trial confinement starts the speedy trial clock so it is used with discretion by commanders. Chief McKinley also raised the concern of suicide prevention as a justification for pre-trial confinement.

With respect to SVCs, Committee member Meg Garvin asked whether contractors and civilian employees have access to these counsel. Major Fricchione responded that there are different categories of civilians that qualify for different services, noting that DoD civilian employees and military dependents do have access to SVCs, but other civilians do not. Colonel Kennebeck observed that because SVC caseloads are already heavy, adding eligibility to more categories of victims would have a negative impact on other legal services provided. He also indicated that in the Army, SVCs are made available only to sexual assault victims, though some Services make SVCs available for other crimes as well, such as domestic violence.

Disposition Process

Colonel Kennebeck explained that when the prosecutor sits down with the brigade-level O-6 commander to brief the case for disposition, he or she will have the completed investigation file and will have written a prosecution memo to break down all of the evidence required to prove all of the elements of the offenses with an assessment of the strength or weakness of the evidence. He noted that the prosecution memo wouldn't be shared with the commander because it is a work product, but it would be discussed so the commander has an understanding of why a case should or should not be tried. After that, he said, the commander owns the decision.

Command Review of Sexual Assault Cases

Colonel Kennebeck explained to the Committee that the SAIRO report (the Sexual Assault Incident Response Oversight report) is an initial report for commanders with the basic facts of a sexual assault incident—without including personally identifying information (PII)—to let them know quickly about an incident within their command. He stated that it is received by the lowest level commander and routed up to the general officer. The battalion-level commander, typically a lieutenant colonel, is then required to meet with the victim monthly to provide an update on the case.

The next form of command review, explained Colonel Kennebeck, is the monthly sexual assault review board (SARB) where the commanding general and all of the O-6s who work in the installation review the status of each sexual assault case within the command—without divulging PII—to discuss victim care and the status of pending cases. As another level of command accountability, Colonel Kennebeck referenced Army Form 4833, which contains information on what action was taken by the command once the investigation was closed. Chair Bashford asked

whether the 4833 form contains information on why certain action was taken or not by the command. Colonel Kennebeck responded that it could say something like “evidentiary challenges prohibited” prosecution, but it would be very generic and will depend on how carefully the form is filled out. He said they don’t usually provide a justification.

Retaliation

Dean Harrison asked whether there are any administrative procedures in place to “flag” a victim to make sure she or he is not penalized for reporting an allegation of sexual assault. Colonel Kennebeck replied that the SVC typically solves that issue because they are the first person to hear about this. Major Fricchione elaborated on the military’s recent focus on the area of retaliation. She explained that reprisal is where anyone in a position of authority withdraws a favorable action, or imposes a negative personnel action, as a result of the sexual assault allegation. She added that traditionally reprisal is investigated by the Inspector General. Major Fricchione also referenced an Army Directive (AD 2014-20) that makes retaliation a punitive offense and enables the command to take action if there has been reprisal following a report of any crime, as well as the new Article 132 of the UCMJ enacted in the 2017 NDAA which prohibits reprisal.

Colonel Kennebeck added that the monthly SARB is a venue where any occurrence of retaliation is discussed and resolved by the command. Major Fricchione also referenced an Army Directive that came out in 2015 that talks about the command’s responsibilities to prevent retaliation and she indicated that if retaliation is reported by anyone involved in the case from witnesses to the SARC, victim advocate, the victim, or others, it will be reported and tracked through the SARB. She added that the SARB will track any incidents even after a court-martial has ended and that the O-5 battalion-level commander of the individual who is being retaliated against is required to develop a plan to address it. In sum, Major Fricchione stated that retaliation issues are most commonly solved by command action through these processes rather than through formal investigation and prosecution.

Chief McKinley expressed concern about the potential unintended consequence of a victim not being able to study and concentrate for a promotion test such as from staff sergeant to tech sergeant and may, as a result, lose out on the promotion.

Committee member James Markey inquired whether the military collects data on retaliation. Major Fricchione indicated that it is collected through the SARB and from SARCs and victim advocates as well as the SVCs. Colonel Kennebeck added that the Inspector General (IG) manages all formal investigations and will be tracking data on those.

Ms. Asha Vaghela, the Service representative for the Air Force, informed the Committee that DoD has a Retaliation Prevention Response Strategy and that the Services all have a process by which retaliation data is collected quarterly by the Department of Defense Sexual Assault and Prevention Office (SAPRO) through the SARCS and victim advocates for the annual DoD sexual assault report. She also noted that the Air Force collects retaliation data from command-directed investigations and the Air Force Office of Special Investigations (OSI).

Committee member Mr. A.J. Kramer asked about the difference between retaliation and reprisal. Major Fricchione explained that retaliation is the umbrella term that refers to hostile acts made by anyone in response to someone reporting or believed to have reported a crime of any kind. Reprisal, she continued, has to do with a supervisor or commander or anyone with authority over an individual in an organization who takes a negative personnel action on or withholds a favorable personnel action from an individual.

Major Fricchione addressed a question from Brigadier General Schwenk about 10 U.S.C. § 1034, the federal Whistleblower Protection Act, noting that the military has its own statute, the Military Whistleblower Protection Act, and that the same protections are also codified in the new punitive Article 132 of the UCMJ.

Commanders' Disposition Options

Colonel Kennebeck discussed commanders' disposition options. First, he described the array of administrative actions a commander may take, including on-the-spot correction, corrective training, counseling, revoking privileges, or issuing a letter of reprimand, which can be the basis for an administrative separation from the Service. He also explained the types of non-punitive discharges one may receive with an administrative discharge noting that "other than honorable" (OTH) is the most severe administrative discharge and that it is a very damaging punishment. An OTH discharge precludes veterans' (VA) benefits and makes it very difficult to secure future employment. In fact, he said, an individual is better off not admitting having served at all.

Next, Colonel Kennebeck reviewed nonjudicial punishment (NJP), which he said is punitive and meant to be a corrective action for minor offenses. With nonjudicial punishment, he continued, an individual may continue to serve but may be reduced in grade and incur monetary penalties. He noted that in the Army the burden of proof increases from a preponderance of the evidence in administrative actions to beyond a reasonable doubt for NJP. However, Major Pedden reported that in the Marine Corps the burden of proof for NJP is the same as it is for administrative actions—a preponderance of the evidence.

Committee member Ms. Meghan Tokash followed up with a question about the factors a commander must consider in making the disposition decision. She asked whether the R.C.M. 306 discussion section, which deals with this issue, still includes "bias of the reporting victim" and the "character and military service of the accused" as factors for the commander to consider. After reviewing the Manual for Courts-Martial (MCM), Colonel Kennebeck answered that the character of the accused has been removed as a consideration (by the FY 2015 NDAA) though bias of the reporting victim is still included. He noted that these considerations are enumerated as guidance and not authoritative.

Colonel Kennebeck next discussed the third type of disposition—the court-martial. He explained that the summary court-martial is similar to NJP, noting that it isn't considered a real conviction and a Service member can turn it down and demand trial by court-martial. With respect to special courts-martial, he noted that in practice it is the GCMCA who refers both special and general courts-martial cases to trial, noting that penetrative sexual assault cases can only be referred to a GCM.

Another disposition option Colonel Kennebeck explained is what he called a “Chapter 10.” This occurs after charges have been preferred and an accused requests an administrative separation with an OTH discharge rather than being tried by court-martial. He indicated that this is not common for sex offenses. Lastly, Colonel Kennebeck explained that punitive discharges—dishonorable, or bad conduct for enlisted members, and dismissal for officers—can only be adjudged at courts-martial.

Committee member Dr. Cassia Spohn inquired about the cases where there is no action taken. She wanted to know about the process and standard followed in the military for unfounding cases, noting that, in the civilian world, law enforcement must determine that a case is false or baseless to consider it unfounded.

Dr. Spohn then asked who makes that decision. Colonel Kennebeck responded “that happens between the lawyers and the investigators before they advise the command.” He continued that once the MCIO is close to completing an investigation the investigator will ask the prosecuting attorney for an opinion. Colonel Kennebeck said this will be a conversation between the investigator and the prosecutor about whether or not there is probable cause for the offenses. He explained that the founding decision is not made at this point but, in practice, it is a very similar decision. The MCIO will record the conversation with the prosecutor about the case in the final investigation report.

The Marine Corps representative at the meeting, Major Harlye Carlton, addressed the Committee, pointing out that in the Marine Corps it is the commanding officer who makes the decision about whether a case is founded, unfounded, or whether there is probable cause, based on the advice of the SJA and the input of the investigating officers, the preliminary hearing officer (if there is an Article 32 hearing), and the attorneys who worked on the case along the way. Colonel Kennebeck responded that the difference is non-existent—the same players are having the discussion, but the conversation about whether there is probable cause or not is very legal, so the Army treats it as a legal discussion.

Brigadier General Schwenk asked whether CID (the Army criminal investigative organization) has stopped making founding decisions. Colonel Kennebeck responded yes, they have stopped. Brigadier General Schwenk added that, in the Army, CID used to go beyond merely delivering their report and making themselves available for questions and made conclusions about whether there was probable cause or the case was unfounded. He asked if this is still happening. Colonel Kennebeck indicated that yes, as he understands it, CID is still doing that. He said it is primarily to help the investigators determine whether there is enough evidence to enter the accused into the database because once an accused is “titled” in the database, it stays with the individual for a long time.

Later in the session, Colonel Kennebeck clarified that the titling decision is separate from whether an investigation is complete or not and has a lower standard. Although the MCIOs are no longer founding and unfounding cases, there is still discussion about probable cause, though it is not dispositive. He explained that every investigation, once complete, goes to the command.

Chief McKinley expressed his concern about accused who receive a separation in lieu of court-martial with an OTH discharge who then are able to appeal the discharge for an upgrade to honorable. He asked whether there are any statistics on how many separations in lieu of court-martial are occurring in each Service. He also expressed concern that the military is discharging perpetrators into the civilian community with no follow-on records or sex offender registry. Colonel Kennebeck responded that there are occasions when it is the victim's wishes to have the accused discharged with "bad paper" rather than having to go through the court-martial process, so it is not always a bad thing. He also noted that it is extremely unlikely that an accused who is discharged in lieu of court-martial will be able to upgrade the discharge since an accused seeking a Chapter 10 is required to make the decision with the advice of a lawyer and sign a form that he or she understands what he or she is agreeing to.

Sexual Assault Prevention and Response

Colonel Kennebeck reviewed the Department of Defense's lines of effort in preventing, educating, and responding to sexual assault. He described the many resources and organizations implemented by the military to support victims including SARCs, victim advocates, special victims' counsel, special victim prosecutors, victim witness liaisons, behavioral health, and the SAFE Helpline.

U.S. v. Abbott - Sample Case

Colonel Kennebeck introduced a fictional case utilized at the Army TJAGLCS called U.S. v. Abbott. Ms. Sudendorf explained that she and Major Pedden developed the case as a teaching tool to encompass as many of the challenging issues that military litigators are encountering in sexual assault prosecutions as possible. The case involves multiple victims of a single perpetrator, including a victim who reported early, initially made a restricted report, and after nearly a year converted it to unrestricted.

Major Pedden described the actions that take place in the first week after a sexual assault report is made. First, he explained, a victim must report the offense to, or be referred to, a SARC to determine whether the victim wants to make a restricted or unrestricted report (by completing DD Form 2910). He noted a problematic issue that sometimes arises is when a victim tells a friend (before making a formal report with a SARC) who then reports the assault to someone in the command, automatically triggering an unrestricted report. However, Major Pedden noted that, in most cases, a victim is able to go to the SARC, make a restricted report, and the command will not know who made the report, only that an incident has been reported.

For unrestricted cases, Major Pedden explained, the victim is offered the services of an SVC, SARC, victim advocate, and medical care, and the victim will be interviewed by the MCIO. He said the victim may also request an expedited transfer, adding that the authority to approve or deny a request for expedited transfer is with the first general officer in the command. Once a victim gets an expedited transfer, he continued, the likelihood of going to come back to participate in the case decreases exponentially, particularly if the case is overseas. He noted that this puts commands in a tough spot because a commander doesn't want to say no to the victim, but also doesn't want to let someone off the hook if it is a strong case. Ms. Sudendorf added that

a victim may also seek a protective order and that the SVC will assist the victim in requesting expedited transfers and protective orders as long as the victim has made an unrestricted report, since both must be approved by the commanding general.

Chair Bashford asked about the finding of a JPP Subcommittee report that indicated substantial delays are occurring before the first MCIO interview with a victim because of the SVCs. Colonel Kennebeck, noting that his experience is anecdotal and somewhat dated, said he thinks there is some truth to that but doesn't see it as a pervasive problem.

Another issue Colonel Kennebeck discussed is collateral misconduct—such as underage drinking—which is fairly common in sexual assault cases. He explained that the disposition decision on collateral misconduct is withheld to the brigade-level commander at the same time the sexual assault disposition decision is forwarded. He noted that this can be a tricky situation for a commander—and a victim, especially if others were engaged in the collateral misconduct, such as underage drinking, and are immediately given NJP. Colonel Kennebeck explained that the policy of DoD is to withhold the disposition of collateral misconduct until the sexual assault is disposed of, however a problem is that this provides great fodder for cross-examination by the defense and may lead to perceptions of favoritism toward the victim by peers, which only increases the pressure on the victim. He noted that this is an area where the SVC has proven very valuable because they can frequently step in and assist with an informal solution that mitigates pressure on the victim and the risk of retaliation from peers.

Next, Colonel Kennebeck discussed prosecution strategy. He explained that throughout the investigation the prosecution is working on the theme and theory of the prosecution of the case and building the prosecution memo, which indicates the strengths, weaknesses and challenges to the evidence. If the trial counsel and special victim prosecutor don't believe they can prove the case beyond a reasonable doubt, he explained, the SJA is usually consulted as well. He noted that the prosecution memo is treated as work product and kept in the file; however, if the case isn't prosecuted, every unit handles this a bit differently. He indicated that there is not a formal policy on how this is managed, but if the decision is made that the case can't be prosecuted, then that is recommended to the brigade commander (O-6), who generally wants to know why. Sometimes the commander will say they want to take it to court-martial anyway, though he said he has not seen a case where a prosecutor believed he or she could not ethically try a case a commander wanted to take forward and that typically the line is fairly clear.

Colonel Kennebeck stated that he doesn't think the nature of the prosecution discussion or decision-making process is much different from that of a civilian prosecutor in a state office—from what can and cannot be proven to what experts are needed. Ms. Sudendorf added that the Army's prosecution memo is similar to the felony review memo used by Cook County when she was a prosecutor in Chicago, Illinois.

With respect to experts needed, Ms. Garvin asked whether there was a budgetary analysis involved with regard to expert testimony. Colonel Kennebeck responded that budget for experts is not a limitation. He added that if the government wants an expert, then the expectation is that the defense is going to need one as well and that is factored in. He said they have plenty of budget money to try the courts-martial they are trying.

Ms. Tokash commented that from her experience as a federal civilian prosecutor, there is a difference between the civilian and military prosecution decisions. She asked what the standard operating procedure is when the SJA's written pre-trial advice to the GCMCA differs from the commander's decision. Colonel Kennebeck explained that Article 34 of the UCMJ defines when a case can be referred to trial—if there is an offense under the UCMJ, probable cause that the accused committed the offense, and court-martial jurisdiction over the accused. Committee member Judge Paul Grimm noted that probable cause is also the standard for a civilian grand jury. If the SJA advises the commanding general (CG) that there is probable cause and the CG agrees, Colonel Kennebeck explained, the commander signs the back of the document and the case has now been referred to a court-martial.

Major Fricchione explained that it was mandated in the 2015 NDAA § 1744 (and Army Directive 2014-19) that when an SJA recommends no charges and the GCMCA agrees, that decision must be reviewed by the next highest commander in the chain of command. She continued that if the SJA recommends going forward with the case and the GCMCA decides not to refer charges, the decision must be reviewed by the secretary of the Service. Dean Harrison asked whether there are any statistics on how often there is disagreement between the SJA advice and commander's disposition decision. Brigadier General Schwenk, who is a member of the JPP Subcommittee, informed the Committee that from the information the JPP received, there have been zero cases reviewed by Service secretaries and 21 or 22 instances where the SJA recommended not going forward and the commander agreed and did not send the case forward. He added that in none of those cases did the next higher authority send it to trial.

Article 32 Preliminary Hearing

Colonel Kennebeck explained the Article 32 preliminary hearing process, noting that the military does not have grand juries like the civilian system. He stated that the Article 32 hearing used to be a more robust discovery tool but it is now limited to a review by a preliminary hearing officer (PHO) of statements and other documentary evidence to determine probable cause. He highlighted that the victim can opt not to testify at the hearing. The PHO, he continued, is a judge advocate usually in the rank of a captain (O-3) or major (O-4) in the Army. He explained that the PHO makes a recommendation as to whether there is probable cause to go forward and produces a report that will be found in the record of trial.

Colonel Kennebeck stated that ideally, in practice, if a prosecutor is confident that a case can't be tried, he or she can advise the brigade commander not to send it to an Article 32, and to handle it with an alternative disposition. However, he said, if a brigade commander is at all hesitant, he or she will send it to an Article 32 to see what the PHO recommends, noting that the Article 32 will have happened before the GCMCA and the SJA get together to decide whether the case should be referred to a court-martial.

Brigadier General Schwenk asked whether that might change because previously (before the legislative revision of Article 32 in 2014), the Article 32 investigating officer had access to everything and could call witnesses, but now is limited to a few documents about the case. He noted that the idea that a commander can get an independent outside observer's in-depth review from an Article 32 hearing is no longer the case.

Colonel Kennebeck concurred that the Article 32 has changed in scope, but he believes that for the cases that are on the fence, where the command “just can’t viscerally give it up or just thinks that we need to know more before [he or she] can make [a] decision,” it is at least another look by another person to opine on whether probable cause exists to send the case to trial. He added that if the PHO doesn’t believe there is probable cause, that is a pretty good indication that the case is unlikely to be proven beyond a reasonable doubt. Colonel Kennebeck said that the Article 32 is certainly not what it was, but he feels that there are pros and cons to the changes.

Alternative Dispositions

Next, Colonel Kennebeck discussed alternative dispositions which may occur when the advice from the prosecutor is that there is not enough evidence to go to trial and the commander will ask what the other options are. An example he provided is an instance where the victim is credible but there is not good forensic evidence, and perhaps the victim and accused were friendly beforehand, or if the victim decides not to participate. He stated that these are the cases where an alternative disposition may be very appropriate, and where commanders may pursue a reprimand or administrative separation.

Major Pedden added that, from his experience, commanders are generally not inclined to entertain alternative dispositions unless there is a compelling reason to do so. He said that, ordinarily, the commander’s election is to move forward.

Chair Bashford asked whether a victim’s decision not to participate is dispositive, and whether it matters at what stage in the process that happens or if the accused is being held in pretrial confinement. According to Colonel Kennebeck, a victim can stop cooperating at any stage in the process, but it is usually less frequent if the case is moving towards a court-martial. He indicated that it is not dispositive, but that it puts the commander in a very difficult position.

Mr. A. J. Kramer asked whether the accused is told of a victim’s decision not to testify or cooperate any longer. Major Pedden said he is not aware of a precise rule that requires that, but as a practical matter it comes to the attention of the accused during the process of preferring charges and moving forward with the case in the event the command elects to do so.

Military Rules of Evidence 412 (Prior sexual behavior) and 513 (Psychotherapist-patient privilege)

Major Pedden discussed issues related to M.R.E. 412 and 513, noting that M.R.E. 412 precludes the introduction of evidence at trial of the prior sexual conduct of a victim in a sexual assault case or evidence of the victim’s sexual predisposition, unless one of three specific exceptions is met. He added that prior to disclosing that evidence in open court, the military judge has to hold a closed hearing with certain notice requirements. Rule 513 is a privilege rather than a rule of relevance and admissibility, therefore until the court holds a closed hearing, the court does not even have the authority to order production of those materials from their ordinary custodian.

Major Pedden explained that in 2015, the NDAA amended the language of the rule to specify that the victim has a right to be heard, including a right to be heard through counsel, including

special victims' counsel, at this hearing as the judge makes a determination on the admissibility of evidence. He also explained that M.R.E. 513 was modified by the 2015 NDAA making it now exceptionally difficult even to order production of mental health records, or to get an in camera review. He indicated that the changes to M.R.E. 513 are now the subject of extensive litigation.

Judge Grimm asked a question regarding M.R.E. 412, noting that under Rule 412(b)(1) there are three circumstances where the otherwise prohibited evidence under 412(a), can be allowed in: (1) to show the identity of the assailant; (2) to show consent; or (3) if otherwise required by the Constitution. Judge Grimm suggested that a clever defense attorney could certainly argue that a client's Sixth Amendment Confrontation Clause rights trump the protections under 412(a) to obtain the otherwise protected information. He asked whether this happens much in practice in the military, and if so, whether it has been successfully argued as an end run around the rape shield rule.

Major Pedden responded that M.R.E. 412 very closely parallels the Federal Rule of Evidence and that the three exceptions are roughly the same. He believes that generally, counsel are not making an end run around the first two requirements by pleading the third, the constitutionally required section, and emphasized that at its basic level, M.R.E. 412 is a rule of exclusion and the default position is not just that the evidence isn't admissible, but that it isn't relevant. He added that the military has a robust executive and legislative history that shows the development and implementation of the rule, and recommended an article by Colonel Fredric Lederer regarding judicial implementation and interpretation of the M.R.E. Major Pedden highlighted that the Sixth Amendment right of confrontation, or any fundamental constitutional right, will trump a rule of evidence. He emphasized that judicial opinions show careful consideration of this issue by military judges who are well-trained on the matter. He also noted that the constitutionally required exception is the most commonly litigated because the first two are less frequently argued.

Colonel Kennebeck noted that even if the constitutionally required exception is met, the judge still must narrowly tailor what is allowed in, in order to protect the victim. Mr. Kramer asked how often it occurs that after a pre-trial ruling on a 412 matter, the victim testifies on direct and says something to open the door to cross-examination on the issue. Major Pedden responded that, in theory, it shouldn't be an issue because the military judge's pre-trial ruling is binding on everyone who testifies, including the victim, and so to the extent that counsel begin to ask questions that sound like they might encroach on the judge's ruling, the judge is going to stop the questioning. He added that if some other fact became known that required the military judge to revisit whether the answer to a particular question is constitutionally required, the military judge might order another closed session to consider it, but this does not typically happen.

Major Pedden noted that the case law shows that the protection is becoming more robust over time, and that the rule is more strictly construed in favor of victims now than it was in the past.

Judge Grimm asked whether the military version of M.R.E. 412 requires notice by the defendant 15 days before the trial and whether the defense has to identify the specific purpose for which it is offered. Major Pedden replied that it requires advance notice, but not 15 days and that not only

does the defendant have to identify the specific purpose, but the moving party bears the burdens of both persuasion and proof by a preponderance of the evidence. Judge Grimm also asked whether a judge who is required to give notice to the victim will consider the victim's views when making the ruling. Major Pedden said the plain language of the rule expressly requires the judge to at least afford the victim the right to be present and opportunity to be heard through the SVC. Colonel Kennebeck noted that Article 6b gives the SVC the right to file a petition (for a writ of mandamus) if the judge does not grant the rights the victim should be afforded or correctly follow procedures. He added that such writs have been successfully filed and granted by the CCAs.

Major Pedden also noted that the standard for appeal under Article 6b is important because it is entirely subjective. The statute says that if a victim believes that what the trial judge has done violates the victim's rights under certain evidentiary rules, including M.R.E. 412 and 513, then the victim may petition the court of criminal appeals for a writ of mandamus. Major Pedden asserted that this standard makes Article 6b a very powerful statute, because it is based only on what the victim "believes," but he noted that it is being employed rather judiciously. He reported that, in practice, the courts are not receiving many writs, and those filed are well-considered and based on substantial questions where a victim is committed to that privacy right and is willing to litigate.

In response to Judge Grimm's question about how quickly these writs are being turned around, Major Pedden answered that they have priority over other matters at the CCAs and some are as quick as a few days, though others have taken longer because they present more complex issues.

Major Pedden noted that Article 6b rights also apply to the privileges under Military Rule of Evidence 513 and 514, and also Military Rule of Evidence 615, which precludes the military judge from excluding the victim from the proceedings unless the military judge first finds that the testimony of the victim would be altered.

Offer to Plead Guilty

Colonel Kennebeck explained that a guilty plea in the military is not the same as in civilian court. He said in the military a deal is negotiated between the accused and the GCMCA and the accused will sign an agreement that places all communications within that agreement and a separate document which agrees to the limit of confinement or punishment, known as the "quantum." The stipulation of fact is presented during the accused's guilty plea and the military judge will ensure that the accused's pleas are provident.

Colonel Kennebeck continued that after the sentencing, the judge will look at the quantum page of the agreement, which the judge has not previously seen, and the accused will get the lesser of the agreement or the adjudged sentence—known as "beat the deal."

Court-Martial

Colonel Kennebeck explained that the Court-Martial Convening Order is the document that creates the court-martial, and it will identify names of the panel members who are selected by the

GCMCA from that installation or from the units that the GCMCA commands. He noted that panel members are typically more senior folks and tend to be captains, majors, lieutenant colonels, colonels, first sergeants, and master sergeants.

He described the next steps which are that the case will be docketed, motions will be argued, and a trial date will be set. He also noted that under R.C.M. 1001A, which is a new provision, the victim is now able to make an unsworn statement, which is usually in addition to the government's case and presentation of victim impact evidence. He added that, much like that of the accused, the victim's unsworn statement can be rebutted with additional evidence. The unsworn statement is typically in writing and is provided to the defense and judge prior to being presented in court.

Sentencing and Post-Trial

Next Colonel Kennebeck discussed the sentencing and post-trial phases, noting that the sentencing hearing takes place immediately after the conviction, unlike civilian practice. He explained that witnesses—typically the victim—testify on behalf of the government about the impact of the crime, followed by the accused, who will testify or submit an unsworn statement, and any supporting witnesses. After that the panel or the judge will render a sentence.

He then discussed the post-trial phase, which he described as giving a second look at what happened in the court-martial. He explained that a verbatim record of trial is typed up which usually takes a few weeks. It is then reviewed by trial and defense counsel and the military judge for error. Once that is completed, it is served on the accused and the victim who both have a certain window of time to provide input back to the convening authority. He noted that the judge is done with the case at this point.

Colonel Kennebeck then discussed what is contained in the record of trial, noting that it is usually contained in four or five hard-copy volumes. He said that there will be a chronology of when the case started and when it ended, the MCIO investigation, all of the submitted pieces of evidence that were admitted or offered, and other documents related to the case that may or may not have been used. He added that any sealed material will be included, as will the transcript of the Article 32 preliminary hearing.

He continued that after receiving input from the accused and victim, the staff judge advocate makes a recommendation to the convening authority on clemency. He noted that Article 60, which gave the convening authority power to disapprove findings of guilt or reduce sentences, has been severely limited by statute. After reviewing the packet, he explained, the commanding general signs a document called the "action," which is an approval of the sentence and findings and starts the appellate process.

Colonel Kennebeck gave an example of clemency that might be granted—an accused who is married with a child requests a waiver of forfeitures for a period of six months to help the family.

Questions

Brigadier General Schwenk asked the presenters whether they had any suggestions based on what they are hearing from people out in the field about issues of concern that the DAC-IPAD may want to look into over the next couple of years.

Major Fricchione mentioned Article 6b and the enforcement of the rights of victims at trial. She referenced the recent *Martinez* case, where the CAAF determined that it did not have jurisdiction to hear Article 6b appeals from the CCAs. She noted that there is no clear guidance on what is and is not a right and the procedural requirements including the incorporation of SVCs into the process. With no CAAF decisions on these issues, each jurisdiction has to take each case on its own and try and figure out how to apply the rules. Major Fricchione noted that one issue is the lack of guidance on where the SVC sits in the courtroom and how they make objections.

Committee member Major General Marcia Anderson asked about the SVC/VLC assignments and career path. Colonel Kennebeck responded that in the Army, generally, the policy is that SVCs need to have litigation experience before becoming an SVC, though, because of its size, that is not always the case. He added that over time, people have become more accepting of the job and he feels that two years as an SVC is about the right amount of time.

Chair Bashford asked about turnover and how often trial counsel in a sexual assault case, an SVC, or the defense attorney has to be replaced during a case. Colonel Kennebeck responded that special victim prosecutors, who are senior litigators with oversight of the sexual assault cases, are typically on three-year assignments. He said that trial counsel are typically in the job either 12, 18, or 24 months, and SVCs remain for a couple years. There is a learning curve to being an SVC, like defense counsel, and they all remain in their positions for two or three years.

Ms. Garvin asked about the precedential value of civilian case law on 18 U.S.C. § 3771 (Crime Victims' Rights Act), since those rights have been around since 2004 and are nearly identical to Article 6b. Major Pedden believes that, as a general matter, it is persuasive authority, but given that the rights are specifically enumerated in the Uniform Code of Military Justice, it is a duty of the court to first look to that body of law. Ms. Garvin also asked about the precedential value of cross-branch appellate courts. Major Pedden responded that they are generally cited as persuasive authority but not binding on other courts of criminal appeals. He noted that decisions from the CAAF are binding on all of the Services.

Major Pedden noted that there are appellate cases in progress now that will be addressing precisely what 6b means and how far it goes, referencing the *Martinez* and *Kitchen* cases. Ms. Garvin asked whether, given that Article 6b applies to victims of all crimes, there have been many civilian lawyers in military court helping protect the 6b rights of victims of non-sexual violence crimes. Colonel Kennebeck replied not in the Army, though Major Pedden said that, while unusual, it does happen in the Marine Corps.

Dean Harrison asked about the resources available and the training levels of defense counsel. Colonel Kennebeck replied that training is robust and that defense counsel, prosecutors, and SVCs go through trial advocacy courses. He noted that at Fort Belvoir, the Army has the Trial

Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) which employ highly qualified experts (HQEs). These organizations provide training at installations or in larger groups. That training is oriented towards either the prosecution or the defense of all crimes and there is typically sex assault-focused training. He added that he believes that both TCAP and DCAP are equally funded and resourced.

Dean Harrison asked whether there are any efforts to make sure there are not sentencing disparities, either within a Service or across the Services. Colonel Kennebeck referenced the Military Justice Act of 2016 which was just passed and requires a four-year study of military sentencing to determine whether sentencing parameters and judge alone sentencing are appropriate. Brigadier General Schwenk asked who is doing this review. Colonel Kennebeck did not know for sure but believes it is prescribed by Article 146 in the new Military Justice Act.

Military Sexual Assault Case Adjudication Data Analysis

Ms. Meghan Peters, an attorney-advisor on the JPP and DAC-IPAD staff, provided the initial overview of the JPP data collection process utilized to collect the adjudication data for 2015 sexual assault cases. She explained that the JPP had three statutory tasks: to examine (1) case dispositions, meaning whether or not a case went to court-martial; (2) the outcomes of those cases; and (3) the punishments rendered at courts-martial. The JPP was also tasked to look at appellate decisions, review sex assault convictions, and compare punishment data in military courts with punishment data in civilian, federal, and state courts.

She stated that JPP staff collected key court-martial case documents that chart out the procedural history of each case from the military Services. The JPP staff asked the military Services last year for access to all sex assault cases that were tried, dismissed, or otherwise resolved in fiscal year 2015.

Ms. Peters explained that the JPP recorded data from 738 cases that were resolved in FY 2015. Dr. Cassia Spohn, who was retained by the JPP to analyze the data, informed the Committee that she has been working with the JPP for a number of years, initially analyzing the 2012-2014 data, and then most recently the data analysis for the 2015 cases. She noted that of the 738 cases, 530 were penetrative offenses, and 208 were cases in which the most serious charge was a contact offense. About two-thirds of the cases were from the Army or the Air Force, and the other Services had a smaller number of cases.

Dr. Spohn reported that the typical accused was an enlisted Service member. She noted that almost all were male, and most were assigned to units in the United States or its territories when charges were preferred. She explained that this is not necessarily where the case occurred or where the incident occurred, but where the accused was stationed at the time that charges were preferred.

She noted that the information available on victims was limited but that the typical victim was female and two-thirds were Service members.

With respect to case dispositions, Dr. Spohn explained that almost three-fourths of the cases were referred to a court-martial, 16% received an alternative disposition, and 12% were dismissed without further action.

Next, she explained case outcomes for the cases in which the most serious charge was a penetrative offense. She reported that 25.8% percent of the defendants in 530 penetrative cases were convicted of at least one count of a penetrative offense, 21% were acquitted at trial, 14.2% received an alternative disposition, and 14.7% were dismissed without further action. She reported that the overall conviction rate for preferred cases in which the most serious charge was a penetrative offense was 49.8%.

With respect to contact offenses, Dr. Spohn reported, the modal outcome for these cases was conviction for a non-sex offense and almost 41% were convicted of something other than a sexual offense. She continued that 17.8% were convicted of a contact offense, leading to an overall conviction rate for contact offenses of 58.6%, 13% were acquitted, 22% received alternative dispositions, and 6% were dismissed without further action.

As for sentences, Dr. Spohn reported that 52.1% received both confinement and separation. Seventy-one percent of the cases resulted in some length of confinement, and almost 60% resulted in a punitive separation.

Dr. Spohn looked at the relationship between sentences and a variety of factors and found that the likelihood of confinement was greater if the victim was a civilian or if there were both civilian and military victims than if the victim was a member of one of the Military Services. She believes the fact that the confinement rate is the highest for those cases in which there is both military and civilian victims reflects in part the fact that by definition, those cases involve more than one victim.

Dr. Spohn also found that length of confinement was not affected by the Military Service of the accused, the rank of the accused, or the gender of the victim. She noted that cases involving military and civilian victims resulted in longer sentences than those that involved only civilian victims, and those cases that involved only military victims resulted in the shortest sentences. She further found that if the victim was a spouse or intimate partner, the sentence was substantially longer than if the victim was not the accused's spouse or intimate partner. Neither the rank of the accused, whether the accused was an enlisted member or an officer, nor the gender of the victim affected any of the outcomes.

Dr. Spohn's overall conclusions based on the 2015 data are that cases involving penetrative offenses have higher rates of case attrition, but conviction for these offenses results in harsher punishment. She found significant differences based on the Military Service of the accused, and she recommended the Committee look into those differences and whether they reflect differences in policies and practices.

She concluded that the status of the victim, military versus civilian, is an important factor in the analysis, and the relationship between the victim and the accused is a somewhat consistent predictor of how the case will be handled and the sentence that will be imposed.

Chair Bashford suggested that the Committee may be interested in looking into whether military victims have higher rates of attrition to see if that is a result of retaliation. She was also interested to see whether the more serious penetrative cases tend to have more evidence than a groping or if there is somehow a reluctance to convict because the consequences are so serious.

Chief McKinley observed that all branches of the Services follow the same UCMJ, but yet there are very different conviction rates. Mr. Kramer also commented on the striking difference in conviction and acquittal rates as compared to civilian courts. He noted that in the federal system, the conviction rate of cases that go to trial, which includes from some Indian reservations a fair number of sexual assault cases, is above 90%. He added that state courts are similarly high for sexual assault cases that are tried.

Dean Harrison asked whether the JPP collected data on the race of the victim or defendant. Ms. Peters responded that the information was not available in the documents the staff collected as they focused on the procedural outcomes of cases.

Ms. Garvin asked about whether there was data about male victims regarding whether the offenses were male-on-male or female-on-male. Dr. Spohn replied that she recalls that there were only five cases with female offenders.

Ms. Tokash asked whether the JPP looked at cases where the CCAs overturned convictions for insufficient evidence. Ms. Peters responded that they did and the analysis will be in the JPP's June 2017 report. The JPP looked at every issuance in FY 2015 from each Service CCA that involved a conviction on an Article 120 or 125 offense or an attempt, and looked at whether there was relief granted in any of those cases. She said the JPP has found very few cases each year—in the single digits—where there was a conviction overturned. She said typically some other defects in the trial affected the entire sentence, since there is unitary sentencing in the military.

Briefing on Department of Defense Annual Sexual Assault Reporting Data

Dr. Nathan Galbreath began his presentation to the Committee by explaining that he would be giving the members a high-level overview about how the Department of Defense views the problem of sexual assault. He noted that he was an Air Force investigator for 12 years before entering a health psychology program and working in a clinical capacity for the Air Force. He has been at SAPRO for the last 10 years.

He noted that DoD SAPRO represents the Secretary of Defense on this issue and is the central point of authority with regard to advising on prevention, response and oversight within the Department. The mission of SAPRO, he said, is to promote military readiness through sexual assault prevention advocacy and execution of the program as well as victim support. He explained that the SAPRO office falls under the Under Secretary of Defense for Personnel and Readiness and then under the Acting Assistant Secretary of Defense for Readiness, who is Dr. Elise Van Winkle. The SAPRO office is run by a two-star flag officer, Rear Admiral Ann Burkhardt, who has been in the position for two weeks.

Dr. Galbreath noted that SAPRO is an unusual policy office because it runs operations as well as policy, including the Safe Helpline, which is a 24/7 sexual assault hotline and online chatroom, a certification program for victim advocates, a web resource for SARCs and victim advocates called SAPR Connect, and the Defense Sexual Assault Incident Database (DSAID). He described DSAID as a congressionally-mandated database that was implemented in FY 2012 that captures all of the unrestricted and restricted sexual assault reports in the Department as well as case disposition information.

Dr. Galbreath reviewed the history of SAPRO which began in 2004 with a task force initiated by Secretary of Defense Rumsfeld. He discussed the resources available to victims of sexual assault in the military including sexual assault forensic exams and policy.

Chair Bashford asked whether DoD sends kits for analysis on a restricted report. Dr. Galbreath responded no, unless a victim requests it and changes his or her report from restricted to unrestricted. Chair Bashford suggested that it might help a victim to make a decision if his or her kit was a match to other kits. Dr. Galbreath said they are looking into this with the MCIOs, but also noted that they want to preserve a victim's confidentiality. Dr. Spohn asked whether there is a problem in the military, as has been seen in the civilian justice system, of untested kits. Dr. Galbreath said that for the military it is "not like what you see in the civilian world" and that now they are able to test kits with unidentified suspects through the national system check.

Dr. Galbreath explained the expedited transfer program that began in January 2012 to allow victims of sexual assault to move across a base or to another duty station so long as there is a "credible report" of sexual assault. He said the number of transfers has been growing every year. Brigadier General Schwenk asked who gets to decide whether a victim moves to a different unit or to another installation. Dr. Galbreath responded that the decision is the victim's and that Congress has also passed a law that allows the accused to be the one transferred if that is easier to facilitate.

Dr. Galbreath noted that in 2004, before SAPRO was established, there were 1,700 reports of sexual assault. Since that time, he explained, measures have been put in place to better track the information and that in 2005, when DoD enacted restricted reporting, the number of reports increased immediately and reports have been slowly but surely increasing each year. Describing sexual assault as an under-reported crime, Dr. Galbreath noted that SAPRO initiated a survey to better measure the extent of sexual assault incidents in 2007. He added that the Active Duty component completes these surveys, and the Reserve component completes separate surveys in alternate years.

Dr. Galbreath reported that the 2006 survey indicated about 34,000 sexual assaults (20,000 men and 14,000 women). He noted that because 85% of the military is male, their numbers are higher even though their rate of sexual assault is lower. He said the number of sexual assaults formally reported that year was 2,289, or only 7% of the 34,000 incidents of sexual assault. In 2015, he continued, the estimated number of sexual assaults based on the survey was down to 20,300, and the number of victims who were reporting was up 6,100 which indicated a reporting rate that had increased from 7% to 23%. He noted that the goal of SAPRO is to increase the proportion of Service members who choose to report every year.

Next, Dr. Galbreath described some of the differences between male and female victims. He said that men are more likely to experience sexual assault at the hands of multiple offenders and are more likely than women to experience it during duty hours. He suggested that they are also more likely to describe what they experienced as “hazing.” Additionally, men are less likely to have been drinking. He said that 90% of sexual assaults in the military occur between people who know each other, which he said is what makes it such a huge readiness issue.

Dr. Galbreath explained that in the early years of the program, only about 13-15% of restricted reports were converted to unrestricted, but in the past couple of years that has increased to 20-21% which he believes indicates that people are more willing to participate in the military justice system. He said that the reason for conversions is not tracked, so they can’t say exactly why the numbers are increasing.

Mr. Kramer observed that there has also been a very large increase in the numbers of restricted reports and asked Dr. Galbreath if he knows why. Dr. Galbreath suggested that the restricted report gives victims a protected way to find out more about the process and resources available. Brigadier General Schwenk noted that the SVC program was launched in recent years and could affect reporting. Dr. Galbreath agreed and added that one change he has seen as a result is that victims convert their reports more quickly than previously, and if they don’t convert within the first month, they are unlikely to do so at all.

Mr. Markey asked how many of the cases that are converted from restricted to unrestricted move through the prosecution stage. Dr. Galbreath replied that this is a research project he has planned now that he has three years’ of data in the DSAID system to review, but he has not yet done so.

Dr. Galbreath then discussed SAPRO’s case disposition data. He said that of the 6,083 reported sexual assaults in FY 2015, about 25% were restricted reports that remained restricted. He explained that because the investigations of the unrestricted FY 2015 reports are not necessarily completed in FY 2015, trends in the disposition of these reports cannot be analyzed based on SAPRO data.

The next issue he discussed is the “substantiation” of allegations. Dr. Galbreath said that to the Department of Defense, substantiation means that evidence existed for commanders to take some kind of action based on the allegation. He indicated that substantiation in this context covers any criminal misconduct, even if it does not include the alleged sex offense.

Dr. Galbreath then reviewed his “waterfall” case disposition slides which indicated that of the 6,083 reports in FY 2015, 2,200 of those reports did not have dispositions by the end of the fiscal year, 2,783 did have dispositions, and the rest were not actionable because there was no jurisdiction under the UCMJ, or the case was handled by civilian or foreign jurisdictions. Of the 2,783 FY 2015 reports that did have dispositions, 926 cases resulted in charges preferred, 303 resulted in non-judicial punishment, and 208 resulted in adverse administrative actions. He added that there were 250 cases where the victim declined to participate, and 420 cases with insufficient evidence.

Ms. Garvin asked about the 73 unfounded allegations from FY 2015 and what definition of unfounded was being used. Dr. Galbreath replied that unfounded means that evidence existed that the crime did not occur, or that the accused did not commit the crime, or that the crime was baseless, meaning that it was improperly reported as a sexual assault and was actually something else.

Dr. Galbreath discussed the statistics on convictions, noting the SAPRO records were merely the “wave tops” of what is happening in the justice system and that the JPP and RSP looked more closely at the details of court-martial dispositions. He reported that DSAID can provide information on what happened to the penetrative or non-penetrative crimes if they were convicted and what was the most serious crime the accused was convicted of as required by Congress, but the granularity the legal system is interested in is not available in DSAID.

He noted that DSAID is primarily used by SARCs and victim advocates for case management and that legal officers input case dispositions into the system. He added that DSAID uploads information on unrestricted reports directly from the MCIOs and that SARCs load the information on restricted reports, noting there is no personally identifying information in the system for restricted reports.

Mr. Markey asked whether the MCIOs enter information into DSAID and whether it is used as an investigative tool to link cases through offenders. Dr. Galbreath indicated that the MCIOs enter data into their own systems that then interface with DSAID and that DSAID is not used by investigators for intelligence.

The last issues Dr. Galbreath discussed were reprisal, mistreatment, and ostracism, which has been an unintended consequence of trying to increase reporting of sexual assault. He noted that in 2014, two-thirds of women who experienced sexual assault in the previous year and made a report received a negative outcome or negative behavior associated with making the report. From the 2015 survey of the Reserve component, Dr. Galbreath explained that 41% of those who indicated they experienced sexual assault in the preceding 12 months didn’t experience any negative outcome associated with making the report. Thirty-six percent indicated that they experienced negative behavior that would qualify as retaliatory and 23% experienced negative behavior, but not rising to the level of retaliation.

DAC-IPAD Strategic Planning Session

Chair Bashford noted that Committee Member Kathleen Cannon, who could not attend the meeting, had submitted a letter to the Committee and that Judge Brisbois had also submitted materials for the planning session. She asked Judge Brisbois to begin the discussion.

Judge Brisbois asked that the staff go through the bullet points in his document to identify where sources of information to answer his questions already exist and what they are. In light of the reviews that the RSP and JPP have conducted, Judge Brisbois suggested that this Committee could take a longer view and evaluate how well the changes already made are working and functioning.

Another observation offered by Judge Brisbois is that there is a considerable social, cultural aspect to the issue, particularly in light of the age demographic of 18 and 19 year olds who are coming out of a high school social environment where they are already misusing social media with sexting and nonconsensual publication of pictures and other material.

He indicated that he took what he heard at the January meeting and tried to incorporate the ideas into the planning document he developed as a starting point for discussion. He noted that from what was heard at today's meeting, some of the information is already available or will be collected soon. He suggested that the July meeting be devoted almost exclusively to strategic planning.

Chair Bashford also noted that from the information the Committee heard at the meeting, there is a lot of data that has been collected already and she asked Dr. Spohn to offer any suggestions about what the Committee should use the data for.

Dr. Spohn responded that there are more questions raised than answered by the data that has been analyzed so far. She recommended looking into differences across the Services and trying to understand why they exist and whether they can be attributed to different policies and practices or to levels of resources or differential training. She also expressed interest in the civilian versus military issue and looking more closely at cases involving intimate partners and spouses and the differing outcomes. She indicated that the data she reviewed has very little information about the victim other than status and gender. She is interested to see whether victims in intimate partner and spousal relationships are more likely to refuse to cooperate. She also noted that the data presented by Dr. Galbreath does not include any of the family cases, whereas that collected by the JPP does include these cases.

Chair Bashford raised the issue of the prosecution memos and whether all the Services write them for their cases. She suggested doing an RFI for prosecution memos for a period of time for cases where they decided they didn't have enough information to go forward.

Ms. Tokash noted that the most striking piece of data she heard was the 49.8% conviction rate. She is interested in conducting a more in-depth investigation to see why – whether it might be because there are not uniform standards of prosecution in the Armed Services, or because there is a push to get sex assault cases preferred and referred, or what other factors may be in play. She suggested making a request for commanders or counsel who are involved in these cases to give the Committee a better understanding of what is happening.

Chair Bashford wondered to what extent prosecutorial discretion plays a role. She said civilian prosecutorial agencies want to see proof beyond a reasonable doubt—not that they won't take a hard case, but they aren't going to take a case that has absolutely no chance of success. She's not sure if in the current military climate the issue is that cases are being brought that shouldn't be, or whether it is fact finders who don't like the cases. She suggested there has to be some structural reason there.

Ms. Tokash observed that, based on the day's presenters, R.C.M. 306 provides some factors for the commander to consider, but not necessarily a set of prosecutorial standards to actually lodge an indictment against a Service member.

Judge Grimm noted that there is no way to measure what it means when you advise a fact finder of proof beyond a reasonable doubt. He indicated that it really goes to the prosecutor's control of a decision. He said a prosecutor won't go to a grand jury if he or she didn't think it is a solid case, and if the grand jury does indict, if the prosecutor believes the case is shaky as it gets closer to trial, he or she can dismiss. In the military, he noted, it is not the professional JAGs making the final decision. In fact, he stated, it is a command structure in which the command has been told to take these cases seriously, that they must be investigated, that they have to provide services, and that the decision not to prosecute must be reviewed by a general or flag officer.

Judge Grimm noted that if there was a 25% acquittal rate in a U.S. Attorney's office, the U.S. Attorney wouldn't be there very long. He believes there is a staggeringly large percentage of cases that go to trial in the military and noted a fundamental difference between the way the two systems operate.

Mr. Kramer brought up the issue of fact finders and how one is supposed to have a jury of one's peers, however that almost never happens in civilian court. He noted that the civilian defendant is usually much different than the jurors, but in the military the fact finders are in the same profession, and the same situation. CMSAF McKinley commented that they will be of significantly different ranks. Though, as Mr. Kramer added, they are all in the same world.

Chief McKinley raised the issue of joint deployments and basing and is interested in how that affects military justice and variances in procedures and process.

Brigadier General Schwenk emphasized the importance of subcommittees to increase the amount of work that the Committee is able to accomplish. He suggested that one subcommittee be dedicated to data and reviewing what is available in the SAPRO report and from the JPP's data collection efforts and that they identify issues for further study and brief the full Committee on what the subcommittee believes the group should address. He suggested a second subcommittee to address the "IPAD" part—the investigation, prosecution, defense, special victims' counsel, the judiciary, etc. He noted that the staff could go through and identify all of the recommendations made by the previous panels that the DAC-IPAD might follow up on. He also suggested that this subcommittee could talk to other groups and individuals to get ideas, filter and prioritize them, and present them to the full Committee.

The third subcommittee, Brigadier General Schwenk suggested, could be the broader brush covering other things like command training and things that affect the military justice process, reporting, and retaliation. He agreed that the next meeting should devote a lot of time to strategic planning.

Dean Harrison seconded Judge Brisbois' idea about looking more closely at the data. He is interested in looking beyond a one-size-fits-all approach to doing things across the five Services and for small versus large commands. He is interested in characteristics such as whether a victim

is most likely to be on his or her first tour in the military, whether an accused is most likely on a first tour or more senior, whether training commands are more likely to have sexual assaults, and whether the race of the victim or perpetrator has any impact on the outcome.

Chair Bashford added that she is interested to know what differences there are between deployed and home stations and at looking at Japan following several recent incidents there. Dean Harrison also suggested reviewing isolated commands. Mr. Kramer suggested looking at whether there is greater prevalence of sexual assault at certain installations.

Chair Bashford stated that she liked Brigadier General Schwenk's idea of the three committees and she liked the idea of looking at retaliation. She also mentioned an interest in looking at what happens to people after a report—whether they stay in the Service, are promoted, how long they stay in, etc.

Chief McKinley requested that the read-ahead materials be provided to the Committee earlier. He also indicated that one-day meetings are too short and recommended day and-a-half meetings. Chair Bashford agreed.

Mr. Markey requested clarification on the edict of the committee and the meaning of reviewing cases and giving advice. He suggested that for the case review, from his lens as an investigator, they should look to see whether there are things that are being done successfully, and whether there are some things that might be helpful to learn from the civilian world. For instance, he noted the issue of victims dropping out and asked whether there is something happening during the investigative process that is pushing victims out, and that this would be something to look at.

Another issue Mr. Markey identified is the relationships between the JAGs and the investigators. Noting the 18 to 24 month rotation of prosecutors, Mr. Markey viewed that as something that makes things frustrating for investigators. He also highlighted the importance of looking behind the numbers and asking why—why victims are dropping out, why there are low prosecution and conviction rates.

Ms. Tokash suggested bringing in the people who tried and investigated the cases that the data is from and asking them questions. Chair Bashford noted that this may be best to do in a subcommittee.

Judge Brisbois followed up on Mr. Markey's comments and suggested that the Committee hear from the authorizing legislation's authors. Mr. Markey recommended that the Committee hear from the MCIOs in all of the branches because it sounded from the testimony at the meeting that things are not being done in a standardized, consistent way across the branches.

Chair Bashford noted that the Committee didn't hear much about caseload other than a reference to SVCs having 20 to 25 cases. She would like to know how many cases investigators and defense counsel have. She also referenced the JPP's Defense resources report and expressed interest in reviewing it and following up on its recommendations.

Dr. Spohn asked if there are written protocols for investigation, prosecution, and defense of sexual assaults in the military and suggested reviewing them. Chair Bashford noted that for cold case investigations, some cold case teams have protocols, and this might be the same. Major General Anderson suggested that this would be in Service regulations which should be easy to get. Captain Tideswell offered to draft a request for information to submit to the Services.

Chair Bashford asked for the group's thoughts on subcommittees and whether the group wanted to initiate the process now or wait until the next meeting. Brigadier General Schwenk suggested that the Committee start by dividing up internally, then make a request to DoD. Chair Bashford wanted to be sure that it would be possible to add members to the subcommittees later.

Chair Bashford indicated that she would like to have some smaller groups that could meet, talk and get a sense of what they need so the same discussion doesn't have to take place in July. Ms. Garvin asked whether a subcommittee could be formed before July, or whether the groups should focus on preparatory work. Captain Tideswell offered as an option that the Committee seek the cooperation of the general counsel once the subcommittees are set and hold small group teleconferences.

Brigadier General Schwenk suggested that the staff go ahead and gather the issues that have either been addressed and where no action was taken, or was partially taken, along with the questions the Committee itself has raised so that before the meeting in July the members can see the list and have considered their views on what to prioritize for this year and for the March report, and what to look at later. He supported the idea of bringing in the MCIO experts for the July meeting. He is interested to hear about what schools they go to for training and to review a syllabus of what is taught.

Major General Anderson agreed with Chief McKinley that training is an issue that needs to be looked at for all levels of command. She noted that considerable time is spent training SARCs, but only a small sliver of time is given to the command team for this kind of training. Chief McKinley feels that if command teams across all branches were better trained on how to deal with these situations, there would probably be a higher conviction rate because victims would be willing to stay in the game and go to court and fewer would leave. Mr. Kramer added that that might lead to a lower incidence of sexual assault in the first place.

Chair Bashford asked how people felt about moving to day and-a-half meetings. Dr. Spohn suggested that subcommittees could meet for part of that time in addition to conference calls or webinars. She said that she liked the idea of the data committee.

Dean Harrison expressed interest at looking into whether the decision-making process of the commander is influenced by things other than protecting the victim and finding the truth of the allegations—such as what it will do to his or her next promotional opportunity.

Chair Bashford asked Dr. Spohn to lead the data subcommittee and she agreed. She also suggested that Ms. Long would be a good person for the subcommittee if she is available because she is working with the Urban Institute currently on developing performance measures

for prosecutors. Brigadier General Schwenk also offered to serve on the data subcommittee. Chair Bashford suggested the Committee work to establish one subcommittee to start.

Judge Brisbois stated that he doesn't have the skill set for the data committee and that with his docket, availability might be an issue for him with respect to subcommittees. He advised against having a subcommittee start the planning process and recommended that the Committee have a full day of strategic planning.

Captain Tideswell agreed to prepare a document that identifies the issues for the Committee to consider at its July meeting.

Mr. Markey offered to develop and coordinate a subcommittee that looks at investigations, identifies performance indicators, and develops a definition of case reviews. Chair Bashford noted that Ms. Cannon indicated in her letter that she is interested in looking at staffing resources and impediments to the defense and she added that it is important to cross-pollinate expertise on the subcommittees.

Brigadier General Schwenk suggested establishing a case review subcommittee to come back in July with ideas for how the case reviews should work. Judge Brisbois disagreed, noting that the definition of case review is one of the strategic planning issues along with the purpose and goal that the whole Committee needs to consider before launching a subcommittee.

Ms. Tokash suggested having the Committee conduct the case review and identify issues to develop the subcommittees. Brigadier General Schwenk suggested that any interested Committee member could come in to go through case records with a subcommittee.

Judge Brisbois believes that the Committee needs to decide what to look for in the case reviews and what a case review means because that is the fundamental foundational strategic plan that drives everything for the next three-and-a-half years.

Captain Tideswell suggested that the first time block for July could be for the development of a definition of case review. Chair Bashford agreed and suggested everyone start thinking of what that would best look like. Judge Brisbois indicated that he envisions no briefings for the July meeting, so a one-day meeting should be sufficient. Chair Bashford asked Captain Tideswell to find out from Committee members whether it would be feasible for people to come in a day earlier.

Ms. Tokash asked if the members could submit their ideas to the Committee through the director. Captain Tideswell asked that everyone send their thoughts individually to her and she will compile them together for the group to receive ahead of the meeting. The DFO added that the Committee Chair should also be copied.

Public Comment

There were no public comments.

The DFO closed the public meeting at 5:17 p.m.

CERTIFICATION

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



Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of DAC-IPAD Public Meeting, Friday, April 28, 2017, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

2. Table of Contents
3. Public Meeting Agenda
4. Public Meeting Speakers' Biographies
5. Military Justice Process: Disposition Decisions, Courts-Martial, and Alternative Outcomes – DAC-IPAD Briefing, April 28, 2017
6. Abbott Sample Case File
7. Presentation on the Mechanics of a Military Sexual Assault Case, Documents and Forms
8. National Defense Authorization Act (NDAA) Provisions Regarding the Department of Defense Annual Report on Sexual Assault, Fiscal Years 2011 - 2017
9. Adjudication of Sexual Assault Offenses: 2015 Data, Cassia Spohn, Ph.D.
10. Sexual Assault Prevention and Response, Nate Galbreath, Ph.D., MFS, Deputy Director
11. DoD Sexual Assault Prevention and Response Office, Fiscal Year 2015 Reports of Sexual Assault, Completed Investigations, and Subject Dispositions
12. Some Initial General Thoughts for Consideration in Developing a Structure for a 4+ Year Work Plan for DAC-IPAD, by Committee Member Leo Brisbois
13. Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-PAD) Committee Planning Session Outline
14. Letter to the Committee from Ms. Kathleen B. Cannon, Committee member

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

**July 21, 2017
Public Meeting**

Speakers' Biographies

Ms. T. L. Williams, U.S. Army, Chief, Policy Branch, United States Army Criminal Investigation Command (CID), retired from the U.S. Army as a chief warrant officer 5, and began her current duties in December 2013. She writes, reviews, and supervises policies and procedures for criminal investigations. She has served on working groups concerning sexual assaults, child abuse and sexual assaults, and retaliation and reprisals associated with sexual assaults. Previous significant duty assignments include protective services as a personnel security officer for the Chairman of the Joint Chiefs and Secretary of Defense; Commander of the 20th Military Police Detachment in Korea; Battalion Operations Officer (at Fort Campbell and Iraq), as a special agent with Hurricane Andrew Relief and body recovery at the Pentagon during 9/11. She culminated her military career in 2008 - 2013 as the Regimental Chief Warrant Officer and the Command Chief Warrant Officer. During her military career she personally investigated and supervised countless numbers of sexual assaults, homicides and other felonies.

Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Investigations, Air Force Office of Special Investigations, is responsible for overseeing agency policy, training and resources in support of the Air Force Office of Special Investigation's (AFOSI) worldwide mission to investigate major crime and counterintelligence matters affecting Air Force personnel and resources. The AFOSI is an agency with over 2,000 credentialed federal law enforcement investigators assigned to over 200 worldwide locations. Mr. Poorman has been an AFOSI special agent for 37 years; 20 years on active duty and 17 years as a Department of the Air Force civilian employee.

Mr. Michael J. DeFamio, U.S. Navy, Division Chief, Family and Sexual Violence Division, Naval Criminal Investigative Service (NCIS) Headquarters, is a special agent responsible for the development and implementation of NCIS policy related to sexual offense investigations and domestic violence crimes. He provides guidance to the field units on all levels of sexual assault crimes investigated by NCIS. Mr. DeFamio, a prior enlisted member of the U.S. Army, has served in various overseas locations, including: Korea, Japan, Indonesia, Iraq, and aboard a U.S. aircraft carrier. In all of his NCIS assignments, Mr. DeFamio has been involved in a variety of felony-level criminal investigations.

Ms. Beverly A. Vogel, U.S. Coast Guard Investigative Service, Sex Crimes Program Manager, is a senior special agent, assigned as the Coast Guard Investigative Service (CGIS) Sex Crimes Program Manager. Ms. Vogel has 19 years of combined federal and local law enforcement experience. She serves as the subject matter specialist for the CGIS Sex Crimes Program and is responsible for the development of policies, procedures and protocols in support of the U.S. Coast Guard (USCG) Sexual Assault Prevention and Response programs, as mandated by the Commandant of the USCG. She has worked tirelessly to promote and forge relationships with other federal, state and local law enforcement agencies, collaborating with specialized victims' rights and sex crimes divisions within those agencies, as well as with victim advocacy, legal, medical, forensic and other specialists who work in Sexual Assault Prevention and Response-related fields. These efforts include the creation of the CGIS Family and Sexual Violence Investigator program, which provides almost three dozen CGIS special agents with that special designation. Ms. Vogel has 32 years of active, reserve, and civilian experience working with the USCG.

**Summary of Regulations and Reports
Related to Sexual Assault Investigations in the Armed Forces**

A. Regulations

- 1. DoD Instruction 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (March 22, 2017), available at <http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf>**

This instruction establishes policy and procedures and assigns responsibility for the investigation of adult sexual assault within the Department of Defense (DoD). Military Criminal Investigation Organizations (MCIOs) are required to initiate a criminal investigation into all allegations of adult sexual assault of which they become aware. All reports that meet the elements of a sexual offense and have a DoD nexus must be investigated. Only an investigator with the MCIO may conduct the formal victim interview, but other DoD law enforcement personnel may assist the MCIOs.

The instruction also establishes the requirement for a working relationship between the MCIOs and the Sexual Assault Prevention and Response Office (SAPRO) and Family Advocacy Program, as well as the participation of the MCIOs in the monthly sexual assault case management group meetings. The MCIOs are responsible for providing information to SAPRO for its database.

- 2. DoD Instruction 5505.19, Establishment of Special Victim Investigation and Prosecution (SVIP) Capability Within the Military Criminal Investigative Organizations (MCIOs) (Incorporating Change 1) (September 4, 2015), available at <http://www.dtic.mil/whs/directives/corres/pdf/550519p.pdf>**

DoD issued this instruction to the MCIOs outlining the SVIP statutory requirement for specially trained investigators to work collaboratively with judge advocates and other personnel who respond to sexual assault cases. The instruction requires that an investigator make initial coordination with the other members of the SVIP capability within 24 hours; coordination must continue, at a minimum, on a monthly basis. The Office of the Inspector General is responsible for assessing the investigations to ensure that required coordination is made in a timely manner and that the investigators assigned to the cases are properly trained and certified.

- 3. Department of Defense, Directive-Type Memorandum (DTM) 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support (Incorporating Change 4) (April 3, 2017), available at http://www.dtic.mil/whs/directives/corres/pdf/DTM14003_2014.pdf**

DoD published this memorandum to the Services directing the Judge Advocates General to ensure they have specially trained prosecutors, paralegals, and victim witness personnel available to work collaboratively with the MCIOs in order to comply with Section 573 of the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA). Section 573 of the FY13 NDAA required DoD and the Services to implement a Special Victim Capability,¹ consisting of specially trained prosecutors, investigators, paralegals,

¹ To avoid confusion with the Special Victims' Counsel (SVC) program, DoD and the Services now refer to the

and victim witness personnel, that would provide a distinct, recognizable group to investigate and prosecute adult sexual assault offenses. The memorandum outlines required coordination and training.

4. DoD Instruction 5505.03, Initiation of Investigations by Defense Criminal Investigative Organization (Incorporating Change 2) (February 13, 2017), available at <http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf>

This instruction outlines the primary duty of the Defense Criminal Investigative Organizations: to provide commanders with fact-based, unbiased investigative findings. The investigative organizations are charged with opening an investigation on all felony offenses for which there is a DoD nexus (which may be based on location, involvement of military property or personnel, and support of the DoD mission). This instruction also details the requirement that the investigative organizations comply with the FBI National Law Enforcement Data Exchange through an automated records management system. The investigative organizations are instructed not to formulate an investigative conclusion; legal coordination is documented in the final investigative report.

5. Coast Guard Commandant Instruction 5520.5F, Coast Guard Investigative Services Roles and Responsibilities (November 30, 2011), available at https://media.defense.gov/2017/Mar/14/2001716375/-1/-1/0/CI_5520_5F.PDF

This Coast Guard instruction² specifies the roles and responsibilities of the criminal investigative arm of the Coast Guard. The Coast Guard Investigative Service (CGIS) is an independent centralized investigative agency responsible for the investigation of felony crimes; the CGIS provides commanders with the facts of reported criminal incidents to include sexual assault.

Special Victim Capability as the Special Victim Investigation and Prosecution (SVIP) Capability.

² The Department of Defense instructions do not apply to the Coast Guard Investigative Service (CGIS), as the Coast Guard is part of the Department of Homeland Security. However, CGIS conducts its basic agent training with the Naval Criminal Investigative Service (NCIS) and attends advanced sexual assault training offered by all Services.

B. Reports

- 1. DoD Office of the Inspector General, Evaluation of the Military Criminal Investigative Organizations' Adult Sexual Assault Investigations (DoDIG-2017-054) (February 14, 2017), available at http://www.dodig.mil/pubs/report_summary.cfm?id=7286**

The DoD Office of the Inspector General (DoDIG) evaluated 378 MCIO adult sexual assault investigations opened on or after January 1, 2014 and completed on or before December 31, 2015 to determine if the investigations were conducted in accordance with current guidance. The report found that only two of the cases reviewed had significant deficiencies. Additionally, the report found that the MCIOs had implemented recommended actions from previous reports.

*Note: This was the third DoDIG evaluation of the MCIO adult sexual assault investigations. The previous evaluations were published in 2013 and 2015.

- 2. DoD Office of the Inspector General, Evaluation of the Military Criminal Investigative Organizations' Adult Sexual Assault Investigation Policy (DoDIG-2014-108) (September 16, 2014), available at <http://www.dodig.mil/pubs/documents/DODIG-2014-108.pdf>**

The DoDIG evaluated the MCIOs' adult sexual assault investigation policies to determine whether the policies align with DoD requirements, Service requirements, and accepted law enforcement investigative standards. The evaluation found that the MCIOs' investigative policies align with DoD and Service requirements and consider nearly all of the investigative actions suggested by the International Association of Chiefs of Police (IACP) guidance for the investigation of sexual assault.

- 3. DoD Office of the Inspector General, Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigation Training (DoDIG-2013-043) (September 16, 2014), available at http://www.dodig.mil/pubs/report_summary.cfm?id=5041**

The DoD IG evaluated the MCIOs' sexual assault investigation training to determine whether the training adequately supports the MCIOs' investigative mission. The review sought to determine what training was provided, how effectiveness is determined, and how resources are leveraged. The evaluation found that each MCIO provides initial baseline training, advanced training, and annual training geared specifically at sexual assault investigations. The DoD IG has developed common training criteria for all levels of sexual assault training and increased efforts to leverage training resources and expertise. (At the time of the evaluation, the Army had a two week program and was providing the same training with minor modifications to the Navy at the Federal Law Enforcement Training Center. Since the publication of this evaluation, the Navy and the Air Force have developed their own advanced sexual assault training programs.)

4. Government Accountability Office (GAO), Military Justice: Oversight and Better Collaboration Needed for Sexual Assault Investigations and Adjudications (GAO 11-579) (June 2011), available at <https://www.gao.gov/products/GAO-11-579>

The GAO was asked to address the extent to which (1) the DoD conducts oversight of the MCIOs and (2) the Services provide resources for investigations and adjudications of alleged sexual assault incidents. The GAO found that there was no evidence that the DoDIG had provided oversight of the sexual assault investigations of the MCIOs. Furthermore, the GAO found that the MCIOs and judge advocates were not collaborating sufficiently during the investigations and in developing training. The GAO recommended better oversight by the DoDIG and the development of policies that better leverage expertise and resources for the investigation and adjudication of sexual assault cases.



DoD INSTRUCTION 5505.18

INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE

Originating Component:	Office of the Inspector General of the Department of Defense
Effective:	March 22, 2017
Releasability:	Cleared for public release. Available on the DoD Issuances Website at http://www.dtic.mil/whs/directives .
Reissues and Cancels:	DoD Instruction 5505.18, "Investigation of Adult Sexual Assault in the Department of Defense," January 25, 2013, as amended
Approved by:	Glenn A. Fine, Acting Inspector General of the Department of Defense

Purpose: This issuance, in accordance with DoD Directive (DoDD) 5106.01:

- Establishes policy, assigns responsibilities, and provides procedures for the investigation of adult sexual assault within the DoD, in accordance with the authority in the Inspector General Act of 1978, as amended, of Title 5, United States Code (U.S.C.), Appendix.
- Establishes the processes and procedures for the use, maintenance, and protection of certain information from a Restricted Report of adult sexual assault obtained by the military criminal investigative organizations (MCIOs) after the victim has elected to provide such information, but without affecting the restricted nature of the report, in accordance with Section 543 of Public Law 113-291.
- Establishes an exception to the initiation of an adult sexual assault investigation by an MCIO when information is received in accordance with Section 543 of Public Law 113-291.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This issuance applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the “DoD Components”).

1.2. POLICY.

a. MCIOs will initiate a criminal investigation in response to all allegations of adult sexual assault, as defined in the Glossary, of which they become aware that occur within their jurisdiction, except under the provisions of Paragraph 3.6.

b. Other DoD law enforcement activity (LEA) resources, as defined in the Glossary, may assist MCIOs while MCIOs investigate offenses of adult sexual assault provided they meet the training requirements established in Paragraph 3.3. First responders and LEA resources have the responsibility to identify the alleged sexual assault victim(s) and the location of the crime scene(s) to prevent the possible loss or contamination of evidence as well as determine jurisdictional responsibility. While first responders and LEA resources may have initial contact with the alleged sexual assault victim(s) in order to obtain this information, only the MCIO will conduct the formal victim interview.

c. Nothing in this instruction is intended to impinge on the authority of the IG DoD.

1.3. INFORMATION COLLECTIONS.

a. The “Catch a Serial Offender” (CATCH) Program Restricted and Unrestricted Reports, referred to in Paragraphs 2.2(d), 3.3.(a) (23) and 3.6 of this issuance, have been assigned Office of Management and Budget (OMB) Control Number 0703-XXXX in accordance with the procedures in Volume 2 of DoD Manual 8910.01. The expiration date of this information collection is listed on the OMB Website at

<http://www.reginfo.gov/public/jsp/PRA/prDashboard.jsp>.

b. The Defense Sexual Assault Incident Database (DSAID), referred to in Paragraph 2.2.g. of this issuance, has been assigned OMB Control Number 0704-0482 and is prescribed in DoDI 6495.02. The expiration date of this information collection is listed on the OMB Website at <http://www.reginfo.gov/public/jsp/PRA/prDashboard.jsp>.

c. Department of Defense (DD) Form 2911, referred to in Paragraph 3.4. of this issuance, does not require licensing with a report control symbol or an OMB control number in accordance with Paragraphs 1.b.(1) and 1.b.(13) of Volume 1 of enclosure 3 of DoD Manual 8910.01 and Paragraphs 8.a.(2)(a) and 8.b.(5) of enclosure 3 of Volume 2 of DoD Manual 8910.01, respectively.

SECTION 2: RESPONSIBILITIES

2.1. IG DOD. The IG DoD will develop policy and procedures for MCIO adult sexual assault investigations and provide oversight pursuant to DoDD 5106.01.

2.2. OSD AND DOD COMPONENT HEADS. The OSD and DoD Component heads ensure:

- a. Compliance with this issuance and prescribe additional procedures as necessary to implement its policy.
- b. All allegations of adult sexual assault are immediately reported to the appropriate MCIO. This includes allegations made by persons affiliated with the DoD, including active duty personnel and their dependents, DoD contractors, and DoD civilian employees.
- c. Procedures exist that allow eligible victims of alleged sexual assault to have, at their request, their allegation handled as a Restricted Report in accordance with DoDD 6495.01 and DoDIs 6400.01 and 6400.06. This reporting option must be explained to all eligible victims by a Sexual Assault Response Coordinator (SARC) or Sexual Assault Prevention and Response (SAPR) VA.
- d. Adequate resources are established to manage the CATCH Program.
- e. The commander of the Service member who is a subject of investigation provides the MCIO, in writing, all disposition data, within 2 business days of disposition, to include:
 - (1) Any administrative, non-judicial punishment, or judicial action that occurs as a result of the investigation; or
 - (2) A declination of command action when no action is taken.
- f. MCIOs participate as members in the monthly installation SAPR Case Management Group meeting in accordance with DoDI 6495.02 and the Family Advocacy Program Incident Determination Committee in accordance with Paragraph 2.b.(5) of enclosure 3 of Volume 3 of DoD Manual 6400.01.
- g. MCIOs provide SARCs with the MCIO case number required for SARCs to enter information into the DSAID within 48 hours of the initiation of an investigation. In deployed locations that have internet connectivity issues, the timeframe is extended to 96 hours.

SECTION 3: PROCEDURES

3.1. COORDINATION AND NOTIFICATION REQUIREMENTS.

a. To ensure system accountability and collaboration, the MCIO investigator assigned as the lead investigator to an adult sexual assault investigation will notify each member of the Special Victim Investigation and Prosecution (SVIP) Capability, as required by DoDI 5505.19.

b. To ensure eligible victims of alleged sexual assaults are aware of and afforded the assistance available to them:

(1) In accordance with Section 534 of Public Law 114-92 (codified in 10 U.S.C. § 1044e(f)), the victim of an alleged sexual assault who is eligible for representation by a special victims' counsel/victims' legal counsel (SVC/VLC) must be advised of the availability for representation by an SVC/VLC.

(a) This notice must occur before an MCIO investigator interviews or requests a statement from the individual regarding the alleged sexual assault unless exigent circumstances apply, such as the need to collect evidence that is subject to degradation (e.g., sexual assault forensic exams and deoxyribonucleic acid (DNA) collection); process a crime scene(s); or prevent or mitigate a serious and imminent threat to the health or safety of the victim of the alleged sexual assault or another person.

(b) The MCIO investigators must document this notification to the victim or the exigent circumstances that delayed notification to the victim in the investigative file.

(2) In accordance with Section 1044e of Title 10, U.S.C., victims of alleged sexual assaults who are eligible for representation by an SVC/VLC are entitled to have SVC/VLC representation during any proceeding in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense. If desired, victims of alleged sexual assault may also have their SARC or Sexual Assault Prevention and Response Victim Advocate (SAPR VA) present. MCIOs will document the date and time the SVC or VLC was notified and when they respond. Any delay or unavailability of the SVC or VLC must also be documented in the investigative file.

c. In accordance with DoDI 1030.2, the MCIO investigator assigned to conduct the adult sexual assault investigation will ensure the victim and, as appropriate, any witness(es) interviewed, have received a completed DD Form 2701, "Initial Information for Victims and Witnesses of Crime." If the victim has not yet received a DD Form 2701, the investigator must provide one to the victim and explain the information in the form. (All DD Forms referred to in this instruction may be found at <http://www.dtic.mil/whs/directives/informgt/forms/index.htm>.) The MCIO investigator must document the provision of the DD Form 2701 to victims and witnesses in the investigative file.

d. Victims and witness(es) must be notified of their reporting options if allegations of retaliation or reprisal surface that can reasonably be attributed to the sexual assault investigation.

If such allegations do not fall under the purview of the MCIO, the victim(s) and witness(es) must be referred to the appropriate DoD Component in accordance with DoDD 7050.06. If the retaliation or reprisal allegation is considered a felony level allegation and under the purview of the MCIO, the MCIO will investigate.

e. When an MCIO initiates an adult sexual assault investigation, it will also initiate and conduct subsequent investigations related to alleged criminal act(s) directed toward a victim or witness(es) that could reasonably be related to the sexual assault matter under investigation. Related criminal conduct may include, but is not limited to, a communicated threat(s), physical assault(s), intentional damage to property, stalking, violation of a no-contact order, etc.

f. If an adult sexual assault allegation is referred to another law enforcement agency, the reason must be fully documented in an investigative file that identifies the agency and states whether or not the MCIO will be involved in either a joint investigation or monitoring capacity.

g. When an MCIO receives credible information from a military confinement facility regarding a report of sexual assault of a prisoner, the MCIO will initiate an investigation, if it is within the jurisdiction of the MCIO, in accordance with Chapter 147 of Title 42, U.S.C., also known and referred to in this issuance as the “Prison Rape Elimination Act (PREA) of 2003”; Title 28 Code of Federal Regulations (CFR) Part 115; DoDI 1325.07; and the July 6, 2015 Acting Under Secretary of Defense for Personnel and Readiness Memorandum.

3.2. INSTALLATION LEA RESOURCES. In accordance with Paragraph 1.2.b., other DoD installation LEA resources may assist MCIOs while MCIOs investigate offenses of adult sexual assault under the following requirements:

a. Only the MCIOs will conduct the formal victim interview.

b. The investigation will be considered an MCIO investigation and the responsible MCIO will provide direct supervision of all investigative work conducted by the DoD LEA resources.

c. Under no circumstances may an MCIO refer an adult sexual assault investigation to an installation LEA regardless of the severity of the allegation.

d. When LEA resources assist MCIOs with sexual assault investigations, the MCIO investigator will maintain full responsibility for the investigation and assign tasks. Before assisting the MCIOs, the LEA resources will receive training on the topics required in Paragraph 3.3. by a certified MCIO sexual assault investigator. Ideally, the LEA resources will receive the same training and certification as outlined in DoDI 5505.19, which is required for MCIO sexual assault investigators.

e. All criminal investigative files will be maintained in accordance with DoD privacy policies in DoDD 5400.11 and DoD 5400.11-R.

f. All adult sexual assault investigations assumed by an MCIO will be investigated thoroughly and in compliance with DoDIs 5505.03, 5505.07, 5505.11, 5505.14, 5505.17, and 5505.19, in consideration of jurisdiction involved.

3.3. TRAINING.

a. The MCIO investigator(s) and the supporting LEA resources assigned to conduct an investigation of adult sexual assault, including first responders, must be properly trained in conducting such investigations. Section 585 of Public Law 112-81 (codified in 10 U.S.C. § 1561 note) requires the creation of a consistent training curriculum regarding sexual assault prevention and response for MCIO investigators, LEA resources, and other first responders assigned to respond to and investigate adult sexual assault. In accordance with that requirement, training will, at a minimum, include:

- (1) Legal jurisdiction for conducting criminal investigations.
- (2) The elements of proof for criminal offenses associated with sexual assault.
- (3) Preliminary investigative procedures, including receiving and responding to notification of a sexual assault.
- (4) Crime scene management to include searching for, locating, identifying, preserving, obtaining, and transporting evidence.
- (5) Sensitivities associated with victims of alleged sexual assault, including, but not limited to:
 - (a) Specific effects of trauma and stress on the victim of an alleged sexual assault.
 - (b) Balancing investigative priorities with needs of the victim of an alleged sexual assault.
 - (c) The provision that victims of alleged sexual assaults may have a SARC, SAPR VA, domestic abuse victim advocate, SVC/LVC, or a support person present during interviews.
 - (d) The various methods used in the practice of interviewing victims of alleged sexual assaults in DoD.
- (6) Sexual assault forensic examination collection and submission.
- (7) DNA collection for criminal investigations.
- (8) Comprehensive instruction in SAPR policy, to include:
 - (a) Differences between Unrestricted and Restricted Reporting.
 - (b) SARC and SAPR VA roles, responsibilities, and limitations.
 - (c) SAPR Case Management Group responsibilities for MCIOs.
 - (d) Responsibilities to provide data elements to the SARC for timely entry into DSAID.

(9) Comprehensive instruction in Family Advocacy Program policy for first responder training requirements and Restricted Reporting.

(10) Victim Witness Assistance Program.

(11) Military protective orders.

(12) Expedited transfers and corresponding MCIO responsibilities.

(13) Military Rules of Evidence (MRE) privileges, in particular MRE 513 “Psychotherapist-Patient Privilege,” and MRE 514, “Victim Advocate-Victim and Department of Defense Safe Helpline Staff-Victim Privilege” in the MRE section of the Manual for Courts-Martial.

(14) Legal assistance for victims of sexual assault in accordance with Sections 1044e and 1565b of Title 10, U.S.C.

(15) Digital evidence.

(16) Handling false reports and official statements.

(17) Alcohol-related incidents.

(18) The use of IG DoD administrative subpoenas in accordance with the Inspector General Act of 1978, as amended.

(19) The use of technical listening and recording equipment in accordance with DoDI 5505.09.

(20) The use of personally identifiable information (PII) in accordance with DoDI 5505.17.

(21) PREA reporting in accordance with PREA.

(22) Reprisal and whistleblower policy and procedures in accordance with DoDD 7050.06.

(23) Policies and procedures associated with the CATCH Program, pursuant to Section 543 of Public Law 113-291.

(24) Policies and procedures associated with DoDI 5505.19.

b. MCIOs will consider aligning training with Council of Inspectors General on Integrity and Efficiency Quality Standards for Investigations, as appropriate.

3.4. INVESTIGATIVE FILE.

a. All MCIO documentation generated as part of the adult sexual assault investigative report, to include case notes, the case activity record, the DD Form 2911, "DoD Sexual Assault Forensic Examination Report," and the investigative plan, will be retained for a period of 50 years in accordance with Section 541 of Public Law 114-92. When MCIOs are not the lead investigative agency in joint investigations, disposition data must be obtained from the lead investigative agency and archived in the final investigative report or database in accordance with Section 577(b)(8) and (9) of Public Law 108-375 (codified in 10 U.S.C. § 1561 note) and Section 563 of Public Law 110-417.

b. MCIOs must include the DD Form 2911 or reports from civilian sexual assault forensic exams conducted at civilian healthcare facilities (when DoD retains jurisdiction) as part of the archived file. If creating digital records, the DD Form 2911 will be uploaded as part of the archived file.

c. All MCIOs will make available unrestricted sexual assault data elements, including the investigative case number, for incorporation into the DSAID, in support of requirements specified in DoDD 6495.01 and DoDI 6495.02.

3.5. EVIDENCE.

a. In accordance with Section 586 of Public Law 112-81 and Section 538 of Public Law 113-291 (codified in 10 U.S.C. § 1561 note), in all investigations conducted by MCIOs as lead investigative agency and relating to sexual assault allegations involving Service members, as defined in the Glossary, all physical and forensic evidence must be retained for a period of at least 5 years from the date of seizure of the evidence. However, the personal property retained as evidence may be returned to the rightful owner of such property before the 5-year period only:

(1) After written evidence disposition is obtained from the senior attorney or designated representative.

(2) When:

(a) It is determined that the allegation is unfounded, i.e., the crime did not occur or it was determined through investigation to be a false allegation;

(b) The evidence is taken from a suspect who is later deemed to be the wrong person, i.e., mistaken identity; or

(c) All legal, adverse action, and administrative proceedings related to such allegation in accordance with Section 538 of Public Law 113-291 (codified in 10 U.S.C. § 1561 note) have concluded.

b. Personal property items gathered as evidence which are digital or electronic in nature may be returned to the rightful owner if a forensic copy of the digital or electronic evidence stored on

or accessed through an electronic device has been made. The copy must be obtained in a forensically sound manner sufficient for command action or prosecution.

3.6. CATCH PROGRAM.

a. Per the Deputy Secretary of Defense Memorandum, the Secretary of the Navy (SECNAV) was designated as the Executive Agent for the implementation of the CATCH Program.

b. Participation in the CATCH Program is voluntary. The information provided to the CATCH Program will not be acted upon unless the victim of the alleged sexual assault changes their reporting option to unrestricted and agrees to participate in the investigation. The victim may opt out at any time. The victim information (to include name, other PII, and contact information) will not be provided to the MCIO for an initial CATCH Program report. The victim will be assigned a unique identifying number by the SARC. This number will then be provided to the MCIO for tracking purposes.

c. CATCH Program information received by an MCIO will be catalogued on a centralized, restricted, Naval Criminal Investigative Service server.

(1) Designated MCIO investigators and analysts will use automated tools to conduct appropriate database inquiries to determine if the information of suspects identified in the CATCH Program can be attributed to a subject in an unrestricted investigation of sexual assault allegation or another restricted CATCH Program data entry.

(2) Website procedures developed to implement the CATCH Program will preserve the presumption of innocence for suspects.

(3) Information concerning the identity of a suspect may not be disclosed to the victim or suspect's chain of command, or any other individual, without a need to know. It may not be used for any purpose related to the suspect's assignment, training, or advancement unless the reporting option is changed to Unrestricted by the victim and an MCIO initiates an investigation.

(4) Information will be retained for a period of 10 years from the date of the input of data or the last date of any query of data.

(5) Any PII reported to the MCIO will be protected in accordance with DoDI 5505.17, DoDD 5400.11, DoD 5400.11-R, and Office of Management and Budget Memorandum M-07-16.

(6) The CATCH Program Website will be sequestered from unauthorized users in order to protect the integrity of the data.

d. If there are multiple victims tied to one perpetrator, and one of those victims changes their mind and changes their reporting option to unrestricted, the MCIO may investigate that allegation.

e. Pursuant to Section 543 of Public Law 113-291, an individual who files a Restricted Report of sexual assault has the option to submit details of the incident to the appropriate MCIO via their SARC. Such information will be submitted anonymously and without affecting the restricted nature of the report. The information obtained by the MCIO will be used in an effort to identify individuals who are suspected of perpetrating multiple sexual assaults.

(1) Information received via the CATCH Program will not trigger an investigation unless the victim(s) of the alleged sexual assault agree to convert their reporting option from Restricted to Unrestricted. If the victim(s) of the alleged sexual assault change their reporting option to Unrestricted, the MCIO will proceed in accordance with the requirements in Paragraph 3.6.

(2) If the reporting option is changed to Unrestricted, the SVC/VLC must be notified before the MCIO proceeds with any investigation. If the victim is not represented by an SVC/VLC, the cognizant Victim Advocate must be notified.

(f) The Naval Criminal Investigative Service (NCIS) is designated as the supported MCIO for collection, access, and use of CATCH Program data.

(1) NCIS has the authority to, unless otherwise directed by the SECNAV or his or her designee, direct support for the CATCH Program from supporting MCIOs. All other MCIOs are designated as supporting agencies.

(2) Provides overall program management for the DoD's use of the CATCH Program.

(3) Provides DoD oversight for the CATCH Program, consistent with Paragraph 3.6 of this issuance, including developing and overseeing policy for access, programming, and account management controls for the CATCH Program.

(4) Develops and conducts training for assigned, employed, and detailed personnel before initial access to the CATCH Program consistent with the requirements of this issuance and DoDD 5400.11, DoD 5400.11-R, and DoDI 5505.17.

(5) Establishes guidance and procedures as necessary to ensure that the DoD Components and DoD personnel with access to the CATCH Program receive training in the proper use of and safeguards for the CATCH Program.

GLOSSARY

G.1. ACRONYMS.

CATCH	Catch a Serial Offender Program
DD	Department of Defense (form)
DoDD	DoD directive
DoDI	DoD instruction
DSAID	Defense Sexual Assault Incident Database
IG DoD	Inspector General of the Department of Defense
MCIO	military criminal investigative organization
MRE	Military Rules of Evidence
OMB	Office of Management and Budget
SAPR	sexual assault prevention and response
SAPR VA	sexual assault prevention and response victim advocate
SARC	sexual assault response coordinator
SVC	special victims' counsel
U.S.C.	United States Code
VLC	victims' legal counsel

G.2. DEFINITIONS. Unless otherwise noted, these terms and their definitions are for the purposes of this issuance.

adult. A person who has attained the age of 16 years or older.

commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a DoD organization or prescribed territorial area. All references to “commander” in this issuance also include the military and civilian heads of DoD organizations and are authorized to request an investigation or act on the result of an investigation by a MCIO.

DSAID. Defined in DoDD 6495.01.

MCIO. U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

other DoD law enforcement activity resources. The U.S. Army Military Police, the U.S. Navy Master at Arms, the U.S. Air Force Security Forces, and the U.S. Marine Corps Criminal Investigation Division.

restricted reporting. Defined in DoDD 6495.01.

SARC. Defined in DoDD 6495.01.

Service members. Members of the Army, Navy, Air Force, Marine Corps, and Military Academies. In addition, National Guard and Reserve Component members on active duty, as defined in Section 101(d)(1) of Title 10, U.S.C; or inactive duty status while in training.

sexual assault. An intentional sexual contact characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. This includes domestic abuse (as defined in DoDI 6400.06) related sexual assaults. The term “sexual assault” includes the following offenses under the Uniform Code of Military Justice:

Rape, in violation of Article 120.

Sexual assault, in violation of Article 120.

Aggravated sexual contact, in violation of Article 120.

Abusive sexual contact, in violation of Article 120.

Forcible sodomy (oral or anal sex), in violation of Article 125.

Attempts to commit any of the above offenses, in violation of Article 80.

Between 2007 and 2012, amendments to the Uniform Code of Military Justice changed the Article 120 offenses in name and character. Depending upon the date the alleged offense was committed, investigators must refer to the name and character of the offense applicable to the Uniform Code of Military Justice provisions in effect at that time.

unrestricted reporting. Defined in DoDD 6495.01.

REFERENCES

- Acting Under Secretary of Defense for Personnel and Readiness Memorandum, “Reporting Option for Prisoners in Military Correctional Facilities Under the Prison Rape Elimination Act,” July 6, 2015
- Code of Federal Regulations, Title 28, Part 115
- Deputy Secretary of Defense Memorandum, “Designation of the Navy as the Executive Agent for Development and Maintenance of the “Catch a Serial Offender” Program Server and Searchable Database,” December 28, 2016
- DoD 5400.11-R, “Department of Defense Privacy Program,” May 14, 2007
- DoD Directive 5106.01, “Inspector General of the Department of Defense (IG DoD),” April 20, 2012, as amended
- DoD Directive 5400.11, “DoD Privacy Program,” October 29, 2014
- DoD Directive 6495.01, “Sexual Assault Prevention and Response (SAPR) Program,” January 23, 2012, as amended
- DoD Directive 7050.06, “Military Whistleblower Protection,” April 17, 2015
- DoD Instruction 1030.2, “Victim and Witness Assistance Procedures,” June 4, 2004
- DoD Instruction 1325.07, “Administration of Military Correctional Facilities and Clemency and Parole Authority,” March 11, 2013
- DoD Instruction 5505.03, “Initiation of Investigations by Defense Criminal Investigative Organizations,” March 24, 2011, as amended
- DoD Instruction 5505.07, “Titling and Indexing Subjects of Criminal Investigations in the Department of Defense,” January 27, 2012
- DoD Instruction 5505.09, “Interception of Wire, Electronic, and Oral Communications for Law Enforcement,” November 27, 2013, as amended
- DoD Instruction 5505.11, “Fingerprint Card and Final Disposition Report Submission Requirements,” July 21, 2014, as amended
- DoD Instruction 5505.14, “Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders,” December 22, 2015, as amended
- DoD Instruction 5505.16, “Criminal Investigations by Personnel Who Are Not Assigned to a Defense Criminal Investigative Organization,” May 7, 2012
- DoD Instruction 5505.17, “Collection, Maintenance, Use, and Dissemination of Personally Identifiable Information and Law Enforcement Information by DoD Law Enforcement Activities,” December 19, 2012, as amended
- DoD Instruction 5505.19, “Establishment of Special Victim Investigation and Prosecution (SVIP) Capability Within the Military Criminal Investigative Organizations (MCIOs),” February 3, 2015, as amended
- DoD Instruction 6400.01, “Family Advocacy Program (FAP),” February 13, 2015
- DoD Instruction 6400.06, “Domestic Abuse Involving DoD Military and Certain Affiliated Personnel,” August 21, 2007, as amended

- DoD Instruction 6495.02, “Sexual Assault Prevention and Response (SAPR) Program Procedures,” March 28, 2013, as amended
- DoD Manual 6400.01, Volume 3, “Family Advocacy Program (FAP): Clinical Case Staff Meeting (CCSM) and Incident Determination Committee (IDC),” August 11, 2016
- DoD Manual 8910.01, Volume 1, “DoD Information Collections: Procedures for DoD Internal Information Collections,” June 30, 2014, as amended
- DoD Manual 8910.01, Volume 2, “DoD Information Collections: Procedures for DoD Public Information Collections,” June 30, 2014, as amended
- Manual for Courts-Martial, United States, current edition, Part III (also known as the “Military Rules of Evidence”)
- Office of Management and Budget Memorandum M-07-16, “Safeguarding Against and Responding to the Breach of Personally Identifiable Information (PII),” May 22, 2007
- Public Law 108-375, “Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005,” October 28, 2004
- Public Law 110-417, “Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,” October 14, 2008
- Public Law 112-81, “National Defense Authorization Act for Fiscal Year 2012,” December 31, 2011
- Public Law 113-291, “Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015,” December 19, 2014
- Public Law 114-92 “National Defense Authorization Act for Fiscal Year 2016,” November 25, 2015
- United States Code, Title 5, Appendix
- United States Code, Title 10 (Chapter 47 is also known as the “Uniform Code of Military Justice (UCMJ)”)
- United States Code, Title 42, Chapter 147 (also known as the “Prison Rape Elimination Act (PREA) of 2003”)

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

Request for Information from DoD IG

RFI Set 2, Question 1

Request Date: June 22, 2017

I. Purpose

- A. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (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 No. 113-291), as amended.
- B. 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.
- 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. Requested Response Date

Suspense	Question(s)	Proponent
12 Jul 17	1	DoD IG – Provide information on sexual assault investigation evaluations

III. DoD IG Sexual Assault Investigation Evaluations

Question 1 (*DoD IG*): Please provide the DAC-IPAD with the following:

- A. A copy of the current case evaluation protocol used to complete the DoD IG “Evaluation of Military Criminal Investigative Organizations’ Adult Sexual Assault Investigations” (DoDIG-2017-054).
- B. A copy of the “Data Call” memorandum used in the most recent “Evaluation of Military Criminal Investigative Organizations’ Adult Sexual Assault Investigations” (DoDIG-2017-054).
- C. Database screenshots, including all of the relative data fields from the Microsoft Access program and other related tools used during the evaluation.
- D. The template for the Microsoft Access program used to collect and analyze the data.

Please provide responses to the DAC-IPAD by July 12, 2017

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

Request for Information from Military Criminal Investigation Organizations (MCIOs)

RFI Set 3, Questions 1–18

Request Date: June 29, 2017

I. Purpose

- A. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (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 No. 113-291), as amended.
- B. 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.
- 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	Questions	Proponent
12 Jul 17	1–18	Service MCIOs – Provide adult sexual assault investigation data for cases closed in fiscal year 2016 (FY 16)

III. Service MCIO Adult Sexual Assault (ASA) Case Data for FY 16

Please provide the requested data for adult sexual assault allegation investigations and information files closed in FY16.

- A closed case means the investigation, if conducted, is complete and a final action has been taken.
- An adult sexual assault allegation means an unrestricted report of sexual assault made by an individual who is at least 16 years of age at the time of the alleged incident as defined by DoDI 5505.18, *Investigation of Adult Sexual Assault in the Department of Defense*.
- “Closed in FY 16” means the investigation or information file was closed between October 1, 2015, and September 30, 2016, regardless of the date the allegation was made or investigation opened.

Questions:

MCIO Adult Sexual Assault (ASA) Case Data for FY 16		
1.	Total number of ASA cases closed by MCIO in FY16 (including cases not investigated).	

MCIO ASA Investigations Closed in FY 16¹		
2.	Total number of ASA investigations closed in FY16.	
3.	Number of ASA investigations closed in FY 16 with a military subject. ²	
4.	Number of ASA investigations closed in FY 16 with a non-military subject.	
5.	Number of ASA investigations closed in FY 16 with an unknown subject.	
6.	Number of ASA investigations closed in FY 16 with a non-participating victim witness.	

MCIO ASA Cases Closed Without Investigation in FY 16		
7.	Total number of ASA cases closed without MCIO investigation in FY 16 (information files).	
8.	Number of non-investigated ASA cases closed in FY 16 with a military subject.	
9.	Number of non-investigated ASA cases closed in FY 16 with a non-military subject.	
10.	Number of non-investigated ASA cases closed in FY 16 with an unknown subject.	
11.	Number of non-investigated ASA cases closed in FY 16 with a non-participating victim witness.	
12.	Number of non-investigated ASA cases closed in FY 16 with a military subject prosecuted by a civilian jurisdiction for a sex offense.	

Military Subject ASA Investigations Closed in FY 16		
13.	Number of ASA investigations of military subjects in which at least one sex offense charge was preferred.	
14.	Number of ASA investigations of military subjects in which sex offense charges were not preferred but non-sex offense charge(s) were preferred.	
15.	Number of investigations of military subjects in which sex offense charges were not preferred but administrative or NJP action was taken for at least one sex offense.	

¹ Do not include cases not investigated (information files).

² A military subject means an individual in Title 10 status at the time of the alleged incident.

16.	Number of investigations of military subjects in which sex offense charges were not preferred but administrative or NJP action was taken for non-sex offense(s) only.	
17.	Number of investigations of military subjects in which sex offense charges were not preferred and no further action was taken for any offense.	
18.	Number of investigations with a military subject in which sex offense charges were not preferred and subject was prosecuted by a civilian jurisdiction for a sex offense.	

Please provide responses to the DAC-IPAD by July 12, 2017

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

Committee Planning Session Outline

I. Statutory Tasking

The Committee was established by the Secretary of Defense in February 2016 as required by section 546 of the National Defense Authorization Act for Fiscal Year 2015 and section 537 of the National Defense Authorization Act for Fiscal Year 2016. There are three statutory requirements for the Committee:

- A. 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;
- B. To review, on an ongoing basis, cases involving allegations of sexual misconduct (as described above), for purposes of advising the Secretary of Defense; and
- C. To submit to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives an annual report of the activities of the Committee during the preceding year. The annual reports are due by March 30 of each year.

II. Overview of Strategic Plan Discussion

- A. Scope of Sexual Misconduct to be Reviewed by DAC-IPAD
- B. Case Review Plan (*Case reviews are required by the authorizing statute.*)
- C. Statistical Data Collection Plan (*Statistical data collection is recommended by the JPP and Judge Brisbois' proposal.*)
- D. Policy Assessment Plan (*Topics were recommended by DoD GC, DAC-IPAD members, the JPP, and Judge Brisbois' proposal.*)
- E. March 30, 2018, DAC-IPAD Report Plan (*Reports are required annually by the authorizing statute.*)
- F. Long Term Report Plan – March 2019, 2020, 2021 Reports

III. Scope of Sexual Misconduct to be Reviewed by DAC-IPAD

- A. Rape (Article 120(a)) (*Required by authorizing statute*)
- B. Sexual Assault (Article 120(b)) (*Required by authorizing statute*)
- C. Forcible Sodomy (Article 125) (*Required by authorizing statute*)
- D. Other Misconduct (*Not further defined by authorizing statute*)
 - Aggravated Sexual Contact (Article 120(c))

- Abusive Sexual Contact (Article 120(d))
- Sexual Harassment (Article 93 – Cruelty and Maltreatment)
- Abuse of Authority or Rank (Article 93a – Prohibited activities with military recruit or trainee by person in position of special trust)

IV. Case Review Options

The options presented will provide the framework and parameters for case reviews. We recommend that the Committee vote to select an option under each section.

A. What Constitutes a “Case” for Purposes of Review (i.e., when in the process does the review start?)

- **Option 1** – An unrestricted report of sexual assault
- **Option 2** – An investigation opened
- **Option 3** – Charges preferred (This is the starting point for the JPP data analysis—it does not capture outcomes for incidents dismissed before preferral.)
- **Option 4** - _____

B. Categories of Cases to be Reviewed

- **Option 1** – Acquittals – Review calendar year 2016 (and/or 2017) cases where an accused has been acquitted of all sexual assault charges.
- **Option 2** – Dismissals – Review calendar year 2016 (and/or 2017) cases where all sexual assault charges were dismissed.
- **Option 3** – Service Designated – Review Service-identified cases (at least two from each Service)—one that reflects best practices and one that presents problematic issue(s). (*Suggested by Ms. Meg Garvin*)
- **Option 4** – Installation or Region – Review cases from a specific installation or region. (e.g., installations with the most sexual assault reports and installations with the least)
- **Option 5** – Service Branch – Review cases from each Service separately to identify issues and disparities within the Service and to compare Services. (**Note that Services vary in the forms used and the composition of case files. This may itself be an issue for review.)
- **Option 6** – _____

C. Number of Cases to be Reviewed

- **Option 1** – Review a statistically significant random sampling of cases across all of the Services or for a specific Service.
- **Option 2** – Review all or a random sampling of cases for a specific category (e.g., acquittals, dismissals, etc.)
- **Option 3** – Review select cases recommended to the Committee. (e.g., specific cases requested by the public/victims/defendants/counsel)
- **Option 4** – Review a sampling of cases selected by the Services based on criteria determined by the DAC-IPAD. (e.g., 10 cases that were dismissed after an Article 32 hearing)
- **Option 5** – _____

D. Types of Records to be Reviewed

- **Option 1** – Investigative files
** Investigation files for the Army, Navy, Air Force, and Marine Corps are located in Quantico, Virginia. Coast Guard investigation files are located in Washington, D.C.
- **Option 2** – Prosecution memos/files
** Prosecution files are located at the installation where the court-martial occurred.
- **Option 3** – Records of trial
** Certain portions of a court-martial record are located at the Service's headquarters in Washington, D.C., while other portions are maintained locally at the installation where the court-martial occurred.
- **Option 4** - _____

E. Case Review Process

- **Option 1** – Establish one or more subcommittees or working groups composed of DAC-IPAD members that will review case files.
 - a. Each subcommittee would review individual cases from beginning to end for purposes of its analysis.
 - b. The Committee will need to develop a uniform protocol for how to review a case file, what information to collect from it, and where the information is located in the file.

- c. DAC-IPAD staff members and DFO will accompany Committee members when reviewing cases and will document case information.
- d. DAC-IPAD staff members will prepare anonymized case summaries and input data collected from case files in a database for analysis and review by Committee members.
- **Option 2** – Establish one or more subcommittees composed of non-DAC-IPAD members to review cases using a methodology determined by Committee or as otherwise directed by Committee.
- **Option 3** – _____

V. Statistical Data Collection Options

- A. **Option 1** – Continue to build upon the data collection methodology and analysis initiated by the JPP.
- B. **Option 2** – Develop a new data collection system/method. (The Committee could provide recommendations to DoD regarding the Article 140a implementation.)
- C. **Option 3** – Utilize the SAPRO annual report data. (**Note: SAPRO data is self-reported and lacks quality assurance on accuracy, reliability, and completeness of case adjudication data.)
- D. **Option 4** – Develop and send specific requests for information to DoD and the Services. (**Note: Since DoD or Service-collected data would be self-reported, such data would not have quality assurance on accuracy, reliability, or completeness.)
- E. **Option 5** – _____

VI. Proposed Demographic Factors for Data Analysis and Review *(Based on DAC-IPAD Initial Report, JPP recommendations, and Judge Leo Brisbois' proposal)*

- A. Review whether there are disparities in case charging decisions or case outcomes associated with any of the following demographic factors:
 - Branch of Service of the accused;
 - Rank of the accused and victim;
 - Race/ethnicity of the accused and victim;
 - Sexual orientation of the accused and victim;
 - Relationship between the accused and victim;
 - Career field of the accused and victim;
 - Geographic location of the alleged offense; or
 - Military or civilian status of the accused and victim.

- B. Assess whether insights can be gleaned from the review of cases about why any identified disparities may be occurring.

VII. Proposed Additional Data Points for Analysis and Review

- A. Collect and evaluate the following information by **Service branch** and by **combat arms vs. combat support convening authorities**: (*Recommended by Judge Leo Brisbois' proposal*)

- The number of sexual assault cases investigated;
 - The number of sexual assault investigations where probable cause found;
 - The number of sexual assault investigations which led to administrative separation proceedings and rates of retention resulting therefrom;
 - The number of sexual assault investigations referred to NJP or summary courts-martial, and rates of dismissal or acquittal resulting therefrom;
 - The number of sexual assault investigations referred to courts-martial (by type of CM); and
 - The number of dismissals after Article 32 hearings and acquittals after trial.
- (**Note: DoD SAPRO reports all of this data by fiscal year and by Service, but it is not differentiated by type of convening authority.)

- B. Collect and evaluate data on the **retention of sexual assault survivors in the military** and the effect a restricted versus an unrestricted report has on such retention. (*Recommended by Chief Rod McKinley*)

VIII. Proposed Policy Topics for Review

- A. Topics recommended by the DoD General Counsel:

1. **Practitioner Training, Experience, and Resources** – Whether those involved in the investigation, prosecution, and defense of sexual assault cases in the military have sufficient training, experience, and resources to fulfill their responsibilities. (*Also recommended by Judge Leo Brisbois and Ms. Kathleen Cannon*)
2. **Operations in Deployed Environments** – How the military's investigation, prosecution, and defense functions are performing in settings where Service members are deployed.
3. **Civilian Best Practices** – Whether there are best practices from civilian jurisdictions that should be incorporated into military practice. (**Note: A comparative review of civilian best practices was conducted by the RSP in 2013–2014.)

4. **Effect of Rank on Outcomes** – Whether the investigation, prosecution, and defense of sexual assault cases are influenced by the grade of either the suspect or the victim. *(Also recommended by DAC-IPAD members in Initial Report)*
5. **Adequacy of Data Collection/Analysis** – Whether the Services are collecting the right data and properly analyzing them to help inform public policy decisions. *(Also recommended by the JPP and by DAC-IPAD members and Protect Our Defenders in DAC-IPAD Initial Report)*
6. **Effect of SVC Program** – What effect the Services’ Special Victims’ Counsel Programs have had.

B. Topics Recommended by DAC-IPAD members in the Committee’s Initial Report. *(Additional topics suggested by DAC-IPAD members are captured elsewhere in the outline.)*

- **Sexual Assault Reporting** – Dean Harrison suggested looking at why many victims do not report by looking at veteran’s groups who treat victims who did not report until separating from their Service and Ms. Bashford suggested investigating whether the restricted vs. unrestricted reporting decision is truly voluntary.
- **Sexual Assault Investigations** – Mr. Markey proposed looking at investigation files to see what facts and evidence are being presented to prosecutors and whether improvements are needed. Dr. Markowitz suggested looking at where forensic exams are taking place and what effect that has on the case.
- **Founding and Unfounding Decisions** – Dr. Spohn suggested undertaking a study that focuses on the unfounded cases and determining whether they are, in fact, false or baseless, according to the definitions of these terms used in the FBI’s Uniform Crime Reporting and comparing by Service and by installation.

C. Topics Recommended by the JPP Subcommittee.¹

JPP SUBCOMMITTEE REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (February 2017)

¹ From July through September 2016, members of the JPP Subcommittee, at the direction of the JPP, conducted site visits to installations throughout the United States and Asia to assess the effects of numerous changes in law and policy on the investigation, prosecution and defense of sexual assault offenses in the military. Based on information received from the site visits, the Subcommittee presented three reports and three short information papers to the JPP for its consideration. Because of the limited amount of time left in the JPP’s term, the final two Subcommittee reports included recommendations to the DAC-IPAD on suggested topics for further consideration and assessment. As the parent panel, the JPP has the authority to accept, modify, or reject the recommendations of its Subcommittee. The JPP conducted deliberations on the final two Subcommittee reports at its May and June 2017 public meetings. The Panel’s final reports on these topics are pending as of June 29, 2017. In the interim, the DAC-IPAD staff has included the Subcommittee’s recommendations for DAC-IPAD planning purposes, noting that the final JPP recommendations on these issues are forthcoming and may differ from those of its Subcommittee.

- **MCIO Investigations Policy** – The JPP Subcommittee recommends that the DAC-IPAD monitor the effects of the DoD policy² that allows Service law enforcement agencies to assist the MCIOs with sexual assault investigations, and make findings and recommendations to the Secretary of Defense as it deems appropriate.

JPP SUBCOMMITTEE REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (May 2017)

- **Article 32 Process** – The JPP Subcommittee recommends that the DAC-IPAD continue the review of the new Article 32 preliminary hearing process, which in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP no longer serves a useful purpose. Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the preliminary hearing officer against referral, based on lack of probable cause, should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required. (R-1)
- **Case Disposition Guidance (Art 33)** – The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases. (R-3) *(Also recommended in DAC-IPAD Initial Report)*
- **Pretrial Advice (Art 34)** – The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Courts-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the

² See DEP'T. OF DEF. INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (March 22, 2017). A copy of this DoD policy is contained in Tab 5 of the read-ahead materials for the July 21, 2017 DAC-IPAD public meeting.

strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision. (R-4)

- **Collection of Case Adjudication Data** – The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system. (R-6)
- **Alcohol Consumption and Consent** – The JPP Subcommittee recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members. (R-8)
- **Expedited Transfers** – The JPP Subcommittee recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons. (R-9)

D. Topics Recommended by Protect Our Defenders, a military sexual assault victim advocacy organization.

- **Practitioner Specialization** – The DAC-IPAD should review the experience levels of military investigators, prosecutors, and defense counsel and the need to specialize in those fields.
- **Retaliation** – The DAC-IPAD should review the issue of retaliation against victims who report sexual assault.

E. Topics Recommended by Judge Leo Brisbois. (*Several of Judge Leo Brisbois' recommended topics are addressed elsewhere in the outline.*)

- **Victim Career Outcomes** – Review and assess across DoD the career outcomes of service member victims for each Service branch who “reported” sexual assault cases in the armed forces.
- **Force-wide Social Media and Gender/Orientation Harassment Training** – Review and assess across DoD policies regarding, as well as, the sufficiency, insufficiency, and regularity of training provided to service members on gender/orientation harassment, proper and improper use and publication of materials through social media, and criminal sexual misconduct in light of the (1) increased cyber-bullying and non-consensual publication of sexually intimate pictures, videos, and other information through social media that is occurring in the broader society even as early as at the secondary school level; and considering (2) that this is the evolving social environment out of which the vast majority of new military recruits (i.e., 18 – 20 year olds) are coming into military Service; and considering (3) that a great deal of recent neurological studies (particularly with regard to

risk/benefit assessment judgment skills) suggests that the development and formation of the adolescent brain is not fully complete until individuals reach their mid-20s.

- **DoD and Service Policy Regarding Social Media/Online Harassment –** Review and assess the environment across DoD involving the apparent prevalence of—and sufficiency or insufficiency of service branch policy regarding and response(s) to—the improper use of social media in general by Service members directed to or about other Service members in order to bully, harass, intimidate, shame, etc., through the non-consensual dissemination or publication of sexually explicit or related information on the world-wide web.
- **Effect of Command Environment on Seriousness of Consequences –** Review and assess how the command environment across DoD might be a possible contributing factor to the broader occurrence of or diminished perception as to the seriousness of sexual offenses in the armed forces where there may be apparent mixed messages or signals being sent to the enlisted and lower officer ranks when sexual offense based misconduct by Flag level personnel appears to be handled in ways that result in less severe consequences for the offender (*e.g.*, the recent media reports of expungement of certain IG report findings by a Flag level reviewing authority in order to permit the individual who was the subject of the IG investigation to retire without a reduction in his Flag grade).

IX. March 30, 2018 DAC-IPAD Annual Report Plan

- A. **Option 1** – The report include a sample of case reviews discussed in-depth, similar to the annual reports published by Senator Kirstin Gillibrand.
- B. **Option 2** – The report include annual sexual assault case adjudication data reported by Service and analysis of trends and statistics similar to the data reports issued by the JPP in 2016 and 2017.
- C. **Option 3** – The report include in-depth assessments of one or two of the policy topics selected by the DAC-IPAD members to review and report on.
- D. **Option 4** – The report include a combination of options A–C.

** The Committee should discuss whether to establish a report writing subcommittee or working group to provide input to the staff on the organization and structure of reports.

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

Request for Information from DoD SAPRO and Service JAG Corps

RFI Set 1, Questions 1–3

Date of Request: June 20, 2017

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 Jul 17	1	DoD SAPRO – Provide DSAID information to each military Service.
11 Aug 17	2	Services – Provide list of cases meeting RFI criteria to the DAC-IPAD using the format in Attachment 1.
22 Sep 17	3	Services – Provide case documents for all cases to the DAC-IPAD via secure electronic file transfer. If an electronic record of trial (e-ROT) is available, the DAC-IPAD staff will obtain the desired documents from the e-ROT's received.

III. Court-Martial Cases Completed in Fiscal Year 2016 (FY 16)

The DAC-IPAD requests case documents for all adult-victim sexual assault cases completed by the military Services in FY 16 that involved a preferred charge of sexual assault (the same criteria as in previous RFIs from the Judicial Proceedings Panel for FY12-14 and FY15 cases). This request is not limited to cases listed in the Annual Report on Sexual Assault in the Military (SAPRO Report). The DAC-IPAD seeks all preferred sexual assault cases that were resolved in FY 16 at court-martial or through alternate means, regardless of whether the case was reported in the FY 16 SAPRO Report or was categorized at any point as a Family Advocacy Program case.

The DAC-IPAD requests the Services provide this information in two phases:

- 1. Identify the cases by case name (e.g., US v. John Doe) and, if the case was reported in the Services' Unrestricted Report Case Synopses enclosed with the FY 16 DoD SAPRO Report, provide the line number as identified in the SAPRO Report; and*
- 2. Provide the documents requested in RFI Question 3 for every identified case.*

Question 1 (DoD SAPRO and Services): The DAC-IPAD requests DoD Sexual Assault Prevention and Response Office (DoD SAPRO) assist the Services in identifying cases listed in each Service Enclosure ("Unrestricted Report Case Synopses") to the FY16 SAPRO Report.

The DAC-IPAD requests DoD SAPRO provide the military Services with a copy of the unique DSAID Number and Subject Name for cases listed as involving at least one preferred charge of sexual assault, according to the military Services' Unrestricted Report Case Synopses in the FY16 SAPRO report.

Please provide a completed list to the military Services by July 21, 2017

Question 2 (Services): **Identification of Cases** -The DAC-IPAD requests the military Services use the information from the Defense Sexual Assault Incident Database (DSAID), provided by DoD SAPRO in response to Question 1, and the Services' case management systems, to identify ALL cases that involve a preferred charge of adult sexual assault and were tried to completion,* dismissed, or resolved by any alternate means in fiscal year 2016.

*A "completed" case means any case tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings in FY16. This list includes cases in which a convening authority has taken, or has yet to take, action in FY16. Request the Services provide a copy of the Convening Authority Action once complete.

Please provide a completed list to the DAC-IPAD by August 11, 2017

Question 3 (Services): **Court-Martial Records** - For cases identified in Question 2 and Attachment 1, provide copies of the following documents (alternatively, you can provide the e-ROTs for these cases and the DAC-IPAD staff can extract the required documents). *If your Service does not use the specified DD form, please provide Service-equivalent documents:*

1. DD Form 458, *Charge Sheet*
2. DD Form 457, *Preliminary Hearing Officer's Report* (include all continuation sheets, but do not include IO exhibits)
3. Article 34 Pretrial Advice and/or SJA recommendations on alternate disposition

4. If applicable, any document memorializing the Convening Authority's referral or non-referral decision
5. DD Form 490, *Record of Trial*
6. DD Form 491, *Summarized Record of Trial*
7. DD Form 2707-1, *Report of Result of Trial*
8. Pretrial Agreements (include both the Offer and Appendix A – Quantum)
9. Master Index of Exhibits
10. SJAR and Addendum
11. Convening Authority Action
12. Victims' input at pretrial, trial, and post-trial stages

For cases where court-martial charges were dismissed but were followed by nonjudicial punishment (NJP) action or resignation/discharge in lieu of trial, please provide the discharge approval document and either the NJP form or the following information:

1. All specifications listed on the NJP form
2. All guilty specifications at NJP

Please provide case documents to the DAC-IPAD by September 22, 2017

ATTACHMENT 1 – Service Responses to DAC-IPAD RFI Set 1, Question 2

[Military Service] – FY16:

Case Number	Case Name	Location of Requested Documents
(Example) 1 (Line No. in SAPRO Case Synopsis Report)	<i>US v.</i>	(Example: Installation, CCA, Suitland...)
12	<i>U.S. v.</i>	
27	<i>U.S. v.</i>	
651* (Please continue a numerical sequence for cases not listed in the SAPRO report, with an asterisk)	<i>US v.</i>	

Legislative History:

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

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) was established by the Secretary of Defense in February 2016 pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (FY 2015 NDAA), as amended by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (FY 2016 NDAA). As part of the legislative process the House and Senate introduced respective versions of the FY 2015 NDAA (H.R. 4435 & S. 4210). The House did not address the creation of the DAC-IPAD. However, the Senate included language creating the DAC-IPAD.

Typically the House and Senate would each address their respective bills through referral to standing committees of jurisdiction (e.g., House Committee on Armed Services (HASC) and Senate Committee on Armed Services (SASC)). The committees would hold hearings and then report the bill to the full chamber for consideration. Each chamber would debate the bill and ultimately vote on passage and referral to the other chamber. In the event that differences exist between the House and Senate bills a conference committee is formed to reconcile the differences. The conference committee publishes a conference report containing recommended changes to reconcile the bills and the House and Senate vote on whether to approve the conference report and the underlying text of the bill.

The legislative process with respect to the FY 2015 NDAA was not typical. The House bill was introduced on April 9, 2014 and, after HASC hearings held between April 28, 2014 and May 13, 2014, ultimately passed the full House on May 22, 2014. The SASC held hearings between February 26, 2014 and April 30, 2014 prior to introduction of the bill on June 2, 2014, but the bill never passed the full Senate. A formal conference to reconcile differences was never convened because the Senate did not pass its bill. Thus, the Chairman and Ranking Member of the HASC and the Chairman and Ranking Member of the SASC empowered House and Senate negotiators to come to an agreement and draft a final bill and issue a committee print. The resulting agreement passed the House and Senate and was signed by the President, becoming Public Law 113-291, on December 19, 2014.

The significance of this atypical process is found in the DAC-IPAD language. The language introduced in the Senate provided guidance as to how the DAC-IPAD should proceed in performing its duties. However, the final Act does not include the guidance. The joint explanatory statement accompanying the legislative text provided:

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (sec. 546)

The Senate committee-reported bill contained a provision (sec. 552) that would require the Secretary of Defense to establish and maintain a Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces to advise the Secretary on the investigation, prosecution, and defense of rape, forcible sodomy, sexual assault, and other sexual misconduct in the Armed Forces and to submit a report on an annual basis to the Secretary and to the Committees on Armed Services of the Senate and the House of Representatives.

The House bill contained no similar provision.

The agreement includes this provision with an amendment that would (1) require the Secretary to 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), known as the “judicial proceedings panel” and (2) clarify the duties of the Advisory Committee.

There does not appear to be any additional rationale available for removing the legislative guidance found in the Senate language.

The original Senate language and applicable committee report language is below:

**S.2410 - Carl Levin National Defense Authorization Act for Fiscal Year 2015
113th Congress (2013-2014) - Placed on the Calendar in the Senate**

**SEC. 552. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND
DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.**

(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 in 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, on an ongoing basis—

(A) select a representative sample of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct in the Armed Forces; and

(B) for each case so selected, review the following:

(i) The criminal investigation reports (including reports of investigations that did not substantiate the alleged offense).

(ii) The report on the preliminary hearing conducted pursuant to section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice).

(iii) Any recommendations of Staff Judge Advocates and the initial disposition authority on the disposition of such case.

(iv) The findings and sentences of the court-martial, if any, or any non-judicial punishment imposed pursuant to section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice).

(v) Any legal reviews that recommended that such case not be referred for prosecution.

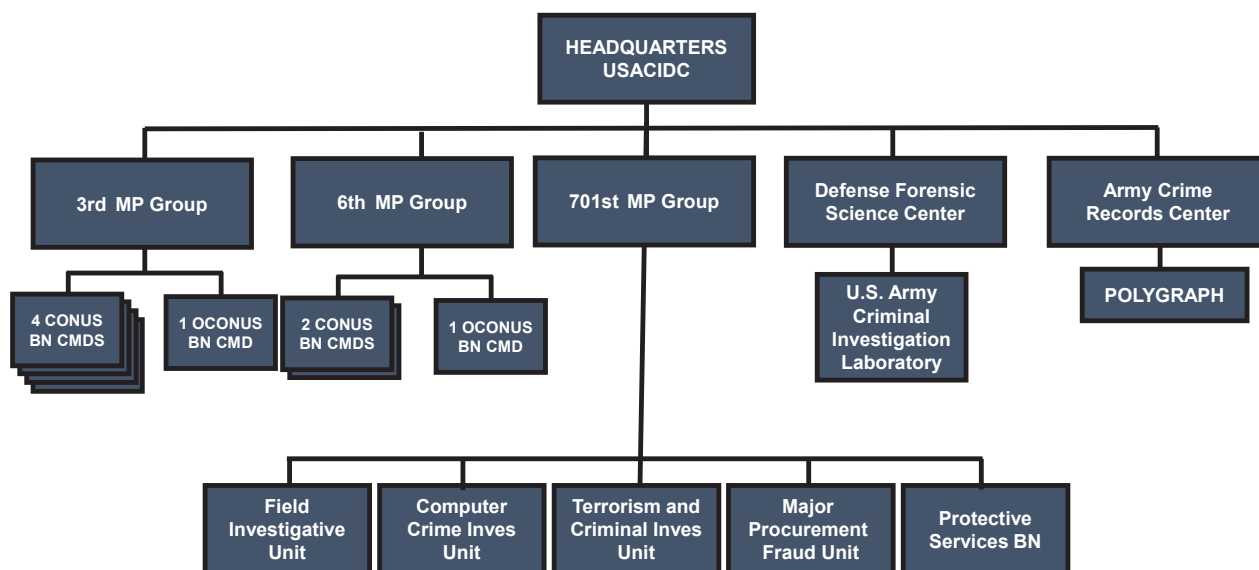
**S. Rept. 113-176 - Carl Levin National Defense Authorization Act for Fiscal Year 2015
113th Congress (2013-2014) [to accompany s. 2410]
Committee on Armed Services, United States Senate**

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (sec. 552)

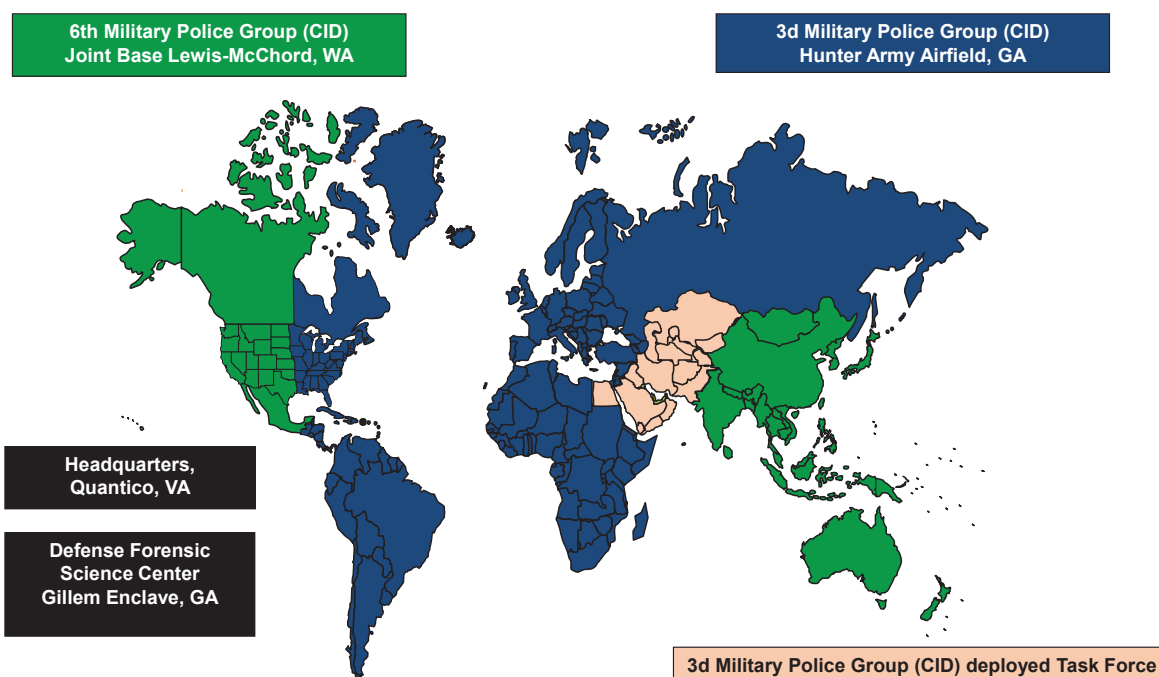
The committee recommends a provision that would require the Secretary of Defense to establish and maintain a Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces to advise the Secretary on the investigation, prosecution, and defense of rape, forcible sodomy, sexual assault, and other sexual misconduct in the Armed Forces and to submit a report on an annual basis to the Secretary and to the Committees on Armed Services of the Senate and the House of Representatives.

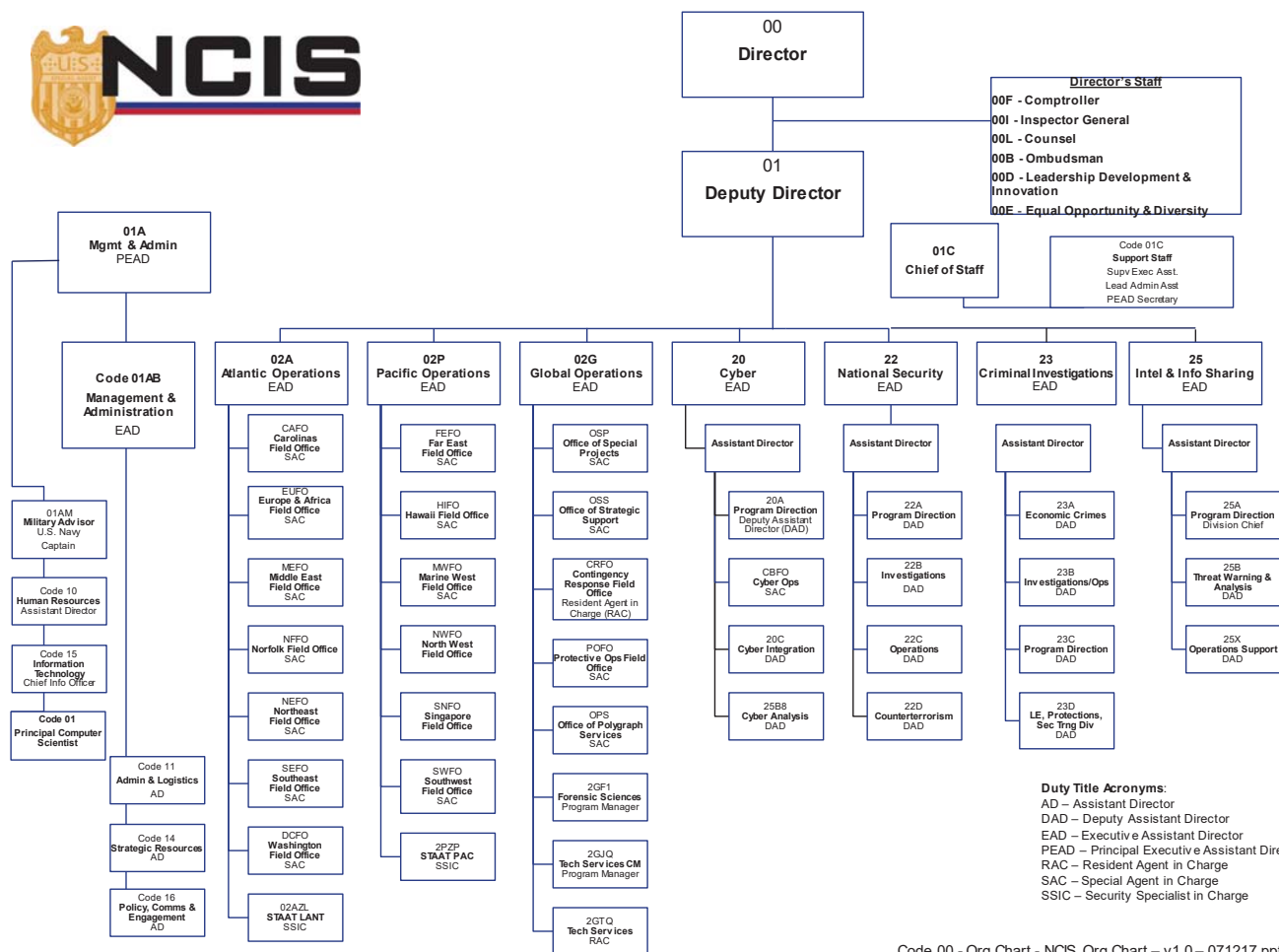
U.S. Army Criminal Investigation Command (CID)

Command Structure



Group Level Command AOR

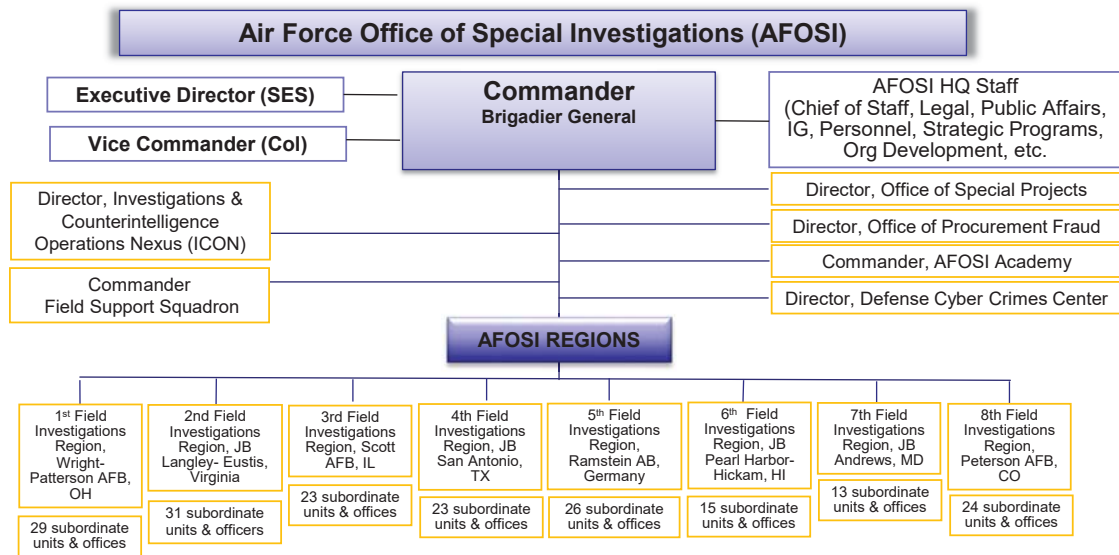




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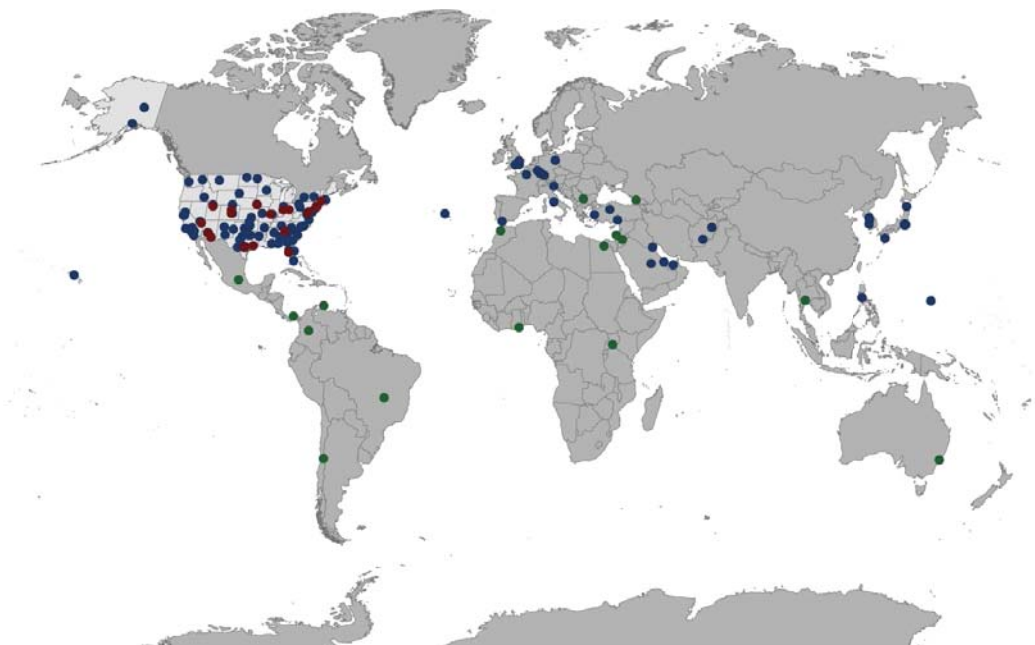
NCIS GEOGRAPHIC FIELD OFFICES AND AREAS OF RESPONSIBILITY

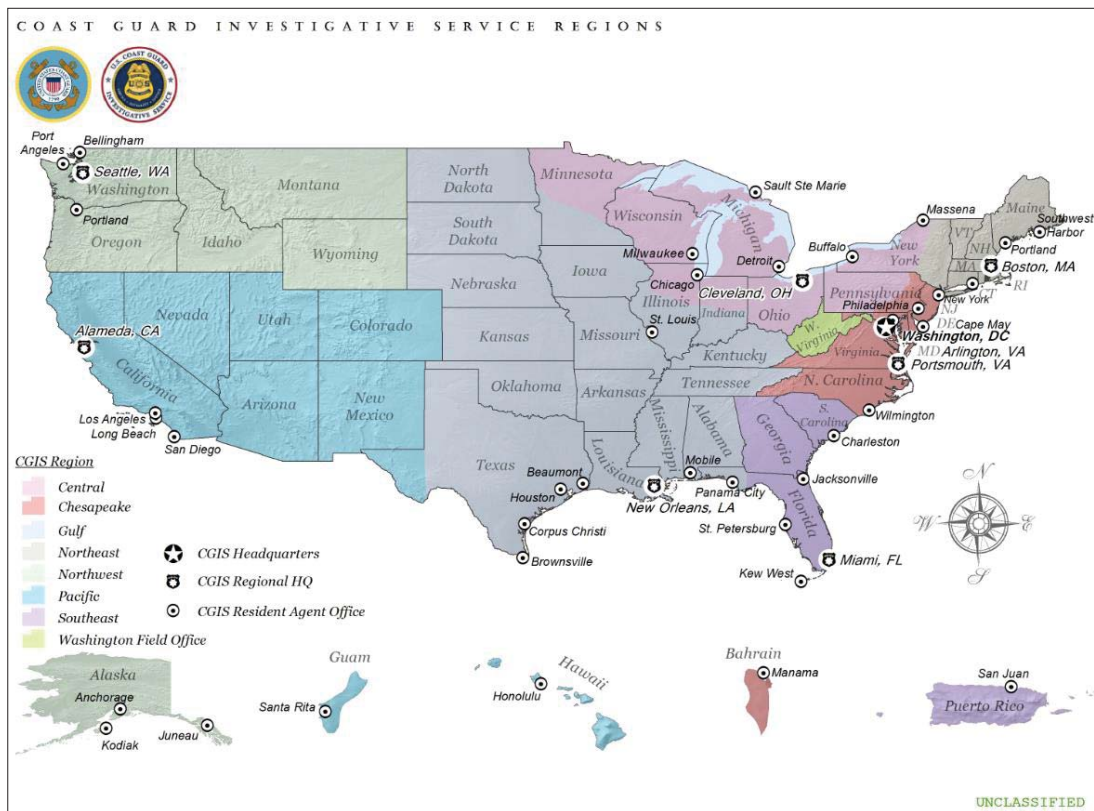
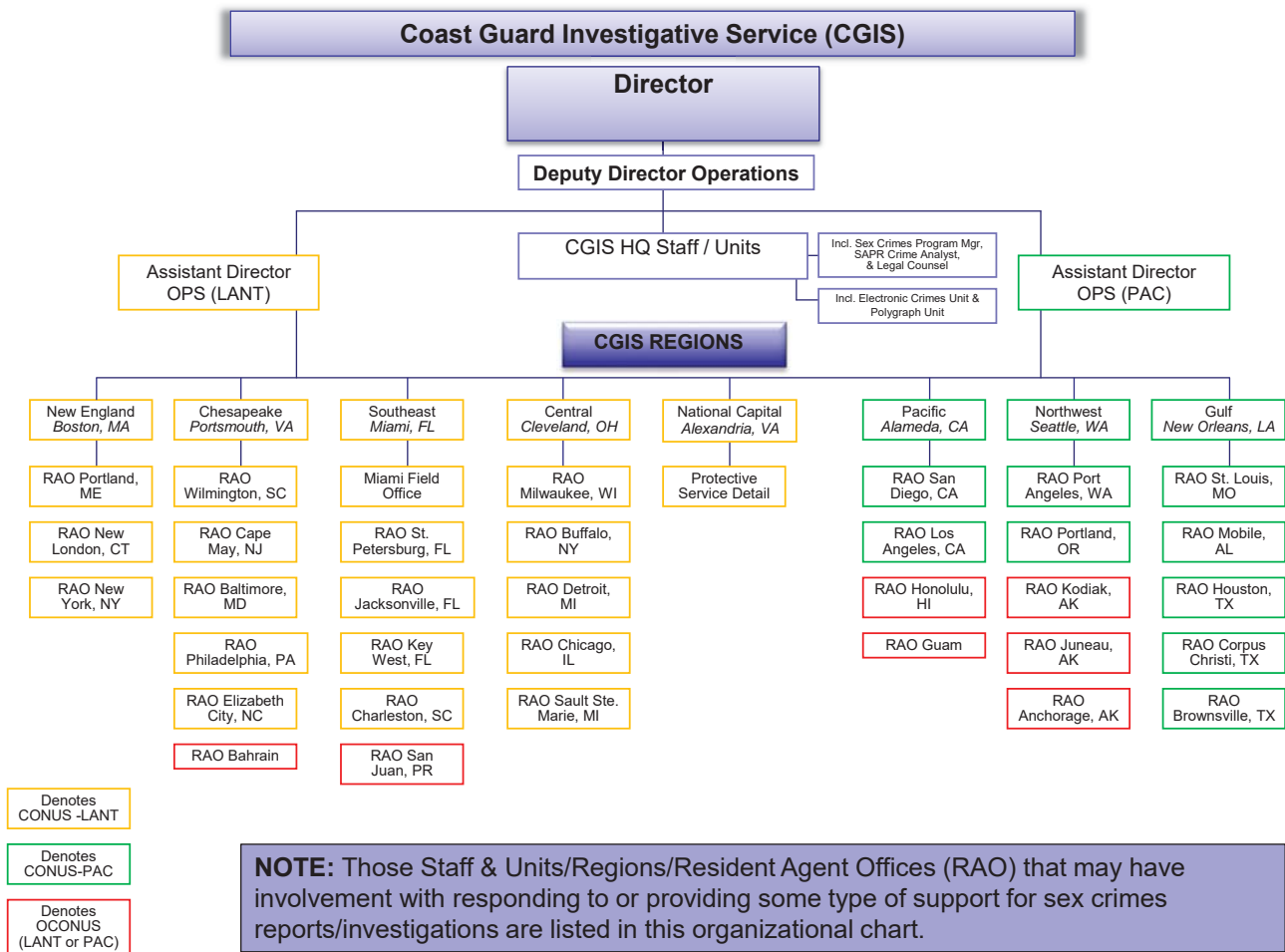




Locations of Air Force Office of Special Investigations

Major Units and Operating Locations





Military Criminal Investigation Organizations (MCIOs)

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

July 21, 2017



This Presentation is Unclassified

Overview



- Introductions
- Organization
 - Authorities, Structure, Agent Strength
- Training
 - Basic & Advanced Training
- Case Data and Trends
 - Case Openings & Trends
- Issues in Common
 - Jurisdictions, Investigation Processes, Challenges
- Questions & Discussion

Introductions



- Ms. T.L. Williams, U.S. Army, Chief, Policy Branch, CID Headquarters
- Mr. Michael DeFamio, U.S. Navy, Division Chief, Family and Sexual Violence Division, NCIS Headquarters
- Ms. Beverly Vogel, Sex Crimes Program Manager, U.S. Coast Guard Investigative Service
- Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Investigations, Headquarters, Air Force Office of Special Investigations

Overview



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CID Organization



- **Authorities**
 - CID reports directly to Army Chief of Staff & Secretary of the Army
 - Eliminates undue command influence from local/regional commanders
 - Once initiated, only SECARMY can close down an investigation
- **Structure (for sexual assault investigations)**
 - Headquarters (Major General) – Russell-Knox Building, Quantico, VA
 - Two Group (Brigade – Colonel level)
 - Eight battalions (Lieutenant Colonel)
 - 64 CID offices worldwide (includes deployed units)
 - US Army Criminal Investigation Laboratory, Fort Gillem Enclave, GA
- **Agent Strength**
 - 834 authorized agent positions, 706 billets filled
 - Includes 30 civilian sexual assault positions

NCIS Organization



- **Authorities**
 - NCIS reports directly to the SECNAV via the UNSECNAV
 - No active duty military in NCIS chain of command
 - May initiate any investigation within charter independent of command request or concurrence
- **Structure**
 - Pacific, Atlantic and Global Regions
 - Fourteen field offices
- **Agent Strength**
 - 164 dedicated Family & Sexual Violence (F&SV) investigators
 - USN/USMC active duty investigator programs

CGIS Organization



- **Authorities**

- CGIS Director reports directly to Vice Commandant, USCG
- Eliminates undue command influence
- CGIS derives authority under Title 14 U.S.C. and Title 10 U.S.C.
- Investigations are conducted, following leads to a logical conclusion IAW COMDTINST 5520.5(series), *CGIS Roles and Responsibilities*.

- **Structure**

- Director, CGIS Headquarters
 - CGIS Sex Crimes Program Manager (for sexual assault investigations)
- Eight CGIS Region offices (Special Agent in Charge)
- 35 Resident Agent Offices (CONUS & OCONUS)

- **Agent Strength**

- CGIS has 381 special agent billets
 - 340 filled billets (Civilian = 102; Active Duty = 89; Reserve = 149)
- 35 special agents designated Family & Sexual Violence Investigators (FSVI)

AFOSI Organization



- **Authorities**
 - AFOSI reports directly to AF Inspector General & Secretary of the Air Force
 - P.L. 99-145: AFOSI is authorized to initiate/conduct criminal investigations
 - Only SECAF may direct OSI to delay, suspend or terminate an investigation
- **Missions**
 - Criminal (felony level), Fraud, Counterintelligence, Cyber, Special Security
- **Structure** (for all investigations)
 - Headquarters (Brigadier General) – Russell-Knox Building, Quantico, VA
 - Eight Regions (Colonels) -- 5 USA, 1 Pacific, 1 Europe, 1 Global
 - 75 AFOSI offices on AF installations; 125+ additional operating locations
- **Agent Strength**
 - 1818 agents authorized (all mission lines) – officers (290), enlisted (1053), civ (475)
 - Includes 24 civilian sexual assault positions
 - 23 Security Forces investigators working sexual assaults w/OSI supervision

Overview



- Introductions
- Organization
 - Authorities, Structure, Agent Strength
- **Training**
 - **Basic & Advanced Training**
- Case Data and Trends
 - Case Openings & Trends
- Issues in Common
 - Jurisdictions, Investigation Processes, Challenges
- Questions & Discussion

CID Training



- **Basic Agent Training**

- 15 Weeks at Ft Leonard Wood, MO
 - 32 hours law
 - 241 hours crime scene processing
 - 187 hours interviews
 - 16 hours specific to sex crime investigations

- **Advanced Training**

- Advanced sex assault training (80 hours) (multi-service training with agents, lawyers, and Sexual Assault Response Coordinators (SARCs) in attendance)
 - 342 agents trained
- Domestic violence (40 hours)
- Child abuse (66 hours)
- Advanced crime scene (80 hours)
- 186 agents trained in all above

NCIS Training



- **Basic Agent Training**
 - 11-week Criminal Investigator Training Program at FLETC (478 hours)
 - 12-week NCIS Special Agent Basic Training Program (430 hours)
 - Includes basic sexual assault investigative training
 - 15-week Field Training Program
- **Advanced Training**
 - Advanced Adult Sexual Assault Investigator Training Program (40 hours)
 - 2-weeks, entire agent corps trained by end of FY-19
 - Advanced Family Sexual Violence Training Program (64 hours)
 - 1-week, required for all F&SV specific billets
 - Interrogation Training (24 hours)
 - Professional Development (Crimes Against Children (CAC), End Violence Against Women (EVAWI), etc.)

CGIS Training



- **Basic Agent Training**

- 12 weeks at Federal Law Enforcement Training Center (FLETC)
 - Total of 464 hours and an additional 22 after hours training
 - 82 hours law
 - 34 hours interviews
 - Continuing case; extends the length of the training (includes a sexual assault scenario)

- **Advanced Training**

- Advanced crime scene (FLETC) (72 hours)
- Advanced interviewing (FLETC) (36 hours)
- Advanced Family Sexual Violence Training (NCIS) (64 hours)
- Special Victims Capabilities Course (Army) (80 hours)
 - 221 agents and 70 CG attorneys trained
- Child Abuse (Army) (66 hours)
- Annual Refresher/Professional Development trainings
 - SAPR funding provided for “specialized training”

AFOSI Training



- **Basic Agent Training**

- 19 weeks: Federal Law Enforcement Training Ctr (FLETC)
 - 100 hours law
 - 59 hours of crime scene processing
 - 58 hours of interview interviewing
 - 23 hours specific to sex crime investigations

- **Advanced Training**

- Sexual Crimes Investigation Training Program (SCITP) (64 hours)
 - Trained: 380 agents; 114 attorneys; 75 Security Forces (JSAT)
- Advanced Crimes Investigations Course (AGCIC) (80 hours)
- Child Forensic Interviewing Course (32 hours)
- Advanced Crime Scene Course (FLETC)
- Professional Development: Crimes Against Women, Crimes Against Children, End Violence Against Women, etc.

Overview



- Introductions
- Organization
 - Authorities, Structure, Agent Strength
- Training
 - Basic & Advanced Training
- **Case Data and Trends**
 - **Case Openings & Trends**
- Issues in Common
 - Jurisdictions, Investigation Processes, Challenges
- Questions & Discussion

CID Case Openings and Trends



- Case Openings & Trends (FY16)

- 11,072 total investigations initiated (about 925 more than FY15)
- 2,521 sexual assault investigation (about 65 more than FY15)
- 154 days average length of investigation (about 25 days longer than FY15)
 - 55% of cases reported a month or more after incident
 - 22% of cases reported a year or more after incident
 - 40% of cases occur off-post
 - 21% of cases involve a civilian suspect (both on and off post)
- Laboratory processing time
 - 88 days FY16
 - 42 days FY15
 - 54 days FY14
 - 76 days FY13
 - All sexual assault forensic examination kits for unrestricted reports are sent to the laboratory for examination.

NCIS Case Openings and Trends (FY-16)



Case Openings & Trends (FY16)

6,001 total criminal investigations initiated (does not include CI investigations)

1,940 sexual assault investigations

US Navy Cases

- 893 total cases
- 129 days average length of investigation
- 407 reports one month or more after incident (46%)
- 66 reports one year or more after incident (7%)
- 544 reports occurring off-base (61%)
- 87 reports involving civilian suspect (10%)

US Marine Corps Cases

- 453 total cases
- 132 days average length of investigation
- 213 reports one month or more after incident (47%)
- 34 reports one year or more after incident (8%)
- 262 reports occurring off-base (58%)
- 47 reports involving civilian suspect (10%)

CGIS Case Openings and Trends (FY16)



- 1,962 total investigations initiated (230 more than FY15)
- 122 adult sexual assault investigations (20 less than FY15)
 - 133 days = average investigation length (11 days shorter than FY15)
 - 57% of cases reported a month or more after incident
 - 24% of cases reported a year or more after incident
 - 40% of cases occur off military installations
 - 10% of cases involve a civilian suspect (both on/off military installations)

AFOSI Case Openings and Trends



- Case Openings & Trends (FY16)
 - 2,528 total investigations initiated (down about 200 from FY15)
 - 986 sexual assault investigation (about the same as FY15)
 - 105 days average & 75 days median = time to run a sexual assault
 - 49% of cases reported a month or more after incident
 - 20% of cases reported a year or more after incident
 - 48% of cases occur off of an Air Force installation
 - 20% of cases involve a civilian suspect (both on and off post)

Overview



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Issues in Common



- **Jurisdictions**
 - UCMJ, Excl. Federal, Concurrent, Proprietary, Foreign, MEJA
- **Investigation Processes**
 - MCIOs Run All Adult Victim Sexual Assault Cases
 - Similar Processes: Case Initiation, Evidence Handling, Reports
- **Challenges**
 - Increased Caseloads
 - Increased Requirements
 - Increased Oversight

Questions & Discussion



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

July 21, 2017



This Presentation was Unclassified

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

Request for Information from Military Criminal Investigation Organizations (MCIOs)

RFI Set 3, Questions 1–18

Request Date: June 29, 2017 **[Responses Included]**

I. Purpose

- A. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (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 No. 113-291), as amended.
- B. 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.
- 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	Questions	Proponent
12 Jul 17	1–18	Service MCIOs – Provide adult sexual assault investigation data for cases closed in fiscal year 2016 (FY 16)

III. Service MCIO Adult Sexual Assault (ASA) Case Data for FY 16

Please provide the requested data for adult sexual assault allegation investigations and information files closed in FY16.

- A closed case means the investigation, if conducted, is complete and a final action has been taken.
- An adult sexual assault allegation means an unrestricted report of sexual assault made by an individual who is at least 16 years of age at the time of the alleged incident as defined by DoDI 5505.18, *Investigation of Adult Sexual Assault in the Department of Defense*.

- “Closed in FY 16” means the investigation or information file was closed between October 1, 2015, and September 30, 2016, regardless of the date the allegation was made or investigation opened.

Questions:

Fiscal Year 2015 Active Duty Population by Military Service	Army 491,300 (36%)	Air Force 311,300 (23%)	Navy 327,900 (24%)	USMC 183,500 (14%)	USCG 36,000 (3%)
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MCIO Adult Sexual Assault (ASA) Case Data for FY 16		Army (CIDC)	Air Force (AFOSI)	Navy/ Marine Corps (NCIS)	Coast Guard (CGIS)
1.	Total number of ASA cases closed by MCIO in FY16 (including cases not investigated).	3225	1237	1650	114

MCIO ASA Investigations Closed in FY 16		Army (CIDC)	Air Force (AFOSI)	Navy/ Marine Corps (NCIS)	Coast Guard (CGIS)
2.	Total number of ASA investigations closed in FY16.	3000	1036	1203	114 ⁱ
3.	Number of ASA investigations closed in FY 16 with a military subject.	2532	1013 ⁱⁱ	949	80 ⁱⁱⁱ
4.	Number of ASA investigations closed in FY 16 with a non-military subject.	241	210	64	13
5.	Number of ASA investigations closed in FY 16 with an unknown subject.	227	88	190	23
6.	Number of ASA investigations closed in FY 16 with a non-participating victim witness.	262	169	157*	N/A

MCIO ASA Cases Closed Without Investigation in FY 16		Army (CIDC)	Air Force (AFOSI)	Navy/ Marine Corps (NCIS)	Coast Guard (CGIS)
7.	Total number of ASA cases closed without MCIO investigation in FY 16 (information files).	225	201	447	N/A
8.	Number of non-investigated ASA cases closed in FY 16 with a military subject.	2 (3rd party mis- interpretation)	197	35	N/A
9.	Number of non-investigated ASA cases closed in FY 16 with a non-military subject.	106	137	61	N/A
10.	Number of non-investigated ASA cases closed in FY 16 with an unknown subject.	117	73	7	N/A
11.	Number of non-investigated ASA cases closed in FY 16 with a non-participating victim witness.	0	Unknown _{iv}	N/A	N/A
12.	Number of non-investigated ASA cases closed in FY 16 with a military subject prosecuted by a civilian jurisdiction for a sex offense.	0	0	11*	N/A

Military Subject ASA Investigations Closed in FY 16		Army (CIDC)	Air Force (AFOSI)	Navy/ Marine Corps (NCIS)	Coast Guard (CGIS)
13.	Number of ASA investigations of military subjects in which at least one sex offense charge was preferred.	482	Unknown ^v	181*	16
14.	Number of ASA investigations of military subjects in which sex offense charges were not preferred but non-sex offense charge(s) were preferred.	16	Unknown	21*	1
15.	Number of investigations of military subjects in which sex offense charges were not preferred but administrative or NJP action was taken for at least one sex offense.	1045	Unknown	140*	37

Military Subject ASA Investigations Closed in FY 16 (continued)		Army (CIDC)	Air Force (AFOSI)	Navy/ Marine Corps (NCIS)	Coast Guard (CGIS)
16.	Number of investigations of military subjects in which sex offense charges were not preferred but administrative or NJP action was taken for non-sex offense(s) only.	9	Unknown	164*	0
17.	Number of investigations of military subjects in which sex offense charges were not preferred and no further action was taken for any offense.	907 ^{vi} (182 Non-participating)	Unknown	448*	26
18.	Number of investigations with a military subject in which sex offense charges were not preferred and subject was prosecuted by a civilian jurisdiction for a sex offense.	73 (8 other Service Members)	Unknown	11*	0

* NCIS Note: Information is derived from the Defense Sexual Assault Incident Database and only includes cases of non-intimate partner adult sexual assaults.

ⁱ CGIS Note: "CGIS cases are classified as "Closed-Referred" when the investigation is completed. Findings from investigations involving military subjects are forwarded, or "referred", to the accused member's Command and the servicing Legal office for adjudication decisions. Once the Command makes that adjudication decision, the CGIS investigation is then classified as "Closed". Naturally, if the Command desires additional investigation prior to making their adjudication decision, CGIS re-opens the case and conducts the needed investigative steps."

ⁱⁱ AFOSI Note: "An investigation may be counted multiple times. Example: 1) A case may have been initiated as an unknown subject case but later resulted in a subject being identified. This would result in a case being counted in two different categories. 2) A case could be counted in all three categories when there were multiple subjects: one unknown subject, one civilian subject and military subject."

ⁱⁱⁱ CGIS Note: "# 3 - 5 = 116 (INCLUDES 2 INVESTIGATIONS W/1 MIL SUBJECT & 1 NON-MIL SUBJECT)."

^{iv} AFOSI Note: "Data for victim participation are not capture for AFOSI Informational Files in AFOSI's investigation management system."

^v AFOSI Note: "Data pertaining to charges and preferrals are not captured in AFOSI's investigation management systems. This information is available for active duty suspects in the Air Force's Automated Military Justice Analysis & Management System (AMJAMS). AFOSI can assist in providing case numbers, names and social security numbers of the suspects to help facilitate AMJAMS searches."

^{vi} CIDC Note: "There are various reasons for "no action taken," including: beyond the statute of limitations; victim declined to participate; insufficient evidence to meet the elements of proof; no probable cause determination; third party misinterpretation of the events, etc."

Article 140a (New Provision) – Case Management; Data Collection and Accessibility

10 U.S.C. § 940a

1. Summary of Proposal

This proposal would promote the development and implementation of case management, data collection, and data accessibility programs for the military justice system under standards and criteria prescribed by the Secretary of Defense.

2. Summary of the Current Statute

There is currently no UCMJ provision addressing the standards and criteria for case management, data collection, or data accessibility programs.

3. Historical Background

The military justice system developed as a highly decentralized process, with the primary responsibility for administration resting with local authorities. As a result, the responsibility for preparing records, collecting data, and providing public access to military justice information has been viewed largely as a local function, with funding responsibilities vested in officials at the installation level. Practices have varied widely among the services, and within the services, in terms of developing and implementing a modernized case management and data collection system.

4. Contemporary Practice

The UCMJ currently does not require the services to collect and maintain data for the military justice system outside of the broad categories of data collected for the annual reports required by Article 146. Each service collects, manages, and makes disclosure decisions regarding court-martial case information and documents differently through service-specific systems. The services have different programs for providing information on court-martial cases through public affairs channels. Other information typically is released only upon a request that complies with the often time-consuming requirements of the Freedom of Information Act.¹

5. Relationship to Federal Civilian Practice

Federal civilian practice currently uses an electronic service called PACER (Public Access to Court Electronic Records) for United States federal court documents. PACER is a fee-based system, with specified opportunities for waiver of fees. In the field of case management, the

¹ 5 U.S.C. § 552.

Federal district courts use the Case Management/Electronic Case Files (CM/ECF) system. This system allows courts to accept filings and provide access to filed documents online. In the field of data collection, the National Criminal Incident Center maintains a computerized index of criminal incidents, including information on criminal offenders and on property. Civilian law enforcement agencies nationwide use and update this system. Additionally, the United States Sentencing Commission and the Administrative Office of the United States Courts maintain and publish data relating to federal sentences, criminal caseloads, and categories of cases.² State courts employ similar systems, with the degree of modernization, centralization, and cost of access varying from state to state.

6. Recommendation and Justification

Recommendation 140a: Enact a new Article 140a requiring the development and implementation of case management, data collection, and data accessibility programs for the military justice system under standards and criteria prescribed by the Secretary of Defense.

The separate case management, data access, and data collection practices currently in use by the services makes it difficult to collect and analyze military justice data on a system-wide basis very difficult. As noted by the Response Systems Panel in its 2014 Report to Congress, “. . . the lack of uniform, offense-specific sentencing data from military courts-martial makes meaningful comparison and analysis of sentencing outcomes in military and civilian courts difficult, if not impossible.”³

This proposal would require the development of standards in the Manual for Courts-Martial outlining the minimum data collection requirements for military justice activities and statistics from across the Department of Defense and the Coast Guard.

A baseline of similarly collected and reported data would help facilitate periodic reviews of the military justice system by the Code Committee or its successor.

This proposal would better align military justice data collection with the Uniform Federal Crime Reporting Act of 1988, the victim and witness notifications mandated under the Crime Victims Fund pursuant to 42 U.S.C. §10601, the Victim's Rights and Restitution Act of 1990, and the Brady Handgun Violence Prevention Act of 1993.

Utilizing the experience of federal and state systems, there are significant opportunities to improve the efficiency of case management and the effectiveness of systemic analysis, by leveraging technology and best practices in the civilian sector. Similar considerations apply to the concept of accessibility. The civilian courts have developed systems that balance public access with the need to protect privacy, sensitive financial data, and classified information. There are well-developed models in the civilian sector which can be applied in a balanced manner to provide timely access to dockets, filings, and rulings.

² See United States Sentencing Commission website, at <http://www.ussc.gov/>; Administrative Office of the United States Courts website, at <http://www.uscourts.gov>.

³ REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 136-137 (June 2014).

To ensure timely and effective action, the proposal requires the Secretary of Defense to develop a set of standards and criteria that would form the framework for modernization.

The Services would have the capability to add service specific requirements to the baseline. The proposal would require the Secretary of Defense to develop standards and procedures within two years after enactment of the legislation, and the services would be required to implement new systems within four years after enactment of the legislation.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating the recommendations of the Response Systems Panel concerning military justice data reporting and collection.

This proposal supports MJRG Operational Guidance by adopting standards and procedures applicable to criminal justice data collection in the civilian sector insofar as practicable in military criminal practice.

The collection and analysis of that data will provide a critical foundation to the development of sentencing parameters and guidelines under Article 56, and would facilitate the periodic evaluation of the military justice called for in this report under Article 146. This proposal would enable military justice managers to better take advantage of the opportunities for efficiency created by the amendments proposed in this report.

8. Legislative Proposal

SEC. 1104. MILITARY JUSTICE CASE MANAGEMENT; DATA COLLECTION AND ACCESSIBILITY.

(a) IN GENERAL.—Subchapter XI of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

“§940a. Art. 140a. Case management; data collection and accessibility

“The Secretary of Defense shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

“(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

“(2) Case processing and management.

“(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

“(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.”.

(b) EFFECTIVE DATES.—(1) Not later than 2 years after the date of the enactment of this Act, the Secretary of Defense shall carry out section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a).

(2) Not later than 4 years after the date of the enactment of this Act, the standards and criteria under section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a), shall take effect.

9. Sectional Analysis

Section 1104(a) would create a new section, Article 140a (Case management; data collection, and accessibility), which would require the Secretary of Defense to prescribe uniform standards and criteria for case processing and management, military justice data collection, production and distribution of records of trial, and access to case information. The purpose of this section is to enhance the management of cases, the collection of data

necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.

Section 1104(b) provides the timeline for implementation of Section 1104(a). In order to provide appropriate time for implementation, this section would require promulgation of standards by the Secretary of Defense not later than two years after enactment of Section 1104, with an effective date for such standards not later than four years after enactment.