

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

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37th PUBLIC MEETING

+ + + + +

TUESDAY
SEPTEMBER 17, 2024

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The Advisory Committee met, via Video-
Teleconference, at 12:00 p.m. EDT, Judge Karla N.
Smith, Chair, presiding.

PRESENT

Hon. Karla N. Smith, Chair
MG (R) Marcia Anderson
Mr. William E. Cassara
Ms. Margaret Garvin
Ms. Suzanne Goldberg
Mr. A.J. Kramer
Ms. Jennifer Gentile Long, MGA, JD
Dr. Jenifer Markowitz
SGM (R) Ralph Martinez
BGen(R) James Schwenk
Det. Lisa Shepperd
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie B. Walton

ALSO PRESENT

Mr. Pete Yob, Director
Ms. Meghan Peters, Deputy Director

Ms. Stacy A. Boggess, Senior Paralegal
Ms. Jennifer Campbell, Chief of Staff
Ms. Breyana Franklin, Communication Specialist
Ms. Theresa Gallagher, Staff Attorney
Ms. Marguerite McKinney, Management & Program
Analyst
Ms. Stayce D. Rozell, Senior Paralegal
Ms. Terri Saunders, Staff Attorney
Mr. William Sprance, Alternate Designated
Federal Officer
Ms. Rebekah Stuyvesant, Administrative Officer
Ms. Kate Tagert, Attorney Advisor
Ms. Lauren Torczynski, Attorney Advisor

C-O-N-T-E-N-T-S

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

2 (12:01 p.m.)

3 MS. PETERS: Over to you, Mr. Sprance.

4 MR. SPRANCE: Thank you, Meghan. Good
5 afternoon. I am William Sprance, the Designated
6 Federal Official. This public meeting of the
7 DAC-IPAD is now open. At this time, I will turn
8 the meeting over to the Honorable Karla N. Smith,
9 the Chair of the DAC-IPAD.

10 Madam Chair, the floor is yours.

11 CHAIR SMITH: Thank you, Mr. Sprance.
12 And good afternoon, everyone. I would like to
13 welcome the members of the DAC-IPAD and everyone
14 in attendance today to the 37th public meeting of
15 the Defense Advisory Committee on Investigation,
16 Prosecution, and Defense of Sexual Assault in the
17 Armed Forces, or DAC-IPAD.

18 The DAC-IPAD was created by the
19 Secretary of Defense in 2016 in accordance with
20 the National Defense Authorization Act for Fiscal
21 Year 2015 as amended for a ten-year term. Our
22 mandate is to advise the Secretary of Defense on

1 the investigation, prosecution, and defense of
2 allegations of sexual assault and other sexual
3 misconduct involving members of the Armed Forces.

4 To begin, it is with gratitude that I
5 welcome the military justice experts from each of
6 the military services' Criminal Law Divisions,
7 who generously serve as the DAC-IPAD's service
8 representatives and who have joined us for the
9 meeting today. Welcome and thank you.

10 At today's meeting, we will hold
11 deliberations on two important projects for the
12 Committee. First, the Policy Subcommittee will
13 lead us in our deliberations of the proposed
14 recommendations regarding provisions for victims
15 to assert their rights under Article 6b, UCMJ.

16 After a break for lunch, we will
17 discuss the Committee's recent military
18 installation site visits to identify possible
19 areas of future studies. After a break, we will
20 continue discussions and deliberations of the
21 recent military installation site visits in order
22 to identify points of consensus in the site visit

1 feedback that will be deliberated in full at the
2 Committee's December meeting.

3 Next, the Committee will receive
4 public comment from three individuals, and
5 afterwards, we will review a request from the
6 General Counsel of the Department of Defense to
7 the DAC-IPAD for a report on support services to
8 service members accused of court-martial
9 offenses. Finally, we will receive updates from
10 the Special Projects and Case Review
11 Subcommittees.

12 Now for a few housekeeping items. To
13 those joining today's virtual meeting, I ask that
14 you please mute your device's microphone when not
15 speaking. If any technical difficulties should
16 occur with the video, we will break for ten
17 minutes, move to a teleconference line, and send
18 the dial-in instructions by email.

19 Today's meeting is being recorded and
20 transcribed, and a complete written transcript
21 will be posted on the DAC-IPAD website. Thank
22 you all for being here today, and I will now turn

1 the meeting over to the DAC-IPAD Deputy Director,
2 Ms. Meghan Peters.

3 MS. PETERS: Thank you, Chair Smith.

4 Hello, Committee members. Thanks for
5 joining us today. Just as an administrative
6 announcement before we begin deliberations, I
7 want to note that we do have a quorum of members
8 present. I have counted 14 members, and because
9 we're virtual, I'll list them here. And if I
10 have missed anyone, please let me know.

11 We have Chair Smith, Dr. Markowitz,
12 Sergeant Major Martinez, Brigadier General
13 Schwenk, Sergeant Shepperd, Mr. Cassara, Major
14 General Anderson, Judge Walton, Ms. Tokash, Dr.
15 Spohn, Ms. Long, Mr. Kramer, Ms. Garvin, and Ms.
16 Goldberg.

17 Now, I'm going to turn it over to
18 Terri Saunders in just a moment for your
19 deliberations, and just to note, today's public
20 meeting -- on the agenda are pretty much
21 deliberation sessions by the members. We don't
22 have any speakers coming to you today from the

1 services. But you're about to deliberate on the
2 third Report and set of recommendations that you
3 have considered this year, and that's in addition
4 to two separate letters you've also issued.

5 So we continue a productive pace. And
6 to ensure we remain productive, I'm going to turn
7 it over to Terri now to get the discussion going,
8 and General Schwenk. Thank you.

9 MS. SAUNDERS: Okay. Thank you,
10 Meghan. And good afternoon, Chair Smith and
11 members of the Committee.

12 So the Policy Subcommittee has
13 completed its review of Article 6b, Enforcement
14 Rights, and we've provided you with a copy of the
15 draft Article 6b report at Tab 4A of your
16 materials. And you also have copies of the text
17 of Article 6b and the Crime Victims' Rights Act
18 at Tabs 4B and 4C.

19 The draft report contains six
20 recommendations, which we are asking the
21 Committee to vote on today. So, following
22 today's meeting, we'll use your deliberations to

1 prepare the analysis portion of the report, and
2 Meghan Peters will find a date that works with
3 your schedules to schedule a virtual meeting in
4 the coming weeks for the Committee to vote on the
5 report as a whole.

6 So if we can go to the next slide.

7 So the goal today is to vote on the
8 six recommendations here today, and they are on
9 four separate issues under Article 6b that the
10 Policy Subcommittee reviewed. And these issues
11 are victims standing to assert their rights at
12 the trial court, jurisdiction of the Court of
13 Appeals for the Armed Forces to review victim
14 petitions, the time frame for appellate review to
15 review these petitions, and the standard of
16 review that the appellate court should use when
17 reviewing victim petitions.

18 So we'll go through each of these
19 issues and then provide time for the Committee to
20 discuss the proposed recommendations that go
21 along with the issue before calling for a vote on
22 the recommendation.

1 A few points before we get started --
2 for many of these issues, we compared the
3 enforcement rights afforded by Article 6b with
4 those afforded by the Federal Crime Victims'
5 Rights Act, upon which Article 6b is based. All
6 of these Article 6b issues relate to a crime
7 victim's ability to assert their rights and where
8 and how they may be asserted.

9 Article 6b provides that if a victim
10 believes their rights have been violated, they
11 may petition the Court of Criminal Appeals for a
12 writ of mandamus. A writ of mandamus in the
13 context of victims' rights is an order from the
14 appellate court requiring a lower court or
15 government official to either take an action to
16 ensure the victim's rights are lawfully
17 recognized or to refrain from taking an action
18 that would violate a victim's rights.

19 In reviewing these issues, the
20 Committee and the Subcommittee heard from the
21 victims' counsel program managers or their
22 designees from each of the military services, as

1 well as other victims' counsel out in the field.

2 The Committee also heard from
3 appellate government and appellate defense
4 counsel from each of the services, as well as
5 from Mr. Ryan Guilds, who spoke to the Committee
6 representing victim advocacy organizations, and
7 Ms. Meg Garvin speaking in her capacity as the
8 Executive Director for the Crime Victim Law
9 Institute and as a nationally recognized expert
10 on victims' rights and the Crime Victims' Rights
11 Act.

12 So if we can go to the next slide.

13 So, starting with issue 1, the first
14 issue that the Policy Subcommittee reviewed is
15 whether a victim should have the ability to
16 assert their rights at the trial court level. On
17 this issue, Article 6b diverges from the CVRA.
18 The CVRA states that a victim should first assert
19 their rights at the District Court in which the
20 Defendant is being prosecuted or in the District
21 Court in which the crime occurred if there's no
22 ongoing prosecution, and only if the District

1 Court denies the victim relief may the victim
2 petition the appellate court for writ of
3 mandamus.

4 Article 6b does not have a similar
5 provision allowing the victim to initially assert
6 their rights at the trial court level, but
7 instead requires the victim to immediately
8 petition the appellate court.

9 Next slide, please.

10 There are some exceptions that provide
11 a victim standing at the trial court. Article 6b
12 provides victims the right to be heard at the
13 sentencing proceedings for the accused. There
14 are also other exceptions written into other
15 statutes and rules.

16 For example, prior to referral, RC --
17 rule for Court-Martial 309 allows a victim to
18 file a motion with a military judge to require
19 the Article 32 preliminary hearing officer to
20 comply with the victim's rights. An important
21 note here is that prior to the Military Justice
22 Act of 2016, which was part of the Fiscal Year

1 2017 National Defense Authorization Act, military
2 judges did not have authority to rule on issues
3 prior to the referral of charges.

4 The Military Justice Act created a new
5 Article 30a, which provides this authority in
6 certain circumstances as determined by -- (audio
7 interference).

8 I think we have somebody who maybe
9 needs to put mute on.

10 (Simultaneous speaking.)

11 MS. SAUNDERS: If I could ask everyone
12 to look at their settings and go on mute -- I
13 don't know if it's possible to mute from our end.

14 Okay. So here we go. So, similarly,
15 Military Rules of Evidence 412 and 513, which are
16 the military's rape shield law and the
17 psychotherapist-patient privilege respectively,
18 provide a victim the right to be heard regarding
19 the admission of evidence under these two rules.

20 Next slide, please.

21 So these are some of the points made
22 by the stakeholders on this issue. For the most

1 part, the stakeholders agree that providing
2 victims standing to assert their rights at the
3 trial court may be beneficial. As noted, there
4 are already a number of statutory and rules-based
5 exceptions that do allow a victim to assert their
6 rights at the trial court.

7 Stakeholders pointed out that even
8 where not explicitly allowed, often, military
9 judges will allow victims to be heard, but this
10 is not consistently applied across or even within
11 the services. Several stakeholders also pointed
12 out that if the victim is heard at the trial
13 court and then files a petition with the Court of
14 Criminal Appeals, the appellate court will have a
15 record with a judicial ruling to review rather
16 than relying only on the filings of the parties.
17 Some counsel also thought this might alleviate
18 some of the delay, as some issues may be easily
19 resolved at the trial court level.

20 Next slide, please.

21 So this leads to the two proposed
22 recommendations on this issue. For your

1 reference, the recommendations are all listed on
2 page 1 and 2 of your draft report, and pages 3
3 and 4 are an extract of Article 6b, Subsection E,
4 with the proposed changes added with tracked
5 changes.

6 Proposed Recommendation 1 is that
7 Congress should amend Article 6b(e)(1) and (2) to
8 state -- and Subsection E is the title
9 Enforcement. This change is addressed in
10 Recommendation 6 later, which contains the
11 conforming recommendations.

12 But moving on to subparagraph 1, the
13 victim of an offense under this chapter may
14 assert the rights of the victim afforded by a
15 section or rule specified in paragraph 5 at the
16 court-martial in which the accused is being tried
17 or may assert these rights with a military judge
18 pursuant to Article 30a if charges have not yet
19 been referred to a court-martial.

20 The court-martial, or military judge
21 if pre-referral, shall take up and decide any
22 motion asserting a victim's right forthwith. If

1 the relief sought is denied, the victim may
2 petition the Court of Criminal Appeals for a writ
3 of mandamus.

4 Next slide, please.

5 Subparagraph 2, if the victim of an
6 offense under this chapter is subject to an order
7 to submit to a deposition, notwithstanding the
8 availability of the victim to testify at the
9 court-martial trying the accused for the offense,
10 the victim may file a motion with the court-
11 martial, or with the military judge if pre-
12 referral, to quash such order. If the court-
13 martial or military judge denies the relief
14 sought, the victim may petition the Court of
15 Criminal Appeals for a writ of mandamus to quash
16 such order.

17 And then next slide.

18 And then this is Recommendation 2,
19 which reads that the Joint Service Committee on
20 Military Justice draft an amendment to rule for
21 court-martial 309(b) to provide that a victim may
22 file a motion pre-referral with a military judge

1 to assert their rights under Article 6b(a) of the
2 UCMJ.

3 So, essentially, combined, these two
4 recommendations would allow the victim to assert
5 their rights at the trial court level, or with a
6 military judge if it's pre-referral, and then
7 only if the victim does not get relief at that
8 level would they then be able to petition a Court
9 of Criminal Appeals for a writ of mandamus.

10 So those are the two recommendations
11 pertaining to this issue. So I'm going to turn
12 it over to the Committee to deliberate on these
13 two recommendations.

14 And, Brigadier General Schwenk, would
15 you like to open the discussion?

16 BGEN SCHWENK: Sure. Okay.

17 So, on the Subcommittee, it was a
18 consensus that the pros for the change far
19 outweighed the cons. As Terri said, our primary
20 focus was to look at what the Department of
21 Justice has provided as an enforcement mechanism
22 for civilian court, criminal court, federal

1 criminal court victims and ask ourselves whether
2 there was a reason if that was more beneficial
3 than what the military provided.

4 There was a unique military reason not
5 to do that. We couldn't find any unique military
6 reason. We were told there are some military
7 judges that allow the victim to raise the issue
8 at the trial court level, and there are some
9 military judges that don't. And so our decision
10 was they should all clearly do it because the
11 benefits far outweigh the detriment. And so
12 that's why this recommendation is there.

13 Questions or other Subcommittee
14 members' thoughts, comments?

15 MS. SAUNDERS: And if you could either
16 raise your hand on Zoom or actually physically
17 raise your hand, I'll try to keep track.

18 I see Suzanne Goldberg has raised her
19 hand. Go ahead.

20 MS. GOLDBERG: This is Suzanne
21 Goldberg. I am coming in, really, to thank the
22 team for their work and express appreciation for

1 BG Schwenk for his comments and am in agreement
2 as a member of the Subcommittee. Nothing
3 substantive to add.

4 CHAIR SMITH: Ditto. I second that.

5 BGEN SCHWENK: Yeah. I think, if you
6 remember that first slide, the one that
7 introduced us, there were two names on it. None
8 of the members' names were on it because the bulk
9 of the work was done by the staff. So I thank
10 Suzanne for recognizing them.

11 Anybody else? Comments?

12 MS. SAUNDERS: Okay. Mr. Cassara?

13 MR. CASSARA: Thank you. Sorry. I
14 don't do the emoji hand. I'm not sure how that
15 works.

16 MS. SAUNDERS: I see real hands, too,
17 so it's all good.

18 MR. CASSARA: There you go. There you
19 go.

20 So my concern is, when we talk about
21 an order for a deposition and how a military
22 judge can quash an order for a deposition, these

1 are not -- my recollection is they're not
2 depositions ordered by the Defense. These are
3 generally depositions ordered by the convening
4 authority or by a military judge. Am I correct,
5 or am I incorrect on that?

6 MS. SAUNDERS: It would -- yeah, I
7 think you are -- you are correct.

8 MR. CASSARA: Okay. So, if a judge is
9 ordering a deposition, we're now saying that a
10 judge can quash that deposition?

11 MS. SAUNDERS: I think it would allow
12 the victim to be heard on that deposition.

13 MR. CASSARA: But aren't they -- I
14 mean, they're heard through a trial counsel.

15 MS. SAUNDERS: I think what we have
16 heard is sometimes -- and we haven't heard a lot
17 on this particular issue, but that, yeah, the
18 victims' counsel or the victims themselves should
19 have the right to be heard rather than -- because
20 there are occasions where the trial counsel and
21 the victim's counsel diverge in their views.

22 MR. CASSARA: Okay. You can sense I'm

1 not in favor. But that's okay. I am a lone
2 wolf.

3 MS. SAUNDERS: Is it just this
4 particular provision or --

5 MR. CASSARA: No.

6 MS. SAUNDERS: -- all of the
7 recommendations?

8 MR. CASSARA: I'm cogitating the
9 others, but on that particular provision, I am
10 not in favor.

11 MS. SAUNDERS: Okay.

12 Judge Walton?

13 HON. WALTON: The idea of a judge
14 ordering that a victim be subject to a deposition
15 is foreign to me. And I just, I guess, don't
16 appreciate what the basis would be for a judge
17 interjecting himself or herself into the process
18 and requiring that a victim be subject to a
19 deposition because, obviously, having been a
20 defense lawyer and a prosecutor, I can see
21 potentially the benefit that maybe the defense
22 acquires from having that deposition done because

1 any time a witness makes multiple statements,
2 there's always a potential that they may say
3 something somewhat different, even though not
4 substantively different, but different that can
5 be used against them when the case ultimately
6 goes to trial.

7 And obviously, from a prosecutor's
8 perspective, you don't want that to occur. You
9 don't want multiple statements out there because
10 even though a witness may be telling the truth,
11 if they have to repeat what they experienced
12 multiple times, there always is a potential there
13 are going to be some minor inconsistencies that
14 can be exploited by the defense.

15 So I guess my real concern is, why
16 would a judge be even ordering that a deposition
17 be taken by a witness?

18 MS. SAUNDERS: So, Judge Walton, to
19 answer that the best I can, the Subcommittee did
20 not delve into that particular issue. Really,
21 what the Subcommittee was looking at is,
22 currently, Article 6b -- that section of Article

1 6b -- requires that if a victim feels their
2 rights are being violated after being ordered to
3 give a deposition, that they may petition the
4 Court of Criminal Appeals for a writ of mandamus.

5 So what the Subcommittee was really
6 looking at there is to say, prior to actually
7 going to the Court of Criminal Appeals, allow the
8 victim to assert their rights with the judge at
9 the trial court level or, if it's pre-referral,
10 with a military judge rather than having to take
11 that first step and go to the Court of Criminal
12 Appeals. But the Subcommittee did not delve into
13 the background of ordering depositions for
14 victims or witnesses.

15 HON. WALTON: Well, obviously, I would
16 be in favor of this amendment. I think it's
17 appropriate. I think the victims should have a
18 right to challenge being ordered to be subject to
19 the deposition.

20 CHAIR SMITH: I agree with Judge
21 Walton. The other thing I would say, just about
22 what Mr. Cassara said related to -- well, the

1 judge has already ordered the deposition. Maybe
2 the judge doesn't have all the information, so it
3 certainly makes sense to allow the victim to come
4 in and at least argue. The judge has the option
5 of saying, no, I still want the deposition, which
6 is odd, but yet here we are. All we're doing is
7 allowing for argument.

8 MS. SAUNDERS: And I think I see Meg
9 Garvin's hand.

10 MS. GARVIN: Yes. Thanks. I really
11 just wanted to echo now what the Chair has said
12 and what the Judge had said before, two points.
13 One, it seems like this is -- in some ways, these
14 two recommendations are a bit of a cleanup in
15 that what seems to be happening right now is a
16 direction to jump over the trial court level and
17 go right to the appellate court level. And that
18 just, from a procedural standpoint, makes no
19 sense in any judicial system.

20 And so cleaning up to make sure that
21 victims have the opportunity to be heard on these
22 issues at the trial court level creates a good

1 record for an appeal -- also might resolve things
2 at the trial court level. So I think, all
3 around, it kind of cleans up practice to ensure
4 there is clarity and consistency of victims of
5 being able to participate on their rights at the
6 lowest level and then ultimately a higher level.

7 With regard to the depositions, I do
8 want to just echo the Judge. I do think, at some
9 point, this Committee should consider that
10 substantively. It is an incredibly rare thing in
11 this country. Only a handful of jurisdictions
12 allow depositions of the victims on the criminal
13 side. Military happens to be one.

14 MS. SAUNDERS: And Mr. Kramer?

15 MR. KRAMER: Thanks. Yeah. I mean,
16 I don't disagree that victims should have a right
17 to be heard. It kind of seems to me it has it
18 backwards. There's already an order for a
19 deposition, and then the person can petition to
20 have the order quashed?

21 I think what really is intended -- and
22 I think Meg Garvin may have said it -- that they

1 be heard before an order for a deposition is
2 entered. And if the deposition is ordered, it
3 doesn't do any good to go back to the same judge.
4 It seems like, then, you want to have an appeal.

5 So it seems like it kind of has it
6 backwards. You want the right to be heard before
7 any such order is issued, and then you want to go
8 to a higher court to get it quashed. So I don't
9 disagree with the substance, but I think the
10 wording may have to be fixed.

11 MS. SAUNDERS: Okay. So, Mr. Kramer,
12 I take your point that we may need to do a little
13 cleanup with that portion.

14 Do any of the other members have
15 anything to say on that issue or any other issue
16 regarding these recommendations?

17 HON. WALTON: This is one of the few
18 times I agree with A.J.

19 CHAIR SMITH: I actually was going to
20 say I agree with him as well. I mean, really, it
21 should be before a deposition is even ordered the
22 victim should have the opportunity to come in and

1 argue against it. My only question is at what
2 point is the judge ordering this deposition?
3 Presumably before the victim has their attorney?
4 I don't know how it plays out, but that would be
5 my only question.

6 MS. SAUNDERS: So, if the victim has
7 an attorney, they probably do have their attorney
8 at that point, although that may not be the case
9 in every situation. Well, it sounds like I
10 probably need to go back to the drawing board on
11 that piece of this recommendation.

12 Mr. Kramer?

13 MR. KRAMER: Sorry. Sorry. Yeah. I
14 assume this is where somebody thinks that the
15 victim is not going to be available for the trial
16 either because they're moving away or, if they're
17 in the military, because they're going to be
18 PCS'd, and they're not going to be available. I
19 assume that's the circumstance, that it would be
20 an unusual case where it would happen.

21 So that's why I think that it kind of
22 has it backwards because the victim may already

1 be gone by the time the deposition order is
2 entered if it's entered because the victim is
3 gone already.

4 CHAIR SMITH: Why don't we -- can we
5 do a vote with whether we want to, A, say no way
6 to this recommendation; B, we like the
7 recommendation the way it is; or C, we like the
8 recommendation with the way A.J. said it -- the
9 order A.J. said it should be in?

10 BGEN SCHWENK: I'd offer another --
11 this is Jim Schwenk. I'd offer another
12 alternative. Why don't, today, we vote on 1,
13 Subsection 1 there or subparagraph 1, and let
14 Terri rework 2? And when it comes back out in
15 writing to everybody, it'll reflect, to the best
16 we can come up with, what A.J. has recommended --
17 and it hurts me to say this, but what A.J. has
18 recommended and what everybody else seems to be
19 agreeing to, because we haven't had any
20 discussion other than Bill not liking 1.

21 So I would recommend that we just do
22 1 and -- Draft Recommendation 1, paren 1, and

1 leave 2 for the future.

2 CHAIR SMITH: That's why they call you
3 General, because you're that clever.

4 All right. So let's, then, vote on
5 Draft Recommendation 1, Part 1. Anyone -- I'm
6 just going to ask, anyone opposed to Draft
7 Recommendation 1, Section 1?

8 DR. MARKOWITZ: So, Chair Smith, this
9 is Jen Markowitz. I will be abstaining from
10 voting on all of these, so I just want to put
11 that out there. So I'll be abstaining on 1, and
12 that will be true for all of the votes on Article
13 6b.

14 CHAIR SMITH: All right. Thank you.

15 DR. MARKOWITZ: Thank you.

16 CHAIR SMITH: So anyone opposed to
17 Draft Recommendation 1, Section 1?

18 MR. CASSARA: I'm reading it.

19 CHAIR SMITH: Okay. Go ahead and read
20 it.

21 MR. CASSARA: Yeah, I oppose.

22 CHAIR SMITH: Okay. Anybody other

1 than Mr. Cassara? And I can't -- I don't know if
2 anyone has their hands raised.

3 MS. SAUNDERS: I don't see anyone
4 else's hand up.

5 CHAIR SMITH: Okay. All right. So,
6 with that, I think we can say we are going to
7 adopt Draft Recommendation 1, Section 1.

8 MS. SAUNDERS: And I will redraft
9 Subsection 2, as General Schwenk suggested.

10 Going on to Recommendation 2 on the
11 next slide, and this is the recommendation that
12 the Joint Service Committee draft an amendment to
13 RCM 309B to revise that a victim may file a
14 motion pre-referral with a military judge to
15 assert their rights under Article 6b, Subsection
16 A. And those are the enumerated rights of
17 Article 6b.

18 Any general -- or I guess you've
19 already had your discussion. Is there any
20 specific discussion on this recommendation?

21 CHAIR SMITH: I don't see anyone. Do
22 you want to go ahead and vote on Draft

1 Recommendation 2?

2 MS. SAUNDERS: Judge, if you're ready,
3 that would be good.

4 CHAIR SMITH: All right. Anyone
5 opposed to Draft Recommendation 2? Mr. Cassara.
6 Anyone else opposed to Draft Recommendation 2?
7 And Ms. Markowitz is abstaining.

8 MS. SAUNDERS: I don't see any other
9 hands raised.

10 CHAIR SMITH: All right. So the
11 Committee will go ahead and adopt Draft
12 Recommendation 2.

13 MS. SAUNDERS: Okay. So we will move
14 on to the next issue, if we could go to the next
15 slide.

16 Okay. Issue 2 concerns jurisdiction
17 of the Court of Appeals for the Armed Forces and
18 whether they should have the jurisdiction over
19 victims' petitions. As background, in a 2016
20 opinion, the Court of Appeals for the Armed
21 Forces ruled that neither Article 6b nor Article
22 67 provide them jurisdiction to review victim

1 repetitions. Article 67 is the article that
2 details jurisdiction for CAAF.

3 Following that decision, in the FY
4 2017 National Defense Authorization Act, Congress
5 amended Article 6b to add a new paragraph, which
6 provides the review of a Court of Criminal
7 Appeals decision on a petition for a writ of
8 mandamus will be given priority for review at
9 CAAF.

10 However, in a 2023 opinion, which was
11 M.W. v. the United States, CAAF held that this
12 added provision does not explicitly provide
13 jurisdiction to CAAF. The Court noted that this
14 provision in Article 6b could apply to cases in
15 which they otherwise explicitly have jurisdiction
16 under Article 67, such as when a Judge Advocate
17 General certifies an issue to CAAF or if the
18 accused appeals a petition to CAAF.

19 Next slide, please.

20 This slide is a recognition that the
21 DAC-IPAD's predecessor, the Judicial Proceedings
22 Panel, recommended in 2017 that Congress provide

1 jurisdiction for CAAF to review victim
2 repetitions, stating that CAAF could provide
3 civilian oversight over the service appellate
4 courts and that they could also solve split among
5 the appellate courts.

6 Next slide, please.

7 The stakeholders highlighted some of
8 the pros and cons of providing CAAF jurisdiction.
9 Some of the pros mentioned were that CAAF
10 jurisdiction would provide unity among the
11 service appellate courts. Several counsel stated
12 that victims should not have to rely on the Judge
13 Advocate General to certify an issue to CAAF.
14 Victims should have the authority to directly
15 appeal.

16 And on the other side, counsel noted
17 that if CAAF grants review for victims'
18 petitions, this would likely further delay a
19 court-martial. Also, appellate defense counsel
20 pointed out that the CVRA provides only one layer
21 of appellate review, and so victims in military
22 court should not have access to two layers of

1 appellate review.

2 So this leads to our proposed
3 recommendation on this issue on the next slide.

4 Thank you.

5 And this is Recommendation 3, that
6 Congress amend Article 6b, Subsection E, to add a
7 new paragraph 3 as follows: the Court of Appeals
8 for the Armed Forces shall review the record in
9 any matter decided by a Court of Criminal Appeals
10 under this section in which, upon petition of the
11 victim and on good cause shown, the Court of
12 Appeals for the Armed Forces grants a review.
13 For the petition of review granted, the Court of
14 Appeals for the Armed Forces may act on any issue
15 specified in their grant of review.

16 Basically, this language mirrors
17 existing language in Article 67 providing review
18 for the accused. And again, it doesn't require
19 that CAAF take jurisdiction or that CAAF hear a
20 case. It just simply provides jurisdiction for
21 them to do so.

22 So I'll turn it over to General

1 Schwenk, if you want to lead the deliberations on
2 this recommendation.

3 BGEN SCHWENK: Okay. To me, this came
4 down to having CAAF have uniformity across the
5 services versus the delay, and -- which is
6 endemic in having CAAF review. And as pointed
7 out in the paper that Terri wrote, there already
8 is a split under 513 on what the heck to do with
9 the deletion of the constitutional due process,
10 you know, constitutionally required language that
11 we had in the rule before and now is not there,
12 with the Navy going one direction, the Army going
13 the other direction, and CAAF saying, well, we're
14 not involved because nobody can get to us till
15 they get a case that has that issue someday.

16 So this would alleviate that problem
17 and allow CAAF, if they wanted to -- it's not a
18 requirement, but if they wanted to -- to take
19 those cases where there's a split and resolve the
20 split. So, to me, that sounded more important
21 than the delay. And so I voted in favor of this
22 change.

1 MS. SAUNDERS: Mr. Kramer? Mr.
2 Kramer, we're unable to hear you.

3 MR. KRAMER: Sorry. I have to do two
4 things, lower my hand and unmute, and that's very
5 difficult. I don't have any problem with the
6 substance again, but the wording seems kind of
7 strange. When it says it shall review the record
8 and any matter upon which it grants a review -- I
9 mean, that's what it does.

10 It seems to me it ought to say, upon
11 petition of the victim and on good cause shown,
12 the Court of Appeals for the Armed Forces may
13 grant review of any matter decided by a Court of
14 Criminal Appeals under this section, because I
15 don't know what the first part of it means, shall
16 review the record in any --

17 MS. SAUNDERS: No, good point, Mr.
18 Kramer. What I was really trying to do here was
19 just to mirror the already existing language in
20 Article 67, which grants CAAF review over the
21 accused petitions. So perhaps that language is
22 not as clear. So I guess we could either go with

1 the language here, which is a mirror of existing
2 language, or what you proposed, Mr. Kramer. So
3 can I ask you to say that one more time where you
4 --

5 MR. KRAMER: Sure. And it really is
6 not that big a deal, but it just seems kind of
7 strangely worded. And I get that you're just
8 taking it from another provision. I think it
9 should say, the Court of Appeals for the Armed
10 Forces may grant review of any matter decided by
11 a Court of Criminal Appeals under this section
12 upon petition of the victim and on good cause
13 shown.

14 Or I probably should -- I'm sorry. It
15 should start, upon petition of the victim and on
16 good cause shown, the Court of Appeals for the
17 Armed Forces may grant review of any matter
18 decided by a Court of Criminal Appeals under this
19 section.

20 MS. SAUNDERS: Sounds like a friendly
21 amendment to the recommendation. Any --

22 MR. KRAMER: I think instead of the

1 word, their, in the last line, it probably should
2 say its. It's referring to a court.

3 MS. SAUNDERS: Okay. Good catch.

4 MR. KRAMER: Sorry.

5 MS. SAUNDERS: No, good catch. Thank
6 you.

7 BGEN SCHWENK: Yeah. This is Jim
8 Schwenk, and I think that's a good decision. And
9 I appreciate that Terri was trying to use
10 existing language, but Congress is going to write
11 whatever they're going to write anyway. So our
12 recommendation may be like A.J.'s recommended --
13 straightforward and to the point so it's clear
14 what we're getting at. So I accept that
15 amendment, whether it's friendly or not.

16 MS. SAUNDERS: Were there any other
17 comments or discussion on this proposed
18 recommendation as amended by Mr. Kramer?

19 HON. WALTON: Only that I agree with
20 Mr. Kramer, but I'm going to lose my credibility
21 here at the courthouse if I'm agreeing with him a
22 second time, but --

1 MR. KRAMER: Can I get a recording of
2 Judge Walton and General Schwenk agreeing with me
3 again?

4 MS. SAUNDERS: Well, we do have a
5 transcript, so I think you have proof.

6 So I don't see any other hands raised.
7 So, Judge Smith, I think -- are we ready for a
8 vote using the amended language that Mr. Kramer
9 proposed?

10 CHAIR SMITH: Yes.

11 All right. So is there anyone opposed
12 to adopting Draft Recommendation 3 with the
13 suggested changes by Mr. Kramer? I'm looking for
14 Mr. Cassara.

15 All right. It doesn't sound like
16 anyone's opposed. So, with that, we'll go ahead
17 and adopt Draft Recommendation 3.

18 MS. SAUNDERS: We'll go right into the
19 next issue, and this is Issue 3, the timing of
20 appellate court review. And this really gets at
21 the length of time it takes the appellate courts
22 to review and decide on a victim's petition for a

1 writ of mandamus.

2 Article 6b simply provides that the
3 appellate court should give a victim's petition
4 priority over other proceedings before the court
5 to the extent practicable, whereas the CVRA has
6 more explicit timelines written into the statute.
7 It requires the district court to take up the
8 victim's motion forthwith, and it requires the
9 appellate courts to decide on the application
10 within 72 hours after it's been filed unless the
11 litigants have agreed to a different time period.

12 Next slide, please.

13 To provide some background, the Courts
14 of Criminal Appeal and CAAF have options when a
15 petition is filed. I include CAAF in here, as
16 they do have jurisdiction over writ petitions
17 filed by the accused. Once they receive a
18 petition, the appellate courts may deny the
19 petition, or they may order the respondent to
20 provide an answer. If the appellate courts order
21 the respondent to provide an answer, they may
22 then hold oral argument, or they may grant or

1 deny the petition based solely on the briefs.

2 According to information provided by
3 victims' counsel and the appellate counsel, a
4 petition filed with the service Courts of
5 Criminal Appeal typically takes between two and
6 four months to resolve. And if CAAF grants
7 review of a petition, that may take six months or
8 more of additional time.

9 Appellate review does not always mean
10 that there will be a delay in the court-martial.
11 If a military judge hears motions ahead of the
12 trial date and the victim files a petition with
13 the Court of Criminal Appeals, it may well be
14 resolved prior to the scheduled trial date.

15 I know the Air Force appellate counsel
16 mentioned in the last meeting that they had had
17 eight petitions go up to the Court of Appeals,
18 and six of those did not result in a trial delay.
19 One went up to CAAF and did result in a
20 significant delay. So that's just for
21 background.

22 Next slide, please.

1 And then on to the stakeholder
2 perspectives. When asked about the CVRA 72-hour
3 requirement, most counsel from all of the groups
4 agreed that that probably would not work well in
5 the military system and that it would strain
6 resources to be able to file and answer a
7 petition within such tight time frames, although
8 some counsel did state that tighter time frames
9 or timelines may be needed and that in some
10 cases, victims elect not to file a petition to
11 protect their rights because doing so may delay
12 the trial.

13 Counsel said it is beneficial to have
14 motions prior to the trial date when possible,
15 which may result in no delay if a victim files a
16 petition. And many counsel agree that the Courts
17 of Criminal Appeal issue rulings relatively
18 quickly.

19 Next slide, please.

20 And then this leads to Proposed
21 Recommendation 4, which has parts A, B, and C.
22 For this recommendation, the Policy Subcommittee

1 provided several options for discussion rather
2 than a single recommendation. And the
3 Subcommittee felt that this issue would benefit
4 from the expertise of the full Committee on
5 deciding the best path forward on this
6 recommendation.

7 And this reads as follows. On Draft
8 Recommendation 4A, it's just changing the
9 numbering, and that's because the previous
10 recommendation inserted a new paragraph.

11 Recommendation 4B should be amended as
12 follows. A petition for a writ of mandamus
13 described in this subsection shall have priority
14 over all proceedings before the Court of Criminal
15 Appeals. The Court of Criminal Appeals shall
16 review and decide on a victim's petition for a
17 writ of mandamus. And here are the options that
18 we've presented to you: within 30 days; within 60
19 days; or another time period that the Committee
20 thinks is appropriate after the petition has been
21 filed with that court unless the litigants, with
22 the approval of the court, have stipulated to a

1 different time period.

2 To the extent practicable, court-
3 martial proceedings shall not be stayed or
4 subject to a continuance of more than five days
5 for purposes of enforcing this section. And
6 again, there, we did borrow some language from
7 the Crime Victims' Rights Act.

8 The next slide has Recommendation 4C.
9 And this reads that review of any decision by the
10 Court of Criminal Appeals on a petition for a
11 writ of mandamus described in this subsection
12 shall have priority in the Court of Appeals for
13 the Armed Forces as determined under the rules
14 for the Court of Appeals for the Armed Forces.

15 The Court of Appeals for the Armed
16 Forces shall review and decide on a victim's writ
17 appeal, again, that the same options -- within 30
18 days, within 60 days, or another time period that
19 this Committee thinks is appropriate after the
20 writ appeal has been filed with a court, unless
21 the litigants, with the approval of the court,
22 stipulated to a different time period.

1 The other option that we provide at
2 the bottom of the slide is just to not change
3 this particular provision of Article 6b,
4 recognizing that it's fairly rare for the Court
5 of Appeals for the Armed Forces to take a
6 petition, and they just are not able to hear that
7 many cases each year.

8 So, if we left that provision of
9 Article 6b alone, it would read as it currently
10 does, which is, review of any decision of the
11 Court of Criminal Appeals on a petition for a
12 writ of mandamus described in this subsection
13 shall have priority in the Court of Criminal
14 Appeals for the Armed Forces as determined under
15 their rules.

16 So, again, I'll turn it over to
17 General Schwenk to lead the deliberations on this
18 recommendation.

19 BGEN SCHWENK: Thank you, Terri.

20 Okay. So, as you can see, the
21 Subcommittee was unable to come up with a number
22 plucked out of the thin air to fill in the blank

1 for you to look at. And we don't have a lot of
2 expertise in how this actually works in the
3 federal court system with their 72 hours unless
4 the litigants have stipulated to a different time
5 period with the approval of the court.

6 So we decided to pack it up and send
7 it to you guys. I will note that it was near
8 unanimous from the appellate counsel, defense,
9 and government and from the victim's counsel that
10 72 hours was just not workable at all if you
11 wanted to have a credible recommendation under
12 the UCMJ.

13 So that's why it's not even
14 recommended, although we do want to mirror the
15 Crime Victims' Rights Act to the extent that we
16 can. And so that's where we left it.

17 Personally, I'm -- nobody was really
18 complaining about the delay except in the context
19 of it takes too long in general, and so every
20 piece that drags things out is bad. But I
21 personally don't mind just leaving the language
22 as it is with priority. That's pretty clear to

1 me.

2 But I know other members felt that we
3 needed to have some maximum limit, and so I leave
4 it to everybody to discuss.

5 MS. SAUNDERS: Ms. Goldberg?

6 MS. GOLDBERG: Just picking up on
7 Jim's point, I don't feel I have the expertise to
8 be able to recommend a time period. At the same
9 time, I think we all had some concern with
10 leaving no time period at all, given the risk of
11 inconsistency that can potentially result without
12 a clear parameter.

13 So I'm very interested personally in
14 the views and experiences of others. It did also
15 seem to me, even without that experience, that 72
16 hours would be a difficult rule to meet. But it
17 was notable to me that that is the federal rule,
18 and wondered if I might be thinking that this is
19 a more difficult period of time to meet than is
20 actually the case. So looking forward to hearing
21 from others with more experience in this area.

22 MS. SAUNDERS: Mr. Kramer?

1 MR. KRAMER: So I actually have
2 personal experience with the 72-hour time limit
3 in a mandamus petition filed by a victim having
4 to do with restitution in a child pornography
5 case. And the petition was filed, and the Court
6 of Appeals then set a briefing schedule, which
7 wasn't even within the 72 hours. It was far
8 beyond the 72 hours because it's almost
9 impossible to file a response brief within 72
10 hours.

11 And the Court of Appeals then went on,
12 heard oral argument, and took months to decide
13 the case. And in that, they said that the 72
14 hours is not jurisdictional, so that they're not
15 -- while it's obviously -- I don't know what you
16 would call it -- more than advisory, but they're
17 not bound by it. So they could issue the opinion
18 whenever they wanted, essentially.

19 But 72 hours is -- I don't think
20 anything can be -- never mind resolved, but
21 briefed within 72 hours. And I don't know enough
22 about the military courts and the system to say

1 what would be the correct time limit. So I guess
2 I'm stuck with leaving it with the second
3 paragraph about priority because I have no idea
4 what time limit would be reasonable to get it
5 briefed and decided.

6 MS. SAUNDERS: Ms. Garvin?

7 MS. GARVIN: Yes, I, too, have
8 experience with 72-hour on the filing side, on
9 the victim side, as well as trained to
10 participate as an amicus in that window.

11 So, just a couple of historical notes,
12 because I helped work on the CVRA and drafted it
13 in 2004 -- helped draft it -- the 72 hours in the
14 CVRA on the civilian side was designed in large
15 part to help alleviate concerns that victim
16 participation would result in delay of the
17 underlying criminal proceedings against an
18 accused.

19 And it was a very strong and joint
20 effort by everyone to try to ensure that victim
21 participation did not result in delay, because
22 that's not good for anyone, including the

1 accused.

2 And so, that's where that time frame
3 came from. And if you look at the history of the
4 CVRA, the 72 hours, it has been looked at a
5 couple of times by Congress to consider changing
6 it. And what has happened is, basically by
7 practice, it's been changed.

8 So, the parties can agree and the
9 court can agree to modify that time frame. And
10 in general practice, that's what happens.

11 More often than not parties will
12 propose a different timeline to the court and the
13 court will endorse that. And then, you are
14 operating under a different timeline in the state
15 system following the passage of the CVRA and the
16 consideration of the 72 hours being a little too
17 rapid.

18 Because quite honestly, what happened
19 early on in the CVRA was not as good a briefing
20 as one would hope, and perhaps not as well-
21 considered decisions as one might have hoped --
22 because of that briefing, the states that started

1 to put in place appellate review for victim
2 rights issues initiated by the victim, considered
3 different timelines.

4 Oregon was one of the most considered,
5 I would say. And they put in place a 30-day
6 timeline with the authority of the court if
7 justice requires to have an extended timeline.

8 So, instead of having it be the
9 parties, and then the court endorsing a different
10 timeline, they put in place in Oregon a
11 timeline -- which I believe is thirty days, I'd
12 have to go back and look -- but that the court
13 has authority if justice requires an extended
14 period of time, a longer period of time.

15 So, it put in place this notion of,
16 this should be expedited in order to preserve the
17 lack of delay, to ensure there's not a delay, and
18 yet, a recognition that courts, if they see a
19 complex issue coming down the pike, might say,
20 justice requires a longer time.

21 And so, there might be an avenue to do
22 that here, which is to recognize the need for

1 these things to move quickly, but also to
2 recognize that courts really understand how to
3 manage their dockets to ensure thoughtful
4 decisions.

5 MS. SAUNDERS: Okay. Other comments?
6 Mr. Cassara?

7 MR. CASSARA: So, I have a different
8 spin, but with the same eventual result.

9 As one who represents clients who are
10 confined on appeal, every time something moves up
11 the queue in the very understaffed CCAs and CAAF,
12 it's usually my client's case that's getting
13 bumped down.

14 And then, the question is, is delay
15 better for a person who's already been convicted,
16 or for a person who is pending trial?

17 I don't think we want to make those
18 choices by imposing artificial deadlines. So, I
19 would agree with General Schwenk that leaving the
20 language the way that it is, is probably the best
21 solution.

22 MS. SAUNDERS: Just so I have the

1 language in front of me, the current language for
2 the courts of criminal appeal -- and let me hunt
3 it down here -- it states that: A petition for a
4 writ of mandamus described in this subsection
5 shall have priority over all proceedings before
6 the court of criminal appeals.

7 So, basically, it's more general
8 language that it should have priority. And that
9 same general language is present for the Court of
10 Appeals for the Armed Forces, that those
11 particular petitions should have priority.

12 MR. CASSARA: And the court can
13 determine what that means.

14 MS. SAUNDERS: Right. And generally,
15 again, what we have heard from our practitioners
16 who came and spoke to us, is that generally the
17 courts of criminal appeals, they are hearing
18 these petitions in a range of two to four months,
19 and then obviously a much longer time when we get
20 up to the Court of Appeals for the Armed Forces.

21 So, we have a couple of suggestions
22 that we just leave the language as it is

1 regarding the time frame for both the courts of
2 criminal appeals and the Court of Appeals for the
3 Armed Forces.

4 Ms. Garvin had also suggested perhaps
5 putting a time frame in there, but then making it
6 clear that the courts could provide a different
7 time frame, basically allowing the court to
8 manage their own docket and allowing that court
9 to say, well, in this case we're not going to be
10 able to do this in 30 days, so that they would
11 stipulate a different time frame. Meghan?

12 MS. TOKASH: Terri, in the references
13 to 6b(e), I just want to make clear the existing
14 language also has a provision -- correct me if
15 I'm wrong -- that the petitions are priority, to
16 the extent practicable.

17 MS. SAUNDERS: Yes.

18 (Simultaneous speaking.)

19 MS. SAUNDERS: No, that's a good
20 mention there. Judge Smith?

21 CHAIR SMITH: I actually like the idea
22 with respect to what Meg said they do in Oregon.

1 Because I think that it's better for the court to
2 have a more concrete time frame, that the court
3 can then say, okay, well I should have this done
4 in 30 days, but if good cause is shown, we can
5 extend it.

6 And just kind of weaving it out there
7 without any real set standard. I mean, I think
8 the reason why statutes have time frames, is
9 because when statutes don't have time frames,
10 people, depending on who the person is making the
11 decision, might take way longer than they should.

12 So, I would lean towards doing
13 something reasonable. Something that's doable.

14 Terri said two to four months seems to
15 be the average amount of time. So, maybe you say
16 60 days. But I would vote for something.

17 MS. SAUNDERS: Ms. Goldberg?

18 MS. GOLDBERG: I completely agree with
19 Judge Smith and was going to say some of what she
20 said.

21 I would just add that the value of
22 having a date is that it gives those concerned

1 that the court may not be moving quickly enough,
2 with something to point to in requesting
3 expedited movement.

4 Without a date, there is very little
5 or no hook for a party that is concerned about
6 timing.

7 I would have serious concerns about
8 leaving no date in. And my interest as a
9 subcommittee member in bringing this question to
10 the full committee was mainly in seeking help
11 with identifying a date, rather than leaving us
12 in a place of full generality and discretion that
13 isn't helpful I think either to parties or
14 courts, frankly.

15 MS. SAUNDERS: For those who do
16 suggest having some kind of time frame in there,
17 would you suggest this both for the courts of
18 criminal appeals, as well as for the Court of
19 Appeals for the Armed Forces? Ms. Goldberg?

20 MS. GOLDBERG: My default would be to
21 have the same for both. If someone is aware of a
22 reason that that should not be the case, I'd be

1 interested to hear.

2 But for the same reasons that I think
3 having a specific time period is useful for CAAF,
4 I think it would also be useful for lower courts.

5 But again, I'm interested in other
6 thoughts, including whether it makes sense, given
7 the variations in jurisdiction, to have the same
8 for both or something different.

9 MS. SAUNDERS: Are there any other
10 members who want to weigh in on this issue?
11 Judge Walton?

12 HON. WALTON: General Schwenk, was
13 there any evidence of extensive delay that's
14 occurring, that needs to be addressed, or we
15 don't know?

16 BGEN SCHWENK: All our information is
17 anecdotal and it came from the appellate counsel
18 and the victims' counsel that work these kinds of
19 cases.

20 And that's where the two to four
21 months came. And that's also where the Air Force
22 said they generally have military judges that

1 schedule motions practice way before the trial.

2 So, they haven't run into problems
3 with delays of the trial date. But the few that
4 have gone to CAAF have taken much longer than
5 60 days.

6 And I remember when they talked to us
7 about that. I thought, why is that? They know
8 there's a trial pending. And yet, longer than
9 six months even.

10 But there haven't been that many
11 cases. So, it's not a good, big sample size. I
12 hope that helps.

13 MS. SAUNDERS: We had asked the
14 victims' counsel who came and spoke to our
15 subcommittee at our last meeting, prior to their
16 coming and speaking to us, to take a look at the
17 petitions that they have filed within the
18 proceeding, and to give us a general idea of the
19 time frame.

20 And I will say for most of the
21 services, there had been no petitions filed in
22 the Army. I think a couple in the Navy. I think

1 I detail this a little bit in the text in the
2 report.

3 And then, obviously, the Air Force
4 with the most age. But I think that is where,
5 generally, more of the two-month mark. I think
6 there was one Navy case that was closer to the
7 four-month mark.

8 I think generally, what the sense was
9 from -- and these were the program managers from
10 the victims' counsel program, as well as the
11 chiefs or designees of the appellate government
12 and appellate defense offices, is that they
13 generally didn't think at the lower appellate
14 court level -- it was sort of a sense that they
15 would like things to be faster, but at the same
16 time they didn't think that it was incredibly
17 unreasonable what they were seeing.

18 They thought that the courts of
19 criminal appeals generally did their best to try
20 to move things along quickly.

21 Obviously, the Court of Appeals for
22 the Armed Forces, though they take many fewer

1 cases of this type, they obviously do take much
2 longer to resolve.

3 And Ms. Garvin, I think I saw you had
4 your hand up.

5 MS. GARVIN: I did, but put it down
6 during that discussion. I just wanted to flag
7 that I quickly pulled up in Oregon there's a
8 21-day. I just wanted to clarify for the record,
9 not the 30-day that I had mentioned. It is
10 factually a three-week mark.

11 And then, to your question, Terri,
12 about timelines for the two different courts, I'm
13 a strong proponent of having timelines in both.
14 Again, if something is going to go up -- and as
15 you noted, not many victims issues have -- but if
16 something is going to go up, I think it is in the
17 interest of the system of the accused, of the
18 victims, to move these quickly, to avoid risk of
19 delays.

20 And so, shorter time periods, giving
21 the court kind of the in-the-interests-of-justice
22 out for longer, seem useful.

1 And I will also say victims' issues,
2 the things that victims would petition on, they
3 tend to be relatively discreet issues.

4 And while they are newer, they're not
5 overly complex issues that really require a lot
6 of time, from my perspective, having done this on
7 the civilian side for 20-plus years.

8 They can generally be decided
9 relatively quickly, because they're singular
10 issues of law, generally speaking.

11 So, I think a 30-day, or a 21-day,
12 something short that still leaves the court the
13 authority, makes sense for both levels of courts,
14 so that we don't create a system that causes
15 delay for the accused.

16 MS. SAUNDERS: So, it looks like we
17 have a couple of different ways we could go here.
18 One is to leave everything as it is and just say
19 that they should be given priority to the extent
20 practicable.

21 The other option, which several of the
22 members have endorsed, is to put a time frame in

1 there -- perhaps three days -- but also making it
2 clear that the court has the authority to take a
3 longer period of time than that to basically
4 manage their own docket, rather than having to
5 produce an opinion within the 30 days.

6 But putting that time frame in there
7 will forecast to all parties concerned, that this
8 is a very important issue and that this should
9 absolutely be given priority.

10 I don't know what the best way of
11 doing this. Do we maybe want to see a show of
12 hands to see who supports leaving the language
13 as-is, without any changes?

14 CHAIR SMITH: Yeah, let's do a vote on
15 that, and then we'll see where we are after that.

16 MS. SAUNDERS: Okay.

17 CHAIR SMITH: Yeah, General Schwenk.

18 BGEN SCHWENK: No, I'm just voting.

19 CHAIR SMITH: Oh, okay. Sorry.

20 MS. SAUNDERS: Okay. So, you can
21 either raise your physical hand or your emoji
22 hand to indicate your vote to leave the language

1 in Article 6b on this issue as-is.

2 I'm seeing -- people are coming up
3 here. One, two, three, four, five --

4 DR. MARKOWITZ: And again, this is
5 Dr. Markowitz. I'll be abstaining from this, as
6 with the previous ones.

7 MS. SAUNDERS: Six, seven -- so, I
8 think what I'm seeing is seven members who are
9 voting to leave this as-is. Oh, actually, one,
10 two, three, four, five, six, seven, eight.

11 CHAIR SMITH: Can you name who you
12 see, just in case --

13 (Simultaneous speaking.)

14 MS. SAUNDERS: General Schwenk,
15 Dr. Spohn, Mr. Kramer, Judge Walton, Sergeant
16 Major Martinez, Sergeant Shepperd, Bill Cassara,
17 and I saw someone else there. Oh, Dr. Spohn.
18 Thank you.

19 So, we have eight members who are
20 voting to have the language stay as-is and one
21 member is abstaining. And so, I think that is --

22 PARTICIPANT: Didn't carry.

1 MS. SAUNDERS: Is that a quorum? Is
2 that the majority, Meghan?

3 MS. TOKASH: Yes, a consensus of the
4 majority carries.

5 MS. SAUNDERS: Okay. Okay. So, what
6 we'll do then is recommendation for A, which is
7 just really the renumbering. I'll just amend
8 that to indicate that it will be renumbered to
9 subparagraph 4, rather than subparagraph 3, but
10 that the remaining two portions of the
11 recommendation -- Recommendation 4B and
12 Recommendation 4C -- have been voted down and
13 that the language that currently exists in the
14 statute will remain as-is.

15 Okay, if we could move to the next
16 section. Here we go. So, this is issue four,
17 and I'll go through this quickly, because I knew
18 we are running out of time for this session.

19 So, issue four, the fourth and final
20 issue, is the standard of review for the
21 appellate courts and what they should use in
22 reviewing a victim's petition for a writ of

1 mandamus.

2 And here again, we compare Article 6b
3 with the CVRA. Article 6b is silent on the
4 standard of review, but the standard that the
5 appellate courts have applied requires the
6 petitioner to show that a writ of mandamus is
7 clear and indisputable.

8 By contrast, the CVRA was amended in
9 2015 to require that the courts use the ordinary
10 standard of appellate review, which is legal
11 error, or abuse of discretion, which is a lower
12 threshold than the clear and indisputable
13 standard. Next slide, please?

14 And as previously mentioned,
15 Article 6b is broader than the CVRA, in the sense
16 that the enforcement mechanism allows the victim
17 to file a petition for a writ of mandamus with
18 the CCA, not only for the enumerated rights under
19 Article 6b, subparagraph A, which are analogous
20 to the rights in the CVRA, but also for alleged
21 violations of the victim's rights under Military
22 Rule of Evidence 412, which is the military's

1 rape-shield law; 513, which is the
2 psychotherapist-patient privilege; 514, which is
3 the victim-advocate victim privilege; and 615,
4 which covers excluding witnesses from the
5 courtroom. Whereas, the CVRA's enforcement
6 mechanism applies only to the enumerated rights
7 listed in the statute. Slide 20.

8 Some of the stakeholders have said
9 that having a lower standard of review would
10 allow the appellate courts to develop the law and
11 clarify issues.

12 It also pointed out that this would
13 put military victims on par with civilian victims
14 in the federal court.

15 However, some have said that these
16 types of writs should be rare. And so, a higher
17 standard of review is appropriate. Next slide,
18 please?

19 So, this brings us to proposed
20 Recommendation 5. The Policy Subcommittee
21 recommends the lower standard of review for at
22 least the enumerated rights of Article 6b, to put

1 the military on par with the federal system.

2 However, again, the Policy
3 Subcommittee wanted the perspectives of all of
4 the committee members, regarding whether the
5 lower standard should also apply to the four
6 Military Rules of Evidence.

7 The recommendation reads that the
8 court of criminal appeals, the Court of Appeals
9 for the Armed Forces, shall apply the ordinary
10 standard of appellate review -- legal error or
11 abuse of discretion -- in reviewing a victim's
12 petition for a writ of mandamus asserting
13 their -- and this is option one -- enumerated
14 rights under Article 6b, subparagraph A.

15 However, the higher standard of
16 review -- leader in indisputable error -- shall
17 continue to apply to review of alleged violations
18 of Military Rules of Evidence 412, 513, 514, and
19 615.

20 The other option is that the writ of
21 mandamus asserting their enumerated rights under
22 Article 6b, including the alleged violations of

1 Military Rules of Evidence 412, 513, 514, and
2 615.

3 So, I'll ask, General Schwenk, if you
4 could lead the discussion on that issue.

5 BGEN SCHWENK: Okay. Going back to
6 what Terri said, we looked at the federal system
7 and they have a lower standard of review than
8 does the military.

9 We couldn't find any unique reason
10 that the military shouldn't have the same
11 standard of review. And so, we made this
12 recommendation.

13 In my view -- this is personal -- the
14 same rule, the same analysis, I couldn't find any
15 reason why there should be a lower standard of
16 review for the MREs than in the federal system
17 either.

18 So, I like the first option, which is
19 match up the standards of review under the CVRA,
20 with ours under Article 6b, and that results in a
21 lower standard of review when you assert denial
22 of rights under Article 6b(a), the first part,

1 but leave the higher standard of review for the
2 MREs.

3 MS. SAUNDERS: Dr. Spohn? Oh, we
4 can't hear you.

5 DR. SPOHN: I just forgot to put my
6 hand down after the vote. I'm sorry.

7 MS. SAUNDERS: Okay. Okay, other
8 comments or discussion on this? Meghan?

9 MS. TOKASH: Terri, to clarify, this
10 applies to the standard review for a victim's
11 petition, but not to an accused's petition?

12 MS. SAUNDERS: The subcommittee
13 studied only Article 6b issues. So, this would
14 apply only to the victim's petition. That is not
15 to say that the same rule should not then also be
16 applied to an accused's petition, but that is not
17 what the subcommittee studied.

18 CHAIR SMITH: Are we ready for a vote?

19 MS. SAUNDERS: Okay. I guess what we
20 could do, Judge Smith, if you're amenable, is to
21 take a vote on whether the members support
22 changing the standard of review for the

1 enumerated rights under Article 6b,
2 subparagraph A, first, and then following that,
3 perhaps seeing if the members also would like to
4 include the other rules in that lower standard.

5 MS. PETERS: One moment, Terri. I see
6 a hand raised.

7 MS. SAUNDERS: Oh, okay, Judge Walton.
8 Thank you.

9 HON. WALTON: Yes, I just wanted to
10 ask is there any rationale for there being a
11 different standard of review for victims, as
12 compared to the accused?

13 MS. SAUNDERS: I can't think of any
14 reason for that, Judge Walton. And again, I
15 think that's something that this committee could
16 certainly look at.

17 If this committee votes to change the
18 standard of review for the victim's petition, I
19 think it would be well within this committee's
20 purview to determine whether they should also
21 change the standard of review for an accused's
22 petition.

1 Again, this committee really just
2 looked at victims' petitions under Article 6b.

3 MS. PETERS: (Audio interference) has
4 her hand up.

5 MS. SAUNDERS: Oh, Ms. Garvin?

6 MS. GARVIN: Yeah, I was just going to
7 say, I do think, like, looking at avenues of
8 appellate review for both human beings involved
9 probably makes sense for the committee, moving
10 forward. I will say that I don't think many
11 accused take the avenue of a petition for writ of
12 mandamus in their appellate review. They take
13 other avenues of review. Although others could
14 correct me.

15 And again, the history of the CVRA and
16 the reason it moved out of traditional mandamus
17 review, was because courts were, in the first
18 decade of the CVRA, routinely denying review
19 because the issue wasn't rising to that level, in
20 part because there wasn't a body of law to
21 compare it to.

22 And so, that's why Congress went back

1 and amended the CVRA when it did the change to
2 the standard of review.

3 MS. SAUNDERS: Mr. Cassara?

4 MR. CASSARA: Yeah, that's correct.

5 And I'm not advocating one way or another, but if
6 an alleged victim believes that evidence should
7 not have come in under 412, there is a writ of
8 mandamus available to them.

9 If an accused believes that evidence
10 should come in under 412 and the judge denies it,
11 the remedy is that after he is convicted, he
12 files ordinary appeal. And that's the reality of
13 it, that there's not an interlocutory appeal in
14 the military, except for in very, very -- even a
15 motion to suppress.

16 If the government wins a motion to
17 suppress, then the case goes to trial and he can
18 litigate that on post-trial appeal.

19 If the government loses a motion to
20 suppress, they can have the TJAG certify that
21 issue, which is the same thing as a government
22 appeal.

1 MS. SAUNDERS: Are there any
2 additional questions or comments on this issue,
3 or on this recommendation? Judge Smith, do you
4 think we are ready to vote on this one?

5 CHAIR SMITH: So, we're going to vote
6 first on Draft Recommendation 5, with respect to
7 changing the standard of appellate review for the
8 enumerated rights under Article 6b(a).

9 Anyone opposed to that, if you could
10 raise your hand. Mr. Cassara, I see.

11 MR. CASSARA: Yeah, I just want to
12 make sure, because it's earlier here than it is
13 there. So, I want to make sure I'm
14 understanding, with my jet-lagged brain, can you
15 give us the binary choices of what we are voting
16 on when we say, this standard, versus this
17 standard?

18 CHAIR SMITH: Okay. So, the
19 recommendation is to apply the ordinary standard
20 of appellate review -- legal error, abuse of
21 discretion -- in reviewing a victim's petition
22 for a writ of mandamus. And that's for the

1 enumerated rights.

2 The higher standard of review is clear
3 and indisputable error. Did I get that right,
4 Terri?

5 MS. SAUNDERS: That's correct.

6 CHAIR SMITH: Okay. So, lowering the
7 standard. So, anyone opposed to lowering the
8 standard with respect to the enumerated rights
9 under Article 6b(a) as a recommendation.
10 Mr. Cassara? I can't see anybody else.

11 MS. SAUNDERS: I don't see any other
12 hands.

13 CHAIR SMITH: Okay. So then, we'll
14 adopt the first part of the recommendation. Now,
15 here's the second question for this vote.

16 (Simultaneous speaking)

17 MS. PETERS: -- one abstention from
18 Dr. Markowitz?

19 CHAIR SMITH: Yes. Sorry about that.
20 Second part of the vote is, do we want to
21 recommend that the lower standard -- again, legal
22 error, abuse of discretion -- apply to review

1 alleged violations of MRE 412, 513, 514, and 615?
2 I guess that's the question.

3 MS. SAUNDERS: Right.

4 CHAIR SMITH: So, anyone who is
5 opposed to lowering the standard of review for
6 those Military Rules of Evidence. Mr. Cassara,
7 General Schwenk --

8 MS. LONG: I'm so sorry, Chair. I
9 don't think I'm understanding what this vote is
10 now.

11 CHAIR SMITH: Okay.

12 MS. LONG: You know, it's different
13 for me and I'm sorry to be slow.

14 CHAIR SMITH: No, no, no. It's okay.
15 So, the one we just voted on was the enumerated
16 rights. Changing the standard of review for the
17 enumerated rights under Article 6b, subsection A,
18 or parens A.

19 Now, we're looking at whether or not
20 we want to recommend the lower standard of review
21 for alleged violations of Military Rules of
22 Evidence of 412, 513, 514, and 615.

1 MS. SAUNDERS: And just as background,
2 this is where Article 6b differs from the CVRA.
3 The CVRA provides this lower standard of review
4 to the rights in the CVRA, which are equivalent
5 to the rights in Article 6b, subsection A.

6 6b is broader in scope in that it
7 allows the victim to petition for a writ of
8 mandamus, not only for those enumerated rights,
9 but also for these four rules of evidence.

10 And so, the question is whether or not
11 that lower standard should also apply to them,
12 which is a little bit outside the scope of what
13 the CVRA covers.

14 MS. GOLDBERG: If I could jump in just
15 to, I think, clarify, or maybe where you're
16 confused.

17 We're really talking about that
18 language that is below the OR -- the full second
19 bracket set of language.

20 BGEN SCHWENK: That's correct.

21 CHAIR SMITH: That's correct, yeah.

22 BGEN SCHWENK: So, our first vote

1 matched up the military system with the federal
2 system. This vote would create a split, because
3 the federal system would be using a higher
4 standard, the higher appellate standard, for the
5 MRE-equivalent rights. And we would be now
6 voting to have the lower standard apply to those.
7 So, it would split off from the federal.

8 MS. SAUNDERS: Okay, Mr. Kramer.

9 MR. KRAMER: You know, we've left the
10 language about the priority, but the 60 is much
11 different than 412, 513. These issues are much
12 more complex, I think, and don't fit into what
13 we've given as a high-priority petition for
14 mandamus. I think there was a reason in the
15 federal court that they didn't include issues
16 like this, which are also very record-dependent
17 and not so much procedural, but very complex and
18 require much more time, I think.

19 So, I'm not sure how much study was
20 done on if these were included, what that would
21 do to the system of petitions for mandamus, but I
22 think that's why I'm against it.

1 MS. SAUNDERS: So, these four rules of
2 evidence are currently included in Article 6b,
3 subsection A.

4 So, if a victim determines that their
5 rights, either one of the enumerated rights under
6 subsection A, or any of these rules of evidence,
7 have been violated.

8 Under the current rules, the victim
9 may petition the court of criminal appeals for a
10 writ of mandamus.

11 So, Congress, in creating 6b, chose to
12 include those four rules of evidence, along with
13 the enumerated rights, in terms of enforcement
14 mechanisms.

15 So, I guess the question here is,
16 should the lower standard of appeal apply just to
17 the enumerated rights, as General Schwenk said,
18 to put it on par with the CVRA, or should it
19 include these additional rules, which would
20 basically extend Article 6b beyond the CVRA in
21 the federal system, which has the higher standard
22 of review for the equivalent rules.

1 MR. KRAMER: Thank you, Terri, for
2 that. Thank you. I really don't see a reason
3 for veering from the CVRA, and especially for the
4 reasons I said about how these issues are a lot
5 more complex. Sorry.

6 CHAIR SMITH: Terri, I have a
7 question. So, does the 6b(a) enumerated rights,
8 are those mirrored in the CVRA? Or do the rights
9 that are not the enumerated rights, are those
10 reflected in the CVRA? Or are they just not --
11 those rules are not mentioned at all in the CVRA?
12 You see what I'm saying? I think it's very
13 confusing what I --

14 MS. SAUNDERS: No, this is a very
15 confusing issue. They are not mentioned in the
16 CVRA. The equivalent of what's in the CVRA is
17 what is in Article 6b, subsection A. And they
18 essentially substantially mirror each other.

19 It's just that under 6b, Congress
20 elected, in terms of enforcement, to add on these
21 four particular rules for the enforcement
22 mechanism. Judge Walton?

1 HON. WALTON: No, I didn't have
2 anything. I was voting.

3 MS. SAUNDERS: Oh, okay. And
4 Ms. Goldberg, did you have something to add?

5 MS. GOLDBERG: Yes. I think -- and
6 please correct me if I'm wrong -- that the reason
7 for this suggestion was that without this,
8 victims would face two different legal standards,
9 depending on the issue that they brought forward.

10 And that is why this situation is
11 different from a situation a victim would face
12 under the CVRA, for reasons I can't exactly
13 explain.

14 But without some more context, it
15 might seem like making this recommendation makes
16 no sense at all. And there was robust
17 discussion, as I remember, in our subcommittee
18 meeting, about some of the challenges if victims
19 were to have different standards, depending on
20 the issue in their appeal, and the court possibly
21 facing different standards by which to review
22 those issues.

1 I don't remember all of it well enough
2 to share that back with the committee right now.
3 And I take A.J.'s point that these are different
4 kinds of issues.

5 But it's not as though this suggestion
6 came out of thin air. Instead, I think it did
7 come from that interest in having a consistent
8 standard for one set of victim appeals. If
9 that's correct.

10 CHAIR SMITH: Right. And it seems
11 that if Congress, for whatever the reason is,
12 decided to include the Military Rules of Evidence
13 within the Article 6b provision, that it doesn't
14 quite make sense to have two different standards
15 of review. It seems kind of like it would add
16 confusion.

17 MS. SAUNDERS: Ms. Garvin?

18 MS. GOLDBERG: I'm sorry. Just to add
19 one more point, I think that is exactly the
20 point. There's the risk of confusion for both
21 parties, as well as possibly the court. Although
22 understanding, of course, that courts are rarely

1 confused about any of their procedural
2 obligations.

3 I think there was also, related to
4 confusion for the parties, I think to the extent
5 the committee is paying attention to issues that
6 sort of contribute to, or detract from, our
7 service members' trust in the system.

8 Having two different standards by
9 which to review aspects of an appeal would
10 likely, at least in my view, create the kind of
11 confusion that could lead to distrust.

12 MS. SAUNDERS: Ms. Garvin?

13 MS. GARVIN: Echoing what the two most
14 recent comments really about the confusion. I
15 also can -- I want to frame this in the way the
16 Chair did a little bit -- which is that Congress
17 put in Article 6b, an enforcement provision that
18 specifically included these rules, and the CVRA
19 has moved forward on standard of review.

20 So, in many ways, I feel like if we're
21 moving the standard of review to align with the
22 CVRA, we move the whole enforcement provision

1 that Congress put in place for Article 6b, in
2 line with the CVRA.

3 So, I don't see why these would be
4 different, since Congress intentionally put 412,
5 513, 514, and 615, in the enforcement bucket when
6 they drafted it. So, that's where I land.

7 BGEN SCHWENK: I guess it's also worth
8 noting that Congress has not changed anything
9 under 6b enforcement, even though they changed
10 the standard of review under the CVRA.

11 So, Congress seems to be perfectly
12 happy if we're trying to figure out what Congress
13 is thinking. Perfectly happy with having the
14 military victims with a higher standard of review
15 on everything, including enumerated rights and
16 the four MREs.

17 Then, there are counterpart victims
18 under the CVRA. So, I'm not sure what Congress
19 is thinking. But from our standpoint, my
20 standpoint, I would like to match up, to the
21 extent we can, unless there's an identifiable
22 military reason to have it be different, I would

1 like to match up the military system with the
2 civilian system.

3 And that means having two standards of
4 review, because that's how the civilian system
5 is. And I can't figure out why the military
6 would have a different approach to it,
7 notwithstanding Congress's idea that they should
8 also include the four MREs. So, there we are.

9 MS. SAUNDERS: Ms. Long?

10 MS. LONG: Thank you. And I
11 appreciate all the discussion on this. I have a
12 question, just to make sure I'm also tracking.

13 So, if we were to change this for the
14 victim standard, if the prosecution is doing an
15 interlocutory appeal -- and I feel like there was
16 conversation, but I'm just getting in my brain --
17 are they subject to the higher standard of
18 review, or do they also have this standard of
19 review? That, to me, would be confusing.

20 MS. SAUNDERS: Mm-hmm. So, my
21 understanding -- I'll let one of my colleagues
22 jump in if they have a different view -- is it

1 depends on the issue, what the interlocutory
2 appeal is. There may be a different standard of
3 review, depending on the issue.

4 MS. LONG: So, on 412, 513, 514, 615,
5 if we vote to affirm the recommendation here,
6 does the victim's counsel and the prosecution now
7 have two standards of review if they're raising
8 issues under 412, 513, 514, 615?

9 MS. SAUNDERS: It gets a little bit
10 more complex as we start talking about government
11 interlocutory appeal under Article 62. It has to
12 be a dispositive issue that the case cannot go
13 forward without that issue being resolved.

14 MS. LONG: Right. And 412 -- I'm
15 thinking of the other ones -- those would go up
16 on interlocutory at least. And maybe some of the
17 others.

18 So, I'm just trying to think
19 practically. Does that mean that when the
20 prosecution raises it, they're subject to one
21 standard of review, and the victim's counsel is
22 subject to another? Because I think that's going

1 to be a problem. I'd love to hear Meg's
2 response, but that seems like that might create
3 an issue.

4 MS. PETERS: I think, Ms. Long, that
5 that is the state of play right now, because
6 there are two sets of rules for a government by
7 interlocutory appeal and a victim's writ
8 petition.

9 MS. LONG: Right. But now, we're
10 going to be creating another one, with respect to
11 412. That's what I'm trying to disentangle. Or
12 are you making them in line with each other?

13 MS. SAUNDERS: I don't think this
14 proposal would align the victim's standard of
15 review with the government's interlocutory appeal
16 in any way.

17 And again, because it is a
18 fundamentally different analysis as to whether
19 the exclusion of the 412 -- I'm sorry, or the
20 admission of the 412 evidence, for example, would
21 affect the findings and sentence for a charge
22 that is before the court.

1 MS. SAUNDERS: So, as we had said
2 before with the issue on the standard of review
3 for the accused on those much more rare instances
4 when they would have an interlocutory appeal or
5 petition for a writ of mandamus, we were looking
6 specifically, under Article 6b, a victim's
7 rights.

8 This was not a comment on whether this
9 should be extended to change the standard of
10 review for the accused or for the government, but
11 that perhaps could be a separate study that this
12 committee could look at.

13 We were primarily looking at the CVRA,
14 putting victim's rights in the military in line
15 with the rights of victims in the federal system.
16 Ms. Goldberg?

17 MS. GOLDBERG: This point may no
18 longer be relevant, but I appreciated the point
19 that Jim Schwenk made earlier, about trying to
20 make the systems consistent between civilian and
21 military courts.

22 And my understanding was that the

1 systems are different in some ways, with the
2 victim having some different rights in appeal in
3 each. And so, there's not a way to make them
4 identical.

5 And the reason for having one
6 standard of review apply to all petitions to
7 review alleged violations by the lower court,
8 would be to have the victim experience of the
9 applicable standard on appeal as a whole be
10 comparable to the experience on the civilian
11 side.

12 So, we will either go with the
13 proposal here, or to have the standard be the
14 same across the board or not. But either way, it
15 won't be identical to -- back up.

16 The change that we are proposing to
17 make will not make the systems exactly the same
18 because there are some structural differences.

19 That doesn't tell us what to do on
20 this particular provision, but it is just to
21 point out that sticking with a higher standard
22 for part and a lower standard for part will not

1 actually make the victim experience the same,
2 because victims under the CVRA have some
3 additional appeal rights, if I understood
4 correctly.

5 CHAIR SMITH: Right. Kind of doesn't
6 make sense to have two different standards for
7 victims. Victims either have the lower standard
8 or the higher standard.

9 And I don't think -- I think Terri
10 said this -- but when do, really, defendants do
11 interlocutory appeals. At least in the state
12 system, you don't really see that happening.

13 But are we ready to take a vote? Do
14 we want to send Terri back to get additional
15 information? What is the feeling?

16 Well, I guess we did vote and say,
17 with respect to the enumerated rights, we're good
18 with that. What do we want to do with respect to
19 the MRE? The Military Rules of Evidence.

20 Did you have something else you wanted
21 to say, Suzanne? Or is your hand still just up?

22 MS. GOLDBERG: Just on this point,

1 this seems like, to me, a very important issue,
2 in the sense that if we vote against aligning the
3 standards for victims on appeal, we will be
4 leaving parties with some significant source of
5 confusion that may amplify distrust in the
6 system.

7 So, my preference would be to possibly
8 create another opportunity for further study and
9 conversation so we don't bind ourselves to a two-
10 tier standard, even if we move forward with the
11 first part in which we have agreed.

12 CHAIR SMITH: Yeah, I like that idea.
13 Terri, did you want to be heard on that? Maybe
14 this is an all-or-nothing kind of proposition, or
15 at least dive a little deeper into the second
16 part of this?

17 MS. SAUNDERS: I guess I would be
18 interested to know what additional information
19 would be helpful to the committee.

20 We know right now, for example, that
21 the CVRA is not as expansive as Article 6b in
22 covering these issues. So, a vote to include

1 these rules of evidence in the lower standard
2 would be extending the Article 6b beyond the
3 CVRA, which only provides the lower standard for
4 the enumerated rights.

5 So, in the federal system you have a
6 lower standard of review for the enumerated
7 rights, but if you have the equivalent of
8 these -- the rape-shield law, the
9 psychotherapist-patient privilege -- if you have
10 an issue like that in the federal system, the
11 higher standard would be applied.

12 So, the federal systems, I think as
13 General Schwenk had mentioned, they are applying
14 both standards. So, the question here is just
15 whether or not this committee wants to recommend
16 with Article 6b, extend -- because these rules of
17 evidence are already included in Article 6b,
18 subsection E, for enforcement purposes, whether
19 this committee wants to extend that lower
20 standard to these additional rules.

21 CHAIR SMITH: Does anyone want any
22 additional information from staff, or do you want

1 to just stick with adopting or recommending the
2 first part that we've already voted to recommend?

3 MS. GARVIN: Chair, if I may, this is
4 Meg Garvin. I just want to note that on the
5 civilian side on the federal, I don't know that
6 in practice two different standards are actually
7 being applied.

8 And the reason I say that is because
9 the CVRA is -- I think it's number eight, which
10 is dignity -- ends up being litigated alongside
11 the equivalent of federal rules of criminal
12 procedure 412, privilege, and then the explicit
13 right to not be excluded in the CVRA gets
14 litigated alongside the exclusionary rule 615 in
15 the civilian system.

16 And so, they tend to be litigated
17 under the CVRA's explicit rights, but also citing
18 the underlying rules.

19 So, in practice, I don't know that
20 there are two standards happening on a daily
21 basis, at least if a litigator is paying
22 attention. Because they'll cite the CVRA

1 alongside the rule. So, I just wanted to add
2 that.

3 MS. PETERS: Chair Smith, at this
4 point in the meeting, we are normally scheduled
5 to run up against lunch, but we have flexible
6 time.

7 Following our proposed lunch break, we
8 could, for clarity of the record, present the
9 options as to this vote. The vote that was taken
10 seems to have been sort of subsumed by your
11 deliberation subsequent, as to really whether
12 this is an all-or-nothing proposition.

13 Could the staff, for clarity of the
14 record, just bring back to what the options for
15 presenting this vote are, following the break? I
16 just offer that for discussion, for how to sort
17 of organize our way ahead, and to note that we're
18 scheduled to pause so members and everyone can
19 take a brief lunch break.

20 CHAIR SMITH: Sure. Okay, so, what
21 you're suggesting is that we pause now for lunch,
22 staff can discuss this and come back after lunch

1 and we'll figure out what we're doing on this
2 issue?

3 MS. PETERS: That's my proposal.
4 Terri?

5 CHAIR SMITH: All right.

6 MS. SAUNDERS: Okay.

7 CHAIR SMITH: Okay. So, we're going
8 to break for lunch just for 30 minutes then, 'til
9 2:15. Yes?

10 MS. GOLDBERG: Can I just note a
11 follow-up question for Meg, which maybe we can
12 come back to after lunch? Which is, are you
13 saying, based on your experience, that if we
14 recommend the two-different-standard approach,
15 that will, as a practical matter, diverge from
16 how appellate standards of review work under the
17 CVRA, even if not under the rules as written?

18 I want to be sure, if we are creating
19 a system that is really going to, in effect, look
20 quite different from the civilian side when we
21 think we're doing the opposite, that we should be
22 aware of that.

1 Again, I don't want to stand between
2 us and lunch, but I want to be sure we get to
3 that point before we have a vote.

4 MS. GARVIN: This is Meg. I will try
5 to come back with a clean answer for the
6 conversation, post-lunch.

7 CHAIR SMITH: Break for lunch right
8 now until 2:15.

9 (Whereupon, the above-entitled matter
10 went off the record at 1:47 p.m. and resumed at
11 2:15 p.m.)

12 MR. GRUBER: Hi, everyone, this is
13 Dave Gruber. My colleague, Bill Sprance, has
14 left, and I will be your DFO for the remainder of
15 the session. We can open the meeting. Madam
16 Chair, over to you.

17 CHAIR SMITH: All right, thank you.
18 I think we're going to continue our discussion of
19 the proposed recommendation number five, so I'm
20 going to turn it back over to Terri.

21 MS. SAUNDERS: Thank you, Judge Smith,
22 and maybe it would be helpful to offer an

1 illustration, and this is getting to the points
2 that Meg Garvin was making prior to the break.
3 So, say you have a victim who petitions the court
4 for writ of mandamus.

5 That victim is likely going to allege
6 several theories about, you know, about their
7 rights being violated. You know, they may say
8 that their right to be treated with fairness, and
9 with respect, and dignity, and privacy for the
10 victim has been violated.

11 They may also say their rights under
12 Military Rule of Evidence 513 have been violated,
13 and possibly other theories. It's then up to the
14 court to parse that out, to say no, we don't
15 think -- you know, we're not going to analyze it
16 under this theory.

17 We are going to look at it under MRE
18 513 because we think that is the most appropriate
19 way to look at this. And then, so depending on
20 the theory that the court is analyzing this with,
21 that may, you know, show, that may determine what
22 standard is applied, and so this is something

1 that the appellate courts do all the time.

2 You know, there may be different
3 standards based on different issues that come up
4 before them, and then when the appellate court
5 looks at those issues and they determine the most
6 appropriate way to review that issue, or which
7 issue should be reviewed in the most appropriate
8 way, that depends on the standards.

9 So, you know, if this committee were
10 to recommend that, for example, that these
11 additional rules not be included in the lower
12 standard, you would have the situation where a
13 victim may petition and try to pull this in, as
14 Meg Garvin had suggested is what may be happening
15 in the federal courts. This is a violation of my
16 rights under Military Rule of Evidence 513, but
17 also it violates one of my enumerated rights, and
18 so then it's going to be up to the appellate
19 courts to determine how to review that.

20 I don't know if that helps or makes
21 things more confusing, but this is something that
22 the appellate courts do, so I don't know if that

1 helps anyone's decision on whether or not these
2 additional rules should be included.

3 CHAIR SMITH: Terri, we have a raised
4 hand.

5 MS. SAUNDERS: Oh, I'm sorry, Judge
6 Walton?

7 HON. WALTON: Yes, you know, I've been
8 thinking about this whole debate and it seems to
9 me that when Congress, as the legislature, makes
10 an assessment that certain rights are
11 specifically covered by a statute, that it's
12 totally appropriate to apply a certain standard
13 of review regarding those enumerated rights.

14 If you're talking about other rights
15 that Congress did not specifically identify,
16 while they may not be less important, it seems to
17 me that it is totally appropriate to apply a
18 different standard of review regarding those
19 rights because they were not specifically
20 enumerated.

21 And in the hypothetical that was just
22 presented, if you have a violation of an

1 enumerated right and you have a potential
2 violation of an evidentiary right, if both rights
3 are being violated, then the standard that would
4 apply to the enumerated right, it seems to me,
5 would control.

6 So, and I agree with what, again, what
7 Mr. Kramer said earlier. When you're talking
8 about an evidentiary assessment, you are talking
9 about something that's a lot more complex
10 conceivably than a specific enumerated right, and
11 a lot of nuance obviously comes into play when a
12 judge is making an assessment as to whether a
13 particular evidentiary rule is to be applied
14 under certain circumstances.

15 So, I do think that by and large, when
16 you're talking about an evidentiary assessment,
17 it is a more difficult and a more nuanced
18 assessment, and therefore, that could justify a
19 different standard of review applying in that
20 context as compared to an enumerated right where
21 Congress specifically indicated that these rights
22 apply under a particular statute.

1 MS. SAUNDERS: Okay, are there
2 additional comments on this recommendation?
3 Judge Smith, I will throw it over to you if you
4 think we're ready to vote on whether to include
5 these additional evidentiary rules within the
6 lower standard or continue to apply the higher
7 standard for those rules, or actually, I'm sorry,
8 I see Suzanne Goldberg has her hand raised.

9 MS. GOLDBERG: I was just -- and
10 thanks, I appreciate, Judge Walton, what you just
11 said. I thought Meg was going to come back,
12 Garvin was going to come back in on this question
13 and maybe she's not available at the moment.

14 MS. GARVIN: Suzanne, I'm here. I
15 came in a couple of minutes late. I apologize,
16 everyone. This is Meg Garvin. And Suzanne, I
17 tried to do some quick looking to see if I could
18 find anything specific and I don't think I can
19 speak generally.

20 And when I'm involved and I'm working
21 on these issues, and when there's a victims'
22 rights attorney involved on the civilian side,

1 they're going to pull together, the articulated
2 enumerated rights together with the evidentiary
3 rules and make the argument.

4 In practice, is that happening every
5 time such that we would be creating a schism if
6 we did something here differently? I don't think
7 I can speak to that sufficiently to inform the
8 committee, so I don't want to speak beyond my
9 expertise.

10 MS. SAUNDERS: And as I was just
11 saying, you know, we are already seeing that
12 where victims' counsel, because unlike the
13 civilian community, in the military, you know, so
14 many victims are represented versus their
15 counterparts in the civilian system, and so they
16 are making these arguments in as many ways and in
17 as many forms as they can, both under the
18 enumerated rights and under the evidentiary
19 rules, and it really is up to the appellate
20 courts to determine how best to review that, and
21 then depending on what they see there, they will
22 apply the appropriate standard.

1 CHAIR SMITH: Okay, so I think that
2 leaves us with a vote on whether or not we want
3 to take it a step further and change the
4 standard, or recommend changing the standard of
5 review for the select Military Rules of Evidence.
6 And I get the sense people are opposed to doing
7 that, so I'm going to phrase the vote
8 differently.

9 All those who are in favor of
10 including the Military Rules of Evidence in this
11 recommendation, raise your hand. So, if you want
12 to reduce or recommend lowering the standard of
13 review for Military Rules of Evidence, raise your
14 hand.

15 MS. SAUNDERS: I see Meg Garvin and
16 Suzanne Goldberg are there. I think those are
17 the only two hands that I'm seeing, and, of
18 course, Dr. Markowitz is abstaining.

19 MS. GOLDBERG: And I would just like
20 to note for the record on my vote that it is for
21 the reasons that I mentioned earlier, which is a
22 real concern about having victims or really any

1 party face multiple standards of review in the
2 course of one appeal petition.

3 CHAIR SMITH: So, recommendation five
4 is just going to be with respect to the
5 enumerated rights under Article 6b, okay?

6 MS. SAUNDERS: Thank you.

7 CHAIR SMITH: All right.

8 MS. SAUNDERS: And we are almost done
9 if we could go to the next slide? Recommendation
10 6, really this is not a substantive
11 recommendation. It's clean up because we are
12 proposing specific language to the statute. This
13 just performs the role of cleanup here.

14 So, number A or Section A is striking
15 the words in the title, you know, enforcement by
16 court of criminal appeals. It would just strike
17 those words, so the title of that section would
18 just be enforcement.

19 B is just a renumbering a subparagraph
20 from E4 to E5 because now we've inserted that
21 additional paragraph regarding CAAF jurisdiction,
22 and then C is just striking the words paragraph

1 one, and what that is right now, that paragraph
2 says paragraph one applies with respect to
3 protections afforded by the following, and then
4 it lists out all of the rights.

5 So, it's just saying this subsection
6 rather than saying paragraph one because now the
7 whole section in the enforcement issue is broader
8 than simply one paragraph, so that's all there is
9 on that. If there are any -- are there any
10 questions on any of these, on this
11 recommendation? Okay, Judge Smith, I think we're
12 ready for a vote?

13 CHAIR SMITH: All those in favor, or
14 I guess all those opposed to adopting
15 Recommendation 6, raise your hand, virtual hand
16 or real hand if you're opposed.

17 MS. SAUNDERS: I think I see Mr.
18 Kramer.

19 MR. KRAMER: No, I'm sorry, I thought
20 -- I'm not opposed to it at all.

21 MS. SAUNDERS: Okay.

22 CHAIR SMITH: All right, so it looks

1 like we will adopt Recommendation 6.

2 MS. SAUNDERS: Okay, so my homework
3 before you see this again is to rework the
4 recommendation, the first recommendation
5 specifically as it concerns subsection two, and
6 I'll take note of everything that's been said
7 here, add any analysis, and ensure that the
8 recommendations now conform to the votes here
9 today, so thank you. Back over to you, Meghan.

10 HON. WALTON: Can I just say thank
11 you, Terri, for all of the hard work on that,
12 that became quite laborious during the
13 discussions? Thank you so much.

14 MS. SAUNDERS: I appreciate it and I
15 appreciate so much for all of you. These are
16 very complicated issues and I appreciate you all
17 staying with me.

18 CHAIR SMITH: You were on the hot seat
19 here, Terri, so thank you.

20 MS. PETERS: All right, at this time,
21 our next item on the agenda is deliberations on
22 your emerging issues from military installation

1 site visits. We can, if you'd like, Chair Smith,
2 just move into that and carry straight through
3 until 3:30, because our next scheduled block
4 after site visit discussions is the public
5 comment. So, I propose we just start now and we
6 have 60 minutes or so to do the deliberations on
7 site visits.

8 CHAIR SMITH: Okay, let's get started.

9 MS. GALLAGHER: I'm going to introduce
10 this section. General Schwenk will be leading
11 the discussion, but I just want to make you aware
12 that Tab 5 of your read-ahead materials contains
13 the initial deliberation document on site visits,
14 and that the slides pretty much copy that
15 information, so you don't necessarily need to
16 look at both because the slides will present the
17 same information that's on that deliberation
18 packet.

19 And I just want to let everybody,
20 because this is a public hearing, know kind of
21 where we are with the site visits. We've
22 completed all of our site visits with the

1 exception of the Naval Academy, and we are
2 working on confirming a date for that, more to
3 follow.

4 And at this point in time, we are in
5 the process of reconciling all of the information
6 we've received over our, you know, these
7 roundtables that we've held and trying to get
8 them in a format that protects the non-
9 attributional nature of the discussions in order
10 to present them to the DAC-IPAD hopefully by mid-
11 November, and those complete packets of
12 information will then be used at the December
13 meeting to go through a thorough kind of
14 deliberation with decisions on what you want to
15 do with that information.

16 Some of the options would include
17 conducting further studies into different issues
18 by the DAC-IPAD, recommending other entities take
19 a look into some of the issues, capturing really
20 just the information in the notes for other
21 entities and individuals to use for their
22 specific purposes. You can also make findings

1 and recommendations without further examination
2 if you think that the subject warrants it, and
3 finally, the information will be discussed in the
4 annual report released in March.

5 I do want to state that we are aware
6 that the site visit information is anecdotal on a
7 variety of topics, and what we're trying to do
8 here today is to explore some very broad topics
9 and issues without the benefit of the full
10 information to see what this committee is
11 interested in further examination of and what
12 maybe it's not interested in, and to kind of
13 prioritize those so that the staff can prepare
14 the materials for December. And with that, I'm
15 going to turn it over to General Schwenk to lead
16 you through the discussion.

17 BGEN SCHWENK: Okay, thank you, Terri.
18 The first thing I'd like to do is on behalf of
19 all of the members, thank the entire staff,
20 because the site visit project was an all hands
21 on deck, everybody was involved on the staff to
22 get it accomplished, thank them for all their

1 hard work in organizing, coordinating, and
2 running our site visits. Many people have told
3 me that the visits they were on went amazingly
4 smoothly, and the opportunity to hear from local
5 practitioners was invaluable.

6 And a special thanks to Terri
7 Gallagher, who was in charge of the entire
8 process and who managed not to lose any of the
9 members during our travels. Thank you, Terri,
10 and everybody else on the staff.

11 Okay, today we have the opportunity to
12 share our thoughts on which issues we think
13 should make the short list for possible selection
14 in December. The staff has identified 36 issues
15 at Tab 5, but they've also identified two new
16 ones that are on these slides, and so we have 38
17 potential issues to go through.

18 The purpose is to see if any of them
19 generate excitement by any of the members so that
20 we can factor that into the revised issues list
21 that we'll get in November or early December. If
22 you see something that you think, based on the

1 site visits or thinking about it, that you're
2 interested in pursuing, then sing out and let
3 everybody know and we can discuss that.

4 If there's one that you think is not
5 worth looking at at all, similarly sing out. The
6 other thing that we're looking for is an issue
7 that you heard that's not on the list, but that
8 you think we should consider. Let us know those
9 also. Next slide?

10 Okay, Terri went over this, so you see
11 that we're supposed to get the notes from the
12 site visits in November, and then we'll get the
13 revised list of issues, and at the December 4
14 DAC-IPAD meeting, we're going to try to do three
15 things.

16 One is we're going to try to select
17 the issues that we want to explore in-depth in
18 2025. Next, we're going to prioritize those
19 issues. Since we only have three subcommittees,
20 if we pick ten issues, we got to prioritize them
21 for the subcommittees, and then the last thing we
22 want to do is we want to assign those issues we

1 select to the subcommittees.

2 So, and if you would like,
3 subcommittee chairs, you may send me money if
4 there's one you want, and if you send enough, you
5 may get it. Okay, next slide, please?

6 The staff did a really interesting
7 arrangement of the issues and I thought it helped
8 me see the issues in a different perspective.
9 So, they broke them down into five categories and
10 these are the five categories, and that's the way
11 it's structured on the slides and that's the way
12 it's structured at Tab 5.

13 So, we will go through them one at a
14 time and see what we can get up, but first a
15 caution. For everybody listening, do not
16 misunderstand what this issues list means. The
17 issues list means we heard from a number of
18 people at a number of different sites that this
19 was a concern, this issue was a concern, but it
20 doesn't mean that the DAC-IPAD has looked at the
21 issue or has any opinion on the issue.

22 So, for example, the last issue under

1 Roman numeral I is, quote, perception of victims'
2 counsel job is undesirable, end quote. That just
3 means that some people at several different sites
4 said there was a perception out there that being
5 a victims' counsel is undesirable.

6 That does not reflect that we have
7 looked at the issue, that we will look at the
8 issue, or that we have any opinion about the
9 issue. So, all it does is reflect that a few
10 people at a few different sites told us that
11 there was this concern, this issue.

12 Okay, finally, there are -- these
13 issues are what we do. We look at issues where
14 we might make a difference in improving the
15 system, so they are concerns, but that does not
16 mean all we heard while we were at our site
17 visits was concern, concern, concern.

18 In fact, on one of the most important
19 issues that we asked everybody about, the new
20 Office of Special Trial Counsel, we heard many
21 good things regarding the system from lots of
22 different people.

1 The vast majority of the military
2 justice practitioners from MCIOs, trial counsel,
3 special trial counsel, defense counsel, and
4 victims' counsel across the services said they
5 believe that the STCs are experienced and that
6 the experience they bring is beneficial to case
7 processing.

8 The main criticism, in fact, was there
9 are not enough STCs. So, with that as
10 background, does anyone have a question or
11 comment before we start going through the issues?
12 No? Okay, next slide, please.

13 So, here we go with the first six
14 issues. Does anybody see anything on this list
15 that they think we should put on our short list
16 for discussion in-depth in December?

17 MS. LONG: This is Jenn Long.

18 BGEN SCHWENK: Yes, Jenn?

19 MS. LONG: I like number two --

20 BGEN SCHWENK: Okay.

21 MS. LONG: -- and number five.

22 BGEN SCHWENK: Okay, and why is that?

1 MS. LONG: Number two, because
2 obviously I -- I shouldn't say obviously. From
3 my perspective, I do think it's beneficial when
4 people stay in a course of a career, and in fact,
5 some people have expressed over the course of our
6 whole DAC-IPAD their preference or their interest
7 maybe in staying with a career, but the,
8 considering the potential impacts on what it
9 would do to their ability to move up and their
10 career necessarily, their career progression, and
11 so I think that it's a good thing to look at to
12 really determine that.

13 BGEN SCHWENK: Okay, and what about
14 five?

15 MS. LONG: Five, just really trying to
16 get a sense of the litigation experience of the
17 special trial counsel coming in.

18 BGEN SCHWENK: You mean how they spend
19 their time?

20 MS. LONG: Okay, so I'm reading this
21 as insufficient time before coming in. Maybe I'm
22 misreading this. Is this a time, how they're

1 spending it currently?

2 BGEN SCHWENK: Yeah, I think that's
3 what --

4 (Simultaneous speaking.)

5 MS. LONG: Got it, okay.

6 BGEN SCHWENK: -- Terri?

7 MS. GALLAGHER: Yes, that is correct.

8 Many have expressed the sense that there is a lot
9 of administrative responsibilities and --

10 MS. LONG: Got it.

11 MS. GALLAGHER: -- reviewing as
12 opposed to being in the courtroom.

13 MS. LONG: Got it, okay. I mean, yes,
14 I would also look at that. I misunderstood the
15 question, but I'm not sure that that has to be us
16 versus internally, whether or not they'd be able
17 to do that internally, just assessing like any
18 other office does. So, really number two is my
19 priority on this one.

20 BGEN SCHWENK: Okay, great. Thank
21 you. Anybody else? Suzanne? Yes, Suzanne, did
22 you have one?

1 MS. GOLDBERG: Yeah, I did, sorry. I
2 was having a hard time getting to mute, but I
3 think Marcia was before me and I'll go after her.

4 BGEN SCHWENK: Oh, okay, Marcia?

5 MG ANDERSON: Sure, I think I agree
6 with number two, but I would also think that
7 number six is linked because in terms of career
8 progression, you certainly want to be in a job
9 that's considered career enhancing, so, and one,
10 if you remain in that billet, that has different
11 impacts as you and I both know, but certainly it
12 should be, there should be something, we should
13 address the perception that the job is
14 undesirable.

15 BGEN SCHWENK: Okay, great. Thank
16 you. Meg?

17 MS. GARVIN: Suzanne, go ahead.

18 MS. GOLDBERG: Thank you. I think in
19 a variety of places, we heard about disparities
20 between prosecution and defense billets and also
21 victims' counsel, a range of concerns that I
22 think are worth looking into, which is number

1 three.

2 This one struck me as also appearing
3 in the second slide, and actually, or in the
4 second category of issues, as did a number of
5 these, but I do think if this is the place where
6 the issue of the disparity is being raised, I
7 think it is important to consider.

8 I think this goes to questions that
9 are on the next page also about how the systems
10 by which lawyers are being brought up and then
11 operating in their various units or various
12 departments, whether it's special trial counsel,
13 or defense counsel, or VCs. So, again, I think
14 there's overlap, but I think the disparity came
15 up in enough places that it's worthy of our
16 attention.

17 BGEN SCHWENK: Okay, you're talking
18 about on the next page, number three, experienced
19 rank disparity between STC and DC or one of
20 those?

21 MS. GOLDBERG: Yes, I think that is
22 there, and I guess the VCs issue doesn't come up

1 there, but certainly that --

2 BGEN SCHWENK: Got it.

3 MS. GOLDBERG: -- the number three is
4 connected to some of the disparity that I was
5 flagging on this slide.

6 BGEN SCHWENK: Great, thank you.

7 Okay, Meg, back to you.

8 MS. GARVIN: I'm just going to echo
9 disparity, number three on this one, I think, is
10 critical for us to investigate further, and is
11 two, so I just echo those two.

12 BGEN SCHWENK: Okay, Karla?

13 CHAIR SMITH: All right, I think one,
14 four, and five are all interrelated and important
15 because five, if there is someone who is able to
16 do the administrative stuff, then you have one
17 more person who can be litigating, and that
18 person is the person with the most experience who
19 can then be mentoring.

20 Because the way to build your system
21 of lawyers is by the mentoring, and I think
22 something you always hear from younger lawyers is

1 feeling like they're kind of thrown to the wolves
2 a little bit and not getting the, you know, not
3 staying long enough, so that goes with the length
4 of tours, right, early departures, not staying
5 long enough to really become competent as a
6 prosecutor, or defense attorney, or victims'
7 counsel. So, I feel like those three things are
8 interrelated and important in order to build a
9 truly competent and robust group of attorneys in
10 the military.

11 BGEN SCHWENK: Okay, thank you.

12 Anybody else? Okay, unsurprisingly, we had six
13 issues to discuss and we selected six issues.
14 So, if we continue down this road, we will see
15 that in December, our real problem will be
16 prioritizing which ones go first and which ones
17 go later.

18 Okay, that's it for that one. Next,
19 all right, this one, we have six more, and we've
20 already got a vote for number three. What do you
21 think about the others? Suzanne?

22 MS. GOLDBERG: Again, I think one of

1 the challenges we are going to run into, picking
2 up on your last point, Jim, is that the issues
3 are interconnected, and it's hard to pull out
4 discussions of workload from discussions of
5 administrative workload or equipment challenges
6 and the addition of the sexual harassment
7 caseload.

8 So, to me, each of these is
9 significant, and I wonder if what we might wind
10 up doing is, or the staff might wind up doing is
11 thinking about ways to identify the overarching
12 category and also not lose the nuance of the
13 points that make up the challenges so that we are
14 able to take a fair look at the systems that
15 we're evaluating.

16 That said, in addition to the number
17 three, experienced rank disparity between STC and
18 DC, I think we heard a lot about challenges and
19 opportunities related to how special trial
20 counsel and trial counsel are sorting out their
21 respective workloads, and that is something that
22 I think the DAC-IPAD could contribute helpfully

1 to in terms of having an overarching look at how
2 this allocation is happening, understanding that
3 different bases are going to handle the issues
4 differently. I'd also note for number six that
5 there are --

6 (Audio interference.)

7 MS. GOLDBERG: Meghan Tokash, I think
8 you're speaking right now. If it's lagging for
9 you, you might want to go on mute. On number
10 six, domestic violence cases taking significant
11 STC bandwidth, I want to flag that we also saw a
12 systemic challenge in some places with the
13 allocation of domestic violence cases to be
14 partly to STC and partly to trial counsel
15 depending on which of the issues were covered,
16 and that seems like a procedural issue that is
17 worthy of the DAC-IPAD's attention. It doesn't
18 exactly fit under number six, but an important
19 one.

20 And just to illustrate what I'm
21 talking about, we heard some things about the
22 idea that part A and C of a case, or A and B of a

1 domestic violence case might fit in the STC's
2 jurisdiction while part C might not, and that
3 kind of separating out of issues might have some
4 counterproductive consequences for the system's
5 efficiency as well as for victims and possibly
6 accused.

7 BGEN SCHWENK: Okay, anybody else?

8 CHAIR SMITH: I think I agree with
9 Suzanne that three is very important, but I would
10 also say resources and proper use of resources,
11 again kind of going back to this idea that the
12 lawyers shouldn't be spending their -- when you
13 have so few lawyers, right, they shouldn't be
14 spending their time doing the administrative
15 things. There should be more administrative
16 backup so that the lawyers are busy lawyering.

17 And certainly, the facilities,
18 equipment, technology, all of those types of
19 things, again, make it easier to get the job
20 done, and perhaps allow the attorneys to get
21 through things more quickly and move onto other
22 things if they have the proper, again, resources

1 are being used properly, so I would say those are
2 two important, two-ish, three-ish important parts
3 of this.

4 BGEN SCHWENK: Okay, thank you.
5 Meghan?

6 MS. TOKASH: Hello, I know it's not
7 listed as one through six, but maybe it's just a
8 general concern that permeates each of these, and
9 I'm sorry that I had to come in a little bit
10 late, but has anyone raised the issue of
11 independence as it pertains to optimal structure
12 and staffing and resourcing?

13 Because I think that that is something
14 that we need to think about critically as we look
15 at these issues. Congress was very specific
16 about the intent that the OSTC remain
17 independent. I understand and am sympathetic to
18 the JAG corps that it's an imperfect system right
19 now and it's still developing, but I think that
20 guarding that independence is something that's
21 very critical, especially since the law says
22 without intervening authority.

1 So, Jim, I would just like to raise
2 that, whether that be as, again, just a concern
3 that weaves through each of these six topic areas
4 here or as something separate and apart. Thank
5 you.

6 BGEN SCHWENK: Okay, thanks, Meghan.
7 So, I got that as independence when we assess
8 structure, process, you know, anything that might
9 affect the independence, okay, got it. Okay,
10 anybody else? Reggie?

11 HON. WALTON: Yes, I echo what Ms.
12 Tokash just indicated because what really stood
13 out to me was an individual who came up to me
14 after the actual public session that we had and
15 indicated a concern that, at least at that
16 location, it was felt that the commanding officer
17 was, in fact, putting his, I'll say his or her,
18 thumb on the scale, even though theoretically
19 with the change in structure, that's not supposed
20 to occur and there's supposed to be independence
21 in reference to the prosecutorial function.

22 And it was felt that at least in that

1 particular location, that that was not sometimes
2 occurring, and what was the norm before the
3 change was still occurring, and that the
4 commanding officer was, in fact, putting pressure
5 or making it known what his or her perspective
6 was in reference to the prosecution of some of
7 these cases.

8 BGEN SCHWENK: Okay, thank you.
9 Anybody else?

10 MS. LONG: This is Jenn Long. I'm not
11 sure if people can see me. Hi.

12 BGEN SCHWENK: Go ahead.

13 MS. LONG: Item six, the domestic
14 violence cases taking a significant amount of
15 time, I'm specifically interested in witness
16 intimidation, if there's enough training to be
17 identifying and to be handling all of the complex
18 issues that come up.

19 BGEN SCHWENK: Okay, all right,
20 anybody else? Okay, let's go onto the next page.

21 MS. GALLAGHER: And the next is a
22 continuing of the same.

1 BGEN SCHWENK: Yeah, lo and behold,
2 there's five more issues that we can discuss.
3 Any thoughts on these five and whether any of
4 them -- so far, Terri is batting 1,000 on issue
5 identification of interest. Okay, what about
6 these five? Anything stick out at you?

7 One of the new ones is number 11, the
8 civilian hiring challenges. As we all know from,
9 even if you don't have any experience with the
10 federal government, just hiring people on staff
11 for the DAC-IPAD, I know we've rolled our eyes
12 about how long it takes to get somebody, but
13 anyway, the same problem out in the field
14 obviously.

15 Yes, oh, okay, let's take a vote. Do
16 we want to hear from A.J. or has he finished his
17 quota for the day? Okay, A.J., go ahead.

18 MR. KRAMER: I'll make it very quick.
19 Number eight seems to me to be a huge concern.
20 They have in some places, we heard, one
21 investigator for, I don't know, ten
22 installations, and then the lack of paralegal

1 support for everybody.

2 Everybody raves about their paralegals
3 for the most part, and the one thing they say is
4 we need way more, so there seems to be a real
5 imbalance of investigators, so those two stand
6 out to me.

7 BGEN SCHWENK: Okay, thank you, A.J.
8 Bill?

9 MR. CASSARA: I was going to say the
10 same thing, so.

11 BGEN SCHWENK: Okay.

12 MR. CASSARA: I will figure out how to
13 electronically lower my hand.

14 BGEN SCHWENK: Okay, but I'm proud of
15 you for getting it up. That was good. That puts
16 you one ahead of me. Okay, Suzanne?

17 MS. GOLDBERG: Very impressive, Bill.
18 I agree with what was just said. I want to add
19 something that is not here exactly, which is an
20 issue that came up in a number of different
21 places about the quality of training for
22 investigators and the quality of investigations.

1 This is more on the government side
2 than the defense side, which, as A.J. just noted,
3 we heard more about a lack of investigators, but
4 concerns both at the MCIO level and then with the
5 investigation, the aspects of investigation that
6 are handled by military police, which include, I
7 think, some aspects of sexual harassment and
8 domestic violence investigations. So, my brief
9 characterization of this would be training and
10 quality control in connection with government
11 investigations and investigators.

12 BGEN SCHWENK: Okay.

13 MS. GOLDBERG: I would have to add
14 that I think we did, again because of the
15 excellent putting together of these issues, heard
16 issues around all of these points that are on the
17 list here.

18 BGEN SCHWENK: Okay, thank you very
19 much. Reggie?

20 HON. WALTON: I agree with number
21 eight, but I think it's a little broader than
22 that because what I was hearing is that not only

1 is there a lack of access to investigators, but a
2 lack of access to experienced quality
3 investigators.

4 BGEN SCHWENK: All right, okay,
5 Jenifer?

6 DR. MARKOWITZ: Hi, thanks. So, one
7 issue that we have not talked about, and it's
8 related to a group that has actually not been
9 talked to, and that is the medical forensic
10 examiners. So, they are the only group in the
11 response that has not ever been talked to.

12 And as we're talking about civilian
13 hiring challenges, I would be remiss if I did
14 not, one, plant that flag here now that we really
15 need to talk to the medical forensic examiners as
16 part of this entire response, and two, mention
17 the fact that medical forensic examiners are
18 largely staffed by civilians.

19 And as we talk about civilian hiring
20 challenges, especially those programs that are
21 managed by civilians, the challenges related to
22 hiring civilians is something that we have to be

1 able to think about across the medical forensic
2 examiner programs, not just managing them, but
3 also staffing them.

4 So, as we are thinking about civilian
5 hiring challenges, we have to be able to think
6 also about how civilian hiring challenges impact
7 the ability to both recruit and retain medical
8 forensic examiners to be able to respond to
9 sexual assault and other patient populations
10 coming in for those particular exams, so I just
11 wanted to mention that here as part of this
12 conversation. I know it's not the focus, but it
13 is tangentially related, I think, as we have this
14 discussion. Thanks.

15 BGEN SCHWENK: It's directly related
16 to the process, so, and it's something, I think
17 you're right, we have not talked to anyone from
18 there, so maybe we can pull something together
19 for one of the subcommittees between now and
20 December and --

21 DR. MARKOWITZ: Yeah, I think it's
22 time that we have that conversation, and I would

1 very much like to make sure that we have a
2 discussion both with folks who are working within
3 DoD and potentially even civilian programs who
4 are serving communities where there are
5 installations that may not have a robust response
6 on installation.

7 BGEN SCHWENK: Okay, great. Thank
8 you. Okay, anybody else? Okay, we have -- we
9 didn't get to -- we actually have a few we
10 haven't talked about. How about that? Okay,
11 we're moving right along. Next slide, please?
12 Okay, case processing, anybody got -- oh, okay,
13 Jenifer, you're back on.

14 DR. MARKOWITZ: No, sorry, I just
15 forgot to lower my hand. We're good.

16 BGEN SCHWENK: Oh, okay, then you're
17 not -- okay, this guy, not again. A.J., go
18 ahead.

19 MR. KRAMER: So, one seems to me to be
20 -- I heard stories about it from investigators
21 saying that they quickly, very quickly uncovered
22 from video evidence or various other sources that

1 there was absolutely no basis. We weren't
2 talking probable cause even, but that the
3 allegations were totally -- they would not have
4 proceeded any further as soon as they found that
5 out except they're required to.

6 And I think civilian law enforcement
7 officers would have stopped and told the
8 prosecutor look, we just looked at a video that
9 shows it absolutely did not happen that way, and
10 maybe try to interview one or two people, but
11 they kept saying they had to go through the whole
12 process, and the full investigation, and write a
13 report, and that that was taking away from the
14 cases, meritorious cases, even though they
15 quickly debunked cases.

16 So, I think that the discretion,
17 number one is a big issue. Now, there may be a
18 reason for it. Maybe there was a feeling that
19 they were not doing what they should, but anyhow,
20 I heard that at several different places.

21 BGEN SCHWENK: Okay, thank you very
22 much. Karla?

1 CHAIR SMITH: So, the delayed victim
2 interviews, I am not even really understanding
3 that because I would think that's kind of the
4 first thing that you're doing when you are --

5 BGEN SCHWENK: Yeah, I believe that
6 the issue there is you can't do the interview if
7 they have a victims' counsel until they have a
8 chance to get the victims' counsel, and victims'
9 counsel sometimes are out of town or far away,
10 and so rather than jumping on the case -- it's
11 one thing with dated cases, the old cases --

12 CHAIR SMITH: Right.

13 BGEN SCHWENK: -- but with new cases,
14 they can't even talk to the victim until they
15 make arrangements with the victim's counsel, and
16 that can take, you know, a week or more.

17 CHAIR SMITH: So, maybe for a second
18 interview, because presumably, the victim is
19 coming forward and reporting there has been --

20 BGEN SCHWENK: Right.

21 CHAIR SMITH: -- such a crime, right.

22 (Simultaneous speaking.)

1 BGEN SCHWENK: Right, this is one
2 where the investigator sits down and really goes
3 into the details. So, is that right, Terri?

4 MS. GALLAGHER: Yes, it is.
5 Essentially, we heard that they're prohibited
6 from getting very much information at all. I
7 mean, there's instances where like the command
8 will, as soon as they hear anything about a
9 sexual assault, will immediately call the MCIOs,
10 and maybe they don't have a statement from the
11 victim. Maybe it was a third-party report.

12 So, their concern is that they
13 sometimes have very little information, certainly
14 not enough information to go out and get warrants
15 for, and then they have to wait. You know, we
16 heard sometimes they wait three weeks to be able
17 to do a victim interview. You know, there are
18 several nuances. There are several things, but
19 that does appear to be an issue we heard a number
20 of times.

21 BGEN SCHWENK: Okay, thank you.

22 CHAIR SMITH: That would be on my list

1 because --

2 BGEN SCHWENK: Okay, got it.

3 CHAIR SMITH: -- if we don't have
4 that, we can't -- yeah, you know.

5 BGEN SCHWENK: Yes, you're behind the
6 eight ball before you get started. Okay,
7 Jenifer?

8 DR. MARKOWITZ: Yeah, I would vote for
9 number eight, the process taking too long. I
10 feel like we heard frequently that there were
11 complaints about the process and how long it
12 takes, so I certainly would want to have a
13 discussion about that.

14 BGEN SCHWENK: Okay, very good.
15 Suzanne?

16 MS. GOLDBERG: I -- we heard a lot of
17 interesting commentary about STC deferrals and it
18 seems like it's quite important to think, you
19 know, that we take a look to see how those might
20 be standardized.

21 I think the lack of uniformity may
22 create serious problems across the service that

1 will be of a different sort than the previous
2 problems, but nonetheless, concerning if there's
3 not some attention to uniformity in the approach,
4 so I put a spotlight on that one.

5 I have one additional comment related
6 to A.J.'s comment earlier, which is, you know, on
7 the lack of agent discretion, because I think we
8 heard that from both sides. I mean, certainly
9 one was if there is sort of empirically
10 definitive proof that there is no need to pursue
11 an allegation further, you know, exploring the
12 idea of having an off-ramp makes sense.

13 I would say we heard equally, or I
14 heard, I should speak for myself, equally and
15 perhaps more so about agents' failure to fully
16 pursue an investigation and interview appropriate
17 witnesses. We heard that from both prosecution
18 and defense. And one remark from government
19 lawyers --

20 (Audio interference.)

21 MS. GOLDBERG: Somebody is speaking
22 who is not on mute. Thank you. Sorry about

1 that. We heard one remark from a government
2 lawyer that stood out to me for capturing what I
3 had heard from others, which was that sometimes
4 STC is not able to pursue a case because the
5 investigation has been so poor and so much time
6 has passed that it becomes difficult to compile
7 the evidence.

8 So, this goes back to the concern I
9 raised from the previous grouping about the
10 quality of investigations on the government side,
11 both at the MCIO and other levels.

12 BGEN SCHWENK: Okay, thank you.
13 Anybody else?

14 MS. LONG: It's Jenn Long.

15 BGEN SCHWENK: Yes, Jenn?

16 MS. LONG: And I'm sorry, I don't know
17 how to raise my hand on this device. I don't
18 know if anyone talked about the backlog of cases.
19 If they did, I missed it. That's item five.

20 BGEN SCHWENK: Okay, item five,
21 significant backlog of cases. When I was a
22 defense counsel, I liked the backlog because my

1 guys were always guilty, so, you know. Okay,
2 anybody else on any of these issues on case
3 processing?

4 Okay, going onto the next slide,
5 please? Reporting sexual misconduct, we have six
6 possible issues to discuss. Anybody see one that
7 strikes them as something we should consider in
8 December? Reggie?

9 HON. WALTON: Lack of privacy of
10 reporting, I mean, yeah, lack of privacy of
11 reporting. I mean, it was the same thing I heard
12 when I chaired the National Prison Rape
13 Elimination Commission, that inmates felt that
14 there was no way to make reports and there not be
15 recriminations as a result of having done so.

16 And I know on several of the visits I
17 went on, I was told that by members, that they
18 felt that if they reported what had taken place,
19 that it would be found out and it could have an
20 impact on their career progression, and it could
21 cause them to be intimidated and shunned by other
22 members on that base. So, I don't know how you

1 fix that, but I think that's a major problem that
2 needs to be addressed.

3 BGEN SCHWENK: Okay, thank you,
4 Reggie. A.J.?

5 MR. KRAMER: I heard people don't have
6 much of an idea of who's a mandatory reporter or
7 not, which makes them uncertain of who to report
8 to and it makes to them of who they might go to,
9 and the other one, I think, is the training seems
10 to be all over the board.

11 Some places take it very seriously and
12 do a very good job, and in other places, it's
13 much more what I would almost call perfunctory,
14 and not only the initial trainings, but the
15 follow-up trainings as well, so I think five and
16 six.

17 BGEN SCHWENK: Okay, thank you.
18 Karla?

19 CHAIR SMITH: I mean, I think all of
20 these are basically the umbrella of lack of
21 education and lack of training with the exception
22 of four, but I think one, two, three, five and

1 six all are about everyone in the military
2 understanding what their role is, understanding
3 what's available to them if they're a victim or
4 if they, you know, are a witness to something,
5 and understanding what the difference is between
6 sexual assault and sexual harassment. Again,
7 that's education.

8 So, all of it seems to be education
9 and training, and I agree, when we did hear from
10 service members, they just really don't even know
11 what's available to them, how things are defined,
12 and so I think we could squeeze this into one
13 thing.

14 BGEN SCHWENK: Okay.

15 (Simultaneous speaking.)

16 CHAIR SMITH: -- see how I did that,
17 make it one?

18 BGEN SCHWENK: Yeah, that's the issue
19 somebody raised earlier about bundling similar
20 issues together, and that's something that I'll
21 work with the staff on between now and the
22 revised version.

1 And then in December when you see the
2 bundles, we'll be able to discuss is the bundle
3 too big or, you know, how do we go from there,
4 but at least we'll have similar things together.
5 Let's see, Reggie, is your hand up or is it still
6 -- okay, he doesn't want to talk to me anymore.
7 Okay, Suzanne?

8 MS. GOLDBERG: And I always want to
9 talk with you.

10 BGEN SCHWENK: Oh, and I'm happy to
11 hear from you.

12 MS. GOLDBERG: And also, to note that
13 Lisa Shepperd put a comment in the chat which the
14 staff has picked up, but I wanted to draw others'
15 attention to it in case they'd like to look.

16 I agree with Karla that these do, many
17 of these fall under the issue of training. I
18 want to point out that number four, which is the
19 loss of victim advocates within units, is also a
20 staffing issue. There were a range of staffing
21 issues that we heard under that category, but
22 again, when we think about how people learn and

1 remember key information about reporting, some of
2 that has to do with not hearing about it once or
3 twice or in a formal training, but also having
4 people around to go to.

5 So, I would put the loss of VAs into
6 that category and I think it's an important issue
7 to consider. The related issue to training that
8 I am not sure if it appears in another category
9 but want to flag for us is the issue around
10 culture and leadership.

11 Because one of the things that we
12 heard, which picks up on others' comments from
13 before, is that training is variable, and even if
14 the services get to the point where the
15 PowerPoints are good enough and written down
16 properly and all of that, their delivery
17 mechanisms, or death by PowerPoint as was
18 described to us in multiple places, and the
19 seriousness and effectiveness, the seriousness
20 with which messages are delivered and the
21 effectiveness of the methodologies, including the
22 lack of small group discussions or the praise for

1 them when they did occur, was something that
2 jumped out in many discussions, and connects
3 issues of training around this kind of
4 information related to reporting also to training
5 around prevention.

6 So, I think the prevention and
7 response training is probably the broad category,
8 but also leadership and culture related to both.
9 That's a long heading, I realize, but I didn't
10 want the point to be missed that making this real
11 has to do with more than what's on paper.

12 BGEN SCHWENK: Yes, okay, thank you
13 very much. A.J., yes, we're going to have a
14 quota for you.

15 MR. KRAMER: Sorry, I just realized
16 there's one thing that I thought might be here,
17 but it's not here or anywhere else, the
18 availability of mental health services for
19 victims seems to be -- first of all, they don't
20 know where to go on the base.

21 They don't know the availability of it
22 either on the base or off the base, and there

1 seems to be huge waits for it. Unless somebody
2 is essentially almost suicidal, there seems to be
3 waits of a month or two and it's all over the
4 board, and so both the knowledge of the
5 availability, and that's a training issue again,
6 but also just the general availability of it for
7 them, and that's going to come in for the accused
8 too if we do the letter from the General Counsel
9 about the suicide.

10 BGEN SCHWENK: Right.

11 MR. KRAMER: So, I think the
12 availability of mental health services is very
13 important.

14 BGEN SCHWENK: Okay, very good.
15 Anybody else? Turn your hand down, please, A.J.
16 I'm not going to call on your again. Okay,
17 anybody else on this page? No? Next slide,
18 please? All right, hard to believe, but we're
19 getting to the end.

20 Okay, accountability, we have seven
21 possible issues to discuss, and maybe as we've
22 done on other slides, you have other issues that

1 are not listed that you want to bring up.
2 Anybody see one on here that rings a bell with
3 them and they want to highlight? Jenifer?

4 DR. MARKOWITZ: Yeah, I know this has
5 been brought up before even our committee, but I
6 think it bears us repeating, the importance of
7 safety in the barracks and dorms and the need for
8 things like CCTV. I think we just continue to
9 hear that this is an issue and it's worth us
10 continuing to emphasize.

11 BGEN SCHWENK: Okay, great. Thank
12 you. Meghan?

13 MS. TOKASH: Thank you. I wanted to
14 echo a comment made by Ms. Goldberg previously
15 about the lack of uniformity of declinations of
16 OSTC cases. I think that that actually talks up
17 well under accountability. I think that there
18 needs to be, even in an aspirational sense, much
19 like the Federal Principles of Prosecution, at
20 least some overarching aspirational criteria that
21 can be promulgated to the servicemembers, to the
22 public, as to what constitutes a case that the

1 OSTC will take and what might not be a case that
2 they would take. So I would suggest that that is
3 something that would be suitable for
4 accountability discussion.

5 BGEN SCHWENK: Okay. Great. I've got
6 that added on. Marcia.

7 MG ANDERSON: Yes. I agree with
8 Jennifer regarding number six, junior members
9 feeling unsafe in the barracks. Not just the
10 CCTV but also that key cards, at least in one
11 instance that I remember listening to, key cards
12 seem to be easily obtainable by people who should
13 not have access to them. So there should be more
14 accountability and guidelines and policies to
15 control access to key cards so that people can
16 access victims' rooms.

17 BGEN SCHWENK: Okay. Great. Thank
18 you. Bill.

19 MR. CASSARA: I'm sure this does not
20 come as a surprise to anybody, but I would like
21 to see some exploration of issues 3 and 4.
22 Recently, I had two servicemembers whose careers

1 were derailed after demonstratively false
2 allegations, one of which the accuser admitted
3 the allegation was false. Nothing happened in
4 either case. One of them was not military, so
5 nothing could happen, could have happened to her.

6 And then something that occurred to me
7 as Marcia was speaking, I live within a couple of
8 hours of Suwanee, Georgia where there was that
9 recent horrific shooting accident. And I may be
10 going complete off a tangent here, but Marcia
11 mentioned something about access. You know,
12 teachers in all of these places, including my
13 daughter-in-law, have a button on their ID card.
14 It's nothing more than a button that they can
15 press if they are in distress. I don't know if
16 I'm going completely off on a tangent or if
17 that's something that is at least worth us
18 looking into.

19 BGEN SCHWENK: We'll add that with
20 junior members feeling unsafe in the barracks and
21 elsewhere, and that's one option. Okay.

22 CHAIR SMITH: With respect, I'm going

1 to disagree with Bill on number three because I
2 would be concerned that folks might go too far if
3 it was something, you know, accountability for
4 false allegations because I think what we've
5 heard is that, for victims who come forward and
6 then, for whatever reason, the case kind of falls
7 apart, that they already feel as if they get
8 punished or transferred or whatever the case may
9 be. I'm not sure -- I would worry that trying to
10 have accountability for false allegations would
11 end up sweeping a lot of people who may be it
12 really did happen to them but, for one reason or
13 another, the case didn't proceed. So I'm a
14 little hesitant with that one.

15 BGEN SCHWENK: You're hesitant of even
16 having it on our list of potential issues to look
17 at or the end result?

18 CHAIR SMITH: I know Bill was saying
19 we should look at it, and I'm saying I do not
20 think we should be --

21 BGEN SCHWENK: Okay. All right.
22 Thank you. Okay. Suzanne.

1 MS. GOLDBERG: Back again. Just
2 picking up on that last thread of conversation, I
3 think point 4 helps to get at some of those
4 questions without getting into the accountability
5 for false allegations issue. I tend to agree
6 with Judge Smith on that.

7 I do think we heard a lot about the
8 effect of declined accusations and acquittals on
9 accused careers. I will say, though, for broader
10 context, we also heard, in part, that even when
11 there's been a deferral or an acquittal, it
12 doesn't mean there was an absence of evidence
13 about other kinds of misconduct that would lead
14 to appropriate action by commanders, and this is
15 the place where -- and the existence of due
16 process in the AdSep process but also the
17 challenges of going through an AdSep process. I
18 think these are, you know, it's a tough ball of
19 issues to ensure fairness in the process, but I
20 think that that topic 4 certainly, you know,
21 enables us to look at those issues more closely
22 if we choose. I think it gets back somewhat to

1 the question of how OSTC handles deferrals, as
2 well.

3 But I wanted to put an additional
4 issue on the table, which is accountability of
5 commanders to address issues around retaliation
6 and hostile environments in barracks and work
7 settings that are short of unlawful retaliation.
8 One of the main reasons we heard across the board
9 and we know to be true outside of the military
10 context that victims decline to report is the
11 fear that their careers will be derailed and that
12 they will be socially isolated and retaliated
13 against physically or in other ways in
14 workplaces, and we heard plenty of that. We also
15 heard stories that stuck with me about people
16 reporting and then that information sticking with
17 them for a decade or more by reputation and that,
18 often, more was known about a person, if they
19 were moved to a different location or a different
20 unit, that the unit knew about their having
21 reported some kind of sexual misconduct even
22 before they got there, which affects the

1 environment, of course, in which that person
2 enters.

3 So accountability for creating an
4 environment in which individuals are not
5 retaliated against either unlawfully or otherwise
6 associated with reporting.

7 BGEN SCHWENK: Okay. Thank you,
8 Suzanne. Anybody else?

9 MS. LONG: This is Jen Long again.

10 BGEN SCHWENK: Yes, Jen.

11 MS. LONG: Hi. I wanted to make note
12 of number 3. And while I agree with Chair Smith
13 because I think it's weaponized, I didn't mind
14 looking at it because I would rather have it on
15 the record how these false reports and the idea
16 that they're very prolific, and I'm not
17 minimizing the ones that are found, but I do
18 think there are mechanisms for handling that.
19 But just having the conversation and being able
20 to discuss it and put our recommendations might
21 put something in writing that otherwise might be
22 left to the own devices of the office with no

1 other guidance.

2 So that's my two cents.

3 BGEN SCHWENK: Thank you, Jen. I
4 appreciate it. We all appreciate it. Okay.
5 Anybody else?

6 MS. GOLDBERG: Sorry to jump in again,
7 but, just on Jen's point, I would note that we
8 heard a lot about false allegations, not only
9 accountability for them but just varying senses
10 of the pervasiveness of them. And so that topic
11 may be broader than the issue of accountability
12 because I think it also seemed to sink into
13 issues related to training in the discussion,
14 some of the discussions we had.

15 BGEN SCHWENK: Yes. So then that goes
16 back to bundling and deciding what issues match
17 up with other issues. Okay. So thank you all
18 very much for your participation. It's been
19 great. And I think we've circled, you know, well
20 more than half, but that will give us more to
21 discuss in December.

22 As far as putting a new package

1 together, does anybody have a preference on how
2 we do it besides trying to bundle similar issues
3 together so you can see them, you know, in a
4 related manner on the slides.

5 Any other thoughts of what you'd like
6 to see? If anybody does have a thought as you're
7 sitting there, please drop an email to me or to
8 Terri and tell us what it is you think would make
9 your job easier in December because, obviously,
10 it's going to be difficult to make the selection
11 and the prioritization. To me, it looks like we
12 need quite a bit of time to work our way through
13 it, but we'll see what we get for the schedule.

14 Okay. Any other comments or questions
15 from anybody? Thank you very much, and we're
16 done before 3:30. So very good.

17 CHAIR SMITH: Thank you, General
18 Schwenk. I know we were going to get started at
19 3:30, but we've got four minutes here. Can we
20 take maybe a five-minute break and then get
21 started with the public comments? Does that
22 work?

1 MS. PETERS: Absolutely.

2 CHAIR SMITH: All right. We'll say
3 five minutes.

4 (Whereupon, the above-entitled matter
5 went off the record at 3:26 p.m. and resumed at
6 3:30 p.m.)

7 MS. PETERS: I'm going to turn it over
8 to Mr. Pete Yob, our director, to get the public
9 comments started.

10 MR. YOB: Thanks a lot, Meghan. I
11 appreciate it. I just want to take a minute and
12 welcome our public speakers who are joining us
13 today. I want to thank them in advance for
14 sharing what they want to say with us, their
15 experience.

16 A couple of notes before we jump into
17 the speakers. First, everything that's said by
18 speakers today or things submitted will be made
19 available to the public. By virtue of us being a
20 federal advisory committee, we're required to
21 make everything public. All the comments are
22 transcribed and will be included on the DAC-IPAD

1 website.

2 Speakers are limited to five minutes
3 each. I'll let you know when you reach the five
4 minutes, and I'll jump in and ask you to please
5 conclude at that point in time.

6 And then the final point I want to
7 make up-front is just the DAC-IPAD does not act
8 on specific cases, but information from specific
9 cases can inform policy findings and policy
10 recommendations of DAC-IPAD. I just like to make
11 that clear.

12 So we have three speakers scheduled
13 for today. I believe they're all on; we just
14 checked. We'll just go in the order that you are
15 signed up, and the first one would be, and I hope
16 I'm pronouncing your name right, Michael Saine;
17 is that right? Are you here, Mr. Saine?

18 MR. SAINE: Yes, that's right.

19 MR. YOB: Okay. Pronouncing it right?

20 MR. SAINE: Yes, sir.

21 MR. YOB: Oh, that's great. Okay.

22 Feel free to begin, and I'll let you know when

1 you reach five minutes.

2 MR. SAINÉ: Perfect. Thank you so
3 much. As he was alluding to, my name is Michael
4 Saine. I was once called Builder Petty Officer
5 First Class, Seabee Combat Warfare, Fleet Marine
6 Force, Master Training Specialist Michael Saine.
7 Now most people just call me Mickey.

8 To be honest, I'm not here for a
9 specific intervention on my case, but the fact is
10 I haven't seen my son in 11 years because I went
11 to Fleet and Family Services when my spouse
12 pulled a knife on me at RTC Great Lakes. No
13 matter how hard I worked or what I attempted to
14 do to stand up to myself and protect myself and
15 my son, I was denied every bit of my rights
16 because I wasn't the ideal stereotype of a
17 victim. I didn't meet what Fleet and Family
18 Support Center felt was a stereotype for a
19 victim, so I was allowed to be taken advantage
20 of.

21 Allow me to take a step back and go
22 over why that happened so that you can understand

1 because that is what's important to me. It was
2 Thanksgiving 2014 when my significant events
3 began. My spouse would recently return from a
4 suicide attempt and left a note acknowledging me
5 as a good man, asking me to raise her two other
6 children during her suicide attempt, became
7 enraged at me. I asked for a glass of milk with
8 Thanksgiving dinner.

9 What followed was a series of
10 terrifying events for me. My spouse attempted to
11 run me over with a vehicle, chasing me into the
12 woods. Earlier that day, she had also attempted
13 to stab me while I was holding our infant, all
14 because of what she described as verbal abuse.
15 Just for the record, verbal abuse means nothing
16 more than I've raised my voice at her. These
17 actions were freely admitted to during my court-
18 martial proceedings and met with indifference by
19 a military court-martial convening authority who
20 stated that he lacked jurisdiction over her and
21 had no interest in prosecuting.

22 The best part of all this, she laughed

1 about it. She claimed she was justified to stab
2 me because of verbal abuse. In layman's terms,
3 because I raised my voice, she was now authorized
4 to attempt to take my life. That is how out of
5 hand and out of control the situation has become.

6 Despite the severity of her actions,
7 my spouse's dishonesty was evident through the
8 entire period. The Grayslake local police
9 department concluded that she was not telling the
10 truth during her accusations. I'm not sure to
11 this day how not telling the truth is different
12 from lying, but it was considered different by
13 the court-martial convening authority. This
14 incident involved her attacking me at a Starbucks
15 during a custody exchange where four men
16 witnessed and stayed after school, missing their
17 college classes, in order to testify to the fact
18 she had attacked me in a local Starbucks.

19 My spouse repeatedly made false
20 accusations, not only at me but about NCIS, the
21 base, my chief, and anyone who didn't comply with
22 her rigid demands. On legal advice, I agreed to

1 her conditions, leading to her putting out
2 multiple conflicting statements. She recanted
3 her accusations when she realized I planned to
4 leave her for another woman, only later to
5 retract her recantation.

6 I would like to be clear and specific
7 that the abuse was severe enough that Navy
8 Medical documented the injuries she inflicted on
9 me, though they called her on the answering
10 machine, since she is my next-of-kin, to notify
11 her the results and that pictures were being
12 taken. That was definitely terrific, as I got
13 the crap beaten out of me again for that. What
14 shocked me the most, though, was how quickly I
15 was vilified. Despite nearly two decades of
16 service with no incidents, I was immediately
17 framed as an abuser. I can't guarantee that this
18 was directly because I wasn't the woman in the
19 relationship, but I can say that she was brought
20 in later and declared the victim, as I was denied
21 my rights, an advocate, and everything else that
22 Fleet and Family Support Center was supposed to

1 provide me with medically-documented injuries, as
2 my abuser sat and told them that she certainly
3 did stab me. She didn't have a mark on her. To
4 this day, I still carry scratches and gouges on
5 my face from that attack. I was denied an
6 advocate while my spouse falsely accused me of
7 assaulting her.

8 These baseless accusations led to a
9 loss of everything I've held dear, including my
10 son, without a shred of credible evidence.

11 Ultimately, I was held in pretrial confinement
12 for nearly six months, during which I suffered a
13 mental breakdown at the reality of losing my
14 child to mentally-unstable individual and that
15 overwhelmed me.

16 Though I won in civilian courts, three
17 different civilian courts, the Navy refused to
18 drop the protective order despite regulations
19 requiring them to do so once the local
20 jurisdiction took over. Trapped by a system that
21 did not adhere to its own rules, I was told that
22 the only way to see my infant was to comply with

1 my abuser's demands. In the end, I was told,
2 even if I won my fourth case, I would face
3 administrative separation and I was court-ordered
4 to pay 110 percent of my paycheck to both my
5 spouses for support and maintenance under the
6 threat of imprisonment if I failed to meet that
7 110-percent payment.

8 My spouse claimed that I sexually
9 assaulted her multiple times, but, interestingly
10 enough, it was to conceive our child. It came
11 with a letter, as we planned the baby, that said
12 now we're going to get our child, and a judge
13 said they could not determine who ours was, which
14 isn't even any type of common sense. It came
15 with a pregnancy test and a card signed, "Daddy,
16 I'm coming in this world. I can't wait to see
17 you. Baby." But because she had signed baby,
18 instead of her name, they threw that out also.
19 They said that they couldn't determine who our
20 child belonged to.

21 Step by step, I was still marched into
22 a court-martial. I was convicted for domestic

1 and sexual assault. I was convicted for my
2 domestic for physically stopping her during her
3 suicide. The act of taking a knife out of her
4 hands was enough to get me convicted for domestic
5 violence. I was convicted of post-penetration
6 sexual assault, and I'm sure there's a lot of
7 lawyers and judges --

8 MR. YOB: Mr. Saine, I'm going to have
9 to ask you to conclude or wrap-up, please.

10 MR. SAINÉ: To this day, I often break
11 down during the night. I often wish for my
12 child, and I dream for a day where I will find
13 justice. But the one thing that I understand is
14 that I will never come forward to the system that
15 will vilify me for being a man. Thank you.

16 MR. YOB: Thank you, Mr. Saine. I
17 appreciate your comment. We have another public
18 speaker, Mr. Jim Liepart. Am I saying that
19 correctly?

20 MR. LIEPART: That is correct, yes.

21 MR. YOB: All right. Mr. Liepart, go
22 ahead and start when you're ready.

1 MR. LIEPART: Hi. This is a picture
2 of my son, Matthew, and this is my wife Dawn and
3 his older brother, Jim. Matthew has a police
4 report from Perth, Australia stating that there
5 was no evidence that a sexual assault or rape
6 occurred. How interesting is it that there are
7 no police reports from the Pettis County
8 Sheriff's Department for any of the sexual
9 assault charges brought against Matthew during
10 his court-martial?

11 His now ex-wife brought all these
12 sexual assault allegations to the Air Force to
13 bolster charges against Matthew that would ensure
14 he would not be part of his son's life. There
15 were three charges of sexual assault alleged to
16 have happened in Australia. One of the charges
17 was changed during the court-martial to attempted
18 sexual assault midstream during the trial.
19 Matthew was found not guilty of all sexual
20 assault charges alleged to have happened in
21 Australia, including the charge that was a change
22 from attempted sexual assault during the trial;

1 but the police report from Perth, Australia was
2 used to bolster the sexual assault charges
3 against Matthew in Sedalia, Missouri. Even
4 though these sexual assaults were alleged to have
5 happened more than a year prior to the
6 allegations made from Perth, Australia.

7 As it turned out, Matthew was found
8 guilty of two sexual assault charges in Sedalia,
9 Missouri with no physical evidence, no rape kit,
10 no police report that anything happened, just the
11 word of his then wife making these allegations
12 that the sexual assault happened. That carried
13 more weight with the Air Force court.

14 The max penalty for all the charges
15 was 70 years. The prosecution asked for 45
16 years, and Matthew was given a 21-year sentence
17 to be served at Fort Leavenworth USDB, the
18 military's maximum security prison, all based
19 entirely on the word of a wife with an agenda to
20 keep Matthew from his son. I ask you why would
21 anyone want their son or daughter to join or
22 serve any military branch if they knew all their

1 work, service, and honor can be brought down by
2 someone who can make a mere allegation and it is
3 upheld entirely on their word and nothing else?

4 Now that you've been made aware, you
5 should also know it could happen to you. Don't
6 think for one second it can't. It did to
7 Matthew. Fort Leavenworth has several honorable
8 men who had their lives, their families, and
9 relatives destroyed by this travesty of justice.
10 No, this is injustice.

11 We have video evidence that was not
12 allowed in Matthew's defense showing consensual
13 sex between Matthew and his then wife taken at
14 the residence in Sedalia, Missouri, one of many
15 Brady violations. After over a year and a half,
16 the defense had to provide a vigorous defense for
17 Matthew. He was called to Whiteman's ADC a
18 couple of days before the trial. Matthew was
19 told by Captain Barry and Jim Colt that he would
20 have to plead guilty to the first block of
21 charges against him. If Matthew did not, he
22 would be in prison for life. Matthew surely did

1 not want to plead guilty to anything.

2 Jim Colt stated that he was not
3 concerned about a charge of ineffective
4 assistance of counsel and that the guilty plea
5 would be used to gain favor with Judge Ambrusia
6 when he decided on the sexual assault charges.
7 This mixed plea was something that Dan Conway,
8 Matthew's lead defense counsel, said during the
9 DuBay hearing he would probably not do again in
10 the future.

11 CAF agreed with Matthew that the
12 prosecutor committed clear error when he used
13 Matthew's guilty plea and providence inquiry to
14 bolster the government's argument that Matthew
15 was guilty of the sexual offenses. The
16 prosecutor provided Judge Ambrusia a slide
17 detailing and reminding the judge of the charges
18 that Matthew had been coerced to plead guilty to
19 in the first part of his court-martial. Please
20 note that, even with a prosecutor committing
21 clear error, this was not deemed sufficient to
22 provide relief, even a new trial. The only thing

1 that mattered was the allegation made by
2 Matthew's then wife.

3 There were 29 new recordings submitted
4 as evidence by Matthew's then wife to be used by
5 the prosecution shortly before the trial, and
6 Matthew asked his defense team to ask for a
7 continuance to determine the legitimacy of these
8 recordings. Matthew's attorney told him we are
9 going to trial no matter what.

10 And if I have just a second, I'd like
11 to cite a couple of these cases from CAF that
12 talk about United States v. Broussard. This says
13 an accused can be properly convicted of a sexual
14 offense on the word of a single victim alone.
15 That's ridiculous. This is what the military is
16 supposed to be fighting for, for the rights of
17 civilian citizens. Yet, once they raise their
18 right hand and sign on the dotted line, they're
19 not allowed the same rights as civilians have.

20 MR. YOB: Mr. Liepart, I'm going to
21 have to -- if you have cases you want to submit
22 them to us for posting, we will take those in

1 written form.

2 MR. LIEPART: I will submit them to
3 you in written form. Thank you very much.

4 MR. YOB: Thank you. Appreciate you
5 being here today and your time.

6 MR. LIEPART: Thank you.

7 MR. YOB: Our third speaker is Ms.
8 Holly Yeager. Ms. Yeager, are you with us?

9 MS. YEAGER: Yes, I am.

10 MR. YOB: Okay. Whenever you're
11 ready, you can begin.

12 MS. YEAGER: Okay. I'm reading a
13 letter today from my son's best friend, a young
14 woman that met him Florida. She's married to a
15 servicemember and fears retaliation for her
16 husband, so she didn't want to read it herself.
17 She says: I met Rob shortly after moving to
18 Destin, Florida through a mutual friend. We soon
19 became best friends and hung out almost daily
20 with our group of mutual friends. Rob shared
21 many details with me about his life and his
22 thoughts. We enjoyed talking about many things.

1 He would tell me about the girls he was seeing
2 and introduce them to us.

3 I always felt safe with him. He is
4 what I would describe as a calm person, even a
5 peacemaker. I only saw someone try to pick a
6 fight with him once at the bar, and he calmly
7 diffused the situation. The incident ended in a
8 handshake. I never once saw him be inappropriate
9 with anyone.

10 Later, his family let me know that he
11 would be away for a while. I assumed it was work
12 related, so I was very confused when a woman from
13 the Air Force called me to schedule a time to
14 talk to my friend, Robert. She seemed put off
15 that I asked her to confirm the person she was
16 referencing. Since I have no affiliation with
17 the Air Force and she was incredibly unclear as
18 to why they wanted to speak with me, I declined
19 the meeting.

20 They reached out again and I asked my
21 husband to contact the lead investigator to
22 clarify why they wanted to speak to me. This

1 woman told him that Rob had my phone number on
2 his call list, and it was simply concerning this
3 matter and it was wise to speak to them now, as
4 to avoid being subpoenaed and risk facing ill
5 treatment in court.

6 Two female investigators came to my
7 home while I was home alone. My husband was
8 deployed to Afghanistan. They asked me very
9 strange and frivolous questions about Rob's
10 girlfriend, Anna, and other relationships he had.
11 Later, things took a drastic turn. One
12 investigator said what if I told you we have
13 evidence that you're having an affair with Rob,
14 suggesting that this could be mentioned to my
15 husband. I was so blindsided and shocked, I felt
16 my body lean across the table and I looked her in
17 the eye and said I would tell you that you don't
18 have this evidence because I'm not having an
19 affair with Rob. She told me they had Skype
20 conversation between us to confirm the affair.
21 She said I had these Skype conversations between
22 him and a girl named Jo, and you go by Jo, don't

1 you? I said, yes, I go by the name Jo, but I've
2 never Skyped with Rob ever. I got my laptop to
3 prove it.

4 I found it so odd that they would
5 threaten me with false evidence and insult me in
6 my own home with an accusation of an affair,
7 especially while my husband was deployed, while
8 also refusing to explain why I would be a victim
9 and what the charges against Rob actually were.
10 I felt disrespected by the investigators and
11 found their weak attempt to fish for some type of
12 wrongdoing on my part and on Rob's part to be
13 despicable. I was sad to see the Air Force
14 investigators treat a military spouse or any
15 woman as just a pawn in their investigation. I
16 found the treatment of the Air Force toward me to
17 be unprofessional, dishonest, and manipulative.
18 I have no doubt that they treated other women as
19 poorly and as ineptly. Every member of our
20 friend group, male and female, have nothing
21 negative to say about Rob in general, let alone
22 his treatment of women; yet, our testimony meant

1 nothing at his trial. It is with a heavy heart
2 that I implore you to do the job of an honest
3 pursuer of truth and justice.

4 I also have a little quote here from
5 the military judge in my son's trial, and this is
6 right from the testimony itself. I'm going to
7 read it just in part because I've got a five-
8 minute time limit. Of course, in the Air Force,
9 everybody is concerned about sexual assault, as
10 they should be. We can't figure out how to get
11 consent these days, and now it's not enough to
12 get consent to have sex. This is Chief Trial
13 Judge of the Air Force, Colonel Vance Spath. If
14 he's confused about the standard, it's no wonder
15 my son has been imprisoned for nearly 11 years
16 for crimes that never occurred.

17 My son is Tech Sergeant Robert Andrew
18 Conden. Thank you.

19 MR. YOB: Thank you, Ms. Yeager. And
20 thanks to all the public speakers who joined us
21 today. We appreciate your time.

22 This concludes the public speaker

1 portion. I will return this back to Chair Smith
2 or Ms. Peters.

3 MS. PETERS: Thank you, Pete.

4 Remaining on the schedule today, we have some
5 items to wrap up, I think some follow-on
6 business, and I just want to touch on a new
7 recent request from the General Counsel to the
8 DAC-IPAD.

9 But, first, I did want to touch on
10 some of the administrative matters. The robust
11 discussion today on the Article 6b report will be
12 followed by another virtual session that we'd
13 like to schedule. So expect to see from me
14 shortly after this meeting a note requesting your
15 availability for a one-hour virtual session
16 either the last week of October or first week of
17 November to deliberate on a final set of
18 recommendations and report, just sort of approve
19 your final product. In advance of that meeting,
20 you'll receive the revised and updated report and
21 recommendations that you discussed today. So
22 we'll budget out that time line and look for a

1 time when everyone can meet and close out those
2 recommendations and the report.

3 Separately, I think, before we do the
4 subcommittee updates as part of our wrap-up
5 session, I just wanted to note that the items at
6 Tab 6A of your materials include a letter from
7 the General Counsel to the DAC-IPAD. This is a
8 request for a report and recommendations to be
9 submitted to DoD. So if you look at the letter
10 at Tab 6A, it's a one-page request for the DAC-
11 IPAD to prepare a report on support systems
12 currently available to servicemembers charged
13 with court-martial offenses and to recommend
14 potential improvements to those support systems.

15 The letter references, for context,
16 concerns that arise in the civilian context where
17 there is a high suicide risk associated with or a
18 heightened suicide risk associated with being
19 charged with a criminal offense. There's also a
20 DoD advisory committee for the prevention and
21 response to suicide, and this advisory committee
22 was statutory. It convened in 2023 and submitted

1 a report to the Secretary of Defense, and one of
2 its findings, the letter notes, is that there is
3 a similar associated risk in the military context
4 when military defendants are charged with UCMJ
5 offenses. As a result, the DoD General Counsel
6 asks the DAC-IPAD to evaluate programs in the
7 civilian sector that might support a defendant
8 facing criminal charges and see if any of those
9 programs would be appropriate for the military to
10 adopt.

11 The letter requests that this report
12 be completed by the 2nd of June, and so I just
13 want to make a few notes for your consideration
14 on this and then kind of open it up for
15 discussion and questions. And really the
16 overarching question, I think, for you all is
17 what issues around those raised in this letter
18 sort of resonate and where this fits in in terms
19 of the DAC-IPAD's priorities, one, in terms of
20 the discussions we've just had that identify many
21 topics from our state visit projects and just
22 looking at the time line for this letter.

1 I also want to note I think the staff
2 has done some initial research to see that there
3 is some work being done in this area in terms of
4 the subcommittee or, I'm sorry, this other
5 advisory committee has produced a report with
6 some information about existing support services
7 available to military defendants. And so issues
8 that you may want to focus on are the civilian
9 sector programs that are available and
10 potentially also wait and see what the outcome of
11 the committee's recommendations and any follow-on
12 actions are.

13 So, for example, that committee met in
14 2023. They submitted recommendations to the
15 Secretary of Defense. Our staff understands
16 there are some follow-on reports and assessments
17 coming out of those recommendations, and we
18 expect to receive those assessments by December
19 of this year. And the committee could really
20 define the scope of how it responds to this
21 letter after receiving some additional
22 information. So the staff could continue doing

1 some work to see what else is out there on this,
2 and we could wait and see, for example, if the
3 Joint Service Committee is looking at some
4 related issues on defendants' ability to seek
5 mental health services and have that information
6 be privileged. I think the Joint Service
7 Committee is looking at the scope of the
8 privilege there, and we could wait for that to
9 come back to us if it's available, if it is
10 available and if it's something that we can share
11 with the committee.

12 So the big picture is where does this
13 fit into the DAC-IPAD's overall priorities? What
14 scope would be appropriate? What more do you
15 want to know and sort of what next steps can we
16 take for you as a staff? So I just invite you to
17 discuss it and ask your questions, and we'll take
18 your recommendations.

19 CHAIR SMITH: Could you give a time
20 line for when the Joint Services Committee might
21 -- no.

22 MS. PETERS: No. I don't think I have

1 a clear one, no.

2 CHAIR SMITH: And do we have a time
3 line for when we need to be addressing this?

4 MS. PETERS: The letter says it
5 requests a response by June 2nd of 2025. It says
6 that that would be beneficial if there are
7 legislative changes that would be proposed
8 because that would fit with the DoD's ability to
9 advance legislative proposals for the NDAA cycle,
10 but, beyond that, I think the time line has to
11 fit the scope and the priorities of the
12 committee. Ms. Goldberg.

13 MS. GOLDBERG: Thank you for fleshing
14 that out, and I had the same time line question
15 that Judge Smith just raised.

16 Two or three quick thoughts first.
17 Your suggestion that we come back to this as we
18 narrow down the set of issues on which we'll
19 focus following the site visit seems to me to
20 make a lot of sense, in particular to the extent
21 that we decide to focus on supports for the
22 accused more generally. This would fall under

1 that category. And if that doesn't rise to the
2 level of one of the top issues, I think that will
3 be helpful for us to know as we think about
4 responding to this.

5 Second, I would assume that, if the
6 DoD General Counsel asks us to do something,
7 typically, we should try to find a way to do it.
8 So then I think the question that comes to mind
9 is how do we do that and avoid duplicating
10 efforts with other committees. But it does seem
11 we ought to take some action, even if minimal,
12 and I wonder, if I'm right about that, whether,
13 as we think about our upcoming invitations to the
14 next set of meetings, whether we might find a way
15 to include a question about this in writing and
16 ask for responses in writing, even if we don't
17 use committee meeting time to have a full
18 discussion.

19 Third is a general observation that
20 these kinds of support efforts, which are quite
21 important and we see a bit of an equivalent on
22 the campus side when a student is accused or a

1 victim of misconduct to try to provide support
2 because it can be extremely derailing, even
3 outside of the court context. But those also
4 tend to be more programmatic than policy, and so
5 my off-the-cuff guess is this is less of a
6 legislative matter and more of a matter related
7 to understanding the felt need, the views of the
8 services, and the resources that might be
9 available, what is working, what's not, are some
10 services already doing this in ways that we're
11 not even aware of. But it doesn't sound, based
12 on what I know, to be something that would
13 require the kind of movement to fit into the
14 legislative cycle. I'm happy to be corrected on
15 that, but that would be my guess.

16 MS. TAGERT: And just to respond to
17 those comments by Ms. Goldberg, Nalini and I had
18 an opportunity to talk about this letter with Ms.
19 Bashford, who kind of also expressed that idea
20 that this should be wrapped into a larger study
21 on some of the defense issues that were sussed
22 out in the site visits, as opposed to just

1 answering this letter, because it does appear
2 that DoD is on a parallel track in examining
3 these issues and it has been looked at in depth
4 by another advisory committee.

5 MS. PETERS: On that point, I think
6 Ms. Bashford, as chair of the case review, has
7 expressed interest in seeing how this could be
8 roped into the defense-related issues, especially
9 as it concerns site visits, in related issues
10 that the accused face that prompted the case
11 review to take on conviction integrity units. Is
12 that accurate? I just want to offer that because
13 I know Ms. Bashford is not here, and you all have
14 worked with her.

15 MS. GUPTA: Yes, Meghan, that's
16 accurate.

17 MS. PETERS: So I think she's willing
18 to take it in that context and report back, and
19 the staff can proceed with gathering the
20 information that is already out there on this and
21 help you hone the scope of the response that
22 would be appropriate and really meet the gist of

1 the letter. That's the staff's recommendation.

2 CHAIR SMITH: Let's give it to Martha
3 while she's not here. Do we need to vote on
4 that?

5 MS. PETERS: I think it seems like we
6 are still in the preparatory stage, and there's
7 some more research, initial steps, that should be
8 taken. To sort of formally propose something
9 might be premature, but we allow them to take the
10 time to do those initial steps and come back with
11 a proposal.

12 CHAIR SMITH: Yes. Perfect. For the
13 next meeting?

14 MS. PETERS: Yes, absolutely.

15 CHAIR SMITH: Okay. Anyone disagree
16 with that? Hearing no one. All right. Thank
17 you.

18 MS. PETERS: Okay. So that's our new
19 business in terms of our many issues that we're
20 studying and how to fold it all in and figure out
21 how to address it, and these are really
22 interesting issues. And I want to turn now and

1 give the other subcommittees time to talk about
2 things that they've been working on. The updates
3 are important. We certainly know the Policy
4 Subcommittee led the way today with their 6b
5 report and recommendations, so I think folks from
6 our Special Project Subcommittee and Case Review
7 just want to share the work that the other
8 subcommittees are doing.

9 So I'm going to turn it over to Lauren
10 Torczynski to talk about special projects.

11 MS. TORCZYNSKI: Good afternoon. We
12 have a subcommittee meeting for the Special
13 Projects Subcommittee scheduled for tomorrow
14 during which we're going to discuss some of the
15 issues that have come up during the site visits
16 with respect to the OSTC and address pursuing
17 some of those issues further.

18 MS. PETERS: All right. Thanks,
19 Lauren. Case review. I know Ms. Bashford isn't
20 here, but Kate and Nalini are, and I think they
21 can share what the subcommittee is going to be up
22 to next.

1 MS. GUPTA: Hi. Good afternoon,
2 members. So our big news is that the DAC-IPAD
3 released a report this past August, I believe,
4 early August entitled Exploring the Race,
5 Ethnicity, and Gender of Military Panel Members.
6 And this reflected the Case Review Subcommittee's
7 multi-year analysis of the demographic of members
8 who are detailed and impaneled at courts-martial.

9 The one thing we still have on our
10 plate for that study is an analysis of the FY '22
11 Air Force data. We weren't able to wrap that
12 into the larger report, so we are in the process
13 of collecting and analyzing that data and it will
14 be part of our annual report this coming March,
15 an analysis of that data and any questions that
16 it may raise.

17 In addition to that project, we
18 continue to work on our conviction integrity unit
19 project. You may remember we heard from a
20 speaker from the civilian sector in June, and we
21 have identified two or three speakers who we are
22 planning to ask to come to our December meeting

1 to continue to give us information about what
2 this may look like in the military context.

3 And then, finally, as we just
4 discussed, we will start thinking about this new
5 tasker from the General Counsel and how to wrap
6 that into a larger report, as the committee hones
7 down on what exactly the site visit, what site
8 visit issues they are going to be focusing on.

9 That's it from the Case Review
10 Subcommittee. Thank you.

11 MS. PETERS: All right. Thanks,
12 Nalini. I think you can tell from today's
13 discussion we have a lot in front of us, and
14 we're going to have a really good December
15 meeting. There's going to be a lot going on, a
16 lot of moving parts, so expect to hear from the
17 staff soon about that.

18 Some of the things we are tracking,
19 again, are the speakers that Nalini referred to.
20 We have received a request to have the lead
21 special trial counsel and the chiefs of Trial
22 Defense Services to extend an invitation to those

1 leaders to come to the meeting, and we will
2 continue to work on the agenda and send it out to
3 you all.

4 But those are some of the things I
5 think the staff is preparing for for the next
6 meeting, along with allowing time for site visit
7 deliberations and potentially other issues, such
8 as the MRE 513 study that has been going on with
9 the Policy Subcommittee. So just about every
10 meeting this year is resulting in recommendations
11 and a report, so we keep moving out. We can
12 hopefully stay on that pace.

13 Does anyone from the staff or the
14 members have anything to add to what I've said
15 about our wrap-up, what we're working on now, and
16 what to look for in the coming weeks ahead? All
17 right. Chair Smith, that's all I have.

18 CHAIR SMITH: Okay. I think that
19 means we're ready to adjourn, yes? All right.
20 And I think it's DFO Sprance, right? Or does he
21 not have to do anything?

22 MS. PETERS: I think our DFO for the

1 afternoon session was Mr. Gruber.

2 CHAIR SMITH: Sorry, Mr. Gruber.

3 MR. GRUBER: Yes. Hi. This is Dave
4 Gruber, DFO for the afternoon session. Madam
5 Chair, we've concluded all business?

6 CHAIR SMITH: Yes, sir.

7 MR. GRUBER: Very good. Well, then
8 thanks, everybody, for your time today and thank
9 you for our speakers from the public. We
10 appreciate your participation, and we will close
11 the meeting.

12 CHAIR SMITH: Thank you.

13 (Whereupon, the above-entitled matter
14 went off the record at 4:05 p.m.)

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This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DOHA DAC-IPAD

Date: 09-17-24

Place: teleconference

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Court Reporter

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